Neutral Citation Number: [2019] EWCA Civ 2000

Case No: A2/2018/2612

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
THE EAST LONDON EMPLOYMENT TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/11/2019

Before:

LADY JUSTICE KING
LORD JUSTICE MALES
and
SIR PATRICK ELIAS

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Between:

MR MUKARRAM SATTAR	**Appellant**
- and -	
1) CITIBANK N.A. **2) CITIBANK INC**	**Respondents**

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- -

Mr Andrew Hochhauser QC & Mr Nicholas Goodfellow (instructed by **Edwin Coe LLP**) for the **Appellant**
Mr Simon Devonshire QC & Mr Simon Forshaw (instructed by **Clifford Chance LLP**) for the **Respondent**

Hearing date: 24th October 2019

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Approved Judgment

Sir Patrick Elias:

Background.

1. The appellant in this case was a very senior employee of the respondent company, Citibank NA ("the Bank"). He had been employed by the Bank for some forty years before he was dismissed for gross misconduct. At the time of his dismissal, he was Global Head of Treasury and Trade Solutions Operations with a responsibility for some 15,000 staff and contractors across a hundred countries. He was also what was termed a "Code staff member" within the Bank. This status was conferred upon staff whose actions may have a significant impact on the Bank's risk profile. The appellant was paid an additional allowance of £200,000 per year in recognition of the heightened obligations accepted with Code staff status. The ET found, and the appellant himself confirmed, that as a Code staff member the appellant was required to demonstrate the highest standards of integrity and probity, and to be seen to be doing so. He was also expected "to be acutely aware of the impact of his actions, decisions, and the performance of his functions on the organisation and its risk profile in the industry" (para.70).

2. The appellant was summarily dismissed for making use of the Bank's staff transfer system improperly and without appropriate authorisation in a manner which might bring the Bank's reputation into disrepute. He brought proceedings alleging both unfair dismissal and disability discrimination. It is not disputed that he is disabled; at the time of dismissal he had been suffering from a frontal brain tumour for about five years. He did not, however, disclose this fact to his employers until his lawyers informed them the day before the scheduled disciplinary meeting. Although there are a number of distinct grounds of appeal, they largely focus on the procedures which the Bank employed to reach its decision. It is alleged that they were wholly inadequate and failed to meet elementary standards of natural justice thereby rendering the dismissal unfair. It is also asserted that the Bank failed properly to take into account the adverse effects of the appellant's disability and did not make reasonable adjustments to ameliorate them, thereby infringing the law on disability discrimination.

3. The employment tribunal ("ET") (Employment Judge Jones presiding) was faced with excessively detailed and overlapping submissions and it dealt with them all in a very lengthy and careful judgment by Employment Judge Jones. She dismissed all the grounds advanced. The Employment Appeal Tribunal ("EAT") (HH Judge Barklem) dismissed the appeal. Permission to appeal to this court was given by Lewison LJ. Fortunately, we have the benefit of a much more focused set of submissions than were advanced before the ET. It is well established that in an appeal of this nature we must focus on the decision of the ET rather than that of the EAT: see *Hennessy v Craigmyle & Co* [1986] ICR 461, 470 per Sir John Donaldson MR.

The facts

4. The ET's findings of fact were set out in very considerable detail, exceeding two hundred paragraphs. For the most part the essential primary facts were uncontroversial and were supported by relevant correspondence and other documents. I will summarise the critical findings pertinent to the appeal.

5. On 3 July 2013 the appellant was arrested by HMRC on suspicion of tax fraud and his house was searched. The Bank became involved when on the same day HMRC served the Bank with a notice of intention to apply for a production order in respect of cheques signed by the appellant and made payable to Citibank accounts, together with related transactional documents. HMRC was particularly interested in transactions involving a charity, the Unheard Voices Trust ("UVT"), which had been set up by the appellant and to which he, as sole donor, had given millions of pounds. Over the next few days the Bank clarified with HMRC precisely what information was required and it contacted the appellant. Two senior representatives of the Bank, Mr Woodward (MD and Head of litigation/employment) and Mr Constantine (then Head of HR in Treasury), were directed to investigate the appellant's use of the Bank's systems to conduct personal and other transactions. They met the appellant on 8 July to inform him of the HMRC approach and to ask about the transactions in which HMRC were interested. The transactions involved the use of the staff transfer system but Mr Woodward did not know how that system worked. The appellant explained it at the meeting and said that he would provide an explanation in writing, which he subsequently did on 10 July. He was told to take time out of the office to sort out his personal affairs; this was not a formal suspension.

6. On 9 July Mr Woodward emailed the appellant and asked for specific information about a certain category of cheques, namely those drawn on the UVT's account, then held briefly within the Bank's accounts, with relevant funds thereafter being transferred to beneficiaries in India or Pakistan. He wanted an indication of how many cheques of this nature there were, the dates on which they were made out, and the amounts involved. The appellant responded the following day saying that he would provide answers by 11 July; Mr Woodward replied that he needed the information that day in order to respond to HMRC and he posed further questions to the appellant. On 10 July the appellant provided answers to the questions but did not disclose a list of relevant transactions. On 11 July the appellant's solicitors dealing with the HMRC, Burton Copeland, emailed Mr Woodward. They confirmed (contrary to what the appellant had earlier said) that the appellant had been arrested but not charged, and they said that the appellant wanted to return to work. In his response Mr Woodward stated that the Bank was carrying out internal inquiries and that the appellant's presence was not required whilst investigations continued.

7. HMRC obtained a production order against the Bank on 12 July and the Bank set up an investigation to be conducted by CSIS, an internal team in the Bank which was responsible for investigating fraud and other wrongdoing. Graham Tan, the senior investigations manager who ran the department, carried out the investigation. The ET found that there were two principal reasons for this investigation: one was to enable the Bank to respond to HMRC, and the other was to enable it to take legal advice about its position vis-a-vis its regulators and employees, including the appellant. Mr Tan reported that there appeared to be a very considerable number of unauthorised and/or illegitimate uses of the Bank's payment systems for the appellant's personal transactions and that this potentially constituted gross misconduct. In the light of this information, and following a discussion with a wide range of managers in a conference call on 15 July, Mr Constantine recommended that disciplinary action should be initiated and that further investigations should take place; this was agreed.

8. On 16 July the appellant was formally suspended. This was considered to be appropriate not least because of a perceived risk that the appellant might interfere with the evidence were he to return to work. The suspension letter expressly made it clear that the suspension was pending further investigations into allegations of unauthorised or illegitimate use of the Bank's payment procedures. The appellant was notified that suspension itself was a neutral act. The letter did not inform the appellant who was conducting the investigation, nor did it identify in any detail the provisions of the Disciplinary Code which might be potentially engaged. The appellant was, however, sent a copy of the Handbook and was specifically referred to the disciplinary procedure. The ET realistically concluded that he would have been aware that matters under consideration would be similar to those being investigated by HMRC and which had been the subject of discussion with Mr Woodward. The appellant did not seek any further information about the investigation at this stage; his response was that the matter would soon be sorted out.

9. On 16 August the Bank sent the appellant a letter inviting him to a formal disciplinary hearing on 21 August and setting out the allegations against him, together with extensive supporting documentation. Nine specific transactions were identified. The core of the case against the appellant was as follows:

> "You improperly used Citi's transaction systems, staff and resources to engage in financial transactions which were either improper or have the strong appearance of impropriety."

10. The appellant was told that the Bank had considered delaying the hearing until after HMRC's investigations had been concluded but it decided that this would be inappropriate given his seniority and the serious nature of the allegations against him. He was informed that he could provide additional documentation or information.

11. On 20 August, the day before the hearing was due to take place, the Bank was informed for the first time about the appellant's brain tumour in a letter from his solicitors, Edwin Coe. They included a letter from Dr Farmer, the appellant's consultant neurologist, who said that the brain tumour caused headaches and might affect memory loss and thinking functions. The solicitors sought a postponement of the disciplinary meeting because the appellant had not had time to prepare for it, and also expressed surprise that there had been no investigation meeting with the appellant himself. The Bank responded by suggesting that the appellant should speak to Occupational Health ("OH") so that OH could consider and advise the Bank what reasonable adjustments might be made to cater for the appellant's health problems. The Bank also said that it would be content for the appellant to conduct his case by way of written submissions but there was no response to that suggestion from the appellant.

12. On 22 August the Bank referred the matter to OH asking whether the appellant could attend a disciplinary hearing and, if so, what adjustments should be made in order for him to be able to do so. Arrangements were made for the appellant to contact OH on 28 August.

13. By a letter dated 23 August, the Bank informed the appellant that it had postponed the disciplinary hearing until 30 August. The appellant's solicitors responded on 27 August by informing the Bank that the appellant did not think it appropriate to have a meeting with OH and was not in a fit state to attend the disciplinary meeting. The solicitors asked that the disciplinary hearing be postponed until after the appellant had undertaken brain surgery. In support of this request it included a further report from Dr Farmer in which he said that the appellant's condition had deteriorated in the spring/summer of 2013 and that the appellant was increasingly developing headaches, personality change and poor memory. The ET noted that this report seemed to have been prepared for the HMCR investigation rather than that carried out by the Bank. The letter did not address the question of possible adjustments.

14. The ET considered that there was a contradiction in the appellant's position, namely that on the one hand he could attend meetings with HMRC and yet he was too ill to attend meetings with his employer (para.136). The appellant's explanation for this was that he was giving priority to his dealings with HMRC and was not well enough to respond on both fronts simultaneously.

15. The Bank responded by a letter dated 28 August in which it proposed that in the light of Dr Farmer's further report, it would modify the disciplinary process in three ways: it would dispense with the need for an OH report; it would limit the number of transactions to be considered to three rather than the nine originally identified; and it would be willing for the disciplinary process to be conducted in writing. The written procedure was proposed so that the appellant would not have to attend the hearing and would have the opportunity to get advice and assistance in preparing his response to the allegations made. It was not, however, willing to delay the hearing until after the operation. It wanted representations by 30 August but stated that the decision maker could, if necessary, ask follow up questions in writing.

16. The appellant's solicitors responded the following day stating that the appellant thought that he might be prejudiced without a formal OH assessment – a complete volte-face from his previous position. He did not want to proceed without medical guidance. He also wanted to postpone the hearing on the grounds that it was too tight to make representations by 30 August but that he would respond in the following week. The ET noted that the Bank had treated this response as a tacit agreement that written submissions would be acceptable, a reasonable inference in the ET's view (para.144) in the light of the correspondence. The Bank agreed to a third postponement but was not prepared to make this indefinite.

17. In fact the appellant's solicitors did make a detailed response to the three transactions, together with supporting documents explaining the appellant's position, by 30 August as originally requested. In essence he claimed that there was nothing improper in his use of the Bank's systems and the staff transfer process was used to create an audit trail. In that letter his solicitors also complained that the Bank had not specified which provisions of the Code of Conduct or other policies had been infringed, nor how the reputation of the Bank was alleged to have been compromised.

18. On 2 September the Bank responded by identifying the specific provisions of the Code relied upon, as well as relevant paragraphs in the Employee Handbook which had earlier been sent to the appellant. It advised the appellant that the disciplinary hearing would be on Friday 6 September, chaired by Mr Bandeen, the Global Head of

Equities. It also stated that the appellant had until 3 pm on that day to make any additional representations, although none were in fact made.

19. The Bank wished to have further advice from OH about what Mr Bandeen needed to take into account when considering the appellant's representations, in the light of his medical condition. The appellant's solicitors were shown the relevant referral form but made no observations about it, notwithstanding that it stated that the appellant had agreed to the written procedure. The Bank also notified the appellant that he could see the Bank's head of the OH department, Deborah Gilbert. The appellant said that he wished to attend with a friend, Dr Durrani, who could help to explain his condition. It was agreed that Dr Durrani could attend by means of a conference call. On the morning of the appointment, 5 September, the appellant's solicitor said that the appellant wished the OH assessment to be made by a qualified medical practitioner, Dr Skidmore. Deborah Gilbert was not medically qualified but she was a specialist OH advisor with twenty two years' experience and was in fact senior to Dr Skidmore. The solicitors also expressed (for the first time) surprise that the procedure should be by way of written representations (notwithstanding the earlier correspondence on this subject) and they asked again for the proceedings to be postponed until some three to four months after the brain surgery operation. There was no date fixed at that point for any surgery, and indeed the appellant had postponed it so that he could deal with the HMRC investigation. The Bank refused to delay the hearing as requested, and noted (producing the relevant correspondence) that the appellant had until that point agreed to the written procedure. The Bank confirmed that it would follow any advice from OH in relation to any adjustments to the agreed disciplinary process.

20. The OH meeting was held and, as well as assessing the appellant, Ms Gilbert spoke by telephone with Dr Durrani. She was told in some detail the effects of his medical condition. The appellant made it clear that he wanted to attend the hearing in person and wanted the hearing to be postponed until he had recovered from surgery rather than to proceed by way of written representations. Ms Gilbert's view was that the proposed written procedure would be an appropriate procedure to adopt; it would assist the appellant because he would have time to prepare his submissions with the benefit of legal advice.

21. At the tribunal hearing there was a dispute about the accuracy of Ms Gilbert's notes, and in particular observations she had made that the appellant was able to recall when he had taken medicine and also to recount his dealings with HMRC in a cogent way. The appellant also alleged that Ms Gilbert was not competent to act as she was not a doctor. The ET rejected these submissions and concluded that Ms Gilbert had properly recounted aspects of the meeting which were potentially relevant to the appellant's ability to cope with a hearing. It also held that she was eminently qualified to make an assessment; to do so did not require a medical qualification. The ET found that proposing a written procedure was perfectly reasonable in the light of the information before her, and the Bank in turn acted reasonably in adopting this proposal (paras.160-168).

22. The disciplinary hearing took place on 6 September before Mr Bandeen. He had experience of conducting such hearings; he did not know the appellant. He considered whether to delay the hearing on medical grounds but he was satisfied that he had a full response to the three transactions and that the appellant would not be prejudiced by the hearing going ahead. Mr Bandeen did in fact wait to see if the appellant would

appear in person but when he did not, he carried out his assessment. He did not seek any further observations or explanations from the appellant, but the ET was satisfied that if he had been unclear on any matter, he would have sought clarification (para. 176).

23. The ET set out in considerable detail the three transactions under consideration and the explanations for them. Briefly, they were as follows. The first involved a cheque for £15,000 drawn on UVT's Lloyd's TSB account made payable to Citibank NA. Approval was obtained from Lee Tarran, Head of Cash and Clearing, who was junior to the appellant and worked in the same department. The appellant had asked him to approve payment into his Citi US account using the staff transfer process and then for the sum to be credited to his personal account with an American company to fund a capital call. The appellant explained that it was a short-term loan to enable him to meet the call; the trustees of UVT were aware of it and the loan had been repaid.

24. The second transaction again involved the staff transfer form and was to pay off a credit card debt of his nephew out of UVT funds. As it happens, the debt was owed to Citibank itself, in NewYork. Again, Mr Tarran approved the transfer. The credit card debts were settled. With respect to this transaction, the appellant had asked Mr Basu, another more junior employee in the Bank, to negotiate a settlement figure with the Bank and to take "a tough line" in the negotiations. The claimant claimed that this was a proper payment consistent with the charity's objects.

25. The third transaction involved a transfer of funds from the UVT trust to the Fakir Trust, based in Pakistan. The appellant and two of his children are trustees of this trust. Again, the staff transfer system was used with the consent of Mr Tarran. A sum of £12,500 was sent to the Fakir Trust via the appellant's Citi bank account, then to his Citi bank account in Karachi, and then to the Fakir Trust.

26. Mr Bandeed concluded that the appellant had committed gross misconduct. In an important passage, the ET summarised the reasoning and his conclusions as follows (paras.198-205):

> "198. [Mr Bandeen] concluded that the transactions were purely personal and were totally unrelated to the Claimant's work for the Respondent. Also, that the Claimant had not sought permission from a more senior manager when using the staff transfer process rather than that of a more junior employee. Although Mr Tarran was senior he was junior to the Claimant.
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> 199. We spent a lot of time in the Hearing discussing the section of the Code of Conduct that referred to personal business dealings. Mr Bandeen considered that the section did not give the Claimant permission to use the staff transfer process to transfer the UVT's funds. In his live evidence, he stated that he would struggle to think of a transaction more non-standard than for example, transaction 8 where the Claimant had sent a UK charity's funds to a UK bank, transferred it to Pakistan, then out through a personal account, transferred it into another currency and finally out to another

charity based in Pakistan. He believed that in accordance with this section of the Code the Claimant should have sought permission from a manager senior to himself before using Citi's systems to make these transactions. He concluded that they were not personal business dealings, were non-standard and were contrary to the Code of Conduct and the Handbook. The Claimant had used the Respondent's resources - both systems and staff (i.e. Mr Basu in transaction 3) to engage in financial transactions that had a strong appearance of impropriety.

200. Mr Bandeen considered the sections of the Code of Conduct that Ms Wiggan referred to in her email to the Claimant's solicitor on 2 September and which the Claimant is likely to have been familiar with having been a long-standing member of staff, Code staff and quite senior staff. He decided that the Claimant could not have considered his use of the Respondent's systems as outlined above to be approved or authorised by the Respondent, especially as he had not sought permission from a senior manager for the non-standard use [of] the staff transfer system in the way that he had. He decided that the way in which the Claimant had conducted transactions 1, 3 and 8 was also in breach of the Employee Handbook as he used Citi's systems for personal use in breach of its policies and procedures and he had not kept the usage to a minimum.

201. Mr Bandeen concluded that the Claimant's claim that he used the staff transfer process to transfer the UVT's money to create an audit trail to be implausible and counterintuitive. Instead, he considered that the way in which the transactions had been arranged made the process opaque and unnecessarily complicated. That is what he understood by the phrase 'complex and multi-layered'…

202. It was not part of Mr Bandeen's function as the business reviewer to confirm whether the distribution of the UVT funds in this way actually breached the relevant charity, tax law or regulations. In the Hearing the Claimant accused the Respondent of seeking to do HMRC's job in the decisions it made in this disciplinary process. We find that Mr Bandeen was careful not to do so. He quite clearly stated in his decision letter that he was not in a position to make a finding as to whether the transactions contravened those laws.

203. It was within his remit however, to determine whether the Claimant had made improper use of the Respondent's systems in conducting these transactions and he confined his decision to that. He considered that it was also inappropriate for the Claimant to have involved Mr Basu in the settlement of Mr Ali's personal debts. He concluded from the emails that the Claimant had used his position and influence to pressure Mr

> Basu to obtain settlement figures and to get the best deal possible for his nephew.
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> 204. Mr Bandeen concluded that the transactions had the strong appearance of impropriety. Although the Claimant provided documents from Mr Malida and Mr White confirming that there was nothing untoward with the transactions, Mr Bandeen concluded that those statements were from the perspective of the charity and its trustees. The loan of £15,000 to meet the cash call had been subsequently repaid. The payment to clear Mr Ali's credit cards was apparently within the objects of the charity and the other Trustee had approved the payment to the Fakir Trust. However, once again, Mr Bandeen was only concerned with the Claimant's use of Citi's systems. He concluded that the numerous steps taken by the Claimant to complete these transactions when they did not appear to be necessary could be seen as designed to conceal the source of the funds. He concluded that there was a lack of transparency.
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> 205. He considered whether transactions 1, 3 and 8 were likely to bring the Respondent's name in disrepute. In this regard he was conscious of the fact that the Claimant was Code Staff as well as being the Global Head of TTS (Operations). The Respondent did not have to wait for an enquiry from the regulator before considering this matter. The Respondent was aware that the Prudential Regulation Authority and the Financial Conduct Authority have become increasingly focused on ensuring that firms are promoting a culture of good behaviour, particularly amongst its senior decision makers, such as the Claimant. He concluded that in those circumstances, the Claimant's involvement in transactions with the strong appearance of impropriety such as transactions 1, 3 and 8 was likely to create embarrassment for the Respondent and did carry with it the real risk of bringing the Respondent's name into disrepute."

27. There are a number of points to note from this passage. First, the transactions were not personal business dealings nor were they properly authorised. Second, Mr Bandeen thought it implausible that the reason was to create an audit trail as the appellant had suggested. Third, Mr Bandeen had not concluded one way or the other whether the payments involved breaches of charity law or tax law; he was focusing simply on the obligations of the appellant as a senior manager and a Code staff member. Fourth, whatever the appellant's intention in using the transfer system in this way, the numerous steps taken to complete these transactions did not appear to be necessary, they lacked transparency and gave rise to a strong perception of impropriety. Fifth, the crux of the matter was that the appellant had exercised poor judgment as a trusted senior employee such that his conduct was likely to create embarrassment to the Bank and carried a real risk of bringing the Bank's name into disrepute. For these reasons, and notwithstanding the appellant's extensive length of service, this constituted gross misconduct justifying summary dismissal.

28. The decision letter was sent to the appellant on 17 September 2013. He decided to exercise a right of appeal conferred by the disciplinary procedure. He was told that he would have at least two weeks to prepare for the appeal. There was much correspondence relating to it. Three matters of significance figured in that correspondence. First, the appellant was given the opportunity under the procedures to provide further evidence in support of his case and he did so. The appeal was not, therefore, simply a review of the original decision, based upon the same materials. In particular, the appellant set out further explanations for the three transactions under consideration and produced additional witness statements. These representations were not before us but the judge described them as "detailed submissions as to the allegations and all of Mr Bandeen's conclusions" (para. 253). (In fact that was not entirely accurate; the submissions for some reason did not include representations on Mr Bandeen's finding that the appellant had acted inappropriately in getting Mr Basu to negotiate settlement of the credit card debt on behalf of Mr Ali, the appellant's nephew, notwithstanding the clear opportunity to do so.)

29. Second, the appellant raised for the first time an allegation that many other staff members had used the staff transfer system in a similar way without being subject to any disciplinary action. This allegation was in fact explored in some detail by Mr Staley, the Bank's Global Head of Commodities, who heard the appeal. It was also considered at some length by the ET. Suffice it to say that the conclusion was that no-one had used the system in a similar manner and that there was no unfairness in proceeding against the appellant. This point is no longer pursued.

30. The third issue of importance is that the appellant wished to appear in person but asserted that he could not do so adequately unless accompanied by a former senior employee of the Bank, Mr Meadows, to assist him. The disciplinary procedures allowed a colleague or trade union representative to accompany a defendant, but this obviously did not include Mr Meadows. The request was bolstered by a report from Dr Dexter who noted that the effect of the appellant's brain tumour was to cause loss of short-term memory, sleep disturbance and hand tremors. He said that the process would be very stressful for the appellant and suggested that this might be avoided by a known adviser who could help in the proceedings, suggesting Mr Meadows as an appropriate person (although he did not know Mr Meadows). The appellant also alleged that the justification for asking for Mr Meadows was that he had asked a number of staff members to accompany him but they had refused, fearing retribution from the Bank. That issue also was explored in some depth at the ET hearing and the judge did not find either the appellant, or certain witnesses who gave evidence supporting him, credible on this point. The appellant had made numerous inconsistent statements about this matter (para.235). The Bank remained unwilling to change its stance on this, although Mr Meadows was allowed to produce a witness statement, which he did. The finding of the ET was that the appellant could have been assisted by a colleague; it held that his reason for insisting on Mr Meadows (or someone of similar status) was that the appellant would have felt unhappy with a junior member of staff to assist him (para.234).

31. The appeal hearing was heard by Mr Staley on 31 October. He had expected the appellant to appear in person but when he did not, Mr Staley determined the case on the materials available to him. His decision was to confirm Mr Bandeen's decision. The ET found that the "core issue" for him was the appellant's use of the Bank's

internal systems for non-personal business dealings (para.257). Mr Staley also observed (para.257) that using Mr Basu for settling the nephew's credit card debt was a situation rife with conflict of interest. He too was satisfied that dismissal was an appropriate sanction, notwithstanding the appellant's very long service.

The application to the Employment Tribunal.

32. There were numerous issues in the case in relation both to unfair dismissal and disability discrimination. I will deal with all stages of the unfair dismissal ground first; they overlap to a significant extent with the issues arising in the disability discrimination claim.

Unfair dismissal.

33. Section 98(1) of the Employment Rights Act 1996 is as follows:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
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> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
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> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

A dismissal relating to conduct is one of the reasons falling within subsection (2).

34. The concept of fairness is defined in section 98(4):

> "Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
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> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
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> (b) shall be determined in accordance with equity and the substantial merits of the case."

35. The classic formulation of how tribunals should approach the fairness test is found in the judgment of Arnold J in *BHS v Burchell* [1980] ICR 303:

> "What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element.
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> First of all, there must be established by the employer the fact of that belief; that the employer did believe it.
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> Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief.
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> And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

36. It is pertinent to note that when the Arnold J used the word "investigation" he was intending this to embrace all the procedural steps taken prior to the decision to dismiss being made; he was not simply focusing on the investigation in the narrower sense of steps taken to determine whether or not there is a case for the employee to answer. The Court of Appeal confirmed in *Sainsburys Supermarket v Hitt* [2002] EWCA Civ 1588; [2003] IRLR 23, resolving certain conflicting decisions on the point, that the reasonableness test applies as much to the investigatory stage as it does to other aspects of the decision to dismiss. It is not for the ET to substitute its view for that of the employer.

37. The appellant sought to allege that the dismissal was not genuinely for the reason given but was because the appellant was subject to the HMRC investigation. The ET rejected this argument; it was satisfied that the decision had been taken independently of the HMRC investigation on the basis of the materials uncovered by the Bank itself in its investigations. There is no challenge to that finding before us. It was also contended that dismissal was not a sanction which a reasonable employer could properly adopt for such a senior employee but that too was rejected and is not now directly pursued. (There is, however, a distinct ground, considered below (paras. 68-69) that the ET did not properly approach this question because it mischaracterised the true reason for the dismissal.)

38. The principal argument before the ET was that the procedures were inadequate and did not meet the standard to be expected of a reasonable employer. There were various strands in this argument; I will focus on those still live in this appeal. First, it was alleged that at the initial investigatory stage when the Bank was determining whether there was a case to answer, the Bank had conducted a secret investigation and had failed, contrary to its own rules, to allow the appellant a formal hearing. Second, there was a failure by the Bank properly to set out the case against the appellant. In particular the breaches of the Code of Conduct and the Employee Handbook which the appellant was alleged to have committed were not identified until after he had made his submissions, and even then it was not made clear how the appellant was

alleged to have infringed these provisions. As a consequence, the Bank had found misconduct for reasons which had never been properly drawn to the appellant's attention. This was particularly so with respect to the allegation that he had used junior staff improperly. Third, the appellant had not been able to attend the disciplinary meeting because of his disability. This was critical because it meant that he was unable to engage in discussion about the allegations made against him. The written procedure was a poor and inadequate substitute for a formal hearing not least because neither Mr Bandeen nor Mr Staley on appeal had asked any questions arising out of the appellant's written submissions. There was no satisfactory exploration of the appellant's case.

39. The ET rejected all these submissions (paras.322-328). It recognised that there was no formal investigatory meeting with the appellant as there had been with some other employees, but nonetheless the investigation overall had been reasonable. The objectives of a disciplinary investigation had been met; the appellant had ample opportunity to provide a full explanation why he had used the transfer process for the three transactions, and he had in fact done so. The charges had been framed with sufficient particularity and the appellant knew the nature of the case against him. As to the fact that he did not attend either of the disciplinary or appeal hearings, this was his choice. He was not precluded from so doing and he was fit enough to do so. Moreover, so far as the hearing before Mr Bandeen was concerned, the Bank could reasonably infer from the relevant correspondence that the appellant had, through his solicitors, confirmed that his preference was for the written procedure to be adopted, given his disability. But he was not precluded from attending had he wished to do so. Although he had told Ms Gilbert at the OH meeting that he wished to attend in person, that was in the context of seeking a postponement until after he had had surgery and the ET accepted that the Bank had acted reasonably in refusing that request. At the appeal stage, he was again permitted to attend in person and would have done so had he been able to be accompanied by the representative of his choice. It was his decision not to attend. In any event, the written procedure gave him a full opportunity to respond to the case against him. Had Mr Bandeen or Mr Staley thought it necessary to seek clarification or further explanation of any matter, they would have done so.

40. The EAT dismissed the appeal on this point. It succinctly summarised the appellant's submissions on the investigation point as follows (paras. 20-21):

> "20. The argument advanced by the Claimant at the hearing of this appeal focussed heavily on the absence of any investigation, properly so called. The "Speaking Note" puts the point succinctly: the failure to carry out an investigation in accordance with the disciplinary procedure, together with a decision to dismiss based on charges which had not been properly put, meant that the Claimant had been unable to advance a full defence, let alone give the Respondent an opportunity to investigate it. It is said that the Tribunal could *only* have held that there was no proper investigation.
>
> 21. In the absence of a reasonable investigation, the argument continues, procedural failings in the investigation render it not only procedurally unfair but also substantively unfair because

> the requisite belief must be reasonably tested through an investigation. The Claimant was dismissed, the Speaking Note complains, for reasons of [sic] several of which he was unaware and unable to defend himself. The reference here is to paragraph 212 of the Reasons, which stated, in effect, that although the Respondent did not set out in its charges certain specific concerns which it had, these were encompassed within the main charge that the transactions were an improper use by the Claimant of its systems etc. to engage in financial transactions that were either improper or had the strong appearance of impropriety."

41. The judge was not persuaded by these arguments. She accepted the Bank's submission that when looking at the fairness of the investigation, one must consider matters in the round: see *Taylor v OCS* [2006] ICR 1602, paras.47-48 and more recently *Shrestha v Genesis Housing Association Ltd*. [2015] IRLR 399, paras.22-23. Adopting that approach, there was evidence which justified the ET reaching the conclusion it did. It gave a full explanation for its findings, there was no material misdirection, and the conclusions could not in any sense be described as perverse.

The grounds of appeal to the Court of Appeal.

42. The appellant essentially reiterates the submissions advanced below with respect to the procedural issues, although they have been advanced in a more focused way. In summary, Mr Hochhauser QC, counsel for the appellant (who did not appear before the ET), advanced his argument under three broad heads: defects in the investigation; failure properly to identify the case which the appellant had to meet; and no proper opportunity to put his case given the shortcomings of the written procedure. I will consider these points in turn.

The defective investigatory process.

43. Mr Hochhauser asserted that there were fundamental defects with the investigatory stage. The investigation was conducted in secret and there never was a proper investigatory meeting with the appellant even though the Bank's own disciplinary rules required it. This was not simply a formal failing, as the courts below appear to have thought; it was a serious procedural defect. The ET relied upon the meeting of 8 July with Mr Woodward and Mr Constantine as a relevant hearing. However, this was prior to any disciplinary charges being formulated and it did not seek justification for the appellant's actions, merely information about the Staff Transfer Process (which the appellant explained both orally and later in writing) and information about which transactions the appellant had undertaken. It was simply false for the ET to describe this meeting as an opportunity for the appellant "to articulate his defence". That was not the purpose of the 8 July meeting and in any event he could not articulate his defence without knowing the case he had to meet. Moreover, none of the responses provided by the appellant to Mr Woodward was in the material made available either to Mr Bandeen at the disciplinary hearing or to Mr Staley on appeal. It was wrong to treat that meeting as an aspect of the investigation process at all since the CSIS investigation was conducted wholly independently of it. These defects were compounded by the fact that the decision to take disciplinary action was determined prior to the conclusion of the investigation and before all the information on the

various transactions had been uncovered. The Bank ought to have completed its investigations before instigating the disciplinary process. Bearing all these considerations in mind, the conclusion of the ET was manifestly perverse; there was no proper basis for determining that the investigation was satisfactory.

44. Mr Hochhauser relied in particular upon the decision of the Employment Appeal Tribunal in *A v B* [2003] IRLR 405 and specifically upon the following observations of Elias P in that case:

> "60. Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.
>
> …
>
> 80. Of course the touchstone is always reasonableness. The recognition that the standard of reasonableness is going to depend upon the state of the case against an employee is found in the decision of the Employment Appeal Tribunal, Wood J giving the judgment, in the case of *ILEA & Gravett* [1988] IRLR 497. In the course of his decision Wood J said this:
>
> > '… in one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end so the amount of inquiry and investigation, including questioning of the employee which may be required, is likely to increase.'"

45. Mr Hochhauser accepted that the facts of that case were very different from the facts here, but he relied upon it as emphasising the need for a fair and balanced investigation as an important element in the disciplinary process, particularly where dismissal would mean the end of an employee's career.

Failure properly to identify the charges.

46. Mr Hochhauser submitted that a further element of unfairness was the fact that the dismissal was for matters which had not been properly identified in the charges. The letter initiating the process described the charges as follows:

> "…during the period spanning from at least November 2008 to October 2011, and in abuse of your position of trust as a senior member of operations management and latterly as global TTS Operations Head, you improperly used Citi's transaction systems, staff and resources to engage in financial transactions which were either improper or have the strong appearance of impropriety, particularly in that they;
>
> (a) Appear to be complex and multi-layered
>
> (b) Seem to be made with the intention of concealing the distribution of funds from the original source, the Unheard Voices Trust….to the ultimate recipient;
>
> (c) Use charitable funds from the Unheard Voices Trust either for yourself personally or for a family trust, the Fakir Trust…"

A list of nine sample transactions was then provided, together with accompanying documentation. (Subsequently it was made clear that only three of the transactions would be relied upon given the appellant's disability.)

47. Mr Hochhauser noted that when the solicitors gave the appellant's written response on 30 August, the disciplinary letter was the sole document identifying the case against the appellant. In their response, the solicitors complained that the Bank had not identified which paragraphs of the Code of Conduct or other policies had been breached, nor how it was alleged that the reputation of Citibank might have been brought into disrepute. It was only three days later that the Bank identified the relevant provisions and then only in a very general way. It referred to three paragraphs of the Handbook and certain sections of the Code but even then there was no attempt to identify in what way it was being alleged that the appellant's conduct infringed these provisions. The failure to specify precisely what case the appellant had to meet was, asserted Mr Hochhauser, a fundamental flaw depriving the appellant of the most elementary standards of natural justice. It also meant that he was found to have been in breach of obligations which were never put to him. By way of example, it is said that there was no indication in the Disciplinary Charges letter that Lloyds did not have line of sight over the onward transaction. Nor did the letter make the specific criticism that the appellant was using more junior staff to authorise the transactions (Mr Tarran) and to negotiate on behalf of the appellant's nephew (Mr Basu). The ET took the view that these complaints were embraced within the allegation that the appellant had "improperly...used Citi's staff". Mr Hochhauser submitted that this was an illegitimate reading; it was quite unjust to say that the appellant should have appreciated that these particular complaints made in relation to junior staff were clearly in issue merely because these matters had figured in the documentation relating to the transactions. The ET reached a perverse conclusion on this point; it could not properly say that the appellant had an opportunity fully to respond to the allegations when he did not know what they were.

Defective hearing process.

48. Finally it is submitted that the appellant was not given a fair disciplinary hearing itself. There are two elements to this argument. First, it is said that the ET's conclusion that the appellant was able to attend the disciplinary hearings and had chosen not to do so was simply unsustainable. In so far as there was an implicit finding by the ET that he would have been able to participate properly in any such hearing (as the EAT had found but which Mr Hochhauser disputed), that was inconsistent with the medical evidence. The tribunal had placed weight on the fact that the appellant had been at work, notwithstanding his tumour, for some five years, but the evidence was that his health was deteriorating and that he was under stress and suffering from memory loss and lack of concentration. Similarly, he could not be expected to attend the appeal hearing on his own and without the assistance of someone he could trust. An alternative to a formal hearing was required. The second element was that the written procedure was not in the circumstances a fair alternative. I understood Mr Hochhauser to concede that in principle a written procedure could be fair, provided it was conducted as far as possible in a manner which replicated the kind of discursive interchange one would find in an oral hearing. This did not happen. The appellant was led to believe that he would have the opportunity to respond to points which arose out of his written submissions, but no issues were in fact raised either by Mr Bandeen or Mr Staley. There was no effective discussion enabling the appellant to deal with areas of concern as would have been the case had there been an oral hearing.

Discussion.

49. All these points were trenchantly advanced by Mr Hochhauser with his customary skill, but save in one relatively minor respect, I am not persuaded by them. In my judgment the employment tribunal was fully entitled to find that, taken in the round, the procedure was one which a reasonable employer could properly consider to be fair, albeit that it was not strictly in accordance with the Bank's own procedures and was, in certain respects, unsatisfactory. As Mr Devonshire QC, counsel for the Bank, properly contends, absent some misdirection, we can only interfere with the ET's decision if it is perverse. This means there must be "an overwhelming case … that the Employment Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached": per Mummery LJ in *Yeboah v Crofton* [2002] EWCA Civ 794; [2002] IRLR 634, para.93. Mr Devonshire submits that this rigorous test is nowhere near satisfied here with respect to any of these findings.

50. The first criticism of the investigatory stage was that this was done covertly without the appellant's knowledge. But the chronology does not support this. It was plain from the 8 July meeting that the Bank needed information about the staff transfer transactions undertaken by the appellant because there were concerns about them. He was told not to come into work whilst inquiries were continuing. Even at that stage, and given in particular that the concerns arose as a result of potential criminal wrongdoing and that the interest of the regulators could be anticipated, the appellant must have appreciated that further consideration of these matters by the Bank would inevitably involve a review of his own personal conduct. In my view it is wholly fanciful to contend otherwise. Again, he was expressly told that investigations were being undertaken when he was formally suspended on 16 July. Whilst he did not

know who was carrying out the investigations, it would have been obvious what they were about. Nor did he seek any information about how the investigation was being conducted. So to the extent that the complaint is that this was a secret investigation, with the implication that the disciplinary charges came out of the blue, it simply does not hold water.

51. Nor, in my judgment, can there be any complaint that the decision to take disciplinary action was made before the investigation was complete. It will often be necessary for an employee to be suspended as soon as investigations have unearthed serious matters which will be, or are likely to be, the subject of disciplinary action, even though the full investigation into those matters has not been completed. One reason may be concerns about the response of the regulators if the matter is not thought to have been treated with the appropriate gravity. Another may be a concern that the employee might interfere in some way with the evidence if he remains at work, as indeed was a concern here. As Wood J observed, giving the judgment of the EAT in *ILEA v Gravett* [1988] IRLR 497, para.16, in the course of a disciplinary process:

> "…[t]here will no doubt come a moment when the employer will need to face the employee with the information which he has. This may be during an investigation prior to a decision that there is sufficient evidence upon which to form a view or it may be at the initial disciplinary hearing. It may be that after hearing the employee's version of accounts, further investigation ought fairly to be made, but this need not be so in every case".

Continuing the investigation is not a flaw in the proceedings and does not render them unreasonable provided that the employee is given a full and fair opportunity to engage with any new charges or new material which might emerge as a consequence of that process. That opportunity may be at the disciplinary hearing itself. The appellant plainly did have such an opportunity here, either by the written procedure or (see paras.63-66 below) by attending the hearing(s).

52. A potentially more telling point is that the appellant was given no formal hearing at the early investigatory stage when the Bank was considering whether he had a case to answer. In my judgment in assessing whether, and to what extent, this failure might undermine a fair procedure, it is necessary to consider the purpose of such a hearing. Typically, it is to get the employee's response to alleged wrongdoing; to determine to what extent the facts are disputed; and to explore which, if any, witnesses may assist in resolving those disputed facts. Where facts are not disputed, it will enable the employee to explain his conduct in the hope that the explanation may exculpate him. *A v B* establishes that an investigation will be unfair if it is simply conducted with the objective of reinforcing the provisional case against the employee and ignores or unreasonably fails to pursue evidence which might support his or her case. In *A v B* there were serious allegations of sexual wrongdoing by a care worker from a highly vulnerable and potentially unreliable witness; they were denied by the employee who was relying upon the employer to investigate those allegations. By contrast, in this case there were no disputed facts as such, or none of significance and in so far as there might have been a simple answer to the concerns raised by the Bank, that could

have been disclosed at or shortly after the 8 July meeting. I agree with Mr Hochhauser that it was inaccurate for the ET to say that the 8 July meeting gave the appellant an opportunity to "articulate his defence" since he did not know at that stage precisely what he was alleged to have done wrong. However, he knew in broad terms the transactions which had caused concern, and he had the opportunity to explain why the concerns were obviously misconceived or why it could not be said that he had behaved improperly. Indeed, if there was a simple and potentially convincing answer, one would naturally expect him to give it at that stage so as to allay the Bank's concerns. By way of example, this was an opportunity to say - if it had been the case - that all transactions had been fully disclosed to the compliance officer in advance and approved by him.

53. Mr Hochhauser has made much of the fact that there was no direct link between the 8 July meeting and the subsequent CSIS investigation, pointing out that none of the material generated following the meeting was relied upon in that investigation. But in my judgment, it is a point of no significance. The appellant knew, albeit only in general terms, that his staff transfer transactions were the subject of real concern to the Bank and he could have allayed those concerns had he a ready answer. Absent such a response, there was obviously a case to answer. It is of no significance that this opportunity arose before the formal investigation had begun. A formal hearing at the investigatory stage would in substance have considered the same issues as were raised in the disciplinary hearing itself; it would have served no useful purpose. It is in my view telling that it has not been suggested that, because of this failure, the appellant has been deprived of the chance to explore, or have the Bank explore, possible lines of inquiry which might have assisted his case. In my judgment the ET was fully entitled to find that this failure did not render the whole investigation unreasonable.

54. There is a further submission which is related to the fact that the information obtained following the 8 July meeting was not made available in the disciplinary process. It goes to the reliability of the disciplinary decisions themselves. Mr Hochhauser contends that Mr Bandeen simply did not understand the nature of the staff transfer procedures and was not in a position to judge the allegations against the appellant. The basis of this argument is that the explanation given by the appellant to Mr Woodward about how the staff transfer process operated was not made available to Mr Bandeen, even though the ET found that he was not personally acquainted with the procedure. Mr Hochhauser suggests that the only legitimate inference is that Mr Bandeen could not properly have understood the procedure and that this ignorance vitiated his decision. He ran a similar argument with respect to Mr Staley's decision.

55. I wholly reject this argument. It is true that at one point (para.175) the ET do mistakenly suggest that Mr Bandeen would have been privy to the written explanation given to Mr Woodward when in fact he was not. But as the ET also pointed out, the letter of 30 August from the appellant's solicitors also explained his use of the procedure and it was also clear from the details of the transactions, in particular the flow charts. Furthermore, as the ET noted in terms (para.326), "an in-depth knowledge of the staff transfer process was not required in order to consider whether the claimant's conduct was in question", adding that the process was not difficult to understand. Quite apart from that, there is in my judgment no basis for assuming that a senior officer charged with such a serious function would have failed properly to acquaint himself with the basic elements of the procedure under

consideration. Furthermore, it is reasonable to assume that this aspect of the case was fully explored with Mr Bandeen when he gave evidence before the ET and yet the ET was satisfied that there was nothing in the point. So am I.

Defective particulars of the charges.

56. It is obviously an elementary principle of justice that the employee should know the case he or she has to meet. It is equally obvious that it is the employer's obligation to put that case so that on a fair and common sense reading of the relevant documentation, the employee could be expected to know what charges he or she has to address. That duty is not met if the employee has to speculate what may be in issue and what may not. The question is not what charges the employer may have been entitled to charge on the material provided to the employee; it is what charges have in fact been made. There may be potential charges which, for one reason or another, are not being pursued.

57. Mr Devonshire submits that in this case the ET was entitled to find that the specific matters raised by Mr Hochhauser were implicit in the general accusation that the appellant had made improper use of systems and staff. He said this:

> "The charge letter identified that Management was concerned about the improper use of "systems, staff and resources" for transactions "made with the intention of concealing the distribution of funds from the original source, the [UVT] …. to the ultimate recipient". Each of the 9 attached flow charts identified that "LTSB would have seen the payee only as 'Citibank NA' and would not have known the ultimate beneficiary of funds" …. The Transaction 1 & 8 flow charts also identified that the recipient of the funds "would have seen the remitter only as 'London Citibank Internal Customer' and would not have known that the original source of the funds was the [UVT]" …. All of the flow charts identified that the "Fund Transfer Form (Staff)" was addressed to Lee Tarran, and the supporting materials for Transaction 3 included C's instructions to Basu to negotiate a good deal on Ali's credit cards."

He submits that this was a conclusion properly open to the ET and there is no justification for interfering with that conclusion.

58. I do not entirely accept that submission. It is important to note what the ET must be satisfied about; it is not that the charges actually made in general terms could be read as entailing specific charges not specifically identified. It is whether it can be properly be satisfied that an employee would understand from the way the case is put that these charges were actually being made; and any doubt about that question should be resolved in the employee's favour, given that the burden is on the employer to make the charges sufficiently clear.

59. It would in my view have been obvious that seeking authority from a more junior member of staff, in this case Lee Tarran, and involving him in the transaction, would inevitably be a factor in the assessment of wrongdoing, and potentially an important

one. Mr Tarran was obviously placed in an invidious position when asked to approve the transaction and it would have been difficult for him to refuse given the source of the request. If there had been full disclosure to an appropriate more senior officer, or perhaps to the compliance officer, the picture would be very different. It might then have been difficult to establish any misconduct, and certainly not gross misconduct. So involving Mr Tarran was in my view plainly an issue which needed to be explained and justified. Similarly, the fact that Lloyds did not have sight of the ultimate beneficiary was an obvious concern about the transactions; it was a consequence of their multi-layered nature. I do not accept that a reasonable employee could have read the disciplinary letter, directed as it was against these particular transactions, and not have appreciated that these were matters arising which would be causing concern and needed to be addressed. In my view it would be obvious enough that these matters fell within the generic description of improper use of systems and staff.

60. However, in my judgment the complaint about Mr Basu's involvement in negotiations on behalf of the appellant's nephew falls into a different category. The question is not whether this would have been a proper charge to make; it clearly would have been, and as Mr Staley justifiably noted, it raised real concerns about conflicts of interest. It is also true that the passage in the Code on conflicts was specifically referred to in the letter of 3 September. Even so, could the ET have been sure that a reasonable employee would have understood that it was a complaint being relied upon? Had the ET posed the question in that way – and I do not believe that it did - I do not think that it could properly have so concluded. Mr Basu's involvement was not, like the other matters, an abuse of the staff transfer procedure itself; it was quite independent of it. Even if the appellant had paid the debt directly and without using this particular procedure, the allegation of breach of trust could still have been made. The fact that the appellant appears not to have made submissions on this point to Mr Bandeen suggests that he genuinely did not appreciate that this was one of the matters he had to address, and I can understand why. The focus was after all on the particular transactions. To that extent, Mr Hochhauser is in my view right to say that the finding that the appellant had acted improperly in involving Mr Basu was not a finding which Mr Bandeen was entitled to make because no charge of that kind had been clearly articulated. If Mr Bandeen was intending to rely upon this matter, he should have given the appellant an opportunity to address it directly.

61. However, in my view there are two reasons why this does not invalidate the overall conclusion of gross misconduct. First, it is clear from the letter of dismissal that this was not central to the primary finding of gross misconduct, which was the unauthorised and improper use of the procedure in breach of the duty of trust and in a manner which could put the Bank's reputation at risk: see the findings of the ET set out in para.25 above. It is plain that on the findings of both Mr Bandeen and Mr Staley, summary dismissal would have been the penalty even ignoring the improper use of Mr Basu. Second, and in any event, it is clear that the appellant had a full opportunity to address this point on appeal even though he did not in fact choose to do so: see para.27 above. The question whether the opportunity to appeal can put right defects at first instance has been considered in a number of authorities. In *Taylor v OCS* [2006] EWCA Civ 702; [2006] ICR the Court of Appeal emphasised that the question is whether, having regard to the substance of the matter, it can be said that a fair procedure has been adopted overall notwithstanding errors at the first stage.

62. In my judgment an important consideration when asking whether the procedures overall are fair will often be whether the employee has had an opportunity on appeal to put in fresh evidence and make further submissions in support of his case, as happened here. Mr Staley would have considered whatever defence the appellant had to this charge, even though Mr Bandeen had not done so. Mr Hochhauser says that even if the appeal is conducted fairly, the employee is being deprived of two bites of the cherry and given only one. However, that argument cannot be decisive or it would mean that an appeal could never put right an earlier error. If the case had turned on this point, I would normally have felt obliged to remit it to the ET to determine whether the procedure overall was fair or not since it is the ET's function to determine that question. Having said that, I may have been minded in this case not to remit, on the grounds that the ET could not arrive at any conclusion other than that the dismissal was fair, given in particular the undisputed facts relating to Mr Basu, coupled with the fact that there was an opportunity for the appellant to explain why he had involved Mr Basu in the way that he did. On the admitted facts it is a clear conflict of duty and interest for the appellant to seek to benefit his nephew at the expense of the Bank, and his involving Mr Basu to advance his nephew's interest compounds the problem. However, since the issue is not decisive of the appeal because I have found the decision to dismiss to be fair with respect to the other charges, it is not necessary finally to resolve whether I would have remitted or not. I am reluctant to express a concluded view not least because we did not hear detailed argument on that particular point.

63. I should add that I do not think that the Bank handled this aspect of the case well. It was not satisfactory for it to identify relevant parts of the Handbook and Code of Conduct after submissions had been advanced. This might have been a more serious matter but for the fact that when giving that information, the Bank also told the appellant's solicitors that they could make additional arguments up until 3 pm on the day of the hearing. Moreover, it was certainly desirable to identify how the alleged acts of conduct had infringed which provision, even where this was obvious. Had this been done it would have put beyond doubt the fact that directing Mr Basu to negotiate the nephew's debt to the Bank was indeed one of the complaints relied upon.

Was there a fair disciplinary hearing?

64. The third principal ground of appeal was directed against the ET's finding that the appellant was able to attend the hearing in person. Mr Hochhauser suggested that the ET could only have meant bare attendance and that there never was a clear finding that he would be able to participate properly in any hearing. The EAT was not persuaded by this submission; it said that it was "implicit from many of the findings of fact that the Tribunal had indeed concluded that he would have been properly able to participate; see e.g. paragraphs 284, 289 and 305". I entirely agree; it would have been pointless for the ET to have found simply that the appellant could attend a meeting if he were not able actively to participate once there. Moreover, in para. 289 it seems to me that the finding was explicit; the ET there rejected a submission that the appellant would not be able to deal with the hearings or articulate his case without Mr Meadows to assist him. The ET obviously thought that he would be able to do those things. Again in para.323 the ET stated that the appellant could have attended the hearing before Mr Bandeen and "reinforced his answers". In my view it is beyond

doubt that the finding was that the appellant would have been able to participate fully in both the first hearing and the appeal hearing had he chosen to do so.

65. Mr Hochhauser's alternative submission is that if the ET did make that finding, it was a perverse conclusion not open to it on the evidence. He focuses in particular on the medical reports which had concluded that the appellant was suffering from headaches, memory loss and poor concentration. In addition, Dr Farmer had said that the appellant had "significant neurological problems which will be adversely affected by stress". In so far as the ET had put emphasis on the fact that the appellant had managed to work with his tumour for five years, this failed to recognise that the medical reports referred to the fact that he had deteriorated significantly around the time of the HMRC investigation. It could not seriously be said that someone with this medical diagnosis could be expected to cope with an oral hearing. Moreover, the Bank had agreed to allow the appellant to make written representations in the light of the medical concerns raised by the appellant's solicitors. In view of these factors, it was not open to the ET to reach the decision it did.

66. It is to be noted that none of the medical reports said that the appellant would be unable to cope with an oral hearing. The ET had to decide whether, in the light of all the evidence, including the medical evidence, he was able to do so. It concluded that he was able to do so and that for a number of related reasons. The ET noted that there was insufficient evidence to show that the appellant had not attended these meetings because of his disability, and there were various bits of evidence relied upon by the Bank which taken together did in my view justify the conclusion that the appellant could have attended and participated at each of the disciplinary hearings. These included the fact that he was at the time attending meetings with HMRC; that he was seeking to return to work; that he had worked for five years with the tumour without sick leave; that he that he could engage with the meeting with Mr Woodward; and that he would have attended the appeal if he had been allowed to have Mr Meadows to assist him. As to this last point, the ET found in terms (para.289) that:

> "Although he was a disabled person, his request to have Mr Meadows…accompany him to the disciplinary meetings was not because he was unable to deal with the hearings or could not articulate his case or remember the transactions involved. In our judgment it was not to alleviate the effect of his disability."

67. Mr Devonshire submits that this conclusion cannot be said to have been perverse; I agree. Mr Hochhauser suggested that it must be because the Bank itself, in the light of the OH report, had suggested that a written procedure should be adopted. But this had been in response to the appellant's repeated claims that he could not attend a hearing. The ET did not accept that the Bank was thereby concluding that he could not attend in person and be able to participate even if he wished to do so. Indeed, Mr Staley expected him to attend the appeal hearing, and even Mr Bandeen delayed the meeting for a short time in case the appellant should appear.

68. Even if the appellant were right on this point, the ET in any event concluded that the written procedure was a reasonable procedure to adopt, and indeed was implicitly the choice of the appellant, at least until his meeting with OH shortly before the first disciplinary hearing. The ET noted that in many ways it was more favourable than an

oral hearing because it allowed the appellant to take his time in responding with the benefit of legal advice. The various postponements ensured that he had adequate time to present his case. As to the complaint that the Bank should have adopted an iterative process, raising further queries arising out of the appellant's submissions, the ET observed that Mr Bandeen and Mr Staley "could have adjourned their meetings and requested further information from the Claimant or further investigation by the Respondent, if they considered it necessary" (para.323). That again is a conclusion the ET was entitled to reach. It would be pointless to raise certain queries unless the decision maker considered them necessary to reach a fair decision.

Reviewing the reasonableness of the sanction.

69. There is one residual point relating to the sanction imposed. It focuses on a sentence in the ET's decision when it said that Mr Bandeen "did not accept that [the appellant] had used the staff transfer process to create an audit trail but that the complete opposite was true and that [the appellant] had used the process in an attempt to conceal the details of the beneficiaries from the UVT's bankers" (para.318). Mr Hochhauser submits that this is a seriously inaccurate statement of both what Mr Bandeen and Mr Staley had relied upon as the justification for dismissal. They had deliberately refrained from making any finding about the intentions of the appellant; rather they had focused on the perception of what he had done. Mr Devonshire points out that the argument as presented in the Notice of Appeal was that there was no evidence to justify that conclusion. I agree with him that there was plenty of evidence had the dismissing officers chosen to draw that inference; but they did not. The real gravamen of the complaint, which became apparent in the course of argument, was that this sentence mischaracterises the reason for the decision. It suggests that the reason was deliberate deception, knowingly concealing the details of the beneficiaries from Lloyd's Bank. The significance of the point, submits Mr Hochauser, is that if the ET had been under this misconception about the true reason for dismissal, that error would have fed through to its conclusion that summary dismissal was an appropriate sanction. There can be little doubt that if this characterisation of the reason for dismissal was correct, that would indeed have justified his summary dismissal. It would be a graver finding than the one actually made, and it would mean that the ET had never properly engaged with the question whether summary dismissal was justified for the misconduct actually relied upon by Mr Bandeen and Mr Staley.

70. I agree with Mr Hochhauser that, read in isolation, this sentence does indeed mischaracterise the finding. There no doubt was evidence which could justify that finding, but it is not for the ET to seek to justify the dismissal for reasons not relied upon by the employer himself, even if the additional reason was consistent with the evidence. I very much doubt whether the ET was intending to do that. The ET's function is to review the reasons actually relied upon by the employer. However, whilst I accept that the sentence is not consistent with the actual reasons relied upon, I am wholly satisfied that the error did not carry through into the ET's analysis of the justification for summary dismissal. It is perfectly clear, reading the decision as a whole, that the ET did properly understand the true basis of the decision and they referred to it on a number of occasions: see in particular the elaboration of Mr Bandeen's reasons set out in para.25 above. Moreover, when it analysed the sanction question, in my judgment it did so by reference to the actual reason. It said that notwithstanding the appellant's length of service, it was open to the ET to conclude

that this was "outweighed by the poor judgment and poor conduct exhibited by him and the embarrassment and reputational risk it posed for the Respondent." That analysis properly describes the balancing exercise which the employer had to undertake.

71. For all these reasons, in my view the ET was fully entitled to conclude that, looking at the matter in the round, a fair investigation had been carried out in all the circumstances and that the dismissal was fair overall.

Disability discrimination.

72. There was a set of extremely detailed and over-elaborate submissions made with respect to the disability discrimination claim. Again, I will only focus on the particular submission bearing upon this appeal. To a significant extent the issues overlap with those already discussed in the context of unfair dismissal.

73. There are circumstances, defined in Section 20 of the Equality Act 2010, where an employer is under an obligation to make a reasonable adjustment to cater for difficulties faced by a disabled person. In so far as is relevant to this case, section 20 is as follows:

> "(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

Section 21 provides that the failure to meet this requirement constitutes a breach of the duty of reasonable adjustment. Section 212 says that something is "substantial" if it is "more than minor or trivial".

74. In *RBS v Ashton* [2011] ICR 632 paras. 15-16 Langstaff J considered the scope of this duty once a substantial disadvantage is established. He cited, with approval, the earlier EAT decision of *Environment Agency v Rowan* [2008] ICR 218. He said this:

> "15. The duty, given that disadvantage and the fact that it is substantial are both identified, is to take such steps as are reasonable to prevent the provision, criterion or practice (which will, of course, have been identified for this purpose) having the proscribed effect - that is the effect of creating that disadvantage when compared to those who are not disabled. It is not, therefore, a section which obliges an employer to take reasonable steps to assist a disabled person or to help the disabled person overcome the effects of their disability, except insofar as the terms to which we have referred permit it."
>
> 16. The fact that this requires in particular the identification of the provision, criterion or practice concerned and the precise nature of the disadvantage which it creates by comparison with those who are non-disabled, was set out clearly by this Tribunal

> in _Environment Agency v Rowan_ at paragraph 27. That guidance is worth restating:
>
> '[…] an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with Section 4A duty must identify:
>
> (a) the provision, criterion or practice applied by or on behalf of an employer, or
>
> (b) the physical feature of premises occupied by the employer ...
>
> (c) the identity of non-disabled comparators (where appropriate) and
>
> (d) the nature and extent of the substantial disadvantage suffered by the Claimant.'
>
> Later in the same paragraph the Tribunal continues to say:
>
> 'in our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under Sections 3A(2) and 4A(1) without going through that process.…'
>
> We interpose to say that of course it is not in every case that all four matters need to be identified but certainly what must be identified is (a) and (d)."

75. These cases were approved by the Court of Appeal in *Newham Sixth Form College v Ms Natalie Sanders* [2014] EWCA Civ.734.

76. The appellant's case before the ET was that there was a provision, criterion or practice ("PCP") which simply reflected provisions in the disciplinary procedure, namely that

> "an employee must make every attempt to attend the hearing and not unreasonably delay the process".

The submission was that given the impact of his disability, the appellant could not attend the hearing and be able to participate in the proceeding in the same way as someone not so disadvantaged. There was therefore a duty to make a reasonable adjustment. The appellant suggested two in particular: first and principally, delaying the hearing until after the appellant had undertaken the operation; and second, adopting an iterative written procedure which was constructed so as to replicate as fully as possible an oral hearing. This could have been achieved if the decision makers, both at the original hearing and on appeal, had posed further questions arising out of the appellant's representations and given him an opportunity to comment further. The adoption of a simple written procedure in the manner it was applied did not constitute a reasonable adjustment.

77. The ET did not accept that the appellant had accurately identified the relevant PCP. It said this (para.268):

> "The Respondent was flexible in its arrangements for the disciplinary hearing and was in constant communication with the Claimant and his representative to make suitable arrangements for him to be able to participate in the disciplinary process. The Respondent did not insist that the Claimant come to the first arranged meeting or that the original charges should be kept. Rather, the Respondent showed flexibility and did not apply a set, rigid procedure to the Claimant. There was no PCP applied here."

78. Furthermore, for reasons I have already discussed above, the ET was not satisfied that the appellant would have been unable to attend and participate in a hearing in person even if the PCP was as the appellant had identified it. The ET concluded that he would have been able to do so without substantial disadvantage. As the ET observed, this finding defeats the disability claim because it means that no adjustment was necessary, or at least none which would have had to dispense with an oral procedure. But in any event the ET went on to consider the question of reasonable adjustments. It was satisfied that the written procedure was an appropriate procedure to adopt and would have constituted a reasonable adjustment. In that context it held that the procedure did allow for further questions to be posed if this was necessary but that in the event, they were not. It also specifically found that it was reasonable not to delay the hearing until after the operation. Accordingly, there would be no breach of the duty to make reasonable adjustments even if that duty had arisen.

Discussion.

79. Mr Goodfellow, junior counsel for the appellant, submits that in concluding that no PCP applied, the ET had adopted a faulty analysis which confused the PCP and the measure taken to ameliorate it. In effect the ET concluded that where an employer was flexible enough to modify the application of a PCP in a particular case to cater for a particular disadvantage suffered by a disabled person, that would have the effect of negating the PCP or re-defining it. What is clearly a departure from the usual practice to take account of a disability is treated as modifying it in some way. Even if the modification can properly be seen as an adjustment – as it will typically be – it denies a claimant the opportunity to argue that the adjustment is not reasonable and that more is required. So here, for example, the approach of the ET precluded the appellant from contending that the written procedure adopted in place of an oral hearing was not a reasonable adjustment on the grounds that more could have been done to replicate the discursive nature of an oral hearing.

80. The appellant submitted that had the ET properly approached the question and found that there was a PCP as alleged, the only possible conclusion on the facts was that the appellant was substantially disadvantaged by it. He could not properly participate at the hearing given in particular the medical findings as to his short-term memory loss and loss of concentration. This was more than a minor or trivial disadvantage. It was simply a perverse conclusion to say that no duty to make a reasonable adjustment arose.

81. Mr Goodfellow also repeated the arguments which had failed to find favour with the ET about the two possible adjustments, namely delaying the hearing until after the operation, and adopting an interactive written procedure. He asserted that delay was not an onerous burden and would have ensured that the appellant would suffer no disadvantage at all. The appellant could have been given a proper hearing when he was fit enough to participate; he would then have been in the same position as any able bodied person. But even if that was not required, the adoption of an iterative written procedure whereby questions would be put to the appellant on points arising out of his submissions so that he would have an opportunity to respond to them, should have been the minimum safeguard adopted. Although this possibility was not in any sense precluded by a written procedure, it did not in fact operate in that way. No additional questions were posed by either Mr Bandeen or Mr Staley; they made their decisions solely on the basis of the material before them without seeking further explanation or elaboration.

82. I agree with the appellant that the analysis of the ET in relation to the PCP was wrong, essentially for the reasons he advanced. As the EAT observed (para.50), the ET was in effect "redefining the PCPs by reference to measures designed to ameliorate the problem and thus conflating two issues" and Mr Devonshire sensibly did not seriously seek to argue otherwise. The PCP was as the appellant had defined it, and his argument is that since he could not participate in the hearing, he was necessarily disadvantaged.

83. Mr Goodfellow realistically accepts that if the ET was entitled to find that the appellant could participate in the meetings, that would effectively defeat the disability claims. This is because there would then be no obligation to make any adjustments. Similarly, if the written procedure effectively gave the appellant the same safeguards as would have been available in the oral procedure, that would be a reasonable adjustment.

84. In large part these are essentially the same issues as I have discussed above when dealing with the unfair dismissal submissions on procedural fairness: see paras.63-66. For reasons there developed, I think that the ET was entitled to conclude that the appellant was in fact able to attend and participate without suffering any significant disadvantage when compared with someone who did not share his disability. It was also entitled to conclude that the procedure adopted gave the appellant every opportunity to respond to the case against him. Indeed, the ET said (para. 285) that the procedure put the appellant in a better position that many employees. These findings necessarily defeat the appellant's disability claims.

85. In this context I should deal with Mr Goodfellow's submission that it is self-evident that the appellant would suffer a disadvantage when compared with an able-bodied person. The memory loss and loss of concentration would inevitably have some impact, he says. But the finding of the ET does not deny that this may be so. For example, it may be that some minor modification of the oral hearing would have been necessary had the appellant chosen to attend, such as allowing regular breaks. This was something Ms Gilbert allowed in the OH assessment. The finding of the ET was that the appellant could have participated in an oral hearing; it did not address (because it had not arisen) whether any adjustments of that procedure might have been required and quite possibly they would have been.

86. It follows that the issue of adjustments does not arise. But in any event the ET made findings on this issue which again cannot be said to be perverse. As to the first suggested adjustment, the ET held that it was reasonable for the Bank to want to resolve this issue with reasonable despatch. As it pointed out, the appellant was not able to participate in the tribunal process after his operation until 2015. That was not known to the Bank when it made its decision, but it was obvious that the potential delay following surgery of this nature was very difficult to predict. This is linked to the fact that the ET was satisfied that the alternative written procedure was in any event one which gave the appellant a full opportunity to defend himself. In my judgment this was a conclusion which was manifestly open to the ET.

87. The second adjustment was not, as I have said, precluded by the procedure adopted. But there was no reason for the decision makers to pose further queries unless they thought it was necessary to reach a fair decision. This ground would in my view have carried more force had the appellant been found to have infringed either charity or tax law. But the conclusion was that his admitted conduct, namely entering into transactions which were not difficult in themselves to understand, was a woeful failure of judgment which embarrassed the company and put its reputation at risk. The reality was, as the Bank submitted to the ET, that "no amount of further investigation or reference back to [the appellant] was going to alter that perception". In my view that is a realistic assessment. The only qualification where I believe that the failure to ask further questions did initially disadvantage the appellant related to the allegation that he had improperly abused his position by securing Mr Basu to negotiate on behalf of his nephew. Even there any initial failure was mitigated by the opportunity given to the appellant to respond fully on appeal, even though it was an opportunity he spurned (see para.27 above).

88. For these various reasons, therefore, I would dismiss this ground of appeal relating to the disability claim also. It follows that if my Lady and my Lord agree, the appeal is dismissed.

Lord Justice Males:

89. I agree.

Lady Justice King:

90. I also agree.