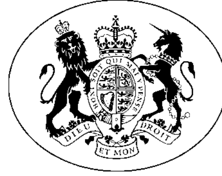
Case Number: 2202797/2019



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Ms D Charalambous		National Bank of Greece

Heard at: London Central Employment Tribunal

On: 16, 17, 18, 19, 22, 23, 24 November 2021 (25 November in chambers)

Before: Employment Judge Adkin
Ms L Moreton
Ms C Brayson

Representations

For the Claimant: in person
For the Respondent: Mr R Cater, Litigation Consultant

JUDGMENT

(1) The following claims are not well founded and are dismissed:

a. Claim of direct race discrimination pursuant to section 13 of the Equality Act 2010;
b. Claim of unfair dismissal brought pursuant to sections 94 & 98 of the Employment Rights Act 1996;
c. Claim of automatic unfair dismissal brought pursuant to section 103A of the Employment Rights Act 1996;
d. Claim of protected disclosure detriment brought pursuant to section 47B of the Employment Rights Act 1996.

REASONS

Procedural matters

1. This hearing was in person, but Mr Hood gave evidence remotely using a video link (CVP).

2. An application to amend the claim dated 8 November 2021 to introduce a post dismissal detriment was refused for reasons that were given orally.

The Claim

3. The Claimant presented her claim on 24 July 2019.

4. An agreed list of issues is attached as an appendix to this claim.

5. The Claimant produced a chronology which was agreed by the Respondent and was helpful to the Tribunal as a starting basis for our findings of fact.

Rule 50 anonymisation order

6. The Tribunal decided on its own initiative to make an order under rule 50(3)(b) of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules") in respect of a colleague of the Claimant, whom we shall refer to as M.

7. We have considered the recent decision of Heather Williams QC in *TYU v ILA Spa Ltd* EA-2019-000983-VP (Formerly UKEAT/0236/20/VP). In that case TYU was not a party nor was she a witness. Nevertheless serious allegations were made against her. The EAT held that the Tribunal in that case had erred in law: (i) in its conclusion that the Appellant's rights protected by Article 8, European Convention on Human Rights ("ECHR") were not engaged; and (ii) in the alternative conclusion that if Article 8 rights were engaged, they did not outweigh countervailing rights protected by Articles 6 and 10 ECHR and common law principles of open justice.

<u>Rule 50</u>

8. Rule 50 of the Employment Tribunal Rules provides:

> 50 Privacy and restrictions on disclosure
>
> (1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.

(2) In considering whether to make an order under this rule, the Tribunal **shall give full weight to the principle of open justice and to the Convention right to freedom of expression**.

(3) Such orders may include—

(a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;

(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;

…

(d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.

ECHR

9. Article 8 of the European Convention on Human Rights, introduced into UK law by the Human Rights Act 1998 states as follows:

> '1. Everyone has the right to respect for his private and family life, his home, and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

10. Article 6, which may be in tension with Article 8, contains:

> '1. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'.

11. Article 10, which may also be in tension with 6 and 8 concerns freedom of expression.

12. We have given full weight to the principle of open justice and considered the guidance of HHJ Auerbach in the Employment Appeal Tribunal in *Christie v*

Paul, Weiss, Rifkind, Wharton & Garrison LLP UKEAT/0036/20. In that case the Employment Judge was found to have wrongly made an anonymisation order in respect of the name of a client who was alleged to have behaved inappropriately in the context of the claim of sexual harassment, and there was insufficient analysis of the client's Article 8 rights.

13. By contrast in this case M is not alleged to have committed an act forming part of an unlawful action against the Claimant. She is the subject of an earlier protected disclosure, but not an actor in any of the decisions about which the Claimant complaints. She was not involved in the dismissal, nor the protected disclosure detriment nor the alleged race discrimination.

14. We have borne in mind that she is not a party, nor a witness and that criticisms have been made of her competence as an employee by the Claimant in circumstances where she was not able to respond. We are not able to resolve those points, but the public at large, including prospective employers might draw negative inferences.

15. We consider that Article 8 the right to a private life encompasses the right to a professional reputation. We bear in mind that she works in a regulated environment and the importance that if allegations are being made against her cheek ought to be able to put her side. In fact M "putting her side" is not relevant to our determinations. There is no criticism of the Respondent for not calling her as a witness. This underlines our view that M's Article 8 rights are engaged and outweigh the Article 6 and Article 10 considerations which would otherwise point in the direction of her being named.

16. Finally, we consider that regarding public interest any reader of these written reasons will be able to understand the evidence and our conclusions based on it without needing to know M's name.

Evidence

17. For the Claimant we heard from:

    17.1. the Claimant herself who produced a witness statement and supplementary witness statement in rebuttal of the Respondent's witness evidence;

    17.2. the Claimant's brother Nico Charalambous;

    17.3. Mr Geoff Saunders, Unite Union Officer (under witness order);

18. Mrs Paraskevi 'Vera' Nazou, Money Laundering Regulation Officer, Compliance Officer & Data Protection Officer gave evidence under a witness order on application for the Claimant. Although parties are not ordinarily allowed to cross-examine their own witnesses, at the indulgence of the Tribunal the Claimant did in effect cross-examine Mrs Nazou for most of the first day of evidence.

19. For the Respondent we heard from:

19.1. Mr Marinos Vathis, Country Manager UK (Signatory of Dismissal Letter);

19.2. Mrs Andrea Herrera, HR & Administrative Manager;

19.3. Mr Michael Hood, formerly Country Risk Manager (since retired);

19.4. Mr George Armelinios, Group HR Director NBG AG, Athens (appeal manager).

Findings of fact

Background

20. The Claimant has had a career in banking, having previously worked for HSBC and the Bank of Cyprus UK.

21. The Claimant commenced employment with the Respondent on 28 May 2014 as a Relationship Manager in the Private Banking department. Her role required her carry out controlled functions, which required certification by the Financial Conduct Authority (the 'FCA').

22. The Respondent is a branch of National Bank of Greece SA headquartered in Athens.

23. The time of her recruitment the Claimant had put forward her salary expectation as £45,000 a year. In fact she was only offered £40,000 a year, but with some indication on the part of the Respondent that there would be an increase in salary following the completion of probation. She says that she only accepted on this basis. It is not necessary for present purposes for us to determine precisely whether this was a legal binding commitment or something less concrete. The Claimant plainly felt a degree of resentment that this appears not to have been honoured and furthermore there was a long period where she and other employees in London did not receive any pay rises at all, even on a inflationary basis, which was attributed to the worsening economic and political situation in Greece. This was raised intermittently throughout subsequently, including a detailed email to Guy Whittaker in Human Resources on 14 November 2016.

24. On 3 June 2014, the Claimant was approved by the FCA and provided a CF30 license. Over the course of working for the Bank, the Respondent annually assessed the Claimant as "fit and proper" to carry out these functions.

25. The Claimant felt that by comparison with her experience with previous employers there was a reluctance on the part of the Respondent to invest in professional training. Indeed she complained in her assessment in May 2015:

> "because there is no bank formal training programme, the training I received was on-the-job which I considered inadequate and did not suit my learning style."

26. On 22 January 2016 the Claimant was appointed Unite Union Representative.

Discriminatory job advertisement

27. In August 2016 the Respondent's Head Office in Greece advertised for a UK Country Manager, which is the most senior position in the London branch, responsible for in the region of 30 members of staff. The advertisement was in Greek and was expressly only for NBG Athens employees.

28. This was picked up by the Claimant, who raised it with Guy Whitaker in HR among others. Mr Whitaker wrote to a colleague in Athens and requested an English version. There was then some correspondence between Mr Hood and Petros Nikakis, HR based in Athens. The latter clarified by an email of 22 August that the circular was solely to employees of NBG SA, Athens. Following this on the same day Mr Whitaker wrote back in reasonably robust terms stating that this would be discrimination in the UK.

29. Following on from these exchanges an advertisement in English was produced.

30. Mr Hood applied for this job, however it went to Mr Marinos Vathis, who was an employee from mainland Greece. Mr Vathis remained the country manager at the times material to this claim and in fact was the signatory of the Claimant's letter of dismissal.

London branch pay dispute – April 2018

31. In April 2018 the Claimant proposed a draft letter for Mr Geoff Saunders, Unite Representative, to write to management in support of a claim for a general pay rise of 10% given that there had not been any salary increases for staff for a number of years, even on an inflationary basis.

32. The two-page letter drafted by the Claimant highlighted that the had been no increase in remuneration packages for at least eight years. She highlighted that by contrast ex-patriate staff (i.e. employees of the Athens office secondment to London) had continued to receive increases in remuneration, including in one case a cost of living increase. She highlighted that this was "incredulous" and discriminatory against London staff.

33. Furthermore the Claimant alleged that there had been a voluntary redundancy scheme for NBG Athens staff but not those in London. She highlighted that the London branch had operated without a local manager.

34. We have received conflicting evidence about whether Mr Saunders forwarded this letter or wrote to the Respondent in precisely these terms. The Claimant, who is supported by Mr Hood on this point, believes that this letter or something very close to was sent to management. Mr Saunders himself believes that he sent some communication but not precisely in these terms. He believes that there were something in the region of 7-8 emails between himself and Mr Vathis at this time. He says he was not able to find this exact letter. It may be that Mr Saunders chose to tone down what was communicated to management. We find that a pay claim was made at about that time, although it was not met.

35. Mr Saunders accepted the explanation that was given by Management about Greek employees being in a different situation, given that they were ex-patriate workers employed by the Athens office.

36. We feel that from the Claimant's perspective the crucial point is that she was raising alleged discriminatory conduct at this time. The evidence clearly supports that she was, and we have no basis to conclude other than this was being raised by her in good faith i.e. she believed in the truth of it.

Authorised signatory request

37. A long-running frustration on the part of the Claimant was that she was not made an authorised signatory, which meant that she needed to find an authorised signatory to sign off for example securities transactions.

38. On 17 October 2017 the Claimant requested by email to be made an 'authorised signatory'. She acknowledged that it had not been necessary up to that point in time, but made the point that her senior colleague Mr Rossolymos was going to be away for medical reasons. For this reason suggested it would be appropriate and would avoid a problem of her going round the office looking for signatories for security trades etc which were supposed to be executed in real time.

39. On 10 April 2018 the Claimant's line manager Mr C Rossolymous, Senior Relationship Manager wrote in a 'Assessment & Development Form' of the Claimant, "exceeded expectations on all fronts" and "must be promoted to signatory to do her duties". Notwithstanding this very positive assessment, this was not implemented.

40. The Claimant explains that she wrote to Mr Stratopoulos, who was in management in Athens, senior to the UK country manager.

41. Mr Vathis was aware that the Claimant wanted to be a signatory. His evidence is that approximately 20 of the 30 or employees in the office were signatories. He told the Tribunal in cross examination initially that the Claimant was not granted signatory status because of her level of knowledge and her conduct. When the Tribunal asked further questions on this point later on in his evidence Mr Vathis referred in generic terms to considerations for this decision including time of service, level of responsibility and practical need, but could not point to any specific reason why the Claimant was not granted signatory status, which we find somewhat surprising and unsatisfactory.

42. The Claimant's colleagues in the Private Banking team, Ms Rossolymos and M both had signatory status. The Claimant points out in her witness statement that M was from mainland Greece and a signatory despite being in a junior role to the Claimant.

43. We have anonymised M's name on the basis that the Claimant has made fairly trenchant criticisms of her and she has not given evidence in these proceedings in response, almost certainly since she was neither a decision-maker nor alleged to be a discriminator.

First protected disclosure (admitted) - October 2017

44. On 24 October 2017 the Claimant reported a suspicious transaction from a client's corporate shipping account to the personal account of the husband of her colleague M in Private Banking. The amount was for 2,000.00 Euro debited from the client's corporate shipping account denominated in USD.

45. She emphasised to the HR manager Mr Whittaker and the Compliance manager Ms Nazou, that the client involved was over 90 years old, in poor health and particularly vulnerable. We find that the Claimant was aware from her professional studies that the FCA published guidance on how banks should deal with vulnerable clients.

46. The Respondent admits that this was a qualifying protected disclosure.

47. The following day, on 25 October 2017 Mr Michael Hood, Country Risk Manager wrote in reference to the circumstances raised by the Claimant:

> "The circumstances outlined above, and in more detail in the attachments, prima facie indicate a potential breach of a number of policies and procedures by the staff involved. In the circumstances we would suggest that Mr Whittaker from HR and Korvesis from Audit undertake a formal investigation into exactly what occurred and what policies and procedures have been breached."

48. Mr Guy Whittaker, Head of HR and administration investigated the matter and ultimately determined that there was not anything dishonest in the transaction, which had been done as a favour to the client to enable the purchase of laptops. He did not advise disciplinary action. Nevertheless was clear that the situation and procedure followed was irregular, which led to a memorandum being circulated to staff on 7 November 2017 in the following terms:

> "The Staff Customer Relationship
>
> It is has recently become evident that some instances are occurring where relationship between a customer and a member of staff may be transgressing that expected and required by the Bank. Accordingly, all staff are reminded that the Bank expects all staff to maintain at all times a professional banker/customer relationship with all customers no matter how long a customer may have banked with NBG. Relationships beyond such boundaries (e.g. on a "friendship" basis) create potential risks to the staff member(s) of staff concerned."

49. The Respondent witnesses, in particular Mr Hood and Mr Vathis who both went on to have a role in the Claimant's dismissal and Ms Nazou in compliance were in the evidence to us that clear that this was a form of "whistleblowing" and that it was appropriate for the Claimant to raise it. They all say that they bore no ill will to the Claimant for raising this matter.

50. The Claimant has highlighted to us that M was not suspended during this investigation period.

51. Following this report the Claimant's difficult relationship with M further deteriorated. This was particularly unfortunate given that they both worked together in a very small team and the Claimant required M's support in her role.

Argument

52. At some point in late 2018 the Claimant had a argument with M in the office, which culminated in the Claimant telling M that she was incompetent and to "go home and make bread". This led to M complaining about the Claimant in three emails, which we have not been taken to in evidence.

Email 12 December 2018

53. On 12 December 2018 the Claimant's submitted an email which she described in her witness statement as a grievance, but might be better characterised as putting her version of events regarding M, as she had been requested to do so by Mr Vathis, Country Manager. This document was 6 ½ pages of close type and contained a series of complaints against M. It begins:

> "I believe the reason you have received the complaints from M last week are due to my build up of frustration and exasperation with her level of incompetence over the incident with the trade orders for [client name] as well as other incidents where I am not shown respect as a manager"

54. The Tribunal should make absolutely clear that we have not heard evidence from M, nor have we in these written reasons made any determination about the truth of the Claimant's complaints about her. We have not seen M's version of the incident nor about working with the Claimant. It seems clear that the Claimant behaved unprofessionally toward M on this occasion, although she believes that she had been provoked.

55. The Claimant reiterated the circumstances of her disclosure in October 2017 and reasons why in her view the conduct of M amounted to gross misconduct, by implication a criticism of the lack of disciplinary action against her. She went on to say that M continued to behave in an inappropriate way. She gives an example of her mentioning to a client that her mother is having an operation. The Claimant describes this behaviour as "brazen" and a breach of professional boundaries and unacceptable behaviour.

56. Furthermore she expressed the view that M's ability to carry out the role of a private banking officer is questionable, given a lack of previous banking experience and, in view of the Claimant a level of written English which was not adequate for a professional environment.

57. She suggested that M had become involved in IT projects where she had no experience or understanding. She complains about an IT system IMS+ which have been implemented in 2005 but was in her view "fundamentally flawed" because the interfaces between the Respondent's core IT system did not work

properly resulting in staff having to manually input entries to correct client's statements. She complained that M was inadequately representing the problems with this system in her involvement with IT projects. She highlighted this is an operational risk in particular that staff could create a false documentation showing a portfolio with a large amount of money in it and use this as a way of seeking a loan or account with another bank. She complained that the upgrade being worked on for IMS+ was behind schedule since MiFID II, a regulatory regime to prescribe bank communication to clients about fees had come into effect on 3 January 2018, 11 months earlier.

58. She complained that clients have been wrongly categorised as "professional" as opposed to "retail", which she asserted was a breach of FCA requirements. She explained that this had led to a big argument "with shouting" in the Private Banking Department involving herself, C Rossolymos and M. She complained that M tried to defend her side of this argument with a FCA Handbook which was 7 years out of date.

59. She went on to complain about the fee tariff being charged to clients. In her view it is illogical to have a flat fee structure for the non-investment grade bonds, and she highlights that the fees are higher than the head office in Athens.

60. The conclusion of this grievance was that the Claimant's relationship with M had broken down irreversibly, that M did not respect her and "I have lost trust and confidence in her ability to do the Relationship Officer Role".

61. The Claimant went on to recommend that M should be moved to the payments department in a role where she had no client contact. She went further and recommended that M's salary should be downgraded as a result.

62. The Claimant recommended that another colleague from a different department came back to work with the Claimant in private banking. She explained that she considered this colleague to be professional and understand the importance of client staff boundaries.

63. The Claimant complains that the Respondent was slow to deal with the content of her email. The next development was the "pre-disciplionary" on 14 January 2019. We consider that the Claimant had placed the Respondent in a difficult situation. In trying to justify her own behaviour, which she accepted have been unprofessional, she was seeking to persuade her seniors that a junior colleague be either dismissed, moved department and her pay reduced. M did not report to the Claimant and had been in the employ of the Respondent for longer than the Claimant.

<u>Workload & stress</u>

64. On 19 December 2018 wrote to her managers and continue to raise concerns about matters arising from the implementation of MiFID II in 3 January 2018. She concludes this email:

"I am online own in the office again today as [colleague] is at the hospital [redacted] has called in "sick" yesterday and is still absent today. I am under a lot of stress as I have refused to complete for Compliance which I have promised to complete before the end of 2018. I also deal with swift payments for clients, and as I do not have a signature I have to leave PB [private banking] unmanned to go to colleagues that are authorised signatories to request signatures from them. Additionally I have to deal with clientele queries and the term deposit renewals and other PB Relationship Manager matters."

65. Mr Vathis in his oral evidence to the Tribunal dismissed out of hand that the Claimant was overworked, although he acknowledged that different people feel stress in different situations. Mr Hood was similarly sceptical about the amount of work that the Claimant had to work. In the main this is because there was a low level of financial transactions being carried out by the PB department at this time, as evidenced that at around this time colleagues were being made redundant and not immediately replaced due to low trading volumes.

66. Notwithstanding this background of low transaction activity, we find that the Claimant was in a very small team from which there were staff absences and being put under pressure and was feeling stressed at this time. Not being a signatory was an irritant and a waste of time given that it required her to find signatories to get things signed off. Conflict in the team was also causing her stress, and the argument leading to the "go home and make bread" comment had not been fully resolved by management.

<u>Second protected disclosure (disputed) – January 2019</u>

67. On 3 January 2019 the Claimant wrote an email in which she reiterated the concerns raised about the IMS+ system made in her grievance the previous month. She expressly set out that she was concerned that the Respondent was in contravention of FCA Handbook rules regarding account opening, client account maintenance and corrections due to interface failures between the Respondent main system and the IMS+ system. This was a reiteration of matters raised on 12 December 2018, albeit that the earlier document was a complaint about M rather than a freestanding concern about systems problems.

68. The Claimant specifically referenced the FCA Handbook SYSC 3.2.1-3.2.6 (Systems and Controls) and 13.2.1 (Establishment of Systems Controls, in relation to the management of "operational risk"). While these points were not set out in the document, of soft clear and particular relevance is the following

"Systems and controls in relation to compliance, financial crime and money laundering

3.2.6 A firm must take reasonable care to establish and maintain effective systems and controls for compliance with applicable requirements and standards under the regulatory system and for countering the risk that the firm might be used to further financial crime.

69. The Claimant reiterated her concern about the possibility of staff members creating a "fake statement" to evidence assets that in fact the individual did not hold

Mr Vathis' actions following the disclosure

70. Mr Vathis following on from the Claimant's disclosure of 3 January 2019 wrote to his management team less than an hour later requesting some immediate answers to a series of structured questions posed by him arising from the matters that she raised. The email begins:

> It is questionable why Ms Charalambous raises these issues now - knowing that are leaving the Bank, although she has been in her position for the past 4 years unless she did and I am not aware of it.
>
> Despite my questioning, her remarks point towards significant operational and regulatory risks for which again I was not aware. I need the following answers:

71. The Claimant suggests that the phrase "it is questionable" is particularly significant as is the fact she has not been copied in.

72. We do not find the fact that the Claimant was not copied in as particularly sinister or surprising. She had raised various matters. Mr Vathis was asking various subject experts amongst his management team to look at the answers. He was not expecting her personally to resolve the problems.

73. As to the "it is questionable", we consider that this was an allusion to the unresolved complaints against the Claimant, in a context in which the Claimant had been an employee and working in the private banking team since 2014.

Geoff Saunders call 3.1.21

74. On the 3 January at 20:43 Mr Saunders of Unite union spoke to the Claimant on the phone advising her that her colleague M had raised complaints against her over the argument. The Claimant told him that her colleague was exaggerating the situation and that she has carried on with her work avoiding conflict. She told him that she was set up and provoked, as management wanted to get rid of her.

Responses to Mr Vathis re: 3.1.19 email

75. On 4 January 2019 Mr Hood the Risk manager responded to Mr Vathis re: claimants whistleblowing about IMS+ system:

> "The two key points that I was not aware of are:
>
> 1. The lack of dual control over IMS in comparison to the way (apparently) in which the system is set up in Athens. If there is such a discrepancy, it would seem very hard to justify.

> 2. Inputting of prices by Front Office staff
>
> If these claims are correct, I would suggest that they are addressed as soon as possible.
>
> It is noteworthy (and concerning) that the Operational Risk Self Assessments conducted by Private Banking staff over the last several years have never highlighted such risks.
>
> I do not concur with the point that simple statements would be accepted by any bank to provide loans, or indeed even open an account without further verification

76. In short, Mr Hood accepted that there were points that were worth looking at, but did not accept the level of risk of fraud that was being suggested by the Claimant.

77. On 9 January 2019 Mr Melachrinos Melachrinos the IT manager responded with some more technical material to Mr Vathis the detail of which is not relevant for present purposes. Nevertheless he expressed the view that the issue of segregation of duties raised by the Claimant should have been raised in the annual operational risk assessment by relationship managers in private banking. By implication he is suggesting that the Claimant among others ought to have raised this as part of that annual process.

78. What neither Mr Melachrinos nor Mr Hood did was to suggest that there was no substance in what the Claimant was alleging.

<u>14 January 2019 – pre-disciplinary re: M</u>

79. The Claimant attended a meeting described as a “pre-disciplinary” meeting to discuss M’s complaints about her.

80. The Claimant says that during the course of this meeting Mr Vathis asked her “why did you whistleblow about the systems. Why now?”. She points to a typed note.

81. We have received four different versions of the notes of this meeting. Each party has produced a handwritten version and a typed up version.

82. Mrs A Herrera was the Respondent’s designated note taker. We have had the benefit of her handwritten notes (1144-1150), which were supplied during the course of the Tribunal hearing and the typed up version (375.1-375.3). While the typed notes are not word for word the same, they broadly reflect the handwritten notes.

83. The Claimant’s typed notes, which were produced after she received the Respondent’s typed notes on 26 March 2019, appear to be her amendment of the Respondent’s typed version. This notes were sent by her to the Respondent on 28 March 2019, which is 2 ½ months after the meeting. Her handwritten notes were written after the meeting took place, and are not a

verbatim note but rather capture some key points that she recollected later that day. This was written on the back of another document [1107].

84. We find on balance of probabilities that that the Respondent's notes better reflect what was said in the meeting for three reasons. First they are based on the notes of a dedicated note taker, whereas the Claimant was speaking. Second, the Claimant's handwritten version was written later that day. Third during the Tribunal hearing Claimant to struggled at times to distinguish between the actual content of documents and her interpretation or an inference that she drew from them. On more than one occasion she strongly asserted that a document contained something that it simply did not. What she asserted was her interpretation, not the actual content of the document. We do not believe that this was deliberate or consciously done nor that she was deliberately trying to mislead us. We take account of the fact that Tribunal proceedings are stressful and unlike day-to-day life. Nevertheless we detected a tendency to blur the distinction between the actual content of things said or written and the Claimant's own consequent thoughts.

85. We find that Mr Vathis said:

> "This discussion is not on your professional capabilities we focus on your behavior – don't understand why you have spoken to people about discrimination? If your frustrated with the systems, why not [raise it] before"

86. In other words we find that Mr Vathis did made a reference to the content of the Claimant's email of 3 January 2019 which related to systems. What he did not do is describe actually it as whistleblowing in this discussion. It was the Claimant who described this as whistleblowing in her note, because this is how she thought about it. The Claimant almost certainly had a greater appreciation of UK employment law concepts than did Mr Vathis at that time.

<u>First data breach - 23 January 2019</u>

87. On 23 January 2019 at 22.02pm the Claimant emailed to Mr Vathis and copied in Ms Nazou, his line manager M. Stratopoulos as well as D. Manailoglou (Head of PB), M. Hood (Risk manager) and Mr Saunders of Unite with an email in which she raised that two of her colleagues were taking voluntary redundancy. She blind copied her lawyer Mr Johnson and M. She queried and made an assumption that she would be taking over the entire portfolio of Private Banking clients and would assume the position of Senior Relationship Manager with the commensurate salary increase.

88. To this email the Claimant attached a breakdown of all private clients as at 31 December 2018, including commissions, turnover, total assets, year end comparisons, foreign exchange commissions and total assets by currency.

89. The message was classified as "2.Confidential".

90. Mr Cater for the Respondent in the Tribunal hearing explored with the Claimant cross examination whether her union representative Mr Saunders had highlighted to her that she had sent confidential information before she sent the subsequent emails which amounted to a further breach. Ultimately we were not satisfied that there was evidence that the Claimant had continued to send the confidential file knowingly after a conversation with her union representative.

Further data breach – 24 January 2019

91. On 24 January 2019 at 12:18 the Claimant forwarded the email with the attachment to her own external personal Hotmail account and copied in her brother Nicos at his personal Internet based email account. Her brother worked for Lloyds, a different bank.

92. At 13:17 the Claimant forwarded the email sent the previous day to Ms Andrea Herrera, HR and copied in Mr Saunders. Again the confidential information was attached. She sent a simple message saying "Apologies I forgot to copy you in last night. Please let know if any update".

93. In order to forward an email containing an attachment the Claimant would need to have clicked a box given that she was forwarding with an attachment. She accepted in the Tribunal that she must have done this.

Suspension

94. At approximately 2pm on 24 January Ms Herrera came to the Claimant's desk and asked her to go to Mr Vathis' office.

95. Mr Vathis asked her if she realised she'd sent the confidential information to Mr Saunders. The Claimant says that it was only at this moment that she realised that she had made a mistake. She said to Mr Vathis:

> "Oh my God, I didn't realise. Don't worry Geoff will not read the email and he will delete it. Will tell him it's an accident. I was tired and hadn't slept all week."

96. Mr Vathis told the Claimant that he had read the email from last night and have been panicking about it. He told her that he would have to tell clients and the FCA.

97. The Claimant was then suspended until the investigation took place.

98. The suspension was confirmed by a letter dated 25 January 2019, which confirmed that she was suspended on contractual pay.

99. In this short the Claimant was not asked who she had sent confidential information, not did she declare it.

Notification to the FCA

100. On 25 January 2019 Mr Vathis' notified the FCA of a 'data breach' in the following terms:

> "Subject: Suspension of certified staff of National Bank of Greece S.A. following unauthorised disclosure of customers' personal data
>
> We have suspended Ms. Despina Charalambous, certified staff of London branch, on the basis of misconduct, after we became aware that she copied an e-mail containing as attachment, a list with personal data of certain Private Banking customers to an Officer of the UK Trade Union of London Branch, Unite the Union. An internal investigation has commenced and we shall keep you posted of the outcome, as well as of any disciplinary penalties which may be imposed.
>
> Our actions:
>
> The e-mail containing the attachment with the customers' data was sent on 23/01 at 22.02 UK time.
>
> We became aware that the e-mail with the attachment was copied to an external recipient on 24/01 upon the start of the working hours. We informed the internal audit, Group Compliance at Head Office and the external firm in UK to which we have outsourced the Human Resources function of London Branch (to the latter we omitted the attachment with the customers' data).
>
> We suspended the employee in the morning of 24/01 and we disabled her user account simultaneously, in Order to contain the data breach and to prevent it from recurring, in accordance with our internal Data Protection policy.
>
> We contacted both orally and in writing the one and only external recipient alerting him to the breach and asking him to destroy the attachment. Since then he has submitted a written letter confirming that he has deleted the attachment and has not stored it.
>
> We have assessed the potential adverse consequences for our customers, based on how serious or substantial these are, and how likely they are to happen based on the Article 29 Working Party (WP29) guidelines on personal data breach notification. We concluded that the resulting risk of affecting our customers' individual freedoms and human rights is not severe. This is because only one external individual, an officer of the trade union, received the attachment. He was duly informed by the Bank of the seriousness of the breach and committed that he had deleted the data. It is not likely that this person may have used the data in order to perpetrate identity theft or fraud against our customers. It

> is not likely that this individual may have further leaked the list. Therefore we do not consider that our customers run the risk of suffering social or economic losses or disadvantages.
>
> Based on our preliminary assessment, we have not yet reported the breach to the Information Commissioner's Office (ICO).
>
> Given that the breach is not likely to result in any risk to our customers' rights and freedoms, we do not consider necessary to inform these individuals of the breach.

101. Mr Vathis accepts that this report to the FCA out of was inaccurate as to the timing of the suspension, which in fact took place in the afternoon. Otherwise he stands behind the content of this report as being accurate as far as the information that he knew at that time. At that time he did not know the full extent of the data breach.

102. The FCA responded on 29 January 2019 by email in fairly bland terms, not suggesting any action other than requesting that the Respondent keep them informed.

Investigation meeting - 28 January 2019

103. On 28 January 2019 the Claimant attended a meeting with Mr Vathis with Mrs Herrera in attendance as a notetaker. He told her that it was not a disciplinary meeting but that he wanted to understand a few things.

104. The Claimant said that she was happy to be transparent. Notwithstanding this opening comment, she was not candid in this meeting, failing to disclose all of the people to whom she had disclosed the confidential information. Instead she lectured Mr Vathis about how she could do his job.

105. The notes of the meeting contain the following:

> M.V. 1st question - Did you send this email and attachment to anyone else other than Mr J. Saunders (UNION)
>
> D C. - It was late, I was tired. Lawyer said it's ok to send this to the union
>
> M.V. - This is wrong, personal data, let me ask you, if you are adamant about how good you are then why
>
> D.C. - With my experience I could your job as well and Michaels job and Vera job, this is the truth but we are going to be face to face, we are here it has come to this I might as well be honest I could do that job for the Country Manager why wasn't it advertised back then 2 yrs ago it was only for Greeks, the Greek speakers I could do your job just because you're a man I'm a woman I could do that job, right down everything I will remember the questions, it not to you it's not your fault, coming to London it's a a lovely city a lovely apartment paid for by NBG, going to Athens frequently, I love that also, I would do the same, why didn't they give us the

> option to do so, Mr Hood is also capable someone could help with the translation, I speak Greek , I am looking good I I could do the Country Manager Job I don't see why I couldn't do the CM Job lots of things that need to come into the open, I am sorry I veered off track carry on

106. Mr Vathis requested that the Claimant provided in writing why email sent twice to the same person and whether she had not sent it anyone else outside the Bank. He asked also for her reasons for doing it.

107. The Claimant told the Tribunal that she didn't mention sending the email to her lawyer because she didn't want Mr Vathis to think badly of her as a result of taking legal advice. This explanation cannot be right given that she freely admitted taking legal advice during this meeting, even going so far as to give the hourly rate of her solicitor.

108. In her oral evidence the Claimant suggested that she had forgotten because of stress who she had forwarded the email to, and she didn't have access to it since her email had been suspended. We found this somewhat implausible. The Claimant in any event had access to her own personal email account to which she had forwarded the message to, copying her brother on 24 January 2019 at 12:18.

109. The Claimant was more candid when she admitted to the Tribunal that she did not want Mr Vathis to find out about who else she had sent the email to, and she was concerned how this would look to him and also to the Tribunal in due course. We accept this.

110. The Claimant during the remainder of that meeting continued to discuss the matter with Mr Vathis on the basis that Mr Saunders was the only external person who had received the confidential data. This was less then full candour.

111. She tried to lobby Mr Vathis about a promotion and her salary and explained that she was frustrated at work "it's like putting a brainy child with stupid children". This seems to be consistent with other evidence we have received about Claimant's low opinion about some of her colleagues.

<u>Claimant's account in writing – 31 January 2019</u>

112. On 31 January 2019, further to Mr Vathis' request the Claimant provided answers in writing. As to the reasons for sending the spreadsheet with confidential information she said it was not done with malicious intent to cause harm to the bank or its clients. It was done by accident and was an innocent mistake. She explained that she had been busy on 23 January 2019 with several calls from clients and that she felt under pressure. She reiterated that she should be promoted to Senior Relationship Manager and set out her professional qualifications.

113. What the Claimant did not do is use this opportunity to be candid about who else she had sent the document to, despite the fact that this is what Mr Vathis had specifically asked her to do.

Formal disciplinary hearing – 12 February 2019

114. By a letter 6 February 2019 the Respondents invited the Claimant to a disciplinary hearing. The matters of concern set out in this letter were:

> Taking part in activities which cause the Bank to lose faith in your integrity namely, unauthorised disclosure of confidential client information to a third party on 23.01.19 by e-mail which was a representative from the UNITE Union. You divulged sensitive and confidential information in the form of a spreadsheet containing clients names, their fixed deposit and call account balances and other details of their Bank accounts.
>
> If these allegations are substantiated, we will regard them as gross misconduct. If you are unable to provide a satisfactory explanation, your employment may be terminated without notice

115. To this document note from the investigator meeting were attached, as were GDPR and the FCA code of conduct.

116. The Claimant attended what was described as a disciplinary meeting on 12 February 2019, held by Mr Hood and Mrs Herrera. The Claimant was accompanied by Mr Saunders. Notwithstanding that this meeting was described as a disciplinary, it was really more of the nature of a further investigation meeting.

117. The Claimant confirmed this meeting that she believed that the proper disciplinary process followed, although she said that there were inconsistencies in the note of the earlier meeting. It was confirmed that Mr Saunders had deleted the confidential email.

118. The Claimant agreed with Mr Hood that disclosure of confidential information to third parties without prior authority or consent was gross misconduct. The Claimant put forward mitigation in response to the suggestion that is difficult to see this as being an accident because the email was sent twice. She said that she was tired and was hungry. The Claimant said that she feels that she had been "targeted since she said all these things" which we assume is a reference to the matters raised in December and January relating to the IMS system.

119. The Claimant described the referral to the FCA as "malicious".

120. The Claimant still did not in this meeting admit that she has sent the confidential Excel file to her lawyer or her brother or herself.

121. The Claimant says that during this meeting she said words to the effect of:

> "why does the Bank not look at my 'sent items' in email to confirm as I don't have access to my emails as I am suspended from work".

122. We find that this was not said in this meeting for reasons given below at the conclusion of our findings of fact.

123. Following on from this meeting, on 19 February 2019 the Claimant's submitted a Sick Note citing 'Work related stress' for the period until 17 March 2019.

Reconvened formal disciplinary hearing – 26 February 2019

124. In a letter dated 22 February 2019 the Claimant was invited to a reconvened disciplinary hearing. In that letter she was notified that further evidence had come to light, namely that the email sent by her on 23 January 2019 had also been blind copied to Tim Johnson her lawyer and that she had sent an email on 24 January 2019 to herself as a personal email address and her brother Nicos.

125. The Claimant attended the reconvened meeting on 26 February 2019. The Tribunal has had the benefit of a transcript prepared based on an audio recording. This is not disputed.

126. At this meeting Mr Hood explained that the Respondent had checked the Claimant's emails and found that it had been blind copied to Mr Johnson. He asked the Claimant who Mr Johnson was. She confirmed it was her lawyer. She said that the sending of emails was unintentional and that she couldn't recall all of these different emails. The Claimant said that she enquired in the previous meeting 12 February as to whether her sent items had been checked.

127. During this meeting the Claimant confirmed that she had spoken to the Information Commissioner's Office (ICO). A case worker at the ICO had told the Claimant that it sounded like an accident. She confirmed that her lawyer would not do anything with the document.

128. The Claimant confirmed that her brother worked for Lloyds Banking Group.

129. Later in this meeting the Claimant urged Mr Hood to listen to the transcript of the 12 February 2019 meeting on the basis that she was pretty sure that she said checked my sent items. Mr Saunders confirmed that he remembered something like that, although later on he said he couldn't remember whether said in this room (i.e. the hearing room) or before we came into the room. That is consistent with his evidence to this Tribunal that he was not sure about whether it was said in the room or before they came into the room, i.e. in a preparatory private conversation.

130. Notwithstanding that she was facing disciplinary proceedings and a gross misconduct charge, the Claimant reiterated that she wanted to come back as an SRM (i.e. a to receive a promotion to a Senior Relationship Manager).

Mr Korvesis's email 27 February 2019

131. On 27 February 2019 an NBG Bank audit manager Mr Antonios Korvesis, Internal Audit Manager wrote to other members of staff in Greek about the Claimant's case. This was translated into English by the Claimant [1027]. The translation was not disputed by the Respondent.

132. He wrote :

> "I was informed that Ms Charalambous admitted to forwarding the email with the excel attachment of PB clients by bcc to her solicitor and also to her personal email copying in her brother. She said this was a mistake caused by stress… She repeated that she wants to return to her job and to be considered for promotion.
>
> Surprisingly in one of her previous meetings she had with the management of London branch, she asked the bank to investigate/check, the possibility that she may have sent the email to other recipients!!!.... I am waiting for the minutes of the meeting."

133. The Claimant put this forward as conclusive evidence that she had mentioned checking the sent items in the meeting on 12 February 2019.

134. The Tribunal finds the most likely explanation for the content of this email is that the Claimant had suggested in the meeting on the previous day that at the meeting on 12 February she had suggested that the sent items be checked. This does not help us to resolve the dispute about what actually was said on 12 February.

Handover to Mr Vathis

135. As has been observed above the role of Mr Hood was essentially to carry out a further investigation rather than was described as a disciplinary. Nevertheless the Claimant was able to put forward mitigating circumstances.

136. Mr Vathis and Mr Hood have described the "handover" as being that Mr Hood simply passed over the notes of these meetings for Mr Vathis Baathist to take the decision in isolation with no discussion.

137. The Tribunal finds it difficult to imagine that there was no discussion whatever. In particular we note that the later notification to the FCA on 21 May 2019 describes a "Disciplinary Committee" Proposal for Dismissal. Mr Vathis confirmed to the Tribunal in his oral evidence that this committee comprised Mr hood and Mrs Herrera. Mr Vathis also told us that he had seen the content of a memo prepared by Mr Korvesis (353), although this is dated 15 March 2019, i.e. it postdates the letter of dismissal.

138. Mr Vathis confirmed he discussed with Mr Hood, Ms Nazou and internal audit before the decision to dismiss was made.

139. We find however, based on his oral evidence to us, which was clear on this point that it was Mr Vathis's decision. He was entitled to take advice from his management team in the making of this decision, which he did.

Decision to dismiss – 4 March 2019

140. By a letter dated 4 March 2019 Mr Vathis the Country Manager summarily dismissed the Claimant, citing a destruction of trust and confidence, and that disclosure of confidential information to 3rd parties without prior authority or consent constituted gross misconduct.

141. In this letter the Respondent found the “charge” set out in the letter of 6 February 2019 substantiated. The Respondent found that the Claimant’s explanation that disclosures were made by mistake was “unsatisfactory in view of the fact that the disclosures were made on three separate occasions to 3 separate third parties with the covering email specifically referring to the attached spreadsheet”.

Appeal against dismissal

142. By a letter of 7 March 2019 the Claimant emailed to Respondent a letter ‘Appeal letter against dismissal’, which contained three grounds of appeal:

142.1. First that her actions have been used as pretext by the Bank to force her exit from the Bank in circumstances where she had previously been informed [by then departing colleague Mr Rossolymos] that the Bank was taking active steps to remove her.

142.2. Second, the Bank has acted with undue severity in treating her actions as reasons for dismissal. They were innocent mistakes caused by stress which was, in turn, caused by the actions of the Bank. As such they did not amount to gross misconduct.

142.3. Third, the actions of the Bank which ted to her being under such stress and ultimately being dismissed were due to being a whistleblower and not being from Mainland Greece.

Email from Mr Vathis to Mr Armelinios

143. On 8 March 2019 Mr Vathis sent an email to Mr George Armelinios the appointed Appeal manager in the following terms:

> “I understand you have or you will receive a letter of appeal from Ms Despina Charalambous whom we have dismissed on the ground of gross misconduct.
>
> Ms Charalambous has leaked very sensitive personal data PB clients' information. I believe it was not intentional nevertheless the information went to three different recipients, namely to a Union Officer, a solicitor and her brother who happens to work for Lloyds Bank.
>
> We have informed the regulators and of course Group Compliance and International Divisions are aware of the matter.
>
> Please note that I am at your disposal should you need further clarification”

Memo

144. On 15 March 2019 Group Internal Auditor, Mr A. Korvesis prepared a memo summarising the circumstances of the case. This was principally for the benefit of any regulator.

145. The Claimant does not dispute the content of the this memo, but highlights that Mr Vathis claims to have read it before the decision to dismiss, when in fact it postdates it by some 11 days. This is an oddity. We have come to the conclusion that Mr Vathis must have seen an earlier draft of this document before his decision to dismiss.

146. On 18 March 2019 the Claimant's continued to be signed off by a Sick Note citing 'Work related stress'.

<u>Appeal – further grounds & information</u>

147. On 20 March 2019 the Claimant's sent an email to Appeal manager G. Armelinios (HR Director) with a 9 page letter in which she expanded on her grounds of appeal. There were 10 attachments, specifically:

147.1. Timeline of events since joining NBG Bank

147.2. Email dated 12th Dec 2018 to M. Vathis

147.3. Email dated 3rd Jan 2019 to M. Melachrinos

147.4. Backcheck copy in my staff file- Shows 1 existing disciplinary record in my name with FCA

147.5. Emails from ex HR Manager G. Whittaker to NBG Athens HR re: Country manager vacancy- 26/08/2016, 19/08/2016, 22/08/2016.

147.6. Email to Compliance -24th Oct 2017

147.7. File Note in my staff file made by ex HR Manager G. Whittaker - 01/07/2016

147.8. Email from ICO case officer dated 08/02/2019

147.9. Article 29 Data Protection Working Party - 'Guidelines on data breach notification under Regulation 2016/679 - These guidelines are approved by the European Data Protection Board (EDPB)

147.10. ICO Guidance on 'personal data breaches

148. The Claimant elaborated particular points:

148.1. That it was unfair that the person who conducted the disciplinary hearings, Mr Hood, was not a decision-maker.

148.2. that the Claimant's actions have been used as a pretext to for her exit from the bank, against a background where she says she had been previously warned that the bank was taking active steps to remove her.

148.3. That the sanction of dismissal was unduly severe in the context of what the Claimant says were innocent mistakes caused by stress which

she says were caused by the actions of the Respondent. She said this was not gross misconduct.

148.4. The actions of the Respondent which led to her being under stress and ultimately dismissed were due to her being a whistleblower and not being from mainland Greece.

148.5. Mitigating factors not considered at the disciplinary stage, which includes a long list of 15 matters, including that M had received no disciplinary sanction for the £2,000 “gift” from a client.

Appeal hearing

149. The appeal hearing took place on 21 March 2021. The hearing was held by Mr Armelinios, Group HR Director who flew over from Athens for the day. Ms Herrera took notes. Mr Saunders (Unite) accompanied the Claimant

150. It seems, based on the notes of this meeting (366 – 374) that the Claimant spoke quite a lot and Mr Armelinios asked little more than a few questions.

151. Mr Armelinios spoke to Mr Vathis before the meeting as a courtesy the latter was the country manager. He spoke to him briefly afterward before heading to the airport. We accept his evidence that he told Mr Vathis to deal with the various matters that the Claimant had raised that he considered that outside of his remit.

Appeal outcome

152. Mr Armelinios focused narrowly on the decision to dismiss. He felt that the sanction was reasonable for the offence in this case. He reiterated in his oral evidence that whatever circumstances the Claimant put forward these were no more than “excuses” and were simply not excuses enough for the seriousness of the breach of confidential data. He told the tribunal, we accept genuinely. that he considered confidentiality and the trust of clients as the cornerstone of a banking operation.

153. Mr Armelinios considered that the circumstances that the Claimant described and her allegations about whistleblowing and her race and being overworked were in reality matters for the London office to deal with falling outside of his remit.

154. In 15 April 2019 Mr Armelinios dismiss the appeal in a short letter, stating that the circumstances relied upon by the Claimant “do not explain or justify her actions to release confidential customer information to the Union, your solicitor but also to an employee of another financial institution”.

Other matters outcome letter

155. By a letter dated 17 April 2019 Mr Vathis and Mrs Herrerra dealt in a summary two-page letter with the other allegations raised by the Claimant of whistleblowing, detrimental treatment for being Greek Cypriot and workload as reasons for the circumstances of the dismissal.

156. In that letter the Claimant's allegation that the was a plan to remove her was rejected. The allegations of discrimination based on whistleblowing or race were rejected. That the bank took the confidentiality of customer information extremely seriously was reiterated. As to workload, the amount of work within the Branch was said to have reduced significantly which had led to a voluntary redundancy scheme in which to members of the PB team left. It said

> "indeed, for the last several weeks one person alone has been sufficient to cope with the workload. We cannot therefore conclude that your position, which also had the support of another member of staff within Private Banking, had an unacceptable workload."

Notification FCA

157. On 21 May 2019 the Respondent notified the FCA of dismissal for gross misconduct .

Whether Claimant told Respondent to check sent items in 12.2.19 meeting

158. This point was strongly disputed between the parties.

159. The Respondent made an audio recording of this meeting and that the typed notes which appear in the tribunal bundle at pages 329 – 337 represent a full transcript of that audio recording. The Claimant contends that she absolutely did make this comment about looking at sent items and believes that the original recording, which was made on the mobile phone of Mrs Herrera has been "doctored" to remove these words.

160. In support of her contention, the Claimant relies upon the report of an expert audiologist Mr James Zjalic dated 24 July 2020, with an amendment on 5 August 2020 and a supplementary report dated 30 December 2020.

161. These reports are written in rather technical terms and appear to have been written by the expert with regard to the kinds of matters that are relevant in a criminal context e.g. "chain of custody". That is of less significance in this case, where the Tribunal simply needs to make decisions on a balance of probabilities. The conclusions of the expert are somewhat opaque, but points to the audio file that he examined not being the same as the original. He does not state in clear terms that in his opinion that some element of the recording has been cut out, omitted or deleted.

162. We accepted the evidence of Mr Vathis and Mrs Herrera that they did not modifiy the recording to remove these words. Significantly Mr Saunders has given equivocal evidence on this point. In the reconvened disciplinary meeting on 26 February 2019 when the Claimant said (page 346) "listen to the audio again, the transcript of 12 February because I am pretty sure, because I was so unsure who I sent what I said can you please check my sent items because after I have been suspended I have no access". Mr Saunders initially said "yes I remember something like that", but a bit later on in the conversation qualifies that with the comment "to be absolutely honest, I couldn't remember if it was said in this room or before we came into this room". Mr Saunders' evidence to

the Tribunal was consistent with this lack of certainty – from his recollection it was possible that these comments were said outside of the meeting room rather than inside.

163. As to the letter of Mr Korvesis sent on 27 February, we consider that this does no more than establish that the Claimant had suggested on 26 February that at the meeting of 12th February she had invited the Respondent to check her sent items. This is consistent with the notes of the meeting on 26 February 2019.

164. We have reminded ourself that cogent evidence would be required to substantiate what is in effect a forgery. This does not amount to a modification of the balance of probabilities test which is the standard to which the Claimant needs to prove her contention that there has been a doctoring of the audio and deliberate omission of a comment about checking the sent items. We do find that the Claimant's suggestion that a senior manager and HR employee "doctored" an audio recording somewhat implausible. Neither of them had anything particularly to gain from this. The Claimant by her own admission was guilty of a gross misconduct offence without the additional aspect of her failure to be entirely candid about the extent of the breach.

165. Ultimately we do not find that these reports show on the balance of probabilities, that the words said by the Claimant were deliberately removed from this recording.

166. For all of these reasons we do not accept the Claimant's contention that the Respondent has deliberately modified the audio recording so as to delete these remarks. We find on the balance of probabilities that any discussion about checking sent items was a discussion that the Claimant had privately with Mr Saunders.

167. In any event, the Tribunal considers that this point does not have the great significance that the Claimant urges upon us. Even if she had made the remark about checking sent items on 12 February 2019, it was still the case that she had failed to be candid with the Respondent about the extent of breach either at the suspension meeting on 24 January 2019, or the investigation meeting on 28 January 2019 or her follow-up email of 31 January 2019.

LAW

168. We are grateful to both parties for their submissions.

Dismissal for conduct

169. The law on dismissal for misconduct is set out in a three stage test in the well-known case of *Burchell v BHS* [1978] ICR 303, namely (i) did the respondent believe the claimant to be guilty of misconduct; (ii) at the time of dismissal did the respondent have reasonable grounds for believing the claimant was guilty of that misconduct and (iii) at the time that the respondent formed that belief on those grounds, did the respondent carry out as much investigation as was reasonable in the circumstances?.

170. As to the sanction of dismissal, this was considered by the Court of Appeal in *British Leyland (UK) Ltd v Swift* [1981] IRLR 91, CA, where Lord Denning MR stated: 'The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view.

171. In *Iceland v Jones* [1983] ICR 17 the EAT confirmed that (1) the starting point should always be the words of section 98(4) themselves; (2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal considers the dismissal to be fair; (3) in judging the reasonableness of the employer's conduct the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer; (4) in many (though not all) cases there is a band of reasonable responses to the employee conduct within which one employer might reasonably take one view, another quite reasonably take another, it would only be if the decision to dismiss is outside of this band that it would be unfair.

172. There is a limit to the amount of investigation reasonably required where the misconduct is admitted — *Royal Society for the Protection of Birds v Croucher 1984 ICR 604, EAT.*

173. In *Sainsbury's v Hitt* [2002] EWCA Civ 158 the Court of Appeal held that band of reasonable responses test applies to the procedure followed by an employer as well as the substantive decision to dismiss.

174. In *A v B* [2003] IRLR 405, EAT, the EAT stated that the gravity of the charges and the potential effect on a professional employee will be relevant when considering what is expected of a reasonable investigation, given the likely ongoing effects. In that case the likely consequence for A, a social worker, was that he would be unlikely to work again.

175. The importance of the right of appeal was strongly asserted by the House of Lords in *West Midlands Co-operative Society v Tipton* [1986] AC 536, [1986] 1 All ER 513. In that case it was held that a failure to permit an employee to exercise a contractual right of appeal was of itself capable of rendering a fair dismissal unfair and that employers must act fairly in relation to the whole of the dismissal procedures. (Harvey)

176. Harvey on Industrial Relations and Employment Law:

> "if an appeal is held, but the procedure is defective, this may also render a dismissal unfair, notwithstanding that the earlier procedural stages may have been impeccable."

177. The ACAS discipline and grievances at work guidance 2015 provides:

> "27. The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case"

178. The Acas guidance also contains the following guidance on how an appeal hearing should be conducted:

> "change a previous decision if it becomes apparent that it was not soundly based – such action does not undermine authority but rather makes clear the independent nature of the appeal. If the decision is overturned consider whether training for managers needs to be improved, if rules need clarification, or if there are other implications to be considered"

Protected disclosure detriment and dismissal ("whistleblowing")

179. The Employment Rights Act 1996 contains the following provisions:

> 43B Disclosures qualifying for protection.
>
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject
>
> 47B Protected disclosures.
>
> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
>
> 103A Protected disclosure.
>
> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure

180. The Court of Appeal in *Chesterton Global Ltd & Anor v Nurmohamed & Anor* [2017] EWCA Civ 979 confirmed that public interest does not need to relate to the population at large, but might relate to a subset, in that case a category of managers whose bonus calculation was negatively affected. It seems that it cannot simply relate to the interest of the person making the disclosure.

181. In *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 the Court of Appeal held that a distinction between "allegations" and "disclosures" which appeared to have been identified in earlier authorities was a false dichotomy,

given than an allegation might also contain information tending to show, in the reasonable belief of the maker, a relevant failure. At [35], Sales LJ said:

> "In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."

182. There is an initial burden of proof on a claimant to show (in effect) a *prima facie* case that she has been subject to a detriment on the grounds that she made a protected disclosure. If so, the burden passes to the not to prove that any alleged protected disclosure played no part whatever in the claimant's alleged treatment, but rather what was the reason for that alleged treatment. Simply because the respondent fails to prove the reason does not act as a default mechanism so that the claimant succeeds. The ET is concerned with the reason for the treatment and not a quasi-reversal of proof and deemed finding of discrimination i.e. there is no mandatory adverse inference mechanism (*Dahou v Serco Ltd* [2017] IRLR 81, CA).

183. The causation test for *detriment* is whether the alleged protected disclosure played more than a trivial part in C's treatment (*Fecitt v NHS Manchester (Public Concern at Work intervening)* [2012] ICR 372, CA).

<u>Direct discrimination</u>

184. We have considered the guidance set out in *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] ICR 1205, EAT, as approved and revised by the Court of Appeal in *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases* [2005] ICR 931, CA.

185. We have considered guidance on the burden of proof in discrimination cases, in particular as referred to by the Claimant *Nagarajan v London Regional Transport* [1999] IRLR 572, *Madarassy v Nomura International plc* [2007] IRLR 246 CA, *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913. In *Hewage v Grampian Health Board* [2012] ICR 1054, SC in which Lord Hope endorsed the following guidance given by Underhill P in *Martin v Devonshires Solicitors* 2011 ICR 352, EAT:

> "'the burden of proof provisions in discrimination cases… are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination — generally, that is, facts about the respondent's motivation… they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law'.

186. In *Madarassy v Nomura International plc* 2007 ICR 867 CA Lord Justice Mummery held as follows:

> "The court in Igen v. Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which

the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination." (para 56)

187. In *Glasgow City Council v Zafar* 1998 ICR 120, HL, Lord Browne-Wilkinson said that in the context of a discrimination claim 'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably".' He approved the words of Lord Morison, who delivered the judgment of the Court of Session, that 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'. It follows that mere unreasonableness may not be enough to found an inference of discrimination.

CONCLUSIONS

<u>First protected disclosure (24.10.17)</u>

188. The first disclosure by the Claimant on 24 October 2017 was disclosure to her manager that a colleague was accepting money personally from a vulnerable client of the Respondent. The Claimant alleged that this was a breach of FCA guidance for banks which included the Respondent.

189. The Respondent admits that this was a qualifying protected disclosure.

190. We find that this was a qualifying protected disclosure.

191. There was a disclosure with factual content and specificity. The Claimant reasonably believed that there was a breach of legal obligation. The public interest element is clear, given that it affected clients of the Respondent.

<u>Second protected disclosure (3.1.19)</u>

192. On 3 January 2019, disclosure to the IT Manager as to concerns over IMS+ computer system being in contravention of the FCA Handbook Rules.

193. The Respondent disputes that this is a qualifying protected disclosure, and seeks to characterise this as a series of suggestions to improve the system, which was gratefully accepted by the Bank.

194. The Respondent rightly did not dispute that the alleged protected disclosure of 3 January needs to be read in the context of the Claimant's email of 12

December 2018 in which she had set out in considerable detail her concerns about the IMS+ system amounting to a regulatory concern.

195. The Claimant's contention is that the problem with the system and the ability of employees to manually manipulate statements led to a risk of financial crime as set out in the FCA Handbook 3.2.6 and that the circumstances amounted to an absence of reasonable care to establish and maintain effective systems and controls for compliance in this respect.

196. This was an allegation with specific factual content.

197. The Claimant we find did believe it.

198. It was reasonable for her to believe it, given that there were sufficient operational risks to require Mr Vathis to request some initial investigation and the information came back from his management team suggested that there were potential risks, albeit not with the degree of seriousness that the Claimant seemed to believe.

199. The Respondent argues that the IMS+ system is purely an interface and does not represent the content of the "Core System". Furthermore the Respondent highlights that the onus on any other financial institution to carry out their own checks means that the situation proposed by the Claimant in which a fraudulently created statement led to lending or the opening of an account elsewhere was simply not something that the Claimant might reasonably believe would occur.

200. We have reminded ourselves that a belief may be wrong and yet reasonable.

201. Compliance with 3.2.6 of the FCA Handbook is open to interpretation. Phrases like "reasonable care" and "effective systems and controls" require a value judgement to be made. In the circumstances whereby manual manipulation of statements might occur we consider that the Claimant did have a basis to query that the systems and controls were effective.

202. We find that this did amount to a qualifying protected disclosure.

<u>DETRIMENTS CONTRARY TO S. 47B RA 1996</u>

203. If the Tribunal finds that the Claimant did make a protected disclosure, did the Respondent subject the Claimant to the following detriments.

204. We considered whether the protected disclosures had a significant influence, in other words more than a trivial influence on the two alleged detriments.

<u>First detriment - Suspending the Claimant on 24 January 2019</u>

205. The Claimant was suspended on 24 January 2019.

206. The Respondent's Handbook defines "disclosure of confidential information to third parties without prior authority for consent" as an example of gross misconduct (110).

207. The provision dealing with suspension from duty, 7.9.7 says as follows:

> "In cases where dismissal may be a likely result of disciplinary hearing and, the Country Manager feels it inappropriate for an employee to be at the workplace pending investigation of the circumstances and the holding of the hearing, the employee may be suspended from duty on full pay and without loss of benefits"

208. The Claimant argues that Mr Vathis "knew" that this was an accidental breach, at the meeting on 24 January she was very apologetic and sincere and that it was obviously an innocent mistake. She characterised suspension as a "knee-jerk" reaction.

209. The Claimant complains about the failure to give her the status of an authorised signatory. This plainly created bad feeling and left the Claimant feeling undervalued. We have considered whether we could draw an inference from Mr Vathis' candid admission that the Claimant's "conduct" was part of the reason why she was not granted authorised signatory status in 2018, despite the recommendation of her manager in April 2018. The Respondent's explanations on this point were not entirely satisfactory, as we have commented above. Could this be because of the first protected disclosure made in October 2017? We accept the Respondent's evidence to the effect that this disclosure was considered appropriate and legitimate. We have borne in mind the length of time that elapsed between October 2017 and suspension in January 2019, which makes it in our assessment rather less likely that the two matters are connected. Ultimately, we do not find that the first disclosure caused the Respondent's management to take a negative view of the Claimant.

210. The Tribunal is struck by how seriously Mr Vathis took this breach of confidential data. It was the entire client list for the private banking department. He described the confidentiality of data as being as being at the heart of the relationship of trust with clients. We do not find that this overstates the reality. He told the Claimant at the suspension meeting that he had been "panicking" about the breach. We find that he had a genuine concern about his own actions and ensuring that he contained the breach. That there was a risk of the Claimant compounding the breach of confidential data was demonstrated by the fact that she forwarded the email on 24 January, although this is with the benefit of hindsight and was not known to Mr Vathis at that time.

211. While it must have been the case that the recent events involving the Claimant, in particular the spat with M which had led to the Claimant mentioning her concerns about the IMS+ system were in his mind, we do not find that the protected disclosure element, which was no more than one part of that overall picture was more than a trivial element considered overall of his decision to suspend. Previously Mr Vathis had been very slow to take action against the Claimant despite the fact that M had been making complaints against her.

212. We consider in fact that it is likely that he would have suspended any employee in the circumstances. He needed to be sure that he had contained the breach.

213. We do not find that the protected disclosures caused or influenced the decision to suspend in more than a trivial way.

Second detriment – report to FCA 25.1.19

214. The Claimant was reported to the FCA

215. The Claimant argues, first that the Respondent only needed to report conduct matters to the FCA on annual basis and second, they did not need to report this suspension since it related to matters that did not amount to "conduct" matters falling within the FCA code of conduct document.

216. The Respondent's position is that reporting to the FCA followed directly on from suspension and that there was no discretion involved.

217. The Financial Services and Markets Act 2000 contains the following:

> 64C Requirement for relevant authorised persons to notify regulator of disciplinary action
>
> (1) If—
>
> (a) a relevant an authorised person takes disciplinary action in relation to a relevant person, and
>
> (b) the reason, or one of the reasons, for taking that action is a reason specified in rules made by the appropriate regulator for the purposes of this section, the relevant authorised person must notify that regulator of that fact.
>
> (2) "Disciplinary action", in relation to a person, means any of the following—
>
> (b) the suspension or dismissal of the person;

218. The FCA Handbook contains the following provisions:

> 2.1 Individual conduct rules
>
> 2.1.2 – "Rule 2: You must act with due skill, care and diligence."
>
> 3.1.3 Without prejudice to section 66A of the Act, a person will only be in breach of any of the rules in COCON where they are personally culpable. Personal culpability arises where:
>
> (1) a person's conduct was deliberate; or
>
> (2) the person's standard of conduct was below that which would be reasonable in all the circumstances.

> 4.1.2 Due skill, care and diligence are required, especially where activities might affect customers or the integrity of the financial system.
>
> 15.11.4 Under section 64C of the Act, a firm must notify the FCA if it takes **disciplinary action** against certain people working for an SMCR firm and the reason for this action is a reason specified in rules made by the FCA (those rules are set out in n SUP 15.11.6R).
>
> 15.11.5 Disciplinary action against a person is defined in section 64C of the Act as the issuing of a formal written warning, the **suspension** or dismissal of that person or the reduction or recovery of any of such person's remuneration
>
> 15.11.6 If a reason for taking disciplinary action as referred to in section 64C of the Act (Requirement for authorised persons to notify regulator of disciplinary action) is any action, failure to act or circumstance that amounts to a breach of COCON, then the SMCR firm is required to notify the FCA of the disciplinary action.
>
> 15.11.13 Timing and form of notifications: conduct rules staff other than SMF managers
>
> (1) A firm must make any notifications required pursuant to section 64C of the Act relating to conduct rules staff other than SMF managers in accordance with SUP 15.11.13R to SUP 15.11.15R.
>
> (2) That notification must be made annually.

219. Ms Nazou gave clear evidence to the Tribunal that the Respondent considered that this fell within rule 2, and 4.1.2 above specifically lack of due skill, care and diligence, in circumstances which did not fall within the nonexhaustive list of 4.1.3. The Respondent argues that disciplinary action requiring notification to the FCA includes suspension, which plainly does under the rules.

220. The code of conduct document is clear that a suspension must be reported. As to the Claimant's contention that this did not amount to "conduct", we find that the Respondent had a reasonable justification in the circumstances for treating this as a breach of rule 2.

221. We accept the Respondent's case that they were bound to notify the FCA in the circumstances of this case of the suspension.

222. We acknowledge the Claimant's argument that 15.11.13 (2) refers to annual notification. The subsequent provisions provide that the notification must be submitted to the FCA within two months of the end of the reporting period. Alternatively a bank must confirm by this stage if there are no notifiable events.

223. The Respondent did not interpret these rules as meaning that a firm suspending an employee has to wait until the end of the year before a

notification can be given. We accept that the Claimant has a different interpretation.

224. We do not find as the Claimant has contended that prompt notification in this case amounted to malicious treatment or that this was done at this stage because of the protected disclosures. We find, based on the evidence of Ms Nazou who is a compliance specialist that the Respondent notified the FCA as they understood they needed to do. We have not received evidence which leads us to the conclusion that the Respondent was deliberately notifying the FCA earlier than required. It is worth noting that even on the Claimant's interpretation the Respondent would have had to notify the FCA of the suspension within two months of the end of the relevant year.

225. We do not find that this report to the FCA amounted to a detriment given that the Respondent was bound to do it.

226. Even if we are wrong about the detriment point, we do not find that the notification of the FCA was caused in more than a trivial way by the Claimant's protected disclosure.

AUTOMATIC UNFAIR DISMISSAL

227. 2. What was the principal reason for the Claimant's dismissal?

228. a. The Respondent relies on gross misconduct (s. 98(2) (b) ERA 1996); or

229. b. The Claimant relies on the (alleged) protected disclosures. - Were they the sole or principal reason?

230. We find that the principal reason for the dismissal was that the Claimant had committed an act of gross misconduct by sending confidential information relating to all private banking clients externally. This fell squarely within the definition of gross misconduct in the Respondent's policy.

231. We accept the Respondent's case that the first protected disclosure, made in October 2017, was accepted by management, who bore no ill will to the Claimant as a result of it. Although this may have had a lasting impact on the Claimant's relationship with M, we do not find that the first disclosure had any negative impact on the Claimant's reputation with Mr Vathis.

232. The Claimant did not make a full disclosure of all the people that she had sent the email to externally at the earliest possible time once the breach had been drawn to her attention. Ultimately the Respondent had to discover the extent of the breach by gaining access to her emails. Mr Hood in his witness evidence made it clear that it was his hope that it would be found that the breach by the Claimant was no more than a one-off and an aberration, but subsequent investigation by the Respondent showed that this was not the case.

233. The Claimant's approach to the investigation and disciplinary process was surprising. Rather than being contrite and entirely candid about the extent of

the breach, she was arrogant about her colleagues whom she compared to stupid children and attempted to use this ongoing disciplinary investigation to negotiate a promotion. In circumstances where she was facing a charge of gross misconduct this is lacked insight into how seriously the Respondent treated this matter and was far from an appropriate response in these circumstances.

234. The Claimant was already in a "pre-disciplinary" i.e. investigation stage into her conduct towards a colleague. Her contention to this Tribunal that she was a model employee simply does not stand up to scrutiny. That the Claimant had made a qualifying disclosure was in our assessment no more than a trivial element in Mr Vathis' motivation in dismissing her given this background.

235. The protected disclosures were very far from being the sole or principal reason for the dismissal. Accordingly this claim must fail.

UNFAIR DISMISSAL

236. [3.] If the principal reason for dismissal was not the (alleged) protected disclosures, did the Respondent have a fair reason for dismissal?

Belief in misconduct

237. Mr Vathis accepted that the Claimant's misconduct was an "accident" - i.e. it had not been her deliberate intention to disseminate confidential client information externally. It follows that this had simply been the consequence of copying client data to underline the point that she had made about her workload. Nevertheless this amounted to breach of confidential data. We find that he did believe that the had been such a breach. The Claimant does not dispute it.

238. Furthermore Mr Vathis believed that the discovery of the further breaches of confidentiality i.e. that the Claimant had sent both her lawyer and her brother (an employee of another bank) only came about following a full audit review of her emails, rather than by her admission either at the meeting on 28 January 2019 or in her written answers on 31 January 2019. Again we find that Mr Vathis did believe this.

Reasonable grounds

239. The Claimant did not dispute the breach of confidentiality. This was a reasonable ground to believe the Claimant was guilty of gross misconduct.

240. Although it is not contained in the letter of dismissal, Mr Vathis in his witness statement says "importantly, at this investigation meeting [28 January 2019], [the Claimant] did not disclose that Mr Johnson and her brother have also been sent the same spreadsheet". We find that this lack of candour must have been in his mind at the time that he took the decision to dismiss. This echoes the content of paragraph 22 of Mr Hood's statement which refers to the Claimant as being less than totally honest. In view of our findings as to the lack of

candour on the part of the Claimant at an early-stage in the investigation, there were reasonable grounds for these conclusions.

241. The Respondent was unaware of the fact that the Claimant had forwarded the confidential information both to her brother and to her lawyer from the date of the breach on 23 and 24 January until inspection of her email account which must have taken place sometime between 12 and 22 February 2019. Had the Claimant been candid at the outset, this additional aspect of the breach might have been identified and addressed earlier.

242. As to the Claimant's contention that at the meeting on 12 February 2019 she had invited the Respondent to check her emails, we have found that this did not occur and must instead have been at a private discussion with her union representative.

Reasonable investigation

243. What is a reasonable investigation, following the guidance of *A v B*, must be viewed in light of the significant consequences for the Claimant professionally of a dismissal for gross misconduct. In practical terms a report to the FCA of dismissal for gross misconduct would cause the Claimant difficulties in finding another role in the sector. This factor points in the direction of a fuller investigation than might otherwise be necessary.

244. On the other hand, in view of the fact of the email breaches and the Claimant's admissions, there was a limit to how much investigation could or reasonably needed to be carried out.

245. The Claimant has not identified to us matters that needed further investigation.

246. The Claimant attended the following separate meetings:

246.1. 24.1.19 suspension meeting;

246.2. 28.1.19 meeting;

246.3. 12.2.19 disciplinary;

246.4. 26.2.19 disciplinary.

247. She was given the opportunity to set out her position by email on 31 January 2019.

248. The Tribunal did consider whether more investigation could have been carried out into what the Claimant alleges were workload issues causing her stress. We note however that although Mr Vathis had some doubts about how busy the private banking team was at that time, he did not dispute that she was experiencing stress. His conclusion was that this was not sufficient mitigating circumstances.

249. Mr Hood did explore with the Claimant at the formal disciplinary meeting on 12 February 2019 the causes of stress and sleeplessness. Given that Mr Vathis

did not dispute that the Claimant was experiencing stress, we did not find that a fair investigation required him to carry out any further investigation into workload.

Fair procedure

250. [**Issue 4.**] If so, did the Respondent follow a fair procedure?

251. The Claimant has highlighted that the initial discussion on 12 January 2019 was not "recorded" in compliance with the disciplinary policy paragraph 7.9.5 (113) which refers to investigations being recorded. We do not accept that this necessarily means that an audio recording is taken by electronic means. In any event we do not find this makes the decision to dismiss outside of the range of reasonable responses given that a handwritten note of the meeting was taken.

252. The next matter that the Tribunal has considered carefully is, the ambiguity as to the role of Mr Vathis, who carried out an initial investigatory meeting but then stood back and allowed Mr Hood to carry out two further meetings before taking the decision to dismiss himself.

253. We considered whether it might be argued that it was unfair that Mr Vathis was not present at a disciplinary hearing. We note that in the referral to the FCA there is a reference to a disciplinary committee. Mr Hood says that he was not a member of this committee whereas Mr Vathis says he was. Both men have told us no recommendation was passed over from Mr Hood, although the notification to the FCA which refers to a disciplinary committee taken together with Mr Vathis' evidence that Mr Hood and Mrs Herrera suggests otherwise.

254. We have considered the ACAS code on Disciplinary and Grievance Procedures 2015, which contains the following:

> "6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.
>
> 7. If there is an investigatory meeting this should not by itself result in any disciplinary action. Although there is no statutory right for an employee to be accompanied at a formal investigatory meeting, such a right may be allowed under an employer's own procedure."

255. We consider that the ideal model in disciplinary cases is that there is an investigation stage which is carried out by one manager and a separate and distinct disciplinary hearing carried out by a separate decision-maker on disciplinary sanction. Ordinarily that decision-maker would be present at a disciplinary hearing.

256. There are two ways in which the process followed by the Respondent in this case was less than ideal.

257. First, there was a blurring of this distinction between investigation and disciplinary. Mr Vathis met with the Claimant on 28 January 2019. He

explained that this was not a disciplinary hearing but that he wanted to understand a few things. We find that this was because he was principally trying to manage the breach. There was however inevitably an element of investigation at this meeting. Mr Vathis then invited the Claimant to put certain matters in writing before handing the matter to Mr Hood, who carried out further investigation, although these were described as 'disciplinary' hearings.

258. It would have been better had Mr Vathis immediately handed over responsibility for the investigation to Mr Hood after the suspension on 24 January 2019. We have borne in mind however, that Mr Vathis did need to take steps to manage the breach of confidential information. Further investigation was dealt with by Mr Hood. This was not a situation in which Mr Vathis was a "witness" to events and ought therefore not to be involved at all. The breach was solely capable of investigation by consideration of the emails sent by the Claimant.

259. Second, is the way in which the decision to dismiss was taken.

260. We have considered carefully who the decision-maker was in this case. Ordinarily the decision-maker as to disciplinary sanction would be present at a disciplinary hearing. In this case the decision to dismiss appears to have been a separate paper exercise, albeit based on a recommendation. Although Mr Hood described his role to ask as simply carrying out the meetings which questions were asked, his witness statement deals in detail with the rationale for dismissal. This fortifies asking our conclusion that there was more than simply the handover of documentation from Mr Hood leading to Mr Vathis' decision. We find that he must have handed over in effect a recommendation for dismissal.

261. We are clear however that Mr Vathis was the ultimate decision-maker, and this is in compliance with the Respondent's handbook (113) which sets out that dismissal should be by the country manager.

262. Mr Vathis was not present at the disciplinary hearing.

263. Did these procedural imperfections make the decision to dismiss unfair? We have concluded that it did not, for the following reasons.

264. Mr Vathis did hand over the investigation after the initial meeting. The Claimant did have the benefit of a formally recorded pair of disciplinary meetings at which she was represented by a trade union representative, and she was able to set out her case, comment on the evidence and mitigating circumstances, which were recorded in the meeting minutes. Mr Vathis had the benefit of these matters in front of him when he took the decision to dismiss.

265. There were two separate stages. There was the investigation on 28 January 2019. There was the disciplinary hearing which took place over two dates on 12 and 26 February 2019. While there was a blurring of distinction between investigation and disciplinary, two different people were separately involved. This at least avoided the problem of a single individual becoming blinkered through the investigation process and unable to take a step back and assess the fairness of disciplinary sanction. We find that Mr Vathis was, by the point

that the decision to dismiss was taken on 4 March 2019 was in a position to take a step back. His last involvement had been in the meeting on 28 January 2019.

Appeal

266. As to the email of 8 March 2019, which the Claimant suggests represented Mr Vathis unfairly trying to influence the outcome of the appeal, we find that the email itself was balanced. It acknowledged that in view of Mr Vathis the breach was not intentional, which was a mitigating factor. We concluded that Mr Armelinios came to his own view in this case and was not influenced by Mr Vathis' views. For example he strongly disagreed with Mr Vathis' suggestion that the breach was merely "accidental". He took a more robust view of the case generally, explaining that client trust in the bank was at the cornerstone of the client-bank relationship.

267. The next point we considered is the oddity of what appear to be two different appeal outcome letters. On closer scrutiny the letter dated 15 April 2019 is the outcome letter representing the decision of the appeal manager who appears to have interpreted his remit to look narrowly at the question of whether the sanction of dismissal was merited in this case. Mr Armelinios underlined the narrow view he took of his remit by requesting that paragraphs 7 – 10 of his witness statement, dealing with wider matters, be deleted from his statement before he confirmed the truth of it.

268. The later letter dated 17 April 2019 (398), signed by Mr Vathis and Mrs Herrera deals with a variety of matters that Mr Armelinios considered fell outside of his remit as someone dealing with the appeal, namely her contentions that the dismissal was caused by being a whistleblower, being Greek Cypriot rather than from Mainland Greece and stress and workload as a mitigating factor.

269. Was Mr Armelinios actually the decision-maker in the appeal? We found that he was. He had very clear view of this case, and in at least one material respect that differed from that of Mr Vathis.

270. Was the appeal too superficial? Certainly as judged by his participation in the appeal hearing in which she asked very few questions and the length of the appeal outcome letter dated 15 April, it might be said that the appeal hearing was somewhat perfunctory.

271. We have considered however that Mr Armelinios was provided with a substantial amount of documentation in advance by the Claimant and that she explained her position at length in the appeal hearing. He cannot have been in any doubt of the various matters that she relied upon as mitigation and/or reasons to doubt that the decision to dismiss her was fair, when he got to the point of making a decision in the appeal. It was his view that the points about race, whistleblowing and workload were no more than "excuses" and management matters that needed to be dealt with by the London branch rather than by himself, as someone who was flying in from Athens for a few hours.

272. It might have been better had Mr Armelinios done more himself, or through an independent investigator to consider these matters. However, he did not and our role is not to substitute what we would have done at any stage of the process.

273. As to whether it fell outside of the range of reasonable responses procedurally, we consider that Mr Armelinios was independent. He was not answerable to Mr Vathis and was senior to him in the organisation. He took his own view of the case quite clearly. Stripping the appeal stage back to its basic element, he did provide an independent view of the case and make an assessment of whether dismissal was fair the circumstances. We find that he did make his own independent judgement and he was adamant, we find genuinely, that the circumstances of this case merited dismissal.

274. Insofar as we have identified imperfections in the investigation/disciplinary stage as discussed above, this appeal process was capable of correcting those imperfections, since Mr Armelionios was independent and to that extent a fresh pair of eyes.

275. Overall therefore viewing the procedure followed in the investigation, disciplinary and appeal process collectively we find that it did fall within the range of reasonable responses.

<u>Sanction of dismissal</u>

276. [**Issue 5.**] Was the sanction of dismissal within the band of reasonable responses?

277. There was an express term of contract about confidentiality in the Claimant's terms and conditions of employment in clause 10 (56).

278. Examples of gross misconduct in the staff handbook (110) [point 6.1] includes "disclosure of confidential information to third parties without prior authority or consent" which describes this situation.

279. The Claimant argues that since the situation was as an "accident" it was not capable of being gross misconduct and should not have lead to dismissal. We have considered what Mr Vathis when he accepted the Claimant's explanation that it was an "accident". This was not a situation in which the Claimant had inadvertently attached a document to her email or accidentally attached the wrong document. It is fairly clear that she had intended to attach this particular document, since the wording of the email refers to "the whole Private Banking portfolio (see attached Excel spreadsheet)". It was only an accident in the sense that there was not intent to deliberately breach confidentiality. As we understand it Mr Vathis had accepted that the Claimant did not send the email specifically with the intention of sending confidential information out of the Bank.

280. The sanction must be assessed in that context.

281. The actions of the Claimant must be seen as a whole. She repeated the breach on a subsequent day. Insofar as she was contending she was tired and hungry, which might apply at 22:02 on Wednesday 23rd January 2019, this mitigation does not hold for 12:18 the following day. This was not a single momentary error, but an action that the Claimant repeated.

282. The Claimant did not fully "come clean" about the number of breaches and the identities of the recipients until weeks later after the Respondent had carried out it investigation and discovered it. This was not purely a case of a momentary "accident" as the Claimant has sought to characterise it.

283. The Claimant places some emphasis on the decision not to report the matter to the Information Commissioner's Office (ICO). The reasons for this were given in the initial report to the FCA. In essence the Respondent believed that they had contained the breach, based on the information given by the Claimant and believed, in line with the ICO guidance that they did not need to take further action.

284. We find that the decision to dismiss fell within the range of reasonable responses open to a reasonable employer.

DIRECT RACE DISCRIMINATION

285. The Claimant identifies as Greek Cypriot

286. Was the dismissal of the Claimant an act of direct race discrimination?

Background matters

287. Claimant relies upon earlier matters as background

288. The Claimant relies upon as "background" as matters that the Tribunal ought to view as being the basis for inference that the Claimant's race was a material factor in the decision to dismiss her. The background matters are as follows.

289. The discriminatory advertisement in 2016. We can see that, viewed from the perspective of the London branch, this advertisement which was initially aimed at employees of the parent organisation in Athens was discriminatory. The advertisement was challenged by HR in London following the Claimant's involvement and a version produced in English. If anything this matter caused a particular difficulty for non-Greek speakers. The Claimant speaks Greek, although is not a language in which she conducts business. We find it is difficult to find a connection between these events, bearing in mind that the Claimant did not even apply for this role, and the Claimant's treatment in 2019 arising from circumstances which were entirely unconnected. We do not find that there was an ongoing discriminatory state of affairs.

290. Next is the Claimant's belief that the Respondent's management were not willing to invest in her professional training. This seems to been an issue for the Claimant from early on in her employment. Her complaint seems to have

been about lack of resources generally the expectation that she should simply receive "on-the-job" training. It seems that, by comparison with previous employers, who may have had more substantial resources, the Claimant was disappointed with what the Respondent offered with regard to training. We bear in mind that the London branch of the Respondent is a small office comparatively speaking only in the region of 30 employees.

291. The Claimant complains that she was excluded from various team meetings. The Respondent's position was that not every person can attend every team meeting, otherwise there would be no one able to interact with clients. We have not received evidence from which we have drawn the inference that the Claimant was inexplicably or systematically excluded from meetings which were necessary for her to do her role.

292. The Claimant contends that she was not given a £5,000 pay increase that was promised to her on completion of her probation. We are sympathetic to the Claimant's position. We find it plausible that she was given some assurances of an increase in salary, albeit that this may or may not have amounted to a binding contractual agreement. We do not find that this in itself is sufficient to draw an inference of discrimination.

293. The Claimant has highlighted that various Cypriot colleagues based in the London office took redundancy and seem to be relieved to be leaving the employment of the Respondent. Mr Vathis' comment was that this was unsurprising after in some cases approaching 40 years of employment, in essence they were simply keen to retire. Again it is difficult to draw an inference of discrimination from these matters.

294. The Claimant complains about the failure to give her the status of an authorised signatory. We found that the Respondent failed to give an entirely satisfactory explanation for why the Claimant had not been granted this status. This particularly called for an explanation given that the Claimant's manager had recommended this in April 2018 in the context of a positive assessment. We find that Mr Vathis gave an candid answer initially when he alluded to the Claimant's conduct as one of the reasons why she had not made a signatory. Ultimately however we do not find that the circumstances lead us to an inference that race was a factor. In fact this point came closer to providing a possible inference in respect of the protected disclosure detriment discussed above.

295. We noted that the Claimant put the protected disclosure (i.e. whistleblowing) case to Mr Vathis with considerable force. By contrast the elements of the race claim were not even mentioned during cross examination, with the result that the Tribunal had to put this part of the case to Mr Vathis. While the Tribunal bears in mind that the Claimant is a litigant in person, we inferred from this that the Claimant has far greater belief in the merit of her protected disclosure/whistleblowing claim than the race claim.

296. We recognise that various unsatisfactory or unexplained matters might individually not be enough to found an inference of discrimination, but when

viewed collectively there maybe enough. We have therefore looked at these matters collectively.

297. We did not find that the Claimant had established a *prima facie* case of race discrimination i.e. facts from which we could conclude that the Respondent could have committed an unlawful act of discrimination.

298. We accepted the evidence of Mr Vathis about friends, family members and long standing being Cypriot and his being saddened by the allegation of race discrimination. We also accepted his evidence about the Chairman and three members of the Respondent's Board being Cypriot. We do not consider that we have received evidence from which we could reasonably conclude that there is some sort of systemic anti-Cypriot bias within the bank.

299. Ultimately we did not find that the Claimant being Greek Cypriot explained any part of her dismissal, which we find is entirely explained by her actions and the Respondent's reasonable response to it.

Victimisation

300. The Claimant put forward closing submissions on a victimisation claim under section 27 of the Equality Act 2010. No such claim was identified in the list of issues, nor in the Summary of legal claims as part of the Claim Form on Pages 16 and 17 which were drafted by the Claimant's solicitor then acting nor have we heard evidence based on such a claim. Accordingly we do not have jurisdiction to deal with a claim of victimisation.

____

Employment Judge Adkin

Date 20 December 2021

WRITTEN REASONS SENT TO THE PARTIES ON

20/12/2021.

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions

shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case. Written reasons for oral decisions should be requested within 14 days of the date that these written reasons sent to the parties.

ANNEX – LIST OF ISSUES

PROTECTED DISCLOSURE

1. The Claimant relies on the following disclosures:
    a. On 24 October 2017, disclosure to her manager that a colleague was accepting money personally from a vulnerable client of the Respondent; and
    b. On 3 January 2019, disclosure to the IT Manager as to concerns over IMS+ computer system being in contravention of the FCA Handbook Rules.

2. Do the disclosures relied upon each have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in s. 43(B)(1) ERA 1996?

3. Did the Claimant believe at the time she made the above disclosures, that the disclosure was in the public interest and if so, was that belief reasonable?

DETRIMENTS CONTRARY TO S. 47B RA 1996

1 . If the Tribunal finds that the Claimant did make a protected disclosure, did the Respondent subject the Claimant to the following detriments:
    a. Suspending her on 24 January 201 9; and/or
    b. On 25 January 201 9, reporting her to the FCA.

AUTOMATIC UNFAIR DISMISSAL

2. What was the principal reason for the Claimant's dismissal?
    a. The Respondent relies on gross misconduct (s. 98(2) (b) ERA 1996); or
    b. The Claimant relies on the (alleged) protected disclosures.

UNFAIR DISMISSAL

3. If the principal reason for dismissal was not the (alleged) protected disclosures, did the Respondent have a fair reason for dismissal?
4. If so, did the Respondent follow a fair procedure?
5. Was the dismissal within the band of reasonable responses?

DIRECT RACE DISCRIMINTION

6. The Claimant identifies as a Greek Cypriot.
7. Was the dismissal of the Claimant an act of direct race discrimination?