JB1

THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M S Radia	**v**	**Jefferies International Limited**

Heard at: London Central

On: 16 -19 October 2017. Reserved Decision 2 November 2017

Before: Employment Judge Henderson

Members: Mr R Lucking
Mr S Godecharle

Representation:

Claimant: Mr S Neaman, Counsel
Respondent: Ms J Stone, Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1. The Claimant's claim for automatically unfair dismissal under Section 103A Employment Rights Act 1996 does not succeed.

2. The Claimant's claim for victimisation under Section 27 Equality Act 2010 does not succeed.

3. The Claimant's claim for detriments arising from a protected disclosure, Section 47B Employment Rights Act 1996 does not succeed.

4. The Claimant's claim for unfair dismissal under Section 98 Employment Rights Act 1996 does not succeed.

REASONS

Background and Claimant's Claims

1. The Claimant brought his first claim on 22 May 2015 in the Employment Tribunal (2201358/2015) for disability discrimination which was heard in November 2016 over 7 days. The Tribunal hearing those claims (**the first Tribunal**) issued a reserved Judgment and Reasons on 3 February 2017 which dismissed all the Claimant's claims. The first Tribunal also made adverse findings with regard to the Claimant's credibility, which affected their assessment of the evidence before them when having to decide if they preferred the Claimant's or the Respondent's version of events, when those were disputed. At the time of the Judgment in the first claim, the Claimant was still employed by the Respondent.

2. The Claimant issued a second claim on 21 September 2016 (2207838/2016) for victimisation, but only one remaining allegation from that claim stands: this is in relation to the time taken by the Respondent to consider his grievance appeal.

3. The Respondent dismissed the Claimant on 6 March 2017 for gross misconduct based on the Tribunal's credibility findings in the first claim. The Respondent is a regulated business and is governed by the Financial Conduct Rules. The Respondent concluded that the Claimant could not be regarded as a fit and proper person in accordance with the FCA (Financial Conduct Authority) Handbook.

4. The Claimant then issued a third claim in the Employment Tribunal on 21 April 2017 for unfair dismissal, whistleblowing (dismissal and detriment) and victimisation in relation to his suspension, dismissal and his dismissal appeal.

The Issues

5. The parties had agreed the issues to be determined by the Tribunal in this hearing at a Case Management Discussion on 22 June 2017. These issues were confirmed at the commencement of the hearing and are as follows:-

   <u>Agreed Issues</u>

   - It was agreed that the presentation of the first claim was a "protected act" within the meaning of Section 27 (2) (a) of the Equality Act 2010 (EA) for the purposes of the victimisation claims;

   - It was agreed that the Claimant's notification to the FCA (on or about 28 September 2016) was a "protected disclosure" within the meaning of Section 43A Employment Rights Act 1996 (ERA) for the purposes of his "whistleblowing" claim;

- It was agreed that the Claimant's suspension on 7 February 2017 (on full pay) and the Respondent not holding an appeal hearing against his dismissal constituted potential detriments;

Unfair Dismissal

- Was the reason or principal reason for the dismissal that the Claimant had made a protected disclosure? (Section 103A ERA – automatically unfair dismissal);

- Was the reason for the dismissal the Claimant's protected act in bringing the first claim (Section 27 EA – victimisation); or

- Was the reason for the dismissal the Claimant's conduct, namely the findings of the first Tribunal as regards the Claimant's credibility?

- If the dismissal was related to conduct, was the dismissal fair and reasonable (Section 98 (4) ERA) in particular:-

  (a) Did the Respondent believe the Claimant was guilty of misconduct?
  (b) Were there reasonable grounds for that belief?
  (c) Had the Respondent carried out a reasonable investigation in the circumstances?
  (d) Was dismissal within the reasonable range of responses open to the Respondent? (**Burchell v BHS).**

Protected Disclosure: Detriments

- Where the following done on the ground that the Claimant made a protected disclosure (Section 47B ERA)

  (a) Suspension.
  (b) Not holding a dismissal appeal hearing?

Victimisation

- Did the Respondent subject the Claimant to the following detriments by reason of the protected act (section 27 EA)

  (a) Suspension;
  (b) Unreasonably delaying the response to his grievance appeal;
  (c) Dismissing him; and
  (d) Not holding a dismissal appeal hearing?

Remedy

If the Claimant succeeds in any of his claims what is the proper compensation due to him having regard to:-

- Would he have been dismissed at the same time or shortly thereafter in any event?
- Mitigation of loss – contributory fault and/or on just and equitable grounds.

Injury to feelings

Did the Respondent breach the ACAS Code of Practice by:-

- Not inviting the Claimant to an investigation meeting;
- Failing to provide the information upon which the Respondent relied to dismiss him;
- Not considering the impact on the Claimant's ability to perform his role; and
- Length of time in concluding the grievance appeal process.

If so was such failure unreasonable and if so would it be just and equitable to increase any award by up to 25%.

The Findings in the First Tribunal Claim

6. The first Tribunal's Reserved Judgment and Reasons is at TB1 pages 146 – 193.

7. The first Tribunal found that in several areas of his evidence, the Claimant had not told the truth or had misled the first Tribunal (paragraph 28 of the Reserved Reasons); had given untrue evidence (paragraph 30) and the first Tribunal also noted that "the Claimant's behaviour as a regulated person would be a matter of grave concern" (paragraph 32). The first Tribunal then went on to say that they found the Respondent's witnesses to be credible and honest and where there were any disputes with regard to various factual events, their credibility assessment led them to prefer the Respondent's evidence to the Claimant's.

8. The Tribunal in the current hearing stressed to the parties at the commencement of that hearing that it would only hear evidence which was relevant to enable it to determine the issues set out above. It was made clear that the purpose of this hearing was not to re-examine or overturn the first Tribunal's findings of credibility or fact in the first claim. The Claimant had not appealed or applied for a reconsideration of that first Tribunal decision and it was not for this Tribunal to re-open that decision. The Claimant acknowledged this at paragraph 93 of his witness statement; but nevertheless proceeded to elaborate at great length on why the first Tribunal had misunderstood his evidence and statements at the hearing in November 2016 and had wrongly concluded that he had been untruthful or misleading. This Tribunal understands the Claimant's natural desire to "clear his name" in the light of the first Tribunal's findings, but as with all misconduct cases that is not the purpose of this hearing.

Counsels' Submissions on Issue Estoppel/Abuse of Process

9. As Mr Neaman pointed out in his submissions, this case involves "an unusual (if not entirely unique) point" – namely the extent to which the Respondent can rely on the first Tribunal's findings against the Claimant's credibility in order to justify dismissing him for misconduct and the inter-relation between those credibility findings and the Respondent's own obligations of fairness in the subsequent internal disciplinary process.

10. Mr Neaman's argument was that the Respondent could not rely on the first Tribunal's findings and that it was not absolved from carrying out its own impartial investigation to reach its own reasonable belief in the Claimant's misconduct: namely that the Claimant had lied to or misled the Tribunal. He maintained that an employer relying on the outcome of civil proceedings between itself and an employee as the starting point for internal misconduct proceedings must display extreme caution.

11. He argued that this Tribunal was not estopped from reconsidering the first Tribunal's findings: this was based on the dicta of Megarry J *in* **Spens v IRC [1970] 1WLR 1173 Ch D** to the effect that a court must *"enquire with unrelenting severity whether the determination on which it is sought to found the estoppel is so fundamental to the substantive decision that the latter cannot stand without the former"*. Having considered the first Tribunal's Judgment, we find that their findings on the Claimant's credibility and their observations on the manner in which he gave evidence before them, were fundamental to their decision to dismiss all his claims. That final decision would not have been reached without the findings of credibility which affected the findings of fact made by the first Tribunal, which in turn led to their conclusions. We find that even if it is not technically an issue estoppel; seeking to reopen or change the first Tribunal's findings on credibility would be an abuse of process. In reaching this conclusion we take into account the fact that the Claimant's counsel at the first hearing in November 2016 was allowed a right of reply to Ms Stone's (the Respondent's counsel) submissions on credibility; so the Claimant had been offered a right to redress the balance on this matter by the first Tribunal. The Claimant also had full opportunity to appeal the first Tribunal's decision on the grounds of perversity or bias, if he felt that they had fundamentally misunderstood his evidence. He did not do so. The Claimant could have applied for reconsideration of the first Tribunal's Judgment (under the ET Tribunal Procedure Rules 2013), but he did not do so. We further note that the Claimant had been legally advised throughout the Tribunal process. We, therefore, find that this Tribunal Hearing cannot and must not be used as an appeal "through the back door", as it were.

12. Accordingly, we do not intend in this Judgment to go behind the first Tribunal's finding of credibility as regards the Claimant. We have reached this decision on the basis of Mr Neaman's submissions and our conclusions on those submissions. We note Ms Stone's submissions with regards to the first Tribunal's findings in their Costs Judgment dated 7 September 2017 (at TB3 page 1032). However, we do not need to consider her submissions in

reaching our conclusion. As a result, the fact that the Costs Judgment is under appeal, is not relevant to our considerations.

Conduct of the Hearing

13. This case was scheduled to be heard on 16-20 November 2017. However the Tribunal Panel was only available to sit for 4 days. It was agreed with the parties that the evidence (including remedy) and submissions could be concluded within that period. The Tribunal indicated that it would deliberate in Chambers on 2 November 2017 and Judgment in this case was reserved.

Documents

14. The parties had failed to comply with the Tribunal's Case Management Directions: there was no agreed bundle. Instead the Tribunal were presented with five lever-arch folders (each containing approximately 500 pages). These were three bundles prepared by the Respondent, including some documents from the Claimant called the Trial Bundles (TB 1, 2 and 3). There were also two folders prepared by the Claimant called the Claimant's Bundles (CB 1 and 2). The Tribunal notes that there was minimal reference to the documents contained in the Claimant's Bundles.

Witnesses

15. The Tribunal heard evidence from the Claimant and on behalf of the Respondent from Mr Huw Tucker (International Chief Finance Officer) and Ms Rani Swords (Head of International HR). The witnesses each produced written statements which were taken as their evidence in chief and were cross-examined by the other party and were asked questions by the Tribunal.

16. The Tribunal was assisted by closing submissions in writing from the parties' counsel and also heard oral submissions from both counsel.

Findings of Fact

17. The Tribunal heard detailed evidence over the course of 3½ days – much of which related to the Claimant's challenge to the first Tribunal's assessment of his credibility. However, as explained above, this Tribunal will only make such findings of fact as are relevant to the issues to be determined (as set out above).

18. The Claimant was employed by the Respondent from 21 June 2006 to 6 March 2017, originally as an Equity Research Analyst and was subsequently promoted to Managing Director at the end of 2009.

<u>Claimant's Protected Disclosure</u>

19. The Claimant revealed under cross-examination at the Tribunal Hearing on 4 November 2016, that he was a "whistleblower" to the FCA. Mr Tucker

accepted in his evidence that the allegations made by the Claimant were serious and formed the subject of an FCA investigation into the Respondent, though he believed that one area of the investigation had recently ceased. However, Mr Tucker said that he was not aware of the detail of these allegations.

The Claimant's Grievance

20. The Claimant presented a grievance on 17 April 2015 (TB1 page 309) he received a grievance outcome letter on 20 July 2015 (TB1 page 364) which found against him on all matters. The Claimant had indicated his intention to appeal on 3 August 2015 (TB1 page 379), which was just within the relevant time limit. The Claimant the submitted a detailed grievance appeal document on 16 September 2015 (TB2 415). This was allowed by the Respondent, even though it was technically out of time. The detailed appeal in September 2015 was 10 pages long and the Claimant indicated that he felt the grievance outcome had either inadequately addressed his concerns or overlooked them. The Claimant's appeal document sought to challenge every conclusion of the grievance outcome: there were thirty-two issues raised by him, as set out in Ms Swords' witness statement (paragraph 12), some going back as far as June 2010 and including some compliance issues.

21. It was agreed in evidence that the issues raised in the grievance appeal substantially duplicated the complaints brought by the Claimant in the first Tribunal claim. Ms Swords acknowledged receipt of the Claimant's appeal on 23 September 2015.

22. The Respondent decided that Gary Pomeroy would be the most appropriate manager to conduct the grievance appeal and he was supported by Karina Bappa, a Senior HR Contractor. Mr Pomeroy held four grievance appeal meetings with the Claimant totalling 8 hours; these were on 9, 10 and 13 November 2015. It is agreed that the grievance appeal outcome was eventually sent to the Claimant on 27 October 2016 (TB3 page 814) and was some 28 pages long.

23. Ms Swords acknowledged that this was an unacceptable delay and should have been concluded much earlier. She said that she had never known such a lengthy delay. She also accepted that she had told the Claimant on or around 27 January 2016 (TB2 pages 278 – 279) that the matter would be concluded in the next couple of weeks.

24. However, she explained that there were many issues raised by the Claimant which had to be considered; that there were several delays with the Claimant providing information or providing comments on the meetings; Mr Pomeroy's availability was often restricted due to his work commitments, as were the Claimant's and because of the duplication of issues with the Claimant's first claim in the Tribunal, there were often delays relating to the disclosure of documents as part of the Tribunal process. Further, because of the duplication of these issues and as the Claimant had issued Tribunal

proceedings in May 2015 (after he had raised his grievance but before the outcome was decided), we find that it was reasonable that the Respondent had sought legal advice in terms of any findings on the grievance. This process also led to some delays. Ms Swords confirmed that it was a conscious decision to ensure coordination between the Tribunal process and the grievance appeal outcome, because of the duplication of the subject-matter. Ms Swords did not accept that the Respondent had deliberately delayed the grievance appeal to tie in with the Tribunal Hearing: however, given the finding that the Respondent had waited for disclosure in the Tribunal process, we find that the two outcomes were clearly linked.

25. Mr Neaman submitted that the Respondent should have treated the grievance as an internal investigation and should not have sought legal advice or linked the grievance to the Tribunal process in any way. However, bearing in mind the duplication of the Claimant's extensive complaints with his first Tribunal claim and the Claimant's comments that he felt his grievances were not being properly addressed, we find that it was not unreasonable for the Respondent to take extra care in preparing the grievance appeal. That said, this Tribunal does not condone the delay, which was excessive, as was acknowledged by Ms Swords herself.

26. Having heard evidence from the Claimant and Ms Swords on this matter, we find that the delay in the grievance appeal was linked to the timing of the first Tribunal Hearing but we do not find that that delay was <u>because</u> the Claimant had brought the Tribunal claim. The delay was a consequence of the first Tribunal claim due to the duplication the issues raised, but the reason for the delay was not motivated by the fact that the Claimant had brought the Tribunal claim.

<u>Claimant's Employment Following the First Claim</u>

27. The Claimant gave evidence that he had been able to continue to work fairly normally following the lodging of his Tribunal Claim in May 2015. He said that his relationship with Richard Taylor, his Line Manager, despite some initial caution between them, remained largely unchanged and that they worked together on "a professional and pragmatic" basis. This was even after the hearing of the first Tribunal claim in November 2016, when he and Mr Taylor had both given evidence which was critical of the other.

28. On 4 November 2016, the Claimant revealed in cross-examination that he had notified the FCA of breaches of FCA Rules by the Respondent. The Claimant accepted in his evidence that his working relationship with Mr Taylor continued as before, even after this protected disclosure was known to the Respondent.

<u>Claimant's Suspension</u>

29. The first Tribunal Judgment & Reasons was received by the parties on 6 February 2017. On 7 February 2017, Ms Swords wrote to the Claimant

suspending him pending a disciplinary investigation (TB1 140-141). The decision to do this had been taken by Ed Keen (Head of Equities) following discussion with Ms Swords and John Ions (the Respondent's In-House Lawyer). This decision was then reported to the Conduct Risk Committee (CRC) on 7 February 2017. Mr Tucker did not attend that CRC meeting.

30. The suspension letter explained that the basis for the proposed disciplinary action was the first Tribunal's findings on the Claimant's credibility. The letter states that no assumption is made that the Claimant is guilty of misconduct. The Respondent was obliged to notify the FCA of the suspension and the reasons for it. A neutral statement recording the Claimant's absence from the office was be made to any enquiries. The Claimant was recalled from his work trip in the USA. The CRC meeting on 10 February 2017 approved Mr Keen's decision to take disciplinary action and Hugh Tucker attended that meeting as Tim Cronin's delegate but he did not take any part in the substantive discussions.

Disciplinary Allegations

31. Ms Swords wrote to the Claimant on 10 February 2017 (TB1 142) confirming that he was required to attend a Disciplinary Hearing. The allegation against him was that "*you have materially and fundamentally breached your employment contract with Jeffries by acting dishonestly. The basis for this allegation is that, based upon on our internal investigation and based upon your sworn testimony at the Hearing which took place on 3-11 November 2016 (see Sections 27-33 of the Judgment of the Employment Tribunal dated 3 February 2017) you have either not told the truth or misled both Jeffries and the Employment Tribunal in a number of respects. I enclose a copy of the Judgment which will be considered at the Disciplinary Hearing*." The letter also enclosed a copy of the Respondent's disciplinary procedure which included dishonesty as one of the reasons for dismissal for gross misconduct.

Investigation

32. The letter inviting the Claimant to a Disciplinary Hearing referred to "*internal investigations*"; however, Ms Swords accepted in her evidence that she had decided that there should be no investigation as such. The Respondent was relying on the Tribunal's findings which were the starting point in the disciplinary allegations, so there were no further investigations which could be carried out on this matter. It is accepted by the Respondent that despite Ms Swords reference to internal investigations, there were no such investigations.

Disciplinary Hearing 23 February 2017 (TB1 232-239)

33. The CRC had identified Mr Tucker as the best person to hear the disciplinary process against the Claimant. Prior to the Disciplinary Hearing, Mr Tucker said that he did not know very much about the Claimant, although he did accept in his oral evidence that he was aware that the Claimant had brought

a Tribunal claim and had raised various complaints against the Respondent. Mr Tucker also agreed that the first Tribunal's findings had been reported in the press in or around 7/8 February 2017. Mr Tucker said at paragraph 17 of his witness statement that although he had not had formal training on the requirements of conducting a Disciplinary Hearing, he had presided over a complex Disciplinary Hearing in 2013 (which had not involved the Claimant). He understood the key principles to be observed. He noted that these included the importance of being impartial and having an open mind and he said that he had approached the Disciplinary Hearing with an open mind as to the potential outcome. He noted that the findings of the Employment Tribunal were highly critical of Mr Radia's honesty and integrity but he accepted that Judges could make mistakes and that he was prepared to hear what the Claimant had to say about the first Employment Tribunal Panel's findings to see if he could satisfy himself that the first Tribunal's comments had been justified. We accept Mr Tucker's evidence on this point.

34. The Disciplinary Hearing was held on 23 February 2017 with Mr Tucker presiding, assisted by Michael Common (HR Representative). The Claimant was accompanied by Trevor Knowles, his Union Representative. At the commencement of the meeting Mr Tucker reiterated that the Respondent had not carried out any investigation prior to the Disciplinary Hearing as the first Tribunal findings were the starting point and the Disciplinary Hearing was the Claimant's opportunity to discuss those findings and to allow him to say what he needed to say in order for Mr Tucker to reach a disciplinary decision.

35. Mr Tucker read out the relevant paragraphs in the Judgment and gave the Claimant an opportunity to comment. The Claimant responded at length to indicating that he believed that his evidence had been misunderstood. He focused on four particular matters in relation to evidence which he had given at the first Tribunal Hearing. These were:-

    (a) Weight figures in the medical expert's report;
    (b) May 2011 holiday;
    (c) Impact on client meeting matrix from his knee injury; and
    (d) Disabled status.

36. For each of those issues, the Claimant maintained that he had been honest in his evidence and that the first Tribunal had misunderstood or misinterpreted that evidence. He also said that the first Tribunal had copied their findings from the Respondent's submissions rather than looking at the Claimant's own statement which he maintained was honest and accurate, especially as regards the forced return from holiday in May 2011. The Claimant accepted in his oral evidence to this Tribunal, that he had been given a full opportunity by Mr Tucker to raise any issues he wished to at the Disciplinary Hearing.

37. Prior to the Disciplinary Hearing, Mr Tucker had seen the first Tribunal's findings; the invitation letter to the Disciplinary Hearing and the Respondent's disciplinary policy. Following the disciplinary meeting, the Claimant handed

Mr Tucker written submissions (which are at TB1 pages 215 – 231). The Claimant said that he had prepared this note before the disciplinary meeting but had not handed it over to Mr Tucker as he needed to add various matters which were discussed at the meeting. This written submission contained details of each of the four areas of evidence set out above.

38. Following receipt of the Claimant's written submissions, Mr Tucker then requested further information namely copies of each party's closing submissions to the first Tribunal and some additional material (TB1 240-291). These were extracts from the Respondent's solicitors (Herbert Smith Freehills) transcript of the relevant parts of the first Tribunal Hearing, relating to the four areas mentioned by the Claimant. Mr Tucker explained that he had not realised that the Claimant's solicitors had prepared a separate transcript of the first Tribunal Hearing. He said that he had assumed there was only one transcript. We find that bearing in mind that Mr Tucker is not a lawyer and is not familiar with the litigation process, it would not be unreasonable for him to think that. As he believed there was only one transcript, Mr Tucker did not send the Claimant a copy of the transcript extracts which he was considering. He believed the Claimant would have seen these as part of the preparation of his written submission. Further, Mr Tucker observed that the Claimant had been present at the first Tribunal Hearing which Mr Tucker had not.

39. Mr Tucker said that he looked at the Herbert Smith transcripts on the four points raised by the Claimant and he concluded that the first Tribunal's findings had in fact been correct, in the light of those transcripts. He said that he had not been intending to re-open the first Tribunal Hearing as such, but the Claimant's comments did not demonstrate that the first Tribunal findings were unreasonable or unfair.

40. The Claimant objected to the fact that he had not been shown the Herbert Smith transcript extracts, which he regarded as unfair. We were taken to copies of the Claimant's solicitors (Ashfords) extracts from the transcripts on the same four issues raised by the Claimant (CB2 457-559). We find that these transcripts do not differ in any material way from the Herbert Smith transcripts and, therefore, the fact that the Claimant had not seen copies of the Respondent's solicitor's transcripts did not put him at any disadvantage in the disciplinary process.

41. On the basis of the documents before him, Mr Tucker reached his disciplinary decision. He said that he had had several discussions with Mr Ions (usually in person) to discuss the drafts of his disciplinary decision. However, he said that the decision was his alone. Mr Tucker said that he was one of the five most senior people in the organisation and that even though he had discussed the matters with Mr Ions and received legal advice from him, he had not been influenced by him in reaching that decision. Mr Tucker also said that he would not have accepted the task of the Disciplinary Hearing if he had not been allowed to reach his own decision. The Tribunal accepts Mr Tucker's evidence on that point. We heard no evidence to suggest that his decision was influence by anyone else. We find that

consulting with the Respondent's in-house lawyer on such a serious matter (given the background of extensive litigation) was a reasonable approach for Mr Tucker to take and does not, of itself, indicate a joint decision.

42. Mr Tucker was taken in cross-examination to an email dated 13 February 2017 (prior to the Disciplinary Hearing) from Dominic Lester (CB2 page 672) which referred to the Claimant's suspension and to the fact that "we are full speed ahead in hiring a replacement". Mr Tucker said that he had never seen this email prior to the Tribunal process. He said he had never discussed the disciplinary decision with Dominic Lester and reiterated that he had made the decision alone. Mr Tucker was unable to comment on this email and he said that he did not know if such recruitment had in fact been taking place. Dominic Lester had been on the CRC which had been notified of the Claimant's suspension and Mr Tucker thought he may be confusing suspension with dismissal and the disciplinary process. The Tribunal accepts Mr Tucker's evidence on this point, namely that he was not aware of recruitment to replace the Claimant pending his disciplinary decision. We find that the disciplinary decision to dismiss was not prejudged, in that it did not precede the disciplinary outcome letter.

43. The email from Dominic Lester was also put to Ms Swords in cross-examination. She also said that she had not seen the email prior to the Tribunal process. She initially said that the HR Team would know if the Respondent was recruiting within the Claimant's team. She herself had not been aware of any such recruitment at the time, but she acknowledged that the Research Department (where the Claimant was based) usually worked closely with a HR Manager called Katherine Eilbeck and Ms Swords accepted that it was possible that such recruitment was taking place without her knowledge. She also observed that vacancies for analysts always needed to be filled quickly because the research teams are "lean". We find that Ms Swords' evidence was honest in that she admitted that though she was not aware of any recruitment, it was possible that it may have been taking place.

44. Ms Swords was also referred to an email dated 9 February 2017 from Joseph Dickerson in which he said that he had been in Steve's office for a coffee and had been informed of the M situation and what the plans were. The email then referred to speaking offline. There was another email from Richard Taylor dated 9 February 2017 which said that "we won the Tribunal v Mr Radia who is now suspended pending a disciplinary process. No need to say more at this stage".

45. Ms Swords said that she had not seen these emails before the Tribunal process and could not comment on them; however, she reiterated that the Respondent had not made any assumption of guilt or misconduct at that point. The Tribunal notes that at the time these emails were written, there was considerable coverage in the Press relating to the first Tribunal's finding on the Claimant's credibility. To this extent, the Tribunal notes the Evening Standard article dated 9 February 2019 at CB2 page 638. Given this publicity, we further note that it would have been difficult for the Respondent

to prohibit such exchanges of emails within the organisation. The emails do not of themselves suggest that the decision taken by Mr Tucker to dismiss the Claimant was prejudged.

The Decision to Dismiss

46. This was contained in a letter dated 6 March 2017 from Mr Tucker to the Claimant (TB1 page 291-295).

47. The letter referred to the Disciplinary Meeting on 23 February 2017 and the fact that Mr Tucker had considered all that the Claimant had said at that meeting, together with his written submissions. Mr Tucker explained that the starting point for the Respondent was that an independent Employment Tribunal had found that the Claimant's evidence had not been credible and that he had either "*lied or misled*" the Tribunal in his evidence. It was this overall picture and the overall findings relating to the Claimant's credibility and bad faith which Mr Tucker said he had in mind. He had to consider whether the Claimant's behaviour was consistent with his continuing to work in the position of an analyst which required a high degree of ethical probity and honesty and also required registration with the FCA.

48. Mr Tucker referred in the letter to the FCA Handbook and the reference to a "fit and proper person" contained in Rule FIT 2.1 and also FIT 2.1.3G. Rule 2.1.1A noted that a relevant authorised person determining the honesty, integrity and reputation of staff being assessed under FIT should consider all relevant matters including those set out in FIT 2.1.3G which may have arisen either in the UK or elsewhere. 2.1.3G referred at sub paragraph 10 to "*whether the person or any business with which the person had been involved had been investigated, disciplined, censured or suspended or criticised by a regulatory or professional body, a Court of Tribunal whether publically or privately" (our underlining)*. It was undisputed that the Claimant had been publicly criticised by the first Employment Tribunal in a matter relating to his credibility.

49. Mr Tucker then went on to consider the four matters raised by the Claimant, where the Claimant said that the first Employment Tribunal had misunderstood the evidence which he had given. Mr Tucker looked at the first three issues raised by the Claimant and concluded on the basis of his own investigations that it had been reasonable for the first Tribunal to come to the conclusions they had and to cite those three matters as examples of the Claimant's lack of credibility. The fourth matter relating to when the Claimant was aware of his disabled status was ambiguous and Mr Tucker did not reach any conclusion on that matter as to whether he felt the Tribunal's findings could be justified.

50. Mr Tucker said that the Respondent did not accept the Claimant's allegations that his suspension and the disciplinary action were a consequence of his protected disclosure. He reiterated that the disciplinary proceedings resulted from the first Employment Tribunal's findings and nothing else. Mr Tucker also reviewed the Claimant's 2016 performance review. The Claimant had

alleged that he had been threatened because of his protected disclosure, but Mr Tucker found that the comments could not be properly considered to be threats. He concluded that the Claimant was simply being reminded of the proper approach to compliance matters which the Respondent expected from all its staff.

51. The Tribunal also notes that in his cross-examination, the Claimant accepted that his bonuses had not been reduced following the issue of Tribunal proceedings or the discovery of his protected disclosure and that his relationship with Mr Taylor whilst affected to some extent, continued to be a professional and pragmatic operational working relationship. The Claimant referred in his cross-examination to the relevant performance review (TB1 page 98) dated 2 December 2016. The Claimant referred to comments from Mr Taylor that he would "*strongly recommend that Milan does not put his regulator status at risk by delaying escalating such matters".* The Claimant had said in his written submissions to Mr Tucker that he regarded this as a threat resulting from his protected disclosure. It was put to the Claimant in cross-examination that these comments were Mr Taylor giving him constructive advice and were not meant to be threatening. The Claimant replied that he found the tone and comments "a little bit threatening" but he accepted that Mr Taylor may have been giving him advice. At the Tribunal Hearing, the Claimant was asked if he felt that Mr Taylor had been victimising him. The Claimant said that he did not believe so, but that he "felt a bit of concern" and that he wanted to try and remind the Respondent of their obligations following his revelation that he had been a whistleblower. The Claimant said that he was not accusing the firm of victimisation but just reminding them that he had made a protected disclosure.

52. Mr Tucker then went on to consider various comments made by the Claimant about the Respondent's closing submissions at the first Tribunal Hearing. Mr Tucker correctly noted that these were not directly relevant to the current disciplinary proceedings, but he had looked at both parties closing submissions and he noted that both parties had an opportunity to make representations to the first Tribunal and it was up to that Tribunal to reach its conclusions based on those submissions. We agree with his observations on that matter.

53. The Claimant had said in his written submissions following the Disciplinary Hearing that he intended to appeal the first Tribunal's decision. Mr Tucker said that he did not believe it was appropriate for the Respondent to await the result of that appeal. In any event, the Claimant did not appeal the first Tribunal's decision, nor did he challenge the first Tribunal's decision by using any of the specifically laid out procedures or processes available to him. When some of these were suggested to the Claimant by Ms Stone in her cross-examination of him, he replied, "I should have had you advise me".

54. Mr Tucker concluded in his Disciplinary Outcome Letter, that having considered the Claimant's observations with regard to the first Tribunal's findings, those comments did not make any difference to that Tribunal's assessment of the Claimant's credibility. Bearing that in mind, Mr Tucker

concluded that the Claimant's behaviour was gross misconduct and was incompatible with his remaining employed by the Respondent. This was especially the case as the Claimant was in a regulated position and his behaviour was not compatible with his being a fit and proper person for the purposes of the FCA Rules. Mr Tucker had considered whether it would be possible for the Claimant to continue to be employed in a different position, but he decided that he could not agree to this. The Claimant's employment was terminated forthwith. The Claimant was given the right of appeal.

55. In summary, the Tribunal finds that there was no evidence presented to it that Mr Tucker was influenced by any of the other managers in the Respondent, or that he was motivated by any other issues such as the Claimant's protected act or his protected disclosure. The starting point for his decision was the first Tribunal's findings of credibility. The Claimant was given an opportunity to put those findings into context, which he duly did at the Disciplinary Hearing and also with his further written submissions. In those submissions he chose to focus on four particular issues. These had been given by the first Tribunal as examples of why that Tribunal felt that the Claimant had misled them in his evidence. The Claimant had attempted to show why the first Tribunal's findings on those examples, were incorrect. The first Tribunal also referred to other matters to address the broader issues with regard to the disciplinary proceedings. Mr Tucker looked at those four issues as chosen by the Claimant, but he could not conclude that the Tribunal had been incorrect or unfair in their findings overall. Mr Tucker also considered the position under the FCA Rules bearing in mind that the Claimant was a regulated person.

Professor Mark's Notes

56. In his written submissions to Mr Tucker (and in his oral evidence at the Hearing) the Claimant put great emphasis on the first Tribunal's conclusions with regards to the weight figures contained in the medical expert's report (Professor Marks).

57. In his written submissions dated 23 February 2017, (at page 217) the Claimant said that "*it was highly unrealistic that I ever stated … to have weighed only 50kg. My 11 year old son currently weighs 45 kg and is within normal range for his age and height."* However, the Tribunal notes that the Claimant did not deny that he ever said that he weighed 50Kg. The first Employment Tribunal said that the Claimant did give such evidence and further that Professor Marks gave evidence that the Claimant had told him that he had weighed 50Kg at the close of his treatment. In the Claimant's submissions (at page 218) he appears to say that the reference to 50Kg was to his weight loss overall and that it was more realistic that he had said this, and not that he had weighed 50Kg at any given point.

58. During the course of the disciplinary proceedings, the Claimant had contacted Professor Marks who believed he still had his manuscript notes of his consultation with the Claimant, but he was travelling at the time and would need to return to the UK and find them. The Claimant also said in his

evidence that the first Tribunal had refused to allow Professor Marks to produce those handwritten notes as they had not been contained in the Tribunal bundle for the first Tribunal claim. The Claimant's argument was that if the first Tribunal had seen Professor Marks' notes they would have understood his (the Claimant's) evidence in context and would not have made their adverse findings on his credibility.

59. This Tribunal did see Professor Marks' notes which were contained at CB2 page 949. They show that against a heading "Weight Loss" Professor Marks had written 95Kg followed by a downward arrow to 50Kg. The Claimant accepted in his oral evidence that these notes would have recorded what the Claimant told Professor Marks. It would appear from Professor Marks' own consultation notes that he had been given information by the Claimant that there had been weight loss down to 50Kg. This is wholly consistent with the basis upon which the first Tribunal reached its adverse findings of credibility.

60. The Claimant said that he had contacted Professor Marks prior to the Disciplinary Hearing but that he only returned from his travels in March 2017. The Claimant could not, therefore, include Professor Marks' written notes in his written submission to Mr Tucker. As a result, Mr Tucker did not have Professor Marks' notes available as at the time he reached the decision to dismiss. The Claimant told the Tribunal that he had obtained the notes from Professor Marks on or around 20th March 2017.

Appeal Against Dismissal

61. On 13 March 2017, the Claimant lodged a written appeal against the disciplinary outcome (TB1 pages 296-300). In that appeal document, the Claimant complained that in reaching his decision to dismiss, Mr Tucker had relied on Herbert Smith's transcripts of the Tribunal Hearing, which the Claimant had not been shown. However, this Tribunal has already found that the transcripts prepared by both solicitors were essentially the same in all material respects. Therefore, we find that the fact that Mr Tucker had seen the Herbert Smith's transcripts, whereas the Claimant had not, would not have prejudiced the Claimant.

62. The Claimant also complained that Mr Tucker had only looked at extracts of the transcripts and not the full transcript. However, Mr Tucker had looked at extracts relating to the four points selected by the Claimant to counter the first Tribunal's credibility findings. The first Tribunal had given those four matters as examples of where the Claimant had misled them. Therefore, the extracts had not been selected by the Respondent, but had been their response to the Claimant's own selection of those particular items. The Claimant complained that there had been no witness statements or evidence but it is not clear what the Claimant means by this. If the Claimant meant witness statements produced in the first Tribunal Hearing, then the Claimant would have seen them in any event and Mr Tucker would not have seen them at all. In any event, it was clear from Mr Tucker's evidence and the dismissal letter, that he had not relied on such statements in order to reach his disciplinary decision to dismiss.

63. The Claimant then reiterated his comments on the three remaining examples which he had presented for discussion at the Disciplinary Hearing. We note that there was no reference in this appeal document to the fact that the Claimant had contacted Professor Marks and was awaiting a copy of his manuscript notes. From the evidence which the Tribunal heard from the Claimant at this hearing, the Claimant would have known at the time he wrote the appeal submissions that he was awaiting such documents from Professor Marks. The Tribunal also note that there is nothing contained in the appeal submission which is new or different from the submissions already made by the Claimant following the Disciplinary Hearing.

Appeal Outcome

64. There is no dispute that Tim Cronin was appointed to hear the Claimant's appeal against his dismissal, but that he did not call an appeal hearing or meeting. He reviewed the evidence and Mr Tucker's decision and the Claimant's written submissions and the relevant documents referred to. Mr Cronin considered that he had all the evidence he needed to consider the appeal and he subsequently wrote to the Claimant with the outcome on 10 April 2017 upholding the dismissal decision (TB3 994).

65. The Tribunal have carefully considered the contents of Mr Cronin's appeal outcome. Mr Cronin summarised the points made by the Claimant about the Respondent's process, namely:-

    1. That he was initially told that there would be an investigation;

    2. That he was subsequently told there would not be, although Mr Tucker reviewed certain "cherry picked" notes in coming to his decision; and

    3. That the Claimant was not provided with witness statements or witness evidence.

66. Mr Cronin concluded that the Respondent had undertaken an appropriate level of investigation in the circumstances. Given the nature of the allegations (namely the first Tribunal's findings) there were no other witnesses who could have been interviewed. The Claimant had challenged the accuracy of certain of the Tribunal findings and had selected various points which he wished to make. Mr Tucker had reviewed Herbert Smith's transcript of those parts of the first Tribunal hearing. Mr Tucker had not selected those extracts himself, but had been guided by the Claimant's own selection as contained in his written submissions. Mr Cronin noted that the Claimant had access to his own solicitor's notes and had then subsequently been provided with the Herbert Smith extracts following Mr Tucker's decision. This Tribunal have found as a matter of fact, that the two transcripts do not vary in any material regard. Mr Cronin, therefore, concluded that there was no unfairness in this process. We agree with his conclusion.

67. Mr Cronin also considered the Claimant's submission that it had been unfair to dismiss him on the basis of the Tribunal's findings relating to his credibility, given that the Respondent had approached defending the Tribunal claims by challenging the Claimant's credibility. Mr Cronin concluded that it was open to the Respondent to defend itself against the Tribunal's proceedings as it thought fit. The Claimant had been under a duty to give honest evidence and the first Tribunal had found that he did not do so. The Claimant could not then criticise the Respondent for challenging his credibility.

68. Mr Cronin then went on to review the remaining three issues raised by the Claimant which he said had been unfairly and wrongly concluded by the first Tribunal against him. Mr Cronin set out why the Respondent did not believe that the Tribunal's findings were incorrect.

69. Finally, Mr Cronin noted the Claimant's submissions that the Respondent had "*jumped on the first opportunity to dismiss him because he had issued a disability discrimination claim and made a disclosure to the FCA*". Mr Cronin said that he had found no evidence that this had been the case and reiterated that he himself had not been motivated by any such matters. Mr Cronin also then reiterated Mr Tucker's concerns with regard to the fit and proper person test bearing in the mind the first Tribunal's credibility findings against the Claimant.

Claimant's Evidence at the Hearing in October 2017

70. The Tribunal make the following observations with regard to the Claimant's evidence given to this Tribunal on 18 and 19 October 2017:-

- The Claimant frequently did not answer the question that was put to him. He would often give oblique or apparently irrelevant answers and had to be reminded of the actual question;

- The Claimant would frequently contradict in his answer to a subsequent question, evidence which he had given earlier. This would then have to be clarified by the Tribunal, which was in itself time consuming and often confusing. This may not have been intentional on the Claimant's part, but it did occur frequently and the Tribunal Judge specifically brought this to the Claimant's attention.

71. This manner of giving evidence meant that the Claimant's evidence was frequently unclear and often apparently contradictory, which in turn affected the Tribunal's ability to rely on the Claimant's evidence with any confidence.

Conclusions

Unfair Dismissal

Was the reason or principal reason for the dismissal that the Claimant had made a protected disclosure?

72. The Tribunal heard no evidence to suggest that the reason or principal reason for the Claimant's dismissal was his protected disclosure. The Respondent had been aware of the protected disclosure from 4th November 2016. The Claimant's own evidence was that following the Tribunal Hearing there had been no substantial change to his employment situation. The Claimant also accepted in his evidence that his working relationship with Richard Taylor had not been substantially affected and that he had continued to receive bonuses. The suspension and disciplinary action leading to dismissal occurred after the first Tribunal's Judgment in February 2017, which indicates that the first Tribunal's findings and not the public interest disclosure were the motivation for his dismissal.

Was the reason for the dismissal the Claimant's protected act in bringing the first claim?

73. The Tribunal did not hear any evidence which supported such a conclusion. The Claimant brought the first Tribunal claim on 22 May 2015 and as set out above, there was no disciplinary action taken against him until the first Tribunal's decision relating to credibility in February 2017. This does not suggest that it was the protected act which motivated the Respondent in his dismissal. The Tribunal has not seen any evidence from which it can conclude that such an act of discrimination took place.

Was the reason for the dismissal the Claimant's conduct, namely the findings of the Tribunal in the first claim as regards the Claimant's credibility?

74. Until the first Tribunal's findings in February 2017, even though the Respondent believed that the Claimant had not been wholly honest in his evidence at the first hearing, and they were aware that he had contacted the FCA, the Respondent did not take any action against the Claimant as regards any disciplinary process. It was not until the Respondent had the first Tribunal findings on credibility that it took any action against the Claimant: indeed the Claimant was in the USA with clients at the time the first Tribunal Judgment was promulgated. It was only when this decision was provided to the parties (and recorded in the Press) that the Claimant was recalled upon his suspension.

If the dismissal was related to conduct was the dismissal fair and reasonable?

Did the Respondent believe the Claimant was guilty of misconduct?

75. From the evidence we heard from the Respondent's witnesses and from the other documentary evidence available to the Tribunal. We find that the Respondent did believe that the Claimant was guilty of misconduct. The Respondent had the first Tribunal's findings and Mr Tucker had heard and considered the Claimant's arguments as to why he believed that the first Tribunal had misunderstood him and had incorrectly assessed his credibility. Mr Tucker had concluded that the Claimant had not demonstrated that the first Tribunal had been unjustified in reaching their conclusions. Mr Tucker said that he was satisfied there had been no "miscarriage of justice". Whilst this might be a somewhat grandiose claim, we understand that having considered the Claimant's points, he could see why the first Tribunal had made their findings.

Were there reasonable grounds for that belief?

76. Again based on our findings of fact above, this Tribunal concludes that there were reasonable grounds for the Respondent to reach that belief. We have set out above in some detail our findings of Mr Tucker's deliberations in reaching his disciplinary decision and we rely on those findings in reaching our conclusion. Mr Tucker had allowed the Claimant to "defend" himself and to put the first Tribunal's findings into context. The Claimant accepted that he had been allowed to say what he wanted to at the Disciplinary Hearing. Having heard the Claimant's point of view, and bearing in mind our findings on the Claimant's arguments, it was reasonable for Mr Tucker (and the Respondent) to reach their belief in the Claimant's misconduct.

Had the Respondent carried out a reasonable investigation in the circumstances?

77. It was accepted in evidence that no investigation had been carried out as such. However, given that the Respondent's belief in the Claimant's misconduct was based on the first Tribunal findings, we find that there was limited investigation which could have been carried out and, therefore, the investigation was reasonable in all the circumstances. The Respondent did give the Claimant the opportunity to explain and put his point of view with regard to the Tribunal's findings and to put them in context. This was the purpose of the Disciplinary Hearing and indeed the Claimant took that opportunity in his written submissions following the Disciplinary Hearing. Mr Tucker had confirmed that he had no intention of re-opening the Tribunal's findings but he did accept that the Claimant should be allowed to explain himself. Mr Tucker referred to "miscarriages of justice". He also made references to being comfortable about the Tribunal's decision. These were interpreted by Mr Neaman as being sinister and showing that Mr Tucker was trying to prejudge the issue. The Tribunal do not agree with this interpretation.

Was the dismissal within a reasonable range of responses open to the Respondent?

78. Bearing in mind the FCA Rules and the Respondent's regulated status and the Claimant's need to be an approved person, the Tribunal finds that the dismissal was within the reasonable range of responses. The Respondent had given the Claimant the opportunity to redress the balance of the first Tribunal's credibility findings, which he had not been able to do. Therefore, based on those Tribunal findings and based on the specific provisions of the FCA Rules, in particular 2.1.3G (10), the Respondent was within a reasonable range of responses in taking the first Tribunal's criticism of the Claimant into account and in dismissing him.

79. The Tribunal notes that the failure to have an Appeal Hearing was not specifically raised as unfair procedure under Section 98 (4) in the List of Issues. The Tribunal notes that it was wholly irregular for the Respondent to act in this way: it was contrary to best practice and contrary to the Respondent's own appeals process (CB1 pages 91, 92 and 93) and also contrary to the ACAS Code. However, the Tribunal finds that, unusually, holding such an appeal would not have made any difference.

80. The Claimant was asked what he would have said had he been given an opportunity to have an appeal hearing with Mr Cronin. He first said in response to Tribunal questions, that his written submissions had covered the main points but that he would have included Professor Marks' consultation notes. However, in re-examination on the same question, the Claimant said that he would have submitted much more detailed written submissions and would have annotated Professor Marks' notes to explain what had happened and to show that the first Tribunal's findings were incorrect. First, we note that this is an example of the Claimant giving inconsistent answers to the same question. Secondly, the Claimant did not specify the nature of the full details he would have included in his written submissions. Thirdly, as regards Professor Marks' notes, we have already found that those notes did not in fact support the Claimant's version of events and so would not have assisted him, even if he had an Appeal Hearing.

81. The Tribunal also notes that as regards the Claimant's own evidence as to when he had Professor Marks' notes, he was aware that Professor Marks had found the notes and would send them to him when he submitted his appeal submission on 13 March 2017. Further, he said that he had Professor Marks' notes on or around 20 March 2017. This was before Mr Cronin had written with his appeal outcome. It would have been open to the Claimant to send Professor Marks' notes to Mr Cronin to allow him to consider them prior to reaching his decision. The Claimant did not choose to do so. Therefore, the Tribunal does not find that the failure to hold an appeal hearing rendered the dismissal unfair.

Protected Disclosure Detriments

82. The Tribunal has set out above its findings of fact that the Respondent was not motivated by the Claimant's protected disclosure. The Tribunal, therefore, finds that the Claimant's suspension was not on the ground that he had made a protected disclosure. The Respondent had known of the protected disclosure as from 4 November 2016. The suspension followed the promulgation of the first Tribunal's Judgment and its findings on the Claimant's credibility. Bearing in mind the publicity that flowed from the first Tribunal's findings; the nature of those credibility findings (including a reference to concern over the Claimant's approved status) and the fact that the Claimant was with clients in the USA, suspension was not an unreasonable action pending further investigation. There is a genuine explanation for the suspension, which is not the protected disclosure. (**Fecitt & others v NHS Manchester [2011] EWCA Civ 1190**) The Tribunal further finds that the Respondent's failure to hold a dismissal appeal hearing was not done on the basis of his protected disclosure. Whilst not in accordance with best practice, we have found that the failure to hold a dismissal appeal hearing was Mr Cronin's decision and was based on his opinion that he had all the evidence he needed to reach a conclusion on the Claimant's appeal – this is an adequate explanation for his conduct which is not connected to the protected disclosure. The Claimant's claims do not succeed in this regard.

Victimisation

83. The Tribunal finds that the Respondent did not subject the Claimant to the following detriments by reason of the protected act: suspension, unreasonably delaying the response to his grievance appeal; not holding a dismissal Appeal Hearing. In reaching these conclusions we refer to our findings of fact set out above. The Claimant accepted in his evidence that his working relationship with his Line Manager Mr Taylor and the Respondent generally had been professional and pragmatic following not only the bringing of the first Tribunal claim but also after the Hearing in November 2016. The Claimant continued to receive bonuses and was in the USA with clients, when the first Tribunal's Judgment was promulgated in February 2017. The protected act had not adversely affected the Respondent's conduct towards to the Claimant. We have found that it was the first Tribunal's findings as to credibility, which led to the Respondent's actions with regard to suspension, investigation for misconduct etc. We have also found that the reason for the delay in the grievance appeal was not the protected act itself but was a practical consequence of the Tribunal litigation process and the duplication of the grievance issues with the Claimant's claims in the Tribunal. We heard no evidence with led us to conclude that the failure to hold a dismissal appeal hearing was because of the protected act.

84. The Claimant, therefore, fails on all his claims and they are all dismissed.

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Employment Judge Henderson on 14 November 2017