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EMPLOYMENT TRIBUNALS

Claimant: Mr B Astoin

Respondent: Bank of England

Heard at: London Central **On:** 26-29 July & 1 August 2017

Before: Employment Judge Goodman

Representation

Claimant: In Person
Respondent: Mr M Sethi, Counsel

JUDGMENT having been sent to the parties on 2 August 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant was dismissed for serious misconduct on 6 December 2016 for accessing documents not relevant to his work. Arising from that dismissal, he has brought claims against the Respondent for unfair dismissal both under Section 98 and for making a protected disclosure.

2. The disclosure relates to a breach of legal obligation under the Data Protection Act to keep confidential personal material and the dates of his reports were 14 April 2016, as stated in the grounds of claim, and an earlier report in August 2015 which arose from a Preliminary Hearing.

3. The August 2015 report related to an exit interview of a former manager. The April 2016 disclosure related to a security report of that same manager.

4. The issues in relation to protected disclosure are firstly whether either disclosure is protected, and secondly, whether either episode was causative of dismissal, on the basis (argued by the respondent) that, among other things, the Claimant was already under investigation for other matters at the time of the second disclosure.

5. There are also claims of reach of the right to be accompanied, under statute and in contract, and of unlawful deductions from wages.

Conduct of Proceedings

6. The claim was presented on 17 February 2017 and directions given on 1 March. There was a response on 29 March followed by a Preliminary Hearing on 24 April 2017 when Judge Tayler drew up a List of Issues for this hearing and confirmed that the orders were in force. Following that, the Claimant answered further particulars and the Respondent amended their response.

7. There was a further Preliminary Hearing on 21 June to hear an application by the Respondent that this hearing take place in private under Rule 50 and an order was made. In that connection in the course of this hearing, I explored with the Respondent's witnesses the extent of discretion to be exercised when preparing a written note of these reasons. It was clarified that they were particularly concerned to keep confidential the identity of any staff below head of department level, and if possible, the technicalities of their data storage systems with a view to reducing access to material which could be used in phishing emails or key words to discover procedures. It was agreed that a draft of the written reasons transcribed from the contemporary recording would be sent to the respondent before promulgation to check that their security concerns had been met. That has been done.

8. The Claimant applied for reconsideration of the privacy order under Rule 50. That was refused on 21 July. At the same time an order was made that he disclose his witness statement or be struck out. In consequence of that, a relatively short witness statement was served at a late stage.

9. Other matters arose during the course of this hearing. On the first morning the Claimant produced two further documents which added material to supplement his otherwise sketchy witness statement. The Respondent objected on the basis that it was an attempt to circumvent the unless order. One of these documents was allowed in to supplement his witness statement, as it was material sent by the Claimant to the Respondent in connection with his application to reconsider the privacy order, and the Respondent would have had time to consider it. The second (the "grounds and events" document) was to be treated as a skeleton argument rather than evidence.

10. On the second day, the Claimant who until then had not had advice, and seems not to be familiar with Employment Tribunal procedure, attended with a representative from the ELIPS Scheme and sought an adjournment of one month to prepare the documents. That application was refused for reasons given and recorded at the time (27 July).

11. Also on the second day, the Claimant, in the course of questioning Ms Gerken, the official of the Bank who dismissed him, about the high turnover of ethnic minority staff, was asked to clarify whether he was suggesting that his ethnicity played a part in his dismissal and whether this was in fact a race discrimination claim. The Claimant clarified that it was not, but instead advanced that the European Convention on Human Rights was now engaged in consequence of the Rule 50 Order. I draw from that reply that there is no claim for race discrimination before this Tribunal.

Evidence

12. The Tribunal heard evidence from: **Eustathios Triantafellou**, senior manager for Quantitative Modelling Team, who managed the Claimant's

team from January 2016 and was his line manager during many of these events. It was he who investigated matters which led to the decision to discipline and eventually dismiss the Claimant.

Charlotte Gerken, Director for Supervisory Risk Specialist Directorate, who dismissed the Claimant following a hearing.

Lyndon Nelson, Deputy CEO of the Prudential Regulation Authority, who was the Executive Director for Supervisory Risk as Regulatory Operations. He heard the Claimant's appeal against dismissal.

Brahim Astoin, the Claimant.

13. As well as his witness statement and the document of 18 July, the Tribunal have treated his Grounds of Claim document and his Further and Better Particulars as containing his evidence. He was questioned by the Respondent on that material, but inevitably there were some areas of his evidence that were not covered by his evidence.

14. There were also two written statements, one from **Leo Cameron**, who accompanied the Claimant to meetings and another from his mother, **Fatima Ait Benbal**, about the effect of dismissal on the Claimant. The content of neither statement was pertinent to the matters in issue in this liability hearing.

15. There was also a bundle of documents, ordered by Judge Tayler to be limited to 500 pages, but by now 1,309 pages, with further additions. The Tribunal read those to which it was directed and has also read into some additional material, such as grievances and grievance outcomes, which were not referred to in witness statements.

16. Finally, before adjourning to consider the decision, the Tribunal heard submissions from each side both oral and written.

Findings of Fact

17. The Respondent is the UK's Central Bank. An arm of the Bank is the Prudential Regulation Authority, which regulates and supervises banks, building societies, credit unions, insurers and major investment firms. Since the financial crisis it has had particular responsibility for ensuring that they are resistant to unexpected market stress.

18. All staff of the Bank sign the Official Secrets Act. Inevitably the Regulator's powers mean that it is the subject of intense curiosity and interest by those it regulates, and the wider financial system, because adverse decisions in the Bank can have lasting consequence for financial institutions. Inevitably security must be high.

19. The Claimant was employed as a Risk Specialist in the Risk Architecture Division. He was paid (by the date of dismissal) a package of £108,000 per annum including benefits.

20. A feature of the Bank's system is that the institutions it regulates upload data to an electronic filing system which the Bank then uses to model outcomes. It also has tools to test the accuracy and authenticity of data supplied. It is important that use of these tools preserves the integrity of the data, and do not risk its corruption.

21. The Respondent has an access control policy, which provides that access to information must be shared across the Bank unless there is a 'specific need to know' restriction. The default option was that all should have access to information unless there is a good reason, to prevent silo working. There was also a provision that access to Bank information assets must be for Bank purposes only.

22. From time to time documents which should be restricted on a need to know basis are misclassified and put on open access, as will be seen in this case.

23. Due to his seniority, the Claimant was classed as a 'super-user' for the access to documents.

24. The Respondent has a standard document of disciplinary procedures; it is largely modelled on the ACAS Code, so provides for staged warnings leading to dismissal on the third attempt if sufficiently serious. There are definitions of serious misconduct, which include 'actions that lead to a breakdown of trust in the employee, e.g. through a lack of judgment or unprofessional behaviour'. This is distinguished from gross misconduct, for which dismissal is without notice where it is "serious enough to cause or be likely to cause serious harm to the Bank". The Claimant was dismissed for serious misconduct, with notice, so was not in the most serious category.

25. The Claimant was first hired on 22 July 2013, and managed by Tim Murnaghan. Documents show that his performance was reviewed at 4 months, and there was concern about the standard of his communication with colleagues. It was not always possible for them to understand him, or for him to communicate to them what he meant. This is reiterated in December 2014, around 18 months after hiring Colleagues did not understand what he said, or he did not seem to understand the purpose of the discussion.

26. The documents also show that others considered that the Claimant's 12 month probation period should have been extended, but that Mr Murnaghan had been too slow to act on this. There was a Human Resources discussion about it, of which Ms Gerken was aware, in 2015. A decision was made not to reverse his confirmation in probation, due to the lapse of time.

First Protected Disclosure

27. The incident which is alleged as the first protected disclosure in this case was on 14 August 2015. The Claimant came across a document which was the HR exit interview with Tim Murnaghan, who was about to leave the Bank's employment. It showed that the reason Mr Murnaghan gave for

leaving was more complex than the reason given to the Claimant and his colleagues, that he was leaving to pursue his own private interests.

28. The Claimant forwarded this document to his new line manager, Andrew Cortis, and to his colleague Mr Triantafellou, without comment other than "FYI". There is no evidence before the Tribunal that it was discussed with them. We can see from the documents that when Mr Triantafellou saw it he recognised that it was a confidential document misclassified by HR, and he immediately asked HR to ensure that it was deleted from open access and moved to the confidential part of the database.

29. On 22 August, Mr Murnaghan began his garden leave and Andrew Cortis became the line manager officially.

Performance Improvement

30. On 9 September, Andrew Cortis put the Claimant on an informal PIP, (performance improvement plan) which was to last six weeks. Mr Cortis was one of those who believed that the Claimant's probation should have been extended because of concerns about his performance. The areas needing improvement appear as eight bullets on the first PIP; they included positive engagement (he was said not to engaged), not debating the legitimacy of a task, to be careful about deadlines, to manage his time, particularly with regard to informing other departments about progress, to focus on and use better prioritisation, and to be sensitive to the confidentiality of the working material. It is not quite clear exactly what concern prompted inclusion of that objective in the PIP. It may be prompted by the forwarding of the Tim Murnaghan interview.

31. The Claimant progressed through the PIP. After six weeks it became clear that he had not achieved, and at least one task, which subsequently became the subject of an operational incident, had not been completed at all.

32. On 4 November 2016, Ashley Kibblewhite the manager overseeing Mr Cortis, contacted security with concerns about the Claimant: he seemed to be consistently checking other people's diaries. Mr Kibblewhite also suspected the Claimant of having altered the account in his performance review, judging by the style of the English that now appeared in it. He seemed to be searching the intranet, as a result of which he had found the Tim Murnaghan exit interview. There was a concern that data had been disappearing from the system although there was no evidence the Claimant was responsible. He mentioned his performance was under review. He asked security to check whether the Claimant was emailing private documents to his home address, and whether he had altered his performance review. The outcome of this is unknown, but the reference marks that Mr Kibblewhite was suspicious even then.

33. Towards the conclusion of the PIP the Claimant made a complaint about the quality of the feedback that he was receiving, and it was referred to Mr Cortis. On 7 November 2015, Mr Cortis reportedly said to the Claimant: "leave the Bank voluntarily or it will be long and painful way".

34. On 9 November, the Claimant was invited to a disciplinary meeting about his failure to perform against the improvement plan.

35. On 10 November, the Claimant lodged a grievance about Mr Cortis, saying he had been bullying him.

36. On 30 November, there was a mediation between the Claimant and Mr Cortis.

37. In preparation for this both signed a mediation contract. Unfortunately, the mediation was not successful, and on 7 December 2015, Mr Cortis issued the Claimant with a first written warning, to be current for 6 months, for unsatisfactory work. It referred to the need to focus on collaboration, positive engagement, being open to change, open to challenge, being accurate with regard to deadlines and more accurate documentation. He was being abusive at meetings such that others were afraid to speak up.

This reflects concern in the documents that the Claimant was challenging his managers. For example, he made disparaging comments about the educational background of Mr Cortis compared to Mr Murnaghan, at meetings he said the reason others did not understand him was because they were less well educated.

38. Following that first written warning, the Claimant was put onto a further formal performance improvement plan, starting 17 December 2015. As to the fate of this plan, it can be seen that in February the next line manager, Mr Triantafellou, proposed to extend it to give the Claimant a little more autonomony in tasks. It was put on hold, never to resume, on 10 June, after the Claimant had been asked to attend a disciplinary meeting for his conduct.

39. In the meantime, on 17 December, the Claimant appealed against the first written warning, complaining of a poor relationship with Mr Cortis, and that he did not understand the technical details.

Second Warning

40. On the 4 December 2015 began a short course of conduct which led to a further warning. The Claimant made offensive remarks in public to another manager, Norbert Janssen, saying he had handled the performance improvement plan poorly and was obviously an inadequate manager, which was why he had not succeeded in getting a Head of Department job. Mr Janssen was offended, particularly at this being done in public. The Claimant continued this attack in a series of emails over the following week. The Claimant asked Mr Janssen to provide his CV. The Claimant was rebuked for doing so and for questioning the competence of his managers.

41. On 18 December 2015, following a hearing, Ashley Kibblewhite issued the Claimant with a final written warning. He said “your actions form part of a pattern of behaviour which you have been warned you must change”, in other words he was not being disciplined for a single outburst. He was told

there would be further sanction "if any aspect of your performance, conduct or attendance falls below the required standard."

42. The Claimant appealed both warnings. The outcome to the appeal against the first was delivered by John Sutherland on 3 February: he was not successful. The final warning appeal was decided on 7 March 2016, again against him, by Sarah Breeden.

Security Investigations

43. Shortly after the appeal outcome on the first warning, on 8 February Mr Kibblewhite again approached security, mentioning the same concerns: that the Claimant was checking diaries, had access to sensitive data, had accessed Tim Murnaghan's exit interview and seemed to be using the electronic filing system as a search tool. He wanted the Claimant's security clearance removed. He was explicit later (when being interviewed in September 2016 about the Claimant's grievance) that in his view the Claimant's behaviour in searching for and using documents was an unacceptable risk to the organisation, and that he might want to use material as revenge for being disciplined.

44. On 25 February, the HR Department consulted with the security team about investigating Mr Kibblewhite's report. They decided to review the Claimant's computer use from 10 September 2015 to 7 January 2016.

Stress Test Incident

45. On 26 February occurred the operational incident which eventually formed part of the final proceedings that led to the Claimant's dismissal. The Respondent had two tools with which to query data uploaded by supervised institutions. The first was about to be archived as the developer had left the Bank; it was used to asses the validity of data submitted by institutions, and to access information for storage and reporting of the stress test market. The second was an analytical tool still in development, used to reconcile and validate underlying data. At the time the Claimant had partial access to

the first tool and none to the second. The question has arisen in the course of proceedings as to whether the Claimant had authority to use either tool. The Claimant asserted that he did, and referred to a document called TOR prepared on 23 February by Mr Triantafellou, but dated after completion of the plan on 7 March. The Claimant says that he was to develop a project for assessment for his PIP. The plan itself makes no reference to either tool one or tool two, but instead to the transfer of data from one application to another application. The PIP had been extended on 16 February to give the Claimant more autonomy.

46. Subsequent investigation shows that on 26 February a user of tool one, Mr W, lost access to data. He was one of two people who used the tool daily. He discovered it was intermittent and that it ceased if he deleted a large spreadsheet that had just been uploaded. He believed it occurred because the spreadsheet contained characters where the programme would expect numbers; as a result data had become unavailable at least for a time. His concern was whether this loss persisted, and whether the data itself had been compromised. The security investigation that took place after Mr W described his problem, on 3 March, showed that the large spreadsheet file had been uploaded at the Claimant's request by a colleague called M.C, who had access to both tools. An email shows that the Claimant asking for it to be uploaded to both. The Claimant subsequently said that he had not himself prepared the spreadsheet; he was adopting an earlier document prepared by Mr S in September 2015.

47. Mr Triantafellou's evidence was that the Claimant should have agreed his project with his line managers first. The Claimant (in the disciplinary meeting on 26 October) explained that he wanted to know whether the tool could run tests on a number of different documents at once, rather than having to test them one by one, so he would know how long his project could be expected to take to completion. This explanation was not given at the time.

48. On 4 March, the day after the security incident had been logged, Mr Kibblewhite and Mr Triantafellou met HR: Mr Kibblewhite made plain that he

wanted the Claimant to be dismissed for trawling confidential material and for accessing the second tool. He said he had new material (access to the second tool). Mr Cortis expressed frustration at trying to manage the Claimant on a PIP.

49. There was a round table discussion about the Claimant on 15 April because Mr Triantafellou had asked the Human Resources Department on 8 March if this should be viewed as a performance issue or a behavioural (conduct) one. One of the outcomes was that on 5 April following that the Respondent took the Claimant's laptop away for 3 days to test. When it was restored on 8 April, the Claimant noted there was a sticker on it saying INV480; this is the code for the security investigation of 26 February incident.

50. On 8 April, the Respondent decided that they should investigate the record of the Claimant's computer activity from 22 February to 4 April. The logs showed that he had accessed a number of documents outside his role; Mr Triantafellou was asked to mark up which were related and which unrelated to his legitimate work. Unrelated items identified included looking at other colleagues' work, looking at the expenses of another employee. Mr Triantafellou was asked to check the Claimant's timesheets and clock cards.

51. The initial outcome of security investigation was that there was no malicious intent in what the Claimant did on 26 February, but the Claimant had uploaded the document, and that he had done so via MC.

Second Protected Disclosure

52. While this was going on, came the second matter alleged as a protected disclosure. According to the grounds of claim, and accepted in the initial response by the employer, this occurred on 14 April. Other than that, the Claimant has not given evidence on it. Mr Triantafellou says that on 15 April the Claimant came and asked him what INV470 (not 480) was, and he replied that he did not know. The contemporary email of 19 April from Mr Kibblewhite shows that Mr Triantafellou reported this to Mr Kibblewhite. The

Claimant says that on 19 April he asked the same question of Mr Kibblewhite. Mr Kibblewhite met him that evening, and kept a note of their discussion. He also told Vanessa Acevedo of HR, who said she would arrange to get the file reclassified, as INV470 was the security investigation into the data activities of Mr Murnaghan when he was on garden leave, in case Mr Murnaghan was using the Respondent's data to set up his own company. (They concluded was that he did not).

53. On 15 April, early in the day, after he had heard from Mr Triantafellou about INV470, but before Mr Kibblewhite had spoken to the Claimant, Mr Kibblewhite told security. They said that between 11 and 18 April the Claimant had looked at similar material; there is a log of his additional data use after the Claimant's laptop was returned. On 19 April Mr Kibblewhite told security that the Claimant was searching for internal security reports, including INV470. Mr Kibblewhite was concerned that in view of his behaviour he should not have access to the electronic filing system at all. Security replied that they would reclassify the classified document.

54. On 20 April the Claimant was called to an investigation meeting with Mr Triantafellou about the 26 February incident. He was given the report of the incident, told that he had last altered the document that was being uploaded, and asked why he did it. He blamed the tool, saying that it was in development and not robust and that was why it had failed. He said he wanted to run the report. He was asked why, and he was told there was concern about the risk to the Bank's sensitive information. The Claimant did not say that he was doing this as preparation of the project for PIP (the explanation given later at the disciplinary meeting). He simply said that it was MC who had uploaded it, and that he was doing it to run the report.

55. Mr Triantafellou concluded that the Claimant had not done this with malicious intent, but that he had not displayed sound judgment. There was no legitimate business reason why he should have done it. He thought that the Claimant should have agreed his project with the line manager first. There is dispute as to whether what the Claimant did was within the scope of his objectives for the PIP.

56. On 21 April the Claimant complained that he felt stalked.

57. Throughout May there is evidence that this incident was discussed between various security departments and Mr Kibblewhite. Security report number INV480 of 12 May records findings that the Claimant had searched for irrelevant data, such as colleague's expenses reports, that he was an insider risk because of poor behaviour, and malicious activity by disaffected staff could pose such a risk; that the delay since 26 February meant the results were inconclusive. There was concern about whether it was a performance issue. The report says that he persistently searched for and reviewed documents unrelated to his role at the Bank. As disaffected staff could pose a strategic information security risk.

58. At the same time as Mr Kibblewhite was concerned about security, Mr Triantafellou was concerned that the Claimant's behaviour in searching for irrelevant documents showed the lack of focus, which was one of the matters expected to improve in his performance improvement plan.

Disciplinary Proceedings

59. Mr Triantafellou, Ms Gerken and various Human Resources personnel met on 1 June to discuss whether the matters raised in the investigation report amounted to poor conduct or poor performance, and they decided that it was conduct. The Claimant was then invited to a disciplinary meeting. A 6 June letter invited him to a meeting on 13 June. He was told his conduct continued to be a cause of concern. He had been involved in an operational incident that resulted in investigation of his online activity. There was no reason for him to be testing the file given his PIP objectives, and he had not provided an explanation of why he was doing it. Secondly, he had persistently searched for documents unrelated to his role in the Bank, including expenses claims for another employee, and the exit interview which had been incorrectly classified. Thirdly, he purposely searched for information on security reports, reviewing "materials related to a sensitive investigation that had inadvertently been misclassified by a third

party stakeholder within the Bank (INV470). You appear to be constantly trawling through information that does not relate to your role." He was told his behaviour appeared to follow a pattern of disruptiveness, and raised serious concerns about his intentions. He had previously been warned about his behaviour by previous and current management, and there was concern that "you continue to behave in ways that are unexpected. Furthermore I am concerned that your actions are such that the management team in RAD cannot continue to have trust in you as an employee particularly in light of the sensitive nature of the information we handle."

Delay in Disciplinary Proceedings

60. The Claimant's response was to put off the meeting, which in fact did not take place until 26 October. Initially he asked for an extension to 20 June in order to prepare. Then on 13 June the Claimant raised a grievance questioning the disciplinary process. Human Resources advised that this should be concluded before disciplinary procedure continued. The grievance was not upheld on 18 July. On 22 July, the Claimant appealed that decision. On 2 August he added to the appeal. some of the 2nd August material was treated as a fresh grievance. The appeal hearing was on 12 August. The decision was made known on 5 October.

61. The Claimant's fresh grievance was resolved on 5 October by Ms Coffey. She said that his report of a misclassified document had resulted in discipline; and the investigation was already under way at the time.

62. Grievances now being out of the way, on 6 October, in the morning, Ms Gerken reset the time of the hearing for the 12 October. Later that day the Claimant asked for a hearing of his November 2015 grievance, the one which had been subject of a failed mediation at the time.

63. The hearing was reset for 10 October, whereupon the Claimant said he had a medical appointment. It was reset for 12 October, whereupon the Claimant booked holiday for that date.

64. The Claimant's actions might be suspected to show that he was focused on the expiry of the final written warning on 17 December. If Ms Gerken suspected that, her suspicion was correct, because in the course of these proceedings, the Claimant admitted that it was a strategy. He said he was doing these things because: "I knew the game; it was the race between me and the management to get there by 17 December 2016."

65. While the Disciplinary Hearing was being held up, other events took place. On 28 July there was a further security report into the Claimant's use of the intranet. It was found that he had continued to access files unrelated to his work. Ms Gerken decided however not to add to the charges already put to him.

66. On 2 September, Ms Gerken asked the Claimant's managers for an update on his performance, in case his conduct had in fact got better. It was reported back to her that he had been taken off PIP tasks because that seemed fairer as while he was under discipline was not focusing properly on the job. He was late with targets, but more particularly, he continued to bombard HR and Communications with "circular matters" and consent queries, indeed it was questioned whether his mental health was affected. It was confirmed to Ms Gerken nonetheless on 19 September that he was in fact fit to work. The core complaint was: "he will not accept responsibility; he makes others do his work."

67. On 6 September, the Claimant was given access to the logs that had been reviewed by managers when preparing the disciplinary letter. For security reasons he was not permitted to take hard copies, instead he had supervised access to the screens for 30 minutes.

68. On 7 September, the Claimant again identified that he considered that whistleblowing on his part in April had resulted in disciplinary action being brought.

69. On 25 October, the day before the hearing, the Claimant was sent examples of irrelevant documents he had accessed. These concerned the

redundancy of employees at a firm regulated by the PRA, a document prepared by HR called 'Rookie Ratio Analysis', some documents relating to whether a part-timer was in fact being paid a full time salary, and information on Japanese mortgages and agendas.

Disciplinary Meeting

70. On 26 October, Ms Gerken held a disciplinary meeting with the Claimant and a representative. It lasted one and a half hours. Ms Gerken had with her the logs of the Claimant's internet activity for the two periods reviewed, that is, 6 weeks from 26 February to 4 April, and ten days from the 8 to 18 April. She had highlighted in yellow those identified by Mr Triantafellou as irrelevant to his task and in brown ones which were both irrelevant and confidential in content, so requiring particular explanation.

71. The Claimant started by saying that he was the victim of management underperformance. On the data tool incident, he said it was MC who decided to use tool one and tool two, he had not seen a risk. He explained that he was testing data properties in the file and wanted to know whether the tool could do it by batch, or file by file, because this would affect his deadlines. He complained that of 2,400 files he had accessed, only 7 or 8 were causing them concern. (These 7 or 8 are the brown highlights. There were far more yellow ones).

72. On authority to do it, he said he had been given autonomy on 19 February, that the spreadsheet file had been created by another person to test a new application and that his PIP objective was to write a test document, which was what he was in the course of doing. He was reviewing expenses, because they had been asked to submit their expenses by the end of month, and he was looking for a template, he wanted to know if he could claim for the Christmas presents he had given to other staff for their children.

73. As for Tim Murnaghan's exit interview, he had been looking for it back in August because he had been asked to ensure that there was a proper

handover of Mr Murnaghan's knowledge and expertise, and he needed to see what documents he might have prepared and so came across the exit interview.

74. As for INV470, (the report into whether Tim Murnaghan he was misusing documents), he had reported to HR that it was misclassified. He was looking for documents about ratios; he would not be able to tell from the title if any particular document thrown up by his word search was relevant, so he needed to read them. As for being challenged with being an insider risk, he said that he was a data addict, meaning he was just curious about it. He added that he was not just a data expert, but a multi-disciplinary engineer; he considered this role gave him the right and need to search other documents. He was not malicious.

75. After the disciplinary meeting, Ms Gerken noted the problem as being that he was searching for documents unrelated to his own work. She spoke to Jackie Benson and Julie Coombs of HR about process matters, and she spoke to MC, Mr Triantafellou, Mr Kebblewhite and Mr Cortis about the Claimant's explanations.

76. She then reviewed the outcome of the grievance - the Claimant's appeal was still ongoing. The report came in on 5 December. The complaint of being bullied by Mr Cortis was not upheld. The Claimant still complains that he was not permitted to appeal this decision; the Respondent argues there is no point in an appeal because he is no longer in their employment.

77. Having postponed her decision until this grievance outcome was available, Ms Gerken now reviewed it. She noted that the 2015 grievance had followed the Claimant being invited to the disciplinary meeting which resulted in the first warning, and appeared to be a response to it. She thought a great deal of time had been invested in the Claimant at the time of the PIP, which should have informed his conduct.

Dismissal

78. Her letter of 6 December was delivered to the Claimant at a meeting called for the purpose. The Claimant was dismissed for conduct. He was told that his unsatisfactory conduct had caused a breakdown in trust. Ms Gerken analysed the reasons for this.

79. Of the operational incident on 25 February, she said that he had not assessed the risks or considered that this included sensitive data, he been unable to explain at all why the second tool was involved. The Tribunal notes that it was not suggested that this was of itself lack of judgment. Mr Triantafellou said there was no explanation but thought it not sinister.

80. On reviewing unrelated documents, it was noted that the Claimant seemed to be using a intranet document search to find documents, explaining that he had to open them to see what they contained, but in her view the title of the document would sometimes tell him that they must be sensitive, for example, exit interview. Of his explanation for looking for Tim Murnaghan's exit interview, she found it implausible that he should not know it was an exit interview and was likely to be confidential.

81. Of the expenses explanation, she found it implausible that he was accessing it in March when the deadline for submitting expenses was the end of February. He was unable to explain at all investigating the full time salary, or the redundancy issues or other redundancy particulars.

82. She went on to consider the outcome of the grievance, which had not been upheld. She noted that in the final written warning letter Mr Kibblewhite had hoped that his acknowledgment of the impact his behaviour had on others would help him to exercise better judgment in future. She said:-

"Following review of the information and our meeting, I have concluded that the concerns outlined in my letter of 6 June 2016 remain, that your behaviour follows the pattern of disruptiveness and raises serious concerns about your intentions. Your actions related to information management suggest a lack of sufficient judgment about what is an expected standard of behaviour and have resulted in your management team losing trust as a

colleague. Given the nature of your role, and the sensitivity of the information we handle, I see no alternative to the decision to dismiss you from the Bank's employment."

Appeal Against Dismissal

83. He was advised about his right to appeal and on 19 December 2016 he did. His lengthy letter includes the following points (and I do not recite them all). He referred to Tim Murnaghan's decision to resign because of pressures of work and said "I made it clear that I won't be capitulating", it is in no way clear what this refers to. He referred to Ashley Kibblewhite saying on 8 February that he was a security concern, and on 26 February he was a covert malicious influence. Ms Gerken was not impartial in making her decision because he had accessed meeting agendas and the other material deemed irrelevant. The final written warning was flawed, moreover it had expired. He said that the sample of his computer use was too small; too much was being made of five files accessed 8 months ago. The process had been accelerated. He had not seen an email Mr Janssen sent to Mr Cortis in October 2015. He had not had legal representation, contrary to Article 6 of the European Convention on Human Rights. At the meeting he could not see all the documents.

84. Mr Nelson heard the appeal. He saw the Claimant on the 19 January 2017. There was extensive discussion of information security. The Claimant said that if it had been misclassified on open access he had the right to review it. He added that file names were not adequate. Mr Nelson's evidence is that when challenged on his reasoning the Claimant had no answers.

85. Mr Nelson also met Ms Gerken on 24 January, he found that her "data driven" and logical "in the way she expressed her reasons, thoughtful and persuasive; she had not rushed her decision, waiting for the grievance outcome. He asked her whether she considered a lesser sanction, and was told no, as the Claimant could not accept that anything was his fault; he had been given much support throughout the PIP, and waiting and giving him

more support was unlikely to change his behaviour, especially as he had since been disciplined for conduct.

86. When challenged on the fact that the Claimant had reported the documents misclassified, Mr Nelson concluded "in my view the legitimate concern of the Respondent related not to what the Claimant did with any document he happened to find but the fact that he had searched for documents unrelated to his role in the first place."

87. On 6 February, Mr Nelson wrote to the Claimant turning down the appeal. He had been deliberately accessing sensitive material in classified documents, although there was no written prohibition on this, this was a matter of judgment. Against the warnings, Ms Gerker's decision to dismiss him had been reasonable. She had not rushed it, and there was no evidence of victimisation.

Relevant Law – Protected Disclosure

88. I deal first with the question of the protected disclosures. The first issue is whether they are in fact protected. Section 43 of the 1996 Employment Rights Act 1996 deals with qualifying disclosures: any disclosure of information which in the reasonable belief of the worker making a disclosure is made in the public interest and tends to show one or more of the following, (which includes failing to comply with the legal obligation to which he is subject).

89. The Claimant clarified at the Preliminary Hearing that by breach of legal obligation, he met the obligation under the Data Protection Act to keep confidential personal data.

90. Section 43 C provides that the disclosures must be made to the employer. This is not an issue.

91. Section 103 of the Act says that "if the reason or if more than one, the principal reason for the dismissal, is that the employee made a protected disclosure" then it is unfair.

92. *Cavendish Munro Professional Risks Management v Geduld [2010] IRLR 38*, indicates that information is not the same as allegation, and that information, in its ordinary meaning, is conveying facts.

Discussion – Protected Disclosure

93. The Tribunal has to consider whether each of the disclosures qualify. The one initially alleged is 14 April 2016, which the Claimant gave in his grounds of claim, is security information of the national economic exercise (UK stress test) in relation to a sensitive investigatory report named INV470. He said that was the reason for his dismissal.

94. At the Preliminary Hearing he added the disclosure that he had referred to his managers Tim Murnaghan's exit interview document in August 2015.

95. No other document was noted as a protected disclosure, although on 14 September 2015, in a discussion of his PIP objectives, the Claimant referred to the speak up policy, (whistleblowing policy) and difficulties in the stress test exercise of part-known validations and reconciliations, that he had reported as to Mr Cortis and recently to Mr Janssen. This is not otherwise mentioned at all in the Claimant's grounds of claim, witness statement or further particulars, and the matters in Mr Murnaghan's exit interview do not appear to relate to those with inside knowledge to the stress test exercise that the Claimant refers to. So this is not an added disclosure.

96. Taking each of these in chronological order, the 14 August 2015 referral to a colleague is marked 'FYI' without any other explanation, then or later. There is no detail given in the further and better particulars of anything said to Mr Cortis and Mr Triantafellou face to face.

97. The evidence of Mr Triantafellou is that he had no idea why the Claimant had sent it to him. The Claimant said that he sent it to the managers 'for information' because it was interesting. He thought it was interesting that the reasons given in the exit interview for Mr Murnaghan leaving appear to differ from the reason being given out to other staff. Challenged as to whether he had marked it FYI because it was misclassified information, he said that the word interesting also comprised the fact that it had been misclassified in breach of the Data Protection Act. He did not say at any stage that he had discussed it face to face with either manager, or had brought to their attention that it was misclassified, though the emails show that it was upon receipt of this that Mr Triantafellou contacted people in HR to get it reclassified, which was sorted by the following Monday.

98. The Tribunal has to consider whether at the time the Claimant had a reasonable belief that the information tended to show a breach of the Data Protection Act. In his evidence there is no sign that this had occurred to him, or that this was any part of his reasoning that in sending it either to Mr Cortis or to Mr Triantafellou; it was not mentioned in his email, he did not discuss it with them and it does not seem to have been referred to later. Further, "interesting" does not necessarily mean that something is in the public interest. It seems that what the Claimant had in mind was that he was interested in the real reasons for Mr Murnaghan's decision to resign. There is no evidence that at the time he considered there was a breach of Data Protection Act or that his managers should know this. This is an afterthought. Misclassification, let alone whether this was a matter of public interest, appears to have been nowhere in his mind. I therefore conclude that at the time the Claimant did not have a reasonable belief that the disclosure was made in the public interest, or even that it tended to show failure to comply with the legal obligation, although of course that was the conclusion that Mr Triantafellou himself reached in discussion with colleagues after the disclosure had been made. It does not qualify for protection.

99. I turn now to the disclosure in April 2016. The exact date is not clear. 14 April is the date given in the ET1, and accepted in the response, but there

appears to be no evidence that this is when it happened and it is more likely 15 April. The document the Claimant turned up and reported was the INV470 investigation of Mr Murnaghan's use of data after leaving. The Claimant reported it to Mr Triantafellou, who said that he mentioned nothing about misclassification, only asking if he knew what it was. Mr Triantafellou did not, because he was not privy to security reports. At some date, not in the Claimant's evidence and not known to Mr Triantafellou, he had discussed it with Vanessa Acevedo of Human Resources, and it was she who arranged for it to be reclassified, having identified that it should be on restricted access. We know that being told by Mr Triantafellou that the Claimant had seen what appeared to be a security report triggered Mr Kibblewhite's request to review the Claimant's activity from the security angle.

100. We also have the meeting the Claimant had with Mr Kibblewhite on the evening of the 19th April. Mr Kibblewhite's note is reasonably comprehensive. It notes the Claimant's concern that INV480 was being linked to INV470 and INV477 that it looked as if he was being linked to a criminal investigation about Mr Murnaghan taking data. He said that he discussed this with Ms Acevedo, the documents had been removed, and the Claimant was concerned that the operational incident was a red herring, and he was being tied into a criminal investigation. It then turned to a discussion of whether the Claimant was doing anything wrong and to why the Claimant had been trying to access the files. The Claimant then said that he had only been given verbal reasons for his association with the operational incident, and was asked if he was trying to access the files; the Claimant responded with an explanation that he was looking for the report on 26 February, for an explanation of this.

101. In other words, in quite a lengthy discussion of the Claimant's discovery of this document, nowhere did the Claimant say that he was concerned in any way about the report being on open access. It was all about the Claimant's concern that he was subject to an investigation on 26 February.

102. Mr Kibblewhite has not been available to give evidence, and of course the note may reflect his own concerns. He had a low opinion of the Claimant, and was already suspicious of him. Nor does the Tribunal have evidence from Ms Acevedo. The Claimant, despite a request for Further and Better Particulars of the precise words and precise time of the disclosures, has given no detail at all of what he said, or to whom he said it. In the light of this, Mr Triantafellou's evidence has to be accepted: the Claimant simply asked him what this document was, expressing no concern about its classification. Even with caution as to Mr Kibblewhite's opinion of the Claimant, all the evidence available points to the Claimant being concerned why he was being investigated, not whether the document he had seen should in fact be available. It should be noted that the Tim Murnaghan exit interview was not discussed on this occasion.

103. It was Ms Acevedo who understood that the document had been misclassified. The Claimant went to see Ms Acevedo because she had learned that the PIP was linked to a security investigation. It was a by-product of his meeting with Ms Acevedo that she had learned it was misclassified, not the Claimant's purpose. There is no evidence that the disclosure was made in the reasonable belief that the Respondent was in breach of a legal obligation. In conclusion, the Tribunal agrees with the Respondent that neither of the disclosures relied on qualifies for protection.

Unfair Dismissal – Protected Disclosure

104. It is not now necessary to consider whether either disclosure was the principal reason for dismissal, but in case I am wrong about that, the reasons are explored. There is no doubt that the Respondent was concerned as early as November 2016 for all sorts of reasons about the Claimant's performance and whether he should be dismissed. There was also express concern from November onwards about the Claimant's security and his activities in looking for documents; he had accessed a confidential document. The Claimant argues that but for the disclosure in April 2016, the Respondent would not have gone back in to check the log of his activity from 18 April, which revealed further activity leading to his

dismissal. The Respondent's argument is that the employer was not concerned that he had reported this document as misclassified, but that he was actually looking for material. It is noteworthy that the Tim Murnaghan exit interview does not appear in this log. There are other Tim Murnaghan documents, as well as the INV470, that had been accessed around the time of the investigation in April. It is also noted that while INV470 is mentioned in the dismissal letter ("you informed your managers that you had found sensitive information"), Ms Gerken said in evidence that she took this as a mitigating factor for the Claimant.

105. As for the exit interview, the Respondent says that the exit interview did not come up in the logs; the Claimant explained he was looking because of the handover, but that did not explain why he was looking for Murnaghan documents again in April. If it were the case that the INV470 being accessible to the Claimant came to light because the Claimant had disclosed it to his managers, and his looking for it led to dismissal then there would be some concern that the protection provided by statute was not being conferred on a whistleblower, as there must be obvious concern that if an employee reports a document has been misclassified and the reply of his employer that he should not have been looking, and he is disciplined for looking, then whistleblowers are deterred from activity (reporting misclassification they have come across) which is otherwise to be encouraged. Detailed enquiry into what were the reasons for dismissal (see below), tends to show that he was not dismissed because he had disclosed this document, but because of his inability to explain why he was looking for this document, and for many others.

Unfair Dismissal – S.98

106. Turning now to the unfair dismissal claim, Section 98 of the Employment Rights Act 1996 provides that it is for the employer to show the reason for dismissal, and sets out those that are potentially fair, which includes a reason related to conduct. It is then for the Tribunal to assess, having regard to that reason, whether the employer acted fairly or unfairly, and that depends on whether in the circumstances, including the size and

administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal of the employee and that shall be determined in accordance with equity and the substantial merits of the case. In conduct dismissals the Tribunal is guided by the directions in *British Home Stores v Burchell*: they must assess whether the reason given was a genuine reason, whether the employer has reasonable grounds for holding that belief and whether his reasonable grounds are based on reasonable investigation in the circumstances.

107. Finally, a Tribunal must consider whether a reasonable employer could have dismissed for that offence, bearing in mind that reasonable employers may have a range of responses to particular conduct. In this context, Tribunals are of course reminded not to substitute their own view for that of a reasonable employer. There is a sequence of cases to this effect, and the Respondent draws the Tribunal's attention to the decision of the Court of Appeal in *Tayeh v Barchester Healthcare Limited [2013] IRLR 388*, that it is largely for the Respondent to judge how serious the conduct is in the context of its own business. That case concerned omissions by a nurse in making up care records, though the Tribunal held that was not serious enough to dismiss, in effect the appeal court decided that it was for the Respondent to decide that the activity of care records was integral to their process.

108. In other cases, in *Shrestha v Genesis Housing Association Limited [2015] EWCA Civ 94*, the Court of Appeal held that what was a reasonable investigation should be looked at in the round. It would not be necessary for an employer to reinvestigate every point raised by an employee when explaining his conduct. Further, in a fair hearing it is not always necessary for the employee to see the witness evidence, provided that he is told of the accusations against him and given a full opportunity to respond to them. There are no hard and fast rules about what process must be followed other than the general ones of fairness and reasonableness: *Hussain v Elon plc*.

109. In the light of this guidance, and taking the *Burchell* questions in turn, the first question is what was the Respondent's reason. The express reason is conduct. The facts at times suggest performance, given that it was already subject to review, and given the view of Mr Triantafellou that the Claimant's lack of focus and time wasting was as much a feature of concern in his review of irrelevant documents as anything else. An alternative spin on the conduct reason is that some of the Respondent's managers considered the Claimant a potential security risk. There must be some examination as to what extent that was the reason for dismissal.

110. There is little doubt that when Mr Kibblewhite was determined to remove the Claimant's security vetting early in 2016; it was in part because he was frustrated by the effectiveness of the PIP process in delivering the result he wanted. Mr Kibblewhite had some grounds for suspicion, but the suspicions did not add up to the Claimant being a wrecker, or malicious, with regard to the Bank's data, nor was it shown that he had altered his performance assessment. It is possible that the Claimant investigated data through curiosity, or accelerated his searches in April 2016 out of concern about his own position. It is clear that many of the grounds for Mr Kibblewhite's suspicion fell away on investigation: the operational incident suggested incompetence, rather than wrecking or leaking, although he was disaffected.

111. There is no doubt that the Claimant was an unsatisfactory employee. He had acted disruptively with his team and managers in meetings and emails, and it is possible that Respondent, particularly Mr Kibblewhite, was looking at an excuse to get rid of him. The question arises as to whether this was in fact the reason.

112. Often where a party's reasons are hard to understand, it is sometimes that the reasons are so obvious to the speaker that he or she overlooks the need to explain what it is that causes them concern, or they find reasons hard to explain because they may not really understand them at all themselves.

113. What did the Respondent consider harmful about the Claimant's behaviour in looking for unrelated documents? Was it in fact a performance issue, that the Claimant was wasting time and lacking focus, conduct issues identified in his PIP? Was it in fact that he might be a security risk?

114. We can identify the pattern of disruptive behaviour. The PIP is delphic about the objective behaviour that led to the areas being identified, in particular, being sensitive to the confidentiality of working materials. It may have been the fact that he had access Mr Murnaghan's exit interview. It is also possible that it was that he was looking at other manager's CV's, and using that material to attack them.

115. The first warning covered not only performance but also conduct, but the behaviour needing improvement was not obviously linked to accessing sensitive material. The final written warning was clearly about conduct, but again there was no obvious link to the Claimant trawling documents in this matter. Nevertheless it warns the Claimant that <u>any</u> aspect of performance or conduct could trigger a dismissal for a further offence.

116. Was Ms Gerken's concern part of this pattern? The Claimant's behaviour did not fulfil any of Mr Kibblewhite's explicit concerns. In talking about lack of trust, it was identified that the Claimant was not able to explain why he was looking for the documents, or that the explanations he did give did not hold water (as in the explanation about expenses) or that he could not identify from the title of the document that it would be confidential, which would have been obvious in the exit interview, and probably from Tim Murnaghan's FOI request.

117. The lack of explanation of what occurred on 26 February is difficult to explain as amounting to suspicious behaviour or lack of trust. It looks more like incompetence. If it was lack of trust, it is not explicit that he could not be trusted to do his job properly; performance had been specifically excluded.

118. So the reasons that are in the background to Ms Gerken's decision, but not made explicit, are that he was looking up lots of documents unrelated to his objectives. Also viewed as disruptive behaviour was that he was bombarding his managers with grievances (as identified on 2 September 2016 by Mr Kibblewhite), or, possibly, that Ms Gerken was out of sympathy with the Claimant because of his obvious prevarication over the date of the dismissal meeting, itself potential for disruption.

119. The clearest expression of that view was given by Mr Nelson, that when the Respondent spoke of lack of trust, they meant that when the Claimant was opening, reading and re-reading sensitive material, it was not one accidental view but a deliberate course of action over several days, and possibly longer. It should have been obvious to him that the material had misclassified this indicated lack of judgment. This was reinforced by the fact that the Claimant at that meeting, and in Tribunal, appears not to understand why a document that has been misclassified should be removed and not read. The Claimant's view was that if it was on open access he was entitled to read it.

120. As to whether the investigation was reasonable, the Respondent carried out a detailed investigation of the Claimant's use. There was a challenge to Mr Triantafellou on his identification of documents being relevant, but the Claimant was shown the log, and he was asked for explanations both by Mr Triantafellou, and by Ms Gerken.

121. The Claimant has complained that it is not fair that he was dismissed for looking at this material. He says it was not made explicit, verbally or in writing, that he should not read material which was confidential but on open access. He argues further that it was not discussed in the context of his PIP, although it remains that it was mentioned as an area of concern. This may account for his failure to provide any explanation on 20 April, on the basis that he was unaware that the Respondent saw it as suspicious activity or that the lack of reason for these documents was itself causing concern. Nevertheless by 6 June, in the invitation to the disciplinary meeting, it would have been very clear to the Claimant what the Bank's view of his conduct

was. It is still not clear that he appreciated their concern about security, but he was told that they wanted to know what his intentions were when he looked at these documents, in other words he was on notice that he needed to explain this. Despite this, the explanations he provided for reading the material were unsatisfactory, only that he had a right to read anything that was on open access, indeed in his final submissions in this Tribunal he argued that if it had become unlawful, (by which it was meant that they had been misclassified), "it is not my problem, its theirs."

122. The second challenge to fairness is whether the Claimant had an adequate opportunity to consider the log of documents that he had been viewing, relevantly or irrelevantly. The security concern about not giving him paper documents is in the circumstances legitimate. The Bank had reason to be suspicious, and it was not for the Bank to prove that the Claimant was not suspicious in this respect. He was given 30 minutes. He said this was inadequate. Nevertheless as he was aware of the area of their concern. It was adequate for him to see what he had viewed and be able to explain why any particular item had been viewed. In addition, on the day before, Ms Gerken had sent him specimens of the items that she was particularly concerned about which would require an explanation. It may have been better if he had paper copies to see during the hearing as she did, or indeed a screen, but in terms of whether the Claimant knew what they were looking at and why they wanted to look at it, he had adequate access and notice. Overall this was fair.

123. The Claimant complains that he was not provided with legal representation on 26 October, relying on the mediation contract. Whether there was a breach of the mediation contract when it came to be dismissal is not pleaded. In almost all cases a Claimant is treated fairly if he has a companion with him at the meeting as he did. The cases where Claimants must have legal representation are truly exceptional, and this is not an exception.

124. Did the Claimant understand the need to explain what his activity on 26 February? On 20 April, Mr Triantafellou, his own line manager, of whom he

has never made a complaint of bullying or unfriendly behaviour, was asking, and the Claimant was unable to give him a clear explanation, nor did the Claimant at that point refer to his objectives or to the fact that he was trying to write a report, or to his autonomy. These are explanations which he might have been expected to raise with the manager with whom he discussed the PIP only, six weeks earlier. If they were genuine he would have mentioned them then.

125. On 26 October, he was still unable to explain why it was that he had asked MC to do this, or why he said that it was not his document that was being uploading, but someone else's and was attempting by this to shift responsibility. Ms Gerken was unable to get to the bottom of why he had done as he did. It may be that the Claimant was evasive because he wanted to cover up the fact that he may have been an incompetent risk architect, rather than out of malice, but the explanation that it was because he was a multi disciplinary engineer and could look at anything or do anything was implausible.

126. Finally, there is no evidence that Ms Gerken was biased against him for the fact that he had accessed one of her meeting agendas. This was but a tiny document among many which had been accessed which were irrelevant. The ones which caused concern had nothing to do with her team.

127. Would a reasonable employer have dismissed for this reason? There remains concern that the Respondent was taking shortcuts to dismissing the Claimant for incompetence, and that their fear of sabotage was baseless. The Respondent has asserted that it is for them to assess the risks to their own organisation as in *Tayeh*. The Tribunal has been alerted to the highly sensitive nature of their role and the data they hold.

128. The risk of disruption to the team of an employee who spent time digging for materials on his colleagues, and who had tried to use it to discredit his colleagues (with regard to educational attainment, or the references to Tim Murnaghan taking a stand) are a real risk: the Claimant had no sense of what was confidential or what use he should make of it.

129. The suggestion that he was trying to disrupt data, or this behaviour interrupted the Bank's primary function, does not hold water, in that there is no evidence this is what he wanted. There was nothing from which they could conclude that the material he was looking for related to leaking or sabotaging their basic operation, this suspicion was not justified.

130. I conclude that the Bank's assessment of the risk of the Claimant spending a great deal of time looking at irrelevant material, and in particular spending time reviewing sensitive material, may not, on its own, be serious misconduct, but in the context of the Claimant being unable, despite invitation, to explain why he was looking at it, raises the question of his lack of openness on this, and on the 26th February incident and the fact that an employee so senior and in a position of responsibility, with access to confidential material, and against the background of his final written warning, raised real concern whether they could rely on him to use his judgment, or explain his actions in other episodes that might occur from time to time.

131. Against the background of the final warning, this is sufficient reason for a reasonable employer to dismiss. His earlier conduct included argumentative behaviour, constant challenges, attacking his colleagues and managers, and failure to take responsibility. The behaviour examined in the course of the disciplinary proceedings echoed much of this, in particular not taking responsibility. It also addressed his behaviour with his managers as relevant background. As Ms Gerken noted, it continued unabated (as she checked in September 2016). In conclusion, the unfair dismissal claim does not succeed.

Right to be Accompanied

132. I turn to the other claims identified at the Preliminary Hearing. There was a question of the breach of the right to be accompanied provided by Section 10 of the Employee Relations Act 1999, that where a worker is required or invited by its employer to attend a disciplinary or grievance hearing, he shall

permit him to be accompanied, subsection 3 provides that this is either a Trade Union Official or another of the employer's workers.

133. At the disciplinary meeting on 26 October, the Claimant was accompanied. There is no requirement an employee is accompanied at an investigatory meeting to explore the facts which may go no further, although in *Skiggs v Southwest Trains [2015] IRLR 460*, it was identified that an interview may change in character beyond an issue of fact and turn into a disciplinary hearing, in which case he may need to be accompanied, it depends on the nature of the meeting itself. This was not such a meeting, as set out below.

134. As for the 6 December, when the Claimant was told the outcome and what Ms Gerken's decision was, this was at a point when the decision had already been made. There was no need for the Claimant to explain anything or react in any way, nor for him to be accompanied. As for the investigatory meeting, Mr Triantafellou explained at the outset of the 20th April meeting, that this was not a disciplinary hearing; but a meeting to investigate the incident, before it was considered whether it was a disciplinary matter. There is no evidence it changed in character.

Breach of Contract

135. There is a complaint of breach of contract in that the Claimant was denied legal representation at the meeting on 26 October 2016. The Claimant relies on the mediation agreement which he and Mr Cortis signed on 30 November 2015 in the context of the disputed PIP. The stated purpose of the agreement was that they would agree to attempt in good faith to settle their dispute at the mediation that they would keep matters discussed there confidential and that was without prejudice to the legal position, and the content was not to be used in evidence. The agreement said that the law of England and Wales would apply, and then that the referral of the dispute to the mediation "does not affect any rights that exist under Article 6 of the ECHR" and if their dispute did not settle through the mediation, the party's right to a fair trial remains unaffected.

136. The Claimant argues that this clause confers on him the right to a fair trial which includes the right to legal representation and Disciplinary Hearing by virtue of Article 6. The Respondent argues no, that the clause simply means that an existing right is not being removed by an agreement to mediation. The Claimant already had a right to be accompanied conferred by the Employment Relations Act 1999. Whether that was upgraded (as it were) to a right to legal representation falls to be considered. In *Mattu v University Hospital Coventry and Warwick [2012] IRLR 661*, there was no dispute that disciplinary hearings do not attract the protection of Article 6. The clause meant that Article 6 would apply to a later dispute being resolved, for example in a Tribunal. Applying that to this case, it seems reasonably clear that the meaning of the agreement was that if the mediation failed the Claimant retained the right to proceed to an Employment Tribunal, or any other right he might have.

137. It is also apt to note what Lord Justice Mummery said in *Leach v the Offices of Communications [2012] ICR 1282*, that "human rights points rarely add much to the numerous detailed and valuable employment rights conferred on workers", in that case the Claimant had a right to claim unfair dismissal, the ACAS Code ensured he had a fair hearing and it conferred on him no free standing right.

138. On a reasonable construction of the clause in the mediation agreement, what this expressed was that a right was not being removed by the mediation agreement, not that it was not being conferred. Article 6 is adequately provided for under the Employment Rights Act 1996 and the ACAS Code on Disciplined and Grievance.

Unlawful Deductions

139. There is a claim for unlawful deductions under the Wages Act provisions of the Employment Rights Act 1996. When the Claimant was dismissed on 6 December 2016, he was told that Human Resources Department would be in touch with him. The Deputy Payroll Manager wrote on 7 December to his home address in London explaining that he was due his final pay for 6

December, plus 3 months salary in lieu of notice from which would be deducted 8 days holiday overtaken. She then mentioned that he had an outstanding loan of £14,000 from which would be deducted the £10,909.16 due to him for his final pay, leaving him to pay them £3,000.84. The letter also dealt with administrative matters, gym passes and the like.

140. The loan agreement is in the bundle. It was an online application. There is an extract of the terms and conditions. It says: "in consideration of your agreeing to advance me the sum required I hereby undertake and agree…on the termination of my employment with the Bank for any reason, the loan will be immediately repayable to the Bank along with any accrued interest and for the purposes of the Employment Rights Act 1996, any monies including wages due to me from the Bank or the pension fund may be first set off against any sums owed by me to the Bank, including interest under this agreement or otherwise."

141. There is then a Data Protection Act warning about the use of the information and about HMRC, then is a provision: "I agree the terms and conditions". We can assume that the Claimant clicked the box to agree, as it is shown on the following page, where is a screen about his application which records that he ticked the box saying "I accept the terms and conditions", along with the details that the application was made on 23 February 2015 and concerned a loan of £21,000 repayable in 60 months.

142. The Claimant has said that he had not seen the terms and conditions, but the evidence shows that he ticked a box saying that he agreed to them, and they were available to him through the intranet system. He has not explained why he did this if he had not read them, or why the Tribunal should disapply this condition if it was a condition of granting the loan and he said he had read them when he had not.

143. Section 13 of the Employment Rights Act 1996 prevents an employer from making a deduction unless (13(1) (b)) "the worker has previously signified in writing his agreement or consent". There is no evidence here that the Claimant did otherwise than signify in writing his agreement and consent to

deductions by way of set off from a payment of wages on termination. The claim for unlawful deductions therefore also fails.

Employment Judge Goodman on 31 January 2018