Appeal No. UKEAT/0336/16/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 19 & 20 December 2017
Judgment handed down on 4 October 2018

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

MR M SATTAR — APPELLANT

(1) CITIBANK NA
(2) CITIGROUP INC — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANDREW HOCHHAUSER (One of Her Majesty's Counsel) and MR NICHOLAS GOODFELLOW (of Counsel) Instructed by: Edwin Coe LLP Solicitors 2 Stone Buildings Lincolns Inn London WC2A 3TH
For the Respondents	MR SIMON DEVONSHIRE (One of Her Majesty's Counsel) and MR SIMON FORSHAW (of Counsel) Instructed by: Clifford Chance LLP Solicitors 10 Upper Bank Street London E14 5JJ

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

DISABILITY DISCRIMINATION - Reasonable adjustments

An Employment Tribunal was entitled to make findings as to the reasonableness of an investigation and subsequent disciplinary process, and as to the effect the Claimant's admitted disability had upon that process, including whether PCPs applied resulted in the Claimant being placed at a substantial disadvantage in comparison with persons who were not disabled. Its conclusions that the Claimant's claims of disability discrimination and unfair dismissal should fail and be dismissed were permissible on the evidence before it.

HIS HONOUR JUDGE MARTYN BARKLEM

1. This is an appeal from a Decision of the Employment Tribunal ("the Tribunal") sitting at the East London Hearing Centre (Employment Judge Jones sitting with lay members), the hearing having taken place between 8 March and 19 April 2016. The Decision was sent to the parties (to whom I shall refer as they were below) on 20 September 2016. I shall refer to the Written Reasons as "the Reasons".

2. The Claimant was represented before the Tribunal by Mr Damian Brown QC leading Mr Nicholas Goodfellow, and the Respondent by Mr Simon Devonshire QC leading Mr Simon Forshaw. At the hearing of the appeal Mr Andrew Hochhauser QC led Mr Goodfellow; the Respondent's representation was as below. Regrettably, the time allotted for this appeal was far too short, with consequent problems in finding the several days necessary to deal with the many issues raised.

3. The unanimous decision of the Tribunal was to dismiss the Claimant's claims of disability discrimination and unfair dismissal. Although it found that the Respondent had failed to provide the Claimant with a written statement of initial employment particulars contrary to section 1(1) of the **Employment Rights Act 1996**, the Tribunal made no award under section 38 **Employment Act 2002**.

4. The appeal was permitted to proceed to a Full Hearing on all grounds of appeal by HHJ Richardson following a Preliminary Hearing.

5. The Tribunal's Written Reasons extend to 344 paragraphs over 74 pages. I shall refer to them as "the Reasons". They begin by setting out a lengthy list of reasons which had been identified by the parties. These reasons, alone, cover over six pages.

6. The Reasons then dealt with the main areas of law which arose in the case. The first to be dealt with was headed "*Law on Disability Discrimination*" and began with a helpful summary of the matters complained of:

> **"8. The Claimant complained that the Respondents had failed to comply with a duty to make reasonable adjustments (section 20 Equality Act 2010 [EA]) and that they had treated him unfavourably because of something arising in consequence of his disability (section 15 EA).**
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> **9. The Respondent conceded that the Claimant was disabled within the meaning of Section 6 and Schedule 1 to the EA. The Respondent had been aware that the Claimant was a diabetic. In August 2013, around the start of the disciplinary proceedings the Respondent became aware that he had a meningioma otherwise known as a brain tumour.**
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> **10. The complaints relate to the Respondent's decision to proceed with the internal disciplinary proceedings when it did; to conduct the disciplinary and appeal hearings according to its procedures and whether or not those decisions were discriminatory and/or represented a failure to make reasonable adjustments to the particular procedures involved."**

7. There followed a statement of the applicable statutory provisions, a summary of applicable caselaw as cited to it by the parties and the rival submissions made. Separate sections related to the duty to make reasonable adjustments and discrimination arising from disability.

8. The Tribunal then considered the unfair dismissal claim. It adopted a broadly similar approach, summarising the actual issue in very brief terms as follows, before turning to the law:

> **"43. The Respondent has the burden of proving the reason for dismissal and that it is a potentially fair one. The Respondent submitted that the Claimant was dismissed for a reason related to his conduct and in the alternative; the matters relied upon also fell into the SOSR (some other substantial reason) category.**
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> **44. The Claimant did not accept the Respondent's reasons and submitted that the decision-makers' conclusion that there was a "strong appearance of impropriety" was due to the mere fact of the HMRC investigation into his personal affairs and that this was therefore not a potentially fair reason for dismissal."**

9. Following a brief recital of the well-known principles underpinning the law of unfair dismissal, at paragraphs 44 to 47 and the approach which a Tribunal must follow, the Tribunal summarised the rival submissions which I set out, as they encapsulate the issues before me, so far as the unfair dismissal appeal is concerned:

> **"48. The Claimant submitted that the following factors bore on the reasonableness of the Respondent's decision. That the Respondent's attempt to investigate was an utter abject failure as there was no designated investigation officer and no investigation report that recommended disciplinary action against him. He questioned where the Respondent had obtained the evidence it relied on and what attempts had been made to consider whether any exculpatory evidence existed. He considered that the decision makers did not have the benefit of evidence from anyone with operational experience in considering the information before them and that the Respondent had failed to engage in dialogue with him about the transactions beforehand and had therefore come to incorrect and inadmissible conclusions about them in the process. The Claimant submitted that the case of *A v B* [2003] IRLR 405 supported his submission as it stated that the person charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him. This Tribunal was also referred to the case of *Shrestha v Genesis Housing Association Ltd* [2015] EWCA Civ 94 in which the Court of Appeal confirmed that it was too narrow an approach to say that the employer has to investigate each line of defence unless it is manifestly false or unarguable.**
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> > **"*To do so would put an unwarranted gloss to the Burchell test. The investigation should be looked on as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole. … What mattered was the reasonableness of the overall investigation into the issue.*"**
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> **49. The Tribunal conclude that it is for the employer to show that it had reasonable grounds for its belief. It will have to show that it conducted an appropriate level of investigation for these particular circumstances. In making its assessment, the tribunal will consider the whole process. The degree of investigation required will vary depending on many factors such as the strength of the case, the seriousness of the allegations and the evidence gleaned in the investigation.**
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> **50. Although not referred to in the parties' submissions, reference was made to the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) during the Hearing. The Code provides guidance to employers, employees and their representatives and … sets out principles for handling disciplinary and grievance situations in the workplace. The Code states at paragraphs 5 - 9 that it is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. It goes on to say that in some cases this will require the holding of an investigatory meeting with the employee before proceeding to a disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at the disciplinary hearing. It advises that different people should carry out the investigation and disciplinary hearing and that if it is decided that there is [a] disciplinary case to answer, the employee should be notified of this in writing with sufficient information about the alleged misconduct so that the employee is able to prepare to answer the case at the disciplinary hearing.**
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> **51. The Claimant submitted that there was no evidence that he had committed gross misconduct and that on the facts it was not reasonable for the Respondent to regard the conduct as having the character of gross misconduct. He contended that the conduct relied on was not sufficient to justify summary dismissal as … the Respondent did not have reasonable grounds for making the findings that it did.**
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> **52. The Claimant also submitted that his treatment was different to that of other staff that had also used the staff transfer process. He contends that the difference now relied on by the Respondent - that the source of funds was the UVT - was not the reason relied on at the time. In relation to the issue of comparative treatment the Respondent referred [to] the case of *Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352. In that case the court held that although the employer should consider how previous similar situations had been dealt with, the allegedly**

> **similar situations must be truly similar or in circumstances where the employer has tolerated the conduct in the past, to such an extent that the employee has tolerated the conduct in the past, to such an extent that the employee has reasonably come to the conclusion that the conduct will be overlooked. That judgment was confirmed in the case of *Paul v East Surrey District Health Authority* [1995] 305 [sic] where it was stated that such considerations would only be relevant in those limited circumstances where the evidence supports the proposition that there are other cases that are truly similar or sufficiently similar to afford an adequate basis for the argument:**
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> > **"*It is of the highest importance that flexibility should be retained and ultimately, the question for the employer is whether, in the particular case, dismissal is a reasonable response to the misconduct proved.*" "**

10. The Tribunal's findings of fact are set out at paragraphs 56 to 260. I will not set them out in full, but it is necessary to refer to many to set the scene. I have omitted matters relating to issues not under appeal.

> **"56. The Claimant was employed as Global Head of Treasury and Trade Solutions Operations. The Claimant began his employment in 1975. At that time his employer was Citigroup Inc. The Claimant worked at many international locations for Citigroup Inc including Saudi Arabia, Greece and Africa. The Claimant was one of the Respondent's longest serving members of staff.**
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> **…**
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> **59. We were shown three versions of the Respondent's Code of Conduct - 2008-2009, 2009-2011 and 2011 to the present time. All three versions of the document set out the values and standards that the Respondent expects of each of its employees in the management of its business and their individual behaviour. It outlined the responsibilities of staff to each other, to the clients and to the shareholders. Under the heading: "Responsibility to each other" it stated:**
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> > **"Citi will not tolerate the use of its systems, including email services and/or intranet/ internet services, in a manner that could be embarrassing or detrimental to the reputation or interest or [sic] Citi …"**
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> **Under the heading: "Electronic Communications" on page 1671 it stated that:**
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> > **"Citi's equipment and services, including but not limited to computers, telephones, PDA's and other electronic communication devices, internet access and email, are provided for business purposes and to enable you to perform tasks related to your job … Therefore you should not have any expectation of personal privacy when you use Citi equipment and services."**
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> **Under the heading: "Employee conflicts of interest" it stated:**
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> > **"You must be sensitive to any activities, interests or relationships that might interfere with, or even appear to interfere with, your ability to act in the best interests of Citi and our clients … Because it is impossible to describe every potential conflict, Citi necessarily rely on your commitment to exercise sound judgment, to seek advice when appropriate and to adhere to the highest ethical standards … You are responsible for knowing and complying with the relevant policies applicable to you."**
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> **Under the heading: "Outside business interests" it stated:**
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> > **"… you may not engage in other outside business activities including not-for-profit activities if a real or perceived conflict of interest exists or could exist. You are also required to comply with any applicable laws, regulations and Citi business unit policies. You are responsible for identifying and raising any such issue or relationship that may pose an apparent or potential conflict of interest and to evaluate with your supervisor and your compliance officer the possible conflicts that could result."**

Lastly, under the heading: "Personal business dealings" it stated:

> **"Citi personnel and their families are encouraged to use Citi for their personal financial services needs [sic] … Any nonstandard business arrangements between Citi personnel and Citi must be pre-approved by your senior business manager and your compliance officer …"**

60. We find that the Code of Conduct indicated that the Respondent tolerated rather than encouraged full-time employed staff to conduct outside business and/or not-for-profit activities and that if they chose to do so, the onus was on staff to decide when there was potential for a conflict of interest between those activities and the Respondent's interest and exercise sound judgment in deciding how to proceed.

61. Although the section was entitled "Personal business dealings" the narrative was about personal financial services and did not refer specifically to personal business whether for profit or otherwise. "Non-standard business arrangements" was also an undefined term but would suggest arrangements that were out of the ordinary or unusual. The overriding message of the Code [of] Conduct was that employees should err on the side of caution and if in doubt about anything - should seek advice or guidance from a senior manager or compliance officer.

62. The Respondent's employee handbook which was also in the Hearing bundle confirmed, under "Our shared responsibilities" that employees were to put the company's clients first by providing superior advice, products and services and always act with the highest level of integrity.

63. The Respondent had a procedure for employees to register their business interests. We saw a register entry for 2003, which showed that the Claimant had registered an outside business interest. He confirmed that he was the Trustee of a charity called the Unheard Voices Trust (UVT), administrator of Nordic Trademann, Administrator of Merino Ltd and Administrator of the Komoto Group. That was approved by Steve Meadows and countersigned by the compliance department. On 5 August 2003 the Respondent's compliance officer wrote to the Trust to confirm that the Claimant had notified it that he was a Director in his personal capacity and not as a representative of the firm. The Claimant made a similar declaration in 2005.

64. The Claimant was the sole donor to the UVT charity. The Claimant set the charity up in 2003. The charitable objectives included awarding scholarships, exhibitions, bursaries or maintenance allowances tenable at any school, university, college, or other educational establishment in Europe or North America approved by the trustees for persons under 25 or whose parents or guardians are resident in the Indian Sub Continent or other such country as the trustees shall from time to time determine. Also, the provision of financial assistance, outfits, clothing, instruments or books to such persons on leaving school or university; in awarding such persons grants or maintenance allowances to enable them to travel either in Europe or North America; and the relief of poverty in the Indian Sub continent by financially supporting the immediate families of students being supported or by financially supporting any such persons as the trustees shall determine by providing money towards housing, food, hospitalisation and maintenance.

65. Since its creation the Claimant has been the sole donor to the Trust donating as much as £4.5 million to it.

66. On 28 July 2011 the Claimant entered into a pension settlement agreement with the Respondent in respect of an underpayment of my pension [sic] following his move to London. The Respondent agreed to pay the Claimant a gross sum of $2.6million in settlement. The Claimant decided to donate the net amount to the UVT charity. We saw the Respondent's letter dated 28 July that informed him of the payment and the deductions. The Claimant claimed a 30% tax rebate through his annual tax return. The UVT also claimed 20% tax rebate through the gift aid scheme. The Claimant's evidence was that he had asked the Respondent to donate the payment direct to the UVT but they refused, as they were concerned to ensure that the correct NIC (National Insurance Contributions) was paid.

67. After that donation the HMRC (Her Majesty's Revenue & Customs) undertook an enquiry into the UVT's gift aid claim. The Claimant was able to deal with that query to the satisfaction of HMRC and it was his evidence that he received a rebate at its conclusion.

68. The Claimant was also a trustee of the Fakir Trust. The Trust was set up in 2006. It was a charity registered in Pakistan with only members of his family as donors and trustees. The charity's objectives were stated to be to promote and assist research, support teaching and

students in need, award fellowships and to promote any other public utility, including the provision of medical relief, establish hospitals, dispensaries, health clinics etc. In response to a general AML (Anti-Money Laundering) enquiry in 2010 from Benjamin Adeya who was in the Citi Middle East compliance team about the Fakir Trust, the Claimant responded to say that it was a family trust between him and the kids and not supporting anything else. The Claimant would have known that it was an AML query as that was the title of the email. He also said in the email "Please make sure we close this query. I want to be an example of support." We found it likely that the Claimant's intention in making those statements was [to] stop any further questions being asked by compliance on this matter. We were not shown any further correspondence between the Claimant and compliance on this query and it is likely that nothing further was raised.

69. As Global Head of Treasury and Trade Solutions (TTS) (Operations) we find that the Claimant occupied a senior post within the Bank. His corporate title was MD (Managing Director). The Claimant's department oversaw 15,000 staff and contractors working across more than 100 countries. The TTS department organised transfers of over US$3 trillion across the world every day and generated over £8bn per year income for the Bank. The Claimant was also a member of Code staff having regard to the Prudential Regulatory Authority's Remuneration Code. There were very few Code members of staff within the Bank. In 2011 the Claimant was one of 169 employees who were Code Staff out of a total number of 8,780 Citi employees in the UK. The number of Code staff increased but not significantly - to 172 in 2012 and then to 182 in 2013. Code staff status was given to those of the Respondent's employees, whose actions may have a significant impact on Citi's risk profile, including persons who perform significant influence functions, senior manager and risk takers. As a member of Code staff the Respondent wrote to the Claimant on 5 October 2011 to inform him that he would be paid an annual allowance of £200,000 in recognition of his obligations as Code Staff.

70. As a member of Code staff the Claimant could be subject to enhanced performance management and independent risk reviews processes, which would focus on both financial and non-financial behaviours. We find that being one of a few Code staff meant that the Respondent expected the Claimant to uphold its values, to be acutely aware of the impact of his actions, decisions and the performance of his functions on the organisation and its risk profile in the industry.

71. The Claimant confirmed that he was required to demonstrate the highest standards of integrity and probity in all his professional and personal dealings, to set a good example for his direct reports and not just to act with the utmost probity but to be seen to be doing so. The Claimant signed on a yearly basis to confirm receipt of the Code of Conduct. In the performance of his duties the Claimant was responsible for managing people, developing policy and holding other people to the standards set out in the Code. We find that it is unlikely that he was not aware of the Code of Conduct. He would be expected to discipline and to call to account members of his team who did not keep within the Code. Given his position and length of service the Respondent was entitled to assume that he was aware of and familiar with its Code of Conduct.

72. On 3 July 2013 HMRC attended and searched the Claimant's home and arrested him. They took some of the [Claimant's] possessions away with them at the end of the search. The department's press released to the Financial Times stated that he had been arrested on suspicion of tax fraud. It specified that the matter concerned a personal tax return and was not related to the person's employer. The Claimant was not named. On the same day the HMRC contacted the Respondent and informed it that it was intending to apply for a production order in relation to the Claimant. That was an order requiring the Respondent to provide HMRC with certain information.

73. On the same day the Claimant informed Francesco Vianni a former colleague in the department and CEO of Citi Holdings and Nigel Kemp - Head of Legal for Citi's TTS business - that HMRC had inspected his home under a search warrant. He indicated that it was related to a trust for his parents.

…

95. It is likely that the Respondent's in-house legal team then instructed CSIS to investigate the Claimant. CSIS is an internal team responsible for the investigation of suspected fraud and internal wrongdoing across all Citi business in Europe, the Middle East and Africa. Graham Tan (Senior Investigations Manager) ran the CSIS department. Mr Tan began conducting a regulatory investigation in order to establish the bank's position as a regulated entity whose senior employee had just been arrested by HMRC. At the same time, HMRC had obtained the

production order on 12 July and the Respondent had been ordered to provide the required documentation by 29 July.

96. The Respondent's disciplinary policy, which was in the Handbook, stated that if an investigation is required, it will be carried out independently and that the employee will have the opportunity to identify relevant witnesses as part of the investigation.

97. The primary purpose of the investigation being conducted by CSIS was to gather all the information available so that the Respondent could obtain legal advice as to their legal position vis-à-vis their regulators, HMRC and its employees; which included the Claimant.

98. In mid-July Mr Tan informed the Respondent that from his investigations there appeared to be a very considerable number of unauthorised and/or illegitimate uses of Citi's payment system for the Claimant's personal transactions.

99. On or around the 15 July it is likely that there was a conference call with Graham Tan leading and attended by a number of people including one of the Bank's AML experts, someone from compliance, someone from the in-house legal team, Naveed Sultan and Simon Constantine. Mr Tan informed everyone on the call that he had gathered evidence that showed that there had been a substantial number of unauthorised and/or illegitimate uses of Citi's payment systems for the Claimant's personal transactions.

100. It is likely that draft flowcharts such as are in the bundle of documents were presented to the people taking part in the conference call on 15 July. Mr Constantine considered the information provided by Graham Tan. It was his considered advice that it was appropriate to start a formal disciplinary process against the Claimant and that the Respondent needed further time to investigate and review all matters properly. He discussed this with compliance, ER, Legal and Naveed Sultan (Head of TTS) in the UK. Jon Beyman and Peter Cronin also discussed it between them and decided that suspension would be appropriate.

101. The Claimant's request to return to work caused the Respondent to consider whether that was feasible or appropriate. Having worked in the Bank for over 30 years the Claimant was well known. He was also very senior and had a loyal team working under him. In his post, he would have had access to all of the Respondent's systems and personnel.

102. In the light of what had been revealed on the call the Respondent considered that as a disciplinary process was appropriate and given the Claimant's seniority and influence in the Bank, it was appropriate to suspend him while further investigations were conducted. They were concerned to protect Citi's business and clients and to reduce what the Respondent considered to be the real risk of the Claimant interfering with any evidence.

103. On 16 July Simon Constantine wrote to the Claimant to confirm his suspension on full pay and benefits while the Respondent carried out further investigation of allegations concerning unauthorised and/or illegitimate use of Citi payment systems by him for personal transactions. Simon Polzmann who also worked in HR wrote the suspension letter and Mr Constantine signed it. The Claimant's access to the Respondent's buildings and electronic systems was also suspended.

104. The Respondent's letter enclosed a copy of the Respondent's Handbook and referred to section 4.19, which was its disciplinary procedure. The Claimant was informed that suspension was a neutral act and was not to be regarded as any form of disciplinary action. Also, the terms of his suspension were set out, which was that: he should remain readily contactable and available for work/meetings; must not enter Bank premises unless asked to do so by HR or General Counsel's office, must not make contact with any of the Bank's other employees, clients or workers and any attempt to do so would lead to disciplinary action; and must keep the details and circumstances of his suspension confidential. The Claimant was not sent any information with this letter apart from the Handbook. He would have been aware that the matters referred to would have been similar to the matters that were also under investigation by HMRC and had been the subject of queries from Mr Woodward. The Respondent had not informed the Claimant about the investigation by CSIS.

…

116. Mr Constantine was in a meeting room on the 42nd floor of Citibank's premises where he held the conference call. The managers dialled in. Graham Tan led the meeting and presented the information. He had the completed flowcharts and gave them to Mr Constantine and ensured that those on the call had copies as well as those who were present. They discussed

whether it was now time to commence formal disciplinary action against the Claimant. The Respondent did not move to such action lightly. This was considered action. Graham Tan had to explain why it was appropriate to proceed to disciplinary action. His recommendation was on the basis that the Claimant's actions potentially constituted gross misconduct. This was a group decision and was made with the benefit of Mr Constantine's advice.

117. Once they decided that it was appropriate to instigate the disciplinary process, it was passed to Julia Wiggan of Employee Relations (ER) so that she could manage the process. Ms Wiggan drafted the letter of invitation to a disciplinary hearing, sent to the Claimant on 16 August. He was given 5 days notice as he was invited to a disciplinary hearing on 21 August to be conducted by Nick Roe, MD.

118. The letter informed the Claimant that the allegations against him were that between November 2008 and October 2011, and in abuse of his position of trust as a senior member of operations management and latterly as global TTS operations head, he had improperly used Citi's transaction systems, staff and resources to engage in financial transactions which were either improper or had the strong appearance of impropriety. In particular, those transactions were alleged to appear to be complex and multi-layered, seemed to be made with the intention of concealing the distribution of funds from the original source (the UVT); and used charitable funds from the UVT either for the Claimant's benefit, or that of his close family members or the Fakir trust.

119. The Claimant was advised that the Respondent was aware that the matters in question were also the subjects of an HMRC/criminal investigation. However, the Respondent considered that, in light of the seniority of the Claimant's position and the seriousness of the alleged misconduct; it would not be appropriate or practicable to wait until the HMRC/ criminal investigation had concluded as it could take many months. Nick Roe was going to chair the meeting and Ms Wiggan would attend to advise him.

120. The Claimant was advised of his right to be accompanied and that anyone doing so should know that they would not be able to answer questions for him but would be able to confer with him during the hearing.

121. He was also advised that the allegations raised were potentially of gross misconduct because they may have constituted serious non-compliance with the Code of Conduct, brought the Respondent's name into disrepute or represented a serious breach of Citi's rules, regulations, policies or procedures. The letter enclosed another copy of the Disciplinary procedure. The Claimant was advised that there would be a notetaker present at the meeting.

122. The letter enclosed the supporting documents, which amounted to 247 pages detailing the nine transactions that the Respondent wished to proceed with. He was reminded of the need to keep these matters confidential. He was also given details of the Employee Assistance program which was a confidential, independent counselling service, available to staff and members of their households, 24 hours a day.

123. On 20 August the Claimant's solicitors wrote to the Respondent on his behalf. The evidence at the Hearing was that some people in his department knew that he was unwell but did not know the details. The Respondent did not know he was unwell until they received this letter. The Claimant's solicitor, Ms Linky Trott informed the Respondent in this letter that the Claimant had a brain tumour and that this had been so for the past five years. He was also apparently suffering from stress initially from the HMRC investigation, which she considered was now exacerbated by the Respondent's actions. The Respondent was informed that the Claimant's conditions were seriously affecting his ability to conduct day-to-day activities and that he was experiencing arm tremors and headaches. The Respondent was also informed that the Claimant was an insulin dependent diabetic about which it was already aware. The Claimant had no sick leave on his records.

…

126. The Claimant's ill health was a surprise to the Respondent and Mr Constantine responded to the Claimant's solicitors on the same day. He asked for further information on the Claimant's health and confirmed that they would expect a sick certificate if the Claimant cannot make the meeting. This was not unreasonable given that the Claimant had not produced a sick certificate prior to receiving the letter of invitation. Before he received the letter he had been advocating to be allowed to return to work.

127. Mr Constantine also confirmed that the Respondent were prepared to conduct further investigations after the meeting, if necessary and based on any representations that the Claimant may make at the meeting; which meant that it would have been unnecessary to delay the disciplinary meeting while the HMRC investigation continued. The Respondent asked for supporting medical evidence so that the postponement request could be properly considered and in the meantime, the Respondent would refer him to Occupational Health to assess whether he could proceed with the disciplinary hearing, with adjustments to the process. As the Claimant had ongoing legal advice and was able to give instructions to his legal team the Respondent indicated in this letter that they were prepared to proceed on the basis of written representations. His solicitor was asked to confirm that he would be available to speak to Occupational Health.

128. We find that the Respondent immediately treated the news that the Claimant was seriously ill as a matter that should cause them to adjust the process and take his health into account in how it chose to proceed.

…

141. However, having read Mr Famer's [sic] report and considered its contents the Respondent decided to make the following adjustments to the process it would usually follow in such circumstances. It proposed that it would:-

> **141.1. Dispense with the need for an OH report and proceed on the contents of the Consultant's report;**
>
> **141.2. Limit the allegations to be considered at the hearing from 9 transactions to 3 transactions only; and**
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> **141.3. Conduct the hearing in writing, which would mean that the Claimant would no longer be required to attend a hearing and would instead have an opportunity to obtain advice and assistance in preparing written representations.**

The Claimant was told that his written representations needed to be with the Respondent by the following Friday 30 August and that the decision-maker could ask follow-up questions which would be put to the Claimant in writing. The Claimant was reminded that he would also have a right of appeal.

…

144. Ms Trott queried the amount of notice the Claimant had been given of the rearranged disciplinary hearing. She also stated that the Claimant would endeavour to make written representations but would not be able to do so by the deadline of 30 August. She hoped to have some representations to send to the Respondent by the following week. The Respondent took that statement to be a tacit agreement from the Claimant to the proposal that the disciplinary hearing could proceed with written submissions. It would not have been unreasonable of the Respondent to come to that conclusion given that the proposal had not been objected to when it was suggested in two previous letters and then in this letter the solicitor actively discussed when the Respondent could expect those written submissions.

…

155. On the morning of the appointment on 5 September, the Claimant's solicitors wrote again to confirm their opinion that the Claimant could only be properly assessed by a medical practitioner and to query the questions asked of OH on the addendum to the OH referral form. Ms Trott enclosed some additional medical evidence. At the same time, she confirmed that the Claimant had been able to meet with his advisers and HMRC on the previous day. The Claimant believed that as a result of the meeting HMRC would be commuting its enquiry from a criminal into a civil one. In the Tribunal Hearing we discussed the length of the meeting the Claimant had with HMRC and we found it likely that it was a long meeting of about 2-3 hours duration.

156. The Claimant's solicitors expressed their surprise and unhappiness at the arrangement for the Claimant to give detailed written representations to the disciplinary hearing. There was no recognition in the letter that this matter had been discussed between the parties in at least three letters beforehand. The Claimant's solicitors asked that the disciplinary hearing be postponed so that he could have his surgery and have a rehabilitation period of 3-4 months. This did not accord with statements in his medical information that the Claimant would require at least six

months rehabilitation. There was as yet no date for the surgery as the Claimant had postponed it so that he could address the HMRC matters. The Claimant indicated that he was prepared to forego his sickpay if it would assist. The letter also prayed in aid the fact that he was a longstanding employee with no prior disciplinary record and that as matters were not in the public domain any delay would not prejudice the Respondent.

157. On 5 September Mr Constantine responded to indicate that the agreement to proceed by way of written representations had been the product of correspondence between the parties. He then set those out. The Claimant's application for a postponement of the disciplinary proceedings was refused. The Respondent did not consider the payment of discretionary sickpay to be relevant to the timing of the disciplinary hearing and also confirmed again that its internal proceedings were separate from any investigation conducted by HMRC and so it was not going to wait until those enquiries were complete. The Respondent confirmed that it would follow any advice from OH in relation to adjustments to the disciplinary process.

158. The Respondent arranged for the Claimant to attend OH offsite on 5 September. He did not see Dr Skidmore as she was not available on that day. However, he did see Deborah Gilbert who was an OH specialist of 22 years and who was senior to Dr Skidmore.

159. Dr Durrani attended on the telephone. Ms Gilbert referred to Dr Durrani in her written report as the Claimant's friend because that is how he was described in the Claimant's solicitor's letter and is likely to be the way he introduced himself on the day, in addition to telling her that he was a doctor. She confirmed that they both explained the impact of his various health conditions to her in the consultation. Ms Gilbert was also clear that the Claimant wished to have the disciplinary hearing organised so that he could attend in person. She was in no doubt that he wished the matter to be postponed until after he had recovered from his surgery rather than proceed by way of written representation. However, she considered that to proceed in a written format would give the Claimant the opportunity to take time in preparing his responses to the allegations he faced and to obtain legal advice on them.

160. At the start of the Tribunal Hearing the Respondent asked for disclosure of the OH notes prepared by Ms Gilbert on 5 September. They wished to see them to address the issue of the impact of his disability on his capacity to attend the disciplinary hearing. There were no submissions on this application and the Tribunal did not order the notes to be produced because the Claimant agreed to disclose them as long as he had an opportunity to see them first.

161. However, when the Claimant saw the notes he firstly objected retrospectively to being seen by Ms Gilbert as he noticed that she was not a doctor. He also objected to the notes she made during the consultation. She noted that the Claimant took a telephone call during the consultation, that he took medication and that he took a break because he felt unwell. He objected to her note that he was able to recount in a coherent way what had been happening between him and HMRC. Also, that he was able to remember when he had to take medication. The Claimant obtained a witness statement from Dr Duranni [sic] and produced his personal supplemental witness statement questioning Ms Gilbert's authority to conduct the consultation and her competence. The Respondent was given leave to and did obtain a witness statement from Ms Gilbert to address some of the comments that the Claimant made about her and the consultation.

162. Ms Gilbert was eminently qualified to undertake his OH assessment. The Claimant may consider that only a doctor could assess him but that was not the case. This was not an assessment to determine whether the Claimant was a disabled person. The Respondent had accepted that he was disabled. The specific reason for the referral to OH was to determine what adjustments were necessary to enable the Claimant to be able to participate fully in the disciplinary hearing.

163. Although the Claimant did not agree with the arrangement that he put his submissions in writing to the disciplinary meeting, the referral had asked OH to address the specific point of what adjustments were necessary in dealing with those written submissions. In addition, OH had the completed referral form and could see all the information in it. Ms Gilbert also had the Claimant there in person as well as Dr Durrani's knowledge of the Claimant and his expertise. If she considered that it would be better for the Claimant to attend the hearing in person it would have been open to her to recommend this. We find that she took into account of [sic] relevant matters in order to come to her assessment. It was not her task to confirm whether or not the Claimant had a brain tumour or whether that affected him. She had all the medical reports to confirm that and Dr Durrani told her about the symptoms that arose from that condition. She was not treating him. It would not have been necessary for her to record everything down as long as her assessment showed that she had heard and understood what

had been said. Her task was to properly assess him in relation to his ability to represent himself in the disciplinary hearing and not in relation to returning to work or anything else.

164. It is unlikely that Dr Durrani told her that the Claimant had an adjustment disorder. If he had it is likely that she would have queried that further. The term 'adjustment disorder' had not been mentioned in the notes from Mr Kitchen, Dr Farmer or Dr Dexter that had been sent to her in preparation for the consultation. It had not been mentioned in the referral either, so if he had said that it would have been the first time she would have heard it and it is likely that she would have asked for clarification. There would have been no benefit to her in failing to mention it or to record it. An adjustment disorder could cover a number of conditions, some quite serious, so it is likely she would have sought further information if she had been told of that diagnosis. We prefer Ms Gilbert's evidence on this.

165. Ms Gilbert's evidence was that the Claimant gave her Dr Durrani's telephone number and instructed her to call him and then after a while he instructed her to end the call. It is likely that he did tell her about the Claimant's symptoms - tremors, lack of concentration, stress - and that he was unable to work at present.

166. It was appropriate for her to note that the Claimant left the appointment and went outside to take a call and she had to wait for him to return to complete the process. He read and made alterations to her proposed report. Also it was appropriate for her to record that that [sic] he kept track of time to make the 3pm call and he told her about the HMRC meeting. It was her task to make observations on the Claimant's ability to recall times, dates, important events, to understand the issues that would be discussed at the disciplinary hearing and to assess whether anything she had observed or been told about would affect his ability to put his case at a disciplinary hearing - whether in writing or in person. She took all that into account as well as the information given by the Claimant and Dr Durrani when making her recommendation.

167. The Claimant made it clear to Ms Gilbert at the appointment that he wanted to attend the disciplinary hearing in person so there was no need for him to be re-referred to OH after the Claimant's solicitor's letter of the same date. Ms Gilbert took all that into account when making her assessment and recommendation.

168. It was reasonable for the Respondent to follow Ms Gilbert's recommendation and to confirm that the disciplinary hearing would proceed with the Claimant's case being put forward by way of written representations. Ms Gilbert had properly assessed that the Claimant was able to give his solicitors instructions, was coherent in his explanation of his interactions with HMRC and was able to coordinate his telephone calls, his medication and his thoughts while in the consultation. In those circumstances, she recommended that the proposed course of action would allow him to put his case forward and to do so with assistance and with time to take advice. It was open to her to advise that the disciplinary hearing should be postponed or that it should proceed in a different format but following her assessment of the Claimant's presentation on the day, she did not do so."

11. The Tribunal then described what happened at the disciplinary hearing, which the Claimant did not attend, and of Mr Bandeen's findings adverse to the Claimant. They also set out what happened at the appeal hearing. The nub of its findings were in the following paragraphs:

"195. We find that through his written submissions to Mr Bandeen and the attached supporting documents the Claimant took the opportunity to fully explain the transactions and to put them in context before any decision was made.

196. At the time he made written representations it was not part of his defence that there were other employees using the staff transfer system in the way that he had. His defence was that there was a legitimate explanation for what he had done.

197. Having made sure that he understood the transactions and the Claimant's explanations, Mr Bandeen then considered them in the light of the disciplinary charges that the Claimant

faced. Firstly, he considered whether they involved the improper use of the Respondent's transaction systems, staff and resources.

198. He concluded that the transactions were purely personal and were totally unrelated to the Claimant's work for the Respondent. Also, that the Claimant had not sought permission from a more senior manager when using the staff transfer process rather than that of a more junior employee. Although Mr Tarran was senior he was junior to the Claimant.

199. We spent a lot of time in the Hearing discussing the section of the Code of Conduct that referred to personal business dealings. Mr Bandeen considered that the section did not give the Claimant permission to use the staff transfer process to transfer the UVT's funds. In his live evidence, he stated that he would struggle to think of a transaction more non-standard than for example, transaction 8 where the Claimant had sent a UK charity's funds to a UK bank, transferred it to Pakistan, then out through a personal account, transferred it into another currency and finally out to another charity based in Pakistan. He believed that in accordance with this section of the Code the Claimant should have sought permission from a manager senior to himself before using Citi's systems to make these transactions. He concluded that they were not personal business dealings, were non-standard and were contrary to the Code of Conduct and the Handbook. The Claimant had used the Respondent's resources - both systems and staff (i.e. Mr Basu in transaction 3) to engage in financial transactions that had a strong appearance of impropriety.

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

201. Mr Bandeen concluded that the Claimant's claim that he used the staff transfer process to transfer the UVT's money to create an audit trail to be implausible and counterintuitive. Instead, he considered that the way in which the transactions had been arranged made the process opaque and unnecessarily complicated. That is what he understood by the phrase 'complex and multi-layered'. For example, in transaction 1, the Claimant could have had the funds transferred directly from Lloyds TSB to Schroder Saloman Smith Barney New York to satisfy the capital call. In transaction 3 he could have made a cheque out to Citibank NA and paid the credit cards off directly and the cheque in transaction 8 could have been made payable to Fakir Trust. Instead, the way that the Claimant set up the transactions involved many stages and did not give a clear 'line of sight' to the Respondent of the ultimate beneficiary or to Lloyds TSB, which was the UVT's bank.

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

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

204. Mr Bandeen concluded that the transactions had the strong appearance of impropriety. Although the Claimant provided documents from Mr Malida and Mr White confirming that there was nothing untoward with the transactions, Mr Bandeen concluded that those statements were from the perspective of the charity and its trustees. The loan of £15,000 to meet the cash call had been subsequently repaid. The payment to clear Mr Ali's credit cards was apparently within the objects of the charity and the other Trustee had approved the payment to the Fakir Trust. However, once again, Mr Bandeen was only concerned with the Claimant's use of Citi's systems. He concluded that the numerous steps taken by the Claimant to complete these

transactions when they did not appear to be necessary could be seen as designed to conceal the source of the funds. He concluded that there was a lack of transparency.

205. He considered whether transactions 1, 3 and 8 were likely to bring the Respondent's name in disrepute. In this regard he was conscious of the fact that the Claimant was Code Staff as well as being the Global Head of TTS (Operations). The Respondent did not have to wait for an enquiry from the regulator before considering this matter. The Respondent was aware that the Prudential Regulation Authority and the Financial Conduct Authority have become increasingly focused on ensuring that firms are promoting a culture of good behaviour, particularly amongst its senior decision makers, such as the Claimant. He concluded that in those circumstances, the Claimant's involvement in transactions with the strong appearance of impropriety such as transactions 1, 3 and 8 was likely to create embarrassment for the Respondent and did carry with it the real risk of bringing the Respondent's name into disrepute.

206. Mr Bandeen understood and considered fully the Claimant's explanations and found them to be unsatisfactory. His decision was that the Claimant had used the Respondent's facilities for his personal benefit and that of his family and that such use had not been properly authorised. The Claimant's use of the Respondent's facilities went beyond the use envisaged by the 'Personal Business Dealings' section of the Code of Conduct. He decided also that by using the facilities in this way he had involved the Respondent in his personal dealings, in transactions that appeared unusual and which could not be considered a legitimate part of the Claimant's duties, or that of his colleagues nor a reasonable use of business resources. The Claimant's conduct looked at as a whole was at odds with the relevant sections of the Code of Conduct and the Employee Handbook. Mr Bandeen's decision was that the Claimant had demonstrated poor judgment from a Managing Director in a trusted position within the bank.

207. Mr Bandeen stood by his decision in the Tribunal Hearing. He considered that the Code of Conduct was not a set of narrow rules to be looked at in isolation but a set of broad principles which the Respondent had a reasonable expectation that the Claimant in his very senior position would uphold and assist in ensuring that others did so too.

208. We find that it would be reasonable to conclude that transfer of the charity's funds where the charity is not a client of the Bank would be a non-standard transaction. The fact that the Claimant has obtained approval to be a trustee of the charity by the Respondent did not give him permission or authorisation to use its resources for the charity. The Claimant was unable to produce any documentation from the Respondent that gave him authority to use its resources for the UVT's activities in this way or at all. The Respondent approved his personal involvement in the charity but it had not approved his use of its systems for the charity's purposes or benefit. The two are very different.

…

212. We find that although the Respondent did not specifically set out in its charges that it was concerned that the Claimant was using its systems to conduct transactions for a third party or that the UVT was benefitting from its systems or that neither it nor Lloyds TSB would not have had line of sight of the transactions; all of that was encompassed in the main charge that the Claimant's conduct of these transactions were an improper use of its transaction systems, staff and resources to engage in financial transactions that were either improper or had the strong appearance of impropriety.

213. Mr Bandeen decided that this all amounted to gross misconduct and was a serious breach of the Claimant's employment obligations, duties and responsibilities. Mr Bandeen considered that the Claimant's conduct was sufficiently inappropriate to warrant summary dismissal. In coming to that decision, he considered the Claimant's seniority and responsibility as Global Head of TTS (Operations) and the level of influence that gave him over a large number of the Respondent's employees. He considered that the Claimant was Code Staff under the PRA and the FCA Remuneration Code. He also considered the Claimant's extensive length of service with the Respondent. It was his decision that the Claimant's length of service, seniority and experience should have made him aware of the potential for these transactions to appear improper and that in effect, he should have known better. His long service did not detract from the poor judgment and conduct he had exhibited in the way in which he conducted these transactions. Mr Bandeen stated that over his career spanning almost thirty years he had never encountered comparable misconduct from someone of the Claimant's seniority and experience. The Claimant was dismissed on 17 September.

…

241. On 25 October the Claimant's solicitor wrote to the Respondent to set out his representations for the appeal hearing. In the representations the Claimant stated that the Respondent had unreasonably allowed itself to be influenced by the fact of an HMRC investigation and that this had coloured its view. In addressing each of the transactions, the Claimant set out the following new information: Transaction 1 - The money to meet the capital call needed to be in New York within 24 hours and the Claimant did not have the cash available to transfer within the time scale. Transactions 3 - This was a donation by the UVT to Mr Ali. It had earlier been said that it had not been a [gift] to him. Transaction 8 - That transferring funds from the UVT to the Fakir Trust in this way ensured that the Claimant would receive a foreign exchange receipt, giving him a certificate and reference number, which was essential for the Charity Commission reviews both in the UK and Pakistan. He stated that this is what he meant by 'creating an audit trail'. Pakistan is an exchange regulated country and therefore information in relation to any money transferred into the country had to be sent to the State Bank of Pakistan which is why a foreign exchange receipt was needed.

242. It was also stated in the Claimant's submissions that the Respondent did not understand the processes and that the Claimant and Mr White would have been willing to explain those to the Respondent had he been given an opportunity to do so. The Claimant believed that the Respondent had made a hysterical response to those transactions by finding that they potentially placed the bank's reputation as a provider of financial services into question. The Claimant then gave details of Employee 11's sole use of the staff transfer system. Employee 11 had asked the Claimant to transfer funds from his personal Citibank account in the UK to a developer in Columbia to purchase a flat on behalf of his children's nanny. The Claimant agreed and the transfer occurred. Employee 11 was senior to the Claimant and was a Citibank Gold Customer.

243. The Claimant referred to 17 colleagues in London who had used the system and to other colleagues based in Dublin who had also done so. All members of staff referred to had been or were within the TTS (Operations) Department when they did the transactions. The Claimant asked whether any of those individuals had been subjected to disciplinary action.

…

253. On 25 October the Claimant's solicitors wrote to the Respondent sending detailed submissions in relation to all the allegations and all of Mr Bandeen's conclusions in support of his appeal. The Claimant's solicitors also arranged the appendices and representations to be couriered over to the Respondent on the 30 October. Included in the documents were statements from Mobi Ajetunmobi and Steve Meadows who had both previously worked for the Respondent and provided character references for the Claimant. It is likely that Mr Staley read all those documents before he conducted the hearing on the following day.

254. Debbie Garlick of the Respondent's ER team attended [sic] Mr Staley on 31 October 2013, which was the day of the appeal. They waited for the Claimant and his chosen companion before starting the hearing. An independent note-taker was also present. The Claimant did not attend the hearing.

255. Mr Staley had prepared a list of questions that he was going to go through with the Claimant. Those related to the charges that the Claimant faced. Mr Staley was conscious that as appeal hearing manager he had to decide whether the disciplinary process followed by Derek Bandeen had been procedurally fair and appropriate, whether he agreed with the decision that the Claimant's actions constituted gross misconduct and whether the decision to terminate the Claimant's employment had been reasonable.

256. Mr Staley would have been aware of the Claimant's long service with the Respondent and therefore the impact that dismissal would have on him. We find that he, as Mr Bandeen before him, took his role seriously and considered the documentation and the Claimant's representations fully before coming to his decision. In his evidence before the Tribunal he showed that he was familiar with the documentation and with the allegations against the Claimant.

257. After careful consideration of the Claimant's grounds of appeal on the day, it was Mr Staley's decision to confirm Mr Bandeen's decision to terminate the Claimant's employment. Mr Staley's decision was that these were transactions that were complex, multi-layered and involved a third party entity and were not in fact personal transactions. In his live evidence he confirmed that what concerned him was the Claimant's use of the Respondent's systems to carry out transactions on behalf of a charity that was neither one of its employees or a client. He was also concerned about the Claimant's use of Mr Basu to discharge Mr Ali's credit card

debt, which he considered to be a situation rife with conflict of interest. The core issue for his [sic] was the Claimant's use of the Respondent's internal systems for non-personal business dealings.

258. Mr Staley wrote to the Claimant on 25 November to set out in detail his decision on the Claimant's appeal. In his letter Mr Staley addressed each of the Claimant's appeal points and gave his conclusions. It was his conclusion that contrary to the Claimant's assertions that the transactions were clear to all concerned and were not multi-layered of [sic] complex; the way in which they were organised was not transparent and he confirmed his conclusion that they were multi-layered, complex and prevented the charity's bank - Lloyds TSB - from having end to end sight of the transactions as they ought to have been able to do. He therefore concluded that Mr Bandeen's conclusion on that allegation had been reasonable in the circumstances.

259. He considered the Claimant's claim that he was of good character and that he had an unblemished 40-year work record but noted that Mr Bandeen had considered that against the [Claimant's] position within the Bank, his seniority and that he was Code staff, which meant that the Respondent had a high expectation of him. Mr Staley considered the comparators that the Claimant referred to in his appeal documents. The investigations were still in progress at the time. However, he was satisfied that from the information available, there were no other staff users who had used the process for transferring or managing a third party charity's money. He was informed by Ms King about what the Respondent had by that time found out about Employee 11's single use of the system and focussed on that as he was CEO of the Respondent's Transaction Services and Global Head of the Respondent's Treasury and Trade Solutions and was therefore quite senior. The Respondent had duly investigated his single use of the Staff Transfer system and found that he had transferred funds in a straightforward manner. The Respondent was able to see the end recipient. Mr Staley concluded that this made it sufficiently different from the Claimant's conduct as to not be comparable. By the time of the Hearing the Respondent knew more about transactions carried out using the staff transfer system by other members of staff, as set out above. The transactions conducted by Employees 3, 11, 14 and 16 were put to Mr Staley during his cross-examination. Mr Staley confirmed that although they had all used the staff transfer process, the ways in which they had done so had been different from the Claimant's use. The Claimant had used it to transfer third party charitable funds, he had done so in a way that made it difficult for the Respondent to see where the funds came from or where they were going and he had not got permission from the Respondent to use the process in that way. The Claimant's transactions were of substantially greater sums of money and the Claimant was of greater seniority than all of the other identified users - apart from Employee 11 - so that more would and should be expected from him in maintaining and promoting good practice within the Bank.

260. Mr Staley considered the Claimant's ill health and concluded that the Respondent had made appropriate adjustments to the appeal process to enable him to have a fair hearing. Mr Staley confirmed that the appeal was refused and the Claimant's dismissal was confirmed."

12. Thereafter, the Tribunal applied the law to the facts as it found them, at paragraphs 261 to 280. Again, little purpose is served by reciting this in its entirety at this point. It should be noted, however, that, as with the section dealing with the findings of fact, the Tribunal goes into considerable detail when setting out its reasons. The paragraphs which set out the final conclusions are as follows:

"281. In summary, it is our judgment that the Respondent applied three of the alleged PCP's in this case. Firstly, the Respondent refused the Claimant's request to be accompanied by Mr Meadows and/or Mr White and insisted that only a trade union official or a work colleague could accompany him to the disciplinary meetings. Secondly, the Respondent sent the Claimant all the documents that they sought to rely on in the disciplinary process and in his case that happened to be a lot of documents. Thirdly, it is also correct and the Respondent conceded that it was likely that it applied a PCP that once disciplinary proceedings are started they would usually seek to bring them to a conclusion with reasonable dispatch while keeping consistent

with the individual circumstances of the employee and with any advice obtained from Occupational Health. This last one is an amalgam of 2.3.3, 2.3.4, and 2.3.5 above.

282. The Tribunal then went on to consider whether the application of these PCP's put the Claimant at a substantial disadvantage - in comparison with persons who were not disabled. Did the application of the PCP's substantially disadvantage the Claimant in relation to his ability to be able to represent himself properly and defend himself in relation to the disciplinary charges brought against him in this process?

…

291. The Claimant was given the right to be accompanied. But the Respondent refused to make the adjustment he wanted to allow him to bring an external companion, which was outside of their policy.

…

295. In our judgment it was not the application of this PCP that resulted in the Claimant being unable to persuade the Respondent of his case in relation to the allegations. The Claimant was able to provide a full account of the events relating to the allegations. He gave the same details in relation to the three transactions in his written submissions as he did in our Hearing. His defence to the allegations have not altered. The Respondent did not accept the Claimant's explanation or his justification for the three transactions. Mr Bandeen and Mr Staley rejected his explanations as being unsatisfactory given his status within the Bank, given the Code of Conduct and the Handbook and given the details of those transactions. It was not that they were unclear of his explanations or that they did not understand his defence. They simply did not accept them.

…

298. Although the Claimant was a person with a brain tumour who was suffering from tremors, poor concentration, memory loss etc at the time of the disciplinary hearing he was able to give his solicitor detailed instructions so that they could respond to the Respondent on his behalf. He was also, at the same time, able to give his criminal solicitor instructions on the HMRC matter and address issues directly with the HMRC. He could have asked a colleague to attend with him. He did not do so and chose Mr Meadows because he thought that he would be able to outrank Mr Staley. There was no evidence that anyone refused to attend for fear of retribution. And no evidence that anyone needed reassurance.

299. In our judgment, the decision to proceed in writing did not disadvantage the Claimant. It allowed him the opportunity to give his explanations of the transactions in detail. His solicitors - on his behalf - made lengthy submissions on each transactions [sic], which he may not have had the chance to do in a meeting. He was able to provide all documentation that he had in support of his case. He was able to consider and review the written submissions before they were sent out. Unlike most employees, he had solicitors draft his response to disciplinary charges for him.

…

302. It would not have been reasonable to postpone the disciplinary process until the HMRC investigation had been completed, as that had still not completed some years later at the time of this Hearing. It would not have been reasonable to postpone it until his brain surgery, as the Claimant did not recover or become sufficiently fit and able to participate in the Employment Tribunal process until 2015.

303. It is our judgment that the application of the 3 PCP's did not result in substantial disadvantage to the Claimant. The duty to make reasonable adjustments did not arise in this case. However, the Respondent did make some adjustments to the disciplinary process as set out above and those adjustments benefitted the Claimant in making his defence to the allegations of misconduct. It is our judgment that at the end of the process, the Respondent made the decision to dismiss him and his appeal against dismissal failed because his defence and explanations for his conduct were not accepted and not because of the effect of the application of any PCP's on him.

…

305. In our judgment, the Claimant felt unable to attend the disciplinary and appeal hearings. However, we do not have evidence that he was unable to do so. After her assessment of him, the

experienced Occupational Health adviser confirmed that the Claimant would be able to properly participate in the disciplinary process by making written submissions. She was aware that the Claimant wanted to attend in person but concluded that if he were suffering from memory loss and poor concentration, it would assist him to be able to make written representations. In his reports, Dr Dexter advised that the Claimant should refrain from work, he also confirmed that he was under stress and set out the ways in which his tumour affected him but did not comment on his ability to attend disciplinary and appeal hearings. Dr Farmer's letter confirmed the stress that the Claimant was under. In his report in August Dr Farmer confirmed the deterioration of what was a previously stable situation and that the Claimant's health was at a precarious state. He did not refer to the Claimant's ability to attend his disciplinary and appeal hearings. It is our judgment that it is more likely that the Claimant chose not to attend both hearings.

306. We did not have sufficient evidence to conclude that his absence from those meetings was due to his disability or was a matter arising from his disability. The Claimant was proposing to attend the appeal hearing - if he was allowed the companion of his choice - which meant that he could attend the meeting. He had attended a long meeting with HMRC on 4 September and had earlier attended the meeting with Mr Constantine and Mr Woodward on 8 July. He was a disabled person but that does not mean that his decision not to attend the disciplinary and appeal meetings was something that arose in consequence of his disability.

…

308. In our judgment, conducting the disciplinary procedure in writing was not to the Claimant's detriment. As the Occupational Health Adviser confirmed, it would have been to his benefit as he was able to have it done by solicitors, which was unusual and meant that his explanations were put in the best possible way from his point of view. Proceeding in writing gave him the opportunity to ensure that everything he wanted to say in explanation was included and that all his documents were produced and attached. He was able to explain in detail how he considered that the three transactions were in keeping with his duties, were within the correct use of the Respondent's staff transfer process and within the remit of his employment.

…

311. In our judgment, the Claimant's disability did not affect his ability to present his case or to articulate his defence.

312. We did not find facts from which we could conclude that that [sic] there was something that arose from the Claimant's disability that caused the Claimant to be treated less favourably by the Respondent. In our judgment, there is no 'something' arising in consequence of his disability that could constitute a causative link between his disability and the treatment complained of. The Claimant was dismissed and his appeal was not upheld. It is our judgment that those outcomes did not happen in consequence of anything that occurred as a result of his ability.

313. The Claimant failed to make a prima facie case of discrimination arising from disability and the burden of proof does not shift to the Respondent.

…

315. The first question for the Tribunal is - what was the reason for the Claimant's dismissal? In our judgment the Claimant was dismissed because of misconduct or Some Other Substantial Reason (SOSR).

…

318. The allegations that the Claimant faced at the disciplinary hearing was [sic] set out in the disciplinary invitation letter as follows: that the three transactions referred to demonstrated that the Claimant had used the Respondent's transaction systems, staff and resources to engage in financial transactions which were either improper or have the strong appearance of impropriety. The letter then went on to give some specifics of the ways in which the transactions were improper or had the appearance of impropriety; such as being multi-layered. At the end of the process, Mr Bandeen came to the conclusion from the evidence before him - which included a consideration of the documents sent to him by the Claimant - that the charges had been proven and that the Claimant had committed gross misconduct. He did not accept that the Claimant had used the staff transfer process to create an audit trail but that the complete opposite was true and that the Claimant had used the process in an attempt to conceal the details

of the beneficiaries from the UVT's bankers. Mr Bandeen considered that the Claimant had used the Respondent's systems i.e. the staff transfer process, its banking facilities; its staff - i.e. Mr Basu and Mr Tarran; to make transfers that were nothing to do with his work, were not personal to him and were inappropriate. That is encompassed in the statement that they were either improper of had the appearance of impropriety. The UVT was not one of the Respondent's clients. The Claimant and the UVT are two separate entities. It does not matter that he was the sole or majority donor to the charity. It was still a separate legal entity. The Respondent was not the UVT's Bank. The transactions were non-standard and not covered by any of the Respondent's policies or the Code of Practice. The fact that the Claimant had permission to be a trustee of the UVT did not mean that he had permission to use the Bank's facilities to transfer its money around the world. It is for those reasons that the Claimant was dismissed.

319. It is our judgment that Mr Bandeen and Mr Staley believed that the details of the 3 transactions demonstrated that the Claimant had shown poor judgment in the way he had used the Respondent's transaction systems, staff and resources. Mr Bandeen considered that the conduct was serious enough to be classed as gross misconduct and that an appropriate sanction was summary dismissal. Mr Staley considered the Claimant's appeal but found no reason to overturn that decision. It is our judgment that both Mr Bandeen and Mr Staley had a genuine belief that the Claimant had committed gross misconduct warranting summary dismissal. They made their decisions independently and we had no evidence from which we could conclude that they had been pre-determined. Both struck us as conscientious managers who took their roles seriously and were senior enough not to be influenced by anyone else.

…

321. The employer needs to have a genuine and reasonable belief that has been reasonably tested through an investigation. What is required here is a reasonable investigation and not an investigation to the standard of criminal proceedings. We also bear in mind the law on investigations most recently referred to in *Shrestha v Genesis* quotes above which advises a Tribunal to look at the investigation as a whole when assessing the question of reasonableness.

322. Did the Respondent conduct a reasonable investigation? In [our] judgment, the Respondent did do so. Mr Woodward and HR held a long interview with the Claimant quite early in the process, on 8 July. That was part of a global regulatory investigation that included the Claimant. In that meeting the Claimant attempted to explain the staff transfer process. The Claimant had another opportunity to do so in correspondence with Mr Woodward. In his emails on 9 July Mr Woodward set out clearly the transactions that the Respondent was focussed on. He was not just being asked to explain a process. He was asked specific questions on transactions involving cheques drawn on the UVT's account, held within Citi's accounts with the relevant funds transferred to beneficiaries in India and/or Pakistan via Citi branches in those countries. Mr Woodward asked the Claimant how many cheques there were and details of the amounts involved. He clearly outlined the questions that he wanted the Claimant to answer. The Claimant responded on 10 July giving the information requested. The Claimant could have been in no doubt that the Respondent was conducting an investigation into these matters.

323. The Claimant did not have a formal investigation meeting with CSIS as Mr Basu and Mr Ghandi did. However, he was asked detailed questions such as was asked of Messrs Ghandi and Basu in their meetings and had an opportunity to answer them in writing. Once he was suspended his solicitors took over correspondence with the Respondent. They asked many questions on his behalf. They raised queries about the process, the allegations, the timing of proceedings and everything else. The Claimant had ample opportunity to ask questions, to articulate his defence to the allegations and to understand and formulate considered answers to the charges he faced. He was able to do so well before the disciplinary hearing. It is likely that he was able to attend the disciplinary hearing and reinforce his answers but chose not to do so. Nevertheless, his case was articulated well and strongly put but [sic] his solicitors.

…

328. It is our judgment that the Respondent had conducted a reasonable investigation. Mr Bandeen had sufficient evidence before him on which to base his belief that the Claimant had committed gross misconduct in that he had conducted transactions using the Respondent's process, staff and resources which were improper or had the strong appearance of impropriety. The transactions had not been personal to the Claimant, they had been contrary to the Code of Conduct and they had on behalf of a separate legal entity i.e. the UVT. The UVT enjoyed the use of the Respondent's facilities without undergoing the usual checks, which included anti-

money laundering (AML) checks. Whether or not Lloyds could also do so was not the point. Since the Respondent's processes were being used - it should have been given the opportunity to decide whether it was happy to rely on Lloyds' checks or preferred to do its own. The stages of each of the three transactions set out in the findings above show that in each of them, the Respondent's systems would not have picked up that the funds were being transferred from the UVT as the funds were put in the Respondent's Nostro Account and then transferred on. When one of the Claimant's transactions did throw up a concern, the Claimant's response to the AML query caused even more concern and did not serve to reassure the Respondent. All of this was clear from the documents and was not disputed by the Claimant in his submissions to the disciplinary hearing. His case was that these transactions were within the use of the staff transfer process. The Respondent did not agree. The Respondent concluded at the end of the process that the Claimant had used its resources, staff and systems to engage in financial transactions which were either improper or had the strong appearance of impropriety. It is our judgment that the Respondent had sufficient evidence from its investigation on which to base [its] disagreement with the Claimant's interpretation of his actions and come to that decision. Mr Staley confirmed the Claimant's dismissal and agreed with Mr Bandeen that the Claimant had committed gross misconduct.

…

336. When considering the appropriate sanction, Mr Bandeen had in his mind the Claimant's gross misconduct, his length of service, and his status within the organisation and in particular his position as Code staff. In our judgment those were legitimate and proper considerations to take into account when determining suitable sanction. It was open to Mr Bandeen to conclude that the Claimant's length of service and his clean disciplinary record were outweighed by the poor judgment and poor conduct exhibited by him and the embarrassment and reputational risk it posed for the Respondent. The Claimant's misuse of the transfer process was unacceptable to the Respondent.

337. In those circumstances, it was not outwith the band of reasonable responses for the Respondent to terminate the Claimant's contract on the grounds of his gross misconduct. The dismissal is fair in the circumstances."

13. The grounds of appeal, as amended, are lengthy. However, they are more pithily summarised in the 26-page skeleton argument served on behalf of the Claimant, which was augmented by a "Speaking Note" of eight pages, essentially a rebuttal of the Respondent's arguments in its skeleton argument. It is from the Claimant's skeleton argument that I shall summarise the grounds. Grounds 1 to 7 are grouped in the amended grounds of appeal as Part 1, headed "*Missapplication of Law*"; grounds 8 and 9 as Part 2, headed "*Failure to take into account relevant considerations*"; ground 9 as Part 3, headed "*Factual findings unsupported by any evidence*"; ground 10 as Part 4, headed "*Perversity*"; and grounds 11 and 12 as Part 5, headed "*Miscellaneous*". The grounds are these:

a) Ground 1 - The conclusion that Mr Bandeen had sufficient evidence on which to conclude that the Claimant had committed gross misconduct was based on evidence derived from an investigation and disciplinary process that was flawed.

b) Ground 2 - The Tribunal erred in law when concluding that the investigation was reasonable.

c) Ground 3 - The Tribunal erred in law when assessing whether PCPs were applied by the Respondent by considering the issue in light of adjustments that the Respondent made to the process.

d) Ground 4 - The Tribunal erred in law when finding that the PCP contended for by the Respondent was one "applied" in the precise terms set out.

e) Ground 5 - The Tribunal erred in law by failing to identify the appropriate comparator, when considering whether the Reasonable Dispatch PCP placed the Claimant at a disadvantage

f) Ground 6 - The Tribunal erred when concluding that the Claimant was not placed at a substantial disadvantage, following its failure to conduct the appropriate comparative exercise and/or by considering the issue in light of adjustments that had been made to the process.

g) Ground 7 - The Tribunal erred in law by rejecting the PCP contended for by the Claimant as this was directly inconsistent with its other conclusions, or alternatively was perverse.

h) Ground 8 - Failure to take into account relevant considerations (these appear at page 3 of the amended grounds of appeal) - there are two points.

i) Ground 9 - Findings unsupported by any evidence - there are three points

j) Ground 10 - Perverse findings - there are two points.

k) Ground 11 - Erroneous conclusion that conducting the disciplinary procedure in writing was not to the Claimant's disadvantage/detriment.

l) Ground 12 - Erring in law when rejecting one of the PCPs contended for by the Claimant as defined in the Judgment.

14. Many of the grounds of appeal raise issues which were squarely before the Tribunal.

15. Following the hearing, and at my request, copies of the skeleton arguments from both sides were sent to me in electronic format. I am grateful to them for that. I acknowledge having cut and pasted from both documents in the course of preparing this Judgment which has saved some time.

16. In their skeleton argument, counsel for the Respondent begin by setting out a number of familiar principles which apply to the EAT's treatment of a decision of a Tribunal:

a) It is inappropriate to "*go through the reasoning of [a tribunal] with a toothcomb to see if some error can be found here or there - to see if one can find some cryptic little sentence*" - **Hollister v NFU** [1979] ICR 542 at pages 552 to 553.

b) Thus "*infelicities or even legal inaccuracies in particular sentences in the decision will not render the decision itself defective if the tribunal has essentially directed itself on the relevant law*" - **ASLEF v Brady** [2006] IRLR 576 at paragraph 55.

c) The appellate court should avoid "*pernickety critiques. Over analysis of the reasoning process; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round*" - **Fuller v London Borough of Brent** [2011] ICR 806 at paragraph 30.

d) "*a generous interpretation ought to be given to a tribunal's reasoning. It is to be expected, of course, that a decision will set out the facts. That is the raw material on which any view of its decision must be based. But the quality which is to be expected of its reasoning is not that to be expected of a High Court Judge … The reasoning ought not to be subjected to an unduly critical analysis*" - **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337.

e) The expressed findings of even the most meticulous Judge are "*always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which ultimately play an important part in the judge's overall evaluation*" - Lord Hoffman in **Piglowska v Piglowski** [1999] 1 WLR 1360 at page 1372E-F. This is *a fortiori* in the case of a Tribunal's reasons.

f) Equally, it is well established that the appellate court should only interfere on the perversity ground where "*the conclusion of the tribunal on the evidence before it is "irrational," "offends reason," "is certainly wrong" or "is very clearly wrong" or "must be wrong" or "is plainly wrong" or "is not a permissible option" or "is fundamentally wrong" or "is outrageous" or "makes absolutely no sense" or "flies in the face of properly informed logic" … The result is that it is rare or exceptional for an appeal to succeed on the grounds of perversity. The reason why it is a heavy burden to discharge is that it has been recognised by those with wide experience and practical wisdom that there are many factual situations arising in the field of industrial relations, including sex discrimination, in which different conclusions may be reached by different tribunals, all within the realm of reasonableness. It is an area in which there may be no "right answer." The consequence of this approach, also approved in cases of high authority, is that it is not appropriate or fruitful to subject the language of the decision of the industrial tribunal to "meticulous criticism" or "detailed analysis" or to trawl through it with a "fine-tooth comb." What matters is the substance of the tribunal's decision, looked at "broadly and fairly" to see if the reasons given for the decision are sufficiently expressed to inform the parties as to why they won or lost the case and to enable their advisers to identify*

an error of law that may have occurred in reaching the conclusion" - **Stewart v Cleveland Guest** [1994] IRLR 440 at paragraph 33.

17. I accept that those principles, which, or course, apply in all cases, are particularly apposite in this appeal and bear them in mind as I approach the grounds of appeal.

18. Weight is placed throughout the Claimant's skeleton argument, and in the oral argument before me, to comments made by HHJ Richardson at the sift stage. I have read these with care, and have borne them in mind, albeit mindful that there is a great deal more material and developed argument before me than was the case at the Preliminary Hearing.

19. There is a significant overlap between the 12 grounds of appeal. I shall turn first to grounds 1 and 2.

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

21. In the absence of a reasonable investigation, the argument continues, procedural failings in the investigation render it not only procedurally unfair but also substantively unfair because the requisite belief must be reasonably tested through an investigation. The Claimant was

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

22. The Claimant asserts that the only possible conclusion that the Tribunal could have reached on this issue was that there was an absence of a reasonable investigation, and the Tribunal's conclusion to the contrary was an error of law. It relies, as it did below, largely on **A v B** [2003] IRLR 405, and in particular paragraphs 60 and 80 which read:

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

23. So far as ground 2 is concerned, it is submitted that the Tribunal erred in law as to its findings as to the reasonableness of the investigation in a number of respects. I will not rehearse in detail the lengthy points made in the skeleton argument, but they amount in brief to this. First, there was no investigatory meeting, and in that regard the Claimant was treated less favourably than other non-disabled employees. The Tribunal's analysis of that was, it is said, flawed in having overlooked that the certain detailed questions asked of the Claimant were not in

connection with the disciplinary process but required in order that the Respondent could deal with HMRC enquiries. A similar point arose as respects the 8 July meeting, which, it is argued, was not part of an investigation into the Claimant's conduct but an opportunity for him to explain the staff transfer procedure. It is also said that the Tribunal erred in relying on certain emails which were not part of the disciplinary process, and did not form part of the materials which were provided to Mr Bandeen as part of the disciplinary hearing. Notwithstanding this, it is submitted, they were relied on by the Tribunal when assessing the reasonableness of the investigation (see Reasons paragraph 322). Further points made include the fact that the "*primary purpose*" of the CSIS investigation was to enable the Respondent to take legal advice on their legal position, vis-à-vis the regulators and HMRC, that there was no investigatory report, that the suggestion that the Respondent could continue to investigate *after* the disciplinary hearing was flawed, and that it was unreasonable to conclude that it was reasonable to proceed with disciplinary action at a time when the Respondent did not have "*all the information on the various transactions ...*" (Reasons paragraph 106). The complaint is also made that the Tribunal had not considered whether the steps taken by the Respondent to investigate the use by other staff of the staff transfer process were reasonable, something considered by the Tribunal only when considering whether dismissal was an appropriate sanction (Reasons paragraphs 331 to 332).

24. The Respondent's position is that the Tribunal correctly considered the investigation carried out "in the round" - as it was required to do by decisions such as **OCS v Taylor** [2006] ICR 1602, at paragraphs 47 to 48 and **Shrestha v Genesis Housing Association Ltd** [2015] IRLR 399, paragraphs 22 to 23. The Tribunal referred to the decision in **A v B** (as it did to **Shrestha**) and referred to it in the Reasons at paragraph 48. The Tribunal properly directed itself on the law in the Reasons at paragraphs 45 to 49 and 321 and it concluded that the level of investigation was reasonable (Reasons paragraph 328). The Respondent asserts that these two

A grounds of appeal, although formulated - they say "dressed up" - as a misdirection appeal, in reality amount to a perversity challenge, and to succeed must surmount the very high hurdle for such a challenge set by established authority.

B

25. The Respondent's Answer, to which its skeleton argument refers me for a detailed rebuttal of these matters, points to findings made by the Tribunal to the effect that it was aware that there had been no formal investigation meeting, nor investigation report but that, nonetheless, the level C of investigation had been sufficient (Reasons paragraph 325). It also asserts that the exchanges between the Claimant and Respondent in July 2013 - including the 8 July meeting - were matters which the Tribunal was right to take into account: they were matters intended to establish what D had happened, and to ascertain the Claimant's version of events. They remind me that the Respondent had been investigating many more than the nine - eventually slimmed down to three - transactions which formed the basis of the charge. As to comparators, it is pointed out that, at paragraph 196 of the Reasons the Tribunal records that, at the relevant time, the Claimant did not E assert that there were other employees using the staff transfer system.

26. I am very much alive to the comment made by HHJ Richardson when granting leave, that F "*It is a striking feature of the case that the Respondent, a company with substantial HR and other administrative resources, does not appear to have carried out anything which would be recognised by an employment lawyer or HR specialist as an investigation stage*".

G

27. This was a difficult and highly unusual case - no doubt for the Claimant as well as for the Respondent - and one in which there had been a great deal of input from solicitors acting for the H Claimant throughout the disciplinary process. The question whether a reasonable investigation had been carried out, as part of the **Burchell** test, is quintessentially a matter for an Employment

Tribunal to determine on the facts as found by them, and this Appeal Tribunal will inevitably be slow to interfere. It is trite that other Employment Tribunals might permissibly have come to conclusions different from those made in this case on the same evidence. The question for me is simply whether the conclusions reached by this Tribunal were ones which it permissibly made on the evidence before it. Having read and re-read the Reasons, by reference to each of the matters said to amount to errors of law, misconceptions and misunderstandings, I have concluded that, in relations to grounds 1 and 2, no error of law is to be found in the decision of the Tribunal read as a whole, which is how I must read it. It cannot be said, in my judgment, that findings made in this connection could be categorised as perverse. Put shortly, I agree with the thrust of the Respondent's submissions summarised (and I stress that word) above. The matter was one for the Tribunal to determine on the facts of the case, and they did so in a permissible manner, giving a careful and full explanation for their decision.

28. I turn to grounds 3 to 7 which are concerned with adjustments. The adjustments concerned were identified at the outset of the hearing in the agreed list of issues, at paragraphs 2.3.1.1 and 2.3.1.2, and related to the requirement (1) "*that an employee must make every effort to attend the disciplinary hearing and not unreasonably delay the disciplinary process*"; and (2) "*the right to be accompanied at the disciplinary, appeal hearing [sic] by a fellow worker or trade union official*". The action complained of in relation to the application of these provisions was set out at 2.3.2 of the Reasons as follows:

> **"2.3.2. The decision/action taken by the Respondents when applying these provisions, by:-**
>
> **2.3.2.1. Not agreeing to a further postponement of the disciplinary hearing on medical grounds;**
>
> **2.3.2.2. Insisting that the disciplinary and/or appeal hearings take place "in writing" in the Claimant's absence; and/or**
>
> **2.3.2.3. Not allowing the Claimant to be accompanied by Mr Meadows and/or Mr White at the appeal hearing on the basis that neither was a colleague or trade union representative.**
>
> **2.3.3. Not agreeing reasonable delays to the disciplinary process to enable employees to attend disciplinary and/or appeal meetings;**

2.3.4. Proceeding to a disciplinary hearing without reference to external proceedings concurrently affecting employees (in the Claimant's case, the HMRC timetable/ proceedings)[;]

2.3.5. Agreeing to a number of short piecemeal postponements to the disciplinary process for employees rather than one substantial period of postponement;

2.3.6. Requiring that employees consider a large amount of documentary material within a short space of time prior to disciplinary hearings;

2.3.7. Not explaining to employees before disciplinary hearings:-

2.3.7.1. The precise provisions of the code/handbook which are alleged to have been breached.

2.3.7.2. Detailed reasons as to why the Respondents consider the employee has committed an act of misconduct.

2.3.8. Not providing further particulars of disciplinary allegations and/or disciplinary findings to employees when dealing with disciplinary and/or appeal hearings;

2.3.9. Not asking any questions of employees prior to the disciplinary hearing;

2.3.10. Forming disciplinary allegations without holding an investigatory meeting with the employee;

2.3.11. Articulating disciplinary decisions by way of generic findings (in the Claimant's case finding the transactions to be multi-layered and complex and with the appearance of impropriety) and/or not providing further information to employees as to the reasons for the decision."

29. The Tribunal's summary conclusions in this regard have already been set out - see paragraphs 281 and following of the Reasons set out above. It is helpful at this point to set out other findings of the Tribunal in respect of each of the 11 PCPs which have been listed above:

"266. The Claimant relied on 11 possible Provisions, Criterion or Practices (PCP's[)], which are set out above. The Tribunal firstly considered whether they were all PCP's. We use the numbering from above.

267. 2.3.1 [-] These potential PCP's relate to the application of the Respondent's disciplinary procedures to the Claimant. We agree that the Respondent applied its disciplinary procedures equally to all staff and in that way it is a PCP. In relation to the specific aspects relied [on] by the Claimant the Tribunal's judgment is as follows:-

268. 2.3.1.1 - The Respondent was flexible in its arrangements for the disciplinary hearing and was in constant communication with the Claimant and his representative to make suitable arrangements for him to be able to participate in the disciplinary process. The Respondent did not insist that the Claimant come to the first arranged meeting or that the original charges should be kept. Rather, the Respondent showed flexibility and did not apply a set, rigid procedure to the Claimant. There was no PCP applied here.

269. 2.3.1.2 - The Respondent did apply a criterion in relation to who was allowed to accompany an employee to a disciplinary or appeal hearing. The Respondent insisted that such a companion had to be either a fellow worker or a trade union official. It is also our judgment that the Respondent considered the Claimant's request to be accompanied by someone to be outside that criterion and refused it on particular grounds. We will address this more fully below. The Respondent did apply this PCP to the Claimant.

270. 2.3.2.1 - The Tribunal does not agree that the Respondent had a particular practice in relation to the timing of the disciplinary hearing. The policy at 2503 does not set a time limit within which the hearing should happen. There was no set policy or practice in relation to the number of postponements or the period of time for which a disciplinary hearing could be

postponed. The postponements that the Respondent agreed to the procedure applied in the Claimant's case were all fact specific.

271. 2.3.2.2 - It is this Tribunal's judgment that the Respondent did not have a policy or practice that disciplinary or appeal hearings take place in writing. That is what was happened [sic] in this case but there was no evidence on which we could make a finding that the Respondent applied such a practice to persons who were not disabled. The Respondent's practice was for the disciplinary hearing to be conducted in person. It was only after the Claimant's solicitor stated that he could not attend the set dates and after further correspondence which we have set out above in the findings, that the arrangement was made for him to make representations in writing. This was not a PCP but was the procedure applied in this case because of the particular circumstances.

272. 2.3.2.3 - The Respondent did not allow the Claimant to be accompanied by Mr Meadows or Mr White at the appeal hearing. This was because neither of those men were a colleague or a trade union official. That was a PCP applied to the Claimant.

273. 2.3.3, 2.3.4 and 2.3.5 are facts that occurred in this case. We had no evidence from which we could conclude that these were PCP's applied to persons who were not disabled or to anyone else. It is our judgment that they were not practices, criterion or procedures applied by the Respondent. It is our judgment that the Respondent may well wait for criminal or other proceedings to be completed in other cases and the amount of material that an employee has to consider before a disciplinary hearing or the number of postponements given in each process would be different in every case. These were therefore not PCP's.

274. 2.3.6 - It is this Tribunal's judgment that the Respondent sent the Claimant all the relevant documentation that was going to be considered in his disciplinary hearing, as they were duly bound to do. The Claimant was entitled to have all the relevant information so that he could be aware of the charges that he faced, the facts that arose out [of] the investigation and the grounds on which the allegations he faced were based. It is likely that this is the Respondent's practice when conducting internal disciplinary proceedings. This was a PCP.

275. 2.3.7 - It is possible that the Respondent has a practice of not identifying specific parts of the Code of Conduct that the employee is alleged to have breached, at the beginning of a disciplinary process procedure. The would give it opportunity to fine tune the charge as the investigation continues. The Respondent had a reasonable expectation that the Claimant was familiar with the Code of Conduct and was active in getting other more junior staff to abide by its spirit and its terms. He was Code staff. It was reasonable for the Respondent to expect the Claimant to be vigilant about it. We had no evidence of the time in their disciplinary processes that Mr Basu or Mr Ghandi were given details of the specific parts of the Code of Conduct that they were alleged to have breached. Before the disciplinary hearing the Claimant was given details of the specific parts of the Code that it was alleged that he had breached. There was no PCP applied here.

276. Also, in this case the Respondent did give the Claimant detailed reasons why they considered that he had committed misconduct. Paragraph 1 of the invitation letter set out the alleged misconduct and the Claimant was given 200 pages of evidence that had been gathered in the investigation. There was no practice applied in this case of failing to explain the reasons why he was considered to have committed misconduct, before the disciplinary hearing. The Claimant was given detailed reasons why the Respondent considered that he had committed an act of misconduct. This was not a PCP applied in this case.

277. 2.3.8 and 2.3.9 - It is our judgment that these were not the Respondent's practice. The Claimant was given particulars of the disciplinary allegations against him. The Claimant was asked questions about his conduct. There was extensive correspondence with Stephen Woodward following the Claimant's meeting with him on 8 July. There was further correspondence between the Claimant and Mr Woodward in which the Claimant set out his explanations for his conduct. He took the opportunity to explain step by step how the internal staff cash transfer system worked. He was fully aware of the matters under investigation as Mr Woodward asked him detailed questions and outlined the information he required. The Claimant provided equally detailed answers and took the opportunity to give his explanation. In addition, it is our judgment that the Claimant had the details of the disciplinary allegations in the letter inviting him to the disciplinary hearing. The Claimant knew about the disciplinary allegations beforehand, he had been asked questions about them beforehand and had provided responses to Mr Woodward's queries about them prior to receiving the letter of invitation.

278. It was not the Respondent's practice to formulate disciplinary allegations without holding an investigatory meeting. We had evidence of Mr Basu and Mr Ghandi for example, who both had investigatory meetings with CSIS before their disciplinary hearing. As far as we were aware, neither Mr Basu nor Mr Ghandi was a disabled person. There was no practice applied to them or the Claimant of proceeding to a disciplinary hearing without given detailed reasons of why the Respondent considered that they have committed misconduct. A PCP needs to be applied equally to disabled and non-disabled persons. There was a variation in the process applied to each case, as the Respondent did not follow exactly the same steps in all cases but in our judgment that does not mean that the variation was because of the Claimant's disability. It also does not mean that the Claimant was unaware of the reasons why the Respondent considered that he had committed misconduct. He was well aware of those reasons. There was no PCP applied here.

279. 2.3.10 - The Respondent's practice was to conduct a separate investigation which could include a meeting with the employee, if necessary. That is what was set out in the disciplinary policy. There was no requirement or practice to formulate disciplinary allegations without holding an investigatory meeting. We have already referred to Mr Basu and Mr Ghandi as examples of persons employed by the Respondent in the same department who did have investigatory meetings with CSIS. The Respondent reserved the right to determine what process was necessary in each case. There was no practice of setting up disciplinary charges without holding an investigatory meeting - sometimes there may be one - such as in the case of Basu and Ghandi and other times, as in the Claimant's case, there may be one meeting followed by the investigation continuing in writing. There was no PCP applied here.

280. 2.3.11 - In our judgment, the Claimant knew the charges that he faced and he and his lawyers were able to fully respond to them. He knew the charges, the allegations; the transactions involved and had been able to provide many pages of evidence in his defence of them. This was not a PCP that the Respondent applied."

30. Ground 3 asserts that the Tribunal erred in law by assessing whether the PCPs were applied by the Respondent by considering the issue in the light of adjustments that the Respondent made to the process. It is argued that the correct approach would have required the Tribunal first to have considered whether a PCP was one that was generally applied by the Respondent. Thus the first requirement, namely that at paragraph 2.3.1.1 (see above), was, the Claimant had contended, a PCP applied by the Respondent.

31. It is argued on behalf of the Claimant that it was impermissible for the Tribunal to conclude that because some adjustments were made, the Respondent did not apply such a PCP. The fact that the Respondent made *some* adjustments to the way this PCP was applied to the Claimant illustrates, it is argued, that it was a PCP of the Respondent's that put the Claimant at a substantial disadvantage. The question the Tribunal ought to have focused on is whether the Respondent took all such steps as were reasonable to *alleviate* the disadvantage. Did the Respondent's adjustments go far enough?

A

32. Counsel for the Claimant point to HHJ Richardson's observation at an earlier stage in this appeal that the purpose of the PCP is to "*define that which causes disadvantage*". It is argued that it cannot be right that, by making any adjustment to a PCP, this provides a defence to a reasonable adjustment claim on the basis that the PCP contended for has not been applied. This would avoid the analysis of whether the adjustments made were "reasonable" in order to alleviate the disadvantage. The central issue in this case, it is argued, is the reasonableness of the adjustments to the process.

B

C

33. So, the argument runs, in inviting the Claimant to attend a hearing the Respondent was applying the provisions of its disciplinary policy, including the PCP contended for by the Claimant. Thereafter, and having learned of the Claimant's disability it made some limited adjustments in relation to the requirement to attend a hearing, and the timeframe within which such hearing would take place. It is argued that these did not go far enough.

D

E

34. By reference to **Roberts v Northwest Ambulance Service** UKEAT/0085/11/RN the point is made that it is not necessary for a PCP to have been applied to engage the duty of reasonable adjustments. Paragraph 31 of that authority is cited:

F

> **"31. The key question for the Tribunal was whether this PCP placed the Claimant, a disabled person, at a substantial disadvantage in comparison with persons who are not disabled. If so, the Respondent would then be under a duty to take such steps as it was reasonable for it to have to take in order to prevent the PCP having that effect. …"**

G

35. Ground 4 argues that the Tribunal erred in law when finding that the PCP contended for by the Respondent was one "applied" in the precise terms set out. The Tribunal has added elements to the PCP of what are adjustments to the usual procedure and, it is argued, in so doing it has made a similar error to that which is the subject of ground 3.

H

36. The finding in question is that the Tribunal added to the final identified words "*to a conclusion within reasonable dispatch*" the words "*while keeping consistent with the individual circumstances of the employee and any advice obtained from Occupational Health*". The added words suggest, it is argued, that the Respondent always complies with the obligation to make reasonable adjustments, and these words should not have been used in identifying the PCP.

37. The correct approach, it is said, would involve the Tribunal considering the unglossed words of the PCP, then considering whether, in the individual circumstances of this Claimant, the Respondent had made reasonable adjustments to alleviate any disadvantage caused by the practice of seeking to bring matters to a conclusion swiftly.

38. The ground goes on to argue that, in order to alleviate the disadvantage in reaction to the Claimant, it would have been reasonable to have postponed the disciplinary hearing until after he had recovered from surgery, or alternatively for the Respondent to have served detailed written questions on the Claimant well in advance of the disciplinary hearing, allowing him adequate time to consider and respond.

39. Ground 5 concerns what is said to be the Tribunal's error of law in failing to identify the appropriate comparator, when considering whether the Reasonable Dispatch PCP placed the Claimant at a disadvantage, it being argued that this was a case in which it was appropriate to conduct a comparative exercise before dismissing the Claimant's argument that he had been subjected to a substantial disadvantage.

40. It is accepted on behalf of the Claimant that it is not always necessary to construct a comparator in a reasonable adjustments claim. The submission is that in many cases the facts

will speak for themselves and the identity of any non-disabled comparators will be clearly discernible from the PCP found to be "in play". However, it is said that if a Tribunal considers that a PCP does not place a disabled person at a substantial disadvantage "*in comparison with persons who are not disabled*" the comparative exercise cannot be overlooked.

41. In response to the Respondent's point made in the Answer, it is submitted that the appropriate comparator would be a person who was able *to* [the word "to" is missing in the skeleton argument but I infer that it is necessary to add it] but chose not to attend the disciplinary hearing. It is said that, on its proper construction, the Tribunal's findings that the Claimant "*chose*" not to attend the disciplinary and appeal hearings, and that the Claimant was "*able*" to attend (see Reasons paragraph 305) means no more than that he was physically able to attend but decided not to. The Tribunal did not, it is submitted, make a finding that the Claimant would have been able fully and properly to participate, had he chosen to attend. A non-disabled comparator would not have had any adjustments made to the process, and *therefore* would not have been subjected to the hearing proceeding in writing. The Respondent's proposed comparator of someone who chose not to attend the disciplinary hearing is, it is argued, misguided, as such a person would never have been subjected to the *adjusted* written procedure. It was this change to the process that seriously disadvantaged the Claimant, as he was deprived of any proper discursive interaction in relation to the disciplinary allegations.

42. Ground 6, namely that the Tribunal erred when concluding that the Claimant was not placed at a substantial disadvantage, following the Respondent's failure to conduct the appropriate comparative exercise and/or by considering the issue in light of adjustments that had been made to the process, is acknowledged to overlap with grounds 3, 4 and 5. The argument is that the Tribunal's failings in its analysis of the PCPs contended for and/or the comparative

exercise in respect of the Reasonable Dispatch PCP, infected its conclusions on substantial disadvantage. The Claimant submits that a non-disabled comparator would have not been subject to an adjusted written procedure and would have been able to attend a disciplinary hearing in person which would have afforded him the opportunity of dialogue, discussion and the ability to respond to questions.

43. Thus, it is said, whilst the Claimant was afforded an opportunity to make some submissions, he was unable to address the specific issues and matters that were specifically concerning Mr Bandeen, and would thus have been influential on the decision that was made against him.

44. Ground 7, the final ground concerning the PCP, contends that the Tribunal erred in law by rejecting the PCP contended for by the Claimant as this was directly inconsistent with its other conclusions, or alternatively was perverse.

45. The Tribunal's finding that the Respondent did not apply a provision set out in its own disciplinary procedure yet did apply the Reasonable Dispatch PCP (Reasons paragraph 281) cannot, it is argued, be sustained. The conclusion is said to be inherently inconsistent and/or perverse.

46. The Respondent has, as with the earlier grounds, dealt with the arguments advanced in two ways. First, and quite briefly, in its skeleton argument and second, in the Answer.

47. Its argument is, first, that the duty to make adjustments is not engaged if the application of the PCP in question does not put the disabled person at a substantial disadvantage in

comparison with persons who are not so disabled, and, second, even where the duty is engaged, it is only to make such adjustments as are reasonable - that question being judged objectively. As these are both questions of fact for a Tribunal to determine, the EAT cannot interfere absent a finding of perversity.

48. However, it argues that the matters complained of are in any event academic because the Tribunal permissibly rejected the Claimant's case that he was subjected to a substantial comparative disadvantage and/or that reasonable adjustments were appropriate.

49. The Respondent points to the specific disadvantages which were relied upon by the Claimant, as identified in the list of issues in the Reasons at paragraphs 2.5.1 to 2.5.8. The summary in the Respondent's skeleton argument, at paragraph 13, summarises both the disadvantage and its response, also identifying the relevant issue number as set out in the Reasons, so I rehearse it with few changes:

- The Claimant claimed he was disadvantaged by not being able to attend the disciplinary hearing or appeal hearings (Reasons paragraphs 2.5.1 and 2.5.2). However, the Tribunal found as a fact that the Claimant was able to attend those meetings (and would have been able to participate appropriately in them) but chose not to do so (see Reasons paragraphs 283, 284, 289, 305, 306, 323).
- The Claimant asserted that he was unable to understand the allegations against him and did not have sufficient time to consider the documents provided to him (Reasons paragraphs 2.5.3 and 2.5.4). However, the Tribunal found as a fact that "*he understood the details of the allegations against him. He had sufficient time to adequately consider the documentation relied upon by the Respondent in the process*" (Reasons paragraph 292).

- The Claimant complained that he had to deal with the disciplinary case at the same time as the HMRC investigation, despite his reduced ability to do so (Reasons paragraph 2.5.5). But the only way to avoid this was to delay the disciplinary process until after the HMRC investigation had been completed. Not only did the Tribunal find that this would not have been reasonable (Reasons paragraph 302), but the Claimant's legal team had conceded at trial that it would not have been reasonable for the Respondent to delay the disciplinary proceedings until after completion of the HMRC investigation.
- The Claimant claimed that he was not able to provide his full account of events relating to the disciplinary allegations, with the consequence that his explanation was rejected and he was dismissed (Reasons paragraphs 2.5.6 to 2.5.8). However, the Tribunal found that the Claimant was able to articulate his defence fully, but the Respondent simply did not accept it (see Reasons paragraphs 290 and 295). It also found as a fact that the Claimant's disability "*did not affect his ability to present his case or to articulate his defence*" (Reasons paragraph 311 and paragraph 6.3 above).

50. I think it is right, as a matter of strict construction, to conclude that the Tribunal was, in effect, redefining the PCPs by reference to measures designed to ameliorate the problem, and thus conflating two issues. But it is important to stand back and look at the relatively straightforward nature of the issues which were engaged, notwithstanding the lengthy analysis which has been applied to them in the Claimant's submissions. The factual findings made as to (i) the Claimant having chosen not to attend the disciplinary hearings, (ii) to his having understood the nature of the allegations against him, (iii) to his having been afforded adequate time to respond and (iv) his disability not affecting his ability to present his case or to articulate his defence seem to me to be unassailable, particularly as the Tribunal had the opportunity to hear

the Claimant who gave evidence at the hearing. It is, I consider, nit-picking to argue, as the Claimant's skeleton argument does, that there was no specific finding that he would have been able to participate appropriately in a disciplinary hearing given the detailed findings rejecting the Claimant's asserted needs for adjustments.

51. In these circumstances the need to construct a comparator would have served no purpose, and would have added a level of unreality to what was, in essence, a fact finding exercise on a relatively limited set of facts, so far as attendance was concerned.

52. I take the same view in relation to the Tribunal's approach to the argument in relation to adjourning the hearing. Having found that he could have attended the disciplinary hearings, but chose not to, the finding that it would not have been reasonable for the Respondent to delay the disciplinary proceedings until after his recovery from surgery (no timetable for which was apparent) and/or after the HMRC investigation was not only one which it was entitled to make, on the evidence, but one which was almost inevitable.

53. The factual findings in relation to the Claimant's motives for wishing to be accompanied to the appeal hearing by specific named individuals are, in my judgment and contrary to the very technical argument advanced, relevant to the question whether he was disadvantaged by the process adopted. The Tribunal held that the PCP as identified was applied to all employees and thus the Claimant was not disadvantaged by being unable to have non-employees accompanying him. These findings were permissible on the totality of the evidence.

54. Ground 8 asserts a failure to take into account relevant considerations. It is said that the Tribunal failed to have regard to the fact that the disciplinary and appeal officers were unaware

A that the staff transfer process was a standard internal procedure and misunderstood the nature of the submissions made. The argument is elaborate, but seeks to pick apart selected passages in the Reasons without regard to the totality. It was, after all, not for the Tribunal to substitute its own view for that of the employer. The Claimant was not dismissed by reason of his having used the staff transfer system as such, but having regard to all the surrounding facts and matters as to the transactions in question. Having found that there was an adequate investigation (as to which see my refusal to allow appeal on earlier grounds in that regard) I reject the submission that relevant considerations were not taken into account.

55. The second limb of ground 8 concerns the assertion, dealt with elsewhere, that the Claimant would not have been able properly to participate in the disciplinary and appeal hearings. I disagree that, fairly read as a whole, the Tribunal failed to address the question formulated in this ground, and concentrated solely on his physical ability to attend. It is implicit from many of the findings of fact that the Tribunal had indeed concluded that he would have been able properly to participate; see, e.g, paragraphs 284, 289 and 305.

56. Ground 9 is concerned with three matters upon which it is said findings were made unsupported by any evidence. Ground 9(a) asserts that paragraph 277 of the Reasons is inaccurate because the Tribunal used the expression "disciplinary allegations" when none such had been formulated at the time when the Claimant was asked questions about aspects of his conduct by Mr Woodward. The Respondent argues that this is nit-picking because the Tribunal was fully aware of the role of Mr Woodward, as shown by paragraph 81 of the Reasons. I agree. This ground is in reality bound up with the general complaint as to the nature of the investigation which I have already dealt with.

57. Ground 9(b) asserts that there was no evidence to support the Tribunal's finding at paragraph 318 of the Reasons as to Mr Bandeen's conclusion that the Claimant had used the process in an attempt to conceal the details of the beneficiaries from the UVT's bankers. In my judgment that is simply wrong: it was, after all, Mr Bandeen's own evidence. But in any event, the paragraph in question, read as a whole, simply sets out the matters which Mr Bandeen had found at the end of a process, and were the reason for the dismissal. It is clear from paragraph 319 of the Reasons that the Tribunal accepted the conclusions of Messrs Bandeen and Staley that the Claimant's conduct arising from the use he had made of the Respondent's transaction systems, staff and resources was serious enough to be classed as gross misconduct warranting summary dismissal. They went on to hold that the beliefs held were genuine, independent and not pre-determined. It seems to me that an overly fine analysis of paragraph 318 cannot detract from the overall conclusions, which was a permissible finding based on the evidence taken in the round.

58. Ground 9(c) is concerned with the conclusion in paragraph 281 of the Reasons to the effect that the Respondent had a practice of "*keeping consistent with the individual circumstances of the employee and any advice obtained from Occupational Health*". The ground as drafted does not make clear the context, which was the finding by the Tribunal that the Respondent had a practice of bringing disciplinary hearings to a conclusion with reasonable despatch, but consistent with the matters italicised. This seems an unsurprising finding - it is hard to think of a disciplinary process not taking a similar form. The complaint is made that the evidence, on which the finding was made, was specific to the Claimant's case. The Respondent submits that this assertion had not been the subject of challenge and that the Tribunal was in any event entitled to infer it from the evidence adduced.

59. This ground seems to me to be the application of the finest of toothcombs to a lengthy decision considering a mass of evidence. Given the conclusion I have already reached about the Tribunal's conclusions in relation to reasonable adjustments, I cannot see how, even if this most obvious of inferences was wrongly drawn, it could amount to an error of law, or vitiate the conclusions reached in this respect.

60. Ground 10 asserts perversity. The first finding (10(a)) said to be perverse is that the Claimant understood the details of the allegations against him and was fully able to respond to them. The ground is developed in relation to findings made in paragraphs 98, 201, 203, 204 and 212 of the Reasons. The second finding (10(b)) said to be perverse is the Tribunal's conclusion that the investigation was reasonable: see paragraphs 322 to 328 of the Reasons. As is recognised in the Claimant's skeleton argument, each of these grounds is inextricably bound up with other grounds, and specifically grounds 1 and 2. The Respondent in its skeleton argument has made a point by point rebuttal of the six sub-points made in ground 10(a). I have found nothing in the arguments advanced in relation to this ground that has not been considered when dealing with those other grounds, and discern no separate error of law in the manner alleged. I need not go through these. The exercise which the Tribunal conducted was a complex one and involved the consideration of competing evidence and submissions. It is clear from the lengthy Reasons that the Tribunal had very much in mind the points which are now repeated, and I consider that the points made in ground 10(a) are no more than an attempt to retry matters permissibly decided. Ground 10(b) is a "sweeping up" assertion, and needs no separate consideration given my conclusions on grounds 1 and 2.

61. Ground 11 contends that the Tribunal erred in concluding that conducting the disciplinary procedure in writing was not to the Claimant's disadvantage or detriment. The ground is written

in a narrative style and does not in terms assert an error of law. It is said that if the Claimant had been able to participate in an oral hearing he would have had an opportunity specifically to address the issues that impacted on the decision to dismiss him, and that it is "likely" that this would have afforded him an opportunity to correct the mistaken impression on the part of Messrs Bandeen and Staley that he had constructed a multi-layered and complex procedure. A decision to dismiss an employee of 40 years' unblemished service should not, it is argued, be made in a vacuum.

62. The Respondent points to numerous findings made by the Tribunal, including the Claimant having elected to attend meetings with HMRC, his accountants and legal advisers, his having sought to return to work notwithstanding the brain tumour with which he had lived for over five years, and his apparent willingness to attend the appeal hearing had he been permitted a companion of his choosing. They point, too, to the finding that his disability did not affect his ability to present his case or articulate his defence, and that he had chosen not to attend the meetings. Finally, the permissible finding that it was not unreasonable for the Respondent to have refused to adjourn the hearing(s) pending either the conclusion of the HMRC investigation or the Claimant's recovery from future surgery.

63. Whilst the emotive points made on behalf of the Claimant may seem at first blush to accord with common sense, the permissible findings of the Tribunal are, in effect, that this is a state of affairs brought on by himself and thus betrays no error of law.

64. Ground 12 asserts that the Tribunal erred in law when rejecting one of the PCPs contended for by the Claimant, as set out at paragraph 280 of the Reasons. The PCP had been defined at paragraph 2.3.11 as "*Articulating disciplinary decisions by way of generic findings (in the*

Claimant's case finding the transactions to be multi-layered and complex and with the appearance of impropriety) and/or not providing further information to employees as to the reasons for the decision".

65. It is said that it is unclear from paragraph 280 of the Reasons whether the finding was that there was no PCP or whether there was but it was not applied to the Claimant. The point is made that a dialogue following the dismissal letter would have afforded the Claimant an opportunity to better understand the Respondent's concerns, and thus to address them.

66. The reason why the Tribunal has found that the Claimant was not at a disadvantage is flawed, it is argued, as it is premised on the flawed findings throughout the Judgment that the Claimant understood the allegations against him and was able fully to respond to them, when he was not. Much the same argument is repeated as for grounds 3 to 6. The point is made that a proper comparator should have been constructed in the form of someone who could have attended a hearing but without the disadvantages which the Claimant would, it is said, have suffered.

67. This ground inevitably fails when one looks at the Tribunal's findings as to the conduct of the disciplinary process as a whole, and in particular the finding that the Claimant chose not to attend, and my conclusions on grounds 3 to 6 above in which I have dealt with each of these points.

68. It follows from the foregoing that I reject each of the grounds and dismiss the appeal.