Case No: 2201079/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr J. Plant**

Respondent: **Bank of Beirut (UK) Limited**

Heard at: **London Central** **On: 2,3,7,8,9 May 2019**
Before: **Employment Judge Goodman**

Representation
Claimant: **in person**
Respondent: **Mr C. Ciumei Q.C.**

RESERVED JUDGMENT

1. The unfair dismissal claim fails.

2. The wrongful dismissal claim fails.

3. The claimant is not entitled to holiday pay.

4. The claimant is ordered to pay 70% of the respondent's costs incurred from 18 July 2018, to be the subject of a detailed assessment.

REASONS

1. The claimant was employed by the respondent from 10 December 2010 until dismissed for gross misconduct on 25 October 2017. This hearing was listed to decide claims arising from that dismissal: unfair dismissal, wrongful dismissal, including stigma damages, and holiday pay. Remedy issues were to be the subject of a further hearing.

2. There had been claims of discrimination because of age, race and religion, but they were withdrawn at a preliminary hearing. At that same hearing claims for detriment and dismissal because of public interest disclosures were dismissed as having no reasonable prospects of success, and disability discrimination claims were dismissed following a finding that the claimant was not disabled.

3. This hearing was also to decide an application by the respondent for costs of the dismissed claims.

4. The grounds of response had been revised after the preliminary hearing to deal with the remaining claims only. The tribunal worked from the list of issues dated 15 August 2018.

Evidence

5. The Tribunal heard evidence from:
Paul Warwick, HR and Facilities Manager
Sophoklis Argyrou, CEO, who dismissed the claimant
Tony Bush, a non-executive director of the respondent, who heard the against dismissal
John Plant, the claimant.

6. There were 1,750 pages of documents in four bundles, plus 223 pages of pleadings and orders, another 780 pages of correspondence, and 199 pages of the medical evidence adduced at the preliminary hearing on disability, to which the claimant in this hearing added some earlier material. The Tribunal read those to which it was directed.

Conduct of Hearing

7. I allowed an application for professional recording and transcription of the evidence and submissions at the respondent's expense. The reasons for doing so included the claimant being without his own notetaker at this hearing, his mistrust of the accuracy of the respondent's notetaker at internal hearings, applications he had made for the judge conducting the preliminary hearing to recuse herself, and appeals lodged against both the substantive judgment and against case management orders from the preliminary hearing. An accurate note would be useful in the event of appeal. As the tribunal does not have a facility to record its own proceedings, and as it can be difficult for a judge sitting alone to keep an accurate note when engaged in dialogue with the parties, this was reasonable and proportionate. Copies of the transcriptions were provided to the claimant each morning.

8. On the third day of the hearing the claimant applied for specific disclosure of documents relating to investigation of a bad debt he had been asked to report on shortly before he went sick in July 2015. I refused the application because it was not shown that the documents were both relevant and necessary to decide the issues. The debt had not featured in the extensive pleadings, nor been raised by either side as reason for dismissal, and even though the claimant alleged ulterior reasons for dismissal, this was not one of them. It was mentioned by a witness only when explaining whether the claimant's status was that of senior manager. The documents were unlikely to assist on this point.

9. At the start of the case the claimant applied for disclosure of a questionnaire he had completed for an independent health adviser

(Blossoms) who was preparing a pre-employment medical report in 2007, on the basis that the respondent was deemed to know what Blossoms staff knew, and he had described matters indicating he was disabled. The respondent stated they had seen only a short report, which was in the bundle, but any other papers were with the health adviser and had not come to them. I directed that the claimant should ask the healthcare provider for any further papers they may still hold, as a data subject access request, as a more efficient way of obtaining the questionnaire. It was not for this tribunal to reopen whether the claimant was a disabled person.

10. The claimant told the tribunal that following rejection by the Employment Appeal Tribunal, after sift and preliminary hearing, of his appeals against preliminary decisions, he had recently applied to the Court of Appeal for permission to appeal, but he stopped short of seeking an adjournment. I explained that this hearing would proceed on the basis of the preliminary decisions made because postponement was undesirable given the Tribunal was even now hearing evidence getting on for four years old which would not improve with keeping; if the appeal succeeded there would be a further hearing.

11. The claimant said he was disabled by short term memory loss due to transient ischaemic attacks (TIA), and also that he had Aspergers syndrome. There is no formal diagnosis of either. In respect of memory loss the doctors had agreed TIA would not cause memory loss, and in any case Judge Wade had found that he was not substantially impaired by memory loss. As for Aspergers, the claimant had not advanced this as a cause of disability in his grounds of claim or at the preliminary hearing on disability, nor is there any mention of it in the medical records or reports. I merely observe that during the hearing claimant had no difficulty with hypothetical questions, and also that his case on stigma damages relied on his own observation of body language. Both (difficulty with hypothetical questions and difficulty interpreting body language) are common features of Aspergers. That said, I made allowance for the claimant being in person, without any friend or family accompanying him, and for the undoubted stress of proceedings. From time to time I observed signs of agitation when dealing with contested matters, such as stamping a foot, jabbing the air with a pen, and raising his voice. There were breaks for him to rest and to prepare, although, despite his assertion he had poor memory, he had not adopted common strategies such as making lists of questions or marking up documents to refer to. These were in addition to breaks for the transcribers. He did seem to have difficulty retaining information, for example, he more than once asserted he was disabled because he had once been given extra time in examination, even though the relevant document showed that the extra time was because of a wrist injury, not because of any mental impairment. I explained the process at the outset, and when he would need to ask questions. I prompted him to ask questions of witnesses when he omitted to ask about disputed issues apparent from the contemporary documents and his grounds of claim, and I asked such questions myself on one such issue. He was assisted in finding page references.

12. At the close of evidence I read written submissions from both parties and then heard oral submissions, first on the claims and then on the respondent's application for costs. Judgement was reserved for want of time within the allocation.

Findings of Fact

13. The respondent is the UK subsidiary of a Lebanese bank. It is regulated by the FCA and PRA. There are about 60 employees in London and another 9 in Frankfurt.

14. The claimant was recruited on 10 December 2007 as Manager, Trade Services and Operations, at a salary of £45,000 per annum. This was a step down from his last job, but at the time he had been out of work following redundancy 18 months earlier. Until the redundancy he had spent 22 years with Singer and Friedlander.

15. By the time of dismissal he was earning £57,500 per annum, plus a bonus of £2,000, and a pension.

16. The Respondent's reason for dismissing concerned a request the claimant had made about his pension, so the pension position must be explained.

The claimant's pension arrangements

17. Normally, employees became members of the respondent's group pension scheme. However, the claimant had already started a self-invested pension plan (SIPP) with fund supermarket Hargreaves Lansdown, and at his request the respondent instead paid the employer contributions of 7.5% of salary into the SIPP.

18. In addition, again at his request, £3,000 of his £3,750 monthly salary was also paid into the SIPP as salary sacrifice. This meant that his taxable pay was only £750 per month, or £9,000 per annum.

19. A SIPP is a pension fund where the investments are managed by the individual who is to benefit, rather than by a pension fund manager. This reduces the costs of the scheme, but increases the responsibility on the individual to invest successfully and take advice.

20. Pension payments are an exception to the usual rule that employment income is taxed when paid. Instead payments into a pension scheme, whether made by the employer or the employee, are tax-free (up to the limits of the annual and lifetime allowances, see below) when paid in, and only taxable when taken as income in retirement. Because of this, there are strict rules preventing money being taken out of the pension scheme other than as retirement income. Otherwise employment income could avoid being taxed.

21. There is a limit to how much money can be saved in a pension scheme over a lifetime. In the year ending April 2010 it was £1.8 million. Since

then it has been successively reduced, and in April 2016 went down from £1.25 million to £1 million. The change was announced in the Chancellor's spring budget of 2015.

22. To avoid unfairness to those who had already made contributions in earlier years, taxpayers could apply for individual protection or fixed protection of an earlier (higher) lifetime allowance. To get the benefit of fixed protection 2016, there must be no contributions to the fund after 5 April 2016, the start of that tax year.

Cessation of Work July 2015

23. Until July 2015 the claimant had worked steadily for several years without criticism, with around 14 people reporting to to him. His line manager had expressed concern at his habit of working late into the evening, that being a red flag matter for regulatory compliance, given the opportunity it affords for dishonest staff to act unsupervised, but there was not and is not any suggestion that the claimant was dishonest in his work.

24. His command of detail was widely acknowledged, to the extent that he was known as "the professor", though the claimant much resented the implied mockery. He had poor relations with his line manager, Osman Sobhi.

25. The Claimant turned 65, his statutory requirement age, at the beginning of July 2015. There was a discussion of his plans in which he indicated an intention to continue working.

26. However, at the end of July 2015 the Claimant went sick with stress, never to return.

27. It was not made clear in evidence what was the precipitating cause of this stress-related ill health, nor is it necessary to make a finding, but it is noted that the claimant had complained of bullying and harassment by Mr Sobhi, and wanted to be allowed to return to work with different duties.

28. Also in July 2015, he had been asked to prepare a report for the directors about a loan of $2.5 million which had gone bad. The claimant says the fault lies with others for poor assessment of the credit risk; the CEO, who did not join the respondent until 2014, says the loan was poorly structured. The claimant also blamed a poor software system which made multiple payments that in July 2015 he was attempting to have repaid. The matter came up in the hearing tangential to another issue, and I make no findings on what had gone wrong, but could see that writing such a report might be stressful.

29. In October 2015, while still off sick, the claimant started applying for jobs with other employers. This was not known to the respondent.

30. The Claimant's terms and conditions of employment provided that he would get sick pay for the first 3 months of any sickness absence,

thereafter statutory sick pay only.

31. The Respondent's Handbook provides that when sick pay is exhausted, payments to the group pension scheme will cease.

32. By the end of October the contractual sick pay was exhausted. Paul Warwick, HR manager, wrote to the claimant on 24 November 2015 to say so. He explained that due to delay in getting the fit note from the claimant there had been a slight overpayment of £651.92 in October, which would be recouped in November and in December. The November payslip was enclosed. Finally he stated:

> "in view of the above your regular salary sacrifice payment has been suspended until further notice. Please note that the bank's pension contribution of £353.13 per month will continue to be paid to Hargreaves Lansdown".

33. According to the respondent, the decision to continue the employer pension contribution was made because he was expected to return to work before long, and it was known that he intended to continue working beyond 65.

34. The Claimant says he did not get this letter.

35. In that respect, it is known that he got a letter posted earlier to his address, on 1 October 2015, which dealt with auto-enrolment into pensions. It is probable that he also received in the post a letter of 7 October about an overdue fit note, because we know he went to his doctor on 13 October 2015 and obtained a fit note backdated to 14 September 2015. In October he was also in communication by email about a data subject access request (SAR) he was making; the search terms he chose suggest that he was concerned about the respondent's plans for him in respect of sickness absence, or poor performance, or ill-health through stress. These SAR documents were delivered by courier, not by post, no doubt because of the volume.

36. He did not query the variations in his pay for October and November because, he said, he was expecting his sick pay to cease and would not notice small irregularities. He did not notice or query the "net advance" (refund of earlier overpayment) entry in his December payslip either. If he had not had the letter of 24 November, and know about the overpayment, it might have been expected he would query the irregularity.

37. Under the arrangements between the claimant, respondent, and Hargreaves Lansdown who administered the pension, the respondent had made a declaration that the respondent was to advise Hargreaves Lansdown of any changes in the amount of payment of contributions. Examples in the bundle show this happening in 2013, 2014, November 2015, and February 2016. In turn, Hargreaves Lansdown notified any contributions change to the claimant. The claimant says however that he did not read paper communications from Hargreaves Lansdown because they usually contained only marketing material, and that he

did not look at personal notifications on the secure website either. He also had a six monthly online statement, which set out all income to and payments from his fund, but he said he did not check it, as he trusted Hargreaves Lansdown. If the total cash shown on the front screen varied, he assumed it was from the proceeds of trading, which he did often, or share dividends.

38. In short, he says he did not know the bank continued to pay his employer contributions into the pension fund. He says he had not read the letter saying they would continue, and he had not read notifications from the pension scheme either which would have set out the continuing payments.

39. A relevant feature of the respondent's declaration to Hargreaves Lansdown is this:

    "we understand the contributions paid to HL Vantage SIPP cannot be refunded unless the SIPP member cancels the SIPP within the cancellation period".

Of course, by 2016 that possible exception to the general ban on refunds had long since passed. This prohibition of refunds is in line with HMRC restrictions on payment out of a pension fund before retirement.

The Request for the Return of Pension Contributions

40. The claimant, who had exhausted his company sick pay by the end of October, received an annual bonus of £2,000 in January 2016, but his statutory sick pay ran out in February 2016, and the last payment was made in March 2016. From that date he had no income from employment.

41. The claimant says that by the summer of 2016 he had not succeeded in finding other work, he was short of money, and he decided to start drawing his pension. He contacted Hargreaves Lansdown about this, and about securing fixed protection 2016.

42. In the course of a series of telephone calls he now learned that the employer pension contributions had continued in payment after April 2016. This prevented him from getting fixed protection. He explored whether the contributions could be taken back.

43. On 19 September 2016 the claimant wrote to Paul Warwick:

    "you will be aware of changes in recent years reducing the lifetime allowance (LTA). Like many personnel who have espoused provision for their, and their dependents futures, whenever possible throughout my working life I have made contributions through firstly AVCs, and thereafter personal contributions. Consequently, to retain the LTA figure for 2015 to 16, no further contributions can be made in subsequent years.

    Hargreaves Lansdown have agreed to return contributions made since

6 April 2016, but before doing so have requested your acknowledgement that the same will be accepted by you. Thereafter, please pay through payroll".

(The reference to "through payroll" means he was asking for the money to be paid to him direct after deduction of tax, instead of into the pension fund).

44. Mr Warwick replied within the hour asking the claimant to get Hargreaves Lansdown:

"to write directly to me with what exactly they wish me to confirm/accept".

As for payment through payroll, he said that they were checking the position, but their first thoughts were that they did not see how company pension contributions could be redesignated salary

"because of what might be the potential tax implications".

Evidently they were concerned about the declaration about not refunding pension contributions to the fund.

45. On 22 September the claimant followed up:

"please advise whether or not the bank will accept the return from Hargreaves Lansdown of employer pension contributions made for my benefit in the current tax year – irrespective of whether or not they will then be paid to me through the payroll".

Mr Warwick replied:

"I can confirm the bank will accept return of employer contributions from Hargreaves Lansdown. It may be best for them to call me as they will need to cancel the direct debit currently in place".

46. Later that evening the claimant responded to Mr Warwick:

"having spoken again to HL, I now understand that a condition of their returning the 6 contributions received is that they were made "by mistake". As I believe you will be aware, the potential personal tax charge (40% of 250 K) exceeds by far the value of the contributions".

47. Next morning Mr Warwick replied:

"could you give me the number for Hargreaves Lansdown and a contact name alternative has sent call me directly. Unfortunately we have not been made aware by HL to discontinue contributions to your pension account and HL continued to claim the funds by direct debit".

48. The claimant responded with a name and contact number and added:

"the above-named has informed me that contributions can be returned

only if made in error by remitter, in this instance, the bank. My instructions, even if you, the bank, concur to receive the return of these contributions, is insufficient."

49. Two days later, after speaking to Hargreaves Lansdown, Mr Warwick wrote to the claimant saying that he should speak to them again about his lifetime allowance, "as there may be other reasons relating to your circumstances why they cannot return the contributions to us. Should you wish the bank to continue paying contributions to HL please advise as soon as possible".

50. The claimant replied: "please discontinue contributions to HL", and a few minutes later,

> "a few minutes ago I received from HL a secure message reading:
>
> > "in order for us to consider the return of your employer's contribution we would require a signed letter from your employer confirming that the contribution were made by them in error and that they should have cancelled it previously. We will then consider the request. Please note that we are yet to receive notification from your employer that they wish to cancel the direct debit; as such scheduled collect a further payment on 7 October. To cancel this they need to send a written confirmation which we need to receive no less than 26 September. Alternatively, they can cancel the direct debit instruction directly with their bank."

It is noted that the claimant has not disclosed this, or any other, secure message from Hargreaves Lansdown at any date. He says all were deleted, and that they may have been auto-deleted.

51. Mr Warwick did not reply. The claimant sent two chasing messages on 5 and 14 October.

52. Eventually Mr Warwick replied, at length, on 20 October 2016. After reviewing the correspondence carefully, he found it "appropriate and necessary to set out the position from the bank's perspective". He recited with care the progress of the email correspondence. He noted that from April 2016 onward the bank had no record of any request from him to cancel contributions, nor was the bank aware at any time of his personal circumstances. He had spoken to HL on 26 September and been told that the deadline for retaining the lifetime allowance at £1.25 million was 31 August 2016 and that the respondent would need to write to HL "admitting an "error" for them to consider returning contributions". At that point Mr Warwick had asked the claimant to contact HL again, as it was clear the bank had not made any "mistake" by paying the contributions. A letter from the bank as requested in the terms of the HL message conveyed by the claimant on 26 September would be:

> "false and misleading for reasons set out above, and on the face of it would be for the primary purpose of securing you a tax advantage as set out in the various email correspondence. The fact is that the bank

had not made any contributions in error, and the request by you to mislead HL (and by implication, HMRC) is a very serious matter".

He added that after a further call to HL on 7 October he had been told that:

> "legally they would have to justify the return of pension contributions to the Pensions Regulator. This means that were the bank to wrongly indicate that they have made the contribution payments in error, and this is simply not the case, the Pensions Regulator will also be misled".

He had now received a letter from HL, and he had advised HL that as the respondent had never previously received an instruction to discontinue making contributions, they would be unable to give a reason for the refund request. Finally,

> "the only person who has misleadingly raised the suggestion of any error is you. I am therefore writing to confirm the bank's position in that we are gravely concerned that you have seemingly requested the bank to falsify events to the effect that it would mislead HL, the Pension Regulator and HMRC regarding employer contributions made between April and September 2016. These payments were not paid "in error" and the only apparent reason for this would be to benefit your personal tax position. The bank considers this a potentially very serious situation, and I have now been charged with investigating the matter further".

53. There is a shorter statement of the respondent's position in the letter written to Hargreaves Lansdown the same day:

> "Mr Plant has never requested the bank to discontinue contribution to his SIPP account. We only became aware of his circumstances when he contacted us on 19 September 2016 regarding refund of his contributions since April 2016. It became clear in further correspondence from Mr Plant that his goal was to retain his lifetime allowance at £1.25 million and by the bank admitting an "error" and HL returning these contributions, he would gain a personal tax advantage. When we spoke we agreed that it was inappropriate for the bank to agree to this request and was indeed unwilling do so."

The October 2016 Grievance

54. The claimant's response to Mr Warwick's letter of 20 October 2016 was to lodge a formal grievance.

55. During the months of 2016 the respondent had been trying, without success, to get the claimant to meet them in connection with his continued sickness absence, which had of course lasted since July 2015. These attempts to meet him continued while the exchanges about the pension were taking place. The 19 September message, for example, included a statement that it was "perfectly reasonable and appropriate to want to meet with the long-term sick employee"; they had tried in May (2016) but the claimant had not been available, and

he had objected to the medical report the respondent had obtained.

56. On 22 October 2016, the claimant lodged the formal grievance. Most was about how the respondent had taken no interest in his health, the work-related causes of his ill health, and had not responded to his offer in November 2015 to return to work on a phased basis. There were complaints about its arrangements to get medical evidence. At the very end he added:

> "you have sought to impugn my integrity by contriving a situation from a routine administrative matter – pointedly omitting to respond to my reasonable queries, or notifying my pension scheme administrators of your actions".

Next day he added additional complaints about the process of getting medical evidence and how it was increasing his stress levels.

57. The claimant now asserted that continuing to pay employer pension contributions when his company sick pay was exhausted was in breach of contract.

58. On 21 October, the claimant had asked for his pension contributions payments to be reinstated, and when Mr Warwick confirmed this had been done, the claimant replied saying that he wanted him to

> "provide documentary evidence that these (employer contribution) payments in the current tax year were made in accordance with the terms of my employment contract".

He had checked his terms and conditions and noted that bank would not make pension contributions during long-term sick leave when occupational sick pay had ceased, which was in January 2016, and:

> "I have no record, nor indeed recollection, of any agreed variation to the above highlighted provision within my contract of employment dated December 2007".

Response to the Grievance

59. Martin Osborne, Executive Director, Finance and Operations, replied to these emails on behalf of the respondenton 18 November 2016. Over six pages he first dealt with the medical expert evidence issues, pointing out that despite having seen 3 medical practitioners for reports there was still no proper diagnosis, and the claimant himself said that his condition of memory loss was self-diagnosed. He had refused access to relevant medical records. His GP had stated on the fit note that he was not fit for work at all.

60. Mr Osborne moved on to the contractual position with the bank. He accepted that:

> "you would have expected your pension contributions to have ceased from 20 October 2015, but I can see that on 24 November 2015 (Paul

> Warwick) wrote to you and informed you that your employer pension contributions still would continue to be paid".

The bank had exercised its discretion to continue contributions, notwithstanding it had no legal obligation to do, in the knowledge that he had no immediate plans to retire. There was no breach of contract. Even if there had been, by continuing to accept contributions for 11 months there was a consensual variation, or he had affirmed the contract. He had not objected to the continued contributions when he raised a grievance on other matters in March 2016. In any case, when on 19 September 2016 he asked for the pension contribution to be paid through payroll, rather than to the pension fund, he was not then asserting there was a breach of contract, and:

> "had the lifetime allowance not been brought to your attention then you would have happily and silently continued to accept the employer pension contributions".

To complain of breach of contract was untenable. This "wholesale turnaround" raised several concerns, "not least of which about your good faith and credibility", especially as he had graduate experience in investment management, and, according to his CV, been the in-house expert on SIPPs with his previous employer. The request to return contributions was not a routine administrative matter, but:

> "a serious attempt by you to have the bank collude in a material misrepresentation to third parties",

the purpose of which was to secure him a significant tax advantage, which he had placed at 40% of £250,000. In his view there was a case for initiating disciplinary proceedings should the bank decide to go down that route, as there was "already sufficient evidence to make out a primary case of potentially serious dishonesty".

61. He enclosed relevant documentation, including a copy of the letter of 24 November 2015 about the continuation of employer pension contributions.

62. The claimant did not reply saying that was the first time he had seen that letter. Asked, in this hearing, why he did not, he said it was because the issue was by then irrelevant, as he had already lost the chance to apply for fixed protection.

Grievance Appeal

63. The claimant replied on 21 November that he had received no evidence of the "contractual pension contributions" extending into the current financial year, and asked for details of that contract. On 27 November he appealed Martin Osborne's response to his grievance, mentioning the absence of evidence of continuing contractual pension contributions.

64. Sophoklis Argyrou, CEO, responded on 13 December in 3 pages, in

essence repeating points made by Mr Osborne. He had not objected to the continuing contributions on 19 September 2016, when he asked them to be put through payroll instead, they had then been stopped and a month later reinstated, both at his instruction, this was not consistent with a belief that the payments were in breach of contract. With active correspondence between the bank and HL about ongoing contributions, and HL authorised to act as his agents, he would go further than Martin Osborne and conclude:

> "that there is no merit whatsoever in your position, and that you are being, at best, disingenuous".

It was untrue that the payments were made in breach of contract, and he must have known that, as it was at odds with his own emails about accepting the money. Nor was it credible that

> "any individual would criticise its employer for making payments to a sick employee over and above any strict contractual entitlement, unless they had an ulterior motive, which in your case I find to be tax considerations".

It was not him to make findings that they were that there was any intentional dishonesty in the correspondence, but he recommended that these were added to the pending investigation by Mr Warwick.

Resumed Investigation of Conduct

65. With the grievance out of the way, Mr Warwick returned to the investigation flagged up in his email of 20 October.

66. He invited the claimant to an investigation meeting on 25 January 2017, telling him the issue being investigated was whether the claimant had sought to get the bank to falsify its records by saying there had been an error to enable him to secure a significant tax advantage. This meeting would also cover matters he had raised on 15 September 2016: his continued ill-health absence, the reason for it, the available medical evidence, refusal to disclose GP records, and "the overall credibility of his position", in getting medical evidence; he had been well enough to make numerous requests connected with his complex tax and pension position, but had not cooperated with nine invitations over the year to meet to discuss his health.

67. The claimant replied on 24 January repeating points about medical evidence. He also stated that:

> "in your endeavours to undermine my integrity, and to contrive a situation as basis for disciplinary measures, you have unknowingly, and purposefully misrepresented to me a salient point within my employment contract: categorically asserting to me that the bank had a contractual – repeat contractual - obligation to make pension in contributions into the current tax year 2016/17, despite my having been absent on sick leave or in excess of 6 months. You know that it was a complete falsehood and misrepresentation on your part, and which you

have repeatedly refused to correct".

Doing so was:

"an irrefutable act of bullying on your part".

He would not attend the meeting on 25 January.

68. Mr Argyrou reviewed the correspondence and told Mr Warwick to cut short the investigation:

"we should now proceed to initiate a disciplinary process especially as regards the pension/tax issue".

69. The complaint about Mr Warwick bullying him would be investigated by an independent member of staff. Mr Warwick told the claimant on 26 January that, as he was not coming to the investigation meeting, they were starting the (disciplinary) procedure, and any further investigation necessary would take place within that procedure.

70. The claimant responded by returning the consent form for GP records; he also asked about carry forward of his 2016 holiday entitlement. The disciplinary process was then paused, pending investigation of the medical reasons for absence, including a joint discussion of the doctors in March 2017, but the claimant then withdrew his consent for medical records disclosure.

Further Grievances

71. On 4 April 2017 the claimant lodged a grievance about Paul Warwick writing to the doctors about the legitimacy of his absence, which he said was defamatory.

72. Martin Osborne responded on 25 April over 4 pages. He had reviewed the medical reports of 2 doctors and their joint statement. The grounds of his absence from work were "non-medical and non-psychiatric". The doctors had concluded the claimant was "malingering". He concluded that the claimant was "absent from work on an improper and unjustified basis" and a disciplinary process on that should be started without further delay. He dismissed complaints about Paul Warwick and took the claimant to task for the tone of his correspondence with a colleague. The grievance appeared to be further obfuscation of the reasons for continued absence from work.

73. On 30 April the claimant appealed this grievance outcome, and asked for the basis of the possible disciplinary procedure. In the meantime he had made a further subject access request, which the bank complied with at the end of May.

74. Mr Argyrou wrote on 11 May turning down the appeal, making detailed points from the medical evidence about his claims of poor memory and impaired vision being unsupported by the doctors or by testing. The facts on which disciplinary action was to take place were his own

emails.

75. On 8 June the claimant lodged a grievance about unauthorised use of his medical records by a person whose name had been redacted in the subject access request procedure, and on 9 June he added a grievance about the cost of the medical reports being treated as a taxable benefit in kind.

76. Martin Osborne replied on 20 June that the medical records had been divulged subject to legal professional privilege, (clarified on 27 June as the bank's legal representative) The grievance about tax liability was upheld, and the value to the employee would be declared to HMRC as nil.

77. The claimant appealed this on 26 June. On 27 June, in reply, the CEO confirmed that the matter was closed, but if HMRC asked for the cost of the medical report to be declared as an employee benefit, the bank would reimburse his tax liability.

Restarting the Disciplinary Procedure

78. With these grievances out of the way, on 21 July 2017 Paul Warwick wrote to the claimant inviting him to a formal disciplinary meeting with the chief executive on 9 August 2017. The conduct being investigated was his:

> "attempt to procure the bank to mislead Hargreaves Lansdown (HL) and/or HMRC and/or the Pension Regulator in relation to the basis on which it paid pension contributions on your behalf to HL."

Possible consequences might be dismissal with or without notice, or some lesser disciplinary action such as written warning. He had the right to be accompanied. If he did not attend without good reason the bank would proceed in his absence; he might be able to submit written representations.

79. A number of documents were enclosed. The claimant emailed on 24 July asking for a copy of the letter of 24 November 2015 and asking how it was despatched. This was of course the letter telling him about continued payment of employer pension contributions. He was sent a copy, and told it had been sent by 1st class post, not returned, and that a copy had also been attached to Martin Osborne's letter of 18 November 2016.

80. Finally, on 28 July the claimant lodged a formal grievance about inaccurate information in his payslips. He said that from December 2015 employer's pension contribution had been stated as nil, in breach of statutory requirements for payslips. This had led to his belief, "consigned to subconscious memory", that any employer pension contributions made by the bank "would have been made in error". Mr Osborne should be aware of the ramifications arising from this incorrect information, namely not being able to register for lifetime allowance protection, and the "grave accusations of dishonesty levelled against me".

81. This was amplified in a longer email of 31 July, in effect making representations on the disciplinary charge. He said he had first noted the continuation of contributions in summer 2016. He had now noted the content of the letter 24 November 2015. This was a variation of his contract of employment; he had not consented to that variation, and he not known of it. It was wrong to present him as a pension expert, he had set up a SIPP scheme at his previous company, and had no direct involvement with individual scheme members and had "never been fully conversant with such matters". In the intervening decade there had been significant changes in pension scheme legislation of which he only had limited knowledge. HL did not provide advice, only an execution service. The email correspondence of September to October 2016 showed confusion on his part, based on the incorrect payslips. He fully accepted that he had failed to pay attention to his pension fund until he wanted to draw down from it, but he "resolutely refuted accusations of dishonesty".

82. Ahead of the meeting on 9 August the claimant was told that the CEO would consider at the meeting both his 28 July grievance and his 31 July submissions. He was asked to send in or bring to the meeting copies of his communications with Hargreaves Lansdown between April 2015 and December 2016, including his pension contribution statements.

83. The claimant did not do this. He also said he was not coming to the meeting because the stress would damage his health.

84. On 9 August Mr Argyrou reviewed the papers, spoke to Mr Warwick, tried to ring the claimant, decided not to postpone the meeting to a further date in view of history of non-cooperation, and then wrote to the claimant on 14 August with 25 questions he wanted him to answer by 28 August. When the claimant did not reply by 28 August, the deadline was extended to 5 September.

85. He did not reply even then, but on 13 September the claimant asked for an electronic version, and he supplied written answers to the questions on 14 September. He explained he had not accessed HL investment reports at the time, and had not done so now, but did concede they were "likely to include contributions received during the period". He did not get the November pay slip. He delayed asking for lifetime protection while waiting for HMRC to provide an online facility for this; it had not happened by mid-July. In mid/late August 2016 he contacted HL about drawing pension. In the calls that followed he learned contributions to the fund had continued. He had said he had not told them he had not received the 24 November 2015 letter because by November 2016 it was not relevant to the grievance issues, and the digression would "obfuscate" the fact of the bank's contractual breach. They had not sought to agree the ongoing payment of contributions with him, and they should have anticipated there could be a problem with someone of his age. He argued the bank wanted to discipline him for sickness absence and lack of cooperation, but instead "concocted a scenario such as to accuse me of dishonesty".

When he referred to the contributions being paid by mistake, he said (in effect, and summarising) that they had failed to tell him they were making them. He said the payslips showed zero pension contributions, so they had falsified their records. Asked how HMRC and the Pension regulator would view the "error" he said HMRC would want an explanation from the bank and the regulator was not involved. He had not suggested anything dishonest to get a tax advantage, he had asked for "corrective action" on the breach of contract "such that I may avail myself of the tax status to which I am entitled". He had done nothing that had an impact on his fitness and propriety, nor fallen below the standards the bank expected of a manager

Dismissal

86. Mr Argyrou decided to dismiss the claimant, and wrote to him at length on 25 October 2017 explaining why. He did not accept he did not get the letter saying his contributions would be continued, he did not get notice from HL because contributions were continuing, not ceasing, It was bizarre he should ignore all communications from his pension provider, especially when he actively traded in the scheme, employer pension contributions were never entered on payslips. Contributions were never paid by mistake, and if he thought it was a mistake, why had he asked for them to be paid through payroll. When asking the bank to say they paid "by mistake" he could have been quoting from an undisclosed email from HL, or he could have been indicating that he knew they were not paid by mistake but wanted them to say that. His explanation of how the *bank* made an error was wholly unconvincing and would not impress HMRC, as he implicitly acknowledged. Finally: "far from conceding that there was anything wrong with your request or your conduct might fall below the standards expected of a manager supervising staff, you have categorically refused to accept that your conduct was in any way blameworthy". At any stage the claimant could have asked them to stop paying contributions, but instead he had sought to procure a written confirmation by the bank that payments were made by mistake, which would have been untrue, and had the bank agreed there could have been very serious repercussions. He would not acknowledge even that he had made an error of judgment. He did not recognise that what he was asking was to secure him a tax advantage which cast doubt on his integrity. His conduct was sufficiently serious for him to have lost trust and confidence in his ability to discharge its functions as a manager of the bank and his behaviour amounted to gross misconduct. His employment was terminated with immediate effect. In recognition of his service by make an expiration payment equivalent is notice pay subject to execution of the statutory settlement agreement. He was entitled to accrued but untaken holiday pay. He had a right to appeal.

87. In evidence Mr Argyrou made clear that he considered the claimant disingenuous. He knew what he was asking and that he was asking the bank to do something wrong. All his subsequent arguments had reinforced that view.

Appeal

88. The claimant appealed on 29 October 2017. The respondent's analysis was fundamentally flawed because continuing contributions without his prior agreement was a breach of contract on the part of the bank. Further, the pay slips did not state the employer pension contribution.

89. An investigation was done on the pay slip point, by asking the third-party payroll company. They explained that employer pension was shown on payslips as the sum of the amount of the employee's salary sacrifice, plus the employer National Insurance contribution paid to the scheme instead of HMRC, plus any additional employer percentage "if going through the payroll".

90. The claimant was asked in the tribunal hearing if he accepted this, and in so far as his answers were understood, he did not explain why he thought the payslips misrepresented the position, and it seems he was no longer pursuing any point about the payslips misleading him.

91. There was an appeal hearing on 8 December, and he was then sent the transcripts of the discussion. On the 13 December he wrote at length restating his arguments. He did not accept the letter was sent, or that if it was he may have read and overlooked or forgotten its content. He repeated why he did not read communications from HL. He explained he was trying to get back to work in April 2016 with the adjustment of working for a different line manager; as the bank would not agree he had sought alternative employment, without success. He then sought to draw down his pension. He then became aware of continued employer contributions; his immediate response have been that they must have been made in error and should be returned, but HL said that it was for the employer to state this and to request the return. He restated the argument that the bank was in breach of contract: even if he had got the November 2015 letter, it would have required his acceptance to be valid. He would not have accepted because of the size of the resulting tax charge. The accusation of dishonesty was "contrived", and "evidential of an ulterior motive".

92. The claimant wrote again on 30 December, and then on 10 January. He said Mr Warwick should have made himself familiar with the pensions changes and appreciated why the request was made. This argument was developed by reference to earlier government consultation on changes to the lifetime allowance indicating that employers would be having discussion with their workforce about impending changes and their implication. He was not contacted for discussion. (The respondent's evidence has been that staff were invited to individual discussion with the third party pension consultant. Other staff were members of the respondent's own scheme).

93. The respondent's Tony Bush refused to overturn the dismissal decision. His six-page letter of 22 January 2018 essentially restates, in detail and by reference to the claimant's representations, the bank's position. He added that the bank could not be expected to know more about his pension than he did. The payslips were not misleading; in

fact he was knowingly trying to obscure the difference between salary sacrifice and employer pension – the payslips did not misrepresent the position. He had asked the bank to misrepresent the position about pension contributions, and was now seeking to maintain he was paid in breach of contract.

94. The note taker's note records that there would be a further meeting when he had reflected, though the transcript of the recording of what was said at the meeting does not. There was no further meeting. In a preliminary hearing judgement sent to the parties 25 March 2019, E J Auerbach considered whether this was a detriment, and concluded it was not. The transcription was more likely to be accurate than the notetaker, and the claimant's own letter of 10 January indicated that he expected a decision next, not another meeting. There has been no evidence at this hearing that suggests that that conclusion was in any way wrong. The note taker made a mistake, but the claimant was at the meeting and knew that no further meeting was planned.

Unfair Dismissal - Relevant Law.

95. Unfair dismissal is a right deriving from section 98 of the Employment Rights Act 1996. It is for the employer to show that the reason for dismissal was one of the potentially fair reasons in section 98(1), which include conduct.

96. In law, a reason is a set of facts or beliefs held by the employer that cause him to dismiss– **Abernethy v Mott, Hay and Anderson (1974) ICR 323**.It is a matter of fact, not law.

97. Once the reason is established, then by section 98(4) it is for the Tribunal to decide "whether dismissal was fair or unfair, having regard to the reason shown by the employer", and that depends on "whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and determined in accordance with equity and the substantial merits of the case."

98. The cases establish that the employer should hold a genuine belief, founded on reasonable grounds, including such investigation as is reasonable in the circumstances - **British Home Stores v Burchell(1978) ICR 378**. An employee should know what is alleged and have an opportunity to put his side of things; if there are reasons why that has not happened, he should at least have a hearing at an appeal.

99. Reasonable employers may have a range of responses to misconduct – some may dismiss, others may not. Tribunals should not substitute their own view for that of a reasonable employer – **Iceland Frozen Foods Ltd v Jones (1983) ICR 17.**

Submissions

100. The claimant submitted that when imposing a career ending penalty, namely dismissal for dishonesty, the employer was bound to be thorough and careful in its investigation and conclusions. The bank had failed to identify the source of the expressions “by mistake” and “in error”, key to their decision that he had been dishonest. The pension provider could reasonably have expected that in accordance with public policy in consultation papers, employers had discussed with their employees their pension levels in advance of April 2016. They had failed to test the allegation that he was trying to secure an unauthorised tax advantage. The appeal was only a review of the papers. The respondent had not got independent advice about the tax position on pensions. The respondent had failed to entertain a workplace adjustment to accommodate his disability so that he could return to work.

101. The respondent, dealing with the claimant’s argument that there was breach of contract, points to cases of implied acceptance of variation of an employment contract if the employee’s claimant’s benefit, when agreement can readily be inferred– **Hershaw and others v Sheffield City Council UKEAT 00 33/14/BA**. The reason for dismissal was that the claimant had tried to get the bank to mislead another financial services provider. Had he succeeded, the bank would have been open to an allegation of involvement in potential tax fraud. The claimant had showed no understanding of the seriousness of what was alleged. There was no reason for the employer to engineer a dismissal for dishonesty. The investigation had been thorough - Mr Warwick had taken it as far as he could go, and when the claimant had refused to attend the meeting Instead he had sent written representations. When he would not come to the dismissal meeting he had been asked questions to which he replied in detail. These were taken into account in making a decision. It was procedurally fair.

Unfair Dismissal - Discussion and Conclusion

102. The reason for dismissal was the respondent’s belief that when the claimant asked the respondent in September 2016 to make a statement that the contributions were paid in error, he knew that to be untrue, and he did it in order to secure him fixed protection for a higher lifetime allowance, meaning he would pay less tax. There is nothing in the respondent’s conduct to suggest that the real reason was his lengthy sickness absence. The claimant may have been worried at the end of 2015 that the respondent was considering dismissal, but they did little but seek medical evidence from time to time. At that time the respondent was expecting him to return work, and continue, hence the decision to continue employer pension contributions when his salary payments ended. There is little else in the evidence to indicate the claimant’s continued absence was a difficulty for the respondent. They sought medical evidence. The claimant disputed some of the experts’ findings (in particular that there was no physiological cause of his symptoms). He raised a grievance n March 2016 not about this but because of damage to his reputation by association with the respondent. The respondent investigated and replied to this in April 2016. The respondent could have started a procedure to remove the

claimant for capability well before October 2016, when the refund of contributions issue arose, but had not. It could still have done that as the months of his absence continued. The respondent's letters do indicate they took the view that his integrity over sickness absence was doubted, but it is clear from the letters of 20 October 2016 that the respondent saw the claimant's pension contributions request as damaging and dishonest, and took a dim view of it. They sought his explanation and considered his arguments and explanations over another 12 months before dismissing him. The only advantage gained by the respondent from dismissal for misconduct rather than for capability was not having to pay notice, and in fact they were prepared to offer that ex gratia. Had that offer been accepted there would have been no advantage at all. There is no evidence to support a finding that the stated reason was not the reason for dismissing. A reasonable employer could have considered using the extensive sickness absence, in the absence of any convincing evidence of ill health as a reason to dismiss, but there is no evidence that this was the respondent's reason.

103. Did the respondent have a genuine belief in the claimant's guilt? There is no reason to believe the belief was not genuine, because it was founded on the email correspondence and their understanding of the position, including speaking to Hargreaves Lansdown about the refund request. By 22 October 2016 the respondent had formulated that they thought what the claimant had asked them to do was wrong, namely he sought a tax advantage by falsely stating the contributions had been made in error. None of the subsequent investigation – of what he knew or ought to have known about the ongoing payment of contributions, checking the documents to see what was notified to and by Hargreaves Lansdown and their practice on informing the claimant of changes, what was shown on his payslips, and so on, dislodged that view. They went to great lengths, with great patience, to get the claimant's account.

104. Despite the various descriptions of what the "error" might be, the claimant could not without contorting the facts explain how this could be the respondent's error. The real error was that the claimant did not notice that his contributions were being continued, or if he did notice, he did not appreciate the significance until too late (after April). By "mistake" he meant simply that if he had thought about it at the time he would have asked for the payments to be discontinued, that is, *he* made a mistake. The subsequent argument that the respondent had acted in breach of contract is another attempt to argue that the respondent mistakenly paid the money to him, but does not hold water. They could decide, as they did, to continue paying his contributions while he was off work sick, without existing contractual obligation. The change was in the claimant's favour. There is no reason why at any date before April 2016 the claimant could or would have objected to this. He could even have accepted until then, then asked for discontinuance of contributions so as not to compromise his ability to cap the lifetime allowance. His first reaction, far from objecting, was to ask for the money to be paid as salary instead ("through payroll"); and it was this very request that made the respondent focus on the tax

position when taking money out of a pension scheme.

105. Other arguments about whether he had gained or would gain any tax advantage are beside the point. Right from the September exchanges he stated, and they understood, that his objection to the payments was that he would thereby incur a higher tax charge. It is irrelevant whether he did or did not, or for some reason in the future may not, actually incur a charge. He told them that was why he wanted them to say the payments were "in error" or "by mistake". The claimant has not provided information about his fund and his tax arrangements, with the result that neither the respondent nor the tribunal has enough information about the SIPP or his tax affairs to know whether by this request he would or could in future avoid a tax charge. What is important is that he said he would suffer from a tax charge much greater than the contributions made, and that was why he wanted to respondent to say the contributions were made in error. He was not able to explain later in any satisfactory way that this was *not* the reason for his request. His own statement was enough to lead to a conclusion he wanted a tax advantage. They did in fact consult with Hargreaves Lansdown about the effect. They did not need to take specialist tax advice, as the claimant has latterly argued. Nor has the claimant explained why they should, or what it would have told them.

106. The argument that the respondent made an error in not consulting him about 2016 fixed protection of the lifetime allowance does not hold water. The claimant already knew about the changes, as he administered his own pension. In any case it is scarcely conceivable his SIPP provider did not alert him, as pension providers usually seize on any change in pension law as a marketing opportunity. The claimant has complained he was deluged with paper by Hargreaves Lansdown, and he cannot show that they did not tell him. He chose not to send the respondent his (online) pension account statements, which would show the contributions, (as suggested in his letter about the appeal). The respondent had no way of knowing whether the claimant was close to the lifetime limit. The fact that they may have been expected to consult with employees about the changes does not mean they were obliged to advise him, even if (as the claimant asserts) they were expected to consult with employees who were not members of their own scheme. Even if they were, such an error was not the cause of the contribution payments.

107. It is argued by the claimant that Hargreaves Lansdown were "entitled to expect" the payments had been agreed between claimant and respondent, but that does not mean the payments were made in error. They were not paid in error, they were made deliberately. There was no error, of law or fact, save that the claimant did not notice, or if he did, overlooked the implication for fixed protection.

108. The respondent took great care to explore whether the claimant was correct when he said he did not get notice of the continued payments. They concluded there was no reason to think he was correct: he received other posted letters that autumn; he would note the unexpected changes to his salary, overpaid and then in part

recovered, which were explained in the letter, and if he had not received it might want an explanation at the time. The payment reduction would trigger notification to him from HL. It was implausible he should not read either their paper letters or the online communications. Their conclusion was closely argued and reasoned.

109. Had the claimant said his request looked bad, but was an error of judgment, made while he was ill, and he could now see it for what it was, or that he had not thought through what he was asking the respondent to do, or appreciated that he was inviting them to collude in gaining an unlawful tax advantage, and generally expressed understanding and regret, it is possible that a reasonable employer, if they believed him, could or would have overlooked this and not dismissed. The difficulty for the claimant is that far from admitting, now he looked at it properly, that he had suggested a deliberate misrepresentation, and offered as mitigation that he had been confused or hasty, the claimant had instead gone on the offensive, with a grievance alleging breach of contract, a contrived argument about breach of contract; a later argument that they were at fault for not consulting, and later still that the respondent was misrepresenting the position in the payslips. This behavior made it reasonable for an employer to conclude that these ever more contrived arguments about why the bank was in some way at fault showed the claimant knew he had done wrong but refused to admit it. In a regulated industry, they could not afford to place trust and confidence in a senior manager who could not see, after long consideration, that this was a request to involve the respondent in wrongdoing, a potential fraud on the revenue. This respondent would be more than usually sensitive to this as the regulator had already fined them on another matter. It is hard to see how any reasonable employer could not have dismissed a manager who could not see that he was seeking to involve his employer in wrongdoing.

110. The claimant is right that employers dismissing for misconduct in a field where conduct is especially important to employers must be very careful about their decisions, as a wrong decision can bar future employment in a particular sector But here, the respondent went to great lengths to get the claimant to put his side of the case, to collect documents, and to check such facts as they could (the claimant never disclosed what he had received from Hargreaves Lansdown) and in particular whether there was reason to allow he may not have received the 24 November letter. This was not a large employer, but every grievance and every argument was investigated and the detail checked. It is not established that legal advice on tax charges was needed; the claimant himself had stated his reason for asking what he did. He has not explained why they were wrong to conclude that by putting the words “in error” he was not quoting, but knew that there had not really been an error but he would like them to say that.

111. The appeal was not a box ticking exercise. There was a hearing. The clamant having raised the point, there was a check on what the payslips stated. The claimant saw the hearing transcript and then made several written representations. The appeal manager reviewed

all the arguments again and explained his decision. There was no failure of process.

112. The tribunal cannot hold that this was an unfair dismissal.

Wrongful Dismissal

113. The claimant also claims that he was wrongfully dismissed for misconduct. This is about whether he should have been given notice (and been paid) in the notice period.

114. The question here is whether the tribunal (rather than a reasonable employer) finds that the claimant was in fact guilty of gross misconduct, as if not, the respondent was not entitled to dismiss without notice. An employee can be lawfully dismissed without notice if guilty of a repudiatory breach, namely: "conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract that the master be no longer be required to retain the servant in his employment" – **Neary v Dean of Westminster (1999) IRLR 288.** The behaviour need not be dishonest, it is enough if it is "seriously inconsistent – incompatible - with his duty as the manager in the business in which he is engaged" **– Sinclair v Neighbour (1967) 2QB 279.**

115. The tribunal holds that there is sufficient evidence to conclude: (1) the claimant was asking the respondent to make a statement which (2) he believed would save him a lot of tax, and which (3) he knew was false, as there was no error or mistake on the part of the respondent when they made the payments, and any mistake was the claimant's in not noting they were being made, or not understanding until too late that he could have stooped them (4) the claimant never said anything to show he appreciated this was wrong, instead he argued the respondent was at fault (5) in financial services an employer must be able to rely on his managers understanding right from wrong, and truth from falsehood, in the context of financial gain, particularly in tax (6) a senior and experienced employee would and should know this. The claimant**'s** action was in serious breach of the term of the contract that he "conduct himself honestly and reliably", and if that was not clear enough when it was made, all his explanations and arguments between October 2016 and dismissal reinforced the view that he could *not* be relied on to know what was honest behaviour.

116. The wrongful dismissal claim also fails.

Stigma Damages

117. There is a claim that the claimant has suffered harm by association with the respondent ("stigma") as it has been fined for serious breaches of the Financial Services Code, and that he is tarred by association and at a disadvantage looking for other work in the sector.

118. The law on this is taken from the House of Lords decision in **Malik and Mahmoud v BCCI (1998) AC 240**, and the decision of the High

Court in **BCCI v Ali and others (2000) ICR 135**. To succeed, the claimant must show both a breach by the employer of the implied duty of trust and confidence, and that the breach has caused him loss and damage. Both must be established on a balance of probability. The breach must be very serious, at a level to entitle the employee to leave immediately without any notice when he discovers it. The test is whether an employee cannot reasonably expect to tolerate it a moment longer after he has discovered it. There is a threshold of what level of conduct is required to establish a breach. The employer's conduct must be "like to destroy seriously damage the relationship of trust of payment employee, and that means "a pretty good chance".

119. The facts from which the claimant argues there was breach on the part of the employer arise from visits by the Financial Conduct Authority to the respondent bank in 2010 and 2011 when they concluded there were failings regarding the risk of financial crime and inadequate supervision. A remediation plan was agreed. However, the plan was not implemented within the timeframe mandated, and as a result the bank was fined, and restricted in its activities for 126 days. Final notices on this implementation failure were issued in March 2015, to the bank, and to two individuals (not including the claimant) who were Approved Persons under the FCA regulatory scheme. There is no reference to the claimant in these notices.

120. The Claimant was at that stage named on the bank's website as a senior manager. In March 2016 a new regulatory framework became applicable by which the earlier "Approved Persons" regime was replaced by a regime applying to individuals assigned to a "senior management function". The individual roles requiring regulatory control were the chief executive function, the Chief finance officer, and the head of internal audit. They will be registered on the Financial Services Register, and can be individually liable under the regime.

121. The claimant's description as senior manager was removed from the respondent's website in or around February 2016, in line with and in anticipation of the changing regime. He continued to be the named contact for Trade Finance business.

122. The claimant says he believed that externally it would appear that he was being demoted because senior managers were castigated in the March 2015 notices. On 7 March 2016, while on sick leave, he lodged a grievance about his name being removed from the senior management category on the website. He said that professional acquaintances' perceptions of him had changed for the worse as a result. His reputation had been wrongly maligned, as the named individuals in the final notices was said to have been "influenced by comments made by senior management". The claimant has not given evidence of who the professional acquaintances were, or how they demonstrated that their attitudes had changed.

123. On behalf of the respondent Paul Warwick replied on 11 March 2016, saying the change to the website was a simple matter of regulatory compliance, and the claimant knew about this, because

there was a well-publicised two year lead time for the change. His own role did not involve compliance. His role did not meet the criteria for senior management designation under the new regime. Nor in fact was he designated under the previous Approved Persons regime, so there was no change to his regulatory status. The amendments to the website on who was shown as senior management were to make sure they were the same as those designated for regulatory reasons. As for his professional standing, he had not been involved directly or indirectly in the FCA investigation of July 2013 to March 2015.

124. The claimant appealed that he had originally applied for a position as "senior management", and was listed as such on the website. Mr Argyrou replied on 22 April that he was appointed "manager" in 2007, and he had nothing to add to the explanation of the change to who was listed as "senior manager" on the website.

125. What is the evidence of harm? From at least October 2015 the claimant was applying for other jobs in trade finance, but without success. He only reached interview in one, for a post at UBA Capital (Europe) Ltd, held on 4 August 2016, when three people were interviewed for a post. He says he did not get the job because the interviewers understood that he was involved in regulatory action against the bank that had culminated in final notices in March 2015; the interview panel had seen him earlier listed as senior management on the website, and assumed he was involved in the regulatory action. He has given no detail of the questions and dialogue at interview, nor of any feedback, oral or by email, despite an order to disclose documents about this claim. In his grounds of claim he says the interview panel knew about the 2015 notices, he explained he was not a senior manager, and their *body language* expressed scepticism. There is no mention of any verbal comment and this description indicates there was no discussion.

126. The respondent is sceptical that UBA would have thought him a senior manager for regulatory reasons, or that he had been an Approved Person before March 2016. They say that would be apparent to them from his CV; they could in any case have checked the register if concerned. They add that if the Bank's regulatory reputation caused stigma of itself, regardless of the claimant's participation, he would not have reached the shortlist for interview.

127. The claimant says in his witness statement that two recruitment agencies advised that further applications would be futile, but he does not explain when, or why, they said that, and there are no documents.

128. The Tribunal finds that the claimant has not established on balance of probability that he did not get the job because he was associated with any regulatory breaches by the respondent. He gives no evidence about why he believes this. It is not clear what was said at the interview. He cannot point to any feedback from UBA or the recruiter on why he was unsuccessful. It is not shown that but for this he would have been appointed. The fact that he was interviewed (he had made it to a shortlist) shows that a general association with the respondent

was not toxic to his chance of employment.

129. In any case it is not shown how he would be associated with the respondent's failure to implement their remediation plan. The claimant was, with many others, a category A signatory, but that did not make him an approved person under the old regime. His CV will have shown he was not demoted but was always doing trade finance. The timing of the website changes indicates the change was because of the 2016 regulatory change – which every financial services provider will have known about – and most unlikely to be related to the final notices a year earlier.

130. The claimant does not establish his claim for stigma damages.

Holiday Pay

131. There is a claim for holiday pay outstanding on dismissal. Under the Working Time Regulations 1998 a worker is entitled to 28 days holiday per annum. Holiday must be taken, and may not be paid in lieu unless employment terminated with untaken leave in the current holiday year. The reason underlying this insistence is that the provisions are not about money but about taking rest, as an important part of health and well being.

132. Difficulty arises where a worker is unable to take leave because he is off sick. The European Court, interpreting the Working Time Directive underlying the Regulations, has held that if a worker is unable or unwilling to take holiday because he or she is unfit for work, or taking maternity leave, it can be carried forward for up to 18 months. In the UK courts this has been confirmed for state workers – **NHS Leeds v Larner (2011) IRLR 894**, and private employees – **Sood Enterprises v Healey (2013) IRLR 865**. In all other cases, if a worker does not ask for and take his leave, he loses the right to be paid in lieu except on termination for current year pro rata.

133. As is clear in the amended response, the respondent disputes the holiday pay claim on the basis that the claimant was not absent through illness, and was in fact fit for work. He was absent without authority. The claimant's position is that he was at all times unfit for work, and the doctors were wrong.

134. The sick notes start in July 215 with a diagnosis of work-related stress. The claimant says that in April 2016 his GP said he was fit for work subject to reasonable adjustments relating to reallocation of duties within his team. That should be read in the light of E J Wade's decision at a preliminary hearing in 2018 that the claimant was not disabled, so no question of reasonable adjustments impeding his return to work arise.

135. In the meantime the respondent obtained two occupational health reports, and then a consultant psychiatrist's opinion.

136. The first is from a Dr P. Ryan of Blossoms Healthcare, dated 14

September 2015, which concluded the claimant had a stress-related illness, best explained by the work environment, which he should discuss with his GP. There is a further report from Dr S.F. Howlett, a GP with an occupational health qualification, dated 16 November 2015, who concluded he had had a reactive anxiety/depression related to a difficult relation to his line manager. It was not long term.

137. The claimant was next seen by a consultant psychiatrist, Dr John Stevens, who reported to the respondent on 13 April 2016. He concluded following examination and review of the GP records that there was no mental disorder, nor did he suffer a personality disorder. The claimant held "unusual or unorthodox ideas about his state of health (memory disorder related to a TIA)", which were unfounded but did not amount to delusion or hallucination. There was no evidence of physical illness; no other doctor had diagnosed TIA in the claimant. He had no ill health condition which prevented him working to his job description, and the reasons for "Mr Plant's continued absence from work are non-medical and non-psychiatric". Reasonable adjustments were not appropriate or relevant. He had made a recovery from the illness diagnosed by Dr Howlett.

138. Subsequent correspondence shows that the claimant commented extensively on this report and complained that the doctors were in the pay of the respondent and not independent. He maintained he had a disability related to TIA which caused memory loss. The doctors found this without foundation, commenting that he had not sought medical help for this, and it was a self-diagnosis.

139. The claimant, on his own evidence, was making many applications for alternative employment in Trade Finance from October 2015 to August 2016. He was also, on his own evidence, actively trading in his SIPP on a regular basis, to the extent that the contract notes were so numerous that he did not read information from HL and the trade proceeds were such that he did not notice the ongoing pension contributions.

140. At this hearing the respondent questioned the claimant on evidence in his disability impact statement about motor car racing (Autocross). In the light of his lengthy account in a witness statement for the preliminary hearing in July 2018 about substantial impairment of his ability to compete at his previous level, they had found online many records of competitions in which he had participated throughout his sick leave, including competing with an individual he said he could no longer compete with because of his disability, and in a class where he said he was no longer fit. Having heard his answers I was persuaded that he was able to drive a car competitively and often, in a way incompatible with being unfit for sedentary work in a bank, or with suffering any mental impairment short of disability that made him unfit for work.

141. I note that the line manger with whom the claimant had, as reported by Dr Howlett, been in conflict, died in January 2016. If this was the reason for not attending work, in that the poor relationship caused

anxiety and depression, it must have ceased then. In any case he was not depressed or anxious by the time of Dr Stevens' April 2016 psychiatric examination. His own GP certified him fit for work subject to adjustments sought by the claimant himself – precisely what they are is not known to the tribunal – but if they included avoiding relations with his manager, they were no longer relevant.

142. I conclude that at least from January 2016 – and possibly earlier - the claimant was fit for work.

143. The consequence is that the claimant cannot say that he was unable to take holiday because he was ill and that therefore his entitlement should be carried over. He was not attending work for other, non-medical, reasons, and he did not need rest from his labours, which is the underlying reason for statutory holiday entitlement. Further, any entitlement accrued when ill in 2015 was lost when he did not take it by June 2017, allowing the 18 months carry over, at the outside, indicated by **Healey**, and the ILO recommendation discussed in that judgment as to the lack of usefulness of holiday as rest after that time.

144. Leaving statutory entitlement to one side, the contract of employment allowed for 23 days paid annual leave, with an extra day for each year of service. Only 5 days could be carried forward at the end of the year, and only with special permission, and they must be used in the next 5 months. Holiday pay under the contract did *not* accrue after the occupational sick pay period had been exhausted. Thus, after October 2015, the claimant was not entitled to contractual holiday pay as an alternative to the statutory entitlement, and he could not carry previously acquired leave entitlement forward after May 2016.

145. The holiday pay claim fails because (1) the claimant did not take statutory leave, and it could not be carried forward after 18 months (2) there is no statutory entitlement for the final year in which employment terminated because he was not attending work, though not unfit for work, and so had no entitlement to rest from work (3) there was no contractual entitlement in the final year because he was ostensibly sick and his sick pay was exhausted, and if not sick, he was not at work and so unable to take holiday from it.

Costs

146. There is an outstanding claim for respondent's costs in respect of the claims struck out or withdrawn at the preliminary hearing. The grounds for this application are set out in their letter of 20 September 2018, to which the claimant replied on 26 September 2018. The application concerned the claimant's conduct in the claims that had been struck out: public interest disclosure detriment and dismissal, and terms and conditions. These claims are said to have been unreasonably pursued, not only did they have no reasonable prospect of success but the claimant, it is said, knew that. The respondent does not seek costs for the claims withdrawn at the preliminary hearing:

claims of discrimination because of age, race and religion. The respondent also limited its costs claim to £20,000 even though its liability to date was £163,000.

147. The claimant replied on 26 September that he was not going to argue whether his claims were unreasonable when the appeal was outstanding, but he stood by his assertion that he was disabled, mentioning his grant of an extra 23% exam time, though without mentioning that this was because of carpal tunnel syndrome, not impaired memory. There was also an attack on the respondent for its FCA Code breaches identified in the March 2015 notices, though how this relates to any ground of the application for costs is not explicit; he also argued the dismissal date was wrong by a day because it took effect when he received the letter. Neither of these two last points appears relevant to the costs issues.

148. At that stage the October 2018 final hearing was coming up. The claimant sought a postponement because he had lodged a number of appeals against the preliminary hearing decisions, and against refusal to reconsider the preliminary hearing decisions. The postponement was refused, but when it came to it, there were insufficient resources for the hearing and it did not take place. The claimant had also at that stage not complied with orders, notably to exchange witness statements, possibly because he hoped for successful appeal outcome.

149. Some of the appeals (notably from the finding that he was not disabled) were held not to be matters of law. Some were dismissed on withdrawal. There was a preliminary hearing on 20 February to find out whether the appeals related to the public disclosure claims were arguable. In a reserved judgment dated 25 March 2018 all the extant appeals were dismissed as not reaching the threshold of being arguable. An application for reconsideration of this decision was refused on 24 April 2019.

150. On 16 April 2019, after the disposal of all the appeals, the respondent added to its application for costs, citing unreasonable conduct of the claim continuing after its application on 20 September 2018, and arguing too that the unfair dismissal claim had no reasonable prospect of success, and the same on the claims for wrongful dismissal and stigma damages. It was argued that the claimant knew they were without merit, and was pursuing them unreasonably. Finally, they were no longer limiting their claim to summary assessment at £20,000. Instead they wanted a detailed assessment, which is unlimited in value.

Relevant Rules

151. Rule 76 of the Employment Tribunal Rules of Procedure 2013 sets out the grounds:

When a costs order or a preparation time order may or shall be made

76. (1) A Tribunal may make a costs order or a preparation time order, and shall

consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

Procedure in this hearing

152. When submissions on the claimant's claims had been made, and it came to costs, I read the relevant tribunal rules to the claimant and explained that in the tribunals, unlike the courts, costs do not follow the event, and that to make an award I must be satisfied there was one or more of the factors named in rule 76(1) or (2), and then also consider whether to make an award even so, as there was a discretion. I could also take account of his ability to pay.

153. The respondent then went through the arguments in their letters. The claimant replied. The costs decision was then reserved like the others.

Costs Discussion and Conclusion

154. Reviewing the history of the claims, there was a preliminary hearing to clarify the issues before E J Isaacson on 11 May 2018. She told the claimant to think carefully about his claims, and warned that some at least could be the subject of strike out applications or deposit orders, which might make him vulnerable to paying costs.

155. The respondent wrote a costs warning letter on 13 July 2018, five days before the open preliminary hearing to decide the application to strike out claims. The claimant was warned that if he did not withdraw claims they would seek costs.

156. At the preliminary hearing, the claimant withdrew his discrimination claims, and the respondent, because of what it said in the costs warning letter, does not seek costs in relation to those claims.

157. The preliminary hearing then heard argument about the disability issue, and about striking out the claims related to protected disclosures. It had been listed for two days in July, but because of complexity two more had to be found in August, one with the parties, and one for deliberation and to write reasons. E J Wade found on the evidence that the claimant was not, as a matter of fact, disabled, and showed some scepticism as to the claimant's account of the severity, or even the existence, of any impairment. She also struck out claims based on public interest disclosures said to have been made in 2008. Her full reasons are available, but in essence it was improbable that disclosures made in 2008, to a manager who had died in January

2016, could account for the respondent's acts from September 2016 onward, especially when the claimant had not been in the workplace since July 2015. Earlier detriments claimed – from 2008 to 2013, and a remark by Mr Warwick to OH in April 2016, were dismissed substantially because they were out of time, though it was also noted that many were vague, unspecified and undated.

158. It is relevant that E J Wade also refused applications to amend the claim. Listed in her appendix 1 to the order as amendment applications refused are twenty additional alleged public interest disclosures and seven more detriments, from 2008 to 2015, some specific (such as reporting unsafe shelving) and others very general. None had appeared in the claim form.

159. The respondent argues that all the dismissed claims had no reasonable prospect of success, and costs were unnecessarily incurred investigating and arguing them. They argue further that the claimant knew this but still ran them. He had some legal advice (from ELIPS, which provides volunteers on some days at the tribunal). They say he brought claims, abandoned them, tried to introduce others, and made his claim a moving target for the respondent to fight. By way of example, his schedule of loss swung from £1,597,000 to £3,769,000 without much explanation, though ordered to make explicit his calculation of remedy. It is said this conduct was unreasonable. His disability impact statement and his oral evidence on this was seriously misleading, in the light of the documentary research of Autocross competitions. He had failed to comply with orders to serve an amended schedule of loss, and further information (Isaacson), or documents and an amended schedule of loss (Wade).

160. On the April 2019 additions to costs application, the unfair dismissal claim is a straightforward conduct dismissal, it is said, which has been overcomplicated. The wrongful dismissal and unfair dismissal claims relied on the claimant's explanations of "by mistake" in which the claimant had a reasonable prospect of success. If there had been any argument about fair process related to the appeal, the EAT finding made it clear that was a non-starter. On the stigma claim, there was little reason to hold he would be associated with the bank's regulatory failures, and there was no evidence to show he suffered any harm as a result. It was without merit.

161. His conduct from September 2018 to April 2019 was also said to be unreasonable – he failed to produce or cooperate with preparation of an EAT bundle. He did not disclose his own witness statement until several weeks after the bank disclosed its statements, to his unfair advantage. His statement contained much irrelevant material related t the dismissed claims and then introduced a whole new disability case based on Asbergers. It was not cross referenced to the bundle. He had reduced this schedule to £2,033,362, but this remained fantasy, involving an improbable number of years of continued employment, and defied E J Isaacson's order to file a realistic schedule.

162. The April application invited the claimant to withdraw his claims and

explained its renewed costs warning by reference to decided cases. The respondent said he treated the process as a game.

163. On ability to pay it is argued that the claimant has substantial means, given that his pension fund is near the lifetime allowance.

164. For guidance on costs awards in tribunals, I have regard to **A-G v Barker (2000) 1FLR 759** on what is vexatious:

> **'"**"Vexatious" is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".

165. What is unreasonable will usually include having no reasonable prospect of success, or behaving in other ways that are unreasonable. A litigant in person should not always be expected to understand matters with the objectivity and knowledge of a professional representative, but litigants in person can still behave unreasonably – **AQ v Holden (2012) IRLR 648.**

166. The amount of any award should be related to the "nature gravity and effect" of the conduct, though it is not necessary to relate specific costs to specific acts – **McPherson v BNP Paribas (2004) EWCA Civ 569; Barnsley MBC v Yerrakalva (2011) EWCA Civ 1255.**

167. I have heard the claimant for several days and have read his many written submissions between hearings too. While not legally trained, he is intelligent, literate, and with a good command of detail and argument. He has had little formal advice – ELIPS volunteers do not have the time to get to grips with cases involving long and involved histories and large amounts of documents. That does not affect his understanding of the law as much as deprive him an objective assessment of the merits of his case.

168. While it is possible that an unrepresented litigant may believe he has a case, there are many features of this one that indicate that the claimant did not himself believe the truth of his assertions, meaning that the assertions must correspond to some reality. The close attention to the events leading to his dismissal, and what he may have meant by "mistake" or "error" on the part of the respondent, demonstrate that he simply adapted his arguments as they occurred to him: first he suggested the payments should simply be returned with a statement they were in error, then that the bank made them in breach of contract, then that they misled him by the payslip information, then that they had failed to consult about changes in the lifetime allowance. All this sought to avoid the bank's point from the start that they had not made the payments in error. Behaviour before proceedings does not give rise to a claim for costs for unreasonable conduct, but they were

maintained during proceedings and at the hearing. This avoidance of the core point involves some willful element of distraction– elaborating arguments to avoid the basic point on which there is no real argument.

169. This elaboration then involved making many other claims: the discrimination claims which were withdrawn, the protected disclosure claims which were improbable, seeking to add so many additional claims by way of amendment, not allowed.

170. An outstanding example of unreasonable, even vexatious conduct is the disability claim. The claimant had been certified unfit by stress. Mental illness caused by stress was not found by the doctors on more than a temporary basis. Dr Stevens, a psychiatrist, had already found no mental or physiological basis for his failure to attend work. The condition relied on (impaired memory) was self-diagnosed, flew in the face of the medical evidence, and was found not to constitute an impairment, on the basis that his evidence of impairment was not credible. Having had that claim struck out, and an appeal on that finding dismissed, he then sought, with much pre-hearing written material, and at the hearing, to assert he suffered from Aspergers, another self-diagnosis.

171. The respondent's assertion that the claimant overcomplicated his claims (and thereby increased costs, as they had to deal with every argument) is accepted. One of the labours of Hercules was to fight the Hydra, a multi-headed monster which whenever one head was cut off would sprout two more. This claim was Hydra-headed. If one explanation of mistake did not work, another was produced, if one disability (mental ill health from stress) was not found, he would suffer impaired memory and then Aspergers syndrome. If some claims had to be withdrawn or were to be struck out, he produced twenty more. This – reinventing the claim when some part of it is closed off - is unreasonable conduct.

172. There were parts of his case where it seemed very clear that he refused to understand the simple point being made by the respondent about his honesty – for example, when told he had invited them to state what was not true so he could gain a tax advantage, he said he had not gained a tax advantage, without explaining why what he said to them about tax at the time was not true, or why they should not have believed it to be true, and without giving any information about what was the tax position.

173. His preparation, despite orders, was unhelpful, notably the schedules of loss, which varied hugely without much explanation, and bore little relation to reality. No excuse was offered why he should disregard the order to exchange, so gaining an unfair advantage, nor for failing to edit his statement to remove material relating to the claims that had been struck out.

174. The conduct of the claim has been without much regard to the rules and orders made, and, even more seriously, without much regard to the truth (relation to the facts of what happened) of what he asserts

with each fresh argument, or to the truth (as found) of claims and arguments that have been rejected. His repetition, more than once, of having needed more time in examinations, which was granted for unrelated conditions, as evidence that he is a disabled person, is a small but obvious example. He clutches at any straw, even when it has been discredited.

175. On whether the unfair and wrongful dismissal claims were unreasonable, there was no application for deposit order or strike out those claims, but that does not save the claimant if he should have known his arguments were unsustainable. The elaboration of his arguments why there was "mistake" suggest he did know this – he simply avoided the respondent's point that he was asking them to become involved in a potential fraud by obfuscation about breach of contract, stigma, failure to consult, disability, loss of memory, pretending he had not received the letter about ongoing pension contributions, refusing to produce any material from HL to back up his saying he did not know about contributions, all demonstrate this. These were not points that required legal input. A good friend or family member could have pointed out that large parts of this did not make sense. It is the lack of appreciation of obvious points of common sense that suggests that the claimant was not seeking to show he had been unfairly dismissed, or dismissed for making protected disclosures in 2008, but that he saw it as a way to make money, or as a game he had to win, by any means. His dishonesty, still maintaining in the face of the published results that he was unable to compete on any but a leisured level in competitive driving competitions, adds to that conclusion.

176. As a result the respondent has been put to significant unnecessary expense. Had this been an unfair dismissal claim for conduct, with wrongful dismissal and a holiday claim, it would have taken no more than two days. The case preparation would have been much less, without the 4 days of preliminary hearings attended by the parties. The added claims, and the vast amount of material included in the final hearing, were unreasonable.

177. On ability to pay, the claimant has a pension fund, and can draw down on it, subject to tax. It is not known what other pensions he has from previous employment, whether he had other savings, owns his home, or the remoter place where he often went when off sick, and so on, because he has volunteered no information. There must have been other resources during the years when only £750 of his pay was not sacrificed for the pension scheme. I conclude that he has means well in excess of most claimants.

178. Having regard to the conclusions, and in the light of **Kovacs v Queen Mary and Westfield College (2002)IRLR 414**, it would not be right in this case to limit the costs to the limit on summary assessment to £20,000.

179. The order is that the claimant pay the respondent's costs on a detailed assessment. Bearing in mind that he was a litigant in person there is no order for costs until the preliminary hearing on 17 July 2018. By that date he had been given a general warning by a judge and a

specific warning by the respondent. He had withdrawn some claims. From 18 July 2018 onwards he is to pay 70% of the respondent's costs. This reflects the fact that had he conducted the remaining claims reasonably and had they been reasonable claims, there would still have been some hearing and it is unlikely an order for costs would have been made. The percentage is a broad brush attempt to reflect his lack of honesty, but also his not unlimited (so far as is known) means. There may be some injustice to the respondent, but that is the nature of a jurisdiction where costs do not follow the event.

EMPLOYMENT JUDGE- Goodman

DATED - 08th July 2019

JUDGMENT SENT TO THE PARTIES ON

.15th July 2019

FOR THE TRIBUNAL OFFICE