Case No: 2200272/2019

EMPLOYMENT TRIBUNALS

Claimant: Mr L Sonde

Respondent: Barclays Bank PLC

Heard at: London Central **On:** 1, 2 & 5 August 2019

Before: Employment Judge H Grewal

Representation

Claimant: Mr M Greaves, Counsel

Respondent: Mr P Keith, Counsel

JUDGMENT

The complaint of unfair dismissal is not well-founded.

REASONS

1 In a claim form presented on 28 January 2019 the Claimant complained of unfair dismissal. It was served on the Respondent on 25 March 2019.

The Issues

2 It was not in dispute that the Claimant had been dismissed on 30 August 2018 and that the reason or principal reason for it was related to conduct. The issues that I had to determine were:

(a) Whether the dismissal was procedurally unfair;

(b) If it was, what would have happened if a fair procedure had been adopted;

(c) Whether any compensation should be reduced because the Claimant's conduct contributed to the dismissal;

(d) Whether the Claimant should be awarded an uplift because of the Respondent's failure to follow the ACAS Code on Disciplinary Procedure.

The Law

3 Section 98(4) of the Employment Rights Act 1996 ("ERA 1996") provides,

"*… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
(a) Depends on whether in the circumstances (including the size and the 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
(b) Shall be determined in accordance with equity and the substantial merits of the case."

4 The well-established authority of **British Home Stores Ltd v Burchell [1978] IRLR 379** provides that in a conduct dismissal case the Tribunal has to ask itself the following three questions:

(i) Did the employer believe that the employee was guilty of misconduct?
(ii) Did he have in his mind reasonable grounds upon which to sustain that belief? and
(iii) at the stage which he formed that belief on those grounds had he carried out as much investigation into the matter as was reasonable in the circumstances of the case?

5 In determining the issue of fairness the Tribunal also has to see whether there were any flaws in the procedure which were such as to render the dismissal unfair, and, finally, whether dismissal was within the band of reasonable responses open to a reasonable employer in all the circumstances of the case.

6 The case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439,** approved by the Court of Appeal in **Post Office v Foley [2000] IRLR 827** lays down the approach that the Tribunal should adopt when answering the question posed by Section 98(4). It emphasises that in judging the reasonableness of the employer's conduct the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer and that the function of the Tribunal is to determine whether in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. The range of reasonable responses test also applies when the tribunal is assessing whether the employer adopted a reasonable procedure – **J Sainsbury plc v Hitt [2003] ICR 699**.

7 The Foreword to the ACAS Code of Practice on Disciplinary and Grievance procedures provides that employment tribunals will take it into account when

considering relevant cases. The following paragraphs of the Code are relevant to the issues in the case:

> "*8. In cases where a period of suspension with pay is considered necessary, this period should be kept as brief as possible, should be kept under review, …*
>
> *11. The meeting* [disciplinary hearing] *should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.*
> *…*
>
> *22. A decision to dismiss should only be taken by a manager who has the authority to do so.*
> *…*
>
> *27. The appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case.*
> *…*
>
> *29. Employees should be informed in writing of the results of the appeal hearing as soon as possible."*

7 Section 124(6) ERA 1996 provides that where the tribunal finds that the dismissal 1s to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

8 Section 2017A of the Trade Union & Labour Relations (Consolidation) Act 1992 provides that if the tribunal finds the employer has failed to comply with the Code and the failure was unreasonable the tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

The Evidence

9 The Claimant gave evidence in support of his claim. The following witnesses gave evidence on behalf of the Respondent – Suzan Meyzin (Investigations Manager, Chief Security Office), Suzanne Wheeler (Branch Manager), Elena Cardinali (Branch Manager) and Michael Conway (Compliance Director). The Tribunal had before it a bundle comprising 700 pages. Having considered all the oral and documentary evidence I made the following findings of fact.

Findings of Fact

10 The Claimant commenced employment with the Respondent on 9 March 2015 as a Community Banker. He was 26 years old at the time. He subsequently became a Moment Banker.

11 The Claimant's contract of employment contained the following provisions –

> "*4. Duties*

4.1 During your employment with the Company you agree that you will:

(a) act in a manner consistent with and which supports our values, purpose and behaviours and in particular the Barclays Values;

(b) …

(c) diligently and faithfully perfom such duties and exercise such powers and functions as may reasonably be assigned to you by the Company in relation to its business and that of the Barclays Group and to the best of your ability and with integrity, due skill, care and diligence;"

12 The Respondent set out how it expected its employees to behave in a document called "The Barclays Way". All employees were trained on the Barclays Way annually. It stated, among other things,

> "*Personal accountability is central to our culture and how we behave is instrumental in us achieving the highest standards of performance, adding value to our customers and clients and meeting our regulatory obligations. In order to achieve this, we expect colleagues to:*
>
> 1. *act with integrity;*
> 2. *act with due skill, care and diligence;*
> 3. *be open and co-operative with regulators;*
> 4. *treat customers fairly; and*
> 5. *observe proper standards of market conduct"*

13 These were replicated, with slight changes, in the Conduct Rules which came into effect on 7 March 2017 for former Approved Persons and certain customer facing roles. The Conduct Rules are part of the FCA's and PRA's "Strengthening Personal Accountabilities" regime. The changes that were made were as follows:

- the word "*regulators*" in number 3 (above) was replaced with "t*he FCA, the PRA and other regulators."*
- Number 4 was changed to *"you must pay due regard to the interests of the customers and treat them fairly."*

14 The Claimant completed training on the Barclays Way on 1 October 2015 and August 2016. The Respondent's employees were trained on the Conduct Rules in the last quarter of 2016. The Claimant completed online training on the Conduct Rules on 21 November 2016.

15 Following the introduction of the Conduct Rules, the Respondent set up a Conduct Rules Panel ("the Panel"). Michael Conway, who was then the Head of Employee Relations, was Chair of the Panel. The other members of the Panel were Ruth Surendran (Head of Employment Legal) and Sam Linsley (Head of Compliance). Any manager dealing with a disciplinary matter has to refer the case to the Panel if the outcome is a written warning or a dismissal or the manager considers

that there has been a Conduct Rules breach. The Panel assesses the manager's decision as to whether or not there has been a breach of the Conduct Rules and provides guidance and advice to the manager. The purpose of providing that assessment is to ensure that there is consistency across the Respondent. The decision as to whether there has been a breach of the Conduct Rules is ultimately that of the manager. The Panel does not review the disciplinary sanction.

16 The Respondent's Fraud Operations team receives reports of fraud on customers' accounts. It is responsible for reporting, investigating and refunding, if necessary, any fraudulent transactions on customers' accounts. It liaises directly with the customers. If the team is dealing with an issue which may involve the Respondent's employees, it refers the matter to the Chief Security Office ("CSO") Investigations team. The CSO Investigations team investigates any matters in which the Respondent's employees might be involved in potential fraudulent conduct,

17 On 24 August 2017 the Fraud Operations team reported a matter to the CSO Investigations team. It related to a fraudulent joint savings account being opened on 10 August 2017. The joint account had been opened by the Claimant at the Swiss Cottage branch. The joint savings account had been opened in the names of Customer 1 and Customer 2. The Claimant had then transferred funds from Customer 1's sole account into the new joint account. A total of £37,040 had been transferred from Customer 1's sole account into the joint account and the funds had then been removed from the joint account. It appeared that Customer 1 had been the victim of an account take over. An "account takeover" is a term used for an account which has been taken over by a third party (not associated with the account-holder) and used for fraudulent purposes. One of the two persons who opened the joint account had pretended to be Customer 1.

18 On 15 September the Fraud Operations team reported to the CSO Investigations team another fraudulent joint account that was opened on 17 August 2017 by the Claimant in the Swiss Cottage branch. It related again to an account take over and a total of £40,041 had been removed from the victim's account.

19 Suzan Meyzin, Investigations Manager in the CSO Investigations team, made the decision to suspend the Claimant. In the space of one week he had been involved in the opening of two fraudulent accounts which had led initially to the customers and subsequently the Bank losing over £77,000. She felt that there was a real risk to the Respondent. Whether the Claimant's actions had been a deliberate fraud or simply a failure on his part by accident, there was a risk that that the actions could be repeated and result in a further financial loss for customers and/or Barclays Bank. She sought advice on the issue from ER Direct, the Respondent's outsourced employee relations advisor. She then spoke to the Claimant's line manager, Dan Inzani, Branch Manager, and instructed him to suspend the Claimant.

20 Mr Inzani suspended the Claimant on full pay on 15 September 2017 and gave him a suspension letter signed by Ms Meyzin. It stated that he was being suspended pending investigation concerning account opening and matters arising. It stated that they would regularly update him on the progress of the investigation and that they aimed to keep the period of suspension as brief as possible. The template of the suspension letter contains a sentence informing the employee of the date until which the employer anticipates the suspension will last. Ms Meyzin did not insert a date at the end of that sentence. The Respondent's Disciplinary Procedure provides that in

some circumstances, following advice from HR, it might decide to suspend an employee prior to or during an investigation. It gives examples of the circumstances in which a decision to suspend might be taken. One of them is where allowing the employee to remain in work might create a serious risk to the bank or its customers or clients. It states that at the time of being suspended, "*the employee will be informed in writing of the reason for the suspension and its likely duration. Any suspension will be kept under review during the investigation"* and "*will last no longer than is reasonably necessary."* At the end of the letter Ms Meyzin provided the Claimant with her telephone number and a number for HR if he required any further information.

21 Ms Meyzin then investigated the matter. While she was doing so, a third matter came to light relating to a transfer of funds from the Claimant's account to someone else's account and the return of a larger sum to the Claimant. She investigated that matter as well.

22 Ms Meyzin's investigation established that in relation to both fraudulent account openings the Claimant had used PINSentry (inserting the card into a machine and entering the PIN number) as identification for the customers involved. That was the Respondent's normal way to identify the customer. On both occasions the Claimant had spent 30-40 minutes with the customers opening the account. The Claimant had the customer profiles of the genuine customers on the computer in front of him. In the first case the customer (customer 1) was a national of China who was born in China on 7 October 1977. The individual who had pretended to be customer 1 was a white male who was approximately 20-30 years old. In the second case the customer profile of the genuine customer (customer 4) was a national of China born in China on 5 September 1962 (55 year old woman). The customer pretending to be customer 4 was a white woman aged around 30 with a shaved head. The Claimant had failed to notice that the people before him did not appear to match the customer profiles.

23 As part of her investigation, Ms Meyzin looked at the Claimant's personal bank account in order to ascertain if there was any unusual activity which, for example, might suggest that he was being paid to open accounts for fraudsters. She saw that the Claimant had on 14 August 2017 transferred £15,000 to the account of customer 6. He had accessed customer 6's account on 31 July 2017 and had opened an everyday saver account for her. That was the account to which the £15,000 had been transferred. He had accessed that account several times in August and September 2017. On 13 September 2017 he had accessed the account and ordered statements. On the same day £16,000 was transferred from that account to the Claimant's account.

24 Once Ms Meyzin had conducted sufficient investigation to understand what had happened, she contacted the Claimant to invite him to a meeting. She initially did so on 20 October 2017. She met with the Claimant on 2 November 2017. He said that he understood Know Your Customer to mean that he should make sure the person was who he or she claimed to be. He was asked what he would do to make sure that it was the customer. He said that he would check the PIN and that the date of birth on the screen matched the person. He was shown a still image of the person pretending to be customer 1 and asked about his age and nationality. The Claimant said that he looked "*some sort of European – mixed"* who was aged "*late 20 late 30".* He said that customer 1, according to the information held about him, was "*Japanese – oriental"* and said that he would have looked at his age but could not remember

what it was. Ms Meyzin asked him whether he had been concerned that the person in the picture did not look like a 40 year old person from China. The Claimant said that if he had been suspicious, he would have asked questions. He said that as he had the PINSentry, he had probably taken his foot off the gas. He was then shown the picture of the woman who had pretended to be customer 4. He described her age and appearance as "*30ish Spanish nationality*" and not Japanese/Chinese. He was told that the real customer was 55 years old and again he said that if he had been suspicious he would have questioned them. When he was told of the amount of the fraud, he said that they were "*big figures*" and that it was "*more than a bit rubbish on my part.*" Ms Meyzin did not specifically offer the Claimant the opportunity to view the CCTV footage. The Claimant did not ask to view it. Had he done so, she would have let him view it.

25 He was then asked questions about customer 6. He said that he knew her quite well. He was aware of the Respondent's policy that employees should not carry out transactions for their family and friends. He said that she was a foreign national who was studying and that she needed to show that she had £15,000 in her account for 31 days. He had lent her that sum and after 30 days he had given her the bank statement for her university, and she had given him £16,000 back. He had loaned her the money to enable her to obtain a student visa.

26 On 6 November Ms Meyzin interviewed the Claimant again. He said that customer 6 had been a friend before she became a customer. He had known her since the end of the previous year. He said that he had never accessed her account without her authority. If she was not present, he would have spoken to her on the telephone before. He said that she had needed money for visa purposes. There had been a problem with her family getting the money to her. She had returned it to him with £1,000 interest. She had needed to show that she had the funds in her account for 28 days. He had produced the statement for her and then the funds had been removed from the account. She had an account abroad and had told him that she had funds in that account. She had given him back more than he had loaned her to show her appreciation for his having helped her. He said that it looked bad technically and he could see where Ms Meyzin was coming from but all he had done was to try to help someone.

27 On 16 November 2017 Ms Meyzin completed her investigation report. Her conclusion was that in respect of all three matters there was a case to answer and it should proceed to a disciplinary meeting. She uploaded it to ER Direct who would then review it and pass it on to the hearing manager. The report comprised seventeen pages. The appendices attached to it ran to nearly two hundred pages. As the ER Direct case reviewer system does not support CCTV footage she could not upload the CCTV footage to ER Direct but she uploaded the still images of the individuals who had opened the fraudulent accounts. She stated in the investigation report that the full CCTV was available for viewing on request.

28 On 27 November the matter was referred to the Conduct Rules panel as it was believed that there might have been a breach of the Conduct Rules. The Panel agreed that there was a potential breach of Rule 1 (You must act with integrity) as there was a suggestion/allegation that the Claimant had knowingly participated in deception to obtain a visa for personal gain and a potential breach of Rule 2 (You must act with due care, skill and diligence) because of the allegations of the

Claimant's failure to notice on two occasions that the customer in front of him was not the customer described on the system.

29 On 15 December 2017 Herman Pereira (Branch Manager) invited the Claimant to attend a disciplinary hearing on 11 January 2018. The allegations against him were that:

(1) On 10 August 2017 when opening a new joint account for an existing customer he had failed to notice that the customer details on the system were for a 40 year old Chinese man and the man in front of him was 20 year old white man. His failure to identify a very obvious fraudster had led to a financial loss (initially) and distress and convenience to the customer and subsequently financial loss of £37,040 and loss of reputation to the bank;

(2) On 24 August 2017 he had done the same thing again when he had failed to notice that customer details on the system were for a 52 year old Chinese woman and the woman in front of him did not meet that description. The financial loss on that occasion had been of £40,041;

(3) On 14 August 2017 he had knowingly participated in deception by loaning a friend £15,000 to allow her to falsely meet the criteria for a visa application and he had charged her interest which had resulted in a personal gain of £1,000.

The letter also said,

> "*Under the UK Individual Accountability Rules, you are also in scope of the Conduct Rules which form part of this Regime. At the disciplinary hearing, the hearing manager will also consider whether these allegations may also be a breach of one or more of the Conduct Rules…*
>
> *If you are found to have breached a Conduct Rule we are required under the FCA/PRA rules to include details of the Conduct Rule breach and any disciplinary sanction on any regulatory reference for a period of 6 years."*

The Claimant was warned that dismissal was a potential outcome. He was advised of his right to be accompanied. A copy of a disciplinary policy and the investigation report were enclosed with the letter. Mr Pereira inadvertently omitted the appendices to the investigation report.

30 The Respondent has a two-page document that sets out the steps in the disciplinary procedure for its managers. This document stated that the investigation report would be referred to the Conduct Rules panel to make a recommendation on whether there was a potential Conduct Rules breach. There is no further reference in that document to referring the matter to the Conduct Rules panel. It provides that the person hearing the disciplinary must contact ER Direct for guidance before making any decision.

31 The Claimant attended the disciplinary hearing on 11 January 2018 with Derrick Brown, his Unite representative. In the course of the hearing they said that the

Claimant had asked during the investigatory interviews to view the CCTV but had only been shown the still image.

32 On 16 January Mr Pereria sent the Claimant the appendices that had been omitted from his original letter. He also spoke to Mr Brown and told him that he had requested the CCTV footage. On the same day Mr Brown wrote to Mr Pereira and requested a new hearing manager on the grounds that Mr Pereira had now become part of the investigation.

33 On 18 January Mr Pereira responded that he did not accept what Mr Brown said but they had nevertheless agreed to appoint a new hearing manager. That manager was Suzanne Wheeler, who would be in touch with the Claimant to arrange a new hearing date. He also told him that the Investigation manager had confirmed that the CCTV footage could be viewed by prior appointment and she had tentatively booked 22 and 23 March for that to be done at the Soho Square branch.

34 Ms Wheeler was on holiday from 26 January to 1 February 2018. ER Direct attempted to contact her several times in the first two weeks of February. On 16 February Ms Wheeler informed ER Direct that she was reading through the case and that there was quite a lot to read through. Ms Wheeler arranged to meet Ms Meyzin on 26 February to view the CCTV footage but the meeting did not go ahead as Ms Meyzin's laptop was notworking. Ms Wheeler was on annual leave for one week at the beginning of March. In the middle of March Ms Wheeler spoke to Derrick Brown about him and the Claimant viewing the CCTV footage. He felt that it was not right to ask the Claimant to go to Soho Square to view it and asked whether it could be provided on disk. He also said that the Claimant was unwell and was under the care of a doctor. Ms Wheeler attempted to contact the Claimant but his telephone went straight to answerphone. By 21 March Ms Wheeler had made contact with the Claimant. He said he would be able to attend a meeting. Ms Wheeler said that she would arrange a meeting and for the Claimant and Mr Brown to view the CCTV on the same day before the meeting. On 9 April Ms Wheeler provided a draft of the invitation to the disciplinary hearing to ER Direct to approve. There were a few amendments and it was finally approved on 23 April 2018.

35 On 23 April 2017 Ms Wheeler invited the Claimant to a disciplinary hearing on 5 May 2019. That letter was in the same terms as the one that Mr Pereira had sent him. ER Direct advised Ms Wheeler that she would also have to decide whether the allegations might be a breach of one or more of the Conduct Rules. Once she had made her decision on the issue, ER Direct would present her rationale to the Conduct Rules Panel who would consider her decision and rationale and offer guidance from a consistency perspective. The hearing on 5 May 2019 was postponed at the Claimant's request because he was not well enough to attend.

36 The Claimant was referred to the Respondent's Occupational Health Service provider. The advice provided on 30 May 2018 was that the Claimant was temporarily unfit for work. Ms Wheeler was on annual leave from 9 to 18 May 2018.

37 The disciplinary hearing took place on 15 June 2018. The Claimant was accompanied by Mr Brown. At the start of the hearing they watched the CCTV footage. In respect of the money that he had given to Customer 6, the Claimant said that he had helped a friend and lent her some money and she had paid it back. He had not read anywhere or had any training that he could not do it. He did not think

that he had falsified the picture by making it look like his friend had the money when in fact she did not. The Claimant was then asked whether, having seen the CCTV footage, he had any further thoughts about the opening of the two fraudulent accounts. The Claimant's response was that nothing really struck him. He repeated that he would have identified them using PINSentry and, if he had had any suspicions, he would have taken further steps. He said that he would not take his foot off the gas.

38 Prior to the hearing, Ms Wheeler had been advised by ER Direct that she should consider her outcome in two parts – first, whether the allegations had been proved and what was the appropriate sanction and, secondly, whether she felt that there had been a Conduct Rules breach.

39 After the hearing Ms Wheeler briefed ER Direct on what the Claimant had said and what her thoughts were. In respect of lending £15,000 to his friend, Ms Wheeler's view was that the Claimant had failed to act with honesty and integrity by lending sums to a customer, who was also a friend, in order to provide an inaccurate picture to an authority in order to obtain a student visa. He had issued the bank statement as a Barclays employee knowing the information was incorrect. In relation to the allegations relating to fraudsters opening accounts the Claimant had followed the correct process for opening accounts. He had been shown the CCTV footage. He had failed to notice that the customer details on the system and the individuals in from of him were very different. If he had been completing his role to the standard expected he should have made further inquiries in light of the obvious difference between the customer details and the appearance of the individuals opening the accounts. She had considered a lesser sanction but had concluded that there was no alternative to summary dismissal. She also felt that there was a breach of Conduct Rule 1 in relation to the first allegation as the Claimant had knowingly falsified documents by printing statements with the £15,000 he loaned to his friend showing that she had funds when she did not have them.

40 On 27 June ER Direct made a referral to the Conduct Rules panel. It stated the manager's view that there was a potential breach of Conduct Rule 1. The Panel met on 4 July 2018 and asked for further information in respect of the allegation of loaning £15,000 to his friend. Ms Wheeler provided the answers to ER Direct on 11 July 2018. It provided the information to the Conduct Rules Panel. The Panel had access to ER Direct's case papers which included the investigation report.

41 The Panel met on 23 July and its guidance was that the allegation relating to the £15,000 loan met the threshold for the breach of Rule 1 ("you must act with integrity") and the other two allegations met the threshold for the breach of Rule 2 ("you must act with due skill, case and diligence"). Its reasons for the former were as follows. The Claimant had transacted on the friend's account by opening an everyday saver account, accessing the account using different instructions (including customer not present and management instruction) viewing and printing bank statements. He had conducted these activities in the performance of his role and where there was no authority to transact on the friend's account. As he had admitted that he knew that his friend did not have the funds to support her when the application was made, he knew that he was helping his friend to make a false application. In the panel's opinion that indicated that he had a defective moral compass. The fact that he had received an extra £1,000 when the loan was repaid a month later indicated a punitive level of interest and accordingly disadvantaged his friend in her capacity as a customer of

Barclays. There was a higher standard of probity expected of Barclays officials when transacting through bank systems and the potentially private arrangement with a friend had extended into the performance of his role at Barclays. Its reasons for the latter were as follows. Given the Claimant's level of experience (2.5 years in the role of Moment Banker), the failure to spot obvious fraudsters was something that no reasonable person with that level of experience would have done, notwithstanding the fact that the normal identification process (the PIN card number) had been completed. The failure had caused harm initially to the legitimate customer.

42 ER Direct advised Ms Wheeler to draft her outcome letter setting out in detail the case in respect of each allegation, the background facts, the Claimant's explanations and her decision, and to do the same in respect of the Conduct Rules. Ms Wheeler sent a draft of the letter to ER Direct and they suggested certain amendments, including where in the letter she should set out the reasons for the conduct being in breach of the Conduct Rules.

43 On 30 August 2018 Ms Wheeler sent the outcome letter to the Claimant. Her decision was to terminate his contract without notice for gross misconduct with effect from that date. She said that she was satisfied that the Claimant had knowingly assisted his friend to make a fraudulent student visa application and that his conduct met the threshold for breach of Conduct Rule 1. She set out the reasons for that conclusion. They were the reasons that the panel had given when advising her that there was breach of Conduct Rule 1. She accepted the panel's advice and reproduced it verbatim. She also found that he had failed to spot obvious fraudsters opening joint account on two separate occasions in August 2017. She said that she was satisfied that that met the threshold for a breach of Conduct rule 2 and again she set out the reasons that had been given by the Panel in its guidance. She added that it had caused financial loss to the business as well as reputational damage. She said that his misconduct was serious as it had had a significant and sustained impact on the bank's performance and its ability to provide outstanding service to its clients and customers. She regarded particularly seriously the fact that he had knowingly assisted his friend to make a fraudulent visa application and had used the bank's systems to produce documentary evidence to support the application. She considered that that amounted to gross misconduct. She had concluded that summary dismissal was the only appropriate sanction. She sent him a copy of the disciplinary notes.

44 The Claimant appealed against his dismissal on 13 September 2018. **H**e appealed, among other things, against the decision that he had knowingly assisted a friend to make a fraudulent visa application. He said that it was incorrect to say that his friend did not meet the financial criteria for her visa to be extended. He also said that if loaning money to his friend was a crime, he would have expected the Respondent to have reported the matter to the police or the Home Office. The Respondent's Disciplinary Procedure provides for an appeal meeting to take place. It states that the appeal meeting is intended to provide an opportunity for the employee to present any new evidence or explain why they believe that the original disciplinary decision was incorrect. It is not a re-hearing of the original issue.

45 The appeal was heard on 17 October 2018 by Elaine Cardinali, Branch Manager. The Claimant was accompanied by Mr Brown. The Claimant said at the appeal hearing that he had not done any training on the Conduct Rules. Ms Cardinali accepted that because she believed that the training had been added on to the

learning system in April 2018 after the Claimant's suspension on 15 September 2017.

46 Ms Cardinali set out in writing her views after hearing the appeal. She expressed concerns about the Respondent's procedures not being followed – the Claimant had been suspended before any investigatory interviews with him took place, his line manager's contact details had not been recorded in the suspension letter, he had been contacted once in the initial two months of his suspension. he had not been shown the CCTV footage until the disciplinary hearing and the Claimant had received sick pay during his suspension. Her view was that the decision to dismiss and the conclusion that there had been breaches of the Conduct Rules should be overturned. Her reasons for that were that she accepted that the Claimant had not completed the Conduct Rules training and, although she accepted that the Claimant's activities on a friend's account were not permitted in his role, she felt there was no proof that the Claimant had assisted a friend to make a fraudulent visa application for a student visa. The Anti-Bribery and Corruption Manager had confirmed that what the Claimant had done did not breach the Anti-bribery and Corruption rules and no report had been made to any immigration authority. There had been no complaint from the customer/friend that she had been disadvantaged and the said interest had been a decision of the family. In respect of the opening of the fraudulent accounts, she accepted that as an experienced moment banker, the Claimant had not demonstrated diligence around checking the customer in front of him against the details on the system.

47 Ms Cardinali discussed her views with ER Direct and was asked to upload her notes of the hearing and her rationale for wanting to overturn Ms Wheeler's decision. ER Direct subsequently informed her that the Claimant had been paid full pay throughout his suspension. She was also advised that the allegations of accessing and transacting on his friend's account without business need to do so or the relevant authority, which he had admitted, were allegations of gross misconduct. It was also confirmed that the Claimant had not received any Conduct Rules training in 2017. It is unfortunate that everyone focused on 2017 because the Claimant had received the training at the end of 2016. Ms Cardinali was later sent the password to access the Respondent's learning system. It would appear that she did not access the learning system. Her view was that the information provided did not change her decision because the Claimant had not received training in the Conduct Rules.

48 On 20 December Megan Whalley from ER Direct discussed the matter with Ms Cardinali. Ms Cardinali explained her rationale as being that an employee should not be found to be in breach of the Conduct Rules in circumstances where he had not received training on the Rules and did not know what was expected of him under the Rules. It was similar to Know Your Customer ("KYC") training and they would not issue a sanction for a KYC breach if the training had not taken place. Ms Whalley's advice was that Conduct Rules training was different to KYC which was procedural training and was in place to eliminate skills gaps. Conduct Rules related to behaviour issues and there was an expectation that the bank's employees would act with integrity at all times and would not put customers at risk. They did not need to train employees on how to act with integrity and not to undermine the Bank's processes. A Conduct Rules breach could be issued to employees who had not completed the Conduct Rules training.

49 On 3 January 2019 Mike Conway told Ms Cardinali that he would like to speak to her before she sent her decision. They spoke on the telephone on 9 January 2019. Mr Conway told Ms Cardinali that the Conduct Rules could be applied even if the employee had not been trained in them. He said that it was rare but agreed to send her an email confirming that it could be done. He also told her a report would be made to the Home Office about the visa application and they would investigate it. He said that he would confirm those maters in an email. He did not do so in the next few weeks.

50 On 24 January Ms Cardinali informed ER Direct that she wanted to withdraw from the case. She said that she had taken Mr Conway's feedback and did not want to compromise her integrity. On 27 February she informed the Claimant by telephone that his appeal was still being reviewed.

51 On 8 March 2019 Megan Whalley advised Ms Cardinali that two outcome letters would be sent – one from her in relation to the sanction (the dismissal) and a separate one in respect of the Conduct Rules breaches. She was asked to upload her draft outcome letter. She uploaded a letter on 11 March and was advised by ER Direct not to issue it until it had been reviewed. She had been advised that it would be reviewed by an impartial manager. Her decision in her letter was to overturn the dismissal.

52 On 12 March Julie Avis, Ms Cardinali's line manager, telephoned her about her letter. She told her that Michael Conway wanted to involve Christopher Dean, who was her line manager. She advised her that the matter was serious and that the Bank had lost money.

53 On the same day Mr Conway advised her that he would visit her at her branch the following day. They met on 13 March. Both Ms Cardinali and Mr Conway referred to this meeting in their witness statements. They had a detailed discussion about the case. Mr Conway went through the Barclays Ways with her and showed how they were mirrored in the Conduct Rules. He pointed out the Claimant had been trained in the Barclays Ways and Values. In respect of the loan to his friend for a visa application, Mr Conway explained that the Panel's view was that it was not a personal issue and that Barclays had become involved by virtue of the fact that Barclays accounts had been used. The Claimant had also used his privileged position as an employee of the Bank to facilitate the transaction. He had opened the account and accessed it inappropriately, without proper authorisation and contrary to the well-known rule about not transacting on accounts belonging to family and friends. He said that the Claimant's actions could indicate a form of deception involving the Home Office and concerns regarding reputational risk for Barclays. He repeated that he would report the matter to the Home Office.

54 Following the meeting Ms Cardinali rewrote her letter and sent a draft to Mr Conway on 14 March. She changed her decision from overturning the dismissal to upholding the original decision to dismiss him and that there had been a breach of Conduct Rules 1 and 2. She accepted that he had not completed the online Conduct Rules training but said that rules 1 and 2 mirrored what was in the Barclays Ways and Values with which he was familiar. She said that in opening the account for his friend and transferring money to her he had not adhered to the Respondent's policy and procedures about not using bank systems to transact on family and friends accounts. He had confirmed that the funds had been used to support an application

for a student visa. She said that the Bank was reporting the application of the student visa to the relevant authority as they believed that the financial criteria for the application had not been met. In respect the opening of the fraudulent accounts she accepted that he had competed the identification process using PINSentry, but there had not been any care or diligence around confirming details against information held on their data base. He was expected to act with integrity and to apply high standards of care and diligence. The stress and inconvenience to their clients and the impact on their brand had ben considered when reviewing his dismissal together with the losses that the bank had suffered.

55 Mr Conway had a brief discussion with her and made some amendments to the letter. Most of them did not alter the meaning of what Ms Cardinali had said. In respect of the loan to his friend, he left the first sentence as it was and then added the following instead of what Ms Cardinali had written,

> *"You confirmed that the funds were used to support the application for a student visa – that the applicant had met the criteria of having sufficient to support. I believe that you lent the money to an acquaintance in the knowledge that a deception of the Home Office would mean that a visa would be granted on false information. Following the conclusion of your appeal, the Bank will be in a position to notify the Home Office, as we believe that the financial criteria in the application for a visa was not properly met."*

56 Ms Cardinali accepted the amendments that he had made and incorporated them into her letter. The letter that she sent to the Claimant on 15 March 2019 also included in that paragraph the following two sentences before the last sentence,

> **"***You willingly did this to obtain a personal gain of £1,000. As a result, I find that you conduct in this matter falls well below the standard that we would expect from a BA3 colleague in the Bank."*

It was not entirely clear how those sentences came to be added.

Conclusions

57 The Claimant's case was that there a number of flaws in the procedure which made the dismissal unfair. He alleged that it had been flawed in the following respects:

(a) The Respondent had not followed its disciplinary procedure in relation to the suspension;

(b) There had been considerable delays in the process, in particular between Ms Wheeler being appointed hearing manager and her first making contact with the Claimant and between the appeal hearing and the Claimant receiving the outcome of that;

(c) The Claimant had not been permitted to view the CCTV footage at the investigation meeting and thereafter in advance of the disciplinary hearing;

(d) The Conduct Rules Panel decided the grounds on which the Claimant was to be dismissed; and

(e) The appeal outcome was the decision of Mr Conway and not Ms Cardinali or, in the alternative, having made the original decision to dismiss, Mr Conway intervened to prevent Ms Cardinali overturning that decision.

Suspension

58 It was submitted on behalf of the Claimant that he was not given the reason for his suspension which was that his continued presence posed a risk to the Respondent. I do not accept that. The Claimant was suspended because in a very short space of time he had been involved in the opening of two fraudulent accounts which had caused a substantial loss to the Bank. The Bank needed to investigate whether he was in any way to blame for that but it could not allow him to remain in post while it did that because there was a risk of it recurring. The reason given by the Respondent – that a decision had been made to suspend him "*pending a current investigation concerning account opening and all matters arising"* – is an accurate, albeit laconic, summary of the reason for the suspension. He was not given a date of when it was anticipated that the suspension would be lifted, but it is implicit in the phrase "*pending a current investigation"* that it would last at least until the conclusion of the investigation, and that its continuation beyond that date would depend on the outcome of the investigation. In this case, as Ms Meyzin concluded that there was a case to answer and it should proceed to a disciplinary meeting, it is not surprising that the suspension continued. Ms Meyzin had some contact with the Claimant from 20 October 2017 onwards. He had her and the HR telephone number if he wished to raise any queries. I did not consider that there were any flaws around the suspension that led to the dismissal being procedurally unfair.

Delay

59 The Claimant was suspended on 15 September 2017 and was sent the outcome letter of the disciplinary hearing on 30 August 2018. That is a period of almost one year and it is not acceptable. Not all of the delay was attributable to the Respondent. Part of the delay stemmed from Mr Brown asking for Mr Pereira to be replaced as the hearing manager in January 2018. The Claimant was unwell in March and again in May 2018. Ms Meyzin's investigation took over two months but it was a very detailed and thorough investigation and involved her conducting detailed audits of the accounts in question and the Claimant's activities on the accounts on the days in question. Delays were also caused by the fact that referrals had to be made to the Conduct Rules panel. While I understand the need for the Respondent to ensure that there is consistency in how it applies the Conduct Rules, the process that it uses at present is problematic in some ways. I deal with this in more detail below but make the point here that it leads to the disciplinary process taking longer.

60 The Claimant complains in particular about the delay between Ms Wheeler being appointed hearing manager on 18 January 2018 and her first contact with the Claimant's representative on 13 March 2018. During that period Ms Wheeler had two periods of annual leave (one week each) and it took her some time to go through the documents in the case. In light of the fact that Ms Wheeler was dealing with the disciplinary hearing in addition to her normal full-time job and the length of the investigation report, that is not entirely surprising. I find that there is a satisfactory explanation for part of the delay but not all for it. The Claimant also complains about

the delay after the appeal hearing. I deal with that later when I deal with his concerns about the outcome of the appeal.

61 I accept that there was a delay and that some of it was avoidable and ought not to have occurred. That having been said, I do not consider that the delay led to any unfairness in the process and in the decision to dismiss.

<u>CCTV footage</u>

62 It is not in dispute that the Claimant was not shown the CCTV footage at the investigation meeting. I have found that he was not offered the opportunity to view it and he did not ask to see it. The still images that he was shown were clear and I do not consider that seeing the CCTV footage would have provided him with any assistance in answering the questions about what, if anything, he had done to probe the differences between the individuals in from of him and the information on the Respondent's systems. The investigation report made it clear that the CCTV footage was available if anyone wanted to see it. The Claimant and his representative did not ask the Respondent for it before the hearing with Mr Pereira. They were offered the opportunity to view it at the Soho Square branch in March 2018. They declined that offer. If they had believed that it was a crucial piece of evidence they would have asked to see it earlier. When the Claimant did see it, it did not assist him in any way. I do not accept that that was because he saw it a year after the events in question. It did not assist him because it did and could not provide an answer to the crucial question of what he had done to verify the identity of the individuals in question. In light of the above, I do not consider that the failure to give him the opportunity to view it at the investigation meeting caused any unfairness in the process or made the decision to dismiss unfair.

<u>The decision to dismiss and the role of the Conduct Rules Panel</u>

63 It is clear from Ms Wheeler's note to ER Direct that at the conclusion of the disciplinary hearing she had found the three allegations against the Claimant to have been proved. In respect of the loan to his friend, she had concluded that he had failed to act with honesty and integrity because he had knowingly provided inaccurate information to an authority in order to enable his friend to obtain a visa. In respect of the opening of the fraudulent accounts she concluded that the differences between the individuals in from of him and their details on the Respondent's system were obvious and he had failed to perform his role to the standard expected. She had concluded that the appropriate sanction was summary dismissal. She had concluded that there was a breach of Conduct Rule 1 in relation to the loan to his friend.

64 The matter was referred to the Conduct Rules Panel for its advice/guidance on her decision in respect of Conduct Rule breaches. The Conduct Rules Panel did not provide any advice or guidance on the sanction of summary dismissal. It sought further information in respect of the loan to his friend. It then provided its guidance. It agreed with her that the loan to his friend in those circumstances was a breach of Conduct Rule 1. It gave its reasons for considering it to be a breach of Rule 1. It also advised her that the opening of the fraudulent accounts amounted to a breach of Conduct Rule 2 and gave its reasons for that.

65 In her outcome letter Ms Wheeler set out her reasons as to why she considered the Claimant's conduct to amount to gross misconduct and why she considered

summary dismissal to be the appropriate sanction. That was her decision and her reasons for coming to that decision. She accepted the guidance given by the Panel that there was also a breach of Conduct Rule 2 and its reasons for both breaches. She adopted the Panel's guidance and incorporated it the section dealing with Conduct Rule breaches. The decision that the Claimant had been guilty of misconduct and that summary dismissal was her decision for the reasons that she gave, and not the decision of the Conduct Rules Panel. The Conduct rules Panel advised on the Conduct Rule breaches and she accepted and adopted that advice. I do not accept that the involvement of the Conduct Rules Panel was in any way inappropriate or that it in any way rendered the process or the dismissal unfair.

The appeal and the Conduct Rules Panel

66 I found this aspect of the case troubling for two main reasons. First, it appeared to me that although Ms Cardinali's role as the person hearing the appeal was to review the original decision and not to re-hear the case, she effectively considered afresh the allegation in relation to the Claimant's loan to his friend and reached her own decision on the matter. In doing so, she did not act in accordance with the Respondent's procedure. Ms Wheeler had concluded that the Claimant had knowingly assisted his friend to make a fraudulent visa application. There was evidence before her on which she could have reached that conclusion. Ms Cardinali decided that the Claimant had not assisted his friend make a fraudulent visa application. Her reasons for saying that were that it had been confirmed that the Claimant's conduct had not breached the Anti-Bribery and Corruption Rules and no report had been made by the Respondent to the immigration authorities. It is difficult to see how those two facts are determinative of the issue that Ms Wheeler had to decide, nor was there any evidence that she had not taken those matters into account. Ms Cadinali also accepted the Claimant's account that the decision to pay him £1,000 had been that of his friend's family.

67 The second troubling aspect was Ms Cardinali's view that the Claimant could not have been in breach of the Conduct Rules because she believed (wrongly because she had not checked his full training record) that he had not been trained in the Rules. The relevant Conduct Rules provided that employees must act with integrity and with due skill, care and diligence. The Claimant's contract provided that he agreed that he would diligently and faithfully perform his duties and exercise his powers and function in relation the Bank's business to the best of his ability and "*with integrity, due skill, care and diligence.*" The Claimant had been trained in the Barclays Way and that provided that employees were expected to act with integrity and due skill, care and diligence. As it had been made clear to the Claimant that he was expected to act with integrity and due skill, care and diligence, it is difficult to see why, if he was found not to have done so, he should not have been held to be in breach of the Conduct Rules.

68 In circumstances where the Conduct Rules Panel had advised the disciplining manager that the Claimant's conduct amounted to a breach of the Conduct Rules, if the appeal manager was presented with new evidence that made her question that advice, one would expect the matter to be referred again to the Panel. In the present case it was not referred to the panel but both ER Direct and Mr Conway, as the Head of the Panel, provided Ms Cardinali advice and guidance as to whether, on the facts of this case, someone who had not been trained in the Rules could be found to have acted in breach of them. There is nothing wrong or unfair about that advice being

given. Initially, Ms Cardinali initially refused to accept that advice and maintained her view, but after a long face to face meeting with Mr Conway where they discussed the matter in detail she accepted his advice that the Claimant's conduct amounted to breaches of Conduct Rules 1 and 2.

69 Ms Cardinali also decided to uphold the decision to dismiss. This flowed to a large extent on Mr Conway's guidance as to why the loan to his friend amounted to a breach of Conduct Rule 1. The decision to dismiss the appeal was Ms Cardinali's decision, albeit it was based on the advice from Mr Conway on the Conduct Rules. There was no evidence that Mr Conway had applied any pressure on her to change her mind. The first draft of the letter dismissing the appeal was drafted by her. I accept that in her first draft she made no reference to the Claimant having any knowledge of any deception of the Home Office and the visa being granted based on false information. Those words were added by Mr Conway. Ms Cardinali accepted his amendments and incorporated them into her letter.

70 I accept that both ER Direct and Mr Conway, as the Head of the Conduct Rules Panel, advised and provided guidance to Ms Cardinali because they believed that she was not approaching the application of the Conduct Rules in the correct way. The whole purpose of the Conduct Rules panel is to provide guidance and to ensure consistency. That is what it did in this case and there was nothing wrong or improper in it doing so.

71 The difficulties that arose at the appeal stage illustrate why the approach adopted by the Respondent as to how and when decisions relating to breaches of the Conduct Rules are made is problematic. Initially two separate processes had been envisaged – one dealing with the alleged misconduct and a separate one dealing the potential breach of the Conduct Rules. It was then thought that it would be more efficient for the two matters to be dealt with at the same time by the disciplining manager but with guidance from the Conduct Rules Panel. That approach can lead to problems, as it did in this case, where in the same case one manager accepted the guidance of the Panel and another one did not. That led to considerable delay in the appeal decision being sent out. In my opinion, a more effective way of dealing with this would be for the disciplining manager to consider first the allegations of misconduct and, if found to be proved, the appropriate sanction. One she has done so, the outcome letter setting out her conclusions on the allegations and the reason for the sanction, should be referred to the Panel. It would then be for the Panel to decide whether the misconduct that she had found provided amounted to a breach of the Conduct Rules. Both the employee and the manager could be given the opportunity to make representations to the Panel. The same process could then be repeated at the appeal stage. That process might be quicker, more consistent and less problematic than the process adopted by the Respondent at present.

<u>Dismissal</u>

72 It was submitted on behalf of the Claimant that the Respondent's conclusion that the Claimant had committed acts of gross misconduct was outside the range of reasonable responses. The issue that I have to determine under section 98(4) of the Employment Rights Act 1996 is whether dismissal was within the range of reasonable responses open to a reasonable employer. I do not accept that the sanction of dismissal for the three allegations of misconduct that were found to be proven was outside the range of reasonable responses. I would go even further and

say that I am not satisfied that no reasonable employer would have categorised it as gross misconduct.

Was the dismissal fair under section 98(4) ERA 1996

73 I have found that there were some defects in the procedure - the suspension letter did not specify when it was anticipated that the suspension would end, there were delays in the process, the Claimant was not offered the opportunity view the CCTV footage at the investigatory interview – but those do not in any way render the dismissal unfair. To put it another way, I am satisfied that in all the circumstances of the case the Respondent acted reasonably in concluding that the Claimant had committed the acts of misconduct which were alleged against him and in treating that as a sufficient reason for dismissing him.

Employment Judge - Grewal

Date 17 Dec 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

17/12/2019

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FOR THE TRIBUNAL OFFICE