



EMPLOYMENT TRIBUNALS

Claimant: Emma Coetzee

Respondent: AO World PLC

Heard at: Manchester

**On: 14-17 October 2019 and
6 February 2020**

Before: Employment Judge Leach

REPRESENTATION:

Claimant: Mr Coetzee, claimant's husband

Respondent: Miss R. Eeley, counsel.

JUDGMENT

This **JUDGMENT** having been sent to the parties on 29 April 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is a claim for unfair dismissal brought by the claimant against the respondent, her former employer, following the claimant's dismissal for gross misconduct. The dismissal letter is dated 11 July 2017. The claimant appealed against her dismissal, that appeal was unsuccessful and the appeal outcome letter is dated 22 June 2018.
2. Mr Coetzee, the claimant's husband represented the claimant at the hearing and Miss Eeley of counsel, represented the respondent.

The Issues

3. The issues in the claim were discussed and identified at the first two Case Management Hearings.
 - 3.1 Issue One. What was the reason for dismissal? The respondent's position is that it dismissed the claim for reasons of misconduct which is a potentially fair reason under Section 98(1) of the Employment Rights Act 1996 ERA.
 - 3.2 Issue 2. Did the respondent honestly believe the claimant had carried out the misconduct alleged?
 - 3.3 Issue 3. Whether that honest belief was reasonable and based on a sufficient investigation.
 - 3.4 Issue 4. Whether the respondent's reason for dismissal was a sufficient one. Here, it is necessary to consider whether the decision to dismiss was within the reasonable range of responses of a reasonable employer.
 - 3.5 Issue 5. If the claimant was unfairly dismissed, did her conduct contribute to her dismissal?;
 - 3.6 Issue 6; whether any deduction to any award should be made in accordance with the principle in **Polkey v. A E Dayton Services Limited [1988] AC 344.**
4. Mr Coetzee identified a number of specific issues that he says made the respondent's decision to dismiss as unfair and I noted these at the end of the initial four days of this hearing. These are as follows.
 - 4.1 That a Forensic Expert should have been engaged by the respondent as part of its investigation,
 - 4.2 That Cybersource should have been in attendance at the disciplinary and/or appeal hearings,
 - 4.3 That certain additional information or questions should have been put to Cybersource.
 - 4.4 That Mr Dempsey, the respondent's Solicitor was involved in the process and he should not have been.
 - 4.5 The claimant should have been provided with a final version of the meeting minutes.
 - 4.6 That proper account should have been taken of the comparison between online and hard copy bank statements.
 - 4.7 That Mr Eastwood and then Mr Emmett did not consider with any sufficient care and attention the alternative explanations put forward; and

- 4.8 That the claimant stumbled on an AO intra group financial transaction and that may have caused the respondent to act against her.

The Hearing

5. The first day of the hearing was taken up with various case management issues. Most of the issues concerned documents.
6. Each party had attended with its own hearing bundle. The respondent's bundle comprised 1352 pages, over 3 lever arch files. The claimant's bundle was available but not handed up. It comprised 9 full lever arch files.
7. It was apparent that there had been a lack of cooperation between the parties. Mr Coetzee also informed me that the claimant had a number of submissions to make at the outset, including an application for a postponement of the hearing and an application for the response to be struck out.
8. I referred the parties to the Overriding Objective at rule 2 of the Employment Tribunal Rules of procedure 2013. Both representatives confirmed they were aware of its terms
9. Both parties also had a chronology document. I considered the 2 versions of the chronologies provided. The following became clear:-
 - 9.1 The respondent had provided the claimant with a draft chronology for comments.
 - 9.2 In response, the claimant had provided an alternative and much more detailed chronology together with an introductory note in which the claimant noted the requirements of a chronology in litigation.
 - 9.3 The chronology had been provided by the respondent to the claimant in good time and, it appeared, well in advance of the claimant putting together and submitting her own chronology.
 - 9.4 It had been open to the claimant to simply have provided their comments/required additions to the chronology already drafted and provided.
 - 9.5 Mr Coetzee accepted, in response to questions from me, that the chronology provided by the respondent met the requirements set out in his introduction note on chronologies.
10. Discussions then turned to the extent of disclosure in the case and what documents that were not in the bundle prepared by the respondent were relevant and should be seen by me.

11. Ms Eeley noted that whilst she had not had time to go through the 9 volume bundle provided by the claimant in detail, she had undertaken some review. In her view, there was considerable duplication (meaning that the 9 volume bundle contained documents which had already been included in the bundle provided by the respondent), the bundle included the outcomes of a number of data protection subject access requests including against third parties, there was a copy of the claimant's entire HR file and disclosure of all correspondence with ACAS.
12. Mr Coetzee referred again to a submissions document he had prepared and was keen for me to review. At this stage I agreed that I would consider the document. Mr Coetzee handed a 27 page document to the Tribunal and to the Respondent. The document had the following heading:-

“Claimant’s application for postponement of the hearing to a suitable date and for related orders, alternatively for stay of proceedings to afford claimant opportunity to bring an urgent application for an injunction of review of proceedings or other appropriate legal relief.”

13. We broke so that I could consider the document.
14. On return I reviewed the document with the parties, particularly those parts of the document relating to disclosure/documentation and I made a number of decisions and orders. These are referred to in paragraphs below.
15. The claimant's application to strike out the response was refused. Under Rule 37 of the Employment Tribunal Rules of Procedure 2013 (“Rules”), a Tribunal may strike out either a claim or a response at any stage of the proceedings on the grounds set out in rule 37. I decided that none of these grounds applied to the circumstances as at day one of the hearing.
16. The claimant's application to stay the proceedings to enable the claimant to make an urgent application to a different court was refused. It was unclear what application the claimant intended to make. I informed the claimant that I could not prevent the claimant trying to make an application to a different court for some sort of relief should she wish. However, these Employment Tribunal proceedings would not be stayed to allow an urgent application to be made. In reaching this decision I had regard to:-
 - 16.1 The lack of credible detail about an intended application.
 - 16.2 That the refusal did not of itself prevent an urgent application being made (and the claimant could have applied prior to the hearing commencing)
 - 16.3 The overriding objective and particularly the requirements for proportionality, saving expense and avoiding delay. I noted that this claim was issued in December 2017, the dates for this final

hearing were listed in December 2018; there had been 3 case management hearings; witness statements had been exchanged, documents assembled in to bundles, the parties were in attendance.

17. Having decided not to either allow a postponement or strike out the response, we moved on to consider various evidence related issues raised by the claimant in her submission document and particularly from page 9 onwards. The claimant had helpfully identified a number of categories of concerns which were considered. These categories are noted below.
18. “36.5.2 *Manipulated emails – with solicitors names.*” It was apparent from discussion and a review of provided examples, that the issue of manipulation was in fact a reference to emails appearing in different formats, particularly when printed more recently by the respondent’s solicitor. I noted that it appeared to be alleged, at 36.5.4.2 of the submissions document that the content of emails had been altered. Following a review of examples, it was accepted by Mr Coetzee that this was not the case. There were no examples of different wording in different versions of the same email.
19. When asked for examples of other documents where some wording had been changed, Mr Coetzee referred to minutes of meetings. It was apparent that this was in fact that the category called “*manipulation of minutes*” referred to at 36.6 of the submissions document and dealt with below.
20. Prior to consideration of 36.6, a matter which had been raised at 36.5.7 “*claimant’s surname discrepancy*” was considered. It was apparent that this was a reference to incorrect spelling of “Coetzee,” the surname of the claimant and her husband. Mr Coetzee submitted that this indicated that Mr Dempsey, the solicitor instructed by the respondent, was involved in the issues at an early stage and certainly prior to the claimant’s dismissal.
21. I proposed, and Mr Coetzee agreed, that this was something that Mr Coetzee could put to the relevant witnesses – ie whether Mr Dempsey was involved in the respondent’s internal processes and if so, why, when and on what basis.
22. “*Manipulation of minutes.*” An example was provided by the claimant and then discussed. It was apparent that a version of the minutes of a meeting which took place on 28 June 2017, differed from another version which was in the bundle. It was accepted by all that sometimes minutes are changed as they are reviewed by attendees and finalised. Mr Coetzee noted however that the claimant had only ever received one version at the time that the internal disciplinary processes were taking place. Ms Eeley stated that his was the first that she knew of this particular issue and her client was concerned to understand the source from which the claimant obtained the alternative version of the minutes (ie the version not provided on disclosure). I noted that there were differences in the 2 versions handed up. One version of the minutes of a meeting on 28 June 2017 was found at 838 to 841 of the

respondent's bundle and a version with some highlighted differences was provided by the claimant.

23. I noted that where there were differences, then these may be no more than "tidying up" issues or they may be more significant. The claimant was entitled to identify these differences and raise them with witnesses. The respondent was entitled to understand where there were differences and for counsel and solicitor to consider and take instructions.
24. I made case management orders in relation to these minutes.
25. The Claimant was entitled to provide copies of minutes which differ from versions of minutes already provided and appearing in the bundle. Mr Coetzee noted that he expected to be able to provide these minutes later that day. I provided the claimant until 8pm on that day to send this information electronically to the respondent's solicitors. I required the claimant to provide the following information in relation to each set of minutes:-
 - 25.1 The alternative version of the minutes which the claimant had, identifying the differences between that version and the version provided by the respondent and contained in the respondent's bundle.
 - 25.2 Information stating what the source of this alternative version is (i.e. how and when the claimant came in to possession of the version)
26. The discussion then moved to paragraph 36.7 of the submissions and what the claimant called the "*Undisclosed page*". This was a reference to page 1212 of the Respondent's Bundle, an email dated 28 March 2018 (so one which post-dated the dismissal but pre-dated the appeal outcome). It was clear from a review of the claimant's submissions document and further points made by Mr Coetzee, that the claimant was cynical about the genuine nature of this email, and the document which was supposedly attached to this email, at pages 1213 and 1214 of the Respondent's bundle.
27. Following discussion, Mr Coetzee accepted that this could and should be dealt with in evidence and that he would be able to put questions to the respondent's witnesses in relation to this document including whether it is genuine. There was no need therefore for any further directions or orders. Pages 15,16 and 17 of the claimant's submission document related to pages 1213 and 1214 of the respondent's bundle.
28. This took the discussion to 36.17 of the claimant's submissions document and the involvement of Mr Dempsey. I noted that I had reviewed the points raised in the submissions and had the following observations:-

- 28.1 That the claimant appears to allege that Mr Dempsey behaved unlawfully and it appears that that she was even alleging criminal conduct on the part of Mr Dempsey. Mr Coetzee confirmed that this was the case. I noted that, at this hearing I would hear and decide on the unfair dismissal claim. I would not consider the conduct of Mr Dempsey except in so far as it was relevant to the issues in the unfair dismissal claim.
- 28.2 The submissions document contained detail about Mr Dempsey's involvement in unrelated cases when acting (or allegedly acting) for unrelated clients. I made clear that I would not be interested in whether Mr Dempsey acted for any particular client or, where he did, any detail of his instructions.
- 28.3 I informed the parties that I did not propose to take any account of the section of the submissions document under the heading "*Concluding remarks about the solicitor Mr Tony Dempsey.*"
29. At page 22 of the claimant's submission document, the claimant commented on the cast list prepared and provided by the respondent. I acknowledged the 8 additional names that were listed by the claimant and that I would note these as additions to the cast list provided by the respondent.
30. Submissions in relation to the chronology were at page 24. I had already made observations in relation to the chronology.
31. In relation to the claimant's submissions about witness statements – at pages 24 and 25 of her submissions document, I noted that these would have to be considered in the course of the hearing. An issue was raised by Mr Coetzee that he did not have a signed version of the respondent's statements. A signed copy of each was volunteered by Ms Eeley. Mr Coetzee also raised doubts that I would have the same version of the witness statements that the claimant had been provided with. I asked for assurance from Ms Eeley that the versions were the same and I accepted the assurance provided.
32. The final 2 sections of the submissions document (paragraph 43 and 44) provided further comment on the strike out application and/or postponement application (which I had already dealt with).
33. Mr Coetzee, on the claimant's behalf, stated that the claimant wished to rely on a number of additional documents. It was unclear from discussion on the first morning how many additional documents this would involve but Mr Coetzee accepted that he would be able to significantly reduce the 9 volume bundle. I directed the claimant and Mr Coetzee to consider very carefully each proposed additional document, having regard to the matters discussed during the course of the morning. Where the claimant considered that a document was necessary to her case and was not already in the Bundle then the

claimant may ask for it to be considered. The claimant was provided until 11am on day 2 of the hearing (15 October 2019), to consider what other documents she required to be considered and to provide the respondent and me with copies of the documents.

34. I informed Mr Coetzee that if there was a considerable amount of documentation being disclosed at this stage then this may well be queried by me and explanations sought in relation to relevance. If there was a need to postpone the hearing, due to last minute disclosure by the claimant then there may also be an issue as to costs.
35. I made clear to both parties that the aim of dealing with these various issues at the outset, was to ensure that a fair hearing could commence as soon as possible within the 4 days allocated.
36. I stated the intention to proceed to hear from witnesses on day 2 after 11am. I also made clear to both parties that I expected cooperation between the parties and with the Tribunal, throughout the hearing, as required by the overriding objective, to help ensure that this matter was dealt with fairly and justly.

Day 2.

37. We began at 11am to review progress on the outstanding disclosure issues. There were 2 issues to address:-
 - 37.1 The production of a file of minutes of meetings, comparing 2 or more versions of minutes, where the claimant had identified differences in wording. The difference in wording was to be identified as well as information about where the claimant obtained the alternative versions of the minutes.
 - 37.2 The production of a file of documents, which the claimant had been encouraged to reduce to those documents necessary for her case and also avoiding duplicates of documents already in the respondent's bundle.
38. In relation to the first issue, a file had been created by the claimant and had been provided to the respondent. Ms Eeley confirmed that the respondent was willing to proceed with the hearing and that this disclosure need not cause any further delay. Mr Coetzee informed the tribunal that the bundle was about 70 pages and had been sent to the Tribunal's email address.

39. In relation to the second issue, the claimant had attended with a bundle that had been significantly reduced in size. It now comprised some 200 pages. Mr Coetzee confirmed that he had worked very hard that evening to go through the documents and he was satisfied that these were the documents that they wished to make reference to and had not been included in the bundle prepared by R. I thanked Mr Coetzee and the claimant for their cooperation and for dealing with this matter overnight.

40. In relation to this further disclosure it was proposed to deal with this in accordance with paragraph 6 of Judge Ainscough's order of 26 July 2019 (at page 46 of the R bundle) which provided as follows:-

“If the parties cannot agree on whether a document should be included within the final bundle they will produce 5 copies of their own bundles of documents not agreed, to bring with them to the Tribunal but they will not be considered by the Tribunal unless specifically directed to do so during the course of evidence.”

41. The parties agreed to proceed on this basis although Ms Eeley asked for a little longer to consider the documents contained in the new bundle.

42. It was agreed to resume at 2pm and begin to hear from the witnesses.

43. The afternoon session began with assembling a file of documents (which was to be referred to as the C Bundle) so that all parties, the Tribunal and the witness stand had the same documents and the same pagination.

44. The respondent's first witness, Mr Williams, gave evidence. Mr Williams had been responsible for investigation in to allegations of misconduct against the claimant.

45. Mr Coetzee's cross examination of Mr Williams was not complete that afternoon and arrangements were made to resume on the morning of day 3.

Day 3.

46. The hearing commenced at 09.50am to hear the remainder of Mr William's evidence.

47. We then heard the evidence of Mr Eastwood, the manager who dismissed the claimant.

48. Finally, on day 3, we heard the evidence of Mr Emmett, who dealt with the claimant's appeal against dismissal.

Day 4.

49. The claimant gave evidence which took up almost all of day 4.

50. On the morning of day 4, a further witness statement was provided by the respondents, being a statement of Mr Anthony Dempsey (dealing issues raised by Mr Coetzee on day one). As it was, the claimant did not seek to challenge the evidence in Mr Dempsey's statement and so no oral evidence was provided by him.
51. There was no time available for the parties to make submissions and so the case was listed for a further day to enable the parties to make closing submissions. If possible, the decision would also be provided on that further day as well as (if appropriate and time permitting) the issue of remedy.

Day 5.(6 February 2020)

52. We continued the hearing on this day in order to for me to hear the parties submissions and, time permitting, provide my decision. Both representatives provided me with full submissions documents which I considered before reaching my decision.

Findings of Fact

The respondent and its operations

53. In this section I set out my findings of the facts which are relevant to the issues. Reference to page numbers is to the 3 volume bundle of documents provided by the respondent on day one.
54. The respondent is an online retailer specialising in the sale of household electrical items. The respondent is a large company with about 3,000 employees. The respondent and/or its associated companies trade in the UK and other countries.
55. The claimant was employed by the respondent between March 2011 and 11 July 2017. For most of this time she was employed as a Fraud Manager based at the respondent's offices in Bolton, Lancashire. In that role the claimant was involved in reviewing and intervening in transactions where fraudulent activity had or might have taken place. The claimant had 2 fraud analyst employees reporting to her and she in turn reported to Malcolm Clarke who was at the time the respondent's director of UK finance.
56. As the respondent was an online retailer then transactions were carried out using debit or credit cards. Transactions could take place over the internet or over the telephone. The respondent was susceptible to fraud and attempts at fraud particularly having regard to the remote nature of these card transactions.
57. The respondent was assisted in the transaction review process with an automated tool called Decision Manager. This tool was able to identify by automated means, transactions which had been attempted with stolen cards, (the details of which were on databases available to Decision Manager). Decision Manager would stop some transactions straight away and either

cancel a transaction before any money was transferred or, where money had left the account of the card in question, would put a stop to any goods being sent out and then cancel the transaction and refund the money to the card in question. Where the cancellation of an order was automatically carried out by Decision Manager there was minimum human involvement in the transaction processes.

58. Some orders were flagged by Decision Manager as suspicious but not automatically cancelled. A suspicious transaction was referred to and reviewed by a member of the respondent's fraud team and any appropriate action taken. Where action was taken manually in this way, the employee looking at the issue would do so by using the respondent's customer order management system which was called CORE.
59. Decision Manager was a system which was supported by an external business called Cybersource. A number of employees of the respondent, such as the claimant in her capacity as fraud manager, were provided with access to an on-line portal operated by Cybersource.
60. This portal enabled access to the Decision Manager system and, for some employees, to a system called Virtual Terminal. The Virtual Terminal enabled payments to be made manually (i.e. by an individual intervening and inputting instructions and details) and so overriding the automatic refund process triggered by Decision Manager. Through Virtual Terminal, payments could be made to an account that was different to the one that had been used to make the initial payment to AO. Access to Virtual Terminal was more restricted than the access to Decision manager. The claimant had access to both systems.

Initial suspicions

61. In early 2017 a bank (Tesco bank) raised a query with the respondent about a transaction. One of their customers was the holder of a Mastercard with a 16 digit number which ended 3660. This card had been used, seemingly fraudulently - without the knowledge of the card account holder - to purchase goods from the respondent totalling £1,253.99. The transaction had been picked up in the respondent systems, by Decision Manager, and identified as fraudulent. The transaction was stopped. In accordance with the Decision Manager's processes which I have summarised above, the intended purchase price of £1,253.99 should have been refunded to the Mastercard account ending 3660. However, it was not refunded and the card holder's bank raised a query. It was considered internally by the respondent and Malcolm Clark, asked the claimant what had happened. The claimant responded by email of 11 April 2017 which is at pages 297 and 298 as follows:-

"Malcolm,

I have seen this before but not recently.

I have now pushed the refund through. I think that it may have failed with the "reject" in CORE but no other orders have done this.

This is the receipt for the one that I pushed through today (don't know why it shows AO Deutschland Limited). The customer should see the refund by Thursday.

[receipt copied in to body of email]

I have checked around that date and the refund that did process was for a different order.

It should all be correct now”.

62. This wording was used by the claimant to provide assurance to the respondent about the transaction in question and that it was a “one off.” In the one or two days following this email, however, the respondent reviewed further the transaction and at that stage it contacted the company behind Decision Manager (Cybersource) who identified that a refund had initially been requested to account ending 3660 but that the payment had in fact been made to a different account ending 6557.
63. Further internal investigations then took place and it became apparent that a number of other repayment transactions had also been made to an account ending 6557. A total of 21 such transactions were identified as having taken place between October 2016 and March 2017. These are listed at page 299.
64. Cybersource informed the respondent that the process of voiding a refund and then processing the refund to a different payment card had happened on these 21 occasions.
65. The respondent through documentary evidence and the witness evidence of Michael Williams explained the transactions leading to the payment of refund money to card ending 6557. At page 865 is a print out of the transaction history. Michael Williams explained the transaction process in relation to the first identified transaction at paragraph 20 of his statement, as follows:-

“From page 84 it can be seen (working from the bottom upwards) that in relation to order AOL100010384 the following occurred:

- *A payment of £1,253.99 was authorised from a Mastercard ending 3660 at 11.46 am on 7 March 2017 (“credit card authorisation”).*
- *That payment was taken from that card at 12:16 pm on 7 March 2017 (“credit card settlement”).*
- *That payment was refunded to that card at 2:45 pm on 7 March 2017 (“credit card credit”).*
- *That refund was voided at 5:24 pm on 7 March 2017 (“voided transaction”).*
- *A payment in the same amount of £1,253.99 was made to a Visa card ending in 6557 at 5:27 pm on 7 March 2017 (“credit card credit”); and*

- *A refund was made of £1,253.99 to the original Mastercard at 10:43 am on 11 April 2017 (“credit card credit”).*
66. Mr Williams noted at paragraph 21 of his statement that as a result of these transactions that AO effectively made the refund twice – once (eventually) to the correct card and once (wrongly) to the payment card whose number ended in 6557.
67. Other than the reference to page 84 (in evidence Mr Williams accepted it should have been page 865) I accept that the transactions occurred as described.
68. The respondent obtained further information from Cybersource:-
- 63.1 confirmation that the transactions made to card 6557 were in fact all to the same card (rather than a number of cards each of which ended in 6557). Cybersource had by then obtained the full sixteen digit number rather than relying on four digits alone
- 63.2 each of the 21 payments had been made using the claimant’s client user log in details to access Decision Manager. A record of this is at page 317, which is a print out of the transactions showing the claimant as the “client user” on the occasion of each transaction.

The claimant’s suspension and the respondent’s ongoing investigations

69. The claimant was interviewed and then suspended on 13 April 2017. Notes of the interview are at pages 302-306. The claimant sent an email to the respondent on 14 April 2017 with further information (page 307-9). In summary, at the stage of this interview and email of the following day, the claimant denied knowledge of the transactions other than the most recent one which had been raised with her and in relation to which she had responded by email on 11 April 2017 (see above). The claimant said she had changed her Cybersource log on password, possibly before she went on holiday at the beginning of April 2017 and that around October or November 2016 she had given colleagues in the fraud team access to her Cybersource user account. She said she would have shown a colleague called Treena Lawlor how to process certain transactions; she said she did not recall processing many refunds especially not 21 in a period of six months or so. She also noted that there had been significant changes to the fraud team and her work had become increasingly busy and stressful. The claimant ended the email of 14 April 2017 on these terms:-

“It would be an understatement if I say that I am, apart from being traumatised, highly upset and annoyed by the totally unexpected circumstances surrounding me.

I categorically deny any wrongdoing, malicious act, theft or fraud against AO.

If you could please confirm that you have received this email.”

70. The claimant was interviewed by the respondent again on 18 and then on 28 April 2017, in part to look into concerns that she had raised on 13 and 14 April 2017 (as noted above)
71. At the meeting on 28 April 2017, the claimant was asked if she recognised a card with number ending 6557 and she said that she did not. At that stage the claimant was told that the Police would be involved and that they would be able to check who the card belonged to. The notes of that interview are at page 319. Mr Coetzee has submitted that the reference to the Police at this stage and at other stages was threatening to the claimant. I find that it was not made as a threat. It was inevitable where potentially fraudulent transactions such as this were being uncovered that consideration would be given to involving the Police. The claimant was told that that was going to happen and that was a fact that was being relayed to her.
72. Later that day (28 April 2017) the claimant's husband Mr Coetzee contacted the respondent to try to speak with their chief executive officer, Steve Counce. It is relevant to note here that Mr Coetzee had previously been employed by the respondent in a senior position and was known to the respondent's executives.
73. Notes of the meeting of 28 April 2017 between Mr Coetzee and Mr Counce, (page 321) record Mr Coetzee providing the following statement: -

"Following the meeting between Emma, Malcolm and Ailsa at lunchtime today I have discussed it with Emma, and I recognise the last four digits of the card mentioned. I have then checked my Gmail account and find a card ending 6557, therefore there is a chance that we have the refunds in our account but I confirm neither myself, Emma or any member of my family have committed fraud against AO and I can't understand what has happened".

74. By 4.30 pm on 28 April 2017, Mr Coetzee returned to the respondent's premises and provided further information in the form of a copy statement of the account relating to the card ending 6557 including details of all the 21 transactions. Mr Coetzee maintained that they knew nothing about these transactions. He explained that card 6557 was an old card, they had had two replacement cards since, that the card was a debit card linked to a personal bank account of the claimant, that they had no idea about the transactions. He also noted that the transactions happened at around the same time as salary payments were made by the respondent into the claimant's account and the claimant had not realised there were other payments.
75. At this second meeting on 28 April 2017, Mr Coetzee was asked how the transactions could have been processed onto the card, why would someone else have those details and his reply is at noted at page 323.

" We have gone through the houses of how this could be, the one thing we talked about is when laptops started coming out, there is a process where she holds a transaction because it is a high value item, there is a different process for refunding the card, all

that the screen brings up is that the refund has to go back onto the card, it doesn't confirm what card it goes back to."

76. The respondent's investigations continued, as did the claimant's paid suspension. The respondent carried out investigations in to the various concerns/scenarios that the claimant had raised in recent interviews including interviewing colleagues (Treena Lawlor and Malcolm Clarke) as well as further investigations with Cybersource.
77. On 8 May 2017 the claimant provided the respondent with a long document which the claimant headed "*draft statement as at 8 May 2017 [not completed]*" The statement is 125 pages long (at pages 109-234). and there is an additional 60 or so pages of annexures (235-293). There were a number of issues raised by the claimant in this long statement, including:-
- 76.1 Frequent protestations of innocence
 - 76.2 Relationship difficulties at work particularly with Treena Lawlor,
 - 76.3 Criticism of the claimant's manager Malcolm Clarke (who was at the time leading on the investigation).
 - 76.4 Criticism of Malcolm Clarke's involvement in the investigation process
 - 76.5 The claimant's own version and criticism of the investigation process that had taken place.
 - 76.6 Criticism of the fact that she was suspended on 13 April 2017 and received written confirmation of the suspension by letter dated 28 April 2017.
 - 76.7 An acceptance that the 21 transactions had taken place.
 - 76.8 Alternative explanations as to how the transactions could have occurred without the claimant's knowledge – which were summarised as falling in to 2 categories "human intervention" and "systemic error" The claimant then noted significant criticism of the respondent's systems.
 - 76.9 Demands by the claimant for her to be provided with information (see extracts below).
- 77 I set out below, some relevant extracts from this long document. It is relevant that I do so because it provides a flavour of the content of the long document and is also an indication of the demands that the claimant was now starting to make in the investigation process:-
- "22. In advance I deem it is only fair to inform you that regarding the information that would be required to afford me the proper ability to pose any defence of any allegation or action against me that such information would, amongst others, include information in the following fields and avenues*

22.1 *Background of the matter and all documentation of whatsoever nature that may have a bearing on the suspicion or any allegation or action against me which is more detailedly set out at the end of my statement in a more complete way for clarity.*

22.2 *Background information on certain staff members insofar as same is in the position [presumably intended to state "possession"] of AO.*

22.3 *The investigation and any possible irregularity or non-compliance of law and rule and any such aspects as would appear from the content of my statement including, but not limited to the reporting of the contents and actions of meetings and the minutes provided to me; and*

22.4 *Furthermore, this includes information as to the persons involved in the fraud investigation and who might have been mentioned, affected, linked or connected to any of the allegations and which could or should have been regarded as contaminating the procedure or compromising it. I have to state my case in these terms as I have not been provided with any information as to who are all the employees that have been involved in the alleged fraud investigation, even if only mentioned in some capacity. This I will have to investigate upon receiving further information".*

78 Extracts from paragraph 5:

"Because I know that I did not defraud or steal from AO; and above all now being faced with being handed over to the Police with all its permutations of criminal procedure which may follow I am logically forced to investigate all other alternatives to establish exactly what happened here. As indicated, it can only be one of two possible alternatives,

5.1 a systematic error which might also be something like a browser auto fill of which there are a multitude of possibilities which kicked in unbeknown to me, any possible IT changes that may have affected the payment made was unaware of etc etc but I which I doubt as I regard systematic errors as unlikely but possible, or

*5.2 human intervention of which there may be three main possibilities
.....*

55.1.2. Following this we deemed it important to log onto my bank account and to check it properly and bring all bank statements related to my account as from around 20 October 2016 until that day, being 28 April 2017. At this point we discovered that there were indeed other amounts that have been transferred into my bank account with AO references that were not dated on 26th of the month which is roughly the usual pay day.

55.1.3. We were, to say the least, horribly shocked. I have not in my entire life experienced such feeling of complete horror. We could

not believe what we had just discovered. We immediately then copied the old expired bank card with the digit 6557 and my new card.

55.1.4. My husband and I then decided that the copies of the bank statements as well as the copies of the old and new cards that I referred to above must immediately without any delay be taken to AO for their information. At that point, during those minutes that we decided to get this information immediately to AO, we also deemed it fit to phone MC and also inform immediately that we have found the information regarding the four digit card and the account statements.”

79 In relation to the last extract above it is relevant to note that, whilst the claimant was giving the impression that she and her husband were assisting the investigation, this is no more than confirmation of transactions that the respondent had already (through Cybersource) uncovered and informed the claimant about. Furthermore, notwithstanding the claimed shock on the part of the claimant and her husband and the claimed review of the claimant’s bank account, they did not identify and disclose any additional transactions which were uncovered later and to which I refer below. The dates of review which the claimant’s claimed to have made corresponded exactly with the dates relating to the transactions which had by then been uncovered.

80 Extract from paragraph 64.2

64.2 I therefore require that in the meantime the following information is made available to me:

my laptop under supervision or at least an external hard drive with all the data from my laptop properly stored the information

all additional information and evidence that is primarily in the possession and under the control and custody of AO and which any person in my position of being accused of fraud on the cyber system of a company would reasonably require to defend its case

I am not going to attempt to define’ list or describe the detailed information and any relevant evidential documentation and information but it will pertain to each and every phase and level of the cyber route or channel and the control thereof by person or system that I will require in dealing with the investigation against me in any further procedures

however this body of information and evidence are known to the cyber forensic specialists and AO is requested in the interest of all parties to ensure that such forensic information is obtained and that the correct, proper and legal procedures be applied to obtain any information and evidence in this regard inclusive of any information from databases or from computers but not limited to that.”

- 81 In the course of submissions, it was raised that the claimant should not have been insisting on undertaking her own investigations into disciplinary matters and some discussion took place in relation to that. Mr Coetzee submitted that the claimant did not propose to undertake any investigations. My finding is that the claimant was at his stage insisting on and being entitled to investigate this matter and she required the provision of substantial amounts of information which was at times vaguely described.
- 82 As a result of the claimant's criticisms of Malcolm Clarke including his involvement in the investigation process, the respondent decided that he would no longer lead the investigation and instead, Mike Williams, the respondent's head of audit, took over.
- 83 The respondent investigated the possible human error scenarios raised by the claimant, taking steps before and also between the two disciplinary hearing dates that I will refer to shortly, including interviewing employees and interrogating the laptops of some of the employees. The claimant was clear at the Tribunal hearing that she had accepted that human error was not the explanation behind the transactions. As the disciplinary process continued, the focus of the claimant's response to the allegations became the IT systems.
- 84 At around the same date as the claimant provided the long "draft statement" document, additional transactions were identified by Cybersource. By then, Cybersource had identified that there had been a total of 68 transactions between November 2015 and March 2017, totalling over £103,000, all processed using the same card belonging to the claimant (the card ending 6557).

Disciplinary hearing

- 85 The claimant was invited to a disciplinary hearing on 16 May 2017. The invitation letter is at pages 294 and 295 and enclosures to the letter are at 296 to 377. The hearing was in fact delayed until 25 May 2017.
- 86 The claimant was provided with substantial documentation which was listed in the body of the letter. It included notes of the investigation meetings undertaken by the respondent, documents obtained from and interview notes with Cybersource and various bank documents.
- 87 As noted above, amongst the claimants many requirements for additional information was a requirement for access to her work laptop and to the respondent's systems. In response and in advance of the disciplinary hearing, the respondent agreed to provide a facility by which the claimant could access information in a supervised and controlled way. Emails were exchanged in which the respondent offered this facility and the claimant complained about what was proposed and did not take up the respondent's offer. By email dated 24 May 2017 (pages 390 to 392) the respondent responded to further queries and complaints raised by the claimant concerning the investigation and provision of information.

- 88 The disciplinary hearing took place on 25 May 2017. It was chaired by Mr Eastwood, the respondent's director of financial control. The respondent's notes of the meeting are at page 435 to 445.
- 89 At this meeting the claimant was asked about the additional transactions, in other words, those additional to the 21 originally identified. Bank statements detailing the period of these additional transactions had not then been provided by the claimant but she accepted that she had checked her statements and the same had happened, that the payments had been received into her account. The claimant also provided more information about the potential for systematic error. She noted the possibility that her card details could have been tested on various systems of the respondent, she explained that when the system was set up some years previously she set up her own account and installed her card details on there. The notes on this are at page 438.
- 90 Mike Williams joined the meeting so he could receive and consider these technical explanations provided by the claimant particularly the claimants contention that she did not input any card information in to Virtual Terminal in relation to the transactions.
- 91 The claimant was asked whether these were the only transactions. The claimant replied that she could not access earlier bank details. She was told that she would be able to contact her bank and request these. The claimant did not admit or deny that there were further, earlier transactions.
- 92 The claimant said she had been unaware of the additional transactions that had been identified by Cybersource. She was asked how she did not notice such large amounts of money going in to her bank account. This concern was separate or additional to the concern that she may have deliberately and fraudulently transferred the money in there. The claimant's explanation was that:-
- 80.1 she did not properly check her bank account,
 - 80.2 when she did look at her account on her phone she only saw the last couple of transactions,
 - 80.3 she knew that she had a number of overtime payments due to her
 - 80.4 that although she had received an additional £102,000 or so in her bank account in the previous eighteen months she did not notice. All she noticed was that her balance tended to be around £2,000.
- 81 The meeting was adjourned to enable further investigation into the system issues raised by the claimant. The claimant had also handed to Mr Eastwood, a further long document headed "*plea and opening statement*" (pages 403 to 428) which Mr Eastwood agreed he would take away and consider.
- 82 I note that the claimant's criticisms of the respondent continued and intensified in this document. The following extract records a number of criticisms made:-

1.7 *There is no doubt that in this disciplinary matter I will not be afforded a fair unbiased and equitable hearing if, amongst others, I am not given the opportunity or provided with the occasion to:*

1.7.1 *test the vitally and all important but flawed version of Cybersource and on which AO apparently bases its approach to me by way of, amongst others, cross examining the maker or makers of the statement which is included in the AO pack of information as part of the alleged evidence against me; amongst others (for the moment not referring to any actionability on the statement for which I have reserved my rights) the reasons are that the statement of Cybersource is filled with, amongst others:*

1.7.1.1 *Hearsay evidence;*

1.7.1.2 *Leading questions*

1.7.1.3 *Offering no possible explanation as to what technical or other problems could have resulted in the monies being transferred into my account, or in the alternative, stating that there is no alternative and the opinion of Cybersource is absolute and excluding all other possibility*

And therefore the statement, whether handed in as purely documentary evidence or as part of live testimony is amongst others at best vague and accordingly totally inadequate and fatally flawed.

1.7.2 *Apart from the seriously flawed and inadequate status of the alleged Cybersource evidence above and in aggravation thereof, I have not even been furnished with copies of the most basic of relevant Cybersource documentation which I have repeatedly requested since all times relevant hereto.*

83. In this document the claimant also complained of a lack of time for her to deal with matters and ended by asking for a postponement of the disciplinary hearing. The claimant's request was met in that Mr Eastwood did postpone matters for some time. The hearing did not reconvene until 28 June 2017.
84. During the period between the first and second disciplinary hearing dates, the respondent undertook further investigations, (1) with Cybersource, (2) through examination of the claimant's laptop and the laptops of two colleagues, (3) through further information from the respondent's bank and (4) of issues raised by the claimant in her opening statement and plea document that she provided at the beginning of the hearing on 25 May 2017.
85. These investigations included a meeting between Malcolm Williams and 2 Cybersource employees where the Cybersource employees provided a demonstration of Virtual Terminal, how it functioned and how employees (such as the claimant) with access to Virtual Terminal, were able to access it.. Cybersource demonstrated and confirmed to Malcolm Williams that Virtual

Terminal did not have a function to automatically populate any card details. It was different to the way Decision Manager could automatically operate to make repayment to the car from which the payment was originally made. When payments were being made using Virtual Terminal, the user was taken through various stages in order to input card details and with specific stages ensuring that the user was checking the transaction and confirming that it should be made. Screenshots of the demonstration were taken and shared with the claimant as was other information obtained from Cybersource relating to the transactions in question

86. As noted, the further investigation included continued scrutiny of the laptop used by the claimant during her employment with the respondent, which identified details of when the claimant viewed her on line bank accounts, household budget or similar documents of the claimant and information concerning some of the transactions under investigation.
87. The scrutiny of the laptop also showed the claimant as having logged on to Virtual Terminal using the laptop on the occasions of all except one of the 68 transactions in question.
88. Further documentation was provided to the claimant on or about 16 June 2017 (letter at page 446 and the enclosures at 448 to 648B). This letter explained the further investigation had been undertaken following the adjournment, and required the claimant to attend the reconvened disciplinary hearing.
89. The letter included the following information:-

“Following the adjournment of the first hearing I appointed Mike Williams, Head of Internal Audit to undertake further investigation. The following action was then taken;

- *Further questions were put to Cybersource.*
- *The examination of your laptop (along with those of Treena Lawlor and Malcolm Clarke) was completed.*
- *Further information was obtained from Barclays Bank.*
- *Relevant issues raised in the document you presented to me on 25 May 2017 were investigated.*

I have reviewed the outcome of these further investigations and now enclose the additional documentation that will be relied upon us during the hearing on 23 June 2017.

For your information, your laptop and the CORE notes relating to the 68 transactions will remain available for inspection for you by prior appointment during normal working hours at any time prior to the hearing”.

90. The disciplinary hearing continued on 28 June 2017 (not 23 June as initially planned). Again the claimant attended with substantial documents being a statement she called an "*interim statement*" (a further 77 pages of narrative) and a number of attachments (pages 727 to 837).
91. This statement continued the themes seen in previous documents, particularly criticism of the respondent's disciplinary process.
92. Notes of the resumed hearing are at pages 838 to 841. The resumed hearing was much shorter than the first hearing. As noted above, the claimant provided Mr Eastwood with further substantial documentation which he agreed to review before making his decision.
93. Mr Eastwood's decision was to dismiss the claimant. The dismissal letter is detailed and is ten pages long. The reasons for dismissal can be very broadly summarised as follows:- (1) That Mr Eastwood decided that the claimant was responsible for arranging the payments to be made from the respondent into her personal bank account, and (2) in any event she admitted that she had received £103,000 or so from the respondent over a seventeen-month period and had not informed the respondent of this.
94. Mr Eastwood's dismissal letter (at page 851) includes the following:-

"I have carefully reviewed all the evidence gathered during the investigation and the statements provided by you. The conclusion I have reached is that you have put forward no credible explanation as to how these events could have occurred other than through your deliberate actions and have given no credible explanation as to why you were not aware of the funds into your bank account.

Even if you had not been responsible for transferring those funds, I would have taken your failure to report their receipt by you (bearing in mind the total amount involved, the period over which the monies were received and your role as Fraud Manager) as a matter of misconduct of the most serious kind.

As it is, my finding on all the evidence is that you were responsible for making the payments into your bank account.

In reaching this decision I have relied, in particular, on the following evidence presented at the disciplinary hearing:

- *The list provided by Cybersource of voided customer refunds and subsequent payments of matching amount to card ending 6557, which list shows the dates and times (adjusted to reflect that the relevant Cybersource server is in the pacific time zone of the United States) of the payment and that (at least in relation to the most recent 21 payments) your Cybersource user name and password was used to make them (Exhibit 2).*
- *The demonstration given by Cybersource to the investigating officer and the resulting screenshots, showing that there are 5*

distinct steps that have to be taken when logged into the Virtual Terminal in order to make such a payment (including the inputting of order and debit/credit card specific data on two screens, two execution dialogue boxes and one confirmation button) (Exhibit 5).

- *The examination of the internet search history on your laptop showing that at the time of 67 of the 68 payments being made you were logged into the Virtual Terminal (Exhibit 1).*
- *The data from Cybersource showing that the other 1 of the 68 payments (being the one made on 27 February 2017) was made using an Iphone rather than a laptop (Exhibit 12).*
- *The information from Cybersource that the Virtual Terminal has not been used during the period from November 2015 to March 2017 other than to make the 68 payments to card ending 6557 using your laptop (save for one occasion when an iPhone was used) (A.10 on Appendix 26).*
- *The internet search history on your laptop showing that between November 2015 and March 2017 the only times that you logged onto the Virtual Terminal coincided with payments being made to a card ending 6557 (Exhibit 1).*
- *Your bank statement showing the receipt of 67 of the 68 payments (the only discrepancy being 1 of 2 payments made on 30 December 2015 – but given that Cybersource have only been able to supply the last four digits of the relevant debit card (and not the entirety of it 16 digits) it is feasible that the number entered on that occasion may not have been correct).*
- *The summary table produced by the Investigating Officer cross referencing the Cybersource information as to the use of the Virtual Terminal; your internet search history; and your bank statements in relation to each of the 68 transactions (Exhibit 13).*

“You say that you were not aware that the monies had been received into your bank account. I find that difficult to believe for the following reasons:-

- *The amounts involved were substantial.*
- *Over the seventeen-month period the total amounts received were over £103,000.*
- *By contrast the amount of net salary (and bonuses and overtime) in that period received from AO was approximately £39,000.*
- *Your average monthly net salary from AO was just over £2,000 yet the amount of refunds averaged over £6,000 per month in the period.*

- *In each of December 2015, February 2017 and March 2017 the amount of refunds received were over £10,000 yet you claim not to have noticed these amounts and to have spent them on “normal household expenditure”. I fail to see normal household expenditure can vary so widely from month to month.*
- *A cursory glance at your bank statements that you have produced that, whilst there were many items of expenditure, there were comparatively few receipts into the account.*
- *Virtually all those receipts fall into the category of either your salary from AO World Plc, transfers from what you say is your husband’s account and the wrongful receipts. The latter stand out markedly.*
- *You have said that if you had noticed any of these wrongful receipts you would have assumed that they were payments of bonuses. Apart from the fact that the wrongful receipts which are shown on the bank statements as being from AO Retail Limited (and not AO World Plc) you were issued with monthly payslips which clearly showed that any bonus or overtime or similar payments were paid in one lump sum with your salary. Again this must have been evident to you from the fact that the salary payment received from AO World Plc each month was variable and not a fixed amount.*
- *During the disciplinary hearing on 25 May 2017 you said that you noticed a £5 transaction going through your bank and it was a name that you did not recognise. In those circumstances I cannot understand how you failed to notice 68 transactions totalling over £103,000.*
- *You also mentioned that you did not check your bank account with any regularity. The internet history from your laptop is wholly inconsistent with that assertion.*
- *You even downloaded a bank statement and saved it on your laptop on 10 April 2017. That statement showed receipt of one of the 68 payments, yet you still did not report this.*
- *There was also found on your laptop a very detailed monthly household budget covering the period from December 2016 to December 2024 setting out (to the penny) your income and over forty categories of expenses. I cannot see that someone who took such an interest in financial matters would fail to check their bank account (or how such a budget could be prepared without reference to bank statements).*
- *You indicated that one of the reasons why you didn’t check your bank statements was because you spent all of your available time (to such an extent that your husband complained about it) on your duties for AO. Again, an examination of your internet search*

history on your laptop shows extensive use of it during working hours for what were clearly non-related purposes (and which, indeed, were on occasions what might be termed inappropriate uses of your work laptop). The daily planner on your laptop also suggests more than sufficient time was available for checking your bank account”.

95. The dismissal letter also detailed reasons why Mr Eastwood did not believe the human error/intervention explanations provided by the claimant or the systemic error explanations. I have noted the claimant’s position in relation to the human error and therefore do not repeat that part of the letter. I set out Mr Eastwood’s conclusions in relation to the claimant’s explanation of systemic errors underneath:-

“A second alternative explanation was that the transfers into your account arose from systemic error. Although you have not given any specific explanation as to how this has occurred, the suggestion appears to be that when an individual (whether you or someone else) is performing an action within a Cybersource programme (or the Cybersource programme is performing an automated operation) the intended action or operation does not occur but instead (or in addition to the intended action or operation occurring) payments are made to your bank account because your bank details have at some time been inputted into the Cybersource programme (or other AO systems) for test purposes.

I do not believe this is likely to be the case for the following reasons:-

The letter then sets out a large number of points that Mr Eastwood considered to be relevant. These included the following.

- *There are clearly circumstances in which transactions are voided for genuine reasons as can be seen from the extent of your internet search history at Exhibit 3 but that does not lead on all occasions to matching payments to a card ending 6557.*
- *Since the matter was first raised with you on 11 April 2017 there appear (as at 10 July 2017) to have been no such further voidings and matching payments.*
- *The fact that payments have been made using both your laptop and an iPhone (i.e. two unconnected devices).*
- *If there was a systemic error then there should be some commonality (and continuity) in the circumstances in which the error occurs.*
- *The details above seem to clearly point a way from any such commonality.*
- *Furthermore, the CORE notes and Cybersource (Decision Manager) records show three distinct elements in relation to each*

transactions – firstly the refund to the customer’s debit/credit card; secondly the voiding of that refund and thirdly the payment to card ending 6557.

- *If there were a systemic error that would be expected to occur after the refund to the customer’s debit/credit card (which was a legitimate step) for it to be triggered by some other action or operation; and for the voiding and payment to card ending 6557 (neither of which were legitimate steps) to occur at the same time.*

96. Mr Eastwood also commented on requests made by the claimant, for additional information and investigations to be undertaken and noted as follows:-

“You have asked to be provided with a full forensic report into AO’s computer systems and their interface with the Cybersource programmes, together with (as you call it) the full “Cyber route” from your laptop being used to the monies reaching your bank account. Aside from the difficulty in understanding precisely what is being requested, in all the circumstances and in light of all the evidence I do not believe that such an extension of the investigation (even if possible) would be justified or proportionate.

You have also requested physical access logs to the AO building and CCTV evidence (which in any event only covers the communal areas) I do not see the relevance of these given the activity giving rise to the allegations arose from the use of a laptop (and iPhone) and so is not location specific. You have also asked for information that is simply not available (such as logs of password changes).

I believe that whenever you have made a request for information that we were able to obtain and was (or was potentially) relevant, we have complied with that request.

For example, as part of the investigation we have made available for you to view all the information (including mailboxes and data) that were on your laptop and the laptops of Treena Lawler and Malcolm Clarke together with copies of the CORE notes relating to each of the 68 transactions. I note however that you have not taken the opportunity to examine any of these.

You have taken issue with the notes taken at the interviews and disciplinary hearings that have taken place during this process. There will clearly be instances where the parties’ recollection of precisely what was said at meetings is at variance and there is nothing unusual in that. However, I do not believe that the points you have raised in this connection have any relevance to the evidence that I have to consider or that they should alter my conclusions”.

97. I have considered the extensive evidence of the investigation and the hearings. I have considered the terms of the disciplinary letter itself and also heard the evidence of Mr Eastwood. I find that the reasons set out in the

dismissal letter are the reasons that Mr Eastwood decided to dismiss the claimant.

98. Mrs Coetzee appealed against her dismissal. The statement of appeal is at pages 869 to 947.

The appeal

99. I note the following findings in relation to the appeal process and the length of time that the appeal took.
100. Mr Emmett, who was then the Managing Director of AO Services, was appointed to consider, hear and decide on the appeal. Mr Emmett gave evidence at the Tribunal hearing. The appeal process was unusually long. The appeal was raised on 18 July 2017 and did not conclude until the appeal outcome letter of 22 June 2018.
101. The provision of extensive documentation by the claimant continued during this process which Mr Emmett considered, together with the very extensive documentation that had already been provided in the course of the disciplinary investigation and hearings. In his evidence at the Tribunal Mr Emmett noted that the documentary evidence generated by the respondent's investigations ran to some 270 pages and there was a further 400 or so pages of documentation from the claimant. In other words, there was a lot of information for Mr Emmett to consider.
102. Mr Emmett wrote to the claimant with a number of questions (15 in total) about the detail of her appeal. The questions are reasonable. For example:-

“on page 2 of your statement of appeal you refer to an “evidence document.” Please will you confirm which document this is?”

“At paragraph 5.24 of your statement of appeal you seem to agree that human intervention is not a likely explanation for what has happened and so the only explanation I need consider (other than the explanation that these were deliberate acts on your part) is that there was some sort of system error in the “re-credit” process. .Is this a fair reflection of your case?”

At the disciplinary hearing on 28 June 2017 I note (from the minutes) that you requested and were expecting within 7 days your bank statements prior to November 2015. Have you got these and if so do they show anything relevant?”

103. A number of other questions focussed on the claimant's explanation of a “re-credit process” – the claimant claiming that Virtual Terminal must have automatically populated the card details when using a function, called a “re-credit” function in Virtual Terminal.
104. The claimant's response to Mr Emmett was provided in 3 tranches the first of which was a 31-page document. In his evidence, Mr Emmett noted the following in relations to the claimant's responses *“In these documents she*

raised a host of procedural issues about the appeal, including a request that I recuse myself. However, she declined to answer the questions I had put to her.”

105. I accept this evidence. I note for example, the claimant’s responses included the following (reference page 952):

“to be-euphemistically said-absolutely frank: your so-called questions are nothing less than a disguised form of cross-examination which is strictly prohibited in the appeal procedure. The question that now begs answering is: why did you as the appeal officer do that? What is your motive as the appeal officer in the broader context of the case?”

It is necessary as an introduction to respectfully remind you of the chest and content of my disciplinary and appeal documents in which all your questions are covered, in more than one way and abundantly so. As appeal officer you have confirmed that you have read and reviewed my papers and thus you should have come across all the answers, assistance or help to the questions that you purport to quote to me now.”

106. Mr Emmett provided the claimant with a further opportunity to reply to his questions. The claimant responded with a document in which she required Mr Emmett to stop dealing with the appeal (to recuse himself) and to tell him that until he responds to this application that he is not permitted to take any other steps in the appeal process. The claimant refused therefore to respond to the questions until then. Mr Emmett replied to say that he saw no reason to recuse himself, to note that an appeal hearing will be arranged and to note that it would be helpful if, before then, the claimant could reply to his questions (page 999).
107. During the time of the appeal the respondent was continuing to cooperate with the police on an ongoing basis. The police had just informed the respondent that yet further payments had been wrongly made in to the claimant’s bank account dating back to 2011. The totality of payments wrongly made was, by that stage known to be almost £240,000. Details of the further payments were provided by Mr Emmett to the claimant
108. The claimant provided a further document dated 4 December 2017. I broadly accept Mr Emmett’s description of this document which is as follows:
- “much of this document ran off at a tangent but she dealt “under protest” to an extent with my questions.”*
109. I find the questions were dealt with to a very limited extent and with expressions of outrage that Mr Emmett had not identified the information from the mass of information that the claimant had already provided. The questions asked were sensible and straightforward. They were barely answered.
110. By way of example, in one of the questions (as noted above) Mr Emmett asked the claimant whether she had reviewed her bank statements prior to November 2015 (see paragraph 102 above). The claimant provided the following answer to this question: -

“firstly I deeply regret to again have to state (now by repetition) that either you as the honourable appeal officer have not read my documentation or you misinterpret same for your convenience-alternatively you are in possession of a set of documentation which is different from what I have and/or what was given to me

Secondly you are requested to read my documentation as to this very point made by you and the minutes in regard there to, to contextualise the fallacious statement now levelled at me. It is necessary for me to again remind you of the open mandate that you had to in any case obtain any of my personal information at will and at liberty.

111. The claimant asked that representatives of Cybersource attend the appeal hearing so that they could be questioned by her. She also asked that Treena Lawlor attend. In fact, Treena Lawlor was no longer employed by the respondent. Even so, she was contacted by the respondent but she declined to attend the appeal hearing.
112. Mr Emmett also arranged for a request be sent to Cybersource although they had not replied by the date of the appeal hearing which took place on 8 December 2017. Notes of this hearing are at pages 1032 to 1051.
113. A focus of the appeal was what became termed the “cyber route” and the suggestion by the claimant that the processes within AO and/or Cybersource had operated incorrectly and as a result, the various amounts of money totalling £240,000 had been, unknowingly, transferred in to the claimant’s bank account. The claimant and her husband (who was representing the claimant at the appeal hearing) was insistent on being given the opportunity to question Cybersource employees. The claimant also continued to demand all information relating to the cyber route.
114. The claimant and her husband also stated a requirement for the cyber route to be investigated by forensic IT specialists.
115. In relation to the discussions of the term “cyber route” or “cyber trail route” having heard from Mr Emmett and also reviewed the appeal hearing notes, I accept the following evidence of Mr Emmett:-

“At the hearing on 8 December 2017 I therefore asked the claimant again about what she meant by this terminology. Again she could provide no specific details – our exchange is in the minutes at the top of page 1035. It appeared to me that the claimant did not really know what she was asking for other than, in general terms, a complete stripping of our computer system (including their interaction with the Cybersource software and with bank payment systems) in the hope that this may show a system defect that resulted in payments intended for 3rd parties ending up in her bank account.

Given the extent of the other evidence against the Claimant, a lack of any specific issues identified by, and the work and cost involved (if indeed what was requested could be done) this was to me a wholly disproportionate request”

116. Mr Emmett also asked the claimant whether she accepted that she had received £239,946.61 in to her account and she confirmed that she did.
117. Mr Emmett decided to stop the appeal hearing so that he could consider the claimant's requests and any further involvement from Cybersource.
118. Cybersource's reply to the request for their involvement came 3 days after the appeal hearing. They noted that they had taken legal advice; they refused to attend a hearing but offered to provide replies to written technical questions.
119. The claimant sent further documents which included substantial criticism of the appeal process and minutes and requested further information.
120. Mr Emmett replied, responding to number of the points raised by the claimant. Importantly, his reply included the following:-

"in relation to the appeal status generally, I had asked if Treena Lawlor and/or Cybersource were willing to attend the appeal hearing, not because the company had wished for them to appear as witnesses, but because you had said that you wished to ask them questions.

As you know neither appeared at the appeal hearing. Treena had declined to do so and Cybersource had not replied to the request. Cybersource have since indicated that they would not attend but would be willing to consider answering a limited number of specific questions that you might have for them, in line with what their legal representatives will allow. Can you therefore please let me have those questions by 18 January or as soon as is reasonably possible?

121. The claimant responded to Mr Emmett's letter with a further tranche of documents, which included more criticism, expressions of outrage and requiring the respondent to take further action and make further disclosures. These documents run to 65 pages.
122. The claimant's response to that part of Mr Emmett's letter where he asks the claimant to provide questions for Cybersource includes the following:-

"this is a totally untenable and an unacceptable situation. I am fully entitled to all evidence relevant to the matter (and I have stressed that point from the beginning and never got the cooperation of any person or employee of AO) and not the so to speak 'scraps of depleted undiluted information' as selected and filtered by a witness that should in law give the evidence be it in the disciplinary procedure, Employment Tribunal or a court of law.'

Furthermore if a witness is truthful, honest, frank and forthcoming, why should it need a lawyer to advise it on what questions could or should be answered? A witness (especially a highly commercial corporate firm) should be able to make available suitable witnesses on a comparable level which could for themselves decide what facts are relevant and not relevant (that is certainly easy enough) - and I repeat and emphasise the term and concept ; facts that is all I am interested in but I will be telling what that are relevant and which are not relevant to my case.

.....

The offer of Cybersource (and/or you as appeal officer) is thus not a credible offer of assistance but a disguised refusal to make proper and due relevant evidence available

in view of the aforementioned, I reject the alleged invitation/offer/opportunity as formulated by you as the appeal officer and I will not present you with the alleged questions as it would be time wasting and ludicrous to do so. As a matter of fact you as the appeal officer should have on the spot told Cybersource that alleged offer was unreasonable in these procedures

NB as regards Cybersource you have been presented with specific questions in regard to this witness which remain outstanding. I implore and request you to urgently reply to the questions in addition to the above mentioned.

123. It is striking that the claimant did not provide questions for Cybersource when given the opportunity to do so. At the Tribunal hearing, the claimant was asked about where she had set out the specific questions referred to above. Her reply was that they were in the documents she had provided to the respondent. By that stage of the appeal, the claimant had provided some 500 pages of documentation. When asked to refer to the questions, within that documentation, the claimant was unable to do so.
124. Mr Emmett/the respondent provided its own technical questions to Cybersource. Written responses were provided (pages 1213 to 1214) and these were in turn sent to the claimant in advance of the reconvened appeal hearing in April 2018.
125. The claimant has challenged these documents, claiming that they are not genuine (it was a topic which arose in discussions on day one). I find that Cybersource were involved throughout the respondent's investigation process including at this stage of the appeal, that the questions were put by the respondent, that Cybersource considered the questions and provided their responses as the documents record.
126. The appeal hearing resumed on 19 April 2018 but not before yet more complaints and requests for action/ information had been sent by the claimant.
127. As for the appeal hearing itself, I accept Mr Emmett's evidence:-

"the hearing was not easy. The claimant's husband was again with her. He took an aggressive line. There was a debate about whether it was a hearing or a meeting. The claimant and her husband broke off to speak to each other in Afrikaans. I referred to the fact that the claimant has not provided any specific questions that she wished to ask of Cyprus's (despite her complaint that she had not had an opportunity to test their evidence or cross examine them). Her husband's view was that it was for me to sift through the hundreds bracket if not thousands) of pages of

documentation submitted by her and work out what questions she want to ask.

I asked the claimant if she had any comments on the cyber source response (towards the top of page 1311). She did not reply directly, but said that she wanted to read out a document. She said it was her address, that it was 49 pages long and that she would give me a copy once she had read it out. I said I was prepared to take the document away and read it, but I did not think it was the best use of time for her to read it out aloud to me. That was unnecessary in my view. I again asked if she had any response to make on the cyber source questions. She and her husband said they were not prepared to proceed unless I sat there whilst she read out the document. I made it clear that I was prepared to carry on but they would not. They left the meeting, leaving a copy of the address with me.”

128. Mr Emmet’s evidence (which I accept) was that he reviewed the document provided by the claimant and other documentation. He was also provided, after the hearing, with further documentation from the claimant commenting on and amending the notes of the appeal hearing.
129. The outcome letter took a further two months to be produced and sent.
130. The outcome letter included the following comment in relation to the first transaction discovered (and the email referred to at paragraph 61 above):-

“I also think it is noteworthy that at no time have you advanced any explanation of your email to Malcolm Clarke on 11 April 2017. This was the email in which you said that the refund on order AOL 10000010384 had been “pushed through” by you on that date” as I think it may have failed with the reject in CORE”. That explanation was patently untrue as is evident from the Decision Manager transaction history (which has been supplied to you) which clearly shows that the CORE rejection had led, (as it should have done) to an automatic refund on 7 March 2017 at 2:45 pm; that this refund had been voided at 5:24 pm on the same day (which your internet search history shows was done by you) and that a payment to another card (which was yours) had then been actioned at 5:27 on 7 March 2017. This wholly misleading email casts real doubt on your credibility generally.

131. The outcome letter also included the following in relation to the offer to the claimant to view the contents of her laptop.

“I note that you have been repeatedly offered access to a cloned copy of your laptop and to the notes from the CORE system but have declined to view these. There appears to be some sort of suggestion that your laptop may have been interfered with (either deliberately or by exposing it to network software). I have seen no evidence of this and if the implication is that this has resulted in the creation of a false internet search history that corroborates the other evidence that is available then I do not find that credible. That is particularly so given that the internet search history matches the information that has subsequently been received from the Police in relation to the 20 of the 93 transfers

which occurred between 22 May 2015 and 9 November 2015 (the existence of which was not known when the internet search history was extracted).

132. In relation to the claimant's persistent request/requirement for a forensic investigation the appeal letter notes as follows:-

"For the avoidance of doubt, I believe that a detailed forensic deconstruction of our computer and operating systems as requested by you would be entirely disproportionate. It is not the case, as you seem to suggest, that AO has to prove "every key stroke" in order for your dismissal to be fair".

133. I set out below a number of additional findings of fact that I was required to make in order to reach my decision.

The extent to which the respondent undertook investigations of a technical nature.

134. In her document of 8 May 2017, the claimant set out what she terms requirements that information is provided to her. I have quoted this at paragraph 80 above.

135. The respondent did not respond by attempting to identify, obtain and provide information that would meet the claimant's requirements. Instead it involved Cybersource and put questions to Cybersource about the relevant systems. I have seen (and accept) evidence of the respondent's involvement of Cybersource from an early stage in the investigation process, up to and including in the appeal stage including a demonstration from Cybersource as to how the Virtual Terminal system worked.

136. I also find that Mr Eastwood (at the disciplinary stage) and Mr Emmett (at the appeal stage) understood the operation of the relevant systems and had the benefit of information from Cybersource.

The extent of the claimant's cooperation in the investigation and disciplinary process.

137. Much was made of the claimant's cooperative approach in Mr Coetzee's submissions and it is relevant that I make findings of fact in relation to it.

138. Initially, 21 transactions were found to have involved the same card, Initially the claimant stated she was unable to recall that the card number was hers. She was informed that the Police would become involved and that they would be able to identify the cardholder details. An hour or two later, the information was volunteered by her husband; the card was hers.

139. On 8 May 2017, the claimant sent in 125-page document. On the claimant's own version of events, by this stage she is aware that she has received a significant amount of money that she should not have received. The document, like other long documents provided by the claimant in the course of the internal processes, is difficult to follow. In this document she protested her innocence on a considerable number of occasions, she set out her requirements for

significant amounts of information, providing the information with wide and imprecise descriptions of what she required, she provided long accounts of office relationship issues which she said may implicate others, she criticised the suspension process and (at pages 196 and 198) she referred to her bank statements. At page 198 she said this:-

“Following this we deemed it important to log onto my bank account and to check it properly and print all bank statements related to my account as from around about 20 October 2016 until that day, being 28 April 2017. At this point we discovered that there were indeed other amounts that have been transferred into my bank account with AO references that were not dated on the 26 of the month which is roughly the usual pay day”.

140. It is notable that these were the days in respect of which transactions had already been identified and communicated to the claimant. The claimant was not providing anything new, there was no evidence that the claimant was asking for bank statements going back further, no “irregular” transactions were voluntarily disclosed by the claimant in this document or on any other occasion. Whilst the claimant admitted to transactions in various tranches, by those stages she really had no option other than to admit them.
141. In the document sent on 8 May 2017, the claimant criticised the respondent’s actions and processes.
142. I note that in these 125 pages there is no apology and no offer to refund the monies received by the claimant. (as at 8 May 2017, the respondent was only aware of the initial 21 transactions. In the day or two after the 8 May 2017 further transactions were uncovered).
143. When the disciplinary hearing was called, the claimant provided a 26-page letter which contained more pleas of innocence and more wide requirements for information as well as long legal submissions on the fairness of an internal employment disciplinary process and reasons why the process in question was failing the tests of fairness.
144. I note again, there was no apology and no proposal to repay any of the much greater amount that has been uncovered of £102,000 or so.
145. After the first disciplinary hearing the claimant was provided with significant additional information, the claimant response was to be very critical of the process; she did not address the information and evidence that was provided
146. I have also noted the striking lack of cooperation by the claimant during the appeal stage
147. I do not accept that the claimant was cooperative as her husband has submitted. I find that she provided long rambling documents, required the respondent to provide her with increasing amounts of information but generally failed to address directly the information that was provided to her or questions asked of her. This approach continued during the appeal process.

Evidence obtained by the respondent.

148. The respondent obtained details of the transactions themselves and evidence that the money was transferred into the claimant's bank account.
149. It is lost sometimes in the huge amount of detail in this case the very basic fact that the claimant received what we now know to be £240,000 in various transactions into her bank account. That in itself was very significant evidence against her.
150. The claimant informed the respondent that she did not look at her bank account. The respondent investigated this and obtained details of financial budgets that the claimant had put together on the respondent's laptop provided to the claimant to use in her employment. The respondent also had details about when she had downloaded bank statements and details of times that she had logged on to online banking.
151. They had information about the more recent transactions and the use of the process of "Virtual Terminal" the fact that Virtual Terminal had been accessed using the claimant's Cybersource log on details in relation to those transactions and they had also had a demonstration by Cybersource of the virtual terminal process.

Cybersource.

152. Insofar as it is alleged that Cybersource and the respondent were somehow in league and looking to implicate the claimant I find that they were not.
153. Insofar as there is criticism of Cybersource in not attending the appeal, first of all I accept that there is nothing the respondent could do about this. The respondent asked Cybersource if they would attend and they refused. Cybersource are not under the control of the respondent.
154. Further, I find that the position adopted by Cybersource was a reasonable position and in turn it was reasonable for the respondent to accept the position. This was not their internal investigation and what was probably also relevant to them was the ongoing Police investigation and it is feasible that legal advisers to Cybersource advised them not to become further involved.
155. That said and as noted, Cybersource were cooperative and provided the respondent with important information though the investigation and disciplinary process.

Transaction involving AO Deutschland

156. This is a reference to the claimant's email of 11 April 2017 (para 61 above) in which the claimant noted that a refund had gone to a company called AO Deutschland Limited which was not the company within the AO group which dealt with UK retail. This is put by the claimant as a sinister point, that she stumbled across this, raised it and then found herself facing misconduct charges. My finding is that it was not relevant to the misconduct issues in this case. As Miss Eeley explained in her submissions, the respondent did not look

for the evidence of the transactions by which money was transferred in to the claimant's bank account, it stumbled across it and eventually found that £240,000 had been transferred out of its accounts into the claimant's account. The respondents did not manufacture that evidence.

Whether the claimant knew that £239, 946.61 had been paid in to her bank account in various amounts between 2011 and 2017.

157. I considered evidence in relation to this and made findings of fact as it was relevant to issues 5 and 6.
158. In addition to the evidence obtained by the respondent I also considered the claimant's responses to questions put to her concerning her bank account records and amounts in her account. The claimant accepted that the money dwarfed the amount received by way of salary, yet did not notice it. She accepted that she had spent the money and in response to a question about how she thought she could afford the amounts she was spending, responded that it was all small transactions, also noting that the spending of the money was not part of the allegations against her.
159. In response to questions about household budget documents which had been saved on to the laptop used by the claimant, she replied that these were a "dreamworld" and "hypothetical"
160. The claimant was also asked about transactions shown from her bank account statements in the bundle and a period of early 2017 was considered. She was asked about significant payments within period to an account that the claimant identified as her husband's account. In January she transferred over £2000 to this account alone. In February she transferred out some £5300 and had transferred in from the account £1500. She maintained that she was unaware that significant additional payments were being made in to her account and maintained that she did not properly check her account even though she was making transfers of these significant amounts and even though her salary payments in to her account were in the order of £2100 - £2200 per month.
161. The page references of the statements on which the claimant was questioned are particularly 548 to 561. I listened to the claimant's responses to the questions in relation to her bank account and considered her evidence when she said she had no idea that there was such a significant amount of additional money in her account and I did not believe her.
162. I also note:-
- 162.1 The claimant's failure to disclose any of the payments. As already noted, the claimant only provided information about payments once they had already been uncovered by the respondent and/or Cybersource and/or the police.
- 162.2 The claimants position that she was not aware of any of the payments at all. The balance of the bank account alone was sufficient to inform the account holder that much more money was going in to the account that she would expect. However, having

regard to the copy statements reviewed which cover the first quarter of 2017 – pages 548 to 561, these payments are striking and obvious. Apart from these payments and the claimant's salary, there are very few transactions by which money is paid in to the account. There are 4 payments wrongly made in January 2017 and 4 in February 2017 each for around or in excess of £1000.

- 163 I find that the claimant did know about the fact that significant regular payments were being made in to her account throughout the period 2011 to April 2017. It is accepted that she did not report these payments to the respondent until after the respondent had discovered them from April 2017 onwards.

The Witnesses

- 164 I did not find the claimant to be a credible witness.
- 165 Further, the claimant's evidence to me did not provide any indication that she was sorry about her having received the amounts that she had from the respondent. She was asked whether any of this had been paid back and she said that it had not.
- 166 There was an increasing amount of contention in the various long and detailed documents that she provided in the course of the respondent's investigation, disciplinary and appeal process. I found that the claimant in providing this documentation, confused and complicated the issues and refused to engage with reasonable and sensible questions put by the respondent. These tactics continued in these tribunal proceedings.
- 167 I found the respondent witnesses to be credible in their explanation of the disciplinary process and the extent of investigation undertaken.

The Law

- 168 The respondent bears the burden of proving on the balance of probabilities that the claimant was dismissed for misconduct, If the respondent fails to persuade me that it had a genuine belief in the claimant's misconduct the dismissal would be unfair. If the respondent persuades me that it held that genuine belief and it did dismiss the claimant for that reason the dismissal is only potentially fair. Consideration must then be given to the general reasonableness of the dismissal under Section 98(4) of ERA.
- 169 Section 98(4) provides that the determination of the question of whether a dismissal is fair or unfair depends on whether in the circumstances including the respondent's size and administrative resources the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing. This should be determined in accordance with equity and the substantial merits of the case.
- 170 In considering the question of reasonableness I must have regard to **British Home Stores -v- Burchell 1978 IRLR 379** and the identified issues guide me through the requirements set by this case.

- 171 Miss Eeley also referred me to the case of **Sainsburys Supermarkets -v- Hitt 2003 ICR 111** which applies the “range of reasonable responses” test to the employer’s investigation process.
- 172 In considering the extent of the investigation and the sufficiency of the process I should take account of the very serious nature of the allegations against the claimant and the possibility that criminal proceedings might follow. Where allegations so serious as are made in this case, it is important that a respondent employer, in considering the extent and sufficiency of investigation and evidence, has regard to the seriousness of what is being alleged and the potential impact on its employee, not just in relation to the employee’s employment with the respondent but also on employability in the future. In the case of the claimant, dismissal for the reasons provided, was likely to have a devastating impact on her employability, particularly in her area of expertise as a fraud manager. The adequacy of the respondent’s investigation and evidence (particularly the extent of objective evidence) has to be considered in this context.
- 173 It is also important that I note that the need for a reasonable investigation, as established by Burchell, applies to the allegations against an employee and to any defences or explanations put forward by an employee suspected of misconduct. It is clear however that a reasonable investigation has its limits and on this and in addition to the Sainsbury’s case noted above, I considered the case of **Shresta v. Genesis Housing Association Limited 2015 IRLR 399** where the following comment was made in the judgment of the Court of Appeal at paragraph 23:-
- To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole*
- 174 That comment was made in the context of a case involving an employee who had been accused of (and then dismissed for) inflating his expenses; and in response to the allegations against him he put forward a wide range of reasons why the mileage claims were as they were. It was decided that the employer was not expected to investigate each and every scenario put forward by the employee and in the context of the allegations being faced by the employee, the employer could consider the evidence “in the round.”
- 175 The authorities require me to focus on the actions of the respondent and decide whether it reasonably and honestly believed that the claimant carried out the acts of misconduct. It is not for me to put myself in the position of the respondent and decide what I would have done. It is not for me to weigh up the evidence and substitute my own conclusion as if I was conducting the process myself. My function is to determine whether in the circumstances the decision to dismiss fell within the range of reasonable responses.

Analysis and Conclusions

- 176 Issue One - What was the reason for dismissal? The respondent's position is that it dismissed the claimant for misconduct which is a potentially fair reason. I find that the reasons for dismissal are those set out in Mr Eastwood's dismissal letter of 11 July 2017 and that those reasons are clearly ones of misconduct.
- 177 Issue 2- whether the respondent honestly believed that the claimant carried out the misconduct alleged? I find that Mr Eastwood honestly believed the claimant had acted as he had found in relation to both allegations (1) the deliberate transfer of monies, by the claimant in to her own bank account and (2) her failure to inform the respondent that substantial monies belonging to the respondent were in her bank account even though she knew the money was there.
- 178 Issue 3 - whether the honest belief was reasonable and based on a sufficient investigation? I find that the investigation was sufficient in relation to both allegations.
- 179 As far as the allegation that the claimant had known the additional £240,000 or so that had been paid into her bank account and did not disclose and repay it, the respondent had interrogated its laptop provided to the claimant to use in the course of her employment and taken in to account information it had found indicating that the claimant did review her bank account and was interested in her financial matters. It asked for and obtained the claimant's account of matters at various meetings. There was no other investigation that the respondent should reasonably have undertaken on this matter.
- 180 As for the first allegation (that the claimant had deliberately transferred the respondent's money into her account) the claimant has claimed that more should have been done to investigate the relevant IT systems used by the respondent in order to make transactions. I disagree. As well as investigating matters internally, the respondent also involved Cybersource throughout the process.
- 181 It is particularly relevant to note that all of the respondent's investigation and evidence obtained pointed to the claimant. Had there been evidence obtained which was inconsistent, (for example if it was apparent that the claimant's log on details had not been used) then, particularly in the light of the seriousness of the allegation, it might have been reasonable to have for example considered the involvement of an independent expert (something which the claimant requested) However, there was no inconsistency. There were a number of instances when the claimant would suggest a possible explanation and the respondent's investigations in to these identified the explanations as not plausible.
- 182 It is also relevant here to note my findings that there was no cooperation by the claimant in the investigation and disciplinary process. The respondent was at times met with a barrage of documentation and complaints from the claimant. The extracts from the claimant's documents which I have set out in this judgment provide some indication of the sort of information that confronted the

respondent throughout the process. I am satisfied that the respondent went to considerable lengths to investigate, not only the allegations but also the explanations put forward by the claimant even when met by the unhelpful, time consuming and disruptive approach by the claimant during the process. The investigation undertaken was sufficient.

183 Issue 4 - was the respondent's reason for dismissal a sufficient one? Here it is necessary to consider whether the dismissal was within the range of reasonable responses. It was and in fairness to the claimant she has not suggested that the outcome of dismissal was too harsh for the conclusions drawn. She has accepted that if she had done what was alleged then dismissal would be appropriate.

184 Issues 5 and 6 – contributory conduct and “Polkey” reduction - On the basis of the findings above, it is not necessary for me to deal with issues 5 and 6. However, having heard the evidence and reached findings of fact, (applying the “balance of probabilities” standard of proof) it is appropriate that I do so.

185 I am prepared to reach a conclusion as to whether, the claimant contributed to her dismissal in not declaring to the respondent that she had received significant amounts of their money in to her account. My finding of fact on this matter is set out at 157-163 above. The claimant's failure to report the fact that she had received this money is very serious misconduct. I agree with the terms of Mr Eastwood's dismissal letter on this point:-

Even if you had not been responsible for transferring those funds, I would have taken your failure to report their receipt by you (bearing in mind the total amount involved, the period over which the monies were received and your role as Fraud Manager) as a matter of misconduct of the most serious kind.

186 The claimant contributed to her dismissal to the extent that, had a finding of unfair dismissal been made, the contributory conduct percentage reduction would have been 100%.

187 I would also have reduced any unfair dismissal compensatory award by 100% had I found any unfairness, for example in the procedure or in relation to the length of time the process (including the appeal) took. Any procedural unfairness would have made no difference whatsoever.

188 Finally, I deal directly with Mr Coetzee's points.

189 A Forensic Expert should have been engaged by the respondent as part of its investigation, I have made a finding of fact about that.

190 Secondly, Cybersource should have been in attendance at the disciplinary and/or appeal hearings. I have made a finding of fact in relation to that.

191 Thirdly, certain additional information or questions should have been put to Cybersource, I have made a finding of fact that the claimant had an opportunity of asking questions and did not take that opportunity up. I have also made

findings of fact in relation to the fact that the respondent returned on a number of occasions to Cybersource with a number of requests.

- 192 Fourthly, Mr Dempsey, the respondent's solicitor was involved in the process and he should not have been. That issue tailed away on the day 4 and I have not noted any specific findings of fact in relation to this but I do note that it is not unusual and certainly not unfair for an employer to involve external solicitors when dealing with very difficult employment issues such as this.
- 193 Fifthly, the claimant should have been provided with final versions of the meeting minutes, I accept that there was an error in relation to meeting minutes that we dealt with in the course of the hearing but I considered this and decided that it is of no significance to the issues.
- 194 Sixthly, proper accounts should have been taken of the comparison between online and hardcopy bank statements. The different ways that information was set out in on line and hard copy statements was dealt with in questions with the claimant and my findings are as I have set out in relation to the claimant's awareness of what was in her bank account.
- 195 Seventh, Mr Eastwood and then Mr Emmett did not consider with any sufficient care and attention the alternative explanations put forward. I find that they did. The disciplinary and appeal hearings were both postponed for a period and further investigations were undertaken. I have made findings of fact in relation to this and reached my decision on the sufficiency of the investigation.

Employment Judge Leach

3 July 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

21 July 2020

FOR THE TRIBUNAL OFFICE

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[JE]