EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr J Choudhury v **Gatehouse Bank plc**

Heard at: London Central **On**: 3, 4, 5 and 9 September 2020

Before: Employment Judge Joffe

Representation

For the Claimant: Mr J Allsop, counsel

For the Respondent: Mr J Jupp, counsel

RESERVED JUDGMENT

1. The claim for unfair dismissal under sections 94 and 98(4) Employment Rights Act 1996 is upheld.

2. Had the claimant not been unfairly dismissed, his employment would have continued for a further two weeks and there is a 20% chance it would have continued for a further 50 weeks thereafter.

3. The respondent made unlawful deductions from the claimant's wages by not paying him a full bonus of 20% of his salary and he is entitled to the unpaid balance in the sum of £8242
4. The claim for unlawful deduction from wages related to the claimant's laptop is dismissed on withdrawal.
5. There was no unreasonable failure by the respondent to follow a relevant Acas Code and no uplift is applied to the claimant's compensation.

REASONS

Claims and issues

1. The claimant brings claims of unfair dismissal and disability discrimination. The issues were agreed at a case management hearing in front of Employment Judge Norris on 1 May 2020 and are as set out below. The issues have been adjusted to reflect the claimant's concession that no Acas Code applied to his dismissal and his contention that there were breaches of a relevant Code in relation to his grievance which could lead to an uplift in any award for unlawful deduction from wages.

Unfair dismissal

i) Was there a potentially fair reason for dismissal?. The respondent's case is that reason was redundancy, in the alternative business reorganisation / SOSR. The claimant's case is that the respondent did not have a fair reason for dismissal.
ii) If so, was the dismissal fair or unfair with reference to section 98(4) ERA?

Remedy

iii) What, if any, compensation should be awarded to the claimant?

I note that this includes consideration of the following issue: if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825;.

Breach of contract/Unlawful deductions (bonus)

iv) Was there any non-payment or under-payment of bonus which was payable to the claimant?
v) Did the claimant previously indicate in writing his agreement or consent to any such deductions being made?

vi) Did a relevant Acas Code of Practice apply, and if so, did the Respondent unreasonably fail to follow the Acas code?

vii) What, if any, uplift should be applied for any failure to follow the Acas Code?

The following additional claim was withdrawn at the outset of the hearing:

Breach of contract/Unlawful deductions (laptop)

viii) Was the respondent authorised to make the deduction from the claimant's salary on account of the claimant's failure to return his laptop computer?

Application to admit late documents

2. On the last day of the hearing, when evidence had been completed and before closing submissions, I was provided with additional documents by the claimant and Mr Allsop applied for those documents to be admitted in evidence. Mr Jupp resisted the application.

3. The documents were:

    a. Two emails between Sharron Harvey and Danesh Mahadeva on 4 and 5 February 2019 relating to the claimant's bonus;

    b. An email from Mr Haresnape to Mr Stockwell, Ms Harvey and Ms Lloyd dated 27 August 2019 with the subject line: Job at Risk - Proposed Redundancy - REVISED WRITTEN SUBMISSION, attaching the claimant's email of 22 August 2019 with Mr Haresnape's comments on that email;

    c. An email from Mr Haresnape to Ms Lloyd and Ms Harvey dated 27 August 2019 saying 'Can I please see any response to JC before it is sent'.

4. In support of the application, Mr Allsop explained that the claimant had found the documents in the documents provided in response to a Subject Access Request he had previously made and which had been responded to well before the hearing; they had not been produced by the respondent by way of disclosure when they should have been. He was critical of the respondent's approach to disclosure generally but I did not have evidence in the basis of which I could fairly conclude that there had been material failures by the respondent.

5. Mr Jupp in response pointed to the unfairness of admitting documents which the claimant had had in his possession since the response to his Subject Access Request in circumstances where the respondent's witnesses were deprived of an opportunity to comment on those documents.

6. I concluded that it would not be in accordance with the overriding objective to allow the late admission of the documents; in particular the parties are not on an equal footing if documents which have been in a party's possession are produced at a point when it is too late for the other party's witnesses to comment on them. Although it would have been possible to list a further day of hearing so that witnesses could have been recalled, neither party urged me to take that course and it would not have been proportionate, unless the documents had been of much greater significance than appeared to me to be the case.

Findings of fact

The hearing

7. I heard from the claimant on his own behalf; for the respondent the following witnesses gave evidence: Charles Haresnape, chief executive officer, Paul Stockwell, chief commercial officer, Sharron Harvey, head of HR, and Amy Lloyd, human resources business partner. Ms Lloyd gave evidence via video link.

8. I had a bundle of over 700 pages, and the claimant's statement alone ran to some 48 pages. On the second day of the hearing, I was provided with a complete transcript of some recordings of telephone calls between Mr Haresnape and Mr Stockwell on 4 June 2019 and the associated sound files. The transcript was prepared by the respondent and marked with areas of disagreement by the claimant. I had previously been provided in the bundle with the claimant's transcript of parts of these telephone calls. I listened to the sound files in order to consider the points of disagreement in the transcript to the extent that these appeared to be material.

9. The hearing was listed for three days which was intended to include reading time and time for deliberation and judgment. In the event, submissions had to be heard on a further occasion and judgment had to be reserved. I observe that the parties should have reviewed the listing when the extent of the evidence became apparent and requested a longer listing.

Background

10. The respondent was described to the Tribunal as 'a socially responsible challenger bank', operating in accordance with Shariah principles. It is part of a group of companies (the Gatehouse Financial Group), which also includes Gatehouse Capital, a real estate investment and advisory firm based in Kuwait. The respondent provides commercial and residential real estate finance products and savings products; it sources and advises on UK real

estate investments, particularly in the build to rent and private rented sector (‘PRS’).

11. I was told that the respondent had, since 2018, been focussing more on home buyer and buy to let home purchase plans, a Shariah-compliant alternative to mortgages, and that this was now the core area of business for the respondent.

12. The respondent has a Shariah Advisory Board which reviews the respondent’s products and oversees it operations, to ensure that they are compliant with Shariah principles.

13. The respondent has some 133 employees, 62 of whom are based in the head office in London.

14. The respondent’s HR arrangements up until summer 2019 were that HR services in addition to those provided by Ms Harvey as Head of HR were provided by an organisation called the Curve Group. From 4 July 2019, the respondent also employed Ms Lloyd as HR business partner.

15. The claimant has had an extensive career in investment banking. The claimant commenced employment with the respondent on 20 May 2015 in the role of vice president, senior transaction analyst. He worked with the respondent’s real estate investment team (‘REIT’), which was responsible for sourcing, managing and advising on real estate investments. Gatehouse Capital would raise the equity for these transactions.

16. The claimant was promoted to vice president, real estate investment, in April 2017. Mr Haresnape became chief executive officer in May 2017. He is a member of the Board of Directors and leads the Executive Team.

17. Mr Stockwell became chief commercial officer in July 2017. He was the claimant’s line manager. In January 2018, the claimant was promoted to head of alternative real estate. In March 2018, the head of real estate investment advisory, Will Lowndes, left the respondent’s employment. That role was merged with the claimant’s role and the claimant’s job title changed to head of real estate. In this role, the claimant managed the Real Estate Investment Advisory (‘REIA’) team.

18. The respondent at relevant times managed two PRS funds and, by the summer of 2018, was seeking to source equity for a third fund – ‘Project Gamma’. Price Waterhouse Coopers (‘PwC’) was supporting the raising of equity for that fund. The REIA team conducted investor presentations and the claimant was leading the project. The aim was to raise equity of £110 – 150 million and there was a process of sourcing a ‘seed portfolio’ of new build properties so that the fund could be deployed quickly once the equity had been sourced. Project Gamma would have produced significant revenue for the respondent and was a very important part of the claimant’s role during the latter part of his employment.

19. By the time of the claimant's dismissal, the REIA team consisted of: the claimant; an associate, Mustafa Dubaissi (on a salary of £65,000); two asset managers, James Grigg (on approximately £70,000) and John O'Toole; an investor relations manager, Talal Al Othman (on approximately £40,000); a PRS consultant, Edmund O'Kelly (on £70 – 80,000); and team support, Tabita Manolea. Mr Dubaissi joined the respondent in April 2018. He had less professional experience than the claimant and did not have investment banking experience.

20. Mr O'Toole was appointed in August 2018. He has a Royal Institution of Chartered Surveyors ('RICS') qualification. Traditionally the asset manager role at the respondent required a RICS qualification and the person specification the respondent had used in recruitment for the role required such a qualification. The claimant in oral evidence said that he had removed that requirement from the role when he was recruiting. He said that the respondent's chairman favoured individuals from a banking background and that his team did not perform the detailed day to day running of properties but gave strategic advice, so the RICS qualification was unnecessary. He said that much of the strategic work performed by asset managers did not require the RICS qualification.

21. Mr Stockwell said that a RICS qualification had always been required for the asset manager role and that this was an industry standard. The respondent produced an email from Mr Stockwell to the respondent's HR consultants dated 23 April 2018 which showed that two roles were being recruited to at that time. For one role, 'VP asset manager', the RICS qualification was required. For the other role 'VP – alternative real estate assets' a RCIS qualification was 'strongly preferred'. The claimant himself did not have a RICS qualification. It appeared to me from the evidence that some but not all of the asset manager functions required a RICS qualification.

22. The functions of the REIA team included sourcing real estate transactions, recapitalising Project Thistle, one of the two existing PRS funds, and seeking to raise equity for Project Gamma.

The claimant's contract of employment

23. The claimant's contract of employment provided at clause 5.3:

"You may be eligible to participate in the Company's share or bonus schemes established by the Company from time to time. Any eligibility to participate in such a scheme is subject to the rules of the relevant scheme and at the entire discretion of the Board. Further, the operation of any such scheme will be at the absolute discretion of the Board who may in its absolute discretion, terminate, replace or amend any such scheme."

And at 5.5:

"The bonus provisions under this Agreement confer no contractual right nor shall it be deemed to become part of the contractual remuneration or salary for pension purposes or otherwise. Receipt of a discretionary bonus in one year creates neither right to nor expectation of any bonus in the next year."

The claimant's bonus

24. In July 2018, the claimant told Mr Stockwell that he was thinking of leaving the respondent as he was not paid enough and Mr Stockwell increased the claimant's salary to £130,000.

25. There was also a discussion about a bespoke bonus scheme. The claimant suggested in cross examination that the detail of the targets was not discussed with him but there was no suggestion in his witness statement that he was not aware of the detail of the bonus terms

26. On 1 July 2018, Mr Stockwell submitted a paper to the respondent's Remuneration and Nominations Committee ('RemCom') recommending a bonus structure for the claimant of up to 150% of his salary divided between three elements: 'The Head of role carries significant responsibility given the enhanced activity and incremental income above budget is likely to be £1 m from REIA this year and over £10m per annum over 4 years from PRS…

    Bonus capped at 150% with three core financial elements:

    - £60 million REIA transaction: 20%
    - Completing the new Thistle strategy: 55%
    - Concluding the Project Gamma equity raise: 75%.'

27. The intention was that the claimant would complete these three targets in 2018.

28. Thistle was one of the respondent's two existing PRS funds. In 2018 it became necessary to recapitalise the fund. The claimant was leading this process.

29. The claimant had a mid year appraisal in August 2018. The document recording the appraisal contained a number of objectives, including completing a commercial real estate transaction. The agreed measurable outcome for this objective was 'successful execution of at least one commercial real estate transaction generating a good level of Day 1 and ongoing fees.' The appraisal document does not make reference to the claimant's bonus.

The claimant's relationships with Mr Stockwell and Mr Haresnape

30. The claimant's evidence was that he felt Mr Stockwell did not have sufficient experience of commercial real estate. It was clear that the claimant had little respect for Mr Stockwell and his abilities. The claimant also said that members of his team lacked respect for Mr Stockwell

31. Mr Stockwell's evidence was that there were times when the claimant could be difficult to deal with but he felt he could work through the issues as they arose and maintain a good working relationship.

32. Mr Haresnape said the claimant was not a direct report of his and he did not have much day-to-day contact with him. It was a business relationship and he neither liked nor disliked the claimant. The only 'cross words' they had related to the Christmas issue discussed below.

33. The claimant said that a number of matters arose in late 2018 and early 2019 which caused a deterioration in his previously good relationships with Mr Haresnape and Mr Stockwell, caused animosity towards him and, he believed, led ultimately to his dismissal.

Issue relating to the claimant's holiday

34. In the 2018 calendar year, the claimant was contractually entitled to 28 days of holiday. He had also had permission to carry over a further 23 days of holiday which he had been unable to take in 2017 because of pressure of work. A plan was agreed whereby the claimant would use up his holiday in tranches over the course of the year but, because of pressure of work, this plan was not adhered to.

35. In September 2018, the claimant had a discussion with Mr Stockwell about his outstanding leave. The claimant offered to take leave additional to that which he had booked in September and a discussion ensued about whether the claimant could carry days of leave forward or be paid for untaken leave.

36. On 4 December 2018, Ms Harvey sent an email to all staff which included the following:

'Annual Leave Carry Over

The maximum amount of carry over permitted from one annual leave year to the next is 5 days, which must be utilised by 31 March of the new annual leave year. Payment will not be provided in lieu of unutilised annual leave. Any leave which is not utilised by 31 March of the new holiday year will be lost, with no additional permissions granted to retain the days for an additional period of time. As previously mentioned, you are encouraged to use your annual leave from a wellness perspective. It's important to take time away from the office environment to rest and recuperate.'

37. This was the third reminder about annual leave carry over restrictions, previous emails having been sent on 3 September 2018 and 14 November 2018.

38. The claimant had email correspondence with Mr Stockwell on 4 December 2018 (when the claimant was on leave), citing their conversation in September 2018 and expressing a preference to carry forward leave rather than being paid for it. Mr Stockwell suggested that they discuss the matter when the claimant returned from leave. He later in the discussion said that he would speak with HR about whether the claimant could carry the leave forward. Ms Harvey confirmed that the leave could be paid for.

39. In December 2018 there were a number of important presentation meetings scheduled on Project Gamma which the claimant was due to attend.

40. On 5 December 2018, the claimant wrote to Mr Dubaissi in relation to these meetings, copying in Mr Stockwell:

‘With deep regret, it looks like I will be unable to attend any of the upcoming meetings. Best to pick up with Paul and PwC whether to reschedule for the New Year or Paul filling in my place.’

41. Mr Stockwell emailed the claimant on 6 December 2018:

‘Given the importance of Gamma, I would prefer that you attend these presentations and we pay you the full amount for lost holiday.

Please let me know your preference ASAP in case we have to cancel meetings.’

42. The claimant was still on leave at the time. He emailed Mr Stockwell back that day:

‘My position has always been that I will prioritise business needs on the understanding that there will be a sensible and fair discussion - this is how I work and I assume people honour their word. This is exactly what I said to you on 4 September in the conversation which less than 48 hours ago you had no recollection of taking place.

We spoke outside the 1st floor lifts and when you mentioned being paid out for unused holidays, I did say my preference would be carry forward but we can have a sensible discussion about it at a later date. The understanding was that everyone would act reasonably, sensibly and fairly. I didn’t pursue it any further as the focus was pushing full speed with Gamma - which to date with a 3 man team of myself, Mustafa and Ed, we have done very well.

So it was very disappointing that the conversations 2 days ago turned into “he said/ she said” and had I not had the private WhatsApp message from Danesh which confirms my version of events, I would have been severely “done over”.

I have always maintained that being paid out for holidays is not my preference. I am taxed at my marginal rate - whereas when I take holiday, my pay is deducted at my average rate of tax which is lower. Also, I value leisure at a

greater price than the net post tax daily rate - as such, my preference will always be skewed towards carrying forward rather than being paid out.

I have suggested something which I thought was a very fair and reasonable proposal i.e. being allowed to carry an additional 5 days on top of the 5 which is within policy i.e. carrying 10 days. However, it is disappointing that this has not been considered acceptable.'

43. Mr Stockwell had forgotten the conversation he had had with the claimant about leave in September 2018. He wrote further on 6 December 2018:

'I honestly didn't remember the conversation with you on the 4th Sept — this is no surprise given how busy we all are and everything we are trying to achieve in the bank. As soon as I realised I was wrong I apologised to you.

I appreciate all the work you and the team have done this year. I made that clear on many occasions including at the GHB gathering. In addition, I have worked hard to get your bespoke bonus in place with the board that is far superior to the generic scheme.

Clearly, we need to recruit more people in your team to provide support and we will move ahead with that now the budget has been approved.

I am not sure it's your intention but you may need to think about the tone of your emails.

Please discuss with Sharron and confirm any further holiday requests ASAP.'

44. The claimant was ultimately paid for his unused holiday in circumstances where he would have preferred to carry the holiday forward. In emails in December 2018 to Ms Harvey he raised concerns about the potential adverse health consequences of not being allowed to carry his untaken leave over to the following year. The claimant then disagreed with Ms Harvey as to the calculation of his daily rate of pay for the purposes of the calculation. Ms Harvey suggested that the matter be escalated to Mr Haresnape and on 27 December 2018 she sent Mr Haresnape a summary of the email correspondence with the claimant.

45. The claimant's view was that his exchanges with Mr Stockwell had led to a considerable breakdown of their relationship; he pointed out to the Tribunal that Mr Stockwell had been critical of the tone of some of his emails.

46. I was also shown some WhatsApp messages between the claimant and members of his team in which the claimant mocked Mr Stockwell and reflected on what he perceived to be Mr Stockwell's lack of talents; these included a

picture of Laurel and Hardy captioned ‘That's Stockwell & Haresnape’. The claimant said in his witness statement that other direct reports of Mr Stockwell and his own team had a running joke about Mr Stockwell being a paper pusher who just copied and pasted other people’s work. He said: ‘Paul Stockwell eventually became aware that the team, and that included me, indeed I did not think much of his abilities’

Issue relating to Silver Noisy

47. Silver Noisy was a legacy loan for a real estate asset in Paris with reducing income from tenants. After a restructure in December 2017, the largest tenant gave notice.

48. The claimant agreed to temporarily take on the role of sole controller of the Silver Noisy SPV in late 2017. Under French law he became the ‘gerant’ of the Silver Noisy entity and president of Divone, the parent company of the Sliver Noisy entity. These roles exposed the claimant to personal liability under French law. The respondent had received advice from Allen & Overy as to the French law implications of these roles.

49. The claimant said that he was concerned about his potential liability in late 2018 because the asset was in poor condition, there was civil unrest in France at the time and there could be injury to a member of the public such as a protester if roof tiles fell.

50. On 19 December 2018, the claimant wrote to Mr Mahadeva, CFO, copying in the respondent’s general counsel, Mr Chowdhury, and Mr Stockwell:

‘Please can you confirm the level and extent of PI cover I have in my capacity as Manager / Gerant of Silver Noisy and President of Divone.’

51. On 20 December 2018, the claimant forwarded his request to Ms Harvey. Mr Mahadeva replied that day saying that there was £10 million public liability cover.

52. The claimant wrote back to Mr Mahadeva that day:

`Thanks - please can you send full details outlining the level of cover, exclusions etc and confirmation of my specific cover.’

53. The claimant chased a response on 24 December 2018. Mr Mahadeva wrote back within an hour attaching the policy.

54. The claimant replied shortly after:

‘I can see the Policyholder is Gatehouse Financial Group and Gatehouse Bank — so what's the mechanism by which this policy extends to Silver Noisy and Divone?

In particular, as Gerant/ Manager of Silver Noisy and President of Divone, how am I covered against the risks outlined below?

There is particularly strong concern about criminal liability arising from health and safety breaches pursuant to the French Criminal Code. This is especially concerning given that there is capex requirement at the asset which currently is not being funded and as such may constitute criminal offence before the French criminal courts.'

55. He then copied in information about his potential civil and criminal liability under French law taken from the Allen & Overy advice, although he did not expressly say that that was where the information came from.

56. The claimant emailed Mr Stockwell asking for assurance that he would be indemnified by the respondent; he also left him telephone messages on the afternoon of 24 December. Mr Stockwell rang him back and left a voicemail and also sent an email saying he would ask Mr Chowdhury to review to ensure there was adequate insurance cover for the claimant.

57. The claimant replied asking for an assurance that he would be indemnified. He then telephoned Mr Stockwell on the morning of 25 December and sent further emails asking about the indemnity issue. Mr Stockwell responded by email to say that the respondent would fully indemnify the claimant.

58. On the evening of 25 December, Mr Haresnape, who had been copied into the correspondence, wrote to the claimant:

'Do you realise that for many today is a festive period and your emails could have waited until after tomorrow.

Please think about this.'

59. The email copied in the executive committee team. After the claimant wrote back explaining why the matter could not have waited, Mr Haresnape sent a further email asking the claimant to make an appointment to see him when Mr Haresnape was next in London 'as there are a few things I wish to discuss'.

60. Mr Stockwell sent Mr Haresnape a summary of the email exchanges and telephone calls about Silver Noisy on 27 December 2018.

Meeting with Ms Harvey

61. On 26 December 2018, the claimant emailed Ms Harvey asking if he could have a meeting when she was back in the office. He wanted to discuss his diagnosis with Crohn's Disease and the fact that work stress, including the Silver Noisy issue over Christmas, was causing flare ups.

62. The claimant and Ms Harvey met on 28 December 2018. They discussed the holiday issue and the Silver Noisy issue.

8 January 2018 meeting with Mr Haresnape

63. Mr Haresnape met with the claimant on 8 January 2019. The claimant made handwritten notes after the meeting.

64. There was a conflict between the claimant and Mr Haresnape as to the content of the discussion about the Christmas day emails exchanges. Mr Haresnape said he told the claimant that he was annoyed that the claimant had disturbed him on Christmas day and that he said that he was sure that the claimant would not like it if he disturbed his Eid celebrations.

65. The claimant recorded in his notes and gave evidence that Mr Haresnape had said that if there was anything he considered important, he would call the claimant on Eid and disrupt his Eid. The claimant described Mr Haresnape as expressing deep annoyance and anger. The claimant's account in his handwritten notes suggests a rather heated meeting during which the claimant suggested, with respect to Mr Haresnape's suggestion that the communications on Christmas could have waited, that perhaps Mr Haresnape did not value his life as much as the claimant or did not value his family and would be OK being imprisoned and taking showers in a French prison. I observe that it may be that the claimant had lost some perspective on the issue at that point. The respondent would not have been able to indemnify the claimant in respect of potential criminal liability so some of what the claimant was saying was simply not rational.

66. In his witness statement, the claimant gave an account of his role in the meeting which did not mention these latter remarks. He said that he 'resolutely stated that with the exposure to civil and criminal liability, it was a matter of utmost concern to me and my family. I stressed and reiterated that as I was acting in a personal capacity. I agreed that if I was acting as an employee of Gatehouse in the matter then I would not have been so personally involved, and I would simply have been able to press for responses to discharge my duties as an employee, but if no response was forthcoming from Senior Management, there would be nothing further for me to do.'

67. There was also a discussion about the holiday issue which had arisen. Mr Haresnape asked if the claimant had written proof of an agreement with Mr Stockwell to carry over holiday into the following year. The claimant asked if he would need to record conversations in the future.

68. The claimant's view was that Mr Haresnape regarded him as a difficult character after this meeting. Certainly the meeting was fractious. Mr Haresnape agreed to take on the gerant role in relation to Silver Noisy and the role of president of Divone.

69. So far as the holiday issue was concerned there were emails on 17 January 2019 between the claimant, Mr Stockwell and Mr Haresnape. The claimant

asked if he could carry forward five days of leave additional to the five allowed by company policy and was told he could not and that the issue was closed.

Email policy

70. On 25 January 2019, Mr Haresnape sent an email to 'all office staff' about 'our culture' which included the following:

'Email policy. There is very little need for all of us to send emails during the evenings and it is vital to ensure we all have a work/life balance. Going forward, Exco [the executive committee] will not send emails out after 6.30pm and will not expect to receive any. We also are not keen on email traffic over the weekends. Clearly if genuinely urgent issues arise we can be contacted on mobiles.'

71. Mr Haresnape's evidence was that he would exercise discretion to send emails outside of those hours when he believed a matter was 'of vital importance'.

Shariah conflict issue

72. A quarterly Shariah Supervisory Board Meeting was held on 29 January 2019 in Kuwait. The claimant gave evidence that Mr Haresnape was annoyed by the suggestion of the Shariah scholar, Mufti Muhammed, that the activities of the REIT were not Shariah compliant. He said that Mr Haresnape sought to stop the claimant explaining the issue to other Board members. Mr Haresnape denied that this had occurred; he said that Mr Mohammed had raised questions but had not said that the activities were not Shariah complaint; he had not cut across the claimant and the transactions had been approved by the Board.

73. The claimant said that his support for Mr Muhammed added to the conflict between himself and senior management.

Project Thistle conflict issue

74. Project Thistle was an existing PRS fund set up by the respondent. It had its own board. It had a lettings management agreement with a company called SDL. In late 2018, the respondent purchased a stake in a lettings management company, Ascend Properties. The respondent advised the Project Thistle board to terminate the SDL agreement and appoint Ascend Properties instead.

75. The claimant gave evidence that he considered there was a conflict of interest in recommending the move to Ascend Properties.

76. I was not provided with documentation on this issue. The claimant said that he was a voting member of the Investment Committee and that the terms of reference required unanimity if the Committee met by email. I understood the gist of the claimant's evidence to be that he had expressed concerns that the change to Ascend was in breach of the respondent's fiduciary duties and declined to support the plan. The claimant said that an investment paper on the issue was prepared by a consultant, Paul Belson, and approved by the respondent's Investment Committee during February 2019 whilst the claimant was on leave.

77. Mr Haresnape's evidence was that the claimant was not a voting member of Investment Committee and that unanimity was not required in these circumstances. A recommendation was made to the Project Thistle board which it accepted. Mr Stockwell said that the result of the recommendation was favourable for the fund, which benefited from increased rents and reduced voids, and that the respondent had good governance around these issues. It was apparent from Mr Stockwell's evidence that he did not perceive the claimant to have raised any significant concern about this issue. The claimant had not sought guidance from the respondent's compliance team.

78. The claimant did not raise any allegation of breach of fiduciary duty with the FCA at the time when he says he was concerned about the alleged conflict of interest.

<u>11 February 2019 appraisal meeting</u>

79. The claimant did not meet any of his bonus targets in in 2018, but the underlying projects were ongoing and the claimant had done a lot of work towards them. Mr Stockwell and the claimant had an appraisal meeting by conference call on 11 February 2019, in the course of which it was agreed that the objectives and the attached bonus would be carried forward into 2019.

80. The call was recorded and the transcript reads:

'Mr Stockwell: OK so my proposition to you is obviously what we have agreed with you on your bonus is for last year and we did not quite get there but what we should do is just roll it on to this year.

But what we would do is basically say, ok, so you've got your potential 150(%). If you do The Mint, then you get your whatever weighting we agreed for The Mint. If you get Thistle we give you this.

We give it to you when it closes

Claimant: OK Fine

Mr Stockwell: So, if you close the Mint in for example February and it's all legally done and everything else then you will get paid the following month the allocation for The Mint

Claimant: OK, OK

Mr Stockwell: If you close Thistle the following month, you get paid the allocation for Thistle

Claimant: Sure, sure

Mr Stockwell: And if you close Gamma in June or whenever, you get paid the following month for Gamma.

That's the proposal that we've done. So we've said, look, we appreciate that you didn't do it last year. But, however, we do appreciate that you did do a lot of work and we don't see why we would change anything. We just roll it on to this year and we would just basically extend your time frame to close on the deals.

Claimant: Yeah – ok, that sounds reasonable

Mr Stockwell: So that's what we've done.

So you won't get the standard bonus like everyone else will get in March. Some of the sales guys got it in January. So, you won't get the standard one in March. But you will get it in if you close the Mint off, you will get the Mint one as soon as it is closed the following month. And the same for the other two elements

Claimant: OK - That sounds, no that's fine

Mr Stockwell: OK- what we then need to do is once Gamma is closed off, fingers crossed on that, we just need to revisit it again and set some bonus targets around other objectives.

Claimant: Yeah – ok

What was the, remind me what the weighting was?

Mr Stockwell: I can't remember it but I think it was, I think it was 75%... So it was 150% Bonus.

Claimant: Yeah, yeah, yeah

But just the weighting across the three.

Mr Stockwell: I think it might have been 75(%) for Gamma, 50(%) for Thistle and 25(%) for The Mint.

Claimant: OK OK, Fine… Yeah, yeah, yeah

Mr Stockwell: It was something like that.'

The Mint is an office building in Leeds.

81. The claimant said that he and Mr Stockwell had agreed that acquisition of The Mint would meet the requirements of the commercial real estate target.

82. On 12 February 2019, Mr Stockwell added the following to the claimant's appraisal document under the hearing 'Financial Targets for the Next 12 months':

'Silver Noisy - Complete restructure with DPK

Huntingdon - Create and execute lettings or sales strategy

Aberdeen - Create and execute re-finance or sales strategy

Gamma - Close JV Fund (Income ca £1.5M for 2019)

UK PRS - Identify new sites and deploy funds Improve reporting to KIA

The Mint or an alternative transaction - Close purchase (Income ca £750K)

Thistle - Re-structure and complete recapitalisation (Income ca £375K)

CRE Shariah Fund – 2019- Support where required the migration of Thistle and UK PRS properties from SDL to Ascend

Monitor 10 Queen Street and maintain contact with Tabung Haji (Potential income of £1.5M)'

83. The claimant's appraisal was positive.

84. Mr Stockwell suggested in oral evidence under cross examination, although not in his witness statement, that there had been an agreement that the objective in relation to a real estate transaction was altered to be a requirement that the claimant achieve a transaction which earned £750,000 for the respondent.

85. There was no evidence that there was any discussion about there being a relationship between what Mr Stockwell wrote in the appraisal document and the triggers for the claimant receiving the different parts of his bonus and in submissions the respondent did not pursue a case on this basis.

<u>March 2019: Core values issue</u>

86. The claimant said that there were some senior leadership events in March 2019 for non-Exco (executive committee) team heads. At one of these events, the claimant said that there was a discussion about the respondent's recently published 'core values'. The claimant expressed the view that no one believed in the core values and that they were just soundbites designed to look good on the website / corporate brochures / annual reports.

87. Subsequently, Mr Haresnape said in one of his Friday blogs (29 March 2019): 'Anyone who thinks our values are purely for the annual accounts statement needs to consider whether they are "on the right bus".' Mr Haresnape said he was unaware at the time of any criticism made by the claimant and the statement in the blog was not referring to the claimant.

Salary increase

88. The claimant received a 2% salary increase in April 2019. He said that this was the respondent communicating to him that he was a troublemaker and not an employee it wished to retain and motivate.

89. The respondent's evidence was that the claimant's pay rise was consistent with that of others in the organisation. The claimant had had a pay rise of 13% in June 2018.

Project Gamma: May - June 2019

90. By June 2019, there had been something in the order of 15 investor presentations to try and find investors for Project Gamma. The main and possibly only realistic hope for investment was the Carlyle Group ('Carlyle'), which had agreed Heads of Terms.

91. In May 2019, Carlyle requested a tour of potential real estate sites and representatives from the respondent, its advisers, PwC, and Carlyle went on the tour.

92. An important meeting was held with Carlyle on 3 June 2019. This was the last day of Ramadan, which the claimant was observing. The respondent's policy was not to require employees observing Ramadan to attend meetings after 4 pm. It was not suggested by the claimant that he objected to going to this particular important meeting.

93. The meeting involved the claimant, Mr O'Kelly and another colleague, Guy Johnston, from the respondent and several individuals from PwC as well as representatives of Carlyle.

94. Mr Stockwell asked the claimant prior to the meeting to update him as soon as the meeting ended. When he had not heard from the claimant, he sent an email to the claimant at 7:06 pm asking 'How did meeting go?'

95. The meeting had ended at 7 pm. The claimant said that he was in an exhausted state after a month of fasting and went straight home to sleep before breaking his fast. He received Mr Stockwell's email whilst travelling home but chose not to respond as he was very tired. He says he was also complying with the respondent's policy restricting email traffic after 6:30 pm.

96. The claimant's team had a WhatsApp group called 'PRS Boyz' . The claimant sent a screenshot of Mr Stockwell's email to the group, saying 'It's after the 7 pm cut off so I will not be responding'. This was a reference to the policy that ExCo would not send email after 6:30 pm. Mr Dubaissi asked how the meeting had gone, and the claimant messaged him about that. It was put to the claimant that he found time to boast on WhatsApp that he would not be responding to

Mr Stockwell but did not find time to respond to him, and that he wanted to make him wait because he had no respect for him. The claimant said that he was looking at WhatsApp on his phone on the train and he needed to compose a lengthy email on a laptop in response to Mr Stockwell's enquiry; this was the reason he had not replied but had responded to his colleagues.

97. On the evening of 3 June 2019, it was decided that Eid would be 4 June 2019. The claimant sent Mr Stockwell holiday requests for 4 June 2019 and another date late on the evening of 3 June.

98. Just after 6 am on 4 June 2019, Mr Stockwell emailed the claimant and other members of his team asking for an update on the meeting and saying he needed to inform Exco and the chairman what was happening with Project Gamma.

99. Mr O'Kelly responded shortly after 9 am that Carlyle had turned into a 'slow No'. Later that day Mr Stockwell asked if Carlyle were definitely not going to invest and the claimant emailed him shortly after midnight saying that Carlyle had not definitely ruled itself out but 'we are up against it'. He set out some further detail of what had occurred at the meeting.

100. The claimant was on leave for Eid on 4 June 2019, attending mosque and visiting family and friends.

101. Mr Stockwell spoke to Anna Clapton from Curve on 3 June 2019 to discuss potentially restructuring the REIA and Real Estate Finance ('REF') teams. He said that this was because it was beginning to look unlikely that Carlyle would invest in Project Gamma.

<u>4 June 2019 discussion between Mr Haresnape and Mr Stockwell</u>

102. Also on 4 June 2019, Mr Haresnape and Mr Stockwell had the telephone conversations in respect of which I was ultimately provided with sound files and a complete transcript with some disputed areas. The conversation is important to an understanding of Mr Stockwell and Mr Haresnape's decision-making in connection with the redundancy process which followed.

103. During these calls, Mr Stockwell reported to Mr Haresnape what Mr O'Kelly had told him about the Carlyle meeting on 3 June. He described a potential deal with Carlyle as 'dead in the water'.

The conversation continued:

'Mr Stockwell: So I think what we do, what we do is, we restructure it now, we get on with it, we let PwC carry on and if they come up with someone then great. He says that he is proposing to let the consultant Guy Johnstone go.

I'm gonna do the restructure which would include basically letting go Joynal, Tabita and one of the asset managers.'

Mr Stockwell said that he did not want to restructure REF at the same time as it would cause too much disruption. There was then a discussion about the asset managers in which Mr Stockwell said that he needed one to manage assets including property in Aberdeen:

‘Yeah because you got all the, you’ve got the refinancing and all that sort of stuff. I would keep Mustafa [Dubaissi]. He’s not all that well paid

Mr Haresnape: Yeah

Mr Stockwell: So I would keep him, and to be honest with you if we do Carlyle or if we do another Gamma and we try to do that, he would be good for that.’

He went on to suggest that Mr O’Kelly could do the ‘PRS stuff’. Mr Haresnape then said that he agreed with Mr Stockwell about the restructure and that they should ‘crack on’ with it. Mr Stockwell said that Anna Clapton, at the HR consultants Curve, was of the view that ‘we just make them redundant… that we compromise’. He referred to some ‘next steps’ that he had sent Ms Clapton the day before and had just sent Mr Haresnape.

‘Mr Stockwell: So don’t mention names or anything, just send it like that, so I’ll send that to her and the next step is she has got someone in Curve, that is their person that does all of this stuff.

Mr Haresnape: Yeah nah, that’s good, good I think, to be honest the Gamma bit’s [inaudible] an absolute pain in the arse, [inaudible] getting shot of that team once and for all is a positive thing.

Mr Stockwell: He is such an….. he’s an arsehole to be honest with you Joynal [the claimant] is, cos when Gamma was going well, he’s arrogant, he’s full of it oh yeah we’re gonna do this, we’re gonna do that, when Gamma’s not doing well, it’s like it’s falling apart, he goes under the radar, and he, like last night, so for example, like I said good luck on the meeting let me know how it goes, ring me afterwards, nothing. So last night I emailed him late last night and said what’s going on with Gamma, you need to give me an update I got.

The connection was then lost and the conversation continued in a further phone call:

‘Mr Stockwell: Yeah so last night, basically so last night I erm umm, I, before they went to the meeting, I said let me know as soon as your the meeting is over, let me know meeting finishes what’s going on, it’s a critical meeting

Mr Haresnape: Hmm

Mr Stockwell: So I don’t hear anything, so I email him late last night saying what’s going on, give me an update, he doesn’t reply to me at all, then I get two holiday requests come at 12 o’ clock at night from him.

Mr Haresnape: Jeez

Mr Stockwell: So he is quite happy to send his holiday requests to me

Mr Haresnape: So don't forget he was the guy hassling us on Christmas Day. You remember?

Mr Stockwell: Yeah, yeah

Mr Haresnape: Pain. Yeah – pain in the arse.Yeah

Mr Stockwell: But he won't send me an email with an update on it

Mr Haresnape: Yeah, cos it's not very good news is it

Mr Stockwell: Yeah, no that's right, so this morning I have to get an update from Ed, yet he has been leading on this project for 12 months

Mr Haresnape: Yeah

Mr Stockwell: And he can't give me an update. Even if it's bad news you need to call it out and say

Mr Haresnape: Tosser

Mr Stockwell: Yeah, he is

Mr Haresnape: Yeah, cos it's now Eid as far as he is concerned and therefore this is dead important probably as well, unlike Christmas for us, which was not important in the slightest

Mr Stockwell: Yeah

Mr Haresnape The bloke's a tosser

Mr Stockwell: Yeah, no yeah he's gone now, that's it, we don't need him anymore.'

A further phone call occurred later that day in which Mr Haresnape proposed to ask PwC to ask Carlyle for a definite yes or no in relation to Project Gamma.

'Mr Haresnape: Let's do it, cos then if the answer is no, it's an absolute bummer after 12 months, but it ain't gonna change is it, so it is what it is, I think we can just then move on, as you say, we need to move pronto on getting those boys out the door…'

Mr Stockwell said that he was finishing off a structure chart to send to Ms Clapton and Mr Haresnape.

'Mr Haresnape: The sooner we can exit, the sooner we can action that plan then the better innit really

Mr Stockwell: Yeah I agree

Mr Haresnape: Cos these boys are costing us every month they're still here, pains in the arse

Mr Stockwell: Yeah they are.'

They then discussed the fact that the claimant would be entitled to his bonus for the Mint transaction, because it was completing, but that he would not get 'a penny' of the rest of his bonus.

104. Mr Haresnape and Mr Stockwell both said in evidence that the language used about the claimant in these conversations reflected frustration about the claimant's failure to update promptly about the 3 June meeting.

105. At 5:34 pm on 4 June 2019, Mr Haresnape emailed the claimant asking for an urgent update on the 3 June meeting. The claimant considered that this was Mr Haresnape deliberately interrupting the claimant's Eid celebrations as, on the claimant's account, he had threatened to do at Christmas.

Further work on Gamma

106. The claimant said that in June 2019, there were conference calls with an equity-raising firm in the Middle, East, Greenstone Equity Partners ('Greenstone') to source investors for Project Gamma. Greenstone were retained by the respondent at some expense. Mr Stockwell wrote to Greenstone on 10 July 2019 saying that 'we really think we can deliver on the Gamma project given the fundamentals and demand for low risk returns'. This was in the context of trying to negotiate a lower retainer fee. The claimant said this was evidence of an agreed strategy to proceed aggressively with Project Gamma.

107. Mr Stockwell said in evidence that once it became clear that Carlyle were not going to invest, it looked unlikely that Project Gamma would come to fruition. This had been a primary focus of the work of the REIA team. Another focus of the team was to source real estate investments for Gatehouse Capital. Gatehouse Capital had traditionally raised capital for investments from the Gulf states region. In recent years it had become more difficult to attract investors given the available returns. There was one such transaction in 2017 and one in 2019 – The Mint. There were no such transactions in 2018.

108. Mr Stockwell said that, with no investment in Project Gamma and little likelihood of future real estate transactions, the REIA team was left with collecting asset management fees from legacy transactions. Project Gamma would have generated income for the respondent in the order of millions of pounds. Whilst there would still be some effort to attract investors to Project Gamma there was no great optimism that these would come to anything (Mr Haresnape said that it was 'extremely unlikely' by this point that investors would be found) and there was a limited amount of work to do following up less promising leads. The REIA team was costly. Although the REIA team was not itself making a loss, the respondent as a whole was and was predicted to make a loss of £2.1 million in 2019. The REIA side received ongoing assert management fees which the claimant said were in the region of £1.8 million per annum. Mr Stockwell said

that these fees were diminishing. In addition in 2019, there were significant sums received from the recapitalisation of Project Thistle and the Mint transaction which would not be repeated. Essentially the cost of the team was not justified if Project Gamma was not going to materialise.

109. The respondent's intention was to grow the retail side of its business and for the REIA side to gradually become a smaller part of the business. It had been building a big retail book and employed about 50 staff with retail experience.

Galliford Try

110. The claimant gave evidence that on 19 July 2019, he agreed Heads of Terms for a PRS transaction on a project with a counter party called Galliford Try. The transaction completed in June 2020.

Project East

111. On 7 June 2019, Mr Stockwell wrote to Ms Clapton attaching an updated structure for both REIA and REF. There were further discussions with Curve. A decision was made after 19 June 2019 to also restructure the REF team and to remove the 'head of' role in that team also.

112. The restructuring exercise was given the name 'Project East'. Curve continued to provide guidance and draft documents such as at risk letters although when Ms Lloyd joined she also became involved in the consultation process.

113. On 14 June 2019, Mr Stockwell reported to Mr Haresnape by email that they were 'still pushing on Gamma' with other investors.

'I have also spoken to Guy [Johnson] and I am going to retain him for £1000 per month (1 day per week). At least this allows us to maintain pipeline and reputation until we have exhausted all routes'. They agreed that these developments would not stop the restructure from going ahead.

114. Mr Stockwell's evidence was that if an investor came along, they would follow that up but the momentum was gone and they had exhausted the market for potential investors.

115. There was a discussion between Mr Haresnape, Mr Stockwell and Mr Mahadeva on 3 July 2019 about the proposals for the REIA and REF restructures and in email correspondence the following was agreed:

'Suggest at risk:

Head of REF

Team support REF

Head of REIA

Team support REIA

Legal REF

Leaving the REF associate originator to manage portfolio, KYC, support on REIA and gives us the ability to turn on

REF again quickly.

We will still need resource to structure SPV, tax, distribute, refi Aberdeen, manage Greyhound, Aberdeen, Mint, KYC and try to raise on Gamma'

116. A finalised restructure plan was prepared by Mr Stockwell and circulated on 3 July 2019. It proposed the removal of the roles of head of real estate (the claimant's role) and team support in the REIA team and the roles of head of real estate finance and REF associate in the REF team as well a legal associate reporting to general counsel. There was a detailed timeline for consultation with those at risk which envisaged initial consultation meetings on 26 July 2019 and outcome meetings on 2 August 2019.

117. At an early point in the discussions about restructuring, there had been a proposal to remove one asset manager. Historically the respondent had managed with a single asset manager. The ultimate proposal retained both asset managers, it was said that so there would be cover for sickness and holidays. Mr Stockwell said in evidence that there was a lot of asset management required for existing properties.

118. On 9 July 2019, Mr Haresnape reported to the Remuneration & Nominations Committee and the Committee then briefed the Board as recorded in the minutes:

'Company Restructure

CH highlighted a planned restructure proposed in relation to the REIA and REF business areas. It was noted that executives have considered both business areas in conjunction with targets set and delivered, in addition to the number of personnel currently employed vs. numbers that will be required going forward.

As such it was determined that 5 roles would be at risk of redundancy. This would comprise 2 roles from each team and the remaining roles would be combined as one asset management team representing REIA and REF, in addition to the REF supporting role in Legal.

CH reported that the restructure would result in no effect on the continuing management of the bank's current business in these areas.

REF will be concentrated on small ticket business items only and a customer focused individual will be retained.'

119. On 10 July 2019, Mr Stockwell presented a report to the board of directors on the restructure of the REF team and also mentioned the REIA restructure.

120. There were some further discussions between Mr Stockwell and others in the respondent business and from Curve as July wore on. Ms Lloyd produced a 'Communications Playbook' for Project East which included scripts for the various announcements to be made to affected and unaffected staff and FAQs:

'When will the proposed changes be implemented?

The consultation process will last a week and will then be followed by either a follow up 1:1 or an outcome 1:1 dependent on the ideas for redundancy mitigation raised throughout the consultation period.

It is during the outcome 1:1 that you will be informed of whether your role has been confirmed as redundant or that you are no longer considered 'at risk'. If confirmed as redundant, your displacement leave date ("garden leave") and your exit date from the Bank will be notified to you.

Confirmation of your severance figure will also be provided to you in your Redundancy paperwork.

Once you commence displacement leave you shall return all equipment and Gatehouse Bank owned property and be permitted to spend this time at home to search for alternative job opportunities.'

115 On 25 July 2019, Mr Stockwell met with the claimant and Ms Manolea together and announced the redundancy proposals. The rationale was set out in the script which was read to them:

'As you may be aware, Gatehouse Bank has seen a change in its strategic business focus over the past 18 months. The Bank has reviewed its business lines and identifying the growth areas it should be investing efforts and finance into. This has included a review of the REIA team.

It is unfortunate that the funding for Project Gamma has not been secured and an opportunity to secure similar work has not presented itself. This project has been the main focus for the team over the past 12 months, however, we were not successful in raising the equity in 2018 as budgeted and although we allowed for more time, we are now a further 6 months in and are no closer to finding an equity partner.

In addition, the GC equity base has diminished over recent years impacting the ability of REIA to create transaction income.

We are therefore reviewing our footprint within REIA. It has been decided, subject to consultation, that the span and layers of management within the team are no longer required in the new target operating model.'

116. Mr Stockwell issued the claimant with his at risk letter which invited him to a consultation meeting the following day and indicated that the final decision was

proposed to be made by 2 August 2019. The claimant was told he could be accompanied by a colleague or trade union representative. The letter said:

'Gatehouse has considered the appropriate approach to pooling and selection in relation to its redundancy proposals. The proposed removal of the Head of Real Estate affects your role only, which is considered to be a unique role within the Bank, and therefore there would not be any need to apply any selection criteria if the proposed redundancy of this role goes ahead'.

117. The claimant emailed Ms Lloyd and Mr Stockwell that day to point out that he was on three weeks leave from 27 July 2020, undertaking the Hajj pilgrimage, an important religious observance. He pointed out that he would need an extension of the consultation period for a sufficient time after his return.

118. The meeting between the claimant and Ms Stockwell and Ms Lloyd proceeded on 26 July 2019. The claimant asked Mr Al Othman to attend with him, as his accompanying colleague, and Mr Al Othman joined by telephone as he was not in the office that day. Ms Lloyd took some brief notes at the meeting, which lasted about an hour. The claimant made some more extensive notes which notes also listed a number of points which he 'should have said' but had not raised at the meeting. The claimant was told that his consultation period would end on 23 August 2019. The claimant was returning from the Hajj pilgrimage on 19 August 2019. At the end of the meeting, the claimant was handed a letter which invited him to an 'outcome meeting' on 23 August 2019, which would either confirm that his role was no longer at risk of redundancy or provide him with details of the termination of his employment.

119. On 27 July 2019, the claimant emailed Mr Stockwell and Ms Lloyd to say that the proposed timeline did not allow time for meaningful consultation. He had medical appointments on 19 August 2019 in relation to his Crohn's Disease. Four days was not a sufficient period for meaningful consultation to take place. He said that the initial meeting had been rushed and asked for a thirty day consultation period commencing 19 August.

120. On 31 July 2019, Mr Stockwell replied to the claimant. He said that the outcome meeting date was provisional and that the date could be adjusted of there were matters that needed exploration. He set out what he said were the main points raised by the claimant in his consultation meeting:

'The message should not have been delivered to you at the same time as the other impacted colleague within the team

- Lone Star and Anand Tejani are still active on Gamma and therefore this requires a Head of REIA

- The reason why Gamma has not been successful is the lack of resource and timing due to economic conditions

- You understand why a restructure is happening to REF but not REIA

- You feel that nothing has recently changed re business deals that should result in an reorganisation

- You hold valuable skill sets that will expose the Bank to risk if removed from the current team / structure. These include; structuring deals, negotiating, identifying and originating senior financing and execution of real estate deals

- You believe the decision to include your role in the restructure is linked to your strained relationship with the CEO.'

He asked the claimant to let him know whether there were other concerns which the respondent should be considering and responding to during the consultation period.

121. Ms Lloyd said that she had a meeting with Mr Stockwell on 31 July 2019 to discuss the Project East responses; as part of that meeting they discussed the points raised by the claimant in his initial consultation meeting.

122. The claimant returned from leave on 19 August 2019. He was suffering from a viral infection which was affecting his ability to speak and emailed Ms Lloyd on 20 August to request that the outcome meeting be postponed. Ms Lloyd replied that day suggesting that the claimant could put forward suggestions in advance of the meeting by email and make written submissions for the meeting if he was not well enough to attend. The claimant replied that there were a number of points which needed to be discussed face to face. He asked for the meeting to be postponed until he was physically fit. Ms Lloyd replied that it was unclear when the claimant would be fit to attend a meeting and the respondent could not hold an open-ended consultation period. She said that the rest of the REIA team were in a state of flux and 'it is deemed best for all parties to bring a close to this unsettling period.' She again invited the claimant to make written submissions or to have a representative attend on his behalf.

123. In his further email of 20 August, the claimant pointed out that he had been told that the timeline was provisional. He asked that the meeting be postponed until the following Monday to allow him the weekend to recover. He added in an email the next day that he was struggling with bright lights which would make it difficult for him to compose a written submission. Ms Lloyd replied to say that Mr Stockwell was on leave the following week and that no one else in the leadership team could answer any technical questions the claimant might have in sufficient detail so the meeting would remain scheduled for 23 August. Mr Stockwell said in evidence that he was due to be away at that time for nine days on a touring holiday and would not have been able to dial in to a meeting. The claimant responded asking that the meeting be postponed until Mr Stockwell returned from leave, alternatively that Mr Stockwell dialled in. Ms Lloyd replied on 22 August 2019 to say in essence that the outcome meeting would proceed and that the claimant's concerns would be responded to in writing if he was unable to attend the meeting.

124. The claimant emailed written submissions on 22 August 2019. The submissions covered a number of points which the claimant wished to add to the points raised at the initial consultation meeting. He said that removing him would cause a material skills shortage which would expose the respondent to breach of its contractual obligations; it made no commercial sense. He suspected that the decision was connected to his strained relationship with Mr Haresnape. He said that Mr Stockwell and Mr Mahadeva had made disastrous errors of judgment and that Mr Stockwell lacked the skills and experience to carry out the functions he would be assuming under the restructuring proposal. In his view the proposed structure would lead to breaches of the FCA Conduct Rules.

125. The claimant proposed other cost-cutting initiatives, such as cutting the marketing team. He questioned the recruitment of a talent manager, who was Mr Haresnape's spouse.

126. A document was prepared by Ms Lloyd setting out what were described as the 'talking points' for the outcome meeting. This was updated after the claimant wrote in with further submissions.

127. In respect of the claimant's point that there was no change to the workload or volume of deals which led to a need to reorganise, the document said:

'- Workload has not altered because we have been trying to raise equity & close project Gamma for over 12 months. Whilst we awaited a potential close for the past 12 months the workload has been minimal for the Head of Real Estate role.

- Whilst we still continue try to raise equity for Project Gamma, it is difficult and there is no certainty this will materialise, especially with the market uncertainty ability to raise equity increasing as the UK leaves the EU.

- 2019 saw a business plan which included objectives to achieve transactions for the GC client, targets for ongoing management fees and exits of property. These objectives have not been fully met and there is nothing in budget for 2020'.

128. There was a section responding to the claimant's contention that his responsibilities could not be distributed between the rest of his team without fundamental changes to their roles, such as originating / negotiating deals, obtaining senor financing, structuring and executing deals. It was said that there was no budget for REIA deals in 2020 and no likelihood of any other deals in 2019. Those responsibilities were no longer required. The asset manager would cover the ''servicing activity' and the REIA team would cover current responsibilities.

129. In relation to the alternative solutions proposed by the claimant (that marketing HR and the CCO role should be considered instead, the document said:

-the number of employees in the bank had doubled so 'bank office functions' needed to grow to ensure enough support;

- the respondent felt the CCO role was necessary.

Mr Stockwell said in evidence that marketing was critical to the strategy to increase the retail side of the respondent.

130. So far as the suggestion of bumping Mr Dubaissi was concerned, the document set out the legal position on whether an employer is obliged to consider bumping and then commented on Mr Dubaissi:

'Mustafa's end of year 2018 review evidenced he was exceeding targets against 5 out of 6 measures and his mid-year showed a trajectory for the same outcome for 2019. It is therefore deemed that he has no lesser skillset than JC to complete this role and the Bank will not benefit from a Bumping situation.'

131. Questioned on the 'bumping' issue Mr Stockwell said that Mr Dubaissi had no lesser skill set than the claimant for the *role actually required*. The claimant's investment banking experience was not required if there were no REIA transactions. He said that his view was, that if offered Mr Dubaissi's role, the claimant would have left, given that he had previously said he had other opportunities when negotiating an increase to his salary package.

132. The claimant emailed Ms Lloyd prior to the scheduled meeting to say that he wished to be accompanied by Mr O'Kelly at the meeting; however as Mr O'Kelly was not in the office that day, he was requesting that the meeting be rearranged. Ms Lloyd declined to rearrange the meeting but said that Mr O'Kelly could dial in, as could the claimant. The claimant said that Mr O'Kelly was not available to dial in and again requested postponement by one working day. He said he would not be attending the meeting as his desires to attend in a better state of health and to have a work colleague present were not being met.

133. The claimant did not attend the meeting nor did he dial in. During the course of 23 August 2019, with input from Mr Stockwell, Ms Lloyd prepared an outcome letter which she posted to the claimant that evening. Her evidence was that she and Mr Stockwell discussed the talking points document during the course of that afternoon and the letter contained Mr Stockwell's responses to the points that the claimant had raised in his written submission. She said in evidence that they had immediate answers to the relevant points and did not need to take them away to investigate or to convene a further meeting. The letter confirmed that the claimant was being made redundant and covered some but certainly not all of the points covered in the talking points document. The dismissal was to take effect immediately, and the claimant was told that he would be paid in lieu of working his notice period.

134. Neither the letter nor the talking points document engaged with the claimant's assertions that his redundancy would lead to breaches of contractual obligations, FCA Rules and various other obligations. Mr Stockwell said that these had been considered in the round. Ms Lloyd said that a lot of the points related to the CCO's accountability and were not relevant to the redundancy. So far as the claimant's skillset was concerned, his skills were not in issue; the question was essentially what skills were required in the roles remaining. She said that the situation was that the claimant's line management responsibilities were going upwards to the chief commercial officer, the remaining responsibilities could be performed by the claimant's team and the rest of his responsibilities had gone.

<u>Claimant's bonus</u>

135. The acquisition of The Mint had completed in June 2019.

136. On 24 June 2019, Mr Stockwell wrote to Mr Haresnape and Mr Mahadeva setting out the requirement to pay the claimant a bonus. He recorded that the claimant had a target of '£60m REIA transactions 20% [of salary]'. He said that the claimant had received his bonus for the Thistle project. The value of this bonus was £71,500 and the claimant had been paid the portion not deferred, £65,050, in April 2019. He continued:
'The Mint element is – (Basic salary £130,000) x 20% = £26,000
I am unclear on the deferral element on this second tranche of £26,000 – I assume as its over £50,000 in the same year it will all be subject to deferral?'

137. Mr Mahadeva replied that day to say that a portion of the bonus should be deferred since the claimant was over the £50,000 figure for the year.

138. Mr Haresnape commented: 'Presume Mint was less than 60m so he gets pro rats [sic]'

139. In further correspondence on 24 and 25 June 2019, Mr Stockwell and Mr Haresnape agreed with Mr Mahadeva that the Mint bonus would be pro rated to reflect the fact that the value of the transaction was £41 million rather than £60 million and that part would be deferred.

140. On 27 June 2019, the claimant wrote to Mr Stockwell:

'Now that The Mint has completed, this achieves the second of the targets relating to my bonus which had a 25% weighting of Base Salary assigned against it.

Please can you co-ordinate with Danesh /Finance so that it gets paid in the July payroll.'

141. Mr Stockwell replied that day:

‘I have already spoken to Curve on this and asked them to proceed on this element of the bonus’.

142. On 23 July 2019, Mr Stockwell emailed the claimant (and followed up with a formal letter) to say that he would receive a bonus in respect of The Mint. He said that the target had been to complete a £60 million REIA transaction and in fact the Mint transaction was worth £41 million. Therefore, as the claimant had achieved ‘68.3% of your target your total bonus payment will be £17,758. As per the Sales Incentive Deferral Scheme 30% of your July payment will be deferred.
Therefore, your discretionary payment to be paid in July payroll is:
- Discretionary cash performance bonus £12,430’

143. I note that if there was a document incorporating the ‘Sales Incentive Deferral scheme’ it was not drawn to my attention. What I was told by the parties about the plan was that it provided for deferral of part of a bonus if the bonus exceeded £50,000. Any bonus over £50,000 would be subject to a 30% retention released in instalments over a 36-month period. The evidence given about whether the £50,000 figure applied to the aggregate of bonuses awarded in a particular year was wholly unclear.

144. The claimant was told there would be a deferral at this time because he had received a bonus for the Thistle project. Ultimately the respondent concluded that it was incorrect to defer part of the bonus, as I discuss below.

145. On 25 July 2019, the claimant emailed Mr Stockwell to say that the calculations were incorrect. There was no agreement about the size of REIA deal which would trigger the bonus and there should be no deferral because the bonus sum was below the threshold for deferral.

‘The target was not set to reflect a specific deal size – we agreed it was a guideline and more linked to doing a deal which generated a given income for the Bank

We had agreed that deal size was not relevant – it was a case of doing a deal that generated a threshold income for the Group. The Mint generates ca £2m for the Group over the hold period and as such satisfies the required parameters which was agreed.’

146. The claimant and Mr Stockwell had a discussion about the bonus on 26 July 2019 and Mr Stockwell agreed he would check his earlier notes as to what was agreed. The claimant recorded in an email to Mr Stockwell that day:

‘Just confirming what we discussed this afternoon regarding the bonus assigned to the Mint.

It was agreed that you would review your notes etc to determine what was agreed between us relating to the bonus linked to the Mint.

The position we had previously discussed was as soon as the Mint closes, in the next month payroll, the weighting associated as a % of Base Salary would be paid (e.g. if we close in say April, it would be paid in the May payroll). It was agreed that the full % allocated would be paid.

You have agreed that if on review of your notes etc, the above situation is accurate, this would be fully honoured and any shortfall amount will be paid promptly. We agreed that it is not reasonable to wait till the next month payroll and it would be made through a one off BACS payment.'

147. Although Mr Stockwell's evidence in his statement was that he did not make any promise to change the bonus award, there was no email in reply to the claimant's email contradicting the claimant's account of what had been discussed. In cross examination, Mr Stockwell said he would have changed the amount if he felt that the claimant was correct.

Claimant's grievance

148. The claimant submitted a formal grievance on 22 August 2019. The grievance covered what he described as unfair treatment and harassment by Mr Haresnape and Mr Stockwell, including:

- The untaken holiday leave issue, which the claimant said was unfair treatment;
- The Silver Noisy / Christmas day issues and the allegation that Mr Haresnape said he would harass the claimant on Eid
- An allegation that Mr Haresnape sent the claimant an intimidating email on Eid after 5:30
- The pro rating of the bonus and the deferral of part of the bonus.

Grievance process

149. Ms Harvey only returned to work for a period of sick leave on 20 August 2019, on a phased return. She read the claimant's grievance on 27 August 2019. She decided, having taken some legal advice, to hear the grievance independently of the redundancy appeal process. She said that she considered that it was better to continue with the redundancy process separately 'due to manager's availability and lack of connection in the complaint to the redundancy while following best practice.' She said that she saw no apparent connection between the grievance issues and the redundancy consultation and therefore saw no

reason why the redundancy should be put on hold whilst the grievance was addressed. She 'took ownership' of the grievance herself.

150. There followed some correspondence between Ms Harvey and the claimant culminating in a meeting on 2 September 2019. The claimant had sent some additional points he wished to be added to his grievance on 29 August 2019. These additional points included:

- Further points on the leave issue;
- The alleged conflict of interest issue. The claimant said he was receiving adverse treatment from Mr Haresnape for raising this issue.
- An allegation that he had not been treated with respect in the redundancy consultation process. In particular, there had been a lack of compassion shown in relation to his ill health at the time of the final meeting.

151. The grievance meeting was held at a hotel and notes were made which were included in the bundle. The claimant raised concerns about the venue for the meeting but Ms Harvey said that there was not a meeting room available at the respondent's premises. The claimant expanded on the points he had raised in his grievance documents.

152. Ms Harvey made no notes of the investigations she carried out. Ms Harvey's investigations so far as the bonus issue was concerned involved considering various documents including the claimant's appraisal form and the remuneration policy. She spoke with Mr Stockwell about the claimant's targets. She also had a discussion with Mr Mahadeva.

153. Ms Harvey sent a draft of her grievance outcome letter to a number of colleagues including Mr Stockwell to 'ensure facts were correct'. Mr Stockwell made some comments in an email dated 13 September 2019 about whether Mr Haresnape would have been aware that the claimant was on leave to celebrate Eid.

154. Ms Harvey sent the claimant a grievance outcome letter on 13 September 2019 which included notification of his right to appeal. She found for the claimant in relation to the bonus issue but not in relation to the other matters which were the subject of his grievance.

155. So far as the bonus was concerned, Ms Harvey said in evidence that she found for the claimant on the issue of deferral but not on the issue in relation to pro rating the bonus. Her written finding was:

'Bonus Payment – The Mint
In respect of bonus relating to The Mint project, the Bank will remit to you a payment of £13,750. At the time of my search, I didn't locate any evidence to indicate the Bank had changed the scope of the project upon which the bonus was payable. This aspect of your grievance is therefore upheld.'

156. Ms Harvey said that she subsequently realised she had made an error in drafting the grievance outcome letter in that she had said the claimant would be paid the entire balance of the bonus payment, i.e. £13,750, when she had intended to say that he would be paid the portion of the pro rated bonus which had (erroneously) been deferred, i.e. £5328.

157. The way in which Ms Harvey expressed her finding on this point was difficult to square with her assertion that the finding related to the deferral issue rather than the pro rating issue. The drafting in this respect was opaque at best.

158. Ms Harvey said she had a discussion with Ms Lloyd on 24 September 2019 after she realised she made a 'drafting error' in the grievance outcome and that the letter should have said the claimant would be paid the deferred amount of £5328 rather than £13,750. She spoke with Ms Lloyd who was writing to the claimant about the sums he was being paid.

159. Ms Lloyd wrote to the claimant on 25 September 2019 setting out his payments:

'Lastly, the outstanding sum for The Mint bonus is confirmed as £5,328. I have attached the confirmation of bonus which demonstrates £12,430 has already been paid to you on 26th July. The grievance upheld that the calculation of your 2019 bonus was correct, however the deferral of £5,328 will be released.'

160. The claimant was understandably surprised by that account given the way in which the grievance outcome was drafted and he emailed back objecting to the change in the bonus figure. Ms Harvey then responded, apologising and saying that it was her error and that:

'The outcome in the letter should have awarded you the deferral portion only of £5,328 which is an amount in addition to the £12,430 you had already been paid.

The Bank has explained to you the terms upon which they based your bonus and you were aware of the percentage and proration which was discussed with the CCO and during the Grievance Hearing and as such, as the bonus was target related, the payment award stands.'

161. The claimant replied to Ms Harvey's email that day objecting to its contents.

162. On 26 September 2019, Ms Harvey sent the claimant an amended grievance outcome letter, which said this:

'At the time of my search, I didn't locate any evidence to indicate the Bank had changed the scope of the project upon which the bonus was payable. This deferral aspect of your grievance is therefore upheld.'

It is still difficult to understand what Ms Harvey was seeking to convey about her reasoning.

Redundancy appeal

163. The claimant emailed Ms Lloyd on 28 August 2019 saying that he was going to appeal his redundancy and asking for the time limit to be extended to 10 September 2019.

164. Ms Lloyd said in evidence that she had a catch up meeting with Mr Stockwell on 4 September 2019 to prepare for the claimant's (as yet unsubmitted) redundancy appeal.

165. On 8 September 2019, the claimant submitted his redundancy appeal document. The appeal covered a range of grounds, including:

- the contention that the retention of two asset managers showed that the redundancy was not genuine;

- the contention that the employment of two consultants showed that the remaining team were not able to absorb the claimant's responsibilities.

166. The claimant also raised an issue about lack of meaningful consultation, reiterated his contentions that without his role, there would be breaches of various legal obligations and again asserted that the various incidents in late 2019 and 2020 had caused his relationship with Mr Haresnape to be strained; the redundancy was not genuine.

167. Ms Lloyd began preparing a response to the appeal with input from Mr Stockwell on 10 September 2019 and had a meeting to discuss the response on 11 September 2019. She took legal advice before finalising the appeal response on 17 September 2019. There was a version of the letter with amendments in 'track changes' format which Mr Stockwell said were possibly his changes but that Ms Lloyd was just checking facts with him. He said that he did not have a role in the decision.

168. The appeal against redundancy was not upheld.

169. Ms Lloyd said in evidence that she heard the redundancy appeal because it contained allegations about Mr Haresnape and therefore it would not have been appropriate for one of his direct reports to hear the appeal. She said that she did not think it would have been appropriate for the chairman to get involved. When challenged in cross examination as to her impartiality, given her involvement with the claimant's redundancy, Ms Lloyd denied that she lacked impartiality. She said that she was not part of the decision-making process in relation to Project East.

Grievance appeal

170. On 20 September 2019, the claimant wrote to Tim Blease, Chief Operations Officer, to appeal against the grievance outcome. At that point there was no need for him to appeal the outcome in relation to the bonus as he had been told it would be paid in full. He did complain about the initial failure to pay the bonus and the financial consequences of the failure.

171. Mr Blease conducted an appeal hearing with the claimant on the morning of 26 September 2019, before the claimant received the revised grievance outcome letter which changed the bonus sum being awarded. There was some discussion of the bonus issue but the claimant said that he considered it closed based on the grievance outcome letter of 13 September 2019 which said he would receive the full amount. He also however outlined in detail why he said that £13,750 was the correct figure.

172. On 7 October 2019, Mr Blease wrote to the claimant rejecting his grievance appeal. On the bonus issue, he concluded in essence that the revised sum of £5328 was the correct payment.

173. Also on 7 October 2019, the claimant sent a further appeal letter, appealing the revised grievance outcome.

<u>REIA team</u>

174. In terms of staff in the REIA team after the claimant's dismissal, Mr Johnston was retained as a consultant on one day a week only at a cost of £1000 per month. Mr Stockwell said that there was a role for Mr Johnston to play as a land specialist and chartered surveyor in maintaining relationships with house-builders and developers in case Project Gamma ever got off the ground. Another consultant, Rachel Pilings, was retained on a short term basis to support the 'exit of Silver Noisy'. In early 2020, an investment analyst, James Guppy was hired in a fixed term contract until August 2020 to provide support to the REIA team. His salary was approximately £30,000. Mr Stockwell said that was not a role which had been foreseen would be required at the time of the claimant's dismissal.

175. When the claimant was asked in cross examination about whether he would have considered Mr Dubaissi's role on a package of about £70,000, he initially seemed to answer that he would have sought to negotiate the package up. When pressed on whether he would have accepted the role on Mr Dubaissi's terms, he referred to the fact that he had been on Job Seekers Allowance and said, 'With hindsight, I would have thought about it.'

<u>Respondent's business post dismissal of the claimant</u>

176. The respondent has not succeeded in finding an investor for Project Gamma and has not secured an investment opportunities for Gatehouse Capital since the completion of The Mint in June 2019.

Submissions

177. Both parties provided written submissions and expanded on these in oral submissions. I have carefully taken into account all of the parties' submissions but refer to them below only insofar as is necessary to explain my conclusions.

Law

Unfair dismissal

178. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g. conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

179. Under s 98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.'

Redundancy

180. Redundancy is one of the potentially fair reasons for dismissal: section 98(2)(c).

181. The definition of redundancy is found in section 139 of the Employment Rights Act 1996. It has a number of elements. The provisions which are relevant for the purposes of these claim are s 139(1)(b):

'*For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –*
……

(b) the fact that the requirements of [the employer's] business -

(i) for employees to carry out work of a particular kind …
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer

…….
have ceased or diminished.'

182. When considering redundancy dismissals, tribunals are not normally entitled to investigate the commercial reasons behind the redundancy situation. The reasonableness of the business decision which leads to a redundancy situation is not a matter on which the Tribunal can adjudicate: Moon and ors v Homeworthy Furniture (Northern) Ltd [1977] ICR 117, EAT. This does not mean, however, that a tribunal is obliged to take the employer's stated reasons for the dismissal at face value. In order to establish that the reason for the decision was genuinely redundancy, an employer will usually have to adduce evidence that the decision to make redundancies was based on proper information and consideration of the situation: Orr v Vaughan [1981] IRLR 63, EAT, and Ladbroke Courage Holidays Ltd v Asten [1981] IRLR 59, EAT.

Reasonableness in redundancy cases

183. In cases of redundancy, an employer will not normally be deemed to have acted reasonably unless it warns and consults any employees affected, adopts objective criteria on which to select for redundancy, which criteria are fairly applied, and takes such steps as may be reasonable to consider redeployment opportunities.

184. In R -v- British Coal Corporation and Secretary of State for Trade & Industry (ex parte Price) [1994] IRLR 72, Glidewell LJ approved the following test of what amount to fair consultation: 'Fair consultation means (a) consultation when the proposals are still at a formative stage; (b) adequate information on which to respond; (c) adequate time in which to respond; and (d) conscientious consideration by an authority of the response to consultation.'

185. An employer will need to identify the group of employees from which those who are to be made redundant will be drawn. This is the 'pool for selection' and the choice of the pool should be one which falls within the range of reasonable responses available to a reasonable employer in the circumstances. The definition of the pool is primarily one for the employer and is likely to be difficult to challenge in circumstances where the employer genuinely applied its mind to the problem. (Capita Hartshead Ltd v Byard 2012 ICR 1256 (EAT)).

186. Transferring a potentially redundant employee to a post held by another employee who is then dismissed (known as 'bumping') may be a fair mode of selection. However, it will not necessarily be unfair for an employer not to consider bumping: Byrne v Arvin Meritor LVS (UK) Ltd EAT 239/02. It will be relevant for a tribunal to consider:

- whether there is a vacancy;
- how different the two jobs are
- the difference in remuneration between the two roles
- The relative length of service of the two employees.

(Lionel Leventhal Ltd v North EAT 0265/04; Fulcrum Pharma (Europe) Ltd v Bonassera and another UKEAT/0198/10/DM9)

187. In selecting employees for redundancy, the selection criteria must be reasonable and not merely based on the personal opinion of the selector. Provided the selection criteria are objective and applied fairly a tribunal should not seek to interfere in the way the individuals are scored or engage in a detailed critique of the scoring (British Aerospace v Green [1995] ICR 1006, CA and Nicholls v Rockwell Automation Ltd EAT/0540/11).

188. The employer will have to conduct the selection process in good faith and give proper consideration to the applications of the potentially redundant employees: Darlington Memorial Hospital NHS Trust v Edwards and anor EAT 678/95.

189. When considering the question of the employer's reasonableness, the tribunal must take into account the process as a whole, including the appeal stage (Taylor v OCS Group Limited [2006] EWCA Civ 702). A procedural defect in the appeal process may render a dismissal unfair if an employee is deprived of an opportunity of demonstrating that the reason for his or her dismissal is not sufficient for the purposes of s 98(4) (London Central Bus Company Ltd v Manning EAT 0103/13).

Concurrent grievance process

190. Guidance on the question of whether disciplinary proceedings should be suspended whilst a grievance is investigated is included in the Acas Code and Acas guide[1] but there is no similar guidance or authority that was brought to my attention on whether and when a redundancy process should be suspended where a grievance is pursued. It is only in rare cases that it will be outside the range of reasonable responses for an employer to proceed with a disciplinary process before hearing a grievance appeal; employer will be expected to complete a grievance procedure before starting or pursuing disciplinary proceedings where to do so would cause clear prejudice to the employee: Samuel Smith Old Brewery (Tadcaster) v Marshall and anor EAT 0488/09.

[1] Examples where it might be appropriate to do so include: where the grievance relates to a conflict of interest that the manager holding the disciplinary meeting is alleged to have and where bias is alleged in the conduct of the disciplinary meeting.

Bias

191. The issue of bias is one which has been considered in the case law on disciplinary proceedings. In order to minimise the possibility of bias, there should generally be separation between the person investigating and hearing the matter at dismissal and appeal stages. There should be no actual bias and no appearance of bias: Watson v University of Strathclyde[2] [2011] IRLR 458, EAT

Polkey reduction

192. Section 123(1) ERA provides that

‘…the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in the all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.’

193. A tribunal will be expected to consider making a reduction of any compensatory award under section 123(1) ERA where there is evidence that the employee might have been dismissed if the employer had acted fairly (see Polkey v AE Dayton Services 1988 ICR 142; King and ors v Eaton (No.2) 1998 IRLR 686).

194. The authorities were summarised by Elias J in Software 2000 Ltd v Andrews and ors [2007] ICR 825, EAT. The principles include:

194.1 in assessing compensation for unfair dismissal, the employment tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal;

194.2 if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future);

[2]Having regard to the test in Porter v Magill 2002 AC 357, HL that the key question was whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that a tribunal, or any member of it, was biased.

194.3 there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal;

194.4 however, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence;

194.5 a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored.

195. As Elias J said in Software 2000:

‘The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.’

Unlawful deductions from wages

196. Section 13 of the ERA 1996 provides that an employer shall not make unauthorised deductions from a worker’s wages, except in prescribed

circumstances. Wages are defined in section 27 as 'any sums payable to a worker in connection with his employment', including 'any fee, bonus, commission, holiday pay or other emolument referable to [the worker's] employment, whether payable under his contract or otherwise' with a number of specific exclusions.

197. On a complaint of unauthorised deductions from wages, a tribunal must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion: Greg May (Carpet Fitters and Contractors) Ltd v Dring [1990] ICR 188, EAT.

198. Once an employer informs an employee that he or she is going to receive an otherwise discretionary bonus payment on certain terms, it is under a legal obligation to pay that bonus in accordance with those terms, until the terms are altered and notice of the alteration has been given to the employee: Farrell Matthews and Weir v Hansen [2005]ICR 509, EAT.

199. Where there is ambiguity in a contract, a court or tribunal must consider the language used and ascertain what a reasonable person, who has the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant: Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 W.L.R. 2900.

200. The task of a court or tribunal is to decide the objective meaning of the language in which the parties have chosen to record their agreement. If there are two possible constructions, the court or tribunal is entitled to prefer the construction which is consistent with business common sense: Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The "Ocean Neptune") [2018] EWHC 163 (Comm).

201. Where there is ambiguity, a contract is also construed more strongly against the party who has made the contract: Borradaile v Hunter (1843) 5 M. & G. 639.

Uplift for breach of Acas Code of Practice on Disciplinary and Grievance Procedures

202. Tribunals have power to increase or decrease awards for compensation where there has been an unreasonable failure by a party to follow the Acas Code of Practice: S.207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

Conclusions

Unfair dismissal

Issue: What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?

Was there a genuine redundancy situation?

203. Did the respondent have a diminution in its need for employees to carry out work of a particular kind? It seemed to me that it did; that work was specifically the pursuit of investors for Project Gamma and the development of that project and the sourcing of real estate investments. All of these activities formed part of the work of the head of real estate role.

204. A crucial piece of evidence was the series of phone calls between Mr Haresnape and Mr Stockwell on 4 June 2019. One thing which was very clear from the conversation was that the view was taken that if Carlyle was not going to invest in Project Gamma, the respondent would need to get 'those boys out the door' quickly i.e. reduce costs by losing members of the REIA team and in particular the claimant.

205. I concluded that there was a diminution in work of a particular kind, that work being the work of the head of real estate and in particular the work which would be done in relation to Project Gamma. This was clear from the 4 June 2019 telephone conversation; if there was no chance of Project Gamma, there was no need for an expensive head of real estate.

206. I considered the evidence I set out above which showed some continued efforts being made on Project Gamma after 4 June 2019 but I did not accept, as the claimant had suggested, that Project Gamma remained very active. The evidence of the telephone calls was consistent with Mr Haresnape and Mr Stockwell's evidence that there was very little hope that anything would come of the project. Although Mr Stockwell said in the 14 June 2019 email 'Still pushing on Gamma' none of what is then set out in the email appears to be anything like a very realistic prospect and the closing line about the retention of Mr Johnson 'At least this allows us to maintain pipeline and reputation until we have exhausted all routes.' reinforces the impression that there was no great hope.

207. There was some evidence of work on other real estate projects, in particular Galliford Try. I accepted however that the respondent's focus was essentially going elsewhere (towards the retail side) and that a decision had been made that, given the prospects for Project Gamma and other projects, the respondent was not going to put a great deal of resource into pursuing those opportunities. That was a business decision for the respondent; whatever its merits, I was persuaded on the evidence that it was a genuine one.

208. Some of the functions the claimant had carried out remained and were parcelled out to other employees. Some of the work had gone or was going because of the likelihood that no equity would be raised for Project Gamma and the fact that there was a lack of real estate transactions on the horizon. The intention was that REIA would become a smaller part of the overall business of the respondent.

Was the redundancy situation the reason or principal reason for the claimant's dismissal

209. A very significant portion of the evidence I heard was in support of the claimant's contention that the real reason for his dismissal was his severely strained relationship with Mr Stockwell and Mr Haresnape as a result of the various incidents in late 2018 and into 2019. On that account, the Carlyle meeting was simply the opportunity or excuse which allowed the respondent to go ahead with the claimant's dismissal.

210. I concluded that the evidence I have set out above shows that by mid-2019, Mr Stockwell and Mr Haresnape had no great liking for the claimant. Mr Stockwell may well have been aware that the claimant had no respect for him and discussed him disrespectfully with his team. Both had found the claimant's behaviour at Christmas 2018 annoying. However the impression I derive from the course of events set out and the 4 June conversations in particular is that the claimant was someone Mr Stockwell and Mr Haresnape would tolerate if he delivered the financial returns on which his bonus was predicated and was useful to the business – that was consistent with the claimant receiving a good appraisal in February 2019.

211. It concluded, looking at the telephone conversations on 4 June 2019 that it was the 'costs of the boys' which was the main reason for the decision made, not what was revealed by the remarks which are made about the claimant's behaviour, which were incidental to the 'costs of the boys'. The principal reason for the dismissal was the perceived lack of need for an expensive head of real estate once Project Gamma was 'dead in the water'.

Issue: If so, was the dismissal fair or unfair in accordance with ERA section 98(4),

Consultation

212. Having considered the 4 June 2019 telephone conversation, I concluded that, although Mr Stockwell and Mr Haresnape had reached the view that they no longer required the claimant's role, they were happy to have come to that view because they had come to dislike him. I could see no evidence that that dislike was connected with the alleged conflict of interest over Thistle or the Shariah conflict point. It appeared to relate to a sense that the

claimant was arrogant when things were going well but did not communicate when things were not going well with Gamma; these features were illustrated by his perceived failure to respond quickly after the Carlyle meeting despite demanding that others respond quickly when he wanted a response (the Silver Noisy issue).

213. I considered the way in which the consultation process was handled in the light of that conclusion. I concluded that, so far as the claimant was concerned the consultation was a cosmetic exercise and was not meaningful consultation in the sense envisaged by the case law. I reached that conclusion based in part on the telephone call and in part on an analysis of how the respondent conducted the consultation process.

214. The telephone call was evidence that a planned outcome of the redundancy process was the dismissal of the claimant. Whilst it would have been possible that, having had that initial view, Mr Stockwell genuinely went on to consider other possible outcomes, there was really no evidence that was the case. The discussions with HR seemed to be about constructing a process which would look fair in order to achieve the outcome already decided on 4 June 2019. It seemed to me that Mr Stockwell's intention to create a cosmetically satisfactory redundancy exercise is revealed in this statement from the 4 June 2019 transcript: 'So don't mention names or anything, just send it like that, so I'll send that to her and the next step is, she has got someone in Curve, that is their person that does all of this stuff.' He has already decided on the claimant's name but is aware that the exercise needs to look like it is not predetermined.

215. The unwillingness to delay the final consultation / outcome meeting when the claimant was unwell seemed to me a product of what was really just the respondent going through the motions of what it had been advised was at least structurally a fair process. The claimant had earlier been told that there was flexibility about the consultation period and Ms Lloyd said that the meeting described as an outcome meeting might have in fact been a further consultation meeting if there had been more to discuss. It seems to me that it was outside the band of reasonable responses not to delay the meeting until Mr Stockwell returned from leave so that the claimant had an opportunity to discuss his points face to face.

Selection

The pool of one / bumping

216. The claimant's role was a stand-alone role. His job was not interchangeable with any other job and the other jobs in his team were all at a lower level and at considerably lower salaries than his.

217. The respondent considered that he was in a pool of one. The question for me is whether that conclusion was outside the range of reasonable responses.

218. The claimant said that he should have been considered for either an asset manager job or Mr Dubaissi's role. These were more junior roles on considerably lower salary packages.

219. I accepted the respondent's evidence that asset managers were required to be RICS qualified and that the claimant would not have had the necessary skills for an asset manager role, even if he would have considered one.

220. The claimant would have had the necessary skIls for the associate post. Was it reasonable of the respondent not to consider bumping Mr Dubaissi?

221. It seemed to me that it was:

- Mr Dubaissi was performing well in the role and his skills and experience were a good fit for the requirements of the role;
- Whether or not the claimant might have accepted a role at a much lower rate of pay as being preferable to redundancy, I concluded that it was reasonable not to offer him such a role. The claimant was over-qualified for the role and it did not meet his salary expectations. At the time of his dismissal, the claimant's total package for 2019 including discretionary bonus payments was up to £325,000 per annum. Employing an employee for a role for which he is over-qualified and in respect of which he will feel underpaid is a course a reasonable employer is entitled to conclude is not likely to lead to a good outcome (ie retention of that employee).

222. In those circumstances, the fact that the claimant had longer service than the incumbents of the associate and asset manager roles was a factor which a reasonable employer could conclude was not outweighed by the other factors set out above.

Redeployment

223. Ultimately it was submitted on the claimant's behalf that he should have been redeployed to an asset manager or associate role. I considered this was conceptually a selection / 'bumping' issue since the roles were not vacant and have set out my conclusions on that issue above.

Not pausing the redundancy pending resolution of the claimant's grievance

224. I consider that just as a disciplinary process should be paused pending a grievance outcome where not to do so would cause clear prejudice to the employee concerned, so too should a redundancy process. In this case, the claimant complained in the course of his grievance about unfair treatment by Mr Haresnape and Mr Stockwell. There was a significant overlap between his complaints in the grievance and his concerns about why he had been put

at risk for redundancy. However, I concluded it was not outside the range of reasonable responses not to have paused the redundancy process when the claimant raised his grievance very shortly before the redundancy dismissal. The natural forum for the concerns raised in his grievance insofar as they related to his selection for redundancy was a redundancy appeal. I concluded that there was no clear prejudice to the claimant in not pausing the redundancy process pending resolution of his grievance. Any prejudice to him would be created by a failure to fairly and conscientiously consider an appeal against redundancy.

Appeal

225. I concluded that it was unfair to have appointed Ms Lloyd to hear the redundancy appeal. She had been extensively involved in the redundancy consultation process, including making decisions not to defer the outcome meeting and drafting the talking points document and the dismissal letter. Even if she was not actually biased, the fair-minded and informed observer would reasonably conclude that she was.

226. It was also inappropriate that the appeal was heard by an employee who was significantly junior to Mr Stockwell and Mr Haresnape; it would not have been easy for Ms Lloyd to uphold the appeal. As a matter of fact, she and Mr Stockwell seem to have simply worked together in preparing the appeal response. I was not satisfied that the respondent could not have sourced another option for the appeal, for example the respondent's chairman or a senior HR individual from an outside organisation. In the circumstances, it seems to me that any reasonable employer would have done so.

227. The failure to appoint someone appropriate to consider the claimant's appeal deprived him of the opportunity to have someone conscientiously consider the points he had to make about why he should not be made redundant, those points not having been conscientiously considered in the earlier consultation process. In other words the appeal did not correct the deficiencies of the dismissal process.

Conclusion on fairness

228. It follows from the above that the claimant's dismissal was unfair because of lack of proper consultation and lack of a fair appeal.

Issue: if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway?

229. I had to carefully consider what the result would or might have been had the claimant been afforded the kind of consultation process he should have been afforded, ie one in which the respondent conscientiously considered what the claimant had to suggest and contemplated outcomes other than the claimant's dismissal.

230. It did not seem to me there was any realistic prospect that the outcome would have been redeployment of the claimant to an asset manager role or the associate role. It was reasonable for the respondent not to offer those roles and it does not seem to me that anything the claimant said about the roles would have changed the respondent's view, even in the hypothetical scenario that Mr Stockwell was undertaking the consultation with an open mind and uninfluenced by his dislike for the claimant. Having regard to the claimant's career history, skills and experience, his sense of his value in the marketplace as evidenced by his negotiations with the respondent about his remuneration, and the way in which he gave his evidence about his willingness to accept a role at a lower salary, I concluded that he would not have accepted one of these roles in any event. At the time of dismissal, he would not have been aware that he would face difficulties finding a new role; he would not have had the benefit of hindsight.

231. It was difficult to identify what else might have come out of a conscientious consultation process which would have changed the result. I concluded that the claimant would not have accepted a role which was significantly less well remunerated than his existing role. There was no evidence that any similarly remunerated role existed to which he could have moved, so the only prospect for his retention would have been if he had been able to persuade the respondent to retain the head of real estate role in some form, perhaps by dispensing with the consultant role and one of the asset manager roles and absorbing some of the responsibilities of those roles into the head of real estate role whilst leaving the line management responsibilities for the REIA team with the head of real estate role.

232. I had no very detailed account of the breakdown of tasks and responsibilities in the various roles in evidence so the exercise of determining whether this was a structure which might have resulted had the respondent consulted fairly was a highly speculative one. Doing my best with the evidence I had, it seems to me that there was a 20% chance that the respondent, had it consulted fairly and with an open mind, would have concluded that it was worth retaining the claimant in a modified role at his existing salary to cover aspects of all three roles. The respondent would have had the advantage of the claimant's skill and experience if, contrary to expectations, Project Gamma had borne fruit or further real estate transactions had come along.

233. I also had to speculate as to how long the claimant might have remained in any such adjusted role. As a matter of fact, nothing has come of Project Gamma and there have been no new investment opportunities for

Gatehouse Capital since the completion of The Mint in June 2019. It seems to me that even had a revised head of real state role been created for the claimant, the likelihood of that revised structure continuing beyond about twelve months given the respondent's change of direction and the lack of REIA opportunities, is close to nil.

234. It also follows from my conclusions above that the claimant's dismissal would in any event have been delayed by a period to allow for Mr Stockwell to return from leave and hold a meeting with the claimant. It was not clear from the evidence when Mr Stockwell's nine day holiday commenced so it seems to me that the best I can do on the available evidence is to find that a fair process would have involved a face to face meeting within two weeks of 23 August 2019.

235. The effect of my conclusions is that the claimant is entitled to:

- 100% of his losses for a period of two weeks;
- 20% of his losses for a further 50 weeks.

Breach of contract / unlawful deductions

Issue: Was there any non-payment or under-payment of bonus which was payable to the claimant?

236. Essentially the question here was whether at some point, the respondent fell under a legal obligation to pay the claimant a bonus of 20% of his salary.

237. The respondent's position was that the agreement reached in July 2019 was that the claimant would receive 20% of his salary if he achieved £60 million worth of new real estate transactions. I rejected the claimant's oral evidence that this level of transactions was not agreed in July 2019. If that was his case, it was not reflected in his witness statement and it did not make sense that Mr Stockwell would go to RemCom with a proposal which he did not know to be acceptable to the claimant. The claimant did not say in his grievance that there had never been a £60 million target.

238. Did that position change? The claimant said that it was agreed at his appraisal in August 2018 that he would receive the bonus if he completed a real estate transaction with a good level of Day 1 and ongoing fees. The appraisal document does not link the achievement of the relevant objective in this way to the claimant's bonus and it seems highly unlikely that a clear target agreed a few weeks earlier would have changed to more ambiguous one.

239. Was there a change to the agreement about the target for the 20% bonus at some later time? The bonus was ‘rolled over’ to 2019 at the 11 February telephone meeting. Looking carefully at the transcript of the meeting, although Mr Stockwell was unclear as to what percentage of salary would be awarded for each target (of the total 150%), what is clear is that achievement of The Mint transaction was now identified as the trigger for receipt of the bonus for the commercial real estate target. The evidence was that this was the only commercial real estate transaction in train. In the context of rolling over the bonus scheme from one year to the next, Mr Stockwell was telling the claimant that in order to achieve the commercial real estate target he would have to complete the acquisition of The Mint. What he says about that is unambiguous.

240. The respondent argued that Mr Stockwell had no authority to agree the bonus target and would have had to get agreement form RemCom but it was not suggested that he told the claimant either that he lacked authority to modify the target or that he had not obtained the agreement of RemCom.

241. I therefore concluded that the claimant had a legal entitlement to receive the 20% bonus when he achieved the renegotiated target of completing the acquisition of The Mint.

242. If I am wrong about that and in the alternative, he was entitled to the bonus of 20% of his salary when Mr Stockwell declared it would be paid without reservation on 27 June 2019.

Issue: Did the claimant previously indicate in writing his agreement or consent to any such deductions being made?

243. No evidence was called to suggest that the claimant consented to the deduction and the evidence which I heard made clear that the opposite was true.

Issue: What, if any, uplift should be applied for any failure to follow the ACAS Code?

244. The aspect of the grievance which was said on the claimant’s behalf to be a failure to follow the Acas Code was that the claimant was said not to have had an opportunity to address at the appeal hearing the pro rating of his bonus, because the revised grievance outcome letter was produced after the grievance appeal hearing.

245. As a matter of fact, as I have noted above, the claimant did address the bonus issue orally at the appeal hearing and Mr Blease did consider the issue in the grievance appeal outcome letter. I do not find there to be in substance any failure to follow the Acas Code in this respect and I do not award any uplift.

246. There were issues with the grievance process, in particular the opportunity given to Mr Stockwell to comment on the grievance outcome letter. However, this was not put forward in submissions by the claimant as a breach of the Code which supported an uplift; it would not be appropriate for me to reach any conclusion on whether that breach should lead to an uplift in the absence of submissions by both parties on the issue.

Remedy hearing and orders

247. If the parties are unable to agree the compensation due to the claimant, there will be a remedy hearing on **4 December 2020** by Cloud Video Platform.

248. The claimant will provide to the respondent by 4 pm on **13 November 2020** any witness statement and document on which he intends to rely at the remedy hearing.

249. The respondent will provide the claimant by 4 pm on **20 November 2020**, any documents on which it seeks to rely at the remedy hearing, those documents having been included with the claimant's document in a paginated remedy bundle.

Additional Case Management Orders for the Video Hearing

Contact Details for Joining Instructions

1. The tribunal needs to send joining instructions out to the parties by email. The current email addresses are as follows:
   Claimant: Rubel.Bashir@slatergordon.co.uk
   Respondent: patrick.glencross@crippspg.co.uk

2. Each party must email londoncentralet@justice.gov.uk as soon as possible if the contact details change. **The email should say "FAO OF CVP CLERK" and give the case number and hearing date in the subject line.**

3. Each party is responsible for sharing the joining instructions with all legal representatives and any witnesses that they are calling to give evidence, as well as any other people wishing to observe the hearing as a member of the public.

Written Materials

4. By no later than 5 days before the hearing the parties must email a copy of the bundle, the witness statements, , and any other relevant document, or a link to a site from which they can be downloaded, to londoncentralet@justice.gov.uk .

5. The email should include **the case number and hearing date and say “FAO THE CVP CLERK” in the subject line.**

6. All written materials should be provided in pdf format and should be rendered text readable.

7. Each party shall be responsible for ensuring they have access to the same written materials that have been sent to the tribunal in a format appropriate to them.

Witnesses

8. All witnesses when giving evidence must have access to:

    - Their own witness statement
    - The witness statements of all other witnesses (as they may be questioned on these)
    - The bundle

    The documents must be clean copies, without any markings, highlighting, notes or bookmarks.

Employment Judge Joffe
12th Oct 2020

Sent to the parties on:
12/10/2020

For the Tribunals Office