Case No: 2204799/20

EMPLOYMENT TRIBUNALS

Claimant: **Ms A. Nnyombi**
Respondents: HSBC UK Bank Ltd

London Central Remote Hearing (CVP) **On:** **8, 9, 13, 14 April 2021**

Before: Employment Judge Goodman
Mr R. Baber
Ms M. Pilfold

Representation
Claimant: Mr. D. Matovu, counsel
Respondent: Ms. A. Reindorf, counsel .

JUDGMENT

1. The race discrimination claim fails.
2. The sex discrimination claim fails.
3. The respondent unfairly dismissed the claimant. The basic award is £2,127.70. The compensatory award is £14,979. The claimant contributed to dismissal and the compensatory award is reduced by 20% to £11,983.20.The total award (basic and compensatory) for unfair dismissal is £14,110.90.
4. The total unfair dismissal award is reduced by 15% for not following the ACAS Code. The respondent is ordered to pay the claimant £11, 994.27 for unfair dismissal.
5. The breach of contract claim succeeds. The respondent is ordered to pay the claimant £ 1,808.54 after the 15% ACAS Code reduction. This is liable to tax in the current year.

REASONS

1. The claimant worked for the respondent bank at their branch at Angel Islington as a business specialist adviser. She was dismissed for gross misconduct on 9 April 2020 for failing to follow account opening and identity check procedures designed to deter money laundering, but not for any dishonesty of her own.

2. She claims unfair dismissal, wrongful dismissal, and discrimination because of sex and race, in that a number of other employees also investigated in connection with attempts to circumvent account opening were said to have been more favourably treated. Initially this was a claim of race discrimination; sex was added by amendment on 25 March 2021. The respondent denies discrimination and asserts the dismissal was fair. If the process was in any way unfair, the respondent argues

fair process would have made no difference to the outcome, and that the claimant by her conduct contributed to the dismissal. The issues were identified by E J Stout at a case management hearing on 4 December 2020, and revised on amendment at a further hearing on 25 March 2021.

3. On the first morning, the claimant applied to amend the claim and list of issues. With the respondent's consent, at paragraph (vii) listing the treatment said to be sex discrimination, the words "fact-finding investigation before she was suspended" were deleted and the words "access to documents for the purpose of non-routine interview, as the comparator Mr Y was" substituted.

Evidence

4. The tribunal heard evidence from:

Angella Nnyombi, the claimant
Joshua Dupoir, Investigations Manager, who carried out investigations into the conduct of the claimant and three of the four comparators.
Claire Wilson, the branch manager, who dismissed the claimant.

5. The claimant had filed witness statements made by former colleagues **Supun Arachchige** (opinion evidence on comparator AK) and **Minara Khatun** (on procedure for verifying signatures), and had obtained a witness order for **Imran Saleem** (no statement filed), but they were not called to give evidence.

6. There was a main documents bundle of 428 pages and a supplementary bundle of 410 pages. Some further pages were added on the fourth comparator (Mr. Y) and a CYC form for customer J. We read those to which we were directed.

Conduct of the Hearing

7. The hearing was open to the public. The tribunal and witnesses had electronic document bundles and witness statements; some witnesses had hard copies. Hard copies were available for public access at the respondent's solicitors' office in Glasgow. There were no technical hitches, except that Mr Matovu sometimes had difficulty with his equipment. On these occasions the hearing was paused while he changed device and reconnected.

8. The case was initially listed for four days to hear all issues including remedy. An extra hearing day had been added at the March preliminary hearing in view of the addition of the sex discrimination claim and three comparators. In the event, with three fewer witnesses being called than had been expected, and despite the preliminary applications on the first day, and the slow pace of cross examination of the respondent's two witnesses, time was made up. Oral submissions were heard on day four, rather than day three, so that counsel for the claimant could have more time to prepare, and we then heard evidence on remedy, on a contingent basis, before reserving judgment.

Rule 50 Applications

9. Rule 50 of the Employment Tribunal Rules of Procedure 2013 provides :

> (1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.

(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

(3) Such orders may include—

(a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;

(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;

(c) …

(d) …

10. The rule 50 powers are conferred against the background of the common law principle of open justice. In **R (on the application of Guardian News and Media Limited) v City of Westminster Magistrates Court (2012) EWCA Civ 420**, the Court of Appeal said:

> "how is the rule of law itself to be policed?… In a democracy, that power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse."

In **Cape Intermediate Holdings Limited v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK) (2019) UKSC 38**, the Supreme Court said:

> "the principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the ways in which courts decide cases – to hold the judges to account the decisions they make and to enable the public to have confidence that they are doing their job properly.
>
> "The second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases".

11. In **Scott v Scott (1913) AC 417,** the House of Lords, dealing with a divorce case, said that although the details of the evidence might be painful and humiliating, and so indecent as to injure public morals:

> "all this is tolerated and endured, because it is felt that in public trial is to be is to is to be found, on the whole, the best security the pure, impartial and efficient administration of justice, the best means for winning for it public confidence and respect.

12. The Convention right to be balanced in the applications we heard is article 8, which states:

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

13. It is because of 8.2 that the tribunal must balance the principle of open justice against the claimant's article 8 right to privacy. It must also consider the respondent's article 6 right. Article 6 provides

> "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require.."

14. The first application made was from the respondent, to anonymise the identity of a comparator, who was not to be a witness. The parties know his identity. Neither objected to this. The tribunal agreed he would be identified only as Mr Y. Open justice could be achieved by description of him, so that the facts of how and why he was or was not comparable to the claimant could be made clear for public understanding of the judgment (as stressed in **Cape Asbestos v Dring**) without naming him. Naming him in a public document, in the context of allegations of fraud and criminal conduct, in circumstances where he could not put his side of the story as he was not present, risked inferences being drawn as to his conduct which might be unfair and unjust; this infringed his Convention right to private life. Open justice could be achieved by coding his name and without infringing his privacy.

15. Although there was no application in respect of comparators who are former bank employees, a degree of anonymity is appropriate for the same reasons. They will be identified by their initials as IA, AK, and RE. The parties know who they are.

16. The second application was made in behalf of the claimant, to anonymise her in the proceedings so as to ensure her privacy as to health records. Mr Matovu did not expand on that, nor refer to any law. The respondent replied that any infringement was mild compared to those cases where anonymity had been ordered, and the issue was not central to the claim.

17. The records are four pages. All post-date dismissal. One is a one-month fit note for work-related stress in October 2020. The others relate to a follow-up cardiology investigation of an episode in June 2020. There are no records about her mental health. As the dates show, these items relate only to remedy. In her two witness statements the claimant discusses her health only in the context of the overwhelming stress she felt that made her unable to attend the disciplinary hearing.

18. The tribunal concluded that the claimant's privacy as to post dismissal health records did not require anonymizing the entire proceedings. They only relate to remedy and whether she has failed to mitigate her loss. There is a brief and inconclusive provisional finding by the cardiologist, without intimate or embarrassing information. She does not discuss these health records in either of her witness statements. If she is to be questioned about how these affect her fitness for work, the tribunal can limit questions to that aspect alone. These records contain nothing which is painful, humiliating, or indecent, and is nowhere near, for example, the facts of the

sexual misconduct in **A v B (2010) IRLR 644** , or the assisted masturbation in **F v G (2012) ICR 246,**which led to anonymized orders being made in those cases, let alone the allegations of sexual assaults on children which did *not* justify an order in **BBC v Roden (2015) IRLR 637**. There is little infringement of the convention right in these records. Open justice requires firstly, that the public understand why it may or may not be fair to dismiss an employee who does not attend a disciplinary hearing because of stress; this scarcely infringes the claimant's right to privacy, as it involves no medical records at all, and feeling overwhelmed by stress is not uncommon in employees facing disciplinary action. Secondly, it is important for open justice that the public has enough information to understand how and why a compensatory award has been calculated, which will require some assessment of the claimant's health, how this may have impaired her search for work, and whether she would have attended work if not dismissed. In the tribunal's finding, open justice far outweighs any infringement of privacy, and there is no reason to anonymize her. The tribunal will seek to minimise reference to health matters both in the hearing and in giving reasons, so far as is compatible with open justice.

Disclosure

19. The claimant had made a contested application for a long list of specific documents at the preliminary hearing on 25 March, when disclosure was ordered of some documents, but not others.

20. On the first morning of the final hearing, counsel for the claimant applied without notice for a number of other documents. After an adjournment to clarify what was sought, he was able to make a list so the all respondent could take instructions. The matter was then adjourned again, with counsel for the claimant being asked to make a further and more focused application at 2 pm, relating the documents sought to the issues in the claim, and explaining how they were both relevant and necessary. He then made applications in respect of two missing sheets from telephone banking application 13 September 2018 for customer EW, and for the business account document CYC for the customer JF. The claimant did not make available the application notice for the March hearing (although represented there by her solicitor), so it was not always clear which had been refused by E J Stout and which had been ordered but were said not to have been provided.

21. Some of these documents were requested by the claimant's husband in a letter of 26 March. This followed Judge Stout's order that the claimant send the respondent copies of documents disclosed under the Data Protection Act DSAR process, if they had not been disclosed in the tribunal proceedings, or had been redacted and full disclosure of the redaction was required. Mr Nnyombi appears to have misunderstood that this meant that he could request *any* documents that had not been disclosed – not just those already disclosed under DSAR. He asked for disclosure of the respondent's procedures in full as relied on for dismissal, namely business account opening, business telephone banking and ID &VA (signature validation). This was not part of the application before Employment Judge Stout. The respondent's answer is that the relevant extracts are contained in a document on page 126 of the main bundle, and that the relevant policies to which that document links have since been taken down from the intranet and are no longer available. The tribunal did not order the disclosure. It is not explained why this application was not made on 25 March when the claimant was represented by her solicitor. A full search to see if some original copy exists now that they have been taken down is likely to result in delay, and may require the hearing to go part heard. The respondent is to be judged on the information they provide, and if it is not adequate to show that the claimant's account of what procedure required is correct, she can be given the benefit of any doubt.

22. In respect of the telephone banking application, the respondent has disclosed one

page, unsigned, but not a sales acknowledgement slip or a suspended record (items identified by the claimant herself in this hearing and not before, or by her counsel). The issue concerns how the claimant checked the customer signature. On the account given in her witness statement she checked it against the passport, rather than the bank mandate required, and it was to this that the respondent took objection. This can be explored in evidence, but it is not clear how these documents will assist on whether it was enough to check against the passport.

23. In respect of the J F document, the tribunal made an order that the respondent was to attempt to find it by 10 am on the second day of hearing, and if it could not be found, it was to produce a similar form, in case it assisted on whether the process could be done in stages, or all at once; otherwise they must explain why they could not produce the form. The respondent had not been asked for it before this morning, and for a full search a postponement is required. Having regard to this being marginal to the decision-making, which was based on the claimant's account and investigation report, it is not in the interests of justice to risk a postponement.

24. The investigator had prepared a timeline of the claimant's actions. The claimant now asks for a similar timeline to the comparators who were investigated. The respondents say they have complied with the order to disclose every item on the comparators' human resources files. It is not known if a similar timeline was produced for them. No order was made, on the basis that the investigator will give evidence and can be questioned about the timeframe of those investigations in which he was involved.

25. Counsel for the claimant had also asked for the counterpart of the correspondence between the bank and the police, and for a further account in the witness statements of this version that was ordered by Employment Judge Stout. The respondent points out that the counterpart of the correspondence is already in the hearing bundle, and that the witnesses deal with the points. In the absence of any disagreement on this from Mr Matovu, no order is made on these.

Findings of Fact

26. The respondent is large retail bank. The UK headquarters are in Birmingham.

27. The claimant is black, originally from Uganda. She was employed from 19 May 2014 as a personal banker at Fulham branch. In 2017 she returned from a year's maternity leave to a similar post at Hammersmith branch. There she worked with AK. In October 2017 she applied for a Business Specialist role, paid £23,500 per annum. After training in the role, she transferred in January 2018 to Angel Islington, one of a team of 3-5 business specialists. It was a busy branch.

28. Early in 2019 the bank came to suspect AK of involvement in internal fraud. He was suspended after a fact-finding interview, whereupon the matter was referred to the police. They arrested him on 19 March, and found information on his electronic devices which linked hm to another bank employee, RE. RE was interviewed by Andrew Porter in connection with internal fraud on 22 March, and then suspended.

29. At this point either the bank or the police connected AK to persons thought to be members of an organised criminal group, external to the bank. This feature meant it was now an investigation of suspected money laundering.

30. Phone calls and emails connected the suspects to the claimant and to Mr Y, another bank employee. On 8 April 2019 the claimant and Mr Y were suspended from work following a brief meeting with each. She was informed only that there were allegations of gross misconduct, and that investigation might take some weeks.

Neither was given a pre-suspension fact-finding interview as AK and RE had. Mr Dupoir, the investigator, said this because he could not risk "tipping off", an offence under the money laundering legislation.

31. AK, RE and Mr Y, all men, are three of the four comparators for the sex discrimination claim. The race discrimination comparator is IA, who was dismissed for fraud in November 2013.

32. In May 2019 the claimant heard that AK had been suspended too. In answer to her query he said it was to do with a fake cheque, but then blocked her. In July 2019 AK was dismissed for fraud, following a hearing he did not attend. The other three remained suspended.

33. In December 2019 members of the suspected organized crime group were arrested by the police.

34. Mr Dupoir had asked the police in August about needing to move on with the bank's investigation of the suspended employees. After the December arrests he asked on 4 January 2020 if he could move on; he was told the police planned to interview the claimant under caution, could he wait 2-4 weeks. Meanwhile Mr Dupoir interviewed Mr Y on 13 January. He concluded he had not breached any bank procedures and Mr Y returned to work. This investigatory interview is called an NRI.

35. On 21 January 2020 the police raided the claimant's home at 6.45 am, removing electronic devices. She was arrested on a charge of conspiracy to launder money. Later that day she was questioned about three 2018 texts from AK, then released. On 1 July 2020 2020 she was informed by email that the police were taking no further action on the matter.

36. The police told Mr Dupoir she had been interviewed and released. He then arranged to interview the claimant on 17 February 2020. She asked UNITE to represent her, but they declined as she was not in fact a member as she had thought.

37. Mr Dupoir had identified four areas requiring investigation. He interviewed the claimant for one hour 45 minutes. The meeting was recorded, though some of the claimant's answers were inaudible. We have the transcript which shows the gaps. It also shows she was offered a break at one point but declined. At the same time a minute taker typed the substance of the claimant's answers into a document listing the questions with space for the answers.

38. Mr Dupoir discussed with her a number of areas that made him suspect fraud or collusion with organised crime. He read her texts and emails that raised suspicion that he wanted to discuss. He said to the tribunal he went to interviews with hard copies to use if needed, as the interviewees would have been suspended so long they might need prompts. He had shown some to Mr Y, but not to the claimant. This was because she had recently been interviewed by the police and so knew what the questions were about. Despite that, it could be seen from the interview record that some documents (a screenshot) were shown to the claimant at interview, others offered to her, and that in fact she usually had good recall, no doubt because the police had gone through it with her.

39. The focus was on whether there had been circumvention of bank procedures designed to reduce the risk that proceeds of crime (particularly cash, such as from drug dealing or human trafficking), are introduced into the banking system to look as if they are derived from legitimate business activity – money laundering. A key part of this, for banks, solicitors and the like, is to "know your client", so as to be able to assess whether the business is likely to produce the kind of money derived from it, or is in fact a shell or front company whose invoices are fictitious. Banks can be

subject to heavy penalties from regulators for not taking care on this. Banks are also a target for fraud, whether from outsiders or their own staff. The respondent had strict procedures on account opening, signature checking and proof of identity, and on resets where an account was blocked for suspected fraud, usually requiring personal meetings with a customer. To prevent staff being used by criminal third parties they were not allowed to give out their own phone numbers (rather than the business telephone in branch). Nor were they allowed to open accounts for family or friends. Mr Dupoir wanted to find out what the claimant's explanation for certain suspicious activity was, and whether she had been complicit with fraudulent colleagues, or whether she had inadvertently facilitated money laundering or fraud by failing to follow the protective procedures.

40. Within a branch there is a daily audit of a random selection of staff activity there, but not, as the claimant through counsel suggested, every single action undertaken. There was also an "audit record", by means of which investigation staff could access the computer system which recorded every action on a computer account, and every time a staff member had looked at an account. "Browsing" an account for no particular reason could indicate dishonest staff looking for accounts to rob.

41. The interview began with the general questions about procedure, her own financial position and what she knew about "staff approach", meaning requests outside the usual channels from people outside the bank. He then took the claimant to a new business customer, JF, a switch from Santander. He went into the Hammersmith branch; the local business adviser was said by AK, her former colleague, to be busy and it was arranged that he would interview the customer while the claimant was on the telephone to them. Her relationship with AK was explored. She was asked about an email she sent to AK early in September about customer J, asking for the proof of address for "your mate". She was challenged, firstly that it meant she was opening an account without the present customer present, secondly that she knew the customer and AK were familiar to each other. Later she had reviewed the account on numerous occasions and then for a fraud warning she had seen. She identified this as when the accounts had been locked. She had called the fraud team and then told the customer she'd have to see him in branch. When he did not she had closed the account. She was asked why she had not reported the personal connection between AK and the customer, when staff should not do business on friends and families accounts.

42. The investigator then reverted to the opening of J's business account. He read out to her series of texts between AK and J on 30th August about "the lady" not calling J, and J not wanting "any long stuff". Was she someone who would cut corners? The claimant said that when she opened the account a few days later, she had done it on the basis of the telephone interview and that was accepted, it was then sent to the customer and they would then process the application. It emerged that the interview was around 5 September, and the application's customer signature was scanned in on 7 September. On the evening 5 September AK had written to the outsider "after your guy signed the paperwork for the business do you think we can get paid tomorrow". There was a discussion of when she had checked identity documents. She asserted she checked the passport, but there was no record of this on the computer audit activity list – at this point she was shown a screenshot that she had sent AK when asking for proof of address. She added that the passport she saw did not match what was on the system and so she had to change the name. She was then asked about getting a text which showed that an outsider had her personal phone number. She said she had remonstrated with AK over the telephone about that, and there have been no further contact. She had not thought to report it. The conversation moved on to the introducer at Hammersmith, Sheikh, who, it turns out, is a member of the crime gang, who referred new business accounts, although in the event they had not arrived. (In answer to tribunal questions the claimant explained that introducers are checked themselves, but no longer receive commission for

referrals). The claimant explained that she knew it looked bad, but that in December her mother had been sick and she was doing exams, and had not shared her concerns with the risk manager or bank manager though she knew she was supposed to raise them, though she added that there was not enough unusual activity to make a report, and in any event when customer J did not come in to the branch after the account was blocked by the fraud team, she had closed it in any event. She was then asked about another suspect customer E, who came at Sheikh's suggestion to ask about her telephone banking. The claimant was challenged that she opened telephone banking for her, without checking the signature she was offered against the signature on the bank mandate on the computer system, and had only made this cheque four days later, on 17 September 2018. There were other questions about the customer phoning her later and her looking at the account. She was asked questions about browsing the account of customer R, who later sent her an email thanking her and saying he would come and see her soon- she was offered sight of the email. The claimant could not remember, and explained the branch was very busy. Finally she was asked about a cash deposit into her account in October 2018 made some distance from her home , at around the same time as J's account was opened the claimant explained it was a friend reimbursing an emergency loan.

43. The tone was businesslike and reasonably friendly. She seems to have been ready to understand and explain. At one point (when it was suggested she too had been paid by outsiders) the claimant broke down and was offered a break.

44. Mr Dupoir then prepared a 6 page investigation report, with the relevant documentary material appended. The claimant is AN, AK is called X. In the executive summary he recorded:

> Although there is no concern of AN being involved in directly defrauding the bank, the investigation did identify a number of potentially reportable events which were not escalated by an AN as well as a relatively minor procedural failing.

45. He set out his findings. On opening J's account he accepted that she had interviewed by telephone and then had the papers signed later. Browsing J's account later was legitimate in response to an enquiry from the fraud team. He recorded she had not considered AK's apparent friendship with J to be reportable, and when considering reporting later had not because of personal pressures. On the phone number, she had remonstrated with AK about giving it out, but did not think it unusual as she had given her number to the Ugandan High Commission, also a customer. On E's telephone banking, he concluded there was a "misstep" in checking the signature, but she was not complict in crime. On R, there was a single look up which was unexplained. It might be linked to E, as a man came in with E. He accepted the explanation of the cash payment to her account. He concluded:

> AN came to the attention of FCTM during a separate investigation as part of which a number of email, audit and other records including texts were reviewed which in context suggested AN had supported X with illicit activity within the bank. During the NRI on 17 February 2020, AN was able to provide explanations for the majority of the interactions that she had on the accounts linked to the OCG and with X. Although there have been some potential red flags missed by AN including fraud warnings and the provision of AN's personal mobile number to the third party as well as some outstanding unexplained activity which includes unexplained emails and browsing activity, having considered all aspects of the investigation and AN's responses, it appears likely that AN has been socially engineered by X to unknowingly undertake actions supportive of their illicit activity in the bank. X is a former staff member who was involved in fraud against the bank and is believed to have used their relationship with AN and her relative inexperience in her role as a Business Specialist to manipulate her into unknowingly support his illicit activity within the bank.

46. The report was passed to Ms Yvonne Schofield of the human resources department,

who decided there should be disciplinary charges, which she formulated as follows:

> -you failed to report colleagues personal involvement with the customer, J, and concerns you had with regard to the account
>
> -you are aware personal telephone number had been shared by a colleague with the customer J and did not report this to the bank as suspicious activity
>
> -you browsed a number of customer accounts, more than one occasion, without business reason in particular JF, JL, R, D and AJ, director of E
>
> -you breached ID and VA procedures, with regard to not checking customer signatures when setting up telephone banking for the customer, E
>
> -you breached ID and VA procedures opening a business account for J, when you opened the account without a face-to-face meeting with the customer

47. The claimant was invited to a disciplinary interview on 25 March with Ms Clare Wilson, branch manager at Kings Road Chelsea, who did not know the claimant. The first letter sent did not reach the claimant because it had been encrypted, so the meeting date was changed to 8 April 2020. The claimant was sent the investigation report and its appendices with the audit trail and texts and emails, and a document with links to the internal policies and extracts from what were considered to be the relevant procedures.

48. She was asked to make every effort to attend the hearing (because of Covid restrictions it was to take place by telephone, or Zoom if she preferred) and advise as soon as possible of the specific reasons if unable to attend. The claimant spoke by telephone to Miss Schofield on 26 March, just after she had seen the letter, and then emailed her that evening saying:

> "further to our telephone conversation today I am bad place mentally at the moment and this is due to the ongoing work-related stress. I'm having to take sleeping pills otherwise I am up all night. I have been signed off by the GP and I will send the sicknote through. I have to put everything on hold in order for me to recover. I won't be able to attend the meeting on 8th. I will call you back when I'm in a better position mentally. Thank you for talking to me today and sorry that I broke down. It's just I've been to hell and through fire and at the moment and not doing well".

49. Miss Schofield had emailed Miss Wilson earlier that day, after the conversation, though before the email, saying:

> "A has just called and is very distraught, and unwell. She is not able to attend the meeting via telephone with you. She doesn't want anyone else to attend on her behalf but advised me she is happy for you to consider the case in her absence. I will let you know what she said in full when we speak. Anyway, she has asked if you could possibly consider the case in absence but if possible earlier 8 April as the stress is unbearable for her. I can explain further when we speak".

50. They arranged to have a discussion on Friday, 3 April. Ms Wilson had read the report and supporting documents. Miss Schofield told her about the content of the conversation with the claimant and (as recorded in the draft letter to the claimant later that day) that she had said it all to the investigator and only wanted to add that if she did return to work she would follow every policy to the letter and seek help if it was felt she needed guidance; she asked for forgiveness for her mistakes.

51. Miss Wilson decided that the claimant's conduct amounted to gross misconduct, except for the charge of browsing accounts, and that the appropriate sanction was a final written warning to remain on the file for 12 months. Yvonne Schofield drafted a letter and emailed it to Ms Wilson that afternoon to approve. It concluded:

> "I believe the allegations that I found to be serious and gross misconduct issues but I do

believe going forward you will be extra vigilant in all that you do and there will be no further issues of a similar nature".

On Monday, 5 April Miss Wilson approved the draft, saying she had nothing to add. Miss Schofield reported she would "get the letter put together for you to send".

52. At some point between Monday and Wednesday 8 April Clare Wilson changed her mind. She could not say when this occurred, and explained she did not keep notes of any of her discussions with Miss Schofield. We know that on the morning of 8 April she held a disciplinary for RE, and decided to dismiss him for fraudulently handing a credit card to someone who was not a customer, and for not reporting suspicions, but Miss Wilson said this had nothing to do with changing her mind about the sanction for the claimant, and that the reason was that when she thought about it she did not believe she could employ in her branch someone she could not trust, the claimant having acted as she had, and would not inflict this on any other branch manager. So on the afternoon of 8 April Ms Schofield redrafted the letter so as to conclude instead:

> "your actions, in my view, sufficiently serious that even though you said you would never do what you have done again I do not believe you can continue working in the bank. Trust and confidence is paramount and fundamental of all employees of the bank. Without trust, which I believe has been lost by your actions, I do not see how you can continue in your role or any other role in the bank. Dismissal I believe is therefore reasonable and fair in the circumstances".

53. In both letters she had concluded there was a breach of the FCA individual conduct rules by not acting with due skill, care and diligence, but that details of the case did not need to be shared with the fraud prevention agency Cifas.

54. The final draft sent by Miss Schofield to Ms Wilson on at 16:51 eighth of April. This was a few minutes after the claimant had sent Miss Schofield by email a GP sicknote dated 26 March 2020 saying she was unfit for work for one month by reason of work-related stress. After checking by Ms Wilson, Ms Schofield sent it to the claimant on the morning of 9 April.

55. In both letters the claimant was offered an appeal, to be submitted in writing within 10 working days. The claimant decided not to appeal and did not reply to the letter. She told the tribunal this was because she had lost trust in HSBC acting fairly.

56. Miss Schofield did not give evidence. We were told she had retired in June 2020.

57. We set out above what the claimant told the investigator, as that is what was known to the respondent at the time. We now set out her explanations to the tribunal, as what she is likely to have said had there been a disciplinary hearing or an appeal meeting.

58. She agreed that it was wrong to pass her phone number to a customer, but not to an introducer, like Sheikh. She complained about it to AK because it was a breach of her privacy, not because it was a breach of bank rules. She did not attach significance to J being AK's "mate", asserting that mate is a common term often used between strangers.

59. On account opening, she asserted that it was common practice to conduct the meeting to find out basic information about the business and complete the forms over the telephone – "pre-registration" – and then meet the customer when they would sign the printed form recording their answers and provide identification material.

60. Ms Wilson was not herself a business specialist and had taken advice on business procedures when making her decision. In evidence to the tribunal she was emphatic that there must be face to face interview for all accounts being opened. The document provided to the claimant with procedures at the time contained links to the intranet with

the full procedure on it. These are no longer available as procedures have changed. Printed extracts on the document sent to her set up the general principle of "know your customer" (KYC) and listed key reminders, including:

> "face to face KYC must be undertaken when opening accounts for potential customers. You must see at least one beneficial owner, director, partner or equivalent for KYC ensuring that you obtain a full understanding of the customer's business and operations. Further discussion may be undertaken face-to-face or telephone… Identification and address verification must always be obtained for the relevant parties to the account. Particular attention must be paid to customers based overseas whether non-face-to-face procedures apply".

The claimant told the investigator that telephone interviews were not unusual, and this is the evidence in her witness statement. We do not have evidence from other bank employees about whether this was a permitted shortcut. The document also shows that signatures on the registration form must be "in accordance with the mandate". The mandate is a document which has been scanned onto the computer system. The tribunal had a copy of the CYC ("confirm your conversation") form completed for J, which was not available at the time to Ms Wilson or the claimant. It does not show whether or when it was signed, so is not useful, as it was never suggested that the claimant had not collected information over the telephone.

61. The claimant added orally, but this is not in her witness statement or any document, that it had been suggested on a previous performance review that she made too many unexplained activity reports, and this is why she was reluctant to report unless necessary. We treat this evidence with caution, as it was not the explanation she gave to the investigator, nor did the respondent have notice of it for this hearing so as to be able to find relevant documents, nor despite the extensive disclosure applications, has she asked for notes of performance reviews saying this. We have some of her training records in the bundle; they do not mention this.

Relevant Law - Discrimination

62. The Equality Act 2010 at section 13 provides that "a person (A) discriminates against another (B) if, because of a protected characteristic, a treats be less favourably than a treats or would treat others". Sex and race are protected characteristics.

63. The word "because" requires the tribunal to examine the reason why an employer acted as he did, and whether the protected characteristic had "a significant influence on the outcome" – **Nagarajan v London Regional Transport (2001) AC 501**.

64. Because people rarely admit to discriminating, may not intend to discriminate, and may not even be conscious that they are discriminating, the Equality Act provides a special burden of proof. Section 136 provides:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

65. How this is to operate is discussed in **Igen v Wong (2005) ICR 931**. The burden of proof is on the claimant. Evidence of discrimination is unusual, and the tribunal can draw inferences from facts. If inferences tending to show discrimination can be drawn, it is for the respondent to prove that he did not discriminate, including that the treatment is "in no sense whatsoever" because of the protected characteristic. Tribunals are to bear in mind that many of the facts required to prove any

explanation are in the hands of the respondent.

Relevant Law-Unfair Dismissal

66. Unfair dismissal is a statutory right. By section 98 of the Employment Rights Act 1996, it is for the employer to show that the reason for dismissal was a potentially fair reason. Section 98 (1) includes as potentially fair reason is a dismissal for conduct. An employer may also potentially dismiss fairly for: "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held".

67. If a potentially fair reason is shown, section 98 (4) provides that it is the employment tribunal to determine:

> "whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—"
>
> (which)
>
> (a) 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
>
> (b) shall be determined in accordance with equity and the substantial merits of the case".

68. In conduct dismissals tribunals have regard to **British Home Stores v Burchell (1978) IR 379**. We must consider whether the employer had a genuine belief that the employee was responsible for the misconduct, whether the employer had reasonable grounds on which to base that belief, and whether at the time the employer form that belief it had carried out as much investigation as is reasonable in all the circumstances. The tribunal was only take into account what was known to the employer at the time of dismissal – **W. Devis & Son v Atkins (1977) AC 931**. It must consider the facts known to the decision-maker, even if other facts were known within the organisation, but not within the group of people responsible for the investigation – **Royal Mail Ltd v Jhuti (2019) UKSC 55.** It must be the decision of the person dismissing, not that of another, such as an HR professional - **Ramphal v Department of Transport UKEAT 0352/14**..The tribunal must not substitute its own view for that of the employer, provided the employer's action was within the range of responses of a reasonable employer, and this principle applies both to findings on whether the decision itself was reasonable, and on whether the process adopted was reasonable – **Foley v Post Office (2000) IR LR 82,** and **Sainsbury's Supermarkets Ltd v Hitt (2002) EWCA Civ 1588.**

69. Where a dismissal is found unfair because of shortcomings in the process by which the decision was reached, when it comes to remedy, the tribunal can consider what difference a fair procedure would have made to the outcome – **Polkey v AE Dayton Services Ltd (1988) AC 344**.

70. There is provision for a tribunal to reduce the basic award by virtue of section 122 (2) of the Employment Rights Act. The conduct may not have contributed to dismissal, nor need the employer have known about it at the time, for the tribunal to exercise its discretion to reduce the award such that it will be just and equitable to do so.

71. There is also provision to reduce the compensatory award, by section 123 (6) of the Employment Rights Act where the tribunal finds that the dismissal "was to any extent caused or contributed to by any action of the complainant". In such circumstances it

must reduce it "by such proportion as it considers just and equitable". When doing so it must consider four questions: what was the conduct said to be contributory fault; irrespective of the employer's view, was that conduct blameworthy; did that blameworthy conduct cause or contribute to the dismissal; if yes, to what extent is it just and equitable to reduce the award - **Steen v ASP Packaging Ltd (2014) ICR 56.**

72. Finally, on compensation, where either the employer or the employee has failed to follow the ACAS Code of Practice on discipline and grievance, and the tribunal considers that failure unreasonable, it may, if it is just and equitable, increase or decrease the compensation otherwise payable by up to 25% – section 207A Trade Union and Labour Relations (Consolidation) Act 1992.

Relevant Law -Wrongful Dismissal

73. There is a claim at common law for pay for the notice period the claimant was not given because she was dismissed for gross misconduct. The employment tribunal has jurisdiction by reason of the Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994. In deciding this claim it for the tribunal to decide whether the contract was fundamentally breached by the misconduct, rather than whether the employer acted reasonably in finding there was such a breach and dismissing because of it.

74. If there was a breach of contract, the measure of damages is the money the claimant would have been paid had she served notice. A statutory minimum term of notice, set out in section 86 of the Employment Rights Act 1996, of a week's pay for each year of service, if the contractual term is less; a contract may provide for longer notice.

Discussion and Conclusion – Wrongful dismissal

75. We assessed whether the claimant's actions in the four matters found against her by Ms Wilson did in fact amount to gross misconduct justifying ending the contract without notice. On not reporting J's apparent personal involvement with a customer, we allow that "mate" can be used of an acquaintance, rather than a friend, and can be used ironically. By itself it was an error of judgment not to report it, but scarcely gross misconduct; she had trusted AK as a colleague. On the telephone number, the charge was factually wrong, as the number was given to Sheikh who texted AK about delayed account opening. We did not think an individual having a personal number was on a par with the High Commission, and it was something she should have reported. Small items as this can make up a pattern prompting investigation.

76. We were more concerned about clearing an account for telephoning banking without checking the signature mandate: such a check should have been automatic for any account, but could have been a one-off, and was put right later. The worst was not meeting J when he came to sign the forms. Whether or not she is correct about using a telephone call to interview and complete a form before meeting, she understood that a face to face meeting of some kind was mandatory. She intended this – having arranged for J to come in to sign – but when he arrived she was on the phone and printed off the form for a colleague to sign. She claimed to have watched him do it through the glass panel of the office where she was making the call. This was hardly a face to face meeting. As far as we know however it was a one-off. She had an order book to fill with business customers and relied on referrals for new accounts.

77. None of these errors included dishonesty, assault, blatant disobedience, bringing the employer into disrepute or similar conduct usually held to be gross misconduct meaning the contract is to be treated as repudiated. They were misconduct, in that she made errors, some potentially serious in their consequences, but not sustained,

and her reaction had been very apologetic. We take the respondent's point that when Mr Dupoir referred in his report to "minor procedural failing", this was "minor" related to the fraud he might have found, while the managers were concerned about procedure being a way to make it more difficult for fraud to be committed, but while it was misconduct not to report the phone number, or to open J's account without meeting him at all, neither individually or taken together did this amount to *repudiatory* conduct.

78. The wrongful dismissal claim succeeds. The measure of damages is her notice period, the statutory minimum term of 5 weeks rather than the month claimed by her husband, and that is the award, £2,127.70

Discussion and Conclusion – Unfair Dismissal

79. The respondent asserts the reason was related to the claimant's conduct, alternatively, some other substantial treason justifying dismissal, namely a breakdown of trust and confidence.

80. In our finding, conduct – found to be gross misconduct - was the reason or dismissal. Ms Wilson's decision she could not trust her was the reason why she decided to dismiss, rather than stay with a warning, not a substantial reason that is not about conduct.

81. We then consider the fairness of the dismissal having regard to the **Burchell** test.

82. Ms Wilson's belief in the claimant's guilt was genuine. This was not cover for some other reason. We were also satisfied with the investigation. The investigation of fraud was thorough. Ms Wilson as a branch manager was familiar with all other relevant procedures, and took steps to inform herself on whether business account opening was different. At worst she could have checked with colleagues whether "pre-registration" followed by a face to face meeting was acceptable, but it made little difference as there had been no meeting in fact.

83. The defect was not having the claimant's input, whether in writing or at a meeting. We were unimpressed by the decision to press ahead. On something so important, and given that oral conversations can lead to misunderstanding, Ms Wilson should have seen something in writing from the claimant confirming she did want a hearing in her absence. She should have asked to see the claimant's email to Ms Schofield, which refers to being very stressed and unable to come to a hearing, and that she would call back when mentally better, as she would then have asked the claimant to confirm whether in fact she wanted a postponement. She should have considered inviting the claimant to make a written statement if she was unable to manage a telephone discussion. She should have considered a postponement in the light of the fit note, which substantiated that the claimant was unwell. It would not have been unreasonable to wait a month or to ask the claimant to say when she could manage a hearing.

84. The claimant had impressed Mr Dupoir that she was genuine, and Ms Schofield was sympathetic. Had there been a meeting, Ms Wilson too may have accepted these were mistakes made when an unscrupulous colleague took advantage of her.

85. In making her findings, Ms Wilson relied on the expression of contrition as an acceptance of guilt. In our view, this, and the context of the guilty conduct of AK and RE, made her take a more severe view. There is nothing in the bank's list of examples of gross misconduct to suggest that *any* breach of procedure on account opening or any slip in checking a signature, would be gross misconduct. All bank staff would probably agree they were potentially serious errors that could facilitate fraud. It was reasonable for an employer to view this as serious misconduct, because

the procedures were there to make fraud difficult, and because the bank faced heavy penalties for lax systems. How serious the claimant's conduct was is a matter of judgment for the employer, having regard to the reason for the error, the frequency, her lack of experience of fraud, and so on.

86. We considered that taken all together Clare Wilson's first response was the right one. A final written warning for 12 months given to an innocent employee was a severe penalty, but entirely reasonable given the need to see procedures were followed. It would ensure the claimant would learn a lesson and be particularly careful from then on. When Ms Wilson said she could not trust the claimant, if she meant she was not entirely reliable, a final warning would have dealt with this fear. If she meant she was deceitful or devious or covering up, then there was no evidence to support this, and had there been a meeting it is unlikely to have been her conclusion. While mindful of the danger of substituting what this tribunal would have done, we did not think any *reasonable* employer would have dismissed the claimant for what was established. To do this, it should have made it clear to staff that any breach of procedure would be sacking offence.

87. It was argued for the claimant, having regard to **Ramphal**, that Ms Schofield had done more than manage the process and had persuaded Ms Wilson to change her decision. Although it is a pity Ms Wison kept no notes of her thinking or their discussions, having regard to the sequence of drafts sent to and fro we do not find that this is what occurred. Ms Schofield first drafted a final warning letter, then accepted Ms Wilson's approval, and then redrafted it when Ms Wilson changed her mind. Nothing suggests Ms Schofield pushed back or proposed dismissal was better.

88. Counsel for the claimant suggested a number of other points about unfairness in the course of the hearing. Dealing with these, we did not agree that the bank proposed to the police that they could not interview the claimant until the police had completed enquiries; the long suspension was unfortunate but unavoidable. Tipping off is an offence, and the bank knew it. The correspondence shows Mr Dupoir was monitoring when he could go ahead without tipping off. Nor did we agree it was unfair that she was not accompanied at the investigatory interview. She did not have a companion but could have brought one, and she did not seek a postponement to get one. The bank's policy on investigation interviews is that they should not last more than 2 hours, and there should be a break of at least an hour between interviews. This interview was within the policy. She was not browbeaten. She seemed to understand the procedures they were discussing. There are gaps in the recording, but no evidence that the note taker omitted any answer.

Discussion and conclusion- Discrimination claims

89. The race claim was pleaded as three acts of discrimination. The first was that Mr Dupoir questioned the claimant at the NRI on 17 February about connections with a criminal bank gang member from North Africa, so suggesting foreign born individuals must be associated and criminal. The allegation derives from the ET1. Mr Dupoir denied discussing the origins of J , or the introducer, Sheikh, or AK. There is nothing in the transcript to suggest this either. The claimant did not mention this at all in her main witness statement, or the supplementary statement prepared after the March preliminary hearing. The alleged remark was not put to Mr Dupoir in cross examination, even after a pause to take instructions on this, and we concluded that it was abandoned. The respondent suggests that it may have been something mentioned by the police, which the claimant confused with the later bank interview. In closing, it was not pursued.

90. The second allegation of less favourable treatment because of race was the decision

to proceed to a hearing even though she had been signed off by GP. The third allegation was the dismissal by Ms Wilson. It was put to Ms Wilson that although she had not met the claimant she must've concluded she was foreign-born because of her unusual name. Ms Wilson replied that many people have unusual names, by marriage or descent and she had drawn conclusions about the claimant's race.

91. Nowhere in the evidence, from the claimant or from others, is there anything else which might suggest race as grounds for treatment. The claimant relied on a white hypothetical comparator, in closing having abandoned IA, who was dismissed in 2013 after interview with a different investigator. Ms Wilson and Mr Dupoir are white. We were not told the ethnicity of Ms Schofield but feel that if she was black the respondent would have said so. In the light of the case law that there must be something more than unfavourable treatment and the difference in race, we could not conclude that there were facts requiring an explanation. The claimant's counsel submitted that the dismissal process was so unfair that race must be the reason, but we do not agree. In our finding her acts were mistakes rather than dishonest, and the dismissal unfair, but there is nothing to indicate that ethnicity had anything to do with it, or that a white employee in the same circumstances would not have been treated the same. It was not suggested there were few black employees, or that other black employees in any branch have been unfairly treated. We agree that the claimant's name might suggest a foreign origin, but also observe that in 21st-century London it is unsafe to make assumptions about anyone's ethnicity, and that the mere fact of an unusual name, and the unusual feature of Ms Wilson changing her mind about the appropriate sanction, were not factors from which we could infer in the absence of explanation that race was the reason for this. The race discrimination claim fails.

92. On the sex discrimination claim, in closing, the claimant abandoned the comparators AK and RE, following the amendment of the list of issues from not having an interview before suspension (as they had had). She substituted not being shown the documents in the NRI, as Mr Y had. We are not satisfied that the difference in treatment and the different in sex are enough to the burden of proof. There is no other evidence of women being treated less favourably by the bank. Mr Dupoir seemed to us admirably thorough, careful, and in no way oppressive in manner. If the burden had shifted, we would have accepted his explanation that the claimant did not need prompting at any stage in the interview, because of her recent interview with the police, whereas Mr Y had not been interviewed by the police, and had been suspended for 10 months without knowing what it was about. The record shows he did share at least one document with her when she was uncertain, which supports his explanation of using them as prompts when necessary. The claimant did not display any uncertainty that might have led him to show her the document to jog her memory, and where she was uncertain (as on R) he gave her the benefit of the doubt. He also accepted without other enquiry her explanation of the case deposit. We derive this from a reading of the transcript as much as Mr Dupoir's evidence.

93. The other sex discrimination alleged was that she was dismissed because of sex. The claimant's counsel did not put to Ms Wilson that she had decided to dismiss because the claimant was a woman. There is no other evidence suggesting women were unfairly treated compared to man, or that the claimant's sex was the reason for the change of heart. The sex discrimination claim also fails.

Remedy

ACAS Code on Discipline and Grievance

94. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that in a claim to which a relevant Code of Practice applies, if the employee, or the employer has not complied with a provision of the code, and the tribunal considers that failure was unreasonable, the tribunal may, if it considers it just and

equitable, reduce, or increase, respectively, the award by up to 25%. This applies to both the unfair dismissal and wrongful dismissal claims.

95. The claimant urged the tribunal to increase the award for failure to hold a disciplinary meeting at a time when the claimant could attend. The respondent urged the tribunal to decrease any award for failure to appeal.

96. The Code provides that a disciplinary meeting should be held up "without unreasonable delay". It can be postponed by up to 5 days to allow an employee to be accompanied by a chosen representative. Employers and employees and their representatives should make every effort to attend. Where an employee is persistently unable or unwilling to attend a disciplinary meeting without good cause the employer should make a decision on the evidence available.

97. The ACAS Guide, not the Code itself, adds on postponements of hearings: "You may also arrange another meeting if an employee fails to attend through circumstances outside their control, such as illness", and " there may be occasions when an employee is repeatedly unable or unwilling to attend a meeting. This may be for various reasons, including genuine illness or a refusal to face up to the issue" and that this may be the time to make a decision on the evidence available.

98. We have already discussed that we thought fair process would have involved checking that the claimant did want the matter to be decided in her absence, or whether in effect she was asking for the hearing to put off until she felt able to face it. This was key to our finding of unfair dismissal. However, in our finding the failure to hold a meeting was well-intentioned. The employer intended to hold the meeting, and believed, mistakenly, that the employee wanted the matter to go ahead in her absence. The employer did not understand there to be a request for a postponement; the GP fit note arrived just after the final draft of the dismissal letter was being signed off. Failure to notice and consider the implications was by oversight rather than malice, in our view. It is also not clear how long the claimant would have remained unfit for a meeting. It is possible that the respondent would have resorted to a decision in her absence in any event. We did not therefore consider it would be just and equitable to increase the award for any breach of the Code.

99. Employees must be offered an opportunity to appeal and :"Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision". The claimant did not appeal, although clearly she thought the action was wrong and unjust. Her failure to do so does not seem to be attributable to any mental stress. Within the month of April she was writing to the employer about her pay, and applying for other jobs. The claimant's own explanation was that she had lost all trust in HSBC, for letting this become a police matter, and for dismissing her. The purpose of the uplifting of awards is part of general encouragement of parties to employment contracts to try to resolve disputes themselves before resorting to employment tribunals, and this is why employers are to offer appeals. When the claimant learned that she had been dismissed she had a detailed account of why they had gone ahead in her absence, and why they had made the findings they did. If she had represented that Miss Schofield was mistaken, and she was seeking a postponement, an appeal, at which she could present all her arguments, was an obvious solution. There is a real prospect that had she presented her side of the case the decision would have reverted to a final written warning and she would have kept her job, or that if still dismissed she would be paid notice. Mr Dupoir had accepted she was transparent and not fraudulent, and Ms Wilson's first reaction was that the errors were innocent and unlikely to be repeated. An appeal did not bar her from going to an employment tribunal if the outcome was unsatisfactory. It was not reasonable for the claimant to hold HSBC responsible for police involvement, especially when she had the evidence set out in the investigation report. In our view it was just and equitable to reduce the award for failure to appeal by 15%, making

allowance for her stressed state at the time, which may have affected her judgment.

Contribution to Dismissal

100. Although the claimant was unfairly dismissed, we did not consider there was misconduct which contributed to the dismissal. Plainly she knew she should have a face to face meeting with a new business customer, and even if taking it in two stages *was* acceptable, she never did meet J, and viewing him through a glass panel while someone else got him to sign a print off was not within the spirit, let alone the letter, of the bank's policy on preventing money laundering. She also knew she should check a signature against the bank's mandate at the time, before authorising telephone banking; this lapse exposed bank customers to risk of fraud, even if nothing occurred in the four day delay; this was a mistake, which she went back to retrieve. She did not report suspicions, even though on her own account she intended to. She also knew she should have reported her phone number being given to an outsider, even if it was an introducer not a customer; she objected to it at the time, so identified it as unusual.

101. All these are conduct which caused her dismissal, even though in our finding it was unfair to dismiss her for them. Some are more serious than others (the face to face meeting stands out, but so is the failure to report the phone number). Taken as a whole we decided it was just to reduce the award by 20% for contributory fault.

102. We did not decide to reduce the basic award. There was no other conduct that an employer may have considered relevant had he known of it at the time or which was unrelated to the reason for dismissal but would make it inequitable to award compensation. Reducing the compensatory award suffices.

Reinstatement

103. In the final paragraph of her witness statement the claimant "asked the tribunal to place her back in the position she would have been in had the breach of contract not taken place"; one reading of this is that she wanted her job back and so at the conclusion of day three, before taking submissions the next morning, the tribunal informed the parties that it would consider a reinstatement order if it found in the claimant's favour. In our view, reinstatement was feasible given the large number of bank branches in London, and would have the practical result that if the claimant wanted to move on she would be able to get a reference from the respondent that did not involve mention of dismissal for gross misconduct, as well as a paid job at a time when she had found it difficult to get work (this was before we heard evidence on remedy). However, on the morning of the next day the claimant indicated that she did not seek reinstatement and we then heard evidence on compensation.

104. This was difficult, because the claimant does not mention anything related to her search for work after dismissal, either in her first witness statement, or in the supplementary statement filed shortly before the hearing. Some documents on her search for work were included in the main bundle. The schedule of loss had not been included in the bundle, but the respondent was able to provide a copy of the schedule served in October 2020. Having been called to give evidence, the claimant mentioned in the course of questioning that there had been an updated schedule. Her solicitor provided this towards the end of the morning, but although dated first of April 2021, if anything it contained less detail than the original.

105. The claimant's evidence was that she had applied for over a thousand jobs. In the bundle of applications 21 jobs between 11 August 2020 and 19 October 2020, none since. In October she had uploaded her CV to some job websites. She first stated that the figures in the schedule of loss accurate and she had not obtained a

new job, but later added that she had had a contract from Track and Trace for about three weeks, which ended when "the contract was withdrawn from Serco". She was unable to remember when this was, then when pressed, she thought it was since Christmas 2020, and that she had been paid "around £1,217", later that it was probably from 18 January. There is no mention of this in 1 April 2020 schedule of loss. She was unable to produce any document to confirm the date or the amount.

106. On the October schedule, prepared by her husband from a CAB template, the claimant argued that her mental health had been adversely affected which had compromised her ability to mitigate her loss. There is no evidence about her mental health and the witness statement or the bundle. In answer to a direct question the claimant said that her GP had referred her on to the mental health team but she had heard nothing more. There are some medical records in the bundle but they concern one investigation by neurology of June 2020 incident, as an appointment for further tests by a cardiologist outcome unknown. While appreciating that the dismissal was a shock, and the claimant will have been apprehensive until the police informed her in July that they were not proceeding, we do not have evidence from which to find that the claimant was so ill that she was impaired in looking for work

107. The claimant also argues that she is at a disadvantage because of the circumstances of her dismissal, the difficulty of getting other jobs in the banking sector, the specialised nature of her work, being black, being 37, and the depressed state of the job market. We can see that it will be difficult to obtain a job in financial services after being dismissed for gross misconduct, even when the reason was not dishonesty. We did not find that the "specialised nature of her work" was a disadvantage. She has skills that suit her for many types of administrative work and customer facing roles, and the salary level (40 hours at national minimum wage is now £18,532 per annum, as against the claimant's £23,500) indicates that. At this salary level and with her employment history, being black is not shown to be a disadvantage on the labour market, in our experience of the range of claimants in London, and without other evidence. Her age (37) is likely to suggest reliability as an employee, again, no disadvantage. She has studied for an MBA qualification, though she has no current plans to start a business.

108. The respondent argues that the claimant has made no serious effort to look for work, other than the flurry of applications in October 2020 when she had been ordered to file a schedule of loss and documents in support. The claimant says she did not understand that she had to provide more than a sample of documents. In our view this is hard to credit when she has, at any rate recently, been represented by solicitors and counsel, this hearing was to hear all issues including remedy, and the schedule was recently updated. Nevertheless, if it is right that she found work with Track and Trace in January 2021, she must still have been looking for a job at that point. We are more puzzled by her losing this job, for which there must be some evidence, such as a text or email, there having been no reduction in testing, and advertisements still being placed for this type of work, nor could we find any news item suggesting that Serco had lost the contract, only that their contract had been extended by six months in October 2020. Our trust in the claimant's frankness was shaken by the failure to mention the Serco earnings in the 1 April schedule.

109. The tribunal recognises that since the beginning of national lockdown in March 2020, with many employees based on furlough, and some of these then being made redundant, vacancies have been reduced, and even if the claimant had been applying for jobs in the summer of 2020, she may have found it difficult to get work. Some businesses have found life very difficult, others, such as supermarkets or Amazon, have thrived, and conditions have certainly eased since the partial unlocking in September 2020, even despite the renewed closure in December 2020, as businesses have adjusted to new conditions and working from home. According to ONS, current job vacancies now run at around two thirds of 2019 levels nationally.

We are concerned that the claimant has not made much effort to find a job, and that by now she should have found work at this level. We decided that the just and equitable compensatory award is to award loss of earnings from 14 May 2020 (the end of the notice period) until 18 January 2021 (when she started with Serco), but not, in the absence of evidence why she ceased work for Serco or has not been able to find other work, after that date. That is 35.2 weeks at £425.54 per week, £14,979.

110. The claimant ticked the box on ET1 saying she was in a pension scheme. There is no pension claim in the October schedule. A round sum is mentioned in the 1 April schedule. There is no evidence before the tribunal, whether documentary or in answer to her counsel's questions, to confirm she was in a scheme, or what kind of scheme it was, or how much the employer paid in contributions, and we are unable to make any calculation. As the ET1 also mentioned the remark about North African crime gangs which the claimant has not pursued here, it is not safe to rely on a ticked box in the absence of any other information.

111. The claimant also mentioned some course fees. We have an advertisement for the course, but no evidence of payment, or whether or when she undertook the course, and decline to make an award for this.

112. The final award after reductions for contributory fault and ACAS Code is set out in the judgment.

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Employment Judge Goodman

Date: 16th April 2021

JUDGMENT and REASONS SENT to the PARTIES ON

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16th April 2021.

FOR THE TRIBUNAL OFFICE