EMPLOYMENT TRIBUNALS

Claimant:	And	**Respondent:**
Ms F Delladio		ENI Trading & Shipping SpA (UK Branch)

Heard by: CVP

On: 20-26 April 2021
27 April in Chambers

Before: Employment Judge Nicolle
Members: Ms C I Ihnatowicz
Mr D Carter

Representation:

Claimant: Mr A Ross, of counsel
Respondent: Ms C Davis QC

RESERVED JUDGMENT

1. The claim for unfair dismissal succeeds but the deductions set out in the Reasons below apply on account of Polkey and contributory conduct.

2. The claim for direct sex discrimination fails and is dismissed.

REASONS

The Hearing

1. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

2. In accordance with Rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended the hearing.

3. The parties were able to hear what the Tribunal heard.

4. The participants were told that it is an offence to record the proceedings.

5. From a technical perspective, there were no major difficulties.

6. There was an agreed bundle comprising 944 pages. Both parties provided chronologies. The Respondent also provided an agreed anonymisation key and a cast list. Counsel provided opening and closing skeleton arguments.

7. The Claimant gave evidence and Paul Green, a former Trading Team Leader of the Respondent (Mr Green) gave evidence on her behalf. Federica Ceccacci, at the material time HR Manager based in London, (Ms Ceccacci), Marco Rubeo, at all material times Raw Materials Supply Manager at ENI's Refining & Marketing Division (R&M) (Mr Rubeo) and James Swan, at all material times Global Head of Market and Credit Risk, (Mr Swan) gave evidence on behalf of the Respondent. Andrea Luppi, the dismissing officer and HR Vice President, (Mr Luppi) died on 16 December 2019.

The Issues

8. There was an agreed list of issues set out at pages 56 to 59 in the bundle. It is not necessary for the Tribunal to set these out, but the list will be referred to in the conclusions section of this Judgment.

Findings of Fact

The Claimant

9. The Claimant commenced employment with the Respondent in the role of Senior Products Operation Specialist in the UK Branch on 27 October 2014. She was promoted to the role of Manager of Product Operations on 1 October 2017. She was further promoted to the role of Manager of Oil Trading Operations on 1 March 2019.

The Respondent

10. The Respondent in the UK Branch of ENI Trading & Shipping (ETS), a commodity trading company that deals with, amongst other commodities, the buying and selling of crude oil and petroleum products and their transport by sea. ETS is a wholly owned subsidiary of ENI SpA (ENI) and part of the ENI Group. ETS is the ENI company dedicated to commodity trading. It provides its services both to ENI's divisions and third-party customers.

11. R&M processes crude oil at refineries it either owns or participates in and distributes and markets the resulting fuel and chemical products across Europe.

12. R&M and ETS are both part of the ENI Group. Their commercial relationship is governed by a framework agreement which, for transfer pricing purposes, provides for two different models of pricing and risk allocation – "back-to-back price" and "negotiated price".

Policies and procedures

Employment Handbook

13. The Respondent has a 37-page Employee Handbook. It includes the disciplinary policy. Section 8.11 contains a list of offences which would justify summary dismissal. However, the Respondent says that this is not an exhaustive list. It contains at (k) gross negligence.

14. Section 9.11 sets out principles applicable to formal disciplinary action. This includes at (e) that no employee will be dismissed for a first breach of discipline except in the case of gross misconduct.

15. The section entitled Formal Disciplinary Action provides that an employee will be invited to attend a disciplinary meeting to discuss the matter and will be given what the Company considers to be a reasonable period "taking account of the circumstances" in which to consider the allegations before the disciplinary meeting takes place. In advance of the meeting the Company will (where appropriate, give to the Employee copies of any written evidence, including any witness statements). As soon as possible and normally at least three days before the disciplinary meeting, the Employee must notify the Company of the names of any additional witnesses.

16. The Policy provides that if an employee is accused of an act of gross misconduct, they may be suspended from work on full pay, while the alleged offence is investigated.

The Claimant's Contract of Employment dated 12 September 2014

17. This sets out standard provisions regarding duties and responsibilities during employment which include:

a) loyally and diligently performing such duties for the Group as the Company may from time to time reasonably require;

b) keeping the Company properly and regularly informed about your activities for the Group; and

c) promoting and protecting the interests of the Group and not knowingly or deliberately doing anything which is to its detriment.

Organisational structure

Hierarchical and functional reporting

18. The Respondent distinguishes between hierarchical and functional reporting. Hierarchical reporting is straight forward as it involves upward and downward lines of managerial responsibility within the organisational structure. Functional responsibility involves responsibilities for a particular function, for example Human Resources, which may involve reporting lines between Group companies and ultimately to senior Group representatives.

The Claimant's reporting lines

19. Until 30 June 2019, the Claimant reported to the position of Head of Trading and Operations Oil (until 28 May 2019 Senior Vice President Alessandro Des Dorides (Mr Des Dorides) who reported directly to the CEO of ETS, Stefano Ballista (Mr Ballista). Following an organisational reshuffle at ETS, from 1 July 2019 until her dismissal the Claimant reported to the Head of Shipping, Oil and Trading Services.

20. The Claimant oversaw a team with a head count of 20 full time employees. Her direct reports were the Manager for Product Operations, who had a team head count of 10 employees and the Manager for Crude Operations who had a team of eight.

Oil Products Operations Specialist (December 2013)

21. In job description for the Claimant's first role which she occupied between October 2014 and 2017 the section entitled Main Job Function includes maintaining a good relationship with internal clients and counterparties.

22. She says that she had no subsequent job description, and none was produced to the Tribunal.

The Claimant's responsibilities

23. The Claimant's responsibilities included assuring the operational management of purchase agreements related to crude, products and semi-finished products and ancillary services.

Refinery deliveries

24. The Respondent receives approximately 12 or 13 tanker deliveries of crude oil per month at its refineries. The standard approach is for testing to be undertaken at the Respondent's laboratory in Milan prior to unloading.

Product testing

25. The framework agreement between the respondent and R&M does not go into the details of what test results the Respondent must pass to R&M and when.

The Transaction dated 3 May 2019

26. ETS contracted with a supplier (the Supplier) for the purchase of 700,000 barrels of Basrah Light Crude Oil (the Contract). The Contract stipulated that title and risk would pass when the crude oil (the Crude) was loaded to ENI's vessel, the White Moon (the Transaction).

27. It is necessary to set out in detail the chronology of events pertaining to the initiation, implementation and termination of the Transaction.

28. The Contract had been negotiated by Francesco Galdenzi, Head of Crude and Derivatise Oil Trading (Mr Galdenzi). He reported to Mr Des Dorides.

Chronology of events relating to testing of the Crude

29. Mr Rubeo, Mr Vatovec and Mr Luca had a telephone conference with Mr Galdenzi on 30 April 2019 to request that the API and sulphur content were tested at loading in addition to the organic chloride. They made it clear that the sample to be tested should be from the New Prosperity (the second ship in the transfer chain).

30. In an email from Ms Roberta DeLuca, R&M Asset Trader (Ms DeLuca) to Mr Galdenzi and the Claimant on 08:26 on 1 May 2019 she stated:

> API (which stands for American Petroleum Index Grade and is a well-established measurement of density of crude) and sulphur are enough on the mother ship (New Prosperity) in addition to organic chloride. I expect that water and sediment and whatever is necessary for inspection is carried out on the daughter ship (the White Moon).

31. In an email of 12:40 on 1 May 2019 from the Claimant to Peter Vanriet of Intertek (a company collecting and undertaking samples in Basra) she requested that Intertek should test organic chloride, sulphur and density (this is a reference to API).

Erroneous loading of The White Moon on 4 May 2019

32. It was intended that before the transfer of the Crude from the New Prosperity to the White Moon that the Respondent would have received and approved the organic chloride test result. However, prior to the receipt of a satisfactory organic chloride test result discharge of the Crude from the New Prosperity to the White Moon commenced.

33. In an email from the Claimant to Emilio Olivari she referred to an earlier telephone conversation and said please immediately stop the loading. She said that test results of qualities were awaited. The Claimant acknowledges that this constituted an operational mistake but disputes its magnitude. This incident was not known to the decision makers of the Respondent prior to her dismissal.

34. A transcript of a telephone conversation between the Claimant and Mr Des Dorides regarding the 4 May 2019 incident includes the Claimant saying: “I nearly had a heart attack, what happened?” The Claimant said: “It’s my fault I did not say not authorised to load”. Mr Des Dorides said towards the end of the call: “Don’t fuck things up, let me see how things stand, don’t fuck anymore things up … stop!”.

35. There is also a transcript of a subsequent call that day between Mr Des Dorides and Mr Galdenzi. Mr Des Dorides said: “I told her wholly shit Francesca, you had one job, you have to think. We can’t keep losing 10 million a year because of operational bullshit”.

5 May 2019

36. At 01:03 on 5 May 2019 Javed Akter of Bureau Veritas sent an email to the Claimant, Mr Galdenzi and others attaching the certificate of analysis of Crude taken from the New Prosperity. This contained density, sulphur and organic chloride readings. At 01:56 the Claimant forwarded the certificate of analysis to Mr Galdenzi and Mr Des Dorides.

37. At 07:30 Bureau Veritas forwarded to the Claimant, copying Mr Galdenzi, an updated version of the certificate of analysis, but this time with API included with the reading being 32.7. Neither the Claimant nor Mr Galdenzi communicated the unexpectedly high API reading to Mr Rubeo or any other representative of R&M.

38. In a further email from Mr Peter Vanriet, Operations Manager of Intertek (Mr Vanriet) to the Claimant of 9:30 he referred to the receipt of the test results from the Intertex lab in Kaz (understood to be Basra in Iraq) which confirmed the API result from the Crude sample from the New Prosperity as being 31.8. This was from a non-leaking sample (see below). Mr Rubeo says that this would have constituted a concern as a reading above 30 is outside the parameters for Basra Light.

39. In an email of 09:51 from the Claimant to Mr Galdenzi and Mr Des Dorides she stated:

> "The inspector in Jubail (a test centre in Dubai) is not surprised about the fact that higher values have been recorded, since much depends on how the sample had been treated; yesterday we also had a leakage on the sample, it has been transported/held still/underwent variations in temperature etc and it seems the light end may have been slightly affected. As for the content of organic chloride the results are held to be as representative, however.

40. The Respondent says that if a sample is defective, it would be defective for all results and therefore it was inconsistent for the Claimant to regard the satisfactory organic chloride result as satisfactory whilst the others were seen as anomalous.

6 May 2019

41. Mr Rubeo called the Claimant twice to chase for the test results in the week commencing 6 May 2019. He believes that Ms Luca also requested the results from the Claimant. Mr Rubeo also requested the results from Mr Galdenzi, even though he considered that they fell within the Claimant's responsibility as Head of Operations.

42. On 6 May 2019 Mr Vanriet sent an email to the Claimant attaching loading summary information for the White Moon. The Claimant forwarded this email to Mr Galdenzi later that morning.

7 May 2019

43. In an email of 15:36 on 7 May 2019 from the Supplier to the Claimant, and copied to Mr Galdenzi, various documents relating to the Crude on the White Moon were attached. This included a certificate of quality from Intertex in Iraq which included API at 31.9.

8 May 2019

44. In an email of 13:02 from Mr Rubeo to the Claimant and various others he reminded them of the order to forward the analysis on the Crude to the right people in R&M's Milazzio refinery in Sicily (the Refinery).

45. In an email from the Claimant to Mr Rubeo and others of 16:50 on 8 May 2019 she attached the organic chloride results. She forwarded this email to Mr Galdenzi at 17:08 that day.

Telephone call between Mr Des Dorides and the Claimant on 8 May 2019

46. A transcript of this call was produced. The Claimant commences by saying that she would send the organic chloride. She went on to say:

> "It just depends if we show the API, if …"

And then:

> "Then I will send the copy of the Bill of Loading and I will tell him I don't have anything else, fuck it!"

Mr Des Dorides said:

> "Send him just the organic chloride, that's it … guaranteed … anything else as we usually do, I will also call Giovanni Papa, Senior Vice President, Head of Oil and Products Portfolio Optimisation & Supply at R&M (Mr Papa). Honestly he is a very annoying person".

Mr Papa was the counterpart at an equivalent level of seniority to Mr Des Dorides.

The Claimant concluded the call by saying:

> "Listen anyway I will keep my mouth shut".

10 May 2019

47. Under cover of an email of 13:45 on 10 May 2019 Intertex provided a certificate of analysis taken from the White Moon to the Claimant. This certificate included the sulphur content.

14 May 2019

48. In an email from the Claimant at 14:24 on 14 May 2019 to Mr Luca and Mr Galdenzi and copied to Rita Vatovec, Head of Raw Material Supply and Foreign Coordination in R&M and the Manager of Mr Rubeo (Mr Vatovec) and Mr Rubeo she stated: "We have requested additional analysis on sulphur and API, and we expect them to be ready by Thursday".

49. Whilst the Claimant had sent an email to the Refinery on 9 May 2019 this had not been copied to Ms Luca and Mr Rubeo. This email was copied to Mr Galdenzi.

17 May 2019

50. In an email of 10:55 on 17 May 2019 Mr Galdenzi stated that payment should be made to the Supplier for the Crude. We find that at the time Mr Galdenzi authorised the payment of circa 42 million euros to the Supplier that he was in possession of all the applicable test results. For whatever reason he concluded that there was no reason to suspend payment under the Contract.

51. In an email from Mr Vanriet to the Claimant of 12:03 he attached an amended certificate together with the retested sulphur analysis conducted that day on the remaining ship composite sample in their Kaz laboratory.

52. At 19:51 on 17 May 2019 the Claimant sent an email to Mr Rubeo and others attaching the balance of the analysis.

21 May 2019

53. On 21 May 2019 R&M ordered a full set of analysis to be performed to assess the quality of the Crude on the White Moon. This was because of the results received on the evening of 17 May 2019 being outside the expected parameters for Basrah Light based on their library database entries.

54. In an email of 14:36 on 21 May 2019 from Ms Luca to the Claimant she requested further analysis should be done to include API and sulphur.

55. At 15:48 that day the Claimant said to Ms Luca that samples from the White Moon had arrived at the lab in Sharjah.

56. The White Moon arrived as scheduled outside the harbour in Milazzo on 24 May 2019 but did not dock as result of concerns regarding the contents of the Crude on board. The vessel remained off the Italian coast before ultimately returning the Crude to the Supplier.

57. We were told that Mr Des Dorides was summarily dismissed for an unrelated matter on 29 May 2019.

Internal audit interview with Mr Galdenzi on 10 June 2019

58. The Respondent's internal audit team met with Mr Galdenzi on 10 June 2019. He was asked to explain the circumstances of the Transaction. He said that the price for the Crude was "very good". He referred to it as "an unusual operation, a ship-to-ship transfer" (STS). On 23 March 2019 he said that he had asked the Claimant to carry out extra documentary checks with the Livorno, Taranto and Milazzo customs authorities to ensure that the documents (Bill of Lading, Certificate of Origin and Chamber of Commerce Certificate) were in order. Since the Transaction involved a new counterparty, he wanted to proceed more cautiously to obtain further confirmation. Unusually payment for the Crude was in euros rather than the customary dollars. He said that Mr Des Dorides had been very determined to close the Transaction and was very pushy.

Internal audit interview with the Claimant on 10 June 2019

59. The Claimant was asked to explain her role and the structure of her office. She said that there had never been an STS with crude oil and in this case, there were two STSs.

60. The Claimant provided a timeline of what she considered to be the relevant events. This did not, however, include the erroneous and premature commencement of the transfer of the Crude from the New Prosperity to the White Moon on 4 May 2019. The Claimant says that this incident was totally irrelevant as it had been rectified. She denies deliberately hiding relevant information.

61. The Claimant's chronology included the first STS between the ship Abyss and the New Prosperity on 3 May 2019 and the second between the New Prosperity and the White Moon on 5 May 2019.

Wall Street Journal Article 19 June 2019

62. On 19 June 2019, an article in the Wall Street Journal referred to ENI having rejected a cargo of suspect Iranian crude potentially imported in breach of US sanctions on Iran. It said that the cargo had properties consistent with Iranian crude and referred to Mr Des Dorides being fired three weeks previously but for an unrelated matter.

Compliance and Monitoring Department (COTMS) report dated 23 June 2019

63. This report related to the broader circumstances of the Transaction to include pricing. It is not necessary to set out details from this 38-page report (the COTMS Report). The Respondent says that the COTMS Report was not seen by, or its contents communicated to, Andrea Luppi, who as HR Vice President conducted the Claimant's disciplinary hearing (Mr Luppi).

Organisational communication dated 2 July 2019

64. This related to the Transaction. It stated that the Crude, because of anomalies in the analysis test results, had not come, as purported, from Iraq. It referred to the anomalous parameters in the API grade and the sulphur content of the product, compared to the historical data available for Basrah Light.

65. It referred to these test results having been made available to the Claimant on 5 May 2019, who in agreement with Mr Des Dorides sent it to R&M only partially, deliberately omitting the API and sulphur data. It further refers to the telephone call on 8 May 2019 between the Claimant and Mr Des Dorides during which they had decided to deliberately omit this information from the communication to the R&M System Trader, who requested it, following instruction from his business line.

66. No reference was made to the role of Mr Galdenzi.

67. It confirms that the White Moon had left Italian coastal waters on 18 June 2019 to return the Crude to the Supplier with a refund of the purchase price to be made in several instalments.

Internal audit interview with the Claimant on 3 July 2019

68. The Claimant was advised that its purpose was to obtain clarification about a telephone call between her and Mr Des Dorides on 8 May 2019 which had been found in the Respondent's mobile recording system. Extracts from the call were read out.

69. The Claimant explained that the test results available on 8 May 2019 comprised organic chloride, API grade and sulphur content. She said that there were concerns about the latter two because the analysis had been contaminated and that they did not want to raise alarms unnecessarily. She said that they had spoken with Mr Galdenzi about the anomalous outcome of the sample test results. The Claimant said that the reason for not making full disclosure of the anomalous test results to R&M was to maintain professional consistency. She said that before raising any alarms they wanted to wait for a representative sample. This was the sample put on board the ship in Basra.

70. Her intention was to keep the level of anxiety low. She said that Mr Galdenzi had advised that the result of the API was different from the statistics of the last 50 years.

71. In her witness evidence the Claimant said that she did not at the time consider that the anomalous API and sulphur results were linked to the provenance of the Crude.

72. The Claimant concluded the interview by saying that she did not think it was her responsibility to challenge anything.

73. The Claimant says that she interpreted questions in relation to the closeness of her relationship with Mr Des Dorides as being inappropriate as they implied a nonprofessional relationship.

Claimant's suspension on 3 July 2019

74. Mr Luppi sent a letter dated 3 July 2019 to the Claimant notifying her of her suspension with immediate effect. He explained the purpose of the suspension as being:

> "Pending investigation into elements related to a process under monitoring where a potential damage to company assets has been identified that may also be attributed to improper conduct from your side. In consideration of your role in the Company we are evaluating any implication that can bring to allegations that may amount to gross misconduct under the Company's Disciplinary Policy. We reserve the right to change or add to these allegations as appropriate in light of our investigation".

75. Mr Ross says that this paragraph is meaningless. We find that the letter lacked particularity of the specific allegations which formed the basis of the Claimant's suspension and the pending investigation.

76. The letter set out relatively standard provisions regarding the terms of suspension which included that the Claimant should remain available, not have any

dealings with third parties and not communicate with any of the Respondent's employees, contractors or clients.

77. It said that no decisions had been made and that the Respondent was simply investigating the situation.

The Claimant's return to Italy

78. The Claimant flew to Italy on 7 July 2019.

79. Notwithstanding the terms of the suspension of 3 July 2019 the Claimant contacted Simone Germani, Head of ETS Compliance Team, (Ms Germani) on the evening of 3 July 2019, and Mario Benedetti, a member of the ETS Compliance Team (Mr Benedetti) three times (twice by telephone and once via WhatsApp message). Ms Germani and Mr Benedetti reported the Claimant's contact to the Respondent's Human Resources Department.

80. The Claimant says that she was merely contacting them for comfort in view of the stressful circumstances of her suspension. The Claimant denies discussing details of the Transaction with them.

81. We find that the Claimant was at least in part motivated by a wish to communicate with those involved in the internal audit investigation in making these contacts. We do not accept that the Claimant was making these contacts purely for comfort as whilst Ms Germani had previously been her Line Manager, the relationship was strictly professional, and there is no evidence that the Claimant had any significant professional or personal relationship with Mr Benedetti.

Disciplinary hearing invitation letter

82. Mr Luppi attempted to contact the Claimant by telephone on the late afternoon/early evening of 8 July 2019 to ask her to attend a meeting in London the following morning. It was not until 19:51 that he was able to speak with her. The Claimant says that he shouted at her during this call. We find that whilst Mr Luppi was likely to have been irritated by the Claimant's non availability and her having travelled to Italy in what he considered to be a breach of the terms of her suspension, that there is no evidence that he was verbally aggressive or alternatively that this had anything to do with the Claimant's sex.

83. The meeting was arranged for 16:00 on 10 July 2019. However, it was not possible to forward to the Claimant the notes from the internal audit meetings on 10 June and 3 July 2019 given their confidential nature and the Claimant was therefore required to collect these from the Respondent's office in London on her return.

84. The Claimant was sent a written invitation to the disciplinary hearing in a letter dated 9 July 2019. It stated the purpose of the disciplinary meeting as being to give her an opportunity to comment on and respond to the allegations that she had breached her contractual obligations and/or her work duties, potentially exposing the Company to economic and reputational damages, in particular:

(a) Concerning the Crude Oil deal with the counterpart supplier of 8 May 2019 and the actions necessary to adequately assess all relevant risk factors to ETS and/or to any other ENI companies. Specifically, to what concerns significant alterations of the crude oil transported by ship White Moon (after a double "ship to ship" operation) and to be processed by ENI assets.

(b) Neglect technical support to an internal reference employee authorised by role to guarantee crude compliance specs for the ENI refining system.

(c) Keeping contact and continuously requesting clarification as to employees of ETS after receiving a suspension letter on 3 July in breach of the conditions indicated in the letter at point five.

85. Mr Ross argues that the allegations were in effect meaningless. He says that no mention was made of "red flags" or warning signs.

86. We find that the disciplinary invitation letter did not adequately set out the specific allegations forming the basis of the disciplinary hearing. There was no reference to the Claimant having deliberately evaded her responsibility to disclose on a timely basis the API and sulphur test results to R&M. We consider that the allegations were extremely generic and lacked the required particularity to enable the Claimant to properly understand the basis upon which the Respondent considered she may have breached her contractual obligations.

87. The Claimant collected the internal audit minutes on 9 July 2019 but was not provided with any other documents. She was not provided with the full transcript of her telephone conversation with Mr Des Dorides of 8 May 2019, albeit what the Respondent considers to be relevant extracts were included in the internal audit note from the 3 July 2019 meeting.

88. We understand that all letters to her were written in English and thus do not constitute poor translations.

<u>The Disciplinary Hearing</u>

89. Mr Luppi was the disciplinary manager. Also present were Elio Zammuto, Manager Financial Regulation Activity Mifid and Ms Ceccacci. It is apparent from the 15-page transcript of the hearing that Ms Ceccacci played a relatively significant role asking a lot of questions some of which were lengthy. She says, however, that the decision to dismiss was Mr Luppi's alone.

90. The Claimant was initially asked to explain the circumstances of the Transaction. She did not, however, mention the premature and aborted initial loading of the White Moon on 4 May 2019.

91. The Claimant referred to the anomalous test results which had been received and that she had passed them on to Mr Galdenzi who had told her they were different from what he would have expected. She said that Mr Galdenzi had explained that once they had the representative results from Dubai that the Respondent could ask

for a price adjustment. She considered this to be logical. She went on to say that quality is the responsibility of the trader i.e., Mr Galdenzi.

92. The Claimant placed emphasis on whether tests were, or were not, contractual in the context of the Respondent's contractual relationship with R&M. She considered that the API and sulphur, as opposed to the organic chloride, results were not contractual and therefore there was no obligation for them to be passed to R&M.

93. She repeated that anything to do with the quality of the crude oil was within Mr Galdenzi's, and not her remit.

94. The Claimant referred to Mr Rubeo having continued to call her with what she described as "inquisitorial questions". She referred to these calls as being "improper" because the operations function talks with the operator and the trader talks with Mr Galdenzi. The Claimant referred to tensions between the Respondent and R&M notwithstanding their being part of the same corporate Group.

95. Mr Luppi asked what it would cost to share all the results with R&M.

96. Mr Ceccacci asked the Claimant who had responsibility in delivering results to R&M. The Claimant said that it was operations under the guidance of the trader, unless in the case of contractual qualities. For anything not under contract, it is the trader's responsibility.

97. Towards the end of the hearing the Claimant complained that no action had been taken against Mr Galdenzi. Mr Luppi said he could not respond to this because there is confidentiality, and they are two separate matters.

98. The Claimant went on to refer to the fact that Mr Des Dorides had made her think about taking a stance because she is a woman, which was something that she had considered. She referred to rumours of a skit on the trading floor about a relationship between herself and Mr Des Dorides. This was not pursued further by Mr Luppi or Ms Ceccacci and no investigation was undertaken.

Reuters article dated 18 July 2019

99. This referred to the Respondent having filed a fraud complaint against Mr Des Dorides regarding a suspect Iraq crude oil shipment which may have been in breach of Iranian trade sanctions. It referred indirectly to the Claimant's suspension.

100. It is apparent that by this time the circumstances of the White Moon had gained significant notoriety and the article included questions being raised of the Respondent's management by Italian politicians. There was substantial media interest.

Letter of dismissal dated 26 July 2019

101. Mr Luppi sent the Claimant a letter dated 26 July 2019 advising that her employment had been terminated without notice for gross misconduct with effect from 26 July 2019. In summary he said the reasons for dismissal were as follows:

(a) she was grossly negligent in the way that she carried out her duties in respect of the Transaction and that this had a very negative impact on the Company;

(b) there had been several “red flag” warning signs that the Claimant should have reported immediately;

(c) she only shared limited and incomplete information with the competent R&M team which meant that they were unable to assess the appropriate risks;

(d) her behaviour constituted a material breach of the specific procedures and practices required in her role;

(e) that had the Claimant provided the information on a timely basis the Respondent would not have progressed with the Transaction and that her failure to do so wasted a great deal of Company time and money and exposed it to a wholly unacceptable level of risk;

(f) she compounded matters by deciding not to share the relent information with the R&M team and that her behaviour was influenced by the fact that she was not in a good relationship with them and did not trust them;

(g) the Claimant had failed in her duty to always act in a professional and diligent manner; and

(h) had breached the terms of her suspension letter by contacting Company employees. This was an act of gross insubordination in what was a very serious and confidential situation.

102. No specifics were included in the letter as to what procedures and practices had been breached.

<u>The Trader</u>

103. Mr Galdenzi had financial authority to enter transactions to a value of circa 160 million euros.

104. There was a dispute regarding the potential level of his bonus as a percentage of base salary. The Claimant contended it was up to 100% but the Respondent says it was a maximum of 40% and this was partly based on Company performance as opposed to his individual performance. The Respondent says that his bonus was not linked specifically to the completion of individual transactions but was rather a reflection of overall performance.

105. Approximately three months after the Transaction Mr Galdenzi was transferred to a Senior Business Development position without trading authority. The Respondent says that this was not a demotion because of his involvement in the Transaction but rather a change in his role.

Sex discrimination allegations

The Claimant says that the oil industry is a strongly male dominated environment. She says that the Respondent has a persistent stereotypical "Italian machismo". She says that the majority of ENI and ETS managers are male and Italian. We find that the Claimant's perception of a male dominated Senior Management level in the Respondent is reflected in the organisational structure.

107. The Claimant contends that when she was promoted to Manager of Product Operations on 1 October 2017, her former manager in Rome, Lucio Pappada, commented that he had to assign the management of the crude team to a female manager, so he had sorted the "pink gender quota within the team".

108. We saw no evidence in respect of this and it is significant that the first occasion upon which it was raised by the Claimant was in her witness statement. We are therefore not able to make a finding as to whether Mr Pappada made such a remark. We are also mindful that this alleged incident was nearly two years prior to the Transaction and not a remark which involved similar events giving rise to a continuing course of conduct.

109. The Claimant contends that in early 2018 she was asked to leave the room by Mr Pappada during second round interviews for a candidate in her team. However, the Claimant was not directly aware of what Mr Pappada said but was told by a person attending the meeting. Again, this incident was not raised by the Claimant prior to her witness statement. Her explanation for the delay being that she would not want to raise every "small" incident during her employment but nevertheless said she felt humiliated and frustrated. We are again unable to make a finding about this hearsay allegation, which was also said to have taken place about 18 months before the Transaction.

Further investigation after the disciplinary hearing

110. On 19 July 2019 Ms Ceccacci met with Ms Germani and Mr Benedetti. She then reported to Mr Luppi. Ms Ceccacci accepted that she did not ask Ms Germani and Mr Benedetti why Mr Galdenzi could not have provided the results to R&M.

111. Ms Ceccacci said that she did not see the COTMS Report and as far as she was aware nor did Mr Luppi.

112. Ms Germani and Mr Benedetti showed Ms Ceccacci two emails dated 5 May and 8 May 2019 which showed that the Claimant had received the results of API and sulphur tests from the Jubail sample on 5 May 2019, but on 8 May 2019 only shared the organic chloride result with R&M and withheld the API and sulphur results.

113. Ms Ceccacci says that she asked Ms Germani and Mr Benedetti whether in their compliance investigation they had seen any evidence that Mr Galdenzi had asked the Claimant not to share the API and sulphur results and they confirmed that they had not. However, when questioned Ms Ceccacci accepted that no direct question was put to this effect and we find that this is consistent with the evidence and failure of the

Respondent to specifically challenge Mr Galdenzi's role in the failure to effect the timely transfer of the API and sulphur test results to R&M.

114. Ms Ceccacci says that it was decided not to interview Mr Galdenzi because he was being investigated by internal audit. Further, she and Mr Luppi did not feel it was crucial that they spoke with him because Ms Germani and Mr Benedetti had confirmed that they had seen no evidence that he had instructed the Claimant not to share the test results.

115. We find that by the time of the Claimant's disciplinary hearing on 10 July 2019, and the subsequent investigation undertaken by Ms Caccacci, Mr Galdenzi was no longer subject to an investigation by internal audit and therefore this did not preclude an interview with him should it had been considered necessary.

Letter of appeal

116. On 1 August 2019, the Claimant appealed the decision to terminate her employment. The Claimant's four-page letter of appeal, in respect of which she had received legal assistance, included the following:

(a) it was not clear what the red flag warning signs or concerns were;
(b) it was the responsibility of the trader to assess the quality of the cargo;
(c) it was reasonable for her to rely on the trader's analysis of the oil;
(d) she followed a reasonable request of Mr Des Dorides, her Line Manager to only disclose the organic chloride test result;
(e) she was only provided with the documents arising as part of the investigation on the night before the disciplinary hearing; and
(f) she was treated differently from Mr Galdenzi.

117. The Claimant attached a two-page timeline to her appeal. This did not refer to the erroneously premature commencement of the loading of the White Moon on 4 May 2019.

118. The Claimant subsequently submitted an addendum to the grounds of appeal. This document ran to 21 paragraphs and included details of her role and her contention that she did not have the technical knowledge to analyse or know the significance of the results of the quality tests.

119. The Claimant sent an undated email to Mr Luppi in relation to her preparations for the appeal hearing. She sought further particularisation of the grounds of dismissal in his letter of 26 July 2019 and the documents relied on in support of the allegations.

The Appeal Hearing on 2 September 2019

120. The appeal hearing took place on 2 September 2019 and was heard by Mr Swan. Ms Ceccacci, Cristina Profeti, Senior HR Advisor and Phillip Dias, the Claimant's companion were in attendance. The hearing was a review of the initial disciplinary process.

121. The Claimant contended that the Respondent wanted to find a scapegoat for a mistake made by others. She said that it had not been clear to her which red flags she had missed or failed to action. She said that it was Mr Galdenzi who was the one in a position to investigate the strategy, history and background of the cargo. She says that she simply executed the Contract.

Post appeal hearing investigation

122. Following the hearing Mr Swan conducted further investigation. This included speaking with Ms Germani and Mr Benedetti. He also spoke with Mr Rubeo who then provided the email dated 14 May 2019 in which he had requested the API and sulphur results from the Claimant. The Respondent says that she pretended not to have them. The Claimant says that she had forgotten, or neglected, the email received on 10 May 2019 containing these results. The Claimant denies deliberately failing to forward relevant information to R&M.

123. We note this conflicting evidence.

124. In an email from the Claimant to Ms Ceccacci dated 19 September 2019 she sought confirmation that if Mr Swan undertook any further interviews that she should be provided with any new evidence arising from these.

125. In an email from the Claimant to Ms Ceccacci of 10 September 2019 she questioned whether Mr Swan was less senior than Mr Luppi and that she was concerned about his independence and authority to overturn the decision.

Disciplinary Procedure/Appeals

126. This provides that the person hearing the appeal must be more senior than the individual whose disciplinary decision is the subject of the appeal. Further, if the Company becomes aware of new evidence relevant to the disciplinary charges, the employee will be given the opportunity to comment on the new evidence before a final decision as to the outcome of the appeal is taken.

Appeal outcome

127. In a letter dated 1 October 2019 Mr Swan advised the Claimant that he had rejected her grounds of appeal. He started by confirming the documents he had read and the individuals he had spoken to as part of his post hearing investigation. He had not, however, spoken with Mr Luppi who was off ill.

128. Mr Swan found the Claimant had been in possession of the API and sulphur results, and followed instructions/chose not to share the test results with R&M.

129. He said that ignorance is no defence and that it was reasonable to expect the Head of Crude and Product Operations to have had suspicions and raise them given that API and sulphur content are the very basics of crude trading.

130. He observed that part of the Claimant's justification for not sharing the results was that it was not an operator's role to talk to an R&M trader. He considered that this showed the Claimant played an active part in withholding the information.

131. He considered that the Claimant's reluctance to provide the results to R&M in a timely manner was partly because of her poor working relationship with R&M. However, having considered the transcript of the disciplinary hearing we find that the Claimant highlighted a generic corporate strained relationship rather than one specific to her own relationship with her counterparts at R&M.

132. Mr. Swan said that he had spoken to Ms Germani, Mr Benedetti and Mr Rubeo and that they had variously confirmed that R&M had asked on multiple occasions for the quality of the Crude and that the Claimant had contacted both Ms Germani and Mr Benedetti during her suspension.

The Law

Unfair dismissal

133. Under section 98(1)(b) of the Employment Rights Act 1996 (the ERA) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. This is the set of facts known or beliefs in the mind of the year decision-maker at the time of the dismissal which causes him or her to dismiss the employee Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden in showing the reason is on the respondent.

134. Under s98(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.

135. In considering whether the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in British Home Stores v Burchell [1980] ICR 303, and the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal as confirmed by the EAT in Sheffield Health and Social Care NHS Foundation Trust v Crabtree EAT/0331/09.

135. In considering the fairness of the dismissal, a tribunal must have regard to Iceland Frozen Foods v Jones [1982] IRLR 439 and the approach summarised in that

case. The starting point should be the wording of section 98(4) of the ERA. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal considers the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

136. The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23.

137. A tribunal is entitled to find that was outside the band of reasonable responses without being accused of placing itself in the position of the employer: Newbound v Thames Water Utilities [2015] IRLR 735, CA, per Bean LJ at paragraph 61. It is not necessary, according to Court of Appeal in *Shrestha v Genesis Housing Association Ltd* [2015] EWCA Civ 94 extensively to investigate each line of defence advanced by an employee. That would be too narrow an approach and would add an *"unwanted gloss"* to the Burchill test. What is important is the reasonableness of the investigation as a whole. Further, when considering the extent of the investigation required, it is important to have regard to the extent to which underlying matters are not in dispute.

138. The Court of Appeal held in London Ambulance Service NHS Trust v Small [2009] IRLR 563 that a tribunal's focus in a complaint of unfair dismissal is not on the employee's guilt or innocence. Instead, the tribunal should confine itself to reviewing the reasonableness of the respondent's decision. In Small the tribunal had, according to the Court of Appeal, seriously strayed from its path of reviewing the fairness of the employer's handling of the dismissal. Instead, the tribunal had retried certain factual issues, substituted its own view of the facts relating to Mr Small's conduct and ultimately concluded that there were not reasonable grounds for believing that Mr Small was guilty of misconduct.

139. It is also important for the tribunal to keep in mind when considering the reasonableness of the disciplinary and dismissal process that procedural issues do not sit in a vacuum, but they must be considered together with the reason for dismissal: Taylor v OCS Group Ltd [2006] IRLR 613 (CA) and Sharkey v Lloyds Bank Plc [2015 UKEAT/0005/15]. The tribunal must consider the context and gravity of any procedural flaw identified and it is only those faults which have a meaningful impact on the decision to dismiss that are likely to affect the reasonableness of the procedure.

Consistency with comparable cases

140. If it bears in mind that authorities suggesting that disparity arguments should be scrutinised with particular care, a tribunal is entitled to rely on disparity of treatment to support a finding of unfair dismissal: Newbound at paragraphs 62- 65.

141. The circumstances must be truly comparable: Hadjioannou v Coral Casinos Ltd [1981] IRLR 352 (EAT); Paul v East Surrey District Health Authority [1995] IRLR 305 (CA) and MBNA Ltd v Jones (UKEAT/120/15). In Paul, the Court of Appeal indicated that it would be rare for a dismissal to be unfair based on inconsistent treatment alone.

142. When allegations of inconsistent treatment are made, it will be necessary to look at whether there really has been a disparity of treatment. The question for a tribunal to ask is whether the alleged differential treatment was so irrational that no reasonable employer could have taken that decision: Securicor Ltd v Smith [1989] IRLR 356, confirmed in Epstein v Royal Borough of Windsor and Maidenhead UKEAT/0250/07.

ACAS Code on Disciplinary and Grievance Procedures (the Code).

143. In reaching their decision, tribunals must also consider the Code. By virtue of s.207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence, and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be considered in determining that question.

144. The Code provides, with underlining added where applicable for emphasis:

Establish the facts of each case

145. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases, this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

146. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

147. If there is an investigatory meeting this should not by itself result in any disciplinary action.

148. In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action.

Inform the employee of the problem

149. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate

to provide copies of any written evidence, which may include any witness statements, with the notification.

Hold a meeting with the employee to discuss the problem.
150. The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.

151. At the meeting, the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses.

Polkey reduction

152. In Software 2000 v Andrews [2007] ICR 825, EAT, Elias P summarised (at paragraph 54) the authorities on "Polkey" reductions and made the following observations:

(a) in assessing compensation for unfair dismissal, the 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;

(b) 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);

(c) 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 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;

(d) 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; and

(e) 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.

Contributory conduct and the compensatory award

153. When considering a reduction to the compensatory award, under S.123(6) ERA, the tribunal should: identify the impugned conduct, consider whether it was blameworthy, and decide, if so, whether it caused or contributed to the dismissal.

154. The conduct must have been known at the time of the dismissal: Optikinetics Ltd v Whooley [1999] ICR 984, EAT, per HHJ Peter Clark at 989A-C. It is for the tribunal alone to determine, as a matter of fact, whether the employee committed the impugned conduct and, if so, how wrongful it was: Steen v ASP Packaging [2014] ICR 56, EAT, per Langstaff P at paragraph 12.

155. There are four questions for the tribunal to consider: ***Steen v ASP Packaging Ltd***:

(a) what was the conduct which is said to give rise to possible contributory fault?

(b) was that conduct blameworthy, irrespective of the employer's view of the matter?

(c) did the blameworthy conduct cause or contribute to the dismissal?

(d) if so, to what extent should the award be reduced and to what extent would it be just and equitable to reduce it?

Contributory conduct and the basic award

156. Under s.122 (2) of the ERA where a tribunal considers that any conduct of a claimant before the dismissal was such that it would be just and equitable to reduce, or further reduce, the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

Sex discrimination and the burden of proof

157. Under s13 (1) of the Equality Act 2010 (the EQA) read with s.9, direct discrimination takes place where a person treats the claimant less favourably because of sex than that person treats or would treat others. Under s.23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

158. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of sex. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as she was.

159. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the

tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.

160. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA). The Court of Appeal in Madarassy, a case brought under the then Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g., sex) and a difference in treatment. LJ Mummery stated at paragraph 56:

161. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

162. Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR870. "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

163. An act may be rendered discriminatory by the mental processes, conscious or nonconscious, of the alleged discriminator: Nagarajan v London Regional Transport [1999] ICR 877, HL. In such cases, the tribunal must ask itself what the reason was for the alleged discriminator's actions. If it is that the complainant possessed the protected characteristic, then direct discrimination is made out. If the reason is the protected characteristic, that answers the question of whether the claimant was treated less favourably than a hypothetical comparator; they are, in effect, two sides of the same coin: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL, per Lord Nicholls at paragraph 10.

164. It is permissible for the tribunal to answer the hypothetical comparator question by having regard to how unidentical but not wholly dissimilar cases have been treated: Chief Constable of West Yorkshire v Vento (No.1) [2001] IRLR 124, EAT, per Lindsay J at paragraph 7; approved in Shamoon, per Lord Hutton at paragraph 81.

165. A benign motive is irrelevant when considering direct discrimination: Nagarajan at 884G-885D, per Lord Nicholls. It is irrelevant whether the alleged discriminator thought the reason for the treatment was the protected characteristic, as there may be subconscious motivation: Nagarajan at 885E-H:

> "I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race.

> After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn. Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of s.1(1)(a). The employer treated the complainant less favourably on racial grounds."

166. It is not sufficient for to draw an inference of discrimination based on an *"intuitive hunch"* without findings of primary fact to back it: *Chapman and Anor v Simon* [1994] IRLR 124.

167. In determining whether a claimant has established a prima facie case, the tribunal must reach findings as to the primary facts and any circumstantial matters that it considers relevant: *Anya v University of Oxford and Anor* [2001] IRLR 377 (CA). Having established those facts, the tribunal must decide whether those facts are sufficient to justify an inference that discrimination has taken place.

168. Where there are multiple allegations, the tribunal should consider whether the burden of proof has shifted in relation to each one. It should not take an *"across the board approach"* when deciding if the burden of proof shifted in respect of all allegations: *Essex County Council v Jarrett* UKEAT/19/JOJ.

169. The tribunal may cast its net widely to look for facts that are consistent with discrimination and may therefore give rise to a prima facie case. The tribunal may take account of circumstantial evidence, including matters occurring before the alleged discrimination (even those outside the limitation period) and matters occurring afterwards if they are relevant. However, there must be *"some nexus between the facts relied on and the discrimination complained of"*: *Wheeler & Anor v Durham County Council* [2001] EWCA Civ 844.

170. Finally, the less favourable treatment must be because of a protected characteristic and that requires the tribunal to consider the reason why the claimant was treated less favourably: ***Nagarajan.*** The tribunal needs to consider the conscious or subconscious mental processes which led the respondent to take a particular course of action in respect of the claimant and to consider whether her gender played a significant part in the treatment: *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439.

Conclusions

171. Our conclusions as set out below reflect the agreed list of issues as set out in pages 56-59 in the bundle and repeated below in bold font.

Unfair dismissal (ss.94, 98 ERA)

Has the Respondent shown that the reason or the principal reason for the Claimant's dismissal was the Claimant's conduct (as detailed at s55 of the GoR) or SOSR (breach of the implied term of trust and confidence)?

172. We find that the Respondent has shown that the reason for the Claimant's dismissal was conduct under s.98(1)(b) of the ERA. Given this finding we do not consider it necessary to opine on whether the Claimant's dismissal would also have fallen within SOSR.

In the circumstances (including the size and administrative resources of the Respondent's undertaking), did the Respondent act reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the Claimant? In particular, if the reason was conduct:

(a) Did the Respondent hold a genuine belief in the Claimant's alleged misconduct?

173. We find that the Respondent held a genuine belief in the Claimant's alleged misconduct. We reach this finding based on the Respondent having in its possession and knowledge at the date of the Claimant's dismissal the transcripts from the Claimant's meetings with internal audit on 10 June and 3 July 2019 together with extracts from the call between the Claimant and Mr Des Dorides on 8 May 2019. We find this evidence was sufficient, together with the responses given by the Claimant during the disciplinary hearing on 10 July 2019 to provide the Respondent with a genuine belief in the Claimant's misconduct primarily that she had delayed the transmission of the API and sulphur test results to R&M and/or been less than candid regarding the status of the various tests undertaken and the responses given to R&M regarding what tests had been undertaken and what results remained outstanding.

(b) Was that belief based on reasonable grounds?

174. We find that because of deficiencies in the Respondent's investigation that the genuine belief was not based on reasonable grounds. We reach this finding given it is possible that had a reasonable investigation been undertaken that potentially exculpatory, or at least mitigating, circumstances may have been identified which could potentially have caused the Respondent to reconsider its decision as to the Claimant's culpability.

(c) At the time it held that belief, had the Respondent carried out as much investigation as was reasonable?

175. We find that the Respondent had not carried out an investigation falling within the range of reasonable responses. We reach this finding for the following reasons:

176. The failure to interview Mr Galdenzi. We consider that no reasonable basis existed for the Respondent not interviewing him given the manifest evidence that he had potentially as much knowledge of the test results as the Claimant, which would have been apparent had the relevant emails in the period from 5-17 May 2019 been properly considered, and the various statements made by the Claimant during the disciplinary hearing to the effect that Mr Galdenzi was not only aware of, but had actively sought to dissuade her from disseminating, the test results to R&M.

177. This included the Claimant saying in her meeting with the internal audit on 3 July 2019 that she had spoken with Mr Galdenzi about the anomalous outcome of the samples test results.

178. She records Mr Galdenzi as having said that the API test result was different from the statistics of the last 50 years.

179. During the disciplinary hearing, the Claimant spoke extensively regarding her communications with Mr Galdenzi to include (at page 729) that the Respondent could ask for a price adjustment once they had the representative results from Jubail and that for now it was only necessary to forward the organic chloride result to R&M. She went on to say that quality is the responsibility of the trader i.e., Mr Galdenzi.

180. She further clarified that anything to do with the quality of the crude oil was within Mr Galdenzi's remit.

181. Ms Ceccacci said that in none of the passages referred to in the internal audit investigation notes did the Claimant say she was instructed by Mr Galdenzi to not share it, and this was not specifically rebutted by the Claimant. We nevertheless consider that the role of Mr Galdenzi was sufficiently open to interpretation and relevant to the circumstances of the disciplinary proceedings against the Claimant that the Respondent's failure to interview him rendered the investigation inadequate/insufficient.

182. The Respondent should as part of a reasonable investigation have reviewed relevant emails between the Claimant, Mr Des Dorides and Mr Galdenzi between 1-17 May 2019. We consider that it would have been relatively straightforward for the Respondent to have done so given the short period and potential relevance of that material. This was so particularly in circumstances where for whatever reason the Respondent had considered it appropriate to listen to and rely on the contents of a telephone call between the Claimant and Mr Des Dorides on 8 May 2019.

183. We therefore find that the investigation was partial and, in the circumstances, short of the standard required within the range of reasonable responses open to an employer.

As below, the Claimant also avers that she was treated less favourably than a man would have been in materially the same circumstances, rendering her dismissal unfair as well as discriminatory.

184. We do not find that the Claimant was treated less favourably than a hypothetical man would have been in materially the same circumstances, rendering her dismissal discriminatory. We reach this finding for the following reasons.

185. It is accepted that the Claimant does not rely on Mr Galdenzi as an actual comparator given that his circumstances were not materially the same for the purposes of s23(3) of the EQA. The Claimant relies on what she contends represents a disparity of her treatment with that of Mr Galdenzi for the purposes of identifying how a hypothetical man in the same circumstances as her would have been treated.

186. It is well established that a Claimant need to establish more than a difference in treatment and a difference in gender between herself and her comparator, in this case a hypothetical comparator. It is not enough for the Claimant simply to point to a difference in treatment and a difference in gender. We do not consider that there was the required "something more" to create an inference that the decision to dismiss the Claimant was on account of her gender.

187. We do not consider that prime facia evidence exists to create an inference that the Claimant's gender was in anyway a factor in her dismissal.

188. The Claimant argues that the Respondent needed to find a scapegoat and that a woman would be less likely to challenge a dismissal in these circumstances. We find this contrary to the evidence. The Claimant had been rapidly promoted with her most recent promotion only six weeks earlier. She had been designated as being a candidate for a senior management position.

Consistency

189. In addressing the Claimant's contention that her dismissal was an unjustified disparity with the Respondent's treatment of Mr Galdenzi we paid careful attention to the EAT's decisions in Paul and Hadjioannou and that the question for the employer is whether in a particular case dismissal is a reasonable response to the misconduct believed to have taken place.

190. We are mindful that it would be inappropriate for us to carry out our own independent evaluation of the respective circumstances pertaining to the Claimant and Mr Galdenzi as in doing so we would in effect be substituting our decision for that of the Respondent and this would be an error of law. It is sufficient for us to be satisfied that the Respondent was able to point to distinctions between their cases, and that was primarily on the basis that internal audit following meetings with both the Claimant and Mr Galdenzi, considered that a further disciplinary investigation and procedure was warranted in the case of the Claimant but not Mr Galdenzi. Internal audit having highlighted potential culpability in relation to the withholding of test results from the Transaction.

191. It would be inappropriate for us to second guess the view taken by internal audit in relation to MR Galdenzi.

192. Notwithstanding what we have found to be deficiencies in the investigation undertaken by the Respondent we nevertheless find that they had genuine grounds for believing that the Claimant was culpable of misconduct.

193. Whilst the Claimant has highlighted the relatively small number of women in senior managerial positions, one out of 11, and what she describes as a general culture of "Italian machismo" within the Respondent we find no evidence to find that the gender disparity within senior management at the Respondent was in any way a factor in the decision to invoke disciplinary proceedings against the Claimant and ultimately dismiss her.

If the ET finds that the Claimant's dismissal was unfair, applying Polkey, would the Claimant have been dismissed fairly in any event?

194. We consider that there would have been a high probability that the Claimant would have been dismissed in any event if the Respondent had carried out a reasonable investigation. It is self-evidently a speculative exercise to determine what the outcome would have been. Nevertheless, having considered both the evidence which was available to the Respondent based on the limited investigation undertaken, together with the evidence which we consider would have been likely to have arisen had such a reasonable investigation been completed, we place the likelihood of dismissal at 80%. We reach this finding for the reasons set out below.

195. The Respondent already had substantial evidence that the Claimant had not forwarded the API and sulphur test results to R&M on a timely basis.

196. The Claimant received the results of API and sulphur tests from the Jubail sample on 5 May, but on 8 May 2019 only shared the organic chloride result with R&M and withheld the API and sulphur results.

197. On 8 May 2019 she was also in possession of results of an API test carried out on a separate, non-leaking sample from the New Prosperity tested in Basra, which she received on 5 May 2019 and an API result from a sample from the White Moon tested in Basra which she received on 7 May 2019. However, she only passed the API result received on 7 May to Ms De Luca on 14 May 2019.

198. On 9 May 2019 she had passed this result to the Refinery but not to the people responsible for checking quality test results.

199. She also received a sulphur result for the White Moon sample tested in Basra on 10 May 2019, but says she did not recollect its receipt, until she passed it on to R&M on 17 May 2019.

200. Further the Respondent had evidence that the Claimant had not been entirely candid with her responses as to what tests results, she already had and whether original or repeat test results were still outstanding.

201. The Respondent already had an insight into the Claimant's state of mind as illustrated by the recording of her telephone conversation with Mr Des Dorides on 8 May 2019.

202. Had further investigation been undertaken, to include interviewing Mr Galdenzi and reviewing relevant email correspondence, we consider it unlikely that the Respondent's concerns as identified above regarding the Claimant's conduct would have been sufficiently assuaged to make it likely that they would have decided not to dismiss her for gross misconduct. We reach this finding given that even it was to be accepted, that the Claimant had been influenced by Mr Galdenzi to withhold the test results, we nevertheless consider that it was incumbent on her as a senior manager to either forward the results to R&M, and specifically Mr Rubeo as he had requested or if she felt Mr Galdenzi was imposing a restriction on her doing so to have reported the matter to compliance or otherwise. She did neither.

203. We do not consider it an acceptable defence for an employee in a senior managerial position to rely on the expectation that Mr Galdenzi, as the trader, would automatically be in the best position to gauge the appropriateness of retaining or forwarding as requested significant test results.

204. We also do not consider it reasonably creditable that the Claimant, as an experienced and senior employee, would not have appreciated the relevance of the API and sulphur test results given that they directly relate to not just the quality but the provenance of the crude. The Claimant was, or should have been, aware of the warning signs or red flags pertaining to the Transaction. We are incredulous that the Claimant in effect suggested her role as a senior employee was merely an administrative functionary tasked with requesting and coordinating test results but performing no role in evaluating the results received.

If the Claimant was unfairly dismissed, was her dismissal to any extent caused or contributed to by any action of the Claimant?

205. We consider that the Claimant contributed significantly to her dismissal. We reach this finding based on the following factors.

206. The Claimant failed to forward the API and sulphur test results to R&M on a timely basis and further was at best disingenuous, and at worst arguably dishonest, or if one accepts that she had forgotten about the receipt of the results on 10 May 2019, careless in performing an important part of her job role.

207. We do not accept that R&M, as an associated Group company, should have been treated as if it was a commercial adversary given that ultimately there was clearly a commonality of interest, or at least there should have been. Further, we consider that the Claimant's reliance on the express provisions of the contract, as opposed to what had been requested by an associated company, was both artificial and overly prescriptive.

208. We consider that the correct approach, if the Claimant had doubts about the accuracy of the initial test results, would have been to explain this situation to Mr Rubeo/R&M, to include why there were concerns regarding the validity of the results based on the leaking sample and advising that additional more reliable tests were being undertaken and the results awaited. She did not do this but created what was in effect a false narrative as to what tests had been undertaken, when results had already been received, and as to the status of subsequent tests being undertaken.

If so, what reduction to the compensatory award would it be just and equitable for the ET to make having regard to that finding?

209. We consider that a reduction of 65% to the compensatory award would be appropriate. This is on the basis that for the reasons set out above the Claimant's dismissal was to an extent caused or contributed to by her actions and therefore we consider it would be just and equitable to reduce the award by this percentage.

Was the Claimant's conduct before the dismissal such that it would be just and equitable to reduce the basic award?

210. We also consider it would be just and equitable to reduce the basic award but, in this instance, we consider that a reduction of 75% would be appropriate. The reason why we have determined that a higher figure would be appropriate for the basic, as opposed to the compensatory award, is that under s.122(2) of the ERA the tribunal is entitled to consider any conduct of the Claimant before the dismissal, to include conduct of which the Respondent was not aware at the time of dismissal.

211. As such we have also considered what we find to have been the Claimant's lack of candour regarding the aborted loading of the White Moon, for which she acknowledged culpability in her 8 May 2019 conversation with Mr Des Dorides. Nevertheless, she made no reference to this in the internal audit meetings, disciplinary hearing nor the timeline appended to her appeal. We do not consider that her explanation, that it was a "small" mistake which had been rectified, provides any form of reasonable justification. It was clearly part of the chronology of relevant events and therefore was directly material to subsequent testing and the overall processes pertaining to the Claimant's involvement with the Transaction.

ACAS CoP

Did the Respondent fail to comply with the ACAS Code of Practice in relation to the Claimant's dismissal in the following respects:

(a) Failing to draft clear allegations:

212. We find that the Respondent failed to draft clear allegations. We find that both the suspension letter dated 3 July 2019 and the invitation letter to the disciplinary hearing dated 8 July 2019 were extremely vague, prolix and lacking the necessary level of particularity to enable the Claimant to properly understand the nature of the allegations against her. We find that the fact that the Claimant did not directly complain about this during the disciplinary hearing, and may well have understood, as an intelligent employee the nature of the allegations, does not excuse what we consider to be a clear failure to comply with the relevant section of the Code.

(b) Failing to provide the Claimant with the necessary information and documentation to allow her to mount an effective defence in the disciplinary hearing:

213. We also find that the Respondent failed to comply with the above element of the Code. Limited documentation, the two internal audit summary notes, was only provided to the Claimant the day before the hearing. It does not appear that the Claimant was provided with a full transcript of her telephone conversation with Mr Des Dorides of 8 May 2019 and nor was she provided with relevant email correspondence between her, Mr Galdenzi, Mr Des Dorides, Mr Rubeo and others between 1 May and 17 May 2019.

214. Further, the Respondent failed to provide the Claimant with any notes or documentary evidence of investigations undertaken after both the disciplinary and appeal hearings. It should have done so.

(c) Failing to give the Claimant proper notice of her disciplinary hearing:

215. We find that the Respondent failed to comply with this element of the Code. In addition, it did not comply with the requirement for three days' notice of a disciplinary hearing under its own disciplinary policy. Mr Luppi contacted the Claimant outside core working hours on 8 July 2019 requesting that she attend a disciplinary hearing the following day.

216. We do not consider that there was a legitimate reason for this level of urgency. Whilst it may well have been that Mr Luppi was conscious of his need to return to Milan for chemotherapy, which would be entirely understandable, there was no necessity that he, and he alone, should conduct the disciplinary hearing. An alternative could have been arranged or the hearing could have waited his return to the London office.

(d) Failing, adequately or at all, to put the case against the Claimant to her:

217. Given our finding above in relation to a failure to draft clear allegations we consider that the Respondent also failed to comply with this specific element of the Code. Whilst we acknowledge that during the disciplinary hearing Mr Luppi and Ms Ceccacci explained in some detail the concerns regarding the Claimant's conduct, we nevertheless consider that many of these explanations were long and lacked precision and therefore the specific basis of the case against her was not cogently set out.

(e) Failing to provide the Claimant with the necessary information and documentation to allow her to mount an effective appeal:

218. Again, we find that the Respondent failed to comply with this element of the Code. As above there was additional documentation which should have been provided to include the relevant emails between 1-17 May 2019. She should also have been provided any evidence arising from post disciplinary enquiries undertaken by Ms Caccacci.

(f) Failing to appoint someone senior to and/or sufficiently independent of the dismissing manager to hear her appeal:

219. We do not find that this represented a breach of the Code. First, the relevant section of the disciplinary policy dealing with appeals provides that "if possible" someone with no previous involvement and more senior than the individual whose disciplinary decision is a subject of the appeal should be appointed. Therefore, this is not a mandatory requirement and in the case of a senior employee, such as the Claimant, it will often be the case that it would not be possible for someone more senior to be appointed. We are satisfied that the choice of Mr Swan was appropriate, he had sufficient gravitas and independence to make his own decision, and we do not find any evidence existed that he was placed under pressure to uphold Mr Luppi's decision.

If so, were any of the above failures unreasonable?

220. We find the failures identified above to have been unreasonable.

If so, would it be just and equitable for the ET to exercise its discretion to increase any award it makes to the Claimant by up to 25%?

221. Given the extent and number of failures we consider it appropriate to increase the compensatory award by the maximum figure of 25%.

Sex Discrimination (ss. 13, 39(2) EqA)

Did the Respondent treat the Claimant less favourably than it would treat others because of her sex?

222. We do not consider that any evidence exists to infer that the Claimant was treated less favourably than the Respondent would treat others because of her sex and therefore we find that the burden of proof does not revert to the Respondent to rebut any such inference of less favourable treatment. We set out our findings below in relation to the individual alleged acts of less favourable treatment.

223. We consider it significant that the allegations of sex discrimination were raised belatedly and then create the impression as having been raised as an afterthought because of the Claimant's dismissal.

224. Before we address the matters relied on, we set out briefly our findings in respect of earlier matters referred to by the Claimant in her witness statement which she contends were less favourable treatment on account of her sex.

225. First, the alleged comment about the "pink quota", in October 2017 and secondly the Claimant's contention that she was asked to leave the room during an interview process for a member of her team in early 2018.

226. Whilst we heard no evidence in relation to these matters we do not, in any event, consider that they could in any realistic way be part of a continuing course of conduct sufficiently linked to the events of May 2019 giving rise to the Claimant's dismissal. We find that they were entirely unrelated and, in any event, would have been significantly out of time.

227. We also do not consider it necessary to set out specific findings on other allegations of sex discrimination referred to in the Claimant's witness statement, to include the inference that she was inappropriately close to Mr Des Dorides and thereby implying she was having an affair with him and the alleged sketch or skit produced on the trading floor pertaining to such an alleged relationship between her and Mr Des Dorides.

The Claimant relies on the following alleged acts of less favourable treatment:

(a) Being suspended from work on 3 July 2019, without any or any proper reason being given for that suspension:

228. We find no evidence to infer that the Claimant's suspension was influenced by her sex. We find that the Respondent would have adopted the same approach for a hypothetical male employee in the same circumstances. Further, the Respondent's prior treatment of the Claimant, in her rapid promotions and designation as a potential member of senior management, was not consistent with a wish to scapegoat her as a female employee.

(b) Being told not to communicate with any of the Respondent's employees, contractors or clients (regardless of the purpose of such communication) during her suspension:

229. We find that absolutely no basis exists to infer that the terms of the Claimant's suspension, to include the prohibition on communication with the Respondent's employees, was influenced by the Claimant's sex. Rather we find that the suspension contained entirely commonplace and reasonable restrictions on an employee's involvement with workplace matters and colleagues whilst serious disciplinary allegations were being investigated.

(c) Being shouted at by Mr Luppi on 8 July 2019:

230. We consider it probable that Mr Luppi was irritated by finding that the Claimant was in Italy and not available to attend the proposed disciplinary hearing the following day. We do not, however, consider that it was unreasonable of the Claimant to have travelled to Italy and do not find that by doing so she breached the terms of her suspension.

231. We find that it was likely that Mr Luppi's exacerbation with the Claimant's non availability to attend the following day was compounded by his own personal situation of having to return to Milan for cancer treatment. We find that his arguable irritation was evidenced by his email to the Claimant of 19:51 on 8 July 2019 when he referred to the "awkward situation" caused by the Claimant's unavailability. However, we take account of Ms Ceccacci's evidence that Mr Luppi was a "very nice man", which is not disputed by the Claimant, and find no evidence that any irritation he may have displayed in his call with her was in anyway related to her sex.

(d) Her summary dismissal, as communicated by letter dated 26 July 2019:

232. We find no evidence to infer that the Claimant's dismissal was related to her sex. We find that the Respondent would have treated a hypothetical man in the same way.

(e) Having her appeal rejected, communicated by letter dated 1 October 2019. The Claimant relies on a hypothetical comparator only, namely a hypothetical male Head of Oil Trading Operations with materially the same responsibilities as the Claimant, who behaved in materially the same way (GoR S68), but avers that Mr Galdenzi's conduct and treatment by the Respondent is relevant in the manner described in Chief Constable of West Yorkshire v Vento (No.1) [2001]

IRLR 124, EAT (at paragraph 7) and Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL (at paragraph 81).[1]

233. We find no evidence to infer that the rejection of the Claimant's appeal was influenced by her sex.

Final conclusions regarding compensation and deductions to be made

234. The Claimant's dismissal was unfair. She is therefore entitled to basic and compensatory awards. However, the compensatory award needs to be increased by 25% to reflect the uplift for the Respondent's failure to comply with the Code but then reduced first by 80% as a Polkey reduction and then a further 65% because of contributory conduct in accordance with s.123(6) of the ERA.

235. The basic award of £2,100 needs to be reduced by 75% to reflect the Claimant's conduct in accordance with s.122(2) of the ERA thereby giving a figure of £525.

236. If the parties are unable to determine the size of the compensatory award, they should notify the Tribunal and a one-day remedy hearing will be listed.

Employment Judge Nicolle

5 May 2021

Sent to the parties on:

05/05/21

For the Tribunal:

[1] The Respondent has agreed to this paragraph notwithstanding its objection to the inclusion of legal submissions in order that the List is agreed.