Appeal No. EA-2020-000463-OO (Previously UKEAT/0231/20/OO)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
Hearing date 29 July 2021
Judgment handed down on 13 October 2021

Before

THE HONOURABLE MR JUSTICE CAVANAGH

Ms K BILGAN

Mrs M V McARTHUR BA FCIPD

MR D THOMPSON — APPELLANT

INFORMATICA SOFTWARE LIMITED — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR ANDREW BURNS QC (of Counsel) and MR SAM WAY (of Counsel) Instructed by: Niki Walker Employment Law, 43 Guildford Grove, Greenwich, London, SE10 8JY
For the Respondent	MR ZAC SAMMOUR (of Counsel) Instructed by: DLA Piper, 160 Aldersgate Street, London EC1A 4HT

SUMMARY

UNFAIR DISMISSAL

This was an appeal against the ET's finding that the Respondent had acted within the range of reasonable responses in deciding to dismiss the Appellant for authorising the payment of the cost of a trip by a senior official of Highways England to stay and to play golf at Pebble Beach Golf Club in California.

Ground 1

The first ground of appeal was concerned with the proper interpretation of the Respondent's Anti-Corruption Policy and whether the ET was right to find that the Respondent had been entitled to find that the Appellant's authorisation of this trip was in breach of the Policy. The EAT held that the right approach to this question was not to treat the Policy as if it was a statute, in which there was only one right and wrong answer to the question of interpretation. The real issue was whether the ET was perverse to find that it had been open to the Respondent to interpret the Policy in a way that meant that the Appellant had breached it.

The ET had not reached a perverse decision in this regard. Indeed, both the ET and the Respondent had been right to conclude that the Appellant's actions were in breach of the Policy. The official of Highways England was a "foreign official" for the purposes of the Policy, and the expenses that the Appellant had authorised were a "Prohibited Payment" as defined in the Policy. Expenditure could be a "Prohibited Payment" even if there was no intention to provide a bribe or corrupt payment.

Ground 2

In Ground 2, the Appellant contended that the ET had been wrong to decide that the ET acted reasonably in finding that the Appellant had acted in "wilful disregard" of the Policy, even though he had not deliberately intended to breach the policy and had no corrupt intent.

The EAT rejected this ground also. Wilful disregard meant something different from "deliberate" or "intentional". The Appellant, who was a senior employee, had been uncomfortable about

making the payment and should have refrained from doing so, or should have explored the matter more fully, or taken advice from the Legal Department. He was aware that there was a potential problem but carried on regardless.

Ground 3

This was a perversity challenge to the decision to dismiss. The EAT rejected it. To an extent this ground overlapped with Grounds 1 and 2. Given the importance of avoiding the potentially catastrophic reputational and other damage which could arise if the Respondent committed, or was suspected of committing a breach of anti-bribery legislation in the UK, US or elsewhere, the Respondent was entitled to take a hard line against senior officials who placed it in danger in this regard by their wilful disregard of the policy.

Ground 4

The Appellant contended that there had been procedural unfairness because he was not told sufficiently clearly which part of the Anti-Corruption Policy he was alleged to have breached. The EAT rejected this ground, as the nature of the allegation against the Appellant was made clear to him in the investigation process and at the disciplinary hearing, and he was able to identify the nature of the alleged breaches in his appeal letter.

Inadequacy of reasons

The Appellant also alleged that the ET judgment was not **Meek**-compliant. This allegation was also rejected.

A **THE HONOURABLE MR JUSTICE CAVANAGH**

Introduction

1. This is an appeal against the judgment of the Employment Tribunal (Employment Judge Vowles, sitting alone, "the ET"), in which the ET held that the Appellant had not been unfairly dismissed by the Respondent on 24 October 2017. The Appellant had been employed by the Respondent, in a senior capacity, as a Vice-President UK & Ireland. The Appellant's principal focus was sales. The reason given by the Respondent for the Appellant's dismissal was that he had committed gross misconduct by authorising a trip to Pebble Beach Golf Club in California by Mr Colin Gray, the Sales Manager, Public Sector UK and Ireland, and a customer, Mr TM, the Chief Information Officer and IT Executive Director of Highways England, on the basis that the cost of the trip (which included an overnight stay) would be paid for by the Respondent. The total cost of the trip was approximately $5,400. The decision to dismiss was taken by Ms Maureen Brennan, Senior Vice President and Chief Human Resources Officer. The dismissal letter, dated 24 October 2017, stated that the authorisation of this trip to entertain a public sector/government customer was in breach of the Respondent's policies and procedures. The relevant policies and procedures were the Anti-Corruption and Compliance Policy ("the Anti-Corruption Policy"), the Global Travel and Expenses Policy, and the Code of Business Conduct. The Appellant appealed against the decision to dismiss and his appeal was heard by Mr Doug Barnett, the Chief Finance Office. His appeal was dismissed. The Appellant was notified by letter dated 15 December 2017.

2. Before the ET, the Appellant's primary argument was that the reason given by the Respondent for his dismissal was a sham, and that the real reason for his dismissal was that he had made protected disclosures. The Appellant claimed, accordingly, that his dismissal was automatically unfair, pursuant to section 103A of the Employment Rights Act 1996 ("the ERA").

This argument was rejected by the ET. The Appellant's secondary argument before the ET was that, even if the real reason for his dismissal was that he had authorised the Pebble Beach trip, the dismissal was unfair on "ordinary" unfair dismissal principles, pursuant to section 98 of the ERA. The Appellant contended that the Respondent had misinterpreted the Anti-Corruption Policy, that no reasonable employer could have dismissed the Appellant in the circumstances, and that the dismissal was procedurally unfair because the Respondent had not made clear to the Appellant exactly how he was alleged to have breached the Anti-Corruption Policy. The ET rejected these arguments also.

3. In this appeal, the Appellant does not appeal against the finding that the real reason for his dismissal was his authorisation of the trip to Pebble Beach, and so he does not challenge the finding that he was not automatically unfairly dismissed for making protected disclosures. However, he alleges that the ET erred in law in failing to find that he had been unfairly dismissed, in breach of s98 of the ERA. The Appellant relies upon four grounds of appeal. In short summary, these are:

(1) The ET misinterpreted the Anti-Corruption Policy. The Appellant contends that it is clear that, on its true construction, he did not act in breach of the Policy by authorising the trip to Pebble Beach. In the Grounds of Appeal, the Appellant submits that the ET misinterpreted the Anti-Corruption Policy in two respects. First, the Policy only applies where a payment or incentive is given to a "foreign official", and Mr TM was not a foreign official, as the Appellant worked for the British subsidiary in the Informatica Group, and Mr TM was a British public official. Second, the Policy only prohibits payments that are intended to induce the official to act improperly, ie inducements with a view to obtaining or keeping business. Again, the Appellant says that this was plainly not the position here. The Respondent had obtained a large contract from Highways England in 2016, but, at

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the time of the Pebble Beach trip, the Respondent was not in negotiation with Highways England for more business, and there was no expectation of new business in near future;

(2) The dismissal letter dated 24 October 2017 said that the Appellant had shown "wilful disregard" for the Respondent's policies. The phrase "wilful disregard" is taken from the Respondent's UK Disciplinary Policy. This document set out a non-exhaustive list of examples of gross misconduct. One of these was "Wilful disregard of Company policy….." The Appellant submits that even if the authorisation of the Pebble Beach trip was not consistent with the terms of the Anti-Corruption Policy, the ET should have found that it was not reasonably open to the ET to find that he was in wilful disregard of the policy. "Wilful disregard" requires a deliberate or, at least, a reckless breach, and that was not the case here: at worst, the Appellant's breach was accidental or careless;

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(3) The ET's finding that it was open to the Respondent to decide that the Appellant's conduct was gross misconduct was perverse; and

(4) The ET erred in law in declining to find that the Respondent has failed to comply with a fundamental principle of natural justice to the effect that an employee should know the case he has to meet when facing disciplinary proceedings that could result in dismissal. The Respondent had failed clearly to draw the Appellant's attention to the part of the policies that he was alleged to have breached.

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4. In addition to the four grounds of appeal set out in the Grounds of Appeal, there is a further thread that runs through several of the grounds. This is that the judgment was not **Meek**-compliant, that is, that the judgment did not adequately explain to the parties why they had won or lost. In particular, the Appellant contends that the ET did not adequately address his contention that the expenses incurred in relation to the Pebble Beach trip were not a "Prohibited Payment" for the purposes of the Anti-Corruption Policy, and that the ET did not adequately

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address his natural justice argument. We will deal with the "adequacy of reasons" arguments separately at the end of this judgment.

5. We will first summarise the relevant facts and the key provisions of the policies. Next, we will summarise the relevant findings of the ET, and we will then deal in turn with the grounds of appeal.

6. The Appellant has been represented before us by Mr Andrew Burns QC and Mr Sam Way, and the Respondent by Mr Zac Sammour. We are grateful to all counsel for their very helpful submissions, both oral and in writing.

The facts

7. There was no significant disagreement between the parties about the facts underpinning the issues in this appeal (as the ET noted at paragraph 77 of its judgment).

8. The Respondent is the UK subsidiary of the Informatica International Corporate Group, which operates in 80 countries and is based in California. The Group enters into data management contracts with public and private sector organisations. It has over 4,200 employees and an annual turnover in excess of US$1 billion.

9. The Claimant had worked for the Respondent since November 2013. He was responsible for a sales team comprising 41 employees. He reported to Mr Steve Murphy. He was the direct line manager of Mr Gray. Prior to this matter, the Appellant had an impeccable work record.

10. Mr TM was invited to speak at a customer conference, Informatica World 2017, in California. He was invited because he was a satisfied customer, after the Respondent had entered into a large contract with Highways England in 2016, worth approximately $4.8 million (the ET

judgment said that this was entered into in 2006, but this appears to be a typo). Mr TM paid for his own travel and other expenses relating to the conference.

11. In April 2017, Mr Gray raised the possibility of hosting Mr TM at the Pebble Beach Golf Club immediately following the conference. Pebble Beach is a world-famous golf club, and a round at the club was on Mr TM's "bucket list". The Appellant told Mr Murphy of his intention to agree to this, and Mr Murphy did not object. However, Mr Murphy was not consulted any further when the cost of the trip became apparent.

12. The Appellant's PA looked into the cost of the trip. It was obvious from the outset that it would be expensive. At first, Pebble Beach said that anyone who played golf at the course would have to spend two nights at the hotel, though in the end it was agreed that Mr Gray and Mr TM would only spend one night at the hotel. At the time when he approved the trip, the Appellant was aware that the cost of the accommodation and green fees would be $3,404 (and that meals would be extra). He did not seek advice from HR or the Legal Department as regards whether the trip was appropriate. In the event, the cost of the trip was higher than anticipated. The total cost was about $5,400, or £4,241. The main reason why the cost was higher than expected was the high cost of transfers from the conference venue to Pebble Beach and back. The Appellant did not join Mr Gray and Mr TM for the trip, and it was never suggested that he would do so.

13. The bill was paid by the Respondent, but the internal audit team subsequently queried whether there had been a breach of the Respondent's policies, and Ms Louise Rourke, Senior HR Manager, North EMEA, was asked to carry out an investigation. The Appellant was not suspended whilst the investigation was conducted, and he remained in post until his eventual dismissal.

14. The Appellant was interviewed by Ms Rourke on 9 August 2017. The ET was provided with a note of the interview. The Appellant was asked what the rationale was for treating Mr TM to the trip. The Appellant said that Mr TM was a:

> **"Senior customer, spent a lot of money with us (refers to Q4 2016) and agreed to speak at INFA World even and also speak at a UK event later in the year…. Big customer advocate for Informatica…. We needed to treat Tony as a special customer…. Big deal, strong advocate, we need to take care of a good customer."**

15. He was asked what benefit there would be for the business. The Appellant's answer was:

> **"No direct benefit. Good networking opportunity, time dedicated/time with the customer, build rapport. Build stronger relationship. Why does anyone do any customer entertainment."**

16. The Appellant pointed out that taking customers to Wimbledon can cost £5,000 per head.

17. The Appellant also said:

> **"… Agree cost is high and I'm not comfortable with that. Cat was out the bag. Could have said beyond our polices. Rather than building rapport. When started process, thought would end up high end of reasonable in terms of an expense but the costs spiralled….. didn't know full cost until expenses came in. Hindsight would to have been more forensic at the earlier stage of the discussion"**

18. The Appellant was asked if he knew which rules/policies existed in terms of entertaining government/public sector customers. He said that he did not know in great detail, and that you rely on customers to follow process and procedure too. He said that he knew that there was a difference between the public and private sectors but did not know the details. The Appellant was asked why he still gave approval when the likely costs were clear. He said that it was "done, too late". He did not realise that it needed to go up to Legal for approval. The Appellant also said that he did not speak to Mr Murphy to obtain approval for the expenditure and that Mr Murphy did not have the details, though he knew that Mr TM would be speaking at INFA World.

19. The Appellant was asked about the Respondent's relationship with Highways England. He said that there were no immediate future business opportunities, but maybe down the line there would be. He said that there would be discussion with Mr TM about future business needs, ongoing business, as there would be with any customer, but that he felt that there was enough distance from the 2016 deal at the time of the Pebble Beach trip. They were not connected.

20. The Appellant asked why he did not cancel the trip when the likely cost became apparent. He said, "Bucket list for [TM]. Unable to back out following there being some discussion about playing at Pebble." He said that he thought cancellation would have a negative impact. Mr TM was a strong customer advocate, and this would be the reverse of what the business was trying to achieve.

21. The Appellant said that if he had known the full end to end costs he would not do it again. It was a "creep of cost". The Appellant said that he had no idea of the approval flows that were needed ir required.

22. On 10 October 2017, the Appellant was invited to a disciplinary hearing. He was given a copy of the Respondent's Disciplinary Policy. The letter said:

> **"The allegation is that in violation of the Company's Code of Business Conduct, Travel and Expense Policy and Anti-Corruption Policy…. You approved the taking of [TM] (a public sector customer representative) to Pebble Beach at the Company's expense."**

23. The Appellant was provided with copies of the three policies, and an "investigation packet" including relevant interview notes. The Appellant had already been provided with copies of the policies by Ms Rourke at the time of the interview, with certain passages highlighted. The Appellant was warned that this was a serious allegation and that the possible consequences included dismissal for gross misconduct. The Appellant was told that he was entitled to be accompanied by a trade union representative or work colleague. He chose to attend alone.

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24. The disciplinary hearing took place on 13 October 2017. Ms Brennan attended by telephone. Ms Rourke and the Appellant were together in a room in the UK. During the hearing, the Appellant produced a pre-prepared script, which he read out. The ET was provided with a note of the Disciplinary Hearing. During the hearing, the Appellant confirmed that he was broadly aware that there is a difference between the public and private sectors. The Appellant said that with hindsight he did not give the trip enough attention. He accepted that he signed a certificate of ethical conduct every quarter, in which he confirmed that he had read, understood, and would comply with Company policies, including the Anti-Corruption Policy. The Appellant said that he had carried out a fundamental ethical check in relation to the trip as to whether there would be any undue influence or gain and had decided that the answer was "no". He remained of that opinion. He said that, on reflection, he overlooked or was unaware of procedure or policy, and that he exercised poor judgment. He accepted that, with the benefit of hindsight, he should have cancelled the trip, but he said that there had been no harm or damage done.

25. On 24 October 2017, Ms Brennan wrote to the Appellant to inform him that he was to be summarily dismissed. The letter said that the trust and confidence which had been placed in the Appellant had been completely undermined. Ms Brennan said that she was clearly in breach of the three policies, which clearly limit gift and entertainment to a maximum of $150 and set out clear reporting lines for approvals, which the Appellant did not follow. She said that:

> **"Despite your comments that no harm or damage has resulted from the event, Informatica's policies and procedures are in place to protect the company and its employees from potential damage or harm. Your wilful disregard for these policies is taken extremely seriously and cannot be disregarded."**

26. Ms Brennan said that it was not accepted that the Appellant did not have sufficient notice of the terms and conditions in the Policies, as he signed and accepted every three months that he

had read and would abide by them. He also undertook an annual certification, and online training which covers these policies and procedures. She added:

> **"Having never entertained customers at Informatica to this level of extravagance, it is not understandable why you failed to seek appropriate guidance and approval to ensure it would be acceptable. You have said that when you realised that the cost was too high it was "too late", that "the cat was out of the bag" and that it would have been "damaging" to back out then. This would indicate that there was indeed a level of realisation that your actions were wrong but you chose not to act on this.**
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> **Despite your comments in regard to your lack of training, it is my opinion from your interview responses and comments made in your disciplinary hearing, that you have sufficient understanding that there was a difference between public and private sector customers. It is my belief your knowledge that a difference existed should have resulted in you seeking counsel with regards to such an expense, such as consulting the applicable policies and obtaining the required approvals."**

27. The letter also stated that, as the Appellant was aware that the Respondent was not paying Mr TM's expenses to attend the INFA World conference, this should have led him to realise that the cost of the trip to Pebble Beach was not the type of expenses that would be approved. Ms Brennan also observed that the Appellant had been copied in to an email from Mr Gray in which he asked his assistant to "remain discreet" about the outing.

28. On 30 October 2017, the Appellant lodged an appeal. He said that there was no evidence of wilful disregard of the polices, and there had been no deliberate breach of his contract of employment. He said that Mr Murphy had been aware of the trip. The Appellant also said that the investigation process was flawed and that he had been prejudiced as a result. He drew attention to his impeccable record.

29. The appeal hearing took place on 16 November 2017. As he was also based in the US, like Ms Brennan, Mr Barnett participated by telephone.

30. Mr Barnett provided a decision in writing on 15 December 2017, dismissing the Appellant's appeal. This letter dealt in detail with the points that the Appellant had made in his appeal. In particular, the letter considered and rejected the contention that the Anti-Corruption Policy was not engaged because TM was not a "foreign official".

31. As for the question whether there had been wilful disregard of the policies, Mr Barnett said that he agreed with Ms Brennan that,

> **"you did understand that your actions were wrong, but that you did not do anything to rectify this. Furthermore, even if there were no facts to demonstrate that you did understand your actions were wrong, you ought to have known and should be held accountable nonetheless."**

32. Mr Barnett accepted that it had not been alleged by Ms Brennan that the Appellant approved the expenses to achieve a gain or undue influence, and said that he did not think that was the Appellant's motivation either. However, Mr Barnett said that "this does not alter the fact you seriously breached established policies and procedures." Later in the letter, Mr Barnett emphasised that the Appellant was not accused of bribing TM. He said:

> **"You have been accused of breaching company policies. There is a difference between the two. The Company's policies are designed to prevent even inadvertent breaches or the appearance of impropriety."**

33. Mr Gray was also dismissed for his involvement in the Pebble Beach trip. Mr Murphy was subjected to disciplinary action but was not dismissed.

The Policies

34. Paragraph 10.2 of the Global Travel and Expense Policy states that entertainment expenses over $150 per person require approval by a Vice-President or above. This requirement

A was satisfied, as the Appellant was a Vice-President. The other relevant passage is paragraph 10.2, which states that "All reasonable expenses incurred are reasonable, provided they comply with the Company's Code of Conduct and Foreign Corrupt Practices Act Policy." The latter reference is a reference to the Anti-Corruption Policy. As for the Code of Business Conduct, the B Code has separate sections on payments or gifts to Government Officials, and to non-Government customers and suppliers. The section on payments to Government Officials states that employees must comply strictly with the laws and regulations about offering gifts to government employees C if doing so will cause embarrassment for the Company or will reflect negatively on the Company's reputation. The section concludes as follows:

D > **"For more information on the limitations on payments or gifts to government officials, please see Informatica's Anti-Corruption Compliance Policy and Guidelines."**

35. In light of these passages in the other two policies, it was common ground before the ET E and before us that the key relevant policy is the Anti-Corruption Policy.

36. The Anti-Corruption Policy is in two parts. The first part is a two-page statement of F principle, and this is followed by a section headed "Anti-Corruption Compliance Guidelines."

37. The first paragraph of the statement of principle says that the parent company and its subsidiaries,

G > **"are committed to maintaining the highest level of professional and ethical standards in the conduct of their business in all countries in which they operate or otherwise have business connections, including the United States. The Company's reputation for honesty, integrity and fair dealing is an invaluable component of the Company's financial success, and of the personal satisfaction of its employees."**

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38. The statement of principle refers to the US legislation, the Foreign Corrupt Practices Act ("FCPA"). This is said to be a criminal statute which prohibits, amongst other things, authorising the payment of anything of value to influence the official in the performance of his or her official duties. The statement says that the FCPA also requires Informatica companies to maintain a system of internal accounting controls that protect against unauthorised payments. The statement says,

> **"The penalties for violating the FCPA are very severe and potentially devastating to both the Company and the individuals involved, including the potential for criminal liability."**

39. The statement of principle also summarises the provisions of the UK Bribery Act 2010, which prohibits the offering of anything of value to foreign (i.e. non-UK) government officials for the purpose of retaining business or obtaining business or a business advantage. The statement of principle points out that companies have strict liability under the Bribery Act for acts of bribery by their employees or agents.

40. The statement says that the Policy and Guidelines were adopted "to facilitate day-to-day compliance with ethical and legal obligations under the FCPA, the UK Bribery Act and other anti-bribery laws and regulations" in place in other countries. It says that all employees are expected to adhere to the business's ethical standards and to be cognisant of the FCPA, the UK Bribery Act, and other applicable laws, "and to seek guidance from the Company's Legal Department whenever any uncertainty regarding those laws or standards arises."

41. The statement adds,

> **"Departures from our business standards will not be tolerated. Informatica will take appropriate action against those persons whose actions violate the Policy, which may include immediate termination of employment or business relationship.**

> **The guidelines set forth below are intended to provide our personnel with guidance on anti-bribery compliance issues. We encourage you to review these guidelines carefully and to discuss any questions you might have with the Company's Legal Department."**

42. The guidelines once again summarise the main features of the FCPA and UK Bribery Act. So far as the Bribery Act is concerned, the guidelines say that there is a prohibition on "active bribery", which consists of the offering, promising, or providing of things of value to any person with the intent to induce them not to act with good faith or impartially or to abuse a position of trust, or to reward such improper action. The guidelines also say that, like the FCPA, the Bribery Act creates an offence of providing improper payments to foreign officials. The guidelines say that compliance with the UK Bribery Act must be undertaken on a case-by-case basis and can be complex. If any question arises, the Legal Department should be consulted.

43. Section C of the guidelines provides a definition of "foreign official" under the FCPA and the UK Bribery Act. We will set this out in full later in the judgment. In short, a "foreign official" under the FCPA is a non-US government official and, under the UK Bribery Act, it is a non-UK government official. Section C states that "Any questions about an individual's potential government status should be raised with the Legal Department."

44. Guidance is given on "Prohibited Payments" and "Permissible Payments" in sections D and E of the guidelines.

45. Section D states, in relevant part:

> **"The FCPA and the UK Bribery Act prohibit offering, promising, or giving "anything of value" to a foreign official to get or keep business….. Violations under the FCPA and the UK Bribery Act are not limited to the giving of cash payments [but include]…. entertainment…."**

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46. Section E states, in relevant part:

> **"The two sections below provide limited exceptions to the general prohibition against providing anything of value to a foreign official. If you have any doubt whether a payment falls within these exceptions, consult with the Legal Department prior to engaging in the transaction.**
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> **1. Gifts**
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> **[This section stated that a nominal gift can be given to a foreign official or private party without violating the FCPA or UK Bribery Act if it is not given to get or retain business or to gain an improper advantage. The guideline said that, though the FCPA and UK Bribery Act do not provide a maximum figure for a "nominal" gift, no gift worth more than $100 should be given without the prior review and written approval of the General Counsel.]**
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> **2. Business Expenses for Foreign Officials and Private Parties**
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> **The FCPA permits companies, including Informatica, to provide certain types of entertainment and travel to foreign officials provided that such entertainment and travel expenses are: (a) bona fide and related to a legitimate business purpose (i.e. not provided to obtain or retain business or to gain an improper advantage); (b) reasonable in amount; and (c) legal under the written laws of the foreign officials' home country. The UK Bribery Act does not specifically permit companies to provide entertainment and travel expenses to foreign officials. However, like the FCPA, if such expenses are reasonable and are not intended to improperly influence the official in the performance of his or her official functions, they will not be a violation of the UK Bribery Act.**
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> **While the FCPA contains no prohibition on providing things of value to purely private persons, the UK Bribery Act prohibits providing anything of value to any person, including private, commercial parties, if it is intended to induce that person to not act in good faith or impartially, to abuse a position of trust, or to reward such improper conduct. Accordingly, any payments for the entertainment or travel of private persons must be reasonable and customary and must not raise any inference that such expenditures were provided in order to improperly influence the private person to not act with good faith.**
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> **….**
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> **It is important to note that expenditures involving foreign officials are generally more heavily scrutinized by government authorities than expenditures involving private parties. Moreover, because both the FCPA and UK Bribery Act prohibit improper provisions to foreign officials, one violation of this sort could expose the Company to liability in both the U.S and the U.K. As a result, these requirements pertaining to foreign officials must be scrupulously followed by Informatica employees."**

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The ET

47. The Appellant's main contention before the ET was that the real reason for his dismissal was that he had made protected disclosures concerning the Respondent's failure properly to pay commission to members of his sales teams. He said that the issues arising from the Pebble Beach expenses were not a credible reason for the decision to dismiss him, and so the real reason must have been something else.

48. As we have said, the ET rejected the automatic unfair dismissal claim arising from the protected disclosures claim. The ET found that there had been no disclosures which qualified as protected disclosures. The ET also rejected the Appellant's contentions that the real reason for his dismissal was connected with his disclosures relating to commissions (whether or not they amounted to protected disclosures) and that there was a conspiracy led by Mr Barnett to remove the Appellant from his employment with the Respondent. The ET noted that Mr Gray was one of the best-performing salesmen in the Respondent company, and the Appellant was also a well-regarded senior employee with a record of high performance. The ET found that there was no hidden agenda or ulterior motive for the Appellant's dismissal. There is no appeal against any of these findings.

49. This left the question whether the Appellant's dismissal for approving the expenses involved in the Pebble Beach trip was unfair on ordinary unfair dismissal principles. The ET reminded itself of the legal principles relating to unfair dismissal at paragraphs 62-68 of the judgment. No criticism is made of this part of the judgment.

50. The ET found that it was reasonable for Ms Brennan and Mr Barnett to conclude that the Appellant had breached the Respondent's policies. The Employment Judge said that they are not

to be interpreted as a court would interpret a statute. The ET rejected the Appellant's argument that the Respondent was wrong to conclude that Mr TM was a "foreign official" for the purposes of the Anti-Corruption Policy and that the benefit conferred on Mr TM was a "Prohibited Payment" as described in the Policy. As for the meaning of "foreign official", the ET said that it was reasonable for Ms Brennan and Mr Barnett to conclude that TM was a foreign official for the purposes of the Anti-Corruption Policy. It was their understanding that the Policy applied at all times to anyone who was a foreign official under either US or UK laws and that was a reasonable interpretation of the Respondent's policies. As for "Prohibited Payment", Mr Burns QC, who represented the Appellant at the ET as he did before us, submitted that the Respondent had been wrong to take the view that there had been a "Prohibited Payment" for the purposes of the Anti-Corruption Policy, because there was no suggestion that the motive for offering the trip to Pebble Beach was to get or keep business, and there was no potential work for Highways England in the pipeline. Also, it was submitted that the Pebble Beach expenses were reasonable and customary. The ET rejected these submissions.

51. The ET found that the facts relating to the Pebble Beach trip were not disputed and had been accepted by the Appellant in the course of the disciplinary hearing. The ET said, at paragraph 77,

> **"He accepted that with hindsight he did not give the matter enough attention, that on reflection, he overlooked or was unaware of procedural policy, that he exercised poor judgment and should have cancelled the trip. He said that with hindsight, the cost was more significant and at that point he should have stopped it. There were therefore reasonable grounds for the Respondent's belief that the Claimant was guilty of misconduct."**

52. The ET also found that, in these circumstances, the Respondent had been entitled to find that there had been "wilful disregard" of the policies on the part of the Appellant. Mr Burns QC submitted that, in the course of cross-examination, Ms Brennan had accepted that the Appellant's

behaviour was careless, rather than deliberate, and that this meant that there was no scope for a finding of "wilful disregard". The ET rejected this contention, saying, at paragraph 92 of the judgment:

> **"Notwithstanding the apparent concession by Ms Brennan, the Tribunal must take account of what factors were operating on the mind of the decision-maker at the time the decision to dismiss was made. The letter of dismissal clearly refers to "your wilful disregard for these policies." Whether or not Ms Brennan now takes a different view, at the time of the dismissal she clearly considered there was wilful disregard particularly in view of the Claimant's knowledge of the Respondent's policies and her view that despite that knowledge he acted in contravention of them. Given the circumstances which were admitted by the Claimant, it was reasonable for Ms Brennan, and later Mr Barnett, to take the view that it was wilful and amounted to gross misconduct."**

53. The ET rejected the contention that there had been inadequate investigation of the matter by Ms Rourke. The facts relating to the Appellant's conduct were not disputed.

54. The ET also rejected an argument that there was a lack of clarity in the dismissal letter, regarding the actual policy breached by the Appellant. The ET found that the dismissal letter was clear. In particular, though the dismissal letter referred to Mr TM being "a public sector/government customer", it is clear that this was a reference to the status of "foreign official" mentioned in the Respondent's Anti-Corruption Policy. The letter was not reasonably capable of being misunderstood by the Appellant

55. The ET also dealt with the Appellant's contention that it had been unreasonable for the Respondent to have failed to investigate how much was spent on entertainment of the Respondent's customers at other times, such as at the Superbowl or US Masters. The ET considered that it was reasonable to draw a distinction between the treatment of a single individual and group entertainments of a completely different nature. The ET held that the failure to investigate this matter did not make the dismissal unfair.

56. The ET said that it had taken into account all of the matters raised on behalf of the Appellant, and found that there had been no procedural unfairness and held that the Appellant's dismissal was fair. There was a reasonable investigation and the Appellant was informed of the evidence against him. He was given an opportunity to provide his own account. The investigation provided reasonable and sufficient grounds to sustain the Respondent's genuine belief in the Appellant's misconduct. The outcome of the hearing was confirmed in a reasoned and detailed decision letter. There was a fair appeal process.

The grounds of appeal

Ground 1

57. On behalf of the Appellant, Mr Burns QC submitted that the ET erred in law because it should have found that there had been no breach of the Anti-Corruption Policy and so should have found that the dismissal was unfair. He said that the ET erred in law because it misinterpreted the Anti-Corruption Policy in two key respects. The ET should have found that the Appellant was not in breach of the Policy, both because Mr TM was not a "foreign official" as defined by the Anti-Corruption Policy and so the benefit offered to Mr TM did not come within the scope of the policy, and also because the policy only prohibited "corrupt" payments or benefits ("Prohibited Payment"), and it was throughout accepted by the Respondent that the Appellant had no corrupt intention.

How should the EAT approach this ground of appeal?

58. Mr Burns QC submitted that there is a right and wrong answer to the meaning of "foreign official" and "Prohibited Payment" in the Anti-Corruption Policy. If the ET has misinterpreted

A the meaning of the words, it has erred in law and its decision cannot stand. It is not a question of perversity. On behalf of the Respondent, Mr Sammour submitted that the task of the ET and EAT is not to interpret the Anti-Corruption Policy as if it were a statute or a contract, with only one possible meaning. Rather, the question is whether the ET was entitled to find that a reasonable employer could have adopted the interpretation that was adopted by Ms Brennan and Mr Barnett, and was entitled to find, applying that interpretation, that a reasonable employer could have found the Appellant guilty of gross misconduct.

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59. The ET adopted Mr Sammour's approach. The ET judgment said, at paragraph 89, that it was reasonable for Ms Brennan and Mr Barnett to conclude that the Appellant had breached the Respondent's policies. The ET went on to find that it had been reasonable for the Appellant to find the Appellant guilty of gross misconduct and to dismiss him for it.

D

60. In our judgment, for the reasons set out below, the ET was right to adopt this approach. Similarly, the task for us is to decide whether the ET had acted perversely in finding that the Respondent been entitled to interpret the Anti-Corruption Policy in the way that it did, and, applying that interpretation, to find him guilty of gross misconduct.

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61. The starting-point is that the Appellant does not suggest that the Employment Judge misdirected himself on the correct legal test to apply to a claim of "ordinary" unfair dismissal. In the absence of such an error of law, the question for us is whether the ET's conclusion that the dismissal was fair was perverse. In other words, did the ET act perversely finding that the decision to dismiss the Appellant for gross misconduct was within the range of reasonable responses open to a reasonable employer? (There is a separate question as to whether the ET was entitled to find that the dismissal was not rendered unfair by procedural unfairness. This issue goes to Ground 4 and will be dealt with separately later in this judgment.)

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62. On behalf of the Respondent, Mr Sammour reminded us of the well-known authorities about the approach that the EAT should take to a perversity challenge. He referred, in particular, to **Stewart v Cleveland Guest (Engineering) Ltd** [1996] ICR 535, in which Mummery J said, at pages 542-4:

> **An appeal should not be allowed on [the perversity] ground simply because the appeal tribunal disagrees with the industrial tribunal as to the justice of the result, the merits of the case or the interpretation of the facts. This tribunal should only interfere with the decision of the industrial tribunal where the conclusion of that tribunal on the evidence before it is "irrational," "offends reason," "is certainly wrong" or "is very clearly wrong" or "must be wrong" or "is plainly wrong" or "is not a permissible option" or "is fundamentally wrong" or "is outrageous" or "makes absolutely no sense" or "flies in the face of properly informed logic."**

63. Mr Burns QC did not challenge any of this, but he said that, when asking whether the employer acted within the range of reasonable responses, one crucial question is whether the employer acted reasonably in believing that the employee breached the Anti-Corruption policy. If as a matter of true construction of the policy there was no breach, there cannot be any reasonable grounds for finding the employee in breach of the policy.

64. It follows that, on the Appellant's case, whilst Ground 1 is in form a perversity challenge, in substance it is, in effect, a challenge on points of law. It consists of a challenge on points of construction. Mr Burns QC submitted that, if we disagree with the ET and with the Respondent on the question whether Mr TM was a "foreign official", or whether the benefit consisting of the trip to Pebble Beach was a "Prohibited Payment", we should substitute our views for theirs and should set aside the finding of fair dismissal and substitute a finding that the dismissal was unfair.

65. Another way of putting Mr Burns QC's argument, which amounts to the same thing, is that the ET erred in law in its interpretation of the key wording in the Anti-Corruption Policy.

For this reason, the ET judgment must be set aside. As Mr Burns QC put it in his oral submissions, the ET has misconstrued the Policy and so has misapplied the law. Mr Burns QC further submitted that, in light of the ET's findings of fact, the only option that would be open to an ET that was not acting perversely would be to find that the Appellant's dismissal was unfair, and so the EAT should substitute such a finding.

66. The premise underlying Ground 1, therefore, is that there is a right or wrong answer to the meaning of words and phrases in the Anti-Corruption Policy and the UK Disciplinary Policy, and so, if the ET and the Respondent got those answers wrong, the finding of fair dismissal is tainted by an error of law and cannot stand.

67. On behalf of the Respondent, Mr Sammour submitted that this is an attempt to dress up a perversity challenge as a challenge on points of law. This is not a claim for breach of contract. The Anti-Corruption Policy is not a contract and it should not be construed as such. The issue for the Employment Judge, on ordinary principles, was whether the Respondent reasonably believed that the Appellant's approval of the Pebble Beach trip amounted to the misconduct against him and, if so, whether it was reasonable to dismiss him for it. This turned on the reasonableness of the belief held by the Respondent's decision-makers as to (i) what the Appellant in fact did and (ii) what the Anti-Corruption Policy prevented him from doing.

68. In our judgment, as we have said, Mr Sammour is right. The central question for the ET (leaving aside procedural fairness), was whether dismissal was a fair sanction for the Appellant's actions in authorising the Pebble Beach trip, in light of the terms of the Anti-Corruption Policy and of the UK Disciplinary Policy. In answering this question, the ET was required to have regard to the terms of the Anti-Corruption Policy, but the question for the ET was not a pure question of law concerning the correct interpretation of the words "foreign official" and "Prohibited Payment" in the Anti-Corruption Policy (or indeed the meaning of "wilful disregard"

in the UK Disciplinary Policy). Rather, the question was whether the decision to dismiss fell within the range of reasonable responses open to a reasonable employer in all of the circumstances, which include the terms of the Anti-Corruption Policy and the UK Disciplinary Policy.

69. This does not mean that arguments about the meaning and effect of the Anti-Corruption Policy are irrelevant. If the Appellant can demonstrate that, in light of the terms of the Policy, the ET's conclusion that the dismissal was fair was perverse, then his appeal will succeed. The test, however, is the perversity test, and we should not approach that test as if the words of the Anti-Corruption Policy are the words of a statute.

The nature, spirit, and purpose of the Anti-Corruption Policy

70. In order to address the Appellant's contention that the Respondent and the ET misinterpreted and misapplied the meaning of "foreign official" and "Prohibited Payment", it is necessary first to examine the nature, spirit and purpose of the Anti-Corruption Policy. These will inform the meaning to be given to the relevant phrases that are set out within the Policy.

71. The nature of the Anti-Corruption Policy is clear, in our view. As its name, and the headings within the document, suggest, the Anti-Corruption Policy consists of policy and guidance, not hard-and-fast rules. The wording of the Policy is designed to convey a message to the employees about how they should behave. It is a working document. It is aimed primarily at employees, but also at managers who have to determine whether the Policy was breached. It was not addressed to lawyers. Neither the employees nor the managers are expected to approach the task of reading and applying the Policy as if they are judges who are engaged in a legalistic exercise to find the correct meaning of a statute or a contract.

72. This is another reason why we take the view that it would be wrong for us to approach this ground of appeal as if we are required to place an interpretation on certain words in the Anti-Corruption Policy as if they were words in a statute. It would be wholly artificial for the ET or the EAT to approach the application of the Policy in the present case without reference to the fact that the Policy is designed to be operated by lay persons, not lawyers.

73. As for spirit and purpose, it is clear from its terms that the purpose and thrust of the Anti-Corruption Policy is two-fold.

74. First it is intended to make clear to employees that they should expect to be held to the highest ethical standards, and that they have a responsibility to ensure that the Respondent's reputation is not damaged by the actions of its employees. Thus, the Policy warns employees of the dangers, to them and to the Respondent, of breaches of the ethical and legal obligations set out in the FCPA, the UK Bribery Act and the anti-bribery laws and regulations of other countries. The statement of principle at the beginning of the Policy says that all employees are expected to adhere to the business's ethical standards, departures from which will not be tolerated. The statement says that the companies in the Informatica Group are committed to maintaining the highest level of professional and ethical standards in the conduct of their business in all countries in which they operate. The statement makes clear that a key objective of the Policy, as well as ensuring that there are no breaches of any country's anti-bribery legislation, is to maintain the business's reputation for honesty, integrity and fair dealing, which is an invaluable component of the business's financial success and the personal satisfaction of all employees.

75. Second, the Policy makes clear that the detailed rules in the FCPA, the UK Bribery Act and the other national anti-bribery legislation are complex, and that, where an employee is in any doubt of the propriety of their action, or as to whether the risk of a breach of the legislation arises,

s/he should not just carry on regardless, but should take the advice of the Legal Department or of HR.

76. It follows that the clear message sent by the Anti-Corruption Policy, in our view, is that employees should err on the side of caution when considering whether to provide benefits to customers. The law is complicated and so (1) they should steer clear of anything that might run the risk of being unlawful, and (2) if they are in any doubt, they should seek the advice of legal or HR. It is easy to get caught out, and the reputational damage to the Company may be severe, even if it is not clear whether the terms of the legislation have actually been broken. If a business such as Informatica were to get a reputation for sailing close to the wind, this would be very harmful in itself.

77. All of this means, in our judgment, that a rigid and technical approach to the meaning of the words used in the Policy misses the point.

78. It is true that the Anti-Corruption Policy summarises, in brief and general terms, the provisions of the FCPA and the UK Bribery Act, but it does not purport to set out all of the provisions of the relevant legislation. The Policy goes further than the terms of the legislation. The spirit and purpose of the Policy is not to tell employees that they will be in breach only if they are clearly and demonstrably in breach of specific provisions of the FCPA, UK Bribery Act or other anti-bribery legislation. The spirit and purpose of the Policy is to tell them to avoid situations in which they might be at risk of being in breach of such legislation.

"Foreign official"

79. Section C of the Anti-Corruption Compliance Guidelines, within the Policy, provides a definition of "foreign official". It states:

> **"<u>Who is a Foreign Official</u>?**
>
> **The term "foreign official" is defined broadly under the FCPA. Foreign officials include all paid, full-time employees of a non-U.S. government department or agency (whether in the executive, legislative or judicial branches of government and whether at the national, provincial, state or local level). Government officials can also include part-time workers, unpaid workers, individuals who do not have an office in a non-U.S. government facility, and anyone acting under a delegation of authority from a non-U.S government to carry out government responsibilities. They also include offices and employees of companies or entities which have non U.S. government ownership or control, such as state-owned enterprises and government-controlled universities and hospitals. A "Foreign Official" under the UK Bribery Act (and for purposes of this Policy) carries the same definition as above, only such person must be a non-UK – rather than non-U.S. official. Any questions about an individual's potential government status should be raised with the Legal Department.**
>
> **It is important to note that the FCPA and UK Bribery Act prohibit payments to individual "foreign officials". Bona fide payments to a government entity are not prohibited unless the Company has some reason to know that the payment will actually end up in the hands of an individual officer."**

80. Whilst the dismissal letter, dated 27 October 2017, said that the Appellant was in breach of the Anti-Corruption Policy, it did not say in terms that Mr TM was a "foreign official". Rather, it described him as a "public sector/government customer". However, it is clear that the Appellant understood this to mean, in the Respondent's eyes, the same as a "foreign official". In his appeal, the Appellant raised the question whether Mr TM was a "foreign official" for the purposes of the Policy. In the letter dismissing the appeal, dated 15 December 2017, Mr Barnett pointed out that that under one of the anti-corruption laws applicable to the Respondent's operations in the UK (ie the FCPA), foreign officials include "all paid, full-time employees of a non-U.S. government department or agency". Mr Barnett said that,

> **"Clearly, [TM] is a foreign official within the context of our internal policy. Likewise, you have acknowledged that you understood he represented a public sector customer, which also indicates to me that you knew or should have known of his government official status."**

81. The ET judgment said, at paragraph 89, that it was the understanding of both Ms Brennan and Mr Barnett that the policies applied at all times to anyone who was a foreign official under

either US or UK law, and that was a reasonable interpretation of the Respondent's policies. There was nothing significant in the difference in language between "public sector/government customer" and "foreign official."

82. Mr Burns QC submitted that this was a mistaken interpretation of the meaning of "foreign official" in the Anti-Corruption Policy. Before the ET, Mr Burns QC submitted that the Anti-Corruption Policy must be interpreted as setting US standards in the US, UK standards in the UK, German standards in Germany, etc. He said that it would be a nonsense to suggest that the policy requires a German employee of a German company doing business in Germany to abide by US criminal law just because one of its parent companies is based in the US. He said that the Respondent's interpretation would lead to the nonsense that every government official in the world was a foreign official under the policy. Before us, Mr Burns QC further submitted that Mr TM was (so far as the Appellant – a UK manager – was concerned) not a "foreign official". The ET's construction that every official of any jurisdiction is a "foreign official" makes the expression "foreign official" in the policy meaningless. He said that the Policy needs to be interpreted from the standpoint of the manager applying it, for it to make any sense.

83. We are unable to accept Mr Burns QC's submissions. Indeed, in our judgment, it would make a nonsense of the Anti-Corruption Policy if it were read in such a way that it did not apply, in these circumstances, to an improper payment that was given by an employee of the UK subsidiary to a UK public official (which is the consequence of the Appellant's argument). This would run completely counter to the spirit and purpose of the Policy, which is to prevent improper inducements being made to public officials. The harm done to society, and to the Respondent's reputation, would be just as great if a US employee made an improper payment to a US public official, a UK employee made an improper payment to a UK public official, or a German employee made an improper payment to a German public official. The clear intention of the

A Policy is to impose stricter standards upon dealings with public officials than upon dealings with those customers and others who work in the private sector.

84. Also, the Appellant's argument ignores the international nature of Informatica's business. B It is a world-wide business, based in the USA. The Pebble Beach trip took place in the USA, and followed on from Mr TM's attendance to speak at a conference in California, which was for the whole Informatica Group, not just the UK subsidiary. In our view, is it unlikely that an improper C payment made in the US to a foreign, ie UK, public official, on behalf of a UK subsidiary of a US company, would not fall foul of the FCPA.

85. In our judgment, the Respondent was entitled to adopt a purposive approach towards the D Anti-Corruption Policy, and it was wholly consistent with such a purposive approach for Ms Brennan and Mr Barnett to treat the phrase "foreign official" as a synonym for "public sector/government customer". There can be no doubt that Mr TM was a public sector/government customer. Indeed, in section E of the Policy, dealing with defraying business E travel and entertainment expenses for third parties, the Policy states, "It is important to note that expenditures involving foreign officials are generally more heavily scrutinized by government authorities than expenditures involving private parties". This treats "foreign officials" as F meaning the same as public sector officials.

86. Whilst we accept that there is a narrow, technical, argument to the effect that Mr TM was not a "foreign official" vis-à-vis the UK company, this is an unmeritorious argument which, as G we have said, is contrary to the spirit and purpose of the Policy. The ET did not err in law in finding that it was open to a reasonable employer to find that, in the circumstances that happened, Mr TM was a "foreign official".

H

"Prohibited Payment"

87. Mr Burns QC submitted that the Anti-Corruption Policy defines 'Prohibited Payments' as "offering, promising, or giving "anything of value" to a foreign official to get or keep business." He says that, crucially (and obviously) a Prohibited Payment is only one which is to get or keep business. In short, the policy prohibits any form of bribe. Mr Burns QC said that there was no business in the pipeline with Highways England. The Pebble Beach trip was a "thank you" for Mr TM for speaking at the Conference and for acting as a "customer advocate" for the Respondent. It was not to get or keep business.

88. In our judgment, the Respondent and the ET were entitled to conclude that the expenses incurred in relation to Mr TM's trip to Pebble Beach was a "Prohibited Payment" as defined in the Anti-Corruption Policy. The policy has a section, section D, which deals with "Prohibited Payments" and a section, section E, dealing with "Permissible Payments". It is clear that these sections are intended to be read together and that any financial benefit provided to a foreign official that is not a Permissible Payment is a Prohibited Payment. There is no third category of financial benefit that is neither a Permissible Payment nor a Prohibited Payment. If a payment made to a foreign official is not a Permissible Payment, it is a Prohibited Payment.

89. As Mr Burns QC said, "Prohibited Payments" are defined to mean anything involving the offering, promising, or giving anything of value to a foreign official to get or keep business. Section E sets out "limited exceptions to the general provision of providing anything of value to a foreign official." These exceptions include the giving of nominal gifts to customers and the payment of certain types of entertainment and travel expenses to foreign officials. The Policy states that the FCPA permits such expenses to be paid, provided that such entertainment and travel expenses are,

> **"(a) bona fide and related to a legitimate business purpose (i.e not provided to obtain or retain business or to gain an improper advantage); (b) reasonable in amount; and (c) legal under the written laws of the foreign official's own country. The UK Bribery Act does not specifically permit companies to provide entertainment and travel expenses for foreign officials. However, like the FCPA, if such expenses are reasonable and are not intended to improperly influence the official in the performance of his or her official functions, they will not be a violation of the UK Bribery Act."**

90. In our judgment, the ET was entitled to find that it was reasonable for the Respondent to conclude that the benefit conferred upon Mr TM was a Prohibited Payment. It was conferred upon him in his capacity as a foreign official and it was open to the Respondent to take the view that it was not a Permissible Payment, and so was a Prohibited Payment. This was for two cumulative reasons. First, it was open to the Respondent to take the view that the sum involved was not reasonable (even leaving aside the unanticipated additional cost of the transfers). It was a large sum to expend upon a single public official. Second, in light of the answers given by the Appellant to the Respondent, it was plainly open to the Respondent to find that the expense was incurred in order to obtain or retain business. Highways England was an existing and valuable client. Even though there was no repeat business in the offing, it was plainly within contemplation that there would be opportunities for new business in the future, and Mr TM might be better-disposed towards the Respondent if he had been given the once-in-a-lifetime opportunity to play golf at Pebble Beach. The Appellant told Ms Rourke, during the investigatory meeting, that Mr TM was a "senior customer, spent a lot of money with us….We needed to treat [TM] as a special customer…. We need to take care of a good customer." The Appellant said that the trip was a good networking opportunity, a chance to build rapport with the customer and to build a stronger relationship. He said that whilst there were no immediately future business opportunities, "maybe down the line there would be". The Appellant said that there would be discussion about future business needs, ongoing business, "as there would be with any customer."

91. It is important to stress that there was no suggestion that the Appellant intentionally set out to do something improper. Though he was uncomfortable about the cost, he did not think that what he was authorising was unethical. It was not a quid pro quo for a particular business opportunity. The Respondent accepted this. Nonetheless, in light of the Appellant's own explanation, it is clear that the trip was paid for in order to obtain or retain business. It was to improve the Respondent's chances of obtaining more business from Highways England in the future. This is different from an out-and-out bribe, but the Anti-Corruption Policy imposes stricter standards upon payments made to public officials. Taken together with the unreasonable level of the expenditure, this means that the ET and the Respondent were entitled to find that the payment for the Pebble Beach trip was a "Prohibited Payment" under the terms of the Policy.

92. In his oral submissions, Mr Burns QC emphasised that the trip was provided to Mr TM in gratitude for him being a customer advocate, ie for speaking at the Conference and for telling other customers and potential customers what a good job Informatica had done for Highways England. However, the statements made by the Appellant himself during the investigatory process make clear that it went further than that. The benefit was conferred in the hope that it would improve the Respondent's chances of obtaining further business from Highways England in the future. It is also worth noting that the fact that Mr TM was going to be a customer advocate for Informatica at the California Conference did not mean that the Respondent paid his expenses for attending the Conference. He paid his own way there.

Conclusion on Ground 1

93. For the above reasons, we reject Ground 1. The ET did not err in law in finding that the Respondent acted reasonably in concluding that the Appellant had breached the Anti-Corruption Policy. We have approached this issue on the basis that the Policy should not be interpreted by the ET or the EAT as if it were a statute, and that the question is whether the Respondent's

A interpretation of it was reasonable. However, even if we are wrong about that, and Mr Burns is right that if the ET misinterpreted the Policy, the ET would have fallen into an error of law, we would have reached the same conclusion. We agree with the interpretation placed on the Policy by the Respondent and by the ET and there is no error of law in this regard.

B

Ground 2

C 94. In Ground 2, the Appellant contends that the ET erred in law in finding, in paragraph 92 of the judgment, that the Respondent was entitled to have concluded that the Appellant had wilfully disregarded the Anti-Corruption Policy. The letter of dismissal had referred to "your wilful disregard of these policies".

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95. In our judgment, the ET was right to find that the conclusion that the Appellant had wilfully disregarded the Anti-Corruption Policy was one that was open to a reasonable employer. A wilful disregard is something different from a deliberate breach. This is made clear by the UK Disciplinary Policy, which contains a non-exhaustive list of types of gross misconduct. These include "Willful [sic] disregard of Company policy", but they also include, separately, "Deliberate breach of company policies and procedures". The Appellant was not dismissed because he had deliberately set out to authorise an improper expenses payment for Mr TM, or because he had deliberately set out to breach the Anti-Corruption Policy. Rather, as the Appellant admitted, he proceeded to authorise the payment even after the likely cost had become known, and even after he had felt uncomfortable about the trip. He accepted that he had overlooked or was unaware of the Policy, and that he did not give the matter enough attention. He agreed that he should have cancelled the trip. He was aware that there was a concern about the trip, but he did not check the Policy before giving the go-ahead for it, and he did not check with Legal or with HR.

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96. The way that the Appellant behaved is properly to be described as "wilful disregard". He knew that there was a Policy, he knew that there was a potential problem with the trip, but he chose to go ahead and to authorise the trip without checking up or seeking advice. He was a very senior employee, who signed a document every three months to confirm that he had read and understood the Policy. Mr Burns QC accepted in oral argument that "wilful disregard" can extend to cover recklessness. In our view, the way that the Appellant behaved can be described as reckless, but in any event, the phrase that is used in the UK Disciplinary Policy is "wilful disregard", not recklessness, and "wilful disregard" should be given its normal and sensible meaning. Giving it that meaning, the ET was entitled to find that the Respondent acted reasonably in finding the Appellant to be in wilful disregard of the Anti-Corruption Policy. It is not necessary to establish that he set out to be corrupt. We should add that we were referred by counsel to two judgments of the House of Lords on the meaning of "wilful" in the context of particular statutory provisions relating to the criminal law. One of these, **R v Senior** [1899] 1 QB 283 is over 100 years old. The other case was **R v Sheppard** [1981] AC 394. We do not consider that either of these cases sheds any light on the meaning of "wilful disregard" in the Respondent's Anti-Corruption Policy.

97. The Appellant's skeleton argument says that he cannot have been in "wilful disregard", because how was he to know that the Respondent would interpret the phrases "foreign official" and "Prohibited Payment" in what the skeleton argument describes as a "completely bizarre fashion"? As we have said in relation to Ground 1, we do not regard the Respondent's interpretation of the Anti-Corruption Policy as being bizarre; indeed, we agree with it. In any event, the Respondent was entitled to take the view that the Appellant should at least have sought advice on the matter. He admitted that he felt uncomfortable about authorising the payment.

98. Mr Burns QC also submitted the finding of "wilful disregard" must be outside the range of reasonable responses because the dismissing officer herself, Ms Brennan, had accepted in cross-examination in the ET that the authorisation was careless rather than deliberate. In our judgment, this takes one answer from Ms Brennan in cross-examination out of context. At an early stage of her cross-examination, Ms Brennan accepted the suggestion put to her by Mr Burns QC that the Appellant's conduct had been careless. However, later in the cross-examination she said that she believed that the Appellant had disregarded the policies, and that she agreed with everything that was said in the dismissal letter. This was consistent with Mr Barnett's answer to Mr Burns QC in cross-examination, in which he said,

> **"Real reason [for dismissal] was because they violated our company policy and should have know better, certified every quarter, nothing to do with commissions."**

99. In our judgment, and in light of that evidence, the Employment Judge was entitled to find, as he did at paragraph 92 of the judgment, that whether or not Ms Brennan now takes a different view,

> **"at the time of dismissal she clearly considered that there was wilful disregard particularly in view of the Claimant's knowledge of the Respondent's policies and her view that despite that knowledge he acted in contravention of them."**

Ground 3, perversity

100. As Mr Sammour pointed out, the perversity challenge covers much of the same ground as Grounds 1 and 2. The test for perversity, as summarised in **Stewart v Cleveland Guest**, is set out above. Mr Burns QC accepts that it imposes a high hurdle upon an Appellant.

101. In our judgment, the ET's conclusion that, in all the circumstances, the Appellant's dismissal for authorising the Pebble Beach trip was fair, was not perverse. The facts as regards what had actually happened were not in dispute. There was no dispute about who Mr TM was or who he worked for; about the nature and extent of the Appellant's involvement in authorising the trip; about the cost of the trip, both at the time when the Appellant authorised it and when all the bills were finally received; and about the nature of the investigation conducted by the Respondent. We have already dealt with the perversity challenge about the conclusion that Mr TM was a "foreign official" and that the authorised expenses amounted to a "Prohibited Payment". For the reasons we have given under Ground 1, the ET's conclusion in relation to these matters was not perverse. Similarly, we have already dealt, under Ground 2, with the perversity challenge against the ET's finding that the Respondent acted reasonably in finding that the Appellant was in wilful disregard of the Anti-Corruption Policy. It was not perverse for the ET to find that the Respondent acted reasonably in concluding that the Appellant had acted in wilful disregard of policy.

102. This leaves two further matters to be dealt with under the perversity ground. The first is whether the ET acted perversely in finding that the dismissal was procedurally unfair. The answer is "no". We will deal with a specific challenge on procedural unfairness grounds under Ground 4, below. More generally, the ET was plainly right to find that the process surrounding the dismissal was procedurally unfair. A careful investigation was carried out. The Appellant was given the opportunity to make submissions, both at the investigation stage and in the disciplinary hearing. He was given the opportunity to be represented if he had wished. As we have said, there was, in fact, no dispute on the relevant facts. The Appellant was given, and took up, the opportunity to appeal.

103. The second matter is whether the ET acted perversely in failing to find that, in all the circumstances, the sanction of dismissal was outside the range of reasonable responses open to a reasonable employer. In our judgment, the ET was not perverse. Dismissal was within the range of reasonable responses even though there had been no intention on the part of the Appellant to make a corrupt or improper payment to Mr TM. The Appellant was a senior employee. He knew that there was a potential problem with the trip and was, on his own admission, uncomfortable about authorising it. It was of crucial importance to the Respondent that it avoided any risk of breaching the FCPA, the UK Bribery Act or other anti-bribery legislation. The consequences of an allegation of improper conduct involving a government official, even if it ultimately turned out not to be in breach of the bribery laws, could be catastrophic for Informatica, both in the UK, the US, and elsewhere. There is strict liability for companies. The importance of complying with the Anti-Corruption Policy, and the importance of being aware of its terms, was brought home to employees such as the Appellant by the fact that he was required to sign every three months to acknowledge that he had read and understood it. The legislation was very complex and so it was not possible for an individual employee to be sure in advance that something that he or she was proposing to do would or would not be in breach of the legislation. In those circumstances, the Respondent was entitled to take the view that the responsibility lay with a senior employee such as the Appellant to avoid any risk of breaching the Anti-Corruption Policy and to take advice from the Legal Department, and that failure to do so was a very serious matter. Wilful disregard of the policy could cause as much damage to the Respondent as a deliberate breach.

104. We also observe that the Respondent had made clear that it would show zero tolerance towards breaches and that if a senior manager was seen to be “let off” for breach of the Policy,

there would be a danger that other employees would not be as strict in their observance of it as they would otherwise be.

105. There is an obvious difference between hosting a number of customers at a sporting event, such as Wimbledon and the Superbowl, on the one hand, and singling an individual client out by providing him with a bespoke one-off benefit, on the other.

106. We accept that other employers might have dealt with the matter in a different way, for example by issuing a final written warning. But that is not the issue for us to decide. The issue is whether it was perverse for the ET to decide that it had been within the range of reasonable responses for the Respondent to dismiss. We have no doubt that it was not perverse.

107. We add, finally on this point, that the submissions on behalf of the Appellant were predicated on the assumption that dismissal could only be justified if the breach of the Anti-Corruption policy was intentional. For the reasons that we have already given, we do not accept this. Wilful disregard is different from a deliberate and intentional breach, and wilful disregard is enough to justify dismissal in these circumstances. As Mr Barnett said in the appeal rejection letter, "The Company's policies are designed to prevent even inadvertent breaches or the appearance of impropriety."

Ground 4

108. In Ground 4, the Appellant contends that there was a breach of natural justice, because neither the Respondent nor the ET identified with any precision which part of which policy the Appellant was alleged to have breached.

109. We can deal with this ground very briefly. The Appellant understood from the outset that he was being accused of breaching the Respondent's policies because he had authorised the Pebble Beach trip for a senior employee of Highways England. At the investigation stage, he was given a copy of the policies with certain passages highlighted. These included the passages in the other two policies that cross-referred to the Anti-Corruption Policy, and to the key parts of section E of the Anti-Corruption Policy which dealt with the meaning of "Permissible Payments". The Appellant could not have been in any doubt from the lines of questioning in the investigation and the disciplinary hearing about the nature of the allegation that was being made against him. He was asked if he knew about the Policy. He was asked why he went ahead with authorising the trip when the likely cost became clear, and he was asked why he did not check with Legal.

110. The fact that the Appellant knew why he had been dismissed, and understood the nature of the breach that was alleged against him, is made clear by the issues that he raised at the appeal stage. He questioned the assertion that there had been wilful disregard of the Anti-Corruption Policy. His appeal grounds focused on the meaning of "foreign official" and upon whether the Respondent was right to conclude that he had breached the policy on gifts and entertainment for such officials. He referred to the relevant part of Section E of the Guidelines. It is clear from this that the Appellant fully understood which part of the Anti-Corruption Policy he was alleged to have breached.

Adequacy of reasons

111. This was not a separate ground of appeal, but the criticism that the ET had given inadequate reasons for its conclusions was raised at several points in the Grounds of Appeal and in Mr Burns QC's submissions. It, too, can be dealt with relatively briefly.

112. The well-known case-law on adequacy of an ET's reasons was helpfully set out by Mr Sammour in his skeleton argument.

113. In **Meek v City of Birmingham District Council** [1987] IRLR 250 (CA), Bingham LJ said, at paragraph 8, that a judgment from an Employment Tribunal:

> **"… must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and the statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court, to see whether any question of law arises …"**

114. In **Fuller v London Borough Council** [2011] ICR 806 (CA) at paragraph 30, Mummery LJ said,

> **"The tribunal judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."**

115. In **ASLEF v Brady** [2006] IRLR 576, Elias J said, at paragraph 55,

> **"The EAT must respect the factual findings of the employment Tribunal and should not strain to identify an error merely because it is unhappy with any factual conclusions; it should not "use a fine toothcomb" to subject the reasons of the Employment Tribunal to unrealistically detailed scrutiny so as to find artificial defects; it is not necessary for the Tribunal to make findings on all matters of dispute before them nor to recount all the evidence, so that it cannot be assumed that the EAT sees all the evidence; and infelicities or even legal inaccuracies in particular sentences in the decision will not render the decision itself defective if the Tribunal has essentially properly directed itself on the relevant law."**

116. Applying the **Meek** test, there is no valid basis for challenging the adequacy of the judgment of the ET in the present case.

117. The subject-matter of the appeal, i.e. the claim of "ordinary" unfair dismissal, was not the main ground of challenge before the ET. The main thrust of the Appellant's argument before the ET was that he was really dismissed for making protected disclosures, and/or that the reasons

given by the Respondent for his dismissal were a sham. "Ordinary" unfair dismissal was his second line of attack. Nonetheless, the Employment Judge dealt carefully and thoroughly with the issues on "ordinary" unfair dismissal. The judgment made it plain to the Appellant why he lost on this issue. In particular, the judgment explains in detail why the ET did not accept the Appellant's argument on the meaning of "foreign official". Though the judgment does not go into the same detail in relation to the argument concerning "Prohibited Payment", it is clear from the judgment, and, in particular, from paragraph 89 of the judgment, that the ET accepted the Respondent's argument that the expenses for the trip to Pebble Beach counted as a "Prohibited Payment" for the purposes of the Anti-Corruption Policy. The Employment Judge made clear that he rejected the contention that the Policy should be read as if it was a statute.

118. The Grounds of Appeal also state that the judgment was not **Meek**-compliant because the ET failed to give any reasons why it was fair for the Appellant to be dismissed without knowing which provision he was alleged to have breached and/or without it being put to him that he acted wilfully and deliberately. We do not accept that this is a fair criticism of the judgment. At paragraph 23 of the judgment, the ET summarised Ms Rourke's evidence of her investigation. At paragraph 28, the ET referred to the letter inviting the Appellant to the disciplinary hearing which said that the allegation against him was that, in violation of the Code of Business Conduct, Travel and Expenses Policy, and Anti-Corruption Policy, he approved the taking of Mr TM, a public sector customer representative to Pebble Beach at the Company's expense. At paragraph 29, there was reference to the relevant parts of the Policy being highlighted. Paragraph 30 set out extracts of the disciplinary hearing, which show that the Appellant was questioned as to whether he understood the difference between public and private sector clients, and was asked why he did not check with legal or finance before proceeding. Paragraph 31 set out the dismissal letter and paragraph 32 set out the grounds of the internal appeal. The ET referred to the allegation that

there was a lack of clarity in the decision letter at paragraph 81 of the judgment. The ET set out the relevant parts of the Anti-Corruption Policy (which the Appellant had been given) and said, at paragraph 89 that the dismissal letter was clear and not reasonably capable of being misunderstood by the Appellant. At paragraph 95, the ET said that the reasons for dismissal were confirmed in a reasoned and detailed decision letter. The ET made an express finding at paragraph 96 that there was no procedural unfairness. In those circumstances, it was clear that the ET found that the Respondent had given the Appellant sufficiently detailed notice of the nature of the allegation against him, and had provided sufficient clarity in the dismissal letter.

Conclusion

119. For these reasons, the Appellant's appeal is dismissed.