Case Nos: 2207838/2016 &
2200809/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M S Radia	**v**	Jefferies International Limited

Heard at: Central London Employment Tribunal On: 4-6 October 2021

Before: Employment Judge Norris, sitting alone (via CVP)

Representation:
Claimant – In person
Respondent – Ms J Stone, Counsel

JUDGMENT

1. The Claimant's claim of unfair dismissal (failure to hold an appeal hearing) is well-founded and succeeds.
2. The decision to dismiss the Claimant would have been upheld even if an appeal hearing had taken place. A reduction of 100% is applied to any compensation that might have been awarded.
3. The Claimant contributed to his dismissal and the amount of that contribution is assessed at 100%.
4. In light of 2 and 3 above, no remedy hearing is required.

REASONS

Background to the claims

1. The Claimant worked for the Respondent, a global investment banking firm, between June 2006 and his dismissal in March 2017. He was initially a Senior Vice President and Senior Research Analyst. With effect from 1 January 2010 he was promoted to Managing Director.

2. The Claimant has submitted a number of claims in relation to his employment by the Respondent and its termination. They have a detailed history which I summarise below.

3. In 2015, the Claimant lodged his first claim with the London Central Employment Tribunal, complaining of disability discrimination, the disability in question being acute myeloid leukaemia ("AML"). That claim was heard by a full panel (EJ Baty sitting with members) in November 2016 at a Hearing where both parties were represented; judgment (to which I refer as the "Baty judgment") was sent to the parties on 3 February 2017, being

received by them on 6 February 2017. The Claimant was suspended the following day on grounds of alleged dishonesty, i.e. in line with some of the findings appearing in the Baty judgment.

4. Following a disciplinary hearing on 23 February 2017 conducted by Mr Tucker of the Respondent, the Claimant was summarily dismissed for gross misconduct on 6 March 2017.

5. The Claimant submitted a written appeal on 13 March 2017. Mr Cronin considered that appeal and dismissed it on 10 April 2017, without holding an appeal hearing.

6. The Claimant had lodged a second claim in September 2016 and in April 2017 he submitted a third claim, complaining of unfair dismissal, victimisation and "whistleblowing". In September 2017, the Respondent was awarded costs (subject to detailed assessment: "costs decision") of defending the first claim.

7. The second and third claims were heard in October 2017 before a full panel (EJ Henderson sitting with members). Once more, both parties were represented. Reserved judgment ("Henderson judgment) was sent to the parties on 15 November 2017, dismissing the claims. The Claimant appealed and on 30 November 2018, Laing J (as she was then) remitted the case to the Employment Tribunal to consider a single point: whether the failure by Mr Cronin to conduct an appeal hearing rendered the dismissal unfair ("Laing appeal judgment"). It is that remitted point which gives rise to the Hearing before me.

8. For completeness, I note that in February 2020, Auerbach J dismissed the Claimant's appeal against the costs decision. Permission to appeal against the EAT's judgment was refused in November 2020 and in April 2021 Bean LJ refused the Claimant permission to reopen the application.

<u>The Hearing – October 2021</u>

9. The Hearing on the point remitted in accordance with the Laing appeal judgment was listed for and took place on 4-6 October 2021 by Cloud Video Platform (CVP). An electronic bundle of 794 pages was prepared by the Respondent and the link forwarded to the Tribunal in advance, although there was difficulty in accessing it until late on the evening of Friday 1 October.

10. On the afternoon of 1 October, the Claimant had sent two links to supplemental bundles that he had produced, comprising a total of 723 pages. On the evening of Sunday 3 October, the Respondent's solicitors sent in by email a supplemental bundle of 81 pages, a separate email with a skeleton argument and a bundle of authorities relevant to the remitted point, and a further email attaching a chronology. The Claimant forwarded his "opening submissions" on the first morning of the Hearing. It was confirmed at that stage that these were all the documents the parties wished to put before the Tribunal. I record that I indicated during the first day that I would not look at any documents that were properly "without prejudice" but included in the Claimant's bundles.

11. Also on the first morning, Ms Stone, Counsel for the Respondent, explained that Mr Cronin would be the Respondent's only witness. He was joining from the USA as had been notified to the Tribunal in advance of the Hearing. Both he and the Claimant had prepared written witness statements which had originally been exchanged in January 2020 and updated (on Mr Cronin's part) to refer to the new bundle contents.

12. Additionally, and in light of the history to which I have alluded above, the Respondent applied to have the proceedings recorded by a third-party transcriber, providing if wished both real-time and a daily transcription in writing with copies for the Claimant and the Tribunal. I allowed the application, to which the Claimant was not opposed provided he was not asked to bear that costs (the Respondent confirmed it was to be solely liable for them) and made a separate order in this regard. At the end of each day's proceedings, the Respondent's solicitors duly forwarded me a copy of the transcription.

13. We adjourned until the early afternoon of day one. The Claimant cross-examined Mr Cronin for the remainder of that day. On day two, the Claimant took the oath and I asked him to provide his current address, which was not set out in the witness statement. The Claimant gave an address in Dubai. Ms Stone asked for an adjournment as it was unclear whether the Claimant was permitted to give evidence in proceedings from an address in the United Arab Emirates. While the position in the UK is that pursuant to the Rules (Schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013), when a person is giving evidence via the internet from a remote location, that location is deemed to come within the precincts of the Tribunal, there was concern that the Claimant might be in breach of the local UAE laws and may even be committing a criminal offence.

14. On reconvening, while the Respondent had satisfied itself that it was able to continue to participate in the proceedings, the Claimant had taken provisional advice that suggested he would have to obtain permission from a local UAE court in order to give evidence, although the position so far as making submissions and otherwise participating as a party was less strictly governed.

15. We discussed briefly whether to adjourn the proceedings until the Claimant could travel to the UK and give evidence, or to proceed to submissions without him giving evidence. He chose the latter, and this was not opposed by the Respondent. Accordingly, I formally released him and as he had not yet affirmed his statement when the query over his participation occurred, by agreement I have not taken his witness statement into account in reaching my decision. In the end, I did not permit either party to refer to its contents in their submissions, which they made by reference to their written skeleton arguments; and where Ms Stone had already made such references in the document she had pre-prepared, I have not taken them into account. It seemed to me that either the contents of the statement were before me or they were not, and it had been agreed that they were not.

16. I heard submissions from the Respondent's Counsel Ms Stone first, and then adjourned so that the Claimant could incorporate into his submissions a response if required. Ms Stone then had a right of reply. As I detail below, in addition to hearing argument about the point of remittal itself (whether the dismissal was fair or unfair by reference to the lack of an appeal hearing) I also heard submissions as to whether I was bound by all the other findings of the Henderson judgment, and specifically the finding that the outcome would have been the same in any event. I reserved my decision.

Prior findings - the Baty Judgment

17. The Baty judgment ran to 48 pages in total. It concluded that a number of complaints brought by the Claimant in his first claim were presented out of time, and those were accordingly struck out. To the extent that the Baty Tribunal had jurisdiction to hear complaints of direct disability discrimination, discrimination arising from something in consequence of disability and disability-related harassment, all those complaints were dismissed as being not well-founded.

18. According to the Baty judgment, the Claimant gave evidence to the Tribunal and so did three Respondent witnesses, Mr Taylor, Mr Black and Mr Ions (the Respondent's in-house lawyer). The judgment records that Ms Stone, who also represented the Respondent on that occasion, required additional time to complete her cross-examination of the Claimant because "*the Claimant repeatedly and persistently failed to answer the questions put to him*".

19. Within the evidence before the Baty panel was a joint medical expert report of a Professor Marks, who also gave oral evidence.

20. The Tribunal commenced the "Background" section of its judgment by setting out findings on the "Respective credibility of witnesses". This is a crucial passage in light of what happened subsequently with the Claimant's employment and accordingly I set it out quite fully. Starting with the Claimant, and following on from its comments set out in paragraph 18 above, the Tribunal found as follows:

"*27 We did not find the Claimant's evidence to be credible in many respects. Under cross-examination, he persistently failed to answer the questions put to him and was on lots of occasions evasive and had to be told repeatedly by the Tribunal to answer the questions. …*

28 In a number of respects, we found that the Claimant either did not tell the truth or misled the Tribunal. Various examples were set out by Ms Stone in her submissions. We do not repeat all of those here. However, examples that stand out include that the Claimant told the Tribunal that, when he left hospital following his treatment for AML, he weighed 50 to 60 kilograms. He told Professor Marks, the independent expert who saw him and prepared a report in preparation for this Tribunal, that he weight [sic] 50 kilograms at the close of his treatment. That fact was a material piece of evidence in Professor Marks' report into the impact of the Claimant's AML on him. However, the discharge records from the Hospital, which we were shown, showed that the Claimant weighed 81.5 kilograms at the time of discharge.

This was clearly an untruth.

29 The other example that we set out is that the Claimant suggested that he was "forced to miss his holiday" in Mexico when he had to do some additional work for the Respondent. However, not only did he join his family on the holiday within four days of it commencing, but he also extended his holiday so that it was just as long as he wanted it to be. He finally admitted that it was misleading for him to refer to joining his family for the "last few days" of his holiday in his claim form when in fact he joined them for a matter of weeks.

30 Furthermore, the Claimant also gave untrue evidence to the Tribunal in exaggerating the length of his absence from work for his knee injury. In his witness statement, he stated that he was injured on 21 July, returned on crutches in August and "quickly slipped back into a normal routine". However, in evidence he initially stated that he was off for "one third of the year", a considerable exaggeration.

31 Furthermore, he gave evidence to the Tribunal that he was not aware of his disabled status until towards the end of 2014, which he then corrected to say in June or July 2013. However, at paragraph 61 of his witness statement, he gave evidence that his wife, who was at the time working in the Employment Team at Herbert Smith, had advised him in May/June 2010 that "these initial steps by Richard potentially represented disability discrimination". It cannot therefore have been true that he did not find out about his disabled status until 2013.

32 We also accept that the Claimant had behaved cynically in relation to this claim by sitting on serious allegations (whether or not he believed them to be true) and choosing to deploy them tactically when he considered it to be in his interests to do so many years later. To give one example, which Ms Stone gave in her submissions, the Claimant admitted in cross examination that, if he genuinely believed that his involvement in the Moneybookers IPO in 2011 was "blatantly illegal" (as he says in his witness statement), then, as a regulated person, his involvement and his failure to report it are themselves serious compliance breaches and constitute potential misconduct. Even the fact that he had recently returned to work after his lengthy absence due to AML would be no excuse for knowingly engaging in conduct that a regulated person considered "blatantly illegal". If, conversely, he did not genuinely believe there to be a breach, his sworn evidence would be false.

33 Furthermore, if he did not genuinely believe that there was a breach, to raise it now and in this way would itself be a serious breach (as he himself admitted when pressed in cross examination). Either way, the Claimant's behaviour as a regulated person would be a matter of grave concern. In cross examination, following a number of evasive answers, the Claimant finally admitted that the fact that he had sat on it for five years could be a cause for concern.

34 Finally, we agree with the submission of Ms Stone that the Claimant is always ready to believe the worst about anybody and that very often his

assessment of events simply did not tie in with reality. Examples include the fact that, when the Claimant was taken to perfectly reasonable emails from HR concerning his return to work and personal health insurance, he regarded HR's motives as suspicious; and the fact that he seemed unable to acknowledge that, throughout the period of his employment under the management of Mr Taylor, there were numerous occasions when Mr Taylor gave him considerable praise. This unwillingness to acknowledge the obvious casts further doubt on his credibility."

21. The Tribunal found by contrast that Mr Taylor was *"thoughtful and considered … careful to tell the truth and that he was willing candidly to concede points where it was appropriate to do so. He gave full answers to the questions put and was not evasive. … In contrast to the Claimant, Mr Taylor was very generous with his praise of the Claimant where he considered praise was due… Furthermore, when there were occasions in his cross-examination when Mr Taylor referred to something but there did not appear to be a document which he could refer to in his cross-examination which corroborated it, he was later taken in re-examination to a whole succession of documents which backed up the assertions he had made in cross-examination and showed that he was telling the truth. This too is indicative that he was not making things up*".

22. In relation to Mr Black, the Baty tribunal found that he was less familiar with the documents in the bundle than Mr Taylor was, and in consequence his memory was occasionally confused; he admitted to elements of his witness statement that were incorrect; but that "*he candidly admitted where his recollection was imperfect… he considered the questions put to him carefully and gave direct answers to the best of his ability … In addition, he too was happy to give considerable praise to the Claimant's talents and ability, both in his witness statement and in his oral evidence."* The panel did not consider Mr Black to be disingenuous.

23. So far as Mr Ions was concerned, the Baty tribunal found him to be "*straightforward in his replies to cross-examination questions ... prepared to admit things which were not necessarily in the Respondent's interest".* It concluded "*We have no reason to doubt his credibility*".

<u>Prior findings - the Henderson Judgment</u>

24. Following the Baty judgment, it is noted that there was "*considerable coverage in the Press*" relating to the findings on the Claimant's credibility, and specifically an Evening Standard article on 9 February 2019. As I have said above, as a result of the contents of that judgment, the Claimant was first suspended and subsequently dismissed.

25. In the 23-page Henderson judgment, the following is recorded:

"*It was made clear that the purpose of this hearing was not to re-examine or overturn the first Tribunal's findings of credibility or fact in the first claim. The Claimant had not appealed or applied for a reconsideration of that first Tribunal decision and it was not for this Tribunal to re-open that decision. The Claimant acknowledged this at paragraph 93 of his witness statement; but nevertheless proceeded to elaborate at great length on why the first*

Tribunal had misunderstood his evidence and statements at the hearing in November 2016 and had wrongly concluded that he had been untruthful or misleading. This Tribunal understands the Claimant's natural desire to "clear his name" in the light of the first Tribunal's findings, but as with all misconduct cases that is not the purpose of this hearing."

26. The Henderson tribunal heard argument as to the extent to which the Respondent (and hence the Tribunal) was fixed by the findings in the Baty judgment as to the Claimant's credibility, or lack thereof. The Henderson tribunal concluded:

"*11. …We find that even if it is not technically an issue estoppel; seeking to reopen or change the first Tribunal's findings on credibility would be an abuse of process. In reaching this conclusion we take into account the fact that the Claimant's counsel at the first hearing in November 2016 was allowed a right of reply to Ms Stone's (the Respondent's counsel) submissions on credibility; so the Claimant had been offered a right to redress the balance on this matter by the first Tribunal. The Claimant also had full opportunity to appeal the first Tribunal's decision on the grounds of perversity or bias, if he felt that they had fundamentally misunderstood his evidence. He did not do so. The Claimant could have applied for reconsideration of the first Tribunal's Judgment (under the ET Tribunal Procedure Rules 2013), but he did not do so. We further note that the Claimant had been legally advised throughout the Tribunal process. We, therefore, find that this Tribunal Hearing cannot and must not be used as an appeal "through the back door", as it were.*

12. Accordingly, we do not intend in this Judgment to go behind the first Tribunal's finding of credibility as regards the Claimant."

27. From that starting point, the Henderson tribunal heard evidence from Mr Tucker (the dismissing officer) and Ms Swords, Head of International HR, who I gather handled the Claimant's internal grievance appeal from an administrative point of view, and from the Claimant's himself. It was also Ms Swords' role to inform the Claimant of his suspension on 7 February 2017, though following discussions with her and with Mr Ions, the decision to suspend the Claimant had been taken, not by her but by the Head of Equities Mr Keen, and that decision had also been reported to the Conduct Risk Committee (CRC).

28. So far as the Claimant's credibility before the Henderson panel was concerned, the judgment records that the Claimant "*frequently did not answer the question that was put to him. He would often give oblique or irrelevant answers and had to be reminded of the actual question. [He] would frequently contradict in his answer to a subsequent question, evidence that he had given earlier. … The manner of giving evidence meant that the Claimant's evidence was frequently unclear and often contradictory, which in turn affected the Tribunal's ability to rely on the Claimant's evidence with any confidence*".

29. In relation to the evidence before it, the Henderson judgment records that the Respondent was obliged to notify the FCA of the Claimant's suspension

and a neutral statement was to be given in response to any enquiries regarding the Claimant's absence from the office. He was recalled from his USA work trip. On 10 February 2017, the CRC approved Mr Keen's decision to take disciplinary action. Mr Tucker, who as I have said above was later to be the person who conducted the disciplinary hearing at which the Claimant was dismissed, attended that 10 February CRC meeting in the capacity of delegate for Mr Cronin (later to be the person who dealt with the Claimant's appeal against dismissal).

30. The disciplinary allegations against the Claimant were that he had "*materially and fundamentally breached"* his contract by acting dishonestly, with explicit reference to his sworn testimony as recorded in the Baty judgment, and specifically to the analysis of his credibility at paragraphs 27-33 (also extracted above), that he had "*either not told the truth or misled both [the Respondent] and the Employment Tribunal in a number of respects".*

31. It was accepted by Ms Swords as recorded in the Henderson judgment that notwithstanding a reference to "internal investigations" in her letter, there had been none such, and that instead the Respondent relied on the Baty tribunal findings as its starting point in the disciplinary proceedings against the Claimant. The fact that there had been no investigations was repeated by Mr Tucker at the beginning of the disciplinary hearing (at which the Claimant was accompanied by a union representative, Mr Knowles).

32. The Henderson tribunal accepted Mr Tucker's evidence that while the Baty judgment was highly critical of the Claimant's honesty and integrity, Mr Tucker accepted that judges can make mistakes and that he was prepared to hear what the Claimant had to say about the findings and satisfy himself whether or not the critical comments were justified. It records that in oral evidence, the Claimant acknowledged Mr Tucker had given him a full opportunity to raise any issues he wished during the disciplinary hearing.

33. The Claimant himself focused in the disciplinary hearing on the four examples given in the Baty judgment as standing out as regarded his honesty and integrity: his weight (as addressed by Professor Marks in relation to the impact of his treatment for AML); his holiday in May 2011[1] that the Claimant had claimed he was "forced to miss"; the length of absence due to his knee injury; and the date on which he became aware of his status as a person with a disability.

34. Mr Tucker considered, as part of his deliberations, extracts from transcripts from the Baty Hearing, taken by those attending from Herbert Smith Freehills (HSF) Solicitors, so far as they related to the four examples in the preceding paragraph. The tribunal accepted that Mr Tucker did not appreciate that these were not the only notes of the hearing/transcripts; representatives from Ashfords solicitors, instructed by the Claimant, had made their own version. Since Mr Tucker was inexperienced in tribunal litigation and furthermore had not attended the Baty Hearing himself, he

[1] Before me it was asserted that the holiday was actually in April 2011, but for consistency purposes, I refer to it as May 2011

neither shared the HSF transcripts with the Claimant beforehand nor saw the copies from the Ashfords transcripts. The Henderson tribunal found as a fact however that the transcripts did not differ in any material way and hence the issue put the Claimant at no disadvantage in the disciplinary process.

35. The Henderson judgment also concluded that Mr Tucker's decision to dismiss was not pre-judged, in that it had not been decided before the disciplinary outcome letter, notwithstanding the presence in the bundle of an email of 13 February 2017 in which a colleague Mr Lester referred to going "*full speed ahead in hiring a replacement*". The Henderson tribunal accepted Mr Tucker's evidence that he had not seen the email and was not aware of recruitment to replace the Claimant pending his disciplinary decision.

36. The Henderson judgment then dealt with the dismissal decision itself, in the following passage:

"The Decision to Dismiss
46. This was contained in a letter dated 6 March 2017 from Mr Tucker to the Claimant.

47. The letter referred to the Disciplinary Meeting on 23 February 2017 and the fact that Mr Tucker had considered all that the Claimant had said at that meeting, together with his written submissions. Mr Tucker explained that the starting point for the Respondent was that an independent Employment Tribunal had found that the Claimant's evidence had not been credible and that he had either "lied or misled" the Tribunal in his evidence. It was this overall picture and the overall findings relating to the Claimant's credibility and bad faith which Mr Tucker said he had in mind. He had to consider whether the Claimant's behaviour was consistent with his continuing to work in the position of an analyst which required a high degree of ethical probity and honesty and also required registration with the FCA.

48. Mr Tucker referred in the letter to the FCA Handbook and the reference to a "fit and proper person" contained in Rule FIT 2.1 and also FIT 2.1.3G. Rule 2.1.1A noted that a relevant authorised person determining the honesty, integrity and reputation of staff being assessed under FIT should consider all relevant matters including those set out in FIT 2.1.3G which may have arisen either in the UK or elsewhere. 2.1.3G referred at sub paragraph 10 to "whether the person or any business with which the person had been involved had been investigated, disciplined, censured or suspended or criticised by a regulatory or professional body, a Court of Tribunal whether publically [sic] or privately" (our underlining). It was undisputed that the Claimant had been publicly criticised by the first Employment Tribunal in a matter relating to his credibility.

49. Mr Tucker then went on to consider the four matters raised by the Claimant, where the Claimant said that the first Employment Tribunal had misunderstood the evidence which he had given. Mr Tucker looked at the first three issues raised by the Claimant and concluded on the basis of his own investigations that it had been reasonable for the first Tribunal to come

to the conclusions they had and to cite those three matters as examples of the Claimant's lack of credibility. The fourth matter relating to when the Claimant was aware of his disabled status was ambiguous and Mr Tucker did not reach any conclusion on that matter as to whether he felt the Tribunal's findings could be justified."

37. Mr Tucker concluded that the Claimant's behaviour constituted gross misconduct and was incompatible with him remaining employed by the Respondent. The Henderson judgment notes: "*This was especially the case as the Claimant was in a regulated position and his behaviour was not compatible with his being a fit and proper person for the purposes of the FCA Rules".* It was the Claimant who had chosen to focus in the disciplinary hearing on the four examples given in the Baty judgment (paragraph 32 above) but having considered the Claimant's submissions in the hearing and in writing thereafter, Mr Tucker had concluded that the Baty judgment was neither incorrect nor unfair overall.

38. In relation to Professor Marks' evidence and the question of the Claimant's weight loss, the Henderson Tribunal had seen Professor Marks' handwritten consultation notes (though Mr Tucker had not) in which it appeared to be recorded that the Claimant weighed 50kg at the end of his treatment, based on what the Claimant had told him. This was "*wholly consistent*" with the finding of the Baty tribunal and hence its adverse findings as to the Claimant's credibility.

39. The Claimant appealed against Mr Tucker's decision on 13 March 2017. The Henderson judgment records that he complained about the two different versions of the transcripts and the fact that he had not been shown the extracts from the HSF version that were instrumental in Mr Tucker's decision; but their finding had been that since they were essentially the same in all material respects, this did not prejudice the Claimant.

40. Secondly, the Claimant took issue with Mr Tucker only looking at extracts and not the full transcripts. However, the Henderson judgment found that he did so in the context of considering the four issues on which the Claimant himself had focussed.

41. The Claimant did not mention in his appeal letter that he was awaiting Professor Marks' notes, which he told the Henderson Tribunal had arrived around a week later. The Henderson judgment found that there was nothing in the appeal submission that was new or differed from the Claimant's earlier submissions.

42. The Henderson judgment went on to set out the findings from Mr Cronin's appeal outcome letter, in summary that: that the level of investigation completed had been fair, despite the Claimant having initially been told there would be "an investigation" since there were no other witnesses to be interviewed; that Mr Tucker had directed himself to the parts of the HSF transcripts to which the Claimant's own selection of the pertinent issues had taken him; and that on the basis of the Baty judgments findings as to the Claimant's credibility, the Respondent could not be criticised for challenging that credibility in its defence to the first claim. Mr Cronin did not believe the

Tribunal's findings were incorrect, and there was no evidence to support the Claimant's allegations that the Respondent had "*jumped on the first opportunity to dismiss him because he had issued a disability discrimination claim and made a disclosure to the FCA*". Mr Cronin also reiterated Mr Tucker's concerns about the Claimant's being a "fit and proper person".

43. The Henderson judgment concluded as follows in relation to the Claimant's dismissal:

    a. There was no evidence to suggest that the reason or principal reason for Claimant's dismissal was his protected disclosure;
    b. There was similarly no evidence to support the contention that the reason for the Claimant's dismissal was that he had done a protected act by bringing the first claim;
    c. The reason for dismissal was the Claimant's conduct, i.e. the findings as to his credibility in the Baty judgment;
    d. The Respondent had a genuine and reasonable belief in the Claimant's misconduct;
    e. Dismissal was within the band of reasonable responses given the FCA Rules, the Respondent's regulated status and the Claimant's need to be an approved person, taking into account the Baty judgment's criticism of him;
    f. While it was "*wholly irregular*" (and contrary to best practice, its own appeals process and the ACAS Code of Practice) for the Respondent not to offer an appeal hearing it would have made no difference and hence did not render the dismissal unfair overall. It is this point that gives rise to the Hearing before me.

<u>Prior findings - the EAT/Court of Appeal decisions</u>

44. The EAT (Laing J) expressed the following findings in the Henderson judgment to be significant:
    a. Mr Tucker was open to the suggestion that ET judges make mistakes and that he was prepared to hear what the Claimant had to say about the Baty judgment findings, to see if he could satisfy himself that they were justified;
    b. The Claimant had acknowledged Mr Tucker had given him a full opportunity to raise any issues he wanted to at the disciplinary hearing;
    c. There was no material variation in the HSF and Ashfords transcripts; the Henderson panel agreed with Mr Cronin that there was no unfairness in the process;
    d. The Claimant had been allowed to defend himself before Mr Tucker and put the Baty judgment findings in context;
    e. Since the Respondent's belief in the misconduct was based on the Baty judgment findings, there was limited investigation to be carried out and that was reasonable in all the circumstances.

45. At paragraph 70, Laing J encapsulated what had been forwarded at the Rule 3(10) hearing before Richardson J as follows: *"In asking whether an*

Appeal Hearing would have made a difference, the first ET[2] did not apply the correct test. The ET was arguably wrong to use hindsight but it was arguable that the second ET should have asked whether the Respondent could reasonably have believed that an Appeal Hearing was futile."

46. It is noteworthy that the Claimant raised at the EAT, as he continued to raise before me, arguments that the Baty judgment did not expressly finding him dishonest or to have lied. Laing J dealt with this in her judgment saying "*That does not help the Claimant… The ET found his evidence was not credible in many respects and on lots of occasions evasive. We have already set out the four examples that the ET gave and the ET's findings that that was of grave concern because the Claimant was a regulated person. Those findings on any view were damaging to the Claimant whether or not they amounted to findings of deliberate dishonesty. … In any event, the Claimant knew as soon as he got the second letter from the Respondent not only that the Respondent was relying on the ET's credibility findings, but that the Respondent further characterised those findings as findings of dishonesty. The Claimant, knowing that, did not challenge that characterisation by the Respondent of the first ET's findings. Instead, he disputed that his evidence to the first ET has been untruthful in any way*".

47. The EAT concluded that it was not an error of law for the Henderson panel to have "elided" the investigation and disciplinary stages; nor to have concluded that there was no further investigation to have been conducted as the Baty findings spoke for themselves. It referred back to the Henderson judgment findings about the evidence given by the Claimant as to what he would have said had Mr Cronin held an appeal hearing:

"80. *…He first said in response to Tribunal questions, that his written submissions had covered the main points but that he would have included Professor Marks' consultation notes. However, in re-examination on the same question, the Claimant said that he would have submitted much more detailed written submissions and would have annotated Professor Marks' notes to explain what had happened and to show that the first Tribunal's findings were incorrect. First, we note that this is an example of the Claimant giving inconsistent answers to the same question. Secondly, the Claimant did not specify the nature of the full details he would have included in his written submissions. Thirdly, as regards Professor Marks' notes, we have already found that those notes did not in fact support the Claimant's version of events and so would not have assisted him, even if he had an Appeal Hearing.*

81. The Tribunal also notes that as regards the Claimant's own evidence as to when he had Professor Marks' notes, he was aware that Professor Marks had found the notes and would send them to him when he submitted his appeal submission on 13 March 2017. Further, he said that he had Professor Marks' notes on or around 20 March 2017. This was before Mr Cronin had written with his appeal outcome. It would have been open to the

[2] I infer that this – and the subsequent reference to the "second ET" - should be a reference to the Henderson panel, since the Baty panel was not considering any appeal, the Claimant not yet having been dismissed

Claimant to send Professor Marks' notes to Mr Cronin to allow him to consider them prior to reaching his decision. The Claimant did not choose to do so."

48. It is not necessary for the purposes of this Hearing to deal in very great detail with the remaining litigation and in particular with the costs decisions. However, I do note that in the EAT costs judgment summary (Auerbach J), referring to the Baty judgment, said as follows: "*The Employment Tribunal also found that, in respect of certain complaints, [the Claimant] had lied to or misled the Tribunal…*".

49. In the body of the EAT costs decision, it was noted that the Baty costs decision had concluded that it had not been a case in which every allegation was based on a lie. It was argued for the Claimant that there had been no finding of dishonesty in the Baty liability decision, despite what was described as the particular importance of a clear and unambiguous finding in such a case. No specific allegation of dishonesty had been put to him at the Baty liability hearing and the Claimant had expressly denied dishonesty in his witness statement for the costs hearing.

50. Auerbach J however described the Baty findings as "*very trenchant and extensive*" as regards the credibility and reliability of the Claimant's evidence and the manner in which he gave it. He pointed out that in the Baty costs judgment, it was found that the Claimant's evidence on the "weight" and the "Mexican holiday" issues was either not the truth or was misleading; and that this conduct was "*deliberate and serious*". He observed that the Baty costs decision "*properly regarded its earlier findings as not being merely to the effect that the Claimant had made a mistake or exaggerated the position, but that he had deliberately told an untruth and sought to mislead. That was, properly, treated by the Tribunal as, in substance, a finding of dishonesty*".

51. In relation to the weight issue, Auerbach J observed that the Tribunal's findings in the Baty judgment were "*properly made, in light of the evidence it had (including from Professor Marks)*"; and in relation to the Mexican holiday issue, that the findings were again "*fairly made… The Tribunal was … entitled to attach significance to what was in [the Claimant's] pleading... its finding focussed, properly, on his response when challenged in evidence about that pleading*".

52. On 20 November 2020, refusing permission to appeal to the Court of Appeal, Bean LJ referred to the Baty credibility findings as "*a devastating series of findings about the Claimant's evidence (in particular at paragraphs 27-32) which amount in my view to findings of dishonesty."* Permission to re-open the refusal of permission to appeal was refused by him on 7 April 2021.

Evidence before this Tribunal

53. Mr Cronin's witness statement set out his background and experience. In summary, he has around 40 years' experience in financial services, the last 20 of which have been with the Respondent, of which he was the President and CEO until his retirement in July 2019. Mr Cronin was aware of the

Claimant's case before the Baty tribunal but not involved in the proceedings himself.

54. While Mr Cronin was also not personally involved in the decision to suspend the Claimant, he chaired the CRC meeting on 7 February 2017, convened to consider the judgment. At that meeting he learned that the Claimant had been suspended and a decision was taken, following an explanation of FCA Rules from the Head of Compliance EMEA and Asia, that the Respondent should submit a form to the FCA explaining the situation.

55. Mr Cronin was not at the subsequent meeting on 10 February (as noted above, Mr Tucker was there on his behalf) and had no involvement in the disciplinary proceedings conducted by Mr Tucker. Mr Cronin does not now recall how he came to be the person conducting the appeal process; but it is common ground that he and the Claimant had not met previously and, as Mr Cronin was more senior than Mr Tucker, he considered himself to be an appropriate person to hear the appeal. Indeed, the Claimant has not suggested that Mr Cronin was not suitable.

56. Having received the dismissal letter and associated documents via Mr Ions, Mr Cronin considered how best to proceed. He explained in his witness statement that he thought Mr Tucker had done a "*thorough*" job and that he, Mr Cronin, was thinking about how he could explain the findings of an independent tribunal - that the Claimant lacked credibility - to a client or regulator, given the Claimant's position as a regulated person. He could not see how anything the Claimant was saying could have given him reason to think that the Baty tribunal had reached the wrong conclusions.

57. Mr Cronin did at some stage see documentation regarding the May 2011 holiday and the Claimant's time out of the office for his knee injury. Although the Claimant had said there were no documents dealing with the length of the holiday, in fact, Mr Cronin said, these items had been before the Baty tribunal.

58. In the circumstances, and having read the paperwork, Mr Cronin says that he could not see anything that would have changed his mind, in that none of his points "*went anywhere near to challenging the culmination of the Tribunal's findings that [he] lacked credibility*". Mr Cronin considered that very unusually, an appeal hearing would be pointless and wrote to the Claimant dismissing his appeal.

59. So far as Professor Marks' notes are concerned, Mr Cronin said in his statement that he saw them for the first time in connection with this tribunal. He does not understand why the Claimant did not send them to him once he received them; but in any case, they do not appear to help the Claimant's case in that they appear to show that he told Professor Marks that he had lost weight down to 50kg. Mr Cronin considered that this would have reinforced his view that the appeal should be dismissed and observes that the Henderson Tribunal evidently considered the same.

60. In his oral evidence, Mr Cronin agreed that a decision about a regulated employee may be critical for their future career path, potentially preventing

them from working in the financial services industry in future. As such, he considered the role of a person conducting an appeal in those circumstances to be to review all the information afforded to them, to gain a clear understanding of the issues and reach a concise conclusion as to what needed to be done or what further information should be garnered. He further agreed it was integral to the process to approach the decision with an open mind. He stated that there were no constraints placed upon him by the Respondent or anyone else in terms of the process he undertook, the way in which he addressed the appeal or the time he should take to complete it. I accept that evidence, which was not challenged.

61. The Claimant put to Mr Cronin a question about the Lester email (paragraph 35 above) where there is a mention of recruiting a replacement. Mr Cronin said he had not discussed this with Mr Lester. In any case, as I have noted above, the Henderson judgment had concluded that the email from Mr Lester (addressed to Mr Tucker) had not rendered the dismissal unfair, and that was not part of the remitted point before me.

62. Similarly, the Claimant put to Mr Cronin that the failure to hold either an investigation or an appeal hearing suggested that the outcome had been predetermined; again, the Henderson tribunal had found that this was not the case so far as the lack of an investigation was concerned. I return below to my own conclusions as to fairness so far as the lack of an appeal hearing was concerned.

63. The Claimant made repeated efforts to cross-examine Mr Cronin in relation to the assertion by the Claimant that the Baty credibility findings were "based entirely on the closing submissions of the Respondent made by Ms Stone". This was a theme to which the Claimant returned repeatedly. I did not consider it would be helpful to me to conduct a comparison of the submissions against the Baty judgment findings. It is not uncommon for a Tribunal to reflect in its decision the arguments of the side whose submissions have been preferred. In any event, suffice it to say, as several judges have said before me, those findings were not appealed, successfully or at all.

64. In the same vein, it was not helpful in the Hearing before me to take Mr Cronin to aspects of the transcripts where the Claimant said the Ashfords version differed from that of HSF and to invite Mr Cronin to say what he might have thought, had he seen both versions. I explained to the Claimant that Mr Cronin was giving factual evidence in the Hearing and should not be invited to speculate, and it is right to say that the Henderson tribunal found as a fact (considered significant by the EAT – see paragraph 44c above) that the transcripts were in fact not materially different. It remains the Claimant's position that there are "prime material differences" but I consider that is not a finding that it is open to me to remake.

65. The fact that Mr Cronin had not seen both versions and in fact was not aware that there was more than one version is however a point that goes to the fairness of his decision not to hold an appeal hearing. I return to it below.

66. It transpired in the course of the Hearing before me that in 2017 the

Claimant brought proceedings for professional negligence against Professor Marks. The Claimant had unsuccessfully applied for a postponement of this Hearing to await the outcome of those proceedings. It seemed to me that the outcome is a moot point so far as this case is concerned, and I did not allow the Claimant to invite Mr Cronin to speculate about professional negligence either generally or specifically.

67. The Claimant did however cross-examine Mr Cronin about the handwritten notes made by Professor Marks, in which at one point there is a note of what appears to be weight reduction from 95 to 50kg. This, Mr Cronin said, was something on which he focused in his witness statement because it was in the Baty judgment and was how the Claimant had described his weight loss.

68. Mr Cronin refuted the Claimant's suggestion that he had not misled the Baty tribunal as regards the May 2011 holiday. Mr Cronin considered that it had been inaccurate and/or at best exaggerated to state that the Claimant had been forced to miss holiday. The premise of having missed it, rather than the specifics, was what caused him to conclude that the Claimant had misled the Tribunal. He pointed out that in any case, it was not just one issue, but a common theme in the Claimant's testimony to the Baty Hearing, so that even if he had given the Claimant the benefit of the doubt on the May 2011 holiday, the "*exaggeration and untruthfulness that was found still seemed to persist*".

69. Mr Cronin indicated that he had felt "*comfortable*" in not holding an appeal hearing, given that some two to three weeks earlier, the Claimant had had the face-to-face meeting with Mr Tucker at which the Claimant had been given the opportunity to make all his points, and (in Mr Cronin's view) there was nothing to suggest that there was anything new for him to review. Mr Cronin did acknowledge that, in hindsight, he perhaps should have asked the Claimant if there was any additional information that the Claimant wanted him to see, but he had assumed that the Claimant would have sent him anything that would have supported his position.

<u>Findings and Conclusions – unfair dismissal</u>

70. I have reminded myself that the single remitted point is whether or not the failure by Mr Cronin to conduct an appeal hearing rendered the dismissal unfair. The Claimant tried on numerous occasions as I have indicated above to re-open points which have already been determined by previous tribunal panels and either appealed unsuccessfully or not appealed at all. The Henderson judgment heard legal argument and concluded that the Baty findings on credibility were fundamental and re-opening them would be an abuse of process. There was no successful appeal to that conclusion. It remains the legal position in this Hearing too.

71. The Claimant should by now acknowledge:

    a) that the Baty findings were tantamount to findings of dishonesty, if not expressly then by implication. I remind myself of the findings repeated at paragraph 50 above, reiterated in the Auerbach decision, that the Baty tribunal had found the Claimant deliberately told an

untruth and sought to mislead, i.e. a finding of dishonesty;

b) the findings included **but were not limited to** the Claimant's evidence in relation to the four issues on which he focused at the disciplinary hearing (weight, May 2011 holiday, absence through knee injury and knowledge of disability status);

c) the decision not to conduct a separate investigation hearing into the Baty findings did not render the decision unfair;

d) the decision was not predetermined, whether because of the Lester email or otherwise.

I proceed on that basis.

72. By the same token, the Respondent should acknowledge, in line with the Henderson findings, that the decision not to hold an appeal hearing was "*wholly irregular, … contrary to best practice and contrary to the Respondent's own appeals process*". On each point, even if I considered I was not bound by those findings, I would have reached the same conclusion.

73. In her submissions, Ms Stone notes that the Claimant knew at the disciplinary hearing that he was facing allegations of dishonesty and that he sought to contradict those findings in the disciplinary process by arguing that he had not given untruthful or misleading evidence. When Mr Cronin came to consider the Claimant's written submissions at the appeal stage, as he explained in his witness statement, he saw nothing that would give him cause to challenge the "*culmination of the Tribunal's findings"* and hence concluded that an appeal hearing would be pointless.

74. While I accept that there is a difference in giving somebody the "opportunity to appeal", this was a decision, I find, that no reasonable employer would have made in all the circumstances that pertained at the time of Mr Cronin's decision. More particularly, these were circumstances where there had already been the omission of the investigatory step and where Mr Cronin did not advise the Claimant of his decision in advance so as to give him the opportunity to confirm that he had no additional evidence to provide or submissions to make. Even under the now-repealed modified statutory dismissal procedure, the employee was entitled to an appeal meeting once the written statement of reasons for dismissal had been given, even if there had been no meeting prior to that.

75. ACAS says that its Code of Practice is the minimum a workplace must follow. That Code provides for an appeal hearing, to which the employee is statutorily entitled to be accompanied. Mr Cronin's failure, not only to offer the opportunity to be heard, but not to tell the Claimant that this was his intention deprived the Claimant of the chance to put his case, assisted by a competent representative, in an unbiased hearing. I add that I do not doubt Mr Cronin was unbiased; the findings are preserved that Mr Cronin did not discuss replacing the Claimant and/or predetermine the appeal outcome.

76. Ms Stone points to the subsequent findings of the Baty Tribunal in the costs judgment and to the other appellate findings in both the EAT and the Court of Appeal, in which successive judges have pointed out what is obvious to

everyone save, it seems, the Claimant: the findings were "devastating" and amount to findings of dishonesty. However, these subsequent findings had not yet been made at the date of the appeal hearing. So far as Mr Cronin knew, the Claimant might have appealed the original Baty findings. Mr Cronin did not suggest in evidence before me that he was aware of the time limits for appealing or whether he had made enquiries as to whether an appeal had been lodged.

77. Of further significance is the fact that the Claimant did want to bring new evidence forward, even though ultimately it would not have availed him to do so. He had, for instance, Professor Marks' handwritten notes and he had the Ashfords transcripts, which he still argues could be persuasive in disregarding the Baty findings on the weight issue and the May 2011 holiday issue. Since Mr Tucker had already weighed up the findings about the Claimant's knowledge of disability status and decided to give him the benefit of the doubt, the Claimant clearly believes that if he could have demonstrated that he had been wrongly characterised as untruthful in another two matters, that could have given rise to sufficient doubt as to the reliability of the findings in classifying him as dishonest.

78. I am not persuaded that this is a case where the very narrow/"*truly exceptional*" potential exemption articulated in *Gwynedd Council v Barratt*[3] would apply. As Ms Stone acknowledged, that was a case concerning dismissals for redundancy in any case. The Claimants, PE teachers at a secondary school, were given just over three months' notice of dismissal on the decision to close their workplace (the school at which they worked) being made. Just under two weeks before the dismissal came into effect, the Chair of Governors of the school acknowledged that an appeal[4] should have been offered but in light of the closure of the workplace, such appeal would have been pointless; it appears that this was an agreed point (paragraph 17d of the extract from the ET judgment).

79. The ET in *Barratt* directed itself to the *Taskforce*[5] case but considered that employment practices and case law had moved on since 2005 such that: "*The right to appeal any dismissal is now so engrained in employment practices that it is rare that an employee would be dismissed without being given the right of appeal. Such a right has virtually become second nature for all but the most cavalier employer".* The Employment Judge also observed that the ratio in the case of *Alvis Vickers Limited v Lloyd*[6]*,* is that "*where the company provides for an appeal, it was incumbent on the company to conduct the process properly. The appeal process had, in the words of the tribunal, to be 'fair and procedurally sound'".* He found that "*no reasonable employer would have rejected the claimant's attempt to exercise their contractual and statutory rights of appeal with these issues in contention*" and that the Claimants had been unfairly dismissed.

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[3] [2021] EWCA Civ 1322

[4] It appears in fact that the right was to be offered "an opportunity of appealing" rather than an appeal hearing *per se* (Regulation 17(11) Staffing of Maintained Schools (Wales) Regulations 2006 as set out at paragraph 14 of the EAT judgment

[5] *Taskforce Finishing & Handling Limited v Love* EATS/0001/2005

[6] EAT/0785/2004

80. The Court of Appeal heard argument from the respondent in *Barratt*, referring back to the dicta in *Taskforce:* "…*it would be wrong to find that a dismissal on the grounds of redundancy was unfair because of the failure to provide an employee with an appeal hearing*". It nonetheless found that whether or not there is a test of "*truly exceptional circumstances*" in relation to appeals following a dismissal for redundancy, the ET's conclusions on overall fairness were not invalidated; the absence of an appeal is not fatal to the employer's defence but it is one of the many factors to be considered in determining fairness. The Court of Appeal dismissed the Respondent's appeal.

81. As I have noted, *Barratt* was a case concerned with a lack of any form of appeal against dismissal for redundancy. The facts are not similar with this case, an appeal dealt with "on the papers" against dismissal for gross misconduct. It is certainly not authority for a proposition that the absence of an appeal hearing in a misconduct case of itself can never render unfair a decision to dismiss. While I am similarly not persuaded of the applicability of the decision in *West Midlands Co-Operative Society Limited v Tipton*[7] (which again concerned a refusal to entertain an appeal to which the employee was contractually entitled) I do consider that nothing short of an appeal hearing - or at the very least, notification that none would be conducted, coupled with an invitation to submit any further evidence or argument in advance of consideration on the papers - would be sufficient as a step that a reasonable employer would take to ensure the process is carefully and conscientiously conducted. In so deciding, I bear in mind the Claimant's submissions in relation to the case of *Salford Royal NHS Foundation Trust v Roldan*[8] in the Court of Appeal (Elias J giving judgment) in which the following appears:

"In A v B [2003] IRLR 405 the EAT (Elias J presiding) held that the relevant circumstances include the gravity of the charge and their potential effect upon the employee. So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of that case, the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite. In A v B the EAT said this:

'Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.'"

82. In the present case, the gravity of the charge of dishonesty and the potential

[7] [1986] ICR 192
[8] [2010] EWCA Civ 522

effect on the Claimant were, as Mr Cronin rightly conceded, of the utmost severity, and while it fell short of express allegations of criminal misbehaviour, it did come within the category of public criticism by a Tribunal and hence was highly likely to mean that the Claimant would lose his FCA approval as a fit and proper person. In turn, that would probably mean the end of his career in financial services.

83. Mr Cronin did not focus on potential evidence that may exculpate the Claimant because he did not address the question of whether there was anything more to come. Certainly, the Claimant could have forwarded (for example) Professor Marks' handwritten notes on receipt and indeed I have no doubt that he would have done so if he had appreciated that Mr Cronin was intending not to hold an in-person appeal.

84. In so finding, I do not accept that Mr Cronin "*cherry-picked criminalising evidence*". The appeal was against the findings of Mr Tucker, which in turn were based on the findings of the Baty tribunal. The Claimant had chosen to take issue with the specific examples given in the Baty decision, and Mr Tucker had carefully considered what the Claimant had to say about them. In one instance (knowledge of disability status) he decided not to take the findings into account in his decision because it was not as clear-cut as the other three. Nonetheless, overall, Mr Tucker agreed with the findings of the Baty tribunal that the Claimant had not been honest, and that was incompatible with him remaining in an approved position because of the FCA requirements for him to be fit and proper. It also concerned Mr Tucker that the Claimant had not understood the seriousness of Tribunal findings of dishonesty.

85. Further, the Claimant had taken issue with the Respondent's closing submissions. Mr Tucker had looked at that too. He noted that in one instance, the Claimant's own position was that he had deliberately told a lie to his manager and that in another he had made serious allegations against others without proper foundation. The latter indicated to Mr Tucker that the Claimant had not acted with integrity, which was another aspect of him being a fit and proper person. The Claimant had been prepared to be dishonest or mislead the Tribunal, despite being on oath.

86. Those were damning conclusions. They were however based on the issues which the Claimant himself had raised as pertinent, in a disciplinary hearing in which he acknowledges he was given the opportunity to say whatever was relevant. Mr Tucker therefore cannot be said to have cherry picked evidence. When the Claimant appealed against Mr Tucker's conclusions, he claimed Mr Tucker had done just that. It is clear that the Henderson tribunal did not agree.

87. The Claimant also claimed that Mr Tucker had ignored the points he had raised, both in his written submissions and at the disciplinary hearing. Again, it is clear that the Henderson tribunal disagreed with that position. The Claimant sought to persevere with those lines of argument in his appeal letter to Mr Cronin. He repeated arguments, both expressly and by implication, as to the three examples that Mr Tucker had taken into account in reaching his decision. He overlooked the fact that they were just

examples. The overall finding was that he had been dishonest. It was the Claimant who focused on those examples (and indeed continued to try to do so in his cross-examination and submissions before me). He continues to fail to see the bigger picture.

88. At an appeal hearing, Mr Cronin could have done what he did in his witness statement to this Tribunal, which was to explain to the Claimant what he understood from the Baty findings, allow the Claimant to respond to that position and give him the opportunity to put forward any new/additional evidence. His failure to conduct that hearing means that he impermissibly restricted himself to an ever-narrowing list of issues. He did not give the Claimant the chance to provide "*potential evidence that may exculpate or at least point to [the Claimant's] innocence*".

89. Mr Cronin concluded that the "*basis of [the Claimant's] appeal was clear so [he] did not see the need for a meeting*". It seems to me that it misses the point to conclude that if there is clarity in an appeal letter, there is no need for a hearing. The letter is the start of the submission on appeal, it is not the entirety thereof. There is consequently a degree of force in the Claimant's assertion that what Mr Cronin did was to rubber stamp what Mr Tucker had already determined.

Findings and Conclusions – *Polkey*/contribution

90. In line with the *Burchell* test however, and as Ms Stone observes, the Henderson judgment found that the Respondent had reached a reasonable belief, based on a reasonable investigation, in the Claimant's misconduct and that dismissal was within the band of reasonable responses, notwithstanding the lack of an appeal hearing.

91. Although we had proceeded from day one on the basis that the remittal did not impact on the Henderson panel's finding that Mr Cronin conducting an appeal hearing would have made no material difference to the outcome, this was later called into question by the Claimant. I therefore heard argument from the parties as to whether I was able to reach my own conclusion. On balance, I prefer the Respondent's position that it is preserved. It is clear in general terms that the Employment Tribunal should not stray beyond what is remitted by the higher Tribunal or Court (*Aparau v Iceland Frozen Foods PLC*[9] and other authorities cited by the Respondent).

92. However, and in any event, I would have reached the same conclusion. In relation to the weight loss example, for instance, Professor Marks' report was in the bundle before me. It was in the bundle before the Baty panel. The Claimant must have read it before Professor Marks gave evidence. It refers to the "*severe weight loss he suffered*", which ironically appears to be a factor in Professor Marks considering the OH report to be "*grossly inadequate*" (in that the OH report did not mention or evaluate it). It says: "*It is very clear that Mr Radia's leukemic treatment was considerably more arduous than average. When he started treatment he weighed 95kg and at the end he weighed slightly less than 50kg, i.e. he had lost nearly 50% of his total body weight. In my 35 years of treating patients with leukaemia, I*

[9] [2000] ICR 341, Court of Appeal

have never seen such severe weight loss".

93. If what he now says is true, the Claimant must have known this to be inaccurate, yet it was under a heading "*Summary of findings*" that were expressly based on the full history taken by Professor Marks from the Claimant himself. Professor Marks also listed "*Weight loss of approximately 45kg (nearly 50% of his total body mass)"* as one of five numbered side effects of the treatment the Claimant had undergone for his AML; and again in assessing the Claimant's medical condition between August 2010 and May 2011, Professor Marks commented "*His AML treatment was extremely arduous and he lost nearly half of his body weight*" and (in relation to fatigue) "*I do not believe this was a functional problem, I believe that it was a real problem, and was related to arduous chemotherapy, prolonged hospitalisation and profound weight loss*".

94. Professor Marks' report is dated 1 April 2016. Following a complaint by the Claimant in May 2017, Professor Marks confirmed that the Claimant had told him on 22 March 2016 that he had lost about 40kg in weight by the end of his treatment. Professor Marks noted that a weight loss of that order was "*probably incorrect, but not impossible*". I gather from Mr Cronin's outcome letter that in fact the Claimant had also written in his first claim that he had lost "*some 40kg in weight*". The point is however that while Professor Marks was not in a position to know whether it was correct or not, the Claimant certainly was and indeed now says it was "*highly unrealistic that he ever stated this*" (the implication certainly being that it was inaccurate) but he did not seek to correct the factual basis for that element of the report. The Baty judgment indeed records that the Claimant also told the Tribunal that when he left hospital after his treatment, he weighed "*50-60 kilograms*". However, the discharge records show he weighed 81.5 kilograms. The Baty panel concluded that this was "*clearly an untruth*".

95. This is just one example that the Baty judgment made clear was fed into its overall findings of the Claimant's propensity to be evasive, to mislead or to exaggerate – in other words, not to be honest. Those findings were not challenged on appeal to the EAT and were, as Bean LJ indicated, "*devastating*". I would therefore conclude that even if Mr Cronin had conducted an appeal hearing in person at any stage within the four weeks from appeal letter to outcome and whether or not it was once Professor Marks' notes were in the Claimant's possession, the Claimant would have been entirely unable to persuade Mr Cronin that he was, in terms, the innocent victim of a series of terrible misunderstandings as to his credibility and should be allowed to remain in an approved position in a regulated industry.

96. Instead, Mr Cronin would inevitably have reached the same conclusion (and on the same date) that he reached on 10 April 2017; that there was a clear pattern of exaggeration and untruthfulness amounting to gross misconduct and that that was inconsistent with the Claimant being a fit and proper person. This means that there is 100% likelihood of the same outcome being reached even if an appeal hearing had taken place and, as such, 100% *Polkey* reduction would apply.

Contribution

97. By similar token, the Claimant's own actions contributed in the amount of 100% to his dismissal[10]. He still sought in terms to reargue before me that he had been scapegoated or treated detrimentally by the Respondent to cover up its own wrongdoing after he had made protected disclosures. He submitted that he could not have appealed the Baty decision, though he did not explain why that would be the case if the tribunal had made findings that no reasonable tribunal could have made on the evidence before it.

98. While the Claimant did not give evidence before me so that I was not required to assess his credibility or lack thereof, he repeatedly referred inaccurately to prior findings of the various tribunals, or evidence that he or others had given, and though he objected to Ms Stone's interventions, I concluded that they were very frequently necessary in order that I would not be misled by his submissions, where binding findings had already been made that the Claimant was seeking to subvert.

99. The Claimant also complained that it was the Respondent who had made known the outcome of the hearing to the Evening Standard and was still focused even before me on the four "stand out" examples that the Baty decision had used, trying once more to demonstrate that those findings were ill-founded.

100. The Claimant continues to ignore the obvious; that those examples were part of an overall finding of evasion, misrepresentation and/or dishonesty that would have meant the Respondent could not continue to employ him in a regulated position and was indeed perfectly entitled to decide it could not employ him at all, in light of the impact that the Baty decision would have on his - and by extension its own - credibility and reputation.

101. Consequently, it is not necessary to conduct a remedy hearing because I have concluded that any compensation (whether considering the basic or the compensatory award) would be reduced on a just and equitable basis to zero in light of the findings on *Polkey* and contribution.

Employment Judge Norris
Date: 24 October 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

25/10/2021.

FOR THE TRIBUNAL OFFICE

[10] Sections 122(2) and 123(6) Employment Rights Act 1996