Neutral Citation Number: [2022] EAT 96

Case No: EA-2020-000331-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 2 February 2022

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MR K PUBBI	**Appellant**
- and -	
YOUR-MOVE.CO.UK	**Respondent**

- -
- -

Ketan Pubbi the **Appellant** in person
Joseph Bryan (instructed by DLA Piper UK LLP) for the **Respondent**

Hearing date: 2 February 2022

- -

JUDGMENT

SUMMARY

UNFAIR DISMISSAL

The claimant was employed as a financial consultant in the respondent's Estate Agency Division. He was dismissed for failing to disclose that he had been made bankrupt. There was no express term of his contract, nor any policy or regulatory requirement that applied to him, that specifically required him to disclose a bankruptcy. However, the tribunal found that the respondent dismissed him because it nevertheless believed that, in all the circumstances, he knew, or should have appreciated, that it would regard his bankruptcy as a serious matter, and would have expected him to disclose it, and that he had deliberately not done so. The tribunal found that the respondent was entitled to view this conduct as warranting dismissal, and that the overall disciplinary and appeal process was fair. It did not err in finding this to have been a fair dismissal.

HIS HONOUR JUDGE AUERBACH:

1. I will refer to the parties as they were in the employment tribunal. The claimant was employed by the respondent from May 2015 until he was dismissed in July 2018. This is his appeal against the decision of the tribunal (Employment Judge Sage, Ms Grayson and Ms Oldfield), arising from a hearing in September 2019. The claimant represented himself at that hearing and the respondent was represented by Mr Bryan of counsel.

2. The tribunal dismissed claims of unfair dismissal and under the **Equality Act 2010** of discrimination arising from disability and failure to comply with the duty of reasonable adjustment by reference to the disability of social phobia. That disability was admitted, but all of the claims were contested on their merits and ultimately dismissed by the tribunal.

3. The claimant appealed and again has been a litigant in person. Originally he sought to challenge the tribunal's decision in relation to the disability discrimination claims. But at a preliminary hearing Deputy High Court Judge Gavin Mansfield QC directed that only the grounds set out in what were paragraphs 2, 3 and 4 of the notice of appeal should proceed to a full appeal hearing. These are all related solely to the dismissal of the unfair dismissal claim. Those paragraphs have been renumbered as grounds 1, 2 and 3, although DHCJ Mansfield QC identified a number of specific points under the umbrella of those grounds which have also been addressed before me.

4. The claimant appeared in person today and Mr Bryan again appeared for the respondent. I had skeleton arguments from them both and I have heard very full oral argument during the course of the day.

5. I take the background facts from the decision of the tribunal and documents before me.

6. The respondent is an estate agency which also arranges mortgages and offers various insurance products. The claimant was employed as a financial consultant. Another company called First Complete Limited, also known as PRIMIS Mortgage Network, has a relationship with the respondent as an appointed representative, under which it sets terms for the work that it will permit

the respondent's advisors, working as its representative, to carry out.

7. The claimant was on sick leave from December 2016 to April 2017. The tribunal made detailed findings about the management of his return to work by the then National Financial Services Director, Mr Cox. Following an appraisal in December 2017, about which he was dissatisfied, the claimant complained. Following further developments, the claimant was then signed off sick from 23 January 2018.

8. At paragraph 67 the tribunal found that the claimant entered into bankruptcy on 29 January 2018, having applied for it on 26 January 2018. The circumstances that led to the decision to go into bankruptcy were that he had been off sick and on nil pay, and this resulted in financial difficulties. The claimant did not inform the respondent of his bankruptcy.

9. On 1 February 2018 the claimant raised a grievance about aspects of how he said he had been treated. On 8 February 2018, as a result of carrying out a Google search, a member of the HR team discovered that the claimant had been declared bankrupt. The tribunal made the following particular findings about ensuing communications involving Mr Cox, Ms Howard – a broker services manager at First Complete / PRIMIS, Ms Hayes – Head of HR at the respondent, and the claimant:

> "71. When the Respondent learnt of the Claimant's bankruptcy, his authorization with the company First Complete Limited was terminated with immediate effect on the 13 February 2018 (and as a result he could no longer hold himself out as an Adviser). The Tribunal saw the letter on page 286A dated 9 February 2018 from Ms Howard to Mr Cox, confirming that they would not consider the Claimant to be a 'fit and proper person' if he had been found to have entered into a bankruptcy order. It was also found to be relevant that he had failed to disclose this first to the Respondent and to the Network as this had "implications regarding his honesty and integrity." Ms Howard stated that "failing to disclose this is contravening section 2.1 of the FCA Handbook (FIT 2.1.3)." The Claimant when taken to this email did not accept that this was the policy of the Network as it referred to the FCA Handbook. However, the Tribunal find as a fact that the approach followed by the network reflected that they applied a systematic response on learning of the bankruptcy coupled with the failure to disclose. It was concluded that in those circumstances the Claimant was not considered to be a fit and proper person. Mr Cox was asked this in cross-examination and he said that if someone had been made bankrupt, he would expect them to report it to the Network immediately. He stated that if someone was working as a financial adviser where financial soundness is of paramount importance and bankruptcy was seen as a '*profound example, it would be a dereliction of duty'* not to report it. Mr Cox said it was his role to inform the

> Network of a change in circumstances.
>
> 72. On the 14 February 2018 Ms Hayes emailed the Claimant asking for him to contact her as a matter of urgency, he replied saying he was on sick leave and would prefer not to be contacted by email. She then followed this up with more details saying that it had come to light that he had been declared bankrupt and that the Respondent would need to suspend his access to systems while this was investigated. She emphasized the seriousness of the matter and stated that it would be preferable to speak on the phone. He replied by email on two occasions firstly asking how they found out (page 308) and then (page 314) he stated that he was contemplating how and when to approach the Respondent but "*this was an awkward time with me currently on sick leave*." He then enquired what standard checks had been carried out that led to this discovery. The Claimant told the Tribunal in his cross-examination that his disability prevented him from disclosing his bankruptcy as he was wanting to seek out a neutral person, he accepted that he did not wish to do this straight away as it was not at the forefront of his mind." (original emphasis)

10. An investigation was then conducted by a Ms Todd, which the tribunal described as being solely in relation to the claimant's failure to disclose his bankruptcy. The claimant was then invited to a disciplinary hearing before Mr Price, National Compliance Manager. As to the disciplinary charges, the tribunal found as follows:

> "The charges the Claimant faced were that he "failed to notify the Company you have been declared bankrupt; failed to be able to operate within the role of Financial Consultant due to the loss of your authorization with First Complete Limited; the above resulted in a fundamental breakdown of Trust and Confidence between yourself and the Company." The Claimant was asked to notify them if any reasonable adjustments were required for the hearing."

11. The claimant then raised a second grievance, the overall burden of which was that his first grievance was not being addressed. The disciplinary hearing was postponed and the grievance was then considered, and partially upheld, by a Mr Duncan. Targets were adjusted and it was recommended that the claimant's appraisal be carried out again by a different manager. Following a grievance appeal hearing heard by another manager, Mr Trantum, the outcome of which was to the same effect, the disciplinary process then resumed.

12. At paragraph 90 of its decision the tribunal said this:

> "Mr Price accepted in cross examination that HR did not realise that the contracts for Appointed Representatives were not issued to the Estate Agency Division and the Respondent did not dispute that the documents at pages 386-459 were irrelevant to the issues and were removed from the investigation pack. He stated that for him

the relevant fact was that the bankruptcy had not been disclosed."

13. I interpose that what Mr Price was referring to here was that, as could be seen from documents that were before the tribunal, and in my bundle, when Ms Todd initiated her investigation, she was initially told by PRIMIS that certain particular agreements applied to the claimant regarding the standards with which he was expected to comply. But when it was then explained to PRIMIS, or became apparent to them, that he worked in the respondent's Estate Agency Division, this was corrected, and they were informed that these specific agreements and documents did not apply to him.

14. The letter inviting the claimant to the disciplinary hearing was reissued, stating the charges in the same terms as before. The tribunal had before it a note of the disciplinary hearing, which had been produced following that hearing and before the internal appeal hearing, including the amendments or annotations by way of commentary on the note that the claimant was at the time given the opportunity to make. The tribunal's findings about the disciplinary hearing included the following:

> "96. Mr Price accepted that he asked the Claimant in the hearing if he understood the 'fit and proper' test which appeared in the FCA Guidelines and Handbook and accepted he did not provide a copy of these documents to the Claimant, Mr Price asked this question because he wanted to gain an understanding of what this standard meant to the Claimant. The Claimant said in the hearing that the "*FCA document is a massive Handbook, which I haven't read and if you are referring to it, I would like to have it here and have a look.*" Mr Price then clarified that he was only referring to the definition of fit and proper person which he explained *"we as a Network have to abide by."* Although the Claimant complained that a document referred to in the hearing had not been provided to him, the Tribunal were satisfied that this did not undermine the fairness of the process. The document had no direct relevance to the charges faced by the Claimant or to his ability to answer those charges, it was a general question to test the Claimant's understanding of the rules that applied to all advisers.
>
> 97. Mr Price stated that the FCA sets guidance and the industry sets guidance for itself and clarified that he *"made clear [in the hearing] that within PRIMIS if you are bankrupt you are no longer fit and proper."* He clarified that the network meant PRIMIS. The Claimant's evidence before Mr Price was that he was not obliged to inform the respondent of his bankruptcy but he was going to inform them but was waiting for a neutral person (page 611), he stated that he intended to tell an impartial member of staff as soon as one was available." (original emphasis)

15. I should set out the next few paragraphs of the tribunal's decision in full:

> "99. Mr Price knew that the Claimant had been off sick but did not know the details

of his disability but was aware that reasonable adjustments had been made for him. Mr Price accepted that in the meeting the Claimant referred to his social phobia and he was told that conversations were difficult for him and this was brought to his attention. Although the Claimant maintained that the process was unfair because he was not specifically asked about mitigation, Mr Price accepted that this was not put to him as a specific question, but the Claimant made a number of submissions in relation to mitigation and he had an opportunity to present any evidence he felt to be relevant in the hearing.

100. The Claimant put to Mr Price in cross-examination that the allegations he faced changed and the words "deliberate and intentional" were added to the charges (page 645), Mr Price denied this saying that the three charges remained the same. In reply to cross-examination he explained that the facts showed that the Claimant *"went bankrupt and had no license, you failed to inform the Company. You had the opportunity to explain and I concluded that someone with your experience who had experience of propriety checks, you knew it was important to disclose and I concluded that it was deliberate and intentional."* Mr Price confirmed that anyone who acted in this way would face disciplinary charges of gross misconduct. Mr Price accepted in cross-examination that at the time of the Claimant's dismissal there was no written fitness or proprietary policy. However, the termination of the Claimant's authorisation was carried out by First Complete on the 13 February 2018 (page 323) who came to the conclusion that the Claimant was no longer considered to be a 'fit and proper person.'

101. The Claimant was informed by email dated 16 July 2018 that the decision was to summarily dismiss him for gross misconduct (page 641). The reasons were not provided in this email but in a letter dated the 17 July 2018 (pages 645-8). The Tribunal find as a fact that the outcome letter set out all the points raised by the Claimant in mitigation. It was concluded that the Claimant's conduct was intentional and deliberate.

102. It was put to the Claimant that the key outcome of the disciplinary hearing was that he had chosen to withhold information about his bankruptcy as he had a number of options available to him to disclose but failed to do so. The Claimant told the Tribunal that "my option was to tell the neutral grievance manager" and therefore he denied that he had chosen to withhold the information. Mr Price confirmed in cross-examination that charges one and two were matters of fact and the third charge was a matter for him to decide and he concluded that the Claimant "*had an opportunity to disclose pre or at the time, whether that would change I don't know. I believe trust and integrity had gone."*

103. The Tribunal noted that Mr Price carefully considered all the evidence before him in respect of the Claimant's ability to disclose his bankruptcy to the Respondent. On page 646 in the dismissal letter he concluded that, "*I have carefully considered your point regarding the stigma attached to a bankruptcy order, coinciding with your disability. Whilst I full appreciate that bankruptcy would not be a pleasant process, this still does not exempt you from communicating with the Company regarding your official declaration."* This quote reflected that Mr Price had considered the possible adverse impact that the Claimant's disability had on his ability to disclose. After hearing all the evidence he concluded that it did not exempt

> or exclude the Claimant from taking the necessary steps to disclose. He also concluded that the Claimant's evidence that he was waiting for a 'neutral person' was not credible because he found that Ms Hayes Head of HR contacted the Claimant on the 14 February 2018, who was independent, but he failed to disclose this to her. He concluded that the Claimant had no intention of disclosing his bankruptcy until the facts were put before him.
>
> 104. It was put to Mr Price in cross-examination that there was no obligation to disclose bankruptcy (as he had said in the hearing) and he replied, *"you refer to the lack of policy and I understand that but I believe it is common knowledge in the industry. I felt that someone who had been in the industry for so long would know that. I felt that the trust had gone."* Mr Price accepted that he felt that the Claimant had acted irresponsibly throughout the process. The Tribunal noted that at the Tribunal hearing the Claimant continued to suggest that he was under no obligation to disclose his bankruptcy to the Respondent.
>
> 105. Mr Price was asked in cross-examination about the sanctions he considered, and he confirmed that he considered all sanctions including a final written warning, but the Claimant was unable to hold a licence under First Complete. He concluded that the only option was dismissal.
>
> 106. The Claimant then lodged an appeal on 25 July 2018 (pages 655-656) and he specifically referred to reference being made to the FCA guidelines which were not provided at the time. He also referred to what he described as the 'lack of policies' saying that there was no policy that required an employee to disclose bankruptcy and nothing to state that the facts that had led to his dismissal amounted to a conduct issue. The Claimant also referred to procedural breaches including failure to follow the ACAS Code in both the grievances and disciplinary process." (original emphasis)

16. The claimant appealed and his appeal was heard by a Risk and Governance Manager, Helen Martin, who upheld the decision to dismiss. The tribunal said this in particular about her decision:

> "108. Ms Martin upheld the decision to dismiss (page 673-6). The Tribunal saw the letter dismissing the appeal dated 14 August 2018. In her statement at paragraph 12 Ms Martin stated that she found that the Claimant was made bankrupt on the 29 January 2018 and was contacted by the Respondent after they discovered this on the14 February 2018. She concluded that the Claimant had a sufficient opportunity to disclose this to the Respondent and he voluntarily chose not to do so. Although she stated that the Claimant had told her that it was his intention to bring the matter to the attention of a neutral party dealing with the grievance, she concluded that it was 'more likely than not' that the Claimant was aware that he should have notified the Respondent of his bankruptcy. She did not believe that waiting for a neutral person was a valid reason to delay disclosure.
>
> 109. Ms Martin considered the Claimant's point about the FCA Handbook and his submission that it did not contain a rule that the occurrence of bankruptcy meant that a person would fail the fit and proper test. She also considered his submission that there was no 'rule' that required him to disclose his bankruptcy. She concluded

> that these points did not assist his case as the Respondent and PRIMIS set their standards higher than that required by the FCA rules and guidance. Ms Martin also considered the Claimant's wider experience and his prior employment in the regulated sector for a number of years and concluded it was likely he would have been subject to the application of structured training and supervision programmes which would have enforced the high standards required of those performing a regulated activity. She concluded that he did not require a formal procedure to inform him of the requirement to disclose and that "rather you were already aware that it should be made and chose not to approach your employer." The Tribunal noted that the appeal outcome was long and detailed and dealt with every point the Claimant took to the appeal. It was sufficiently detailed and thorough to overcome any minor procedural defect in the disciplinary procedure."

17. After a self-direction as to the law and a lengthy section dealing with the disability discrimination claims, the tribunal turned to the unfair dismissal claim. The tribunal said:

> "150. Turning to the claim of unfair dismissal, the Tribunal have found as a fact that the Claimant had worked in regulated roles in the financial sector prior to working for the Respondent and was aware of the fitness and propriety tests. He also confirmed in cross-examination that he was aware, having been taken to the documents, that the Respondent would carry out regular checks on his fitness and propriety and not only at the onboarding stage (see above at paragraph 33). We heard compelling evidence from Ms Martin and Mr Price of the importance of financial soundness of advisers in sales roles in the financial sector and this was also the consistent view of Mr Trantum. The Tribunal also noted that Mr Cox also impressed upon the Claimant the importance of the compliance standards when reasonable adjustments were discussed and agreed. The Claimant had before him consistent and credible evidence to show that the standards relating to fitness and propriety were considered to be of paramount importance to the Respondent. The Tribunal were told that where an employee is employed to sell financial products on commission, any financial distress could lead to a lack of objectivity in the advice given. We heard that the fitness and propriety rules were introduced to protect consumers and we again saw consistent evidence to support this. The Tribunal accept the evidence of Mr Price that non-disclosure of bankruptcy would be a material issue for the Respondent.
>
> 151. It was the Claimant's evidence to the Tribunal that he was going to disclose his bankruptcy however he put to the Respondent that he was under no obligation to do so in the disciplinary and in the appeal hearing. We preferred the consistent evidence of the Respondent that the Claimant was aware of the obligation to disclose and he did not need a written procedure or a policy to inform him of the importance of doing so. He had been informed at the onboarding stage that the Respondent was an appropriate representative of First Complete, who was regulated by the FCA and the fitness and propriety test was conducted by them. Later when the Claimant's bankruptcy was discovered, his authorisation was terminated thus making it impossible for him to continue to act as an adviser.
>
> 152. The Respondent has shown a potentially fair reason to dismiss and we accept that it was misconduct. The Tribunal also found as a fact that the charges that the

> Claimant faced were potentially so serious to be capable of amounting to offences of gross misconduct, taking into account the role the Claimant performed, the sector in which he worked, and the standards imposed by the Respondent of its advisers."

18. The tribunal went on to find that the disciplinary process followed overall was fair, and rejected certain particular criticisms of it raised by the claimant that have not been pursued on appeal. Its further findings and conclusions then included the following:

> "155. The Claimant had an opportunity to make all representations he wished to put forward and we are satisfied that they were considered, and an outcome delivered on all the points he raised. The Claimant complained that his mitigation was not considered however we have found as a fact above that this was dealt with in the hearing and the conclusions appeared in the decision letter. The Claimant also suggested in closing submissions that his dismissal was a foregone conclusion due to the email sent by Ms Thompson to indicate he had left the business in February 2018. We have dealt with this point above and have concluded that the Claimant's grievance on this point was upheld and Ms Thompson was required to provide an apology for her conduct. The Tribunal also considered that those dealing with the disciplinary and appeal were independent having no line management responsibility for Ms Thompson or the Claimant. There was no evidence to suggest that Mr Price or Ms Martin had predetermined the outcome or that they were partial in any way. Both handled the process fairly and the conclusions reached were detailed and were formed after a thorough analysis of the evidence before them. There was therefore no evidence to suggest that dismissal was a foregone conclusion or that the outcome was in some way predetermined.
>
> 156. We were satisfied that Mr Price considered alternatives to dismissal (as did Ms Martin). The Respondent was entitled to conclude on the evidence that the Claimant's actions were culpable, the evidence suggested on balance that he was not going to voluntarily disclose his bankruptcy. Having reached that conclusion the Respondent was then entitled to conclude that the Claimant had breached the duty of trust and confidence and therefore dismissal was considered to be the appropriate sanction in all the circumstances."
>
> 157. The Claimant referred in his closing submissions to the failure to disclose the occupation health report (which was in the bundle at page 590 dated the 26 June 2018), which the Respondent received on 18 July 2018). Although there was no evidence that this report was disclosed to Mr Price or Ms. Martin, there was nothing in the report which was material to the facts and issues before the hearing and appeal. The OH report indicated that a reasonable adjustment should be made to allow him to be accompanied by a member of his family and this adjustment was put in place. There was no evidence to suggest that the failure to share the OH report with others resulted in a procedurally unfair dismissal or that it resulted in the Claimant being disadvantaged in the disciplinary process."

19. The tribunal added a finding that the claimant was able to make all representations he felt to be appropriate at each hearing in relation to his disability, and the impact that this had had on his

ability to disclose, and to this extent he was not materially disadvantaged during the process.

20. In its final substantive paragraph the tribunal said this:

> "159.The Tribunal were reminded by the Respondent that the Tribunal is not entitled to substitute their view for that of the Respondent. Our role is limited to considering whether the dismissal fell within the band of reasonable responses open to this employer. We conclude that the decision to dismiss, although harsh fell within the band of reasonable responses considering the responsible position held by the Claimant and the strict rules applied by the Respondent to their financial advisers. We heard that the Respondent applied a high standard of conduct to its financial advisers and expected them to comply with the FCA rules even if they had not been expressly referred to in any policy or contractual document. The Respondent was entitled to expect a high standard of propriety from its employees and this had been communicated to the Claimant at the start of his employment and during the discussion regarding reasonable adjustments and in compliance meetings. The Tribunal has also found as a fact above at paragraph 46 that Mr Cox made it clear to the Claimant on the 3 April 2017, when discussing what was described as 'poor work performance' that there could be no relaxation of Compliance standards as they were in place to protect customers and the Company, had the Claimant been in any doubt as to what they were and whether they applied to him he could have asked but did not do so. The Respondent was entitled to conclude on the evidence before them and on the balance of probabilities that the allegations were proven, and dismissal was a reasonable response."

21. The tribunal concluded that the dismissal was both procedurally and substantively fair.

22. The following aspects are raised by the grounds of appeal that are live before me, either in the text of the grounds themselves, or by way of further points highlighted by the judge at the preliminary hearing as coming under their general umbrella.

23. First, an issue arises which provides context to the substantive challenge as to what the tribunal found to be the reason or principal reason for dismissal. The disciplinary charges raised two matters of substance, being, first, the claimant's failure to notify the respondent of the bankruptcy, and, secondly, the inability to operate as a financial consultant due to the loss of authorisation with First Complete. The disciplinary charges also referred to breakdown of trust and confidence, but this was said to be a consequence of either or both of those two matters.

24. In the course of submissions the claimant referred me to an observation in **Leach v The Office of Communications** [2012] ICR 1269 to the effect that an employer cannot seek to rely on a bald assertion of breakdown of trust and confidence if the substance of the matter said to have led to such

a breakdown is not properly identified or cannot properly itself be relied upon. But, as I will describe, it seems to me that the respondent was not seeking before the tribunal to rely on this as a freestanding ground or a freestanding reason why it dismissed.

25. As to what the tribunal found was the reason or principal reason for dismissal, the tribunal did not expressly identify it in those terms. However, I agree with Mr Bryan that, reading various passages and the decision as a whole, it is clear that the case that was advanced at the tribunal hearing was that the reason or principal reason for dismissal was the view that was taken of what was regarded as a conscious decision by the claimant not to disclose the fact of his bankruptcy; and it is clear that the tribunal found that this was indeed the true reason or principal reason, as a matter of fact, why the claimant was dismissed, and why his appeal against dismissal was rejected.

26. This is the feature that repeatedly recurs, for example, in the tribunal's account of what Mr Price said in cross-examination, and in particular passages of the dismissal letter that were cited at, for example, paragraphs 100, 103 and 104, and in its account of Ms Martin's reasons for rejecting his appeal at paragraphs 108 and 109. It is also (though that complaint is not the subject of this appeal as such) reflected in the tribunal's consideration of a complaint that the dismissal was an act of discrimination because of something arising from his disability. The claimant's case was that his disability prevented him from disclosing his bankruptcy or inhibited him from doing so to a person who was in his view non-neutral. That was rejected by the tribunal at paragraphs 141 and 144.

27. The tribunal, elsewhere in its decision at paragraphs 150 and 151, accepted that non-disclosure of bankruptcy would be a material issue for the respondent and focused there on this aspect, leading up to its conclusion that the reason for dismissal was misconduct at paragraph 152; and this focus is again reflected in its findings as to culpability at paragraph 156.

28. Although the tribunal ought to have stated in terms what its factual finding was as to the reason or the principal reason for dismissal, I think it is clear from all of this material, and other passages, that the tribunal did find as a fact that the reason for dismissal was what the respondent believed was

a conscious decision by the claimant not to disclose the bankruptcy.

29. That being so, I agree with Mr Bryan that this in turn answers certain of the particular concerns that were raised by DHCJ Mansfield QC when directing a full hearing of the grounds that are before me. In particular, he was concerned that, if the decision of PRIMIS to revoke the claimant's licence was regarded as the principal reason for dismissal, then that could not be categorised as a reason relating to conduct, and further questions arose as to whether PRIMIS/First Complete had concluded that the licence should be terminated on the basis of insufficient information about the circumstances of the non-disclosure and/or a misapprehension that the claimant was in a category of regulated advisor that did not actually apply to him. But, given what I conclude was, on a fair reading, the tribunal's proper finding as to the principal reason for dismissal, being the deliberate non-disclosure of the bankruptcy, those particular concerns voiced by DHCJ Mansfield QC fall away.

30. Central to what are now grounds 1 and 2 of the appeal is a challenge to the tribunal's conclusions that the respondent properly regarded the claimant's failure to disclose his bankruptcy as a culpable matter, because Mr Price and Ms Martin considered that he knew or ought to have known that it was a significant development that would be of serious concern to the respondent, and about which he ought to have informed it; and that the respondent was entitled to regard the failure to do so as so serious as to warrant the sanction of dismissal.

31. Before considering that in more detail, I should interpose that, given the finding of fact as to the reason for dismissal, I accept that the tribunal properly categorised that as a reason relating to conduct, because it related to the conduct of the claimant in failing to make the disclosure. The tribunal also, as I have said, made a proper finding of fact not only that this was the reason for dismissal but that it was factually true, as it was never disputed that the claimant had not disclosed the bankruptcy to the respondent.

32. It seems to me that the tribunal also made a finding, with which I cannot interfere, that it accepted on the basis of the evidence, both of the dismissing manager and the manager who dealt

with the appeal, and also of others – including mentions of the evidence of Mr Cox and Mr Trantum – that management, and in particular the managers who dismissed and dealt with the appeal, did regard the failure to disclose the bankruptcy as something that was serious, and that they considered the claimant knew or should have known that he should be disclosing.

33. However, the focus of the appeal then becomes the question of whether the tribunal properly concluded that those managers were entitled to take that view. The claimant, in particular by ground 1, asserts that there was no documentation by way of contractual or policy documentation expressly requiring him to disclose the fact of his bankruptcy. Hence, he argues, that failure could not properly be regarded as a breach of express term, but nor could it be regarded as a breach of an implied duty under the contract of employment.

34. There was ultimately no dispute before the tribunal that there was no express term or policy provision to that effect. Although initially there was some misunderstanding on the part of PRIMIS as to what sort of advisor the claimant was, this was cleared up with Ms Todd. However, ultimately the respondent's case before the tribunal was that it was entitled to take the view that, even though he was not specifically required by any express term or express written policy to disclose his bankruptcy, the claimant should nevertheless have appreciated that, over and above the formal standards required of him by any such documentation, this was the sort of thing that the respondent would regard as a matter of serious concern, and would have expected him to disclose. That case was accepted by the tribunal in the sense that it held that the respondent was properly entitled to take that view.

35. In his submissions, Mr Bryan said that that was an express conclusion of the tribunal with which I could not interfere. I should not seek to go behind it to interrogate it on the basis of what evidence was before the tribunal, but in any event it was clear that there *was* an evidential foundation for that conclusion. He referred to five features that were referred to in the course of the tribunal's decision and/or are apparent from evidence that was before the tribunal and was also in my bundle.

36. First, the tribunal had evidence that when the matter was initially raised with the claimant, he

indicated that he had been intending to disclose the fact of his bankruptcy, even though he did not accept that he was formally obliged to do so. Mr Bryan submitted that this evidence could properly inform the tribunal's conclusion that the claimant himself recognised and acknowledged that there was some expectation on him to share the fact of his bankruptcy with the respondent.

37. Secondly, the tribunal referred to reliance placed by the respondent on the claimant having had previous experience of working in the financial services sector before he came to work for it. In particular there was a reference at paragraph 34 to his previous employment, on the FCA register, at Lloyds Banking Group and a reference at paragraph 109 to Ms Martin having considered his wider experience and prior employment in the regulated sector for a number of years.

38. Thirdly, there was evidence before the tribunal that, when the claimant joined the respondent, the paperwork that he had to fill in included a financial services employment form which included a statement that financial consultants, mortgage advisors and general insurance consultants would be subject to regular checks, typically annually, to verify ongoing fitness and propriety as part of the company's obligation in financial monitoring. This was evidence that the claimant was aware that these were aspects that were important to the respondent, and which would be the subject of ongoing monitoring in his role.

39. I should interpose that the tribunal found that, prior to the point at which he became bankrupt, and by way of a reasonable adjustment, the claimant ceased to be involved in mortgage broking, but continued to be involved in dealing with other insurance policies, so that this guidance continued to apply to him.

40. Next, Mr Bryan referred to the evidence of Mr Price, referred to at paragraph 104, that he considered that it was common knowledge in the industry that something like bankruptcy would be a matter of concern in relation to the employment of a financial advisor.

41. Finally, he referred to the evidence that when the claimant returned to work from his previous period of sickness absence, and adjustments of his responsibilities and performance obligations were

discussed, Mr Cox explained that there could be no allowance made in relation to compliance standards, which were there to protect advisors, customers and the company (see paragraph 46).

42. The claimant made a number of points in response during the course of submissions to me today, including: that he was simply wishing to be open about his bankruptcy when the time was opportune to disclose it, not acknowledging that he had any kind of formal or informal obligation to disclose it; that his previous experience in the financial services sector was in a very different FCA-regulated environment and was therefore not relevant; that the onboarding documentation told him that there would be ongoing monitoring of fitness standards, but not that he had a proactive duty to disclose; that he disagreed with Mr Price about what was common knowledge in the industry; and that the discussion with Mr Cox about standards of compliance in the context of his return to work was more specifically about matters to do with ongoing reviews of cases with which he was dealing.

43. However the difficulty which the claimant faces is that all of these were matters for the evaluation of the employment tribunal, which heard and considered the witness and documentary evidence, and whose task it was to make findings of fact. These are not matters that can be reopened and reargued at the appeal stage. Indeed, as Mr Bryan rightly reminded me, I should not assume, even were I not shown it, that the tribunal did not have evidence to support its findings, although in fact he had shown me that there was some evidence to support these features of its findings.

44. Mr Bryan's overall point was that this material was more than enough to support the tribunal's conclusion that the respondent was entitled to take the view that, although the claimant was not subject to any specific express policy or regulatory requirement requiring him to disclose the fact of his bankruptcy, he nevertheless ought to have appreciated that the respondent would regard this as a serious development, that it would want to know about, and that should have been disclosed to it. Nor can I go behind the tribunal's finding, accepting the respondent's rejection of the particular reasons he gave it as to why he was not deliberately withholding this information; nor the tribunal's finding of fact that the respondent was entitled to take the view that this was a conscious decision on his part.

45. Again the claimant faces a double obstacle. Firstly, in the employment tribunal, the issue was not what the employment tribunal might have made of the claimant's conduct. Rather, its first task was to make findings of fact, as it did, about what the respondent thought of it. Secondly, the tribunal's findings of fact about that are themselves not amenable to be reopened upon appeal.

46. Pausing there, I should deal with one other matter raised by the claimant by reference to **The Basildon Academies v Amadi** UKEAT/0342/14/RN. He seeks to rely on that case to argue that the tribunal was wrong to accept that the employer was entitled to treat him as being under a duty to disclose this matter. I have to some extent addressed this point already, insofar as I do not consider it to be decisive that there was no express contractual provision requiring disclosure. The issue for the tribunal in the context of an unfair dismissal claim was whether the respondent was reasonably entitled to take the view that he ought to have appreciated that he would be expected to disclose something of this sort, notwithstanding that there was no express term requiring him to do so.

47. In addition, I do not think that **Amadi**, which concerned whether there is a contractual obligation to disclose a disputed allegation of misconduct by a third party, assists the claimant. It does not demonstrate that, for the purposes of an unfair dismissal claim, a respondent cannot be found properly to have formed the view that it expected an individual to disclose a factual matter such as a bankruptcy, and reasonably formed the view that he would or should have understood this.

48. A further limb of this challenge is raised by ground 2. The thrust is that the tribunal erred by proceeding on the basis that there was some obligation to disclose the matter of bankruptcy imposed on the claimant, through his being directly or indirectly regulated by the FCA, whereas in fact there was nothing in the FCA's regulatory regime that was applicable to him, that either touched on the significance of being bankrupt as such, or required someone in his position to disclose bankruptcy.

49. The respondent did not dispute that the claimant was factually right about that, as such. Part of the claimant's case, however, was that the tribunal had therefore erred, because it should have come to the conclusion that he had been unfairly dismissed on the basis of a false premise. He referred

me in particular to **Premachandra v HBOS Plc** UKEAT/0090/15/RN, in which a dismissal on the false premise that someone was subject to certain requirements of the FCA, upheld by the tribunal as fair on that same false premise, was overturned by the EAT.

50. This point did initially give me some real cause for concern. I can certainly see why the claimant focused very much upon it. The materials before the tribunal show, and I do not think this is or was really disputed, that the respondent initially got off on the wrong foot in exchanges with PRIMIS, in which it formed the impression that FCA requirements, or requirements of PRIMIS, to disclose a bankruptcy applied. That later was clarified as not being the case once PRIMIS had understood that he was in fact working in the Estate Agency Division. Further, in the course of the disciplinary hearing, as the evidence before the tribunal showed, and indeed Mr Price accepted, Mr Price asked the claimant various questions about his understanding of FCA standards. The FCA was also referred to more than once in the dismissal letter.

51. However, ultimately the difficulty that the claimant faces in this regard is that the tribunal had to consider the fairness of the end to end dismissal process. The evidence was that the claimant himself assiduously raised this point at the internal appeal stage, having himself checked the position with the FCA in an online chat, and then tendered a copy of his online chat as part of his appeal case. The tribunal found in terms at paragraph 109 that Ms Martin considered the claimant's point about the FCA handbook not containing any relevant provisions applicable to him, and accepted that point, but concluded, for the reasons that the tribunal summarised there, that this did not assist his case. This therefore plainly was taken on board at the internal appeal stage.

52. Indeed, the tribunal went further and made findings, at paragraph 96, that Mr Price had not in fact attached the weight or significance to the FCA that the claimant contended. Plainly it was the claimant's case before the tribunal that Mr Price was restating his position after the event; but it was for the tribunal to consider that evidence and to make findings of fact about what they considered had in fact been the significance that he had attached to the FCA. They found there that this part of the

discussion was no more than by way of testing the claimant's appreciation of the significance attached to fitness and propriety generally in the financial services advice environment.

53. In any event, as I have noted, the tribunal had to consider the end to end process, and made clear findings about how this matter, which was expressly raised by the claimant at the internal appeal stage, was approached by Ms Martin.

54. I also initially had some concerns nevertheless that the tribunal itself might have been labouring under some confusion or fundamental misunderstanding about this issue, given particularly the copious references to regulation by the FCA in the opening paragraphs of the tribunal's findings of fact. However, ultimately, reading the decision as a whole, and in particular the conclusions, it seems to me that the tribunal did have this point well on board, not only having regard to its express consideration of the matter having been raised by the claimant at the appeal stage, and what Ms Martin made of it, but also in its references at paragraph 151 to the evidence of the respondent that the claimant was aware of the obligation to disclose, and he did not need a written procedure or a policy to inform him of the importance of doing so; and again to similar effect at paragraph 159.

55. It therefore seems to me that, ultimately, the tribunal did not come to its conclusions on the basis of a false factual premise, as happened in **Premachandra**, but did so on the basis of an understanding that the decision to dismiss was upheld on the basis that it was considered that the claimant ought to have appreciated the need to disclose this matter, notwithstanding that he was correct to say that it was not a specific FCA requirement on him in his particular role.

56. I turn to ground 3. This concerns the handling of mitigation. In particular, the claimant says that the tribunal erred, because it should have concluded that he was never asked specifically what points he wanted to make in mitigation, and he did not have a fair opportunity to advance his points.

57. Mr Bryan in his submissions notes that the tribunal considered this, but rejected it in terms. See paragraph 155, where the tribunal found that this issue was dealt with at the disciplinary hearing and addressed in the dismissal letter. The claimant was right to say that it had not been raised by Mr

Price expressly at the hearing, as he admitted, in the sense that he had not specifically asked the claimant whether there were any particular points that he wanted to make in mitigation. But the tribunal properly found, submitted Mr Bryan, that there had nevertheless been a fair opportunity for such points to be raised, and such points as the claimant wished to make were also considered.

58. Once again, the tribunal, on the face of its decision, considered this aspect and made a specific finding about it. I should not assume, unless it were demonstrated, that it did not have the evidence to support that conclusion. In fact, however, Mr Bryan showed me material, in particular the note that was produced, of the discussion at the disciplinary hearing, including the version amended by the claimant. This included the claimant being asked about the circumstances leading up to his bankruptcy. It also included the claimant being asked when he intended to inform his employer that he had been made bankrupt, and responding "when a neutral person was appointed to hear my grievance"; and, further on, saying that he had asked HR to explain the implications of his bankruptcy and was also waiting for a neutral person to speak to about it; and that due to his social phobia these conversations were very difficult, especially with the stigma being attached to it.

59. I note that, given that the tribunal's conclusion was that the reason for dismissal was the non-disclosure, its focus was properly on whether the claimant had a fair opportunity to put forward the mitigating circumstances he might wish to raise about the failure to disclose the fact of the bankruptcy, rather than being on the reasons for it, and circumstances leading to it. It seems to me that the tribunal did have evidence to conclude that the former *was* a topic raised by the claimant, and indeed that he put forward his case about that during the course of the disciplinary hearing.

60. The minute also shows that the claimant was given the opportunity to add anything else he wanted to before the hearing concluded. The evidence also was that the claimant's statements that he had intended to raise the bankruptcy with an independent grievance manager as and when appointed, and that his disability had inhibited him from disclosing it, and that he was also inhibited by the feeling of stigma, were also all referred to in the dismissal letter. Although the claimant's case was

that they were, unfairly, not treated as good mitigating circumstances by Mr Price, the specific ground of appeal is that the tribunal was not entitled to find that there had been a fair opportunity to raise them, and that they had received consideration, as Mr Price had not raised mitigation expressly as a topic of discussion in those terms. The tribunal, however, made a proper finding of fact about that, which I conclude was supported by evidence and material that was before it.

61. The claimant had two further particular points that he raised in submissions. The first was that there was an occupational health report which had been delivered to the respondent prior to the conclusion of the disciplinary appeal stage, which he said contained further material that would have lent further support to his case on mitigation, but was not considered. This included references to various aspects of his personal circumstances, the ill health of his parents, one of whom passed away during the course of the disciplinary process, and a number of aspects of his domestic and familial circumstances. The claimant argued that the tribunal was therefore wrong to discount the occupational health report in the way that it did at paragraph 157.

62. However, it seems to me that the tribunal was entitled to take the view that the claimant had had sufficient opportunity to raise any of these matters, had he wanted to do so, at the disciplinary hearing. I cannot see that the tribunal should have concluded that the fact that the occupational health report was not passed to the managers concerned in any way prevented him from raising those matters in the context of the disciplinary process had he wished to do so, bearing in mind that he was asked about the reason for his non-disclosure of the bankruptcy, and did put *some* reasons forward.

63. Lastly, on this aspect, the claimant raised a point by reference to **Brito-Babapulle v Ealing Hospital NHS Trust** [2013] IRLR 854. He said that it was unfair for the tribunal to have made the assumption that, because the respondent regarded the matter as one of serious misconduct, therefore it was within the band of reasonable responses to dismiss, without having given proper consideration to the aspect of mitigation. However, as Mr Bryan correctly submitted, the specific criticism of the tribunal in **Brito-Babapulle** was that it had gone straight from the proposition that the employer had

made a finding of gross misconduct, to the proposition that it was therefore inevitably within the band of reasonable responses to dismiss, without considering whether there had been sufficient examination by the employer of potential mitigating circumstances.

64. In this case the tribunal, for reasons I have explained, made a finding which it was entitled to make, that there had been sufficient opportunity for the claimant to put forward mitigating circumstances, and consideration of this. The tribunal plainly must have had that in mind when coming to its ultimate conclusion that dismissal was within the band of reasonable responses.

65. In conclusion, I appreciate that the claimant feels very aggrieved that he has lost his job and that the tribunal did not find him to have been unfairly dismissed. I also appreciate that he felt particularly aggrieved at what he says were errors that were made, particularly at early stages in the disciplinary process and in communications with PRIMIS, about whether there were specific requirements of the FCA or PRIMIS that touched upon his bankruptcy and that applied to him.

66. However, for the reasons I have explained, it seems to me that the tribunal properly came to the conclusion that, ultimately, in the end to end process, the respondent dismissed him because it came to the view that he had consciously decided not to disclose his bankruptcy. It came to the view that this was a serious matter so far as it was concerned, notwithstanding that it was not specifically the subject of any express procedure or term relating to him. It came to the view that he ought in all the circumstances to have appreciated that it would regard the matter as serious and one that needed to be disclosed. The tribunal properly came to the conclusion that the respondent reached that view after a fair overall process in which he had also had a fair opportunity to make points in mitigation; and the tribunal properly came to the conclusion that the respondent in all the circumstances was entitled to view this as conduct sufficiently serious to warrant dismissal.

67. The EAT can only interfere with an employment tribunal's decision where there is an error of law. The EAT is not a forum in which the arguments about evidence or findings of fact made by the employment tribunal can be rerun or reopened. I am therefore bound to conclude that the tribunal in

reaching its decision did not err in any of the particular ways alleged by the grounds of appeal that were live before me. Therefore, I am bound to dismiss this appeal.