



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr P Gee

**Respondent:** Santander UK Plc

**HEARD AT:** Bedford ET      **ON:** 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 15<sup>th</sup>,  
16<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup> & 23<sup>rd</sup> November  
2016

24<sup>th</sup> & 25<sup>th</sup> November 2016 (No  
parties in attendance)

4<sup>th</sup> & 5<sup>th</sup> January 2017 (No parties  
in attendance)

**BEFORE:** Employment Judge Ord

**MEMBERS:** Mrs M A Russell  
Mr N Cochrane

## REPRESENTATION

**For the Claimant:** Mr P Gee (In person)

**For the Respondents:** Mr P Nichols Q.C. (Counsel)

## JUDGMENT

It is the unanimous decision of the Employment Tribunal that

1. The Claimant's complaint that he was unfairly dismissed is not well founded and is dismissed.
2. The Claimant's complaint that he was the victim of unlawful discrimination on the ground of his age or his sex or his race are not well founded and are dismissed.

## REASONS

1. The Claimant was employed by the Respondent from 12<sup>th</sup> November 2007 until his employment terminated by virtue of his written resignation dated 6<sup>th</sup> May 2016. His resignation was given with immediate effect.
2. The Claimant said that following complaints made by a colleague Kamani Perera ("KP"), he was discriminated against, by comparison to KP, in particular during grievance and disciplinary processes. The Claimant also brought a claim for unfair dismissal alleging that his resignation was a dismissal within the meaning of section 95 (1)(c) of the Employment Rights Act 1996.
3. The Claimant brought his claim by the presentation of a single claim form with attached particulars on 30<sup>th</sup> March 2016 having commenced early conciliation on 26<sup>th</sup> February 2016, the conciliation certificate being dated 3<sup>rd</sup> March 2016.
4. Thus the Claimant's original complaint to the Tribunal preceded his resignation. On 27<sup>th</sup> May 2016 at a Preliminary Hearing the Claimant applied to amend his claim form in accordance with a draft sent to the Tribunal and the Respondent on 10<sup>th</sup> May 2016 to include a claim for (constructive) unfair dismissal to which the Respondent did not object. The amendment was allowed.
5. The Claimant's Allegations

### 5.1 Unfair Dismissal

The Claimant relied on five matters as constituting a fundamental breach of contract by the Respondent being:

- 5.1.1 That he had been "subject to internal proceedings with the Respondent since August 2015" and that he had cited discriminatory treatment at the hands of the Respondent which had led to excessive stress and anxiety leaving him unable to work".
- 5.1.2 The handling of complaints raised by KP and the investigation into them that commenced on 15<sup>th</sup> September 2015. The Claimant said that this amounted to discrimination and that the subsequent failure to consider that allegation of discrimination during his hearing, appeal and grievance was, in the Claimant's submission a series of acts of discrimination.
- 5.1.3 An alleged failure to properly investigate or conclude the Claimant's formal grievance of 10<sup>th</sup> November 2015 which, as stated in a letter from the Respondent (Grace Smith) of 29<sup>th</sup> April 2016 was still in the process of further investigation following an outcome meeting on 2<sup>nd</sup> March 2016.

- 5.1.4 The Claimant said that the last straw precipitating his resignation was the Respondent's "abject failure to address the Claimant's grievance of 30<sup>th</sup> March 2016 (acknowledged 4<sup>th</sup> April by Caroline Hill) in breach of its own internal grievance procedures and in the knowledge of the Claimant's state of health given the recent history between the parties".
- 5.1.5 As a result the Claimant concluded that his employment with the Respondent was no longer tenable given the Respondent's fundamental breaches of his contract of employment. The Claimant stated that he accepted the Respondent's breach by way of his resignation with immediate effect on 6<sup>th</sup> May 2016.

## 5.2. Direct Discrimination

The Claimant said that he had been treated less favourably than KP relying upon the protected characteristics of age, sex and race. The Claimant is a white male and at the relevant time was aged 45 years. KP was a non-white female aged 54 years. In particular the Claimant said,

- 5.2.1 That he was subject to stage 3 disciplinary proceedings for alleged breaches of IT security whereas KP was guilty of the same breach of security but was not subject to stage 3 disciplinary process (or any disciplinary process at all).
- 5.2.2 That the Respondent was trepidacious about pursuing KP for fear of allegations of discrimination.
- 5.2.3 That had KP been a 45 year white British male she would have been treated in the same way as the Claimant was.

## 5.3 Harassment

The Claimant alleged that he had been subjected to unwanted conduct on the ground of sex, creating an intimidating, hostile and defensive environment for him which manifested itself:

- 5.3.1 Through the way in which female members of the Special Investigations Unit, Head of Financial Crime and Human Resources approached the investigation of KP's grievance against the Claimant.
- 5.3.2 By the way the same female members of staff failed to provide the Claimant with the relevant internal policy he was alleged to have breached and further asking in advance of the disciplinary hearing that the Claimant admits that a breach had occurred.
- 5.3.3 By Human Resources insisting that an age discrimination allegation made by KP be investigated at stage 3 of the disciplinary process despite it having been addressed and

resolved to the satisfaction of the Chair of KP's grievance hearing.

5.3.4 By Human Resources seeking downgrade the Claimant's performance rating to IP (the lowest grade) despite the Respondent's guidance and policy frequently asked questions stating that a half year rating should be used for employees on sickness absence or under disciplinary warning/proceedings.

5.3.5 The Claimant stated that he believed the unwanted conduct of female members of the Special Investigations Unit, Head of Financial Crime and Human Resources towards him had been on the grounds of his sex and that a female employ in the same situation would not have been subjected to "such disparity of treatment".

## 6. The Issues

Based on the allegations contained in the Claimant's amended claim form the issues to be determined by the Tribunal were as follows:

6.1 Did the Respondent act in breach of the Claimant's contract of employment by:

6.1.1 Subjecting the Claimant to discriminatory treatment in the context of internal proceedings, in particular, the handling of the complaint by KP and the hearing, appeal and grievance in respect of the matter generally.

6.1.2 Failing to properly investigate or conclude the investigation into the Claimant's grievance 10<sup>th</sup> November 2015.

6.1.3 Failing to address the Claimant's grievance of 30<sup>th</sup> March 2016.

6.1.4 If so, was any such breach repudiatory either individually or cumulatively.

6.1.5 As far as the Claimant relies upon the sequence of events as constituting a fundamental breach of contract by the Respondent what was the "last straw" and did that amount to blame worthy conduct.

6.1.6 Did the Claimant resign in response to any such breach without having unreasonably delayed in doing so?

6.1.7 Did his conduct affirm his contract of employment so as to waive any or all of the alleged breaches upon which he relies.

6.2. Was the Claimant treated less favourably on any of the grounds of age, race or sex than KP by being subjected to stage 3 disciplinary proceedings for the alleged breach of IT security when she was not subject to any disciplinary action even though both had, on the Respondent's case, acted in breach of the same policy. In particular:

- 6.2.1. Was there a difference in treatment between the Claimant and KP?
  - 6.2.2. If so, has the Claimant established fact in which the Tribunal could conclude that such different treatment was on the ground of any protected characteristic or characteristics
  - 6.2.3. Has the Respondent established to the satisfaction of the Tribunal a non-discriminatory reason for the difference in treatment.
- 6.3 Was the Claimant subjected to harassment on the grounds of his sex by any of the following acts (if such acts occurred):
- 6.3.1 The approach of female members of the Special Investigations Unit (SIU), Head of Financial Crime and Human Resources to the investigation of KP's grievance.
  - 6.3.2 The failure of the same people to provide the Claimant with the policy was alleged he had breached and asking him to admit that a breach had occurred.
  - 6.3.3 The requirement of human resources that age discrimination be investigated at stage 3 having been resolved at the hearing of KP's grievance.
  - 6.3.4 Human resources' attempt to downgrade the Claimant's performance relating to "improvable performance" ("IP") the lowest possible rating.

## 7. The Hearing

- 7.1 The Tribunal heard evidence from the Claimant and the following witnesses were called by the Respondent
- 7.1.1 Sally West, Investigations Specialist within SIU
  - 7.1.2 Susie Austin, HR Operations Business Partner
  - 7.1.3 Peter O'Gorman, Regional Director Business Banking
  - 7.1.4 Clive Hawes, Former Director of People Engagement, Technology and Operations
  - 7.1.5 Tom Snodgrass, Senior Risk Manager
  - 7.1.6 Grace Smith, HR Consultant.
- 7.2 A witness statement was submitted on behalf of the Respondent from Marco Mukherjee (Financial Crime Director and Money Laundering Officer) which the Claimant accepted and was taken as read.
- 7.3 All witnesses gave their evidence by reference to written witness statements which had been exchanged in accordance with instructions issued by the Tribunal. Reference was made to a substantial bundle of documents. The Tribunal expresses its gratitude to both Mr Gee and to Mr Nichols for their assistance in this case including the navigation of the substantial bundle of documents.

## 8. Case Overview

- 8.1 Although the volume of documents in this case was substantial the essential factual matrix of the case was relatively simple and many of the facts were not in dispute between the parties. The essential landscape of the case is as follows:
- 8.1.1 KP (who was a fixed term employee of the Respondent, her contract was to expire unless she obtained permanent work on 30<sup>th</sup> September 2015) reported to the Claimant who had been employed continuously by the Respondent since 12<sup>th</sup> November 2007.
  - 8.1.2 Both KP and the Claimant worked in the data team.
  - 8.1.3 On 18<sup>th</sup> May 2015 the Claimant wrote to Paul Jones (HR) by email raising a lengthy complaint regarding alleged favouritism towards another female by the Claimant in relation to day to day work and a recruitment process for a permanent position, Risk Reporting Analyst. She also mentioned at the end of the email, password sharing for log-in on to a laptop on the computer.
  - 8.1.4 Investigations into the alleged password sharing did not proceed for reasons connected to KP's continued desire for anonymity. Investigation was carried out into the recruitment process which was found to be "exemplary".
  - 8.1.5 On 24<sup>th</sup> August 2015 KP raised a second complaint relating to three matters. The first concerned a complaint about her rating given in a one to one meeting which she considered to be too low, the second was an allegation that the Claimant had made derogatory comments to her on the basis of her age and the third was that password sharing had taken place, the Claimant using his password and staff number when he was not at work and sending email from her email account.
  - 8.1.6 Investigation took place into KP's grievance. There was an outcome meeting on 19<sup>th</sup> September 2015 but the following day fresh allegations of a wide ranging nature were made by KP and as a result of that and other delays the final outcome letter was not sent until 4<sup>th</sup> November 2015 (KP having ceased her employment with the Respondent on 30<sup>th</sup> September 2015).
  - 8.1.7 Investigation into KP's grievance made a number of recommendations. It recommended disciplinary proceedings in relation to breaches of the IT policy, disciplinary action against the Claimant for age discrimination and a reduction in the Claimant's performance grading. The latter two recommendations were not accepted but disciplinary action was taken against the Claimant for breaches of the IT policy.
  - 8.1.8 The Respondent considered the Claimant's actions constituted potentially gross misconduct and thus the Claimant was subject to disciplinary action at "stage 3".

- 8.1.9 The Claimant admitted use of KP's passwords but explained the mitigating circumstances around the incident (business need to meet a deadline) and the circumstances in which KP had volunteered or given the Claimant her password. In the circumstances the Respondent considered that the appropriate sanction should be a stage 1 warning (the lowest level of formal action which can be taken under the Respondent's disciplinary policy).
- 8.1.10 The Claimant appealed that outcome unsuccessfully.
- 8.1.11 The Claimant had also brought a grievance, lodged on 10<sup>th</sup> November 2015 relating to the commencement of disciplinary proceedings against him and the fact that no action had been taken against KP for her own breach of the IT policy (which makes it an offence to share a password).
- 8.1.12 A meeting was held to deliver the grievance outcome on 2<sup>nd</sup> March 2016 but as a result of the terms of that meeting further investigations were considered necessary and on 30<sup>th</sup> March the Claimant lodged a further grievance.
- 8.1.13 The Claimant was called to an absence meeting on 11<sup>th</sup> April 2016, resigned on 6<sup>th</sup> May 2016 and received a written outcome of his grievance on 10<sup>th</sup> June 2016.
- 8.1.14 On 4<sup>th</sup> July he appealed against the outcome of the grievance but by agreement that appeal was not pursued.

## 9. The Law

- 9.1 Under section 94 of the Employment Rights Act 1996 every employee has the right not to be unfairly dismissed.
- 9.2 Under section 95 (1)(c) an employee is dismissed when that employee terminates the contract under which they are employed with or without notice in circumstances in which they are entitled to terminate the contract without notice by reason of the employer's conduct.
- 9.3 Under section 98 (1) in determining whether a dismissal is fair or unfair, the employer is to show the reason or if more than one, the principal reason for the dismissal and that it is a potentially fair reason for dismissal.
- 9.4 (Note: that in this case the Respondent did not seek to establish any potentially fair reason for dismissal, the Respondent relying upon their contention that the requirements of section 95 (1)(c) were not met.
- 9.5 Under section 4 of the Equality Act 2010 each of age, race and sex are protected characteristics.
- 9.6 Under section 9 of that Act, race includes colour.

- 9.7 Under section 13 of the Act (Direct Discrimination) a person discriminates against another if, because of a protected characteristic, they treat that person less favourably than they treat or would treat others.
- 9.8 Under section 26 of the Act (Harassment) a person harasses another if they engage in unwanted conduct related to a relevant protected characteristic and that conduct has the purpose or effect of violating the other's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.
- 9.9 Under section 26 (4) of the Act, in deciding whether the relevant conduct has that effect, each of the following must be taken into account:
- 9.9.1 The perception of the person harassed
  - 9.9.2 The other circumstances of the case
  - 9.9.3 Whether it is reasonable for the conduct to have that effect
- 9.10 Under section 136 of the Act, if there are facts from which a Tribunal could decide in the absence of any other explanation that a person has contravened a provision of the act, the Tribunal must hold that the contravention has occurred, but that provision does not apply if the person shows that they did not contravene the provision.
- 9.11 The Tribunal had brought to its attention a number of authorities, in particular:
- 9.11.1 *Madarassy v Nomura International plc* [2007] EWCA CIV33, concerning the application of what is now 136 of the Equality Act 2010 and the burden of proof thereunder.
  - 9.11.2 *The Law Society and Others v Bahl* [2003] IRLR640, concerning the need by a Claimant to establish a factual link between different treatment and a protected characteristic to cause the burden of proof to shift under section 136 and the importance of taking into account any non-discriminatory explanation for any detrimental treatment.
  - 9.11.3 *Richmond Pharmacology Limited v Dhaliwal* [2009] IRLR336, concerning the elements of liability for harassment under what is now section 26 of the Equality Act.
  - 9.11.4 *D W Goold (Pearmak) Limited v McConnell* [1995] IRLR516, confirming as an implied term of a contract of employment that employers would reasonably and promptly afford a reasonable opportunity to employees to obtain redress of any grievance, that that right is fundamental and that a failure to provide a procedure for dealing promptly with employee grievances can be a breach sufficiently serious to justify an employee in terminating their employment.
  - 9.11.5 *Chapman & another v Simon* [1994] IRLR124, reinforcing that the jurisdiction of an Employment Tribunal is limited to



complaints which have been made to it (in particular, that it is the act or acts of which complaint is made [in discrimination cases] and no other that the Tribunal must consider and rule upon).

- 9.11.6 *Nagarajan v London Regional Transport* [1999] 1AC501, confirming that a finding of direct discrimination does not require that the discriminator was consciously motivated in treating the Claimant less favourably if it could properly be inferred from the evidence that, regardless of the discriminator's motive or intention, a significant cause of the decision was the person's race and that discriminatory arrangements (albeit implemented through a non-discriminatory employee) may be sufficient to justify a finding that discrimination had taken place.

## 10. The Facts

Based on the evidence presented to the Tribunal we have made the following findings of fact:

- 10.1 The Respondent is a well known banking institution undertaking commercial and retail banking operations throughout the UK. It is part of the Santander group of companies which operates internationally.
- 10.2 In the UK access to any piece of computer equipment within the Respondent requires the use of two passwords (three in the case of a laptop computer).
- 10.3 For a laptop computer there is a "safe boot" password which is necessary to permit the laptop to function and is unique to the relevant piece of equipment.
- 10.4 In addition, each employee has an LAN password and a "black shield" password which are unique to the relevant user.
- 10.5 In the Respondent's Internet, Email and Workstations Acceptable Use policy, section 2.3 "Keep your password secure", it is stated that, "you must not allow anyone to undertake an activity on a company system while you are logged on and you must not undertake an activity on a company system while someone else is logged on" [subject to exceptions which have no relevance to the matters being considered by us].
- 10.6 In the Respondent's employee handbook, attention is drawn to the Acceptable Use of Internet policy and highlights requirements including "not using a workstation logged on with someone else's password" and "choosing secure passwords and not sharing these or writing them down. You must never disclose your password, even to your manager or colleagues from helpdesk".
- 10.7 Under the Respondent's disciplinary policy, employees are required to act in accordance with the company's policies and guidelines.
- 10.8 Further, under the disciplinary policy, a non-exhaustive list of allegations which "will always be considered as gross misconduct

- in the first instance. However, the specific circumstances of each case will be taken into account when deciding the appropriate outcome”, includes “breaches of IT polices”.
- 10.9 Examples of misconduct include, “minor breaches of IT procedures including rules governing use of emails, the intranet and company equipment where the nature of extent of the breach is not serious”.
- 10.10 Under the same policy the outcome of a stage 3 disciplinary hearing can include taking no further action, taking informal action such as training or support, issuing a warning at stage 1 or stage 2 of the disciplinary process, dismissal with notice (for procedural misconduct) or without notice (for gross misconduct) and demotion to a different role by agreement as an alternative to dismissal.
- 10.11 Stage 1 disciplinary warnings are “live” for 6 months and stage 2 disciplinary warnings for 12 months.
- 10.12 In 18<sup>th</sup> May 2015 KP raised a complaint via email to Paul Jones in the Respondent’s Human Resources team. The vast majority of the complaint was related to KP’s security of employment and an opportunity of a role as a Risk Reporting Analyst. She alleged that she would not be given a fair opportunity for that role because another person within the team (also female) was being given an interview and, she further alleged, that that person was being preferred in any process because she flirted with the manager (the Claimant). KP said that she had applied for the job and asked whether HR, “or someone” could monitor CV selection and the interviews for the job “because that way only the right person will get the job for the right reasons”.
- 10.13 Mr Jones’ reply to KP was that she should raise the matter as a formal grievance but she then later the same day sent the email to the Special Investigations Unit stating that HR had requested her to contact the whistle blowing helpline in order to protect her anonymity. There is no evidence at all that KP was given that information by Mr Jones or anyone else. Mr Jones’ advice was to raise the matter as a grievance.
- 10.14 On the following day, 19<sup>th</sup> May, KP made a further allegation which she said she had “forgotten” to add to her email, alleging that her manager had “hacked in” to her personal business accounts.
- 10.15 The only part of these allegations which were investigated at the time was the recruitment process for the Risk Reporting Analyst role. It was examined and found to be exemplary.
- 10.16 Forensic analysis of the use of IT equipment was carried out to determine whether or not unauthorised viewing of KP’s personal bank account had taken place. No such evidence could be gathered from the IT system.
- 10.17 The remainder of the allegations regarding password sharing, were not investigated. According to the information provided by SIU, who were charged with this investigation, this was because

- KP insisted that no member of the team should be spoken to as part of the investigation.
- 10.18 In subsequent correspondence when she raised her second complaint, KP alleged that she was told that the matter could not be investigated unless she agreed to waive her anonymity.
- 10.19 Based upon the simple points that both SIU and HR from time to time, investigate anonymous complaints (and indeed the whistle blowing policy specifically refers to anonymous complaints) we conclude that the reason why the first complaint was not further investigated was because KP insisted that SIU should speak to no member of the relevant team. Why SIU, if this was a matter of serious concern (password sharing) chose to ignore it at the insistence of the complainant no one could explain.
- 10.20 When the first complaint had been raised by KP, SIU opened a file on the matter in the name of the Claimant. The nature of the investigation was described as “theft”. We do accept Ms West’s evidence (in the absence of any evidence to the contrary) that this identification was simply as a result of the person who opened the file not using the drop down menu showing the nature of the complaint or issue at the time the file was opened. It was not suggested to any witness that the identification of the matter as “theft” in any way impacted upon the investigation carried out or the approach taken to it. The Claimant was unaware of this identification prior to disclosure in these proceedings. Indeed, throughout this period and for some time afterwards the Claimant was unaware of the complaint that had been raised on 18<sup>th</sup> May 2015.
- 10.21 On 24<sup>th</sup> August 2015 KP raised the second complaint which was sent to Thomas Roberts (by this time the Claimant’s direct manager), Leslie Penn (the Head of the department in which KP worked) Paul Brian (Human Resources) Emileo Lopez (Bank Director), Sally West and Jo Webster (HR). The second complaint was sent by email to all of those people. KP did not use the whistle blowing helpline or the grievance process but headed her email, “Formal Complaint – Strictly Private and Confidential”.
- 10.22 Anne Clarke (Miss West’s manager within SIU) decided that this “formal complaint” should be dealt with as a reactivation of the previous complaint (although there was no request by KP that this should be the case).
- 10.23 In addition, Ms Clarke informed Miss West that KP had also sent the complaint to Sean Coles, the Respondent’s Company Secretary. Under the Respondent’s whistle blowing policy it is the Company Secretary that determines how matters of whistle blowing should be investigated.
- 10.24 No evidence has been produced to us to indicate that Sean Coles was in fact advised of this case, nor have we seen any document or note which explains the basis from Ms Clarke’s belief that he had been informed. It is not necessary for us to make a finding on this point but it is indicative of a problem to which we will refer

later in our judgment, namely an absence of notetaking and contemporaneous documentary recording which appears to be a feature of both SIU and Human Resources practices within the Respondent.

- 10.25 The complaint of 24<sup>th</sup> August 2015 contained 12 numbered paragraphs.
- 10.26 The first 6 paragraphs were a complaint about the half year rating given to KP by the Claimant as her previous line manager at a one to one meeting on 21<sup>st</sup> August (the previous Friday) which meeting had also been attended by Mr Roberts. She disagreed with the rating she had been given, saying it had been a shock to her because her performance had not previously been discussed and alleged that the rating had been given, “just because I am on a 12 months fixed term contract and not a permanent staff member”.
- 10.27 In the next 5 numbered paragraphs KP raised complaint that she had been given an “abandoned computer” between October 2014 and February 2015 but afterwards she was given a new desktop and a laptop. She then said that she had been asked by the Claimant to share the laptop password so other members of staff could use the laptop as a result of which there had been issues regarding file corruption. She again raised the issue of unauthorised viewing of her personal bank account (although it is not clear from the complaint whether this was said to be the same incident as she had complained about in May), comments made more than once by the Claimant, which she referred to as being allegedly unethical relating to KP’s age and which she described as discriminatory, along with the use of KP’s password and staff number “more than once” when she was not at work, making specific reference to an incident on 14<sup>th</sup> and 15<sup>th</sup> July 2015 regarding the running of reports and allegedly sending an email from KP’s email account.
- 10.28 It was further alleged that the Claimant had made reference to age at the one to one meeting and KP raised again the issue of the Risk Reporting Analyst role.
- 10.29 Finally KP also alleged that the Claimant had tried to pay her less than the appropriate wage for her job, failed to carry out proper one to one meetings with KP or others in the team and at the end of her 2 page email said that she had been told by her manager to share a laptop and a password needed to log on to it as well as bemoaning the fact that someone now working from home had possession of the laptop which she understood had been assigned specifically to her.
- 10.30 Having determined that this should be a reactivation of a previous whistle blowing complaint, Ms Clarke appointed Miss West to conduct an investigation into it so far as the matters raised could be considered to be whistle blowing matters. Human Resources were to investigate the matters insofar as they could be considered to be a grievance.

- 10.31 Notwithstanding that Ms Austin, the Human Resources Officer appointed to deal with that aspect of the Complaint was instructed by her manager, Ms Wardle, to “pick this up as a whistle blowing/grievance case” and at no stage was it clearly differentiated which parts of KP’s complaint were properly being considered as part of a whistle blowing process and which were properly being identified as grievances. Indeed, neither Ms Austin nor Miss West could properly explain to the Tribunal why some matters would be treated as a grievance and why some matters would be treated as whistle blowing. The nearest either of them could come to explaining how it was determined which policy would apply to a complaint was whether or not the matter had been raised by the Complainant through the whistle blowing helpline or through the whistle blowing procedures on the intranet, rather than through the specific grievance process.
- 10.32 On 27<sup>th</sup> August 2015, Ms Austin and Miss West met to discuss the matter. Miss West advised Ms Austin of the previous complaint in 2015 which she described as “a whistle blow direct to SIU” which had been investigated by Miss West and Ms Webster but which had not been progressed according to what Miss West told Ms Austin because it was impossible to investigate further without compromising KP’s anonymity.
- 10.33 At no stage was Miss West (nor indeed, any other person outside of SIU) told that the issue which had comprised the vast majority of the earlier complaint (the application for the Risk Reporting Analyst role) had been fully investigated and that the process had been found to be “exemplary”. No explanation could be given for this lack of disclosure.
- 10.34 By this time, KP was approaching the end of her fixed term contract which was due to expire on 30<sup>th</sup> September 2015. In addition she was taking holiday before the end of her employment.
- 10.35 According to Ms Austin’s evidence which we accept it was agreed between her and Miss West that Miss West would investigate “the IT issues surrounding KP’s grievance” whereas Ms Austin would identify a suitable manager to hear KP’s grievance.
- 10.36 On 2<sup>nd</sup> September 2015 KP was told by Ms Austin that a grievance was being investigated but that it had been agreed with KP, before then, at a meeting held between Ms Austin and KP on 27<sup>th</sup> August 2015 that no active investigation would take place until KP had gone on holiday. KP was taking holiday from 11<sup>th</sup> September 2015 and returning to work on 28<sup>th</sup> September 2015 and her last day of work was to be 30<sup>th</sup> September 2015.
- 10.37 Ms Austin’s evidence was that this was done because KP was “very scared” but about what, or why, was not clear and nor was it clear to the Tribunal why this prevented KP herself from being interviewed to get full details of her complaints and the circumstances around the issues.
- 10.38 What Ms Austin did was to arrange a grievance outcome meeting with KP for 29<sup>th</sup> September. Thus no time was available to obtain

further information from KP about her complaint, nor to get her comments on the findings of any investigation, nor to question her about any discrepancies in the accounts given by her and any other witnesses.

- 10.39 Ms Austin appointed Mr Snodgrass to investigate the grievance. Ms West was investigating the IT issues.
- 10.40 On 15<sup>th</sup> September, the Claimant was interviewed by both Ms West and Mr Snodgrass, together. There was no clear separation of the roles between them and the entire interview was tape recorded as is, we are told, standard practice within SIU (but not standard practice in relation to the investigation of a grievance).
- 10.41 Before that according to Ms West, she had met both Ms Austin and (with Ms Austin) KP to “clarify, specifically how [KP] had shared her password (written, verbal or by email).”
- 10.42 Notwithstanding the importance of the information being given at the meeting on 9<sup>th</sup> September, and notwithstanding the “standard practice” of SIU to tape record interviews, there is no recording, nor any contemporaneous note of this meeting. According to Ms West, however, KP admitted that she had given the Claimant her password, “because he had asked for it and she felt she had no choice because he was her manager”.
- 10.43 The decision had been taken that Ms West and Mr Snodgrass should interview the Claimant together and that the entire interview should be recorded. SIU do not provide transcripts of the interviews they carry out (for the interviewed person nor for their own internal use) and no notes of the interview were taken at the time. How the Respondent then seeks to consider or use the contents of that recording at any stage was not explained to us.
- 10.44 Nor were notes taken of the allegedly “separate” matter of the grievance which Mr Snodgrass was investigating. How Mr Snodgrass – with no notes, no copy of interview tapes and no transcript of them, was to use the information that was given in that interview to progress the grievance is unclear to us.
- 10.45 Indeed the only reason why the Claimant (and the Tribunal) has had access to a record of the interview is because the Claimant himself asked for a copy of the interview tapes (he was given a set of tapes that he had no means to play and then was loaned a recording device so that he could play them) and subsequently at his own expense had them transcribed.
- 10.46 Throughout the interview, as the Respondents accept, the Claimant was open and honest as regards the events of password sharing. He confirmed his understanding of the rules regarding the sharing of passwords and accepted that in December 2014 he had asked KP for her password to enable him to finish a process which was running on her machine. This event had not been mentioned by KP in her complaints at all and thus the Claimant was volunteering information about an incident which the Respondents were not aware of.
- 10.47 The events of 14<sup>th</sup> July which KP had specifically complained about were discussed. Again, the Claimant accepted that he had

used KP's password because a report she had been preparing had errors in it and needed to be redone. The Claimant had to return to work in the evening to rerun the report to rectify it. To do so he had to have access to KP's computer, the alternative being that KP would also have to return to work until the small hours (the Claimant apparently continuing to work until approximately 2.30am). The Claimant said that KP had not been unhappy to give him the relevant password and that she knew why he needed it.

- 10.48 There was a continued debate about whether KP was asked for her password or whether she offered it. The Claimant was at pains to point out the password rules relate to not allowing others to use your password and he had not done that but KP had, suggesting that he was not in breach of the policy at all.
- 10.49 The Claimant accepted that he had not conducted one to one meetings with his team as he should have done.
- 10.50 The Claimant was asked if he had referred to KP's age. He said he had done so but in a way that credited the experience which she brought to the team.
- 10.51 The day following the taped interview Mr Roberts, Mr Gee's direct Manager, conducted a "fact finding" meeting into the question of sharing passwords. This was said by Ms Austin as necessary as prior to this, in her words, the Claimant "had only been spoken to in the context of [KP's] grievance". That was obviously not the case, as Ms West has no role whatsoever in the grievance but she had conducted the interview with the Claimant alongside Mr Snodgrass and was involved throughout. This, we find, was a consequence of confusion, a lack of separation of roles and a lack of clear understanding (such lack of understanding being shared by Ms West, Ms Austin and it appeared to us, SIU, and HR generally) about what parts of the investigation related to the grievance brought by KP and what part related to IT issues or potential disciplinary issues. The Respondents could and should have been clearer about the division of roles. This would have reduced the number of occasions when the Claimant needed to be interviewed.
- 10.52 In any event Mr Roberts held the meeting and produced notes which the Claimant then amplified and reamplified with considerable additional detail. Crucially the Claimant accepted during that meeting that asking a team member to give their password was a breach of policy.
- 10.53 There was a further meeting between the Claimant and Ms Austin on 21<sup>st</sup> September 2015. In that meeting both the Claimant and Ms Austin confirmed that the Claimant was upset. Following it the Claimant referred in an email to the services of the Respondent's Employee Assistance programme which is consistent with Ms Austin's evidence that she suggested to the Claimant that he contact them for counseling. The Claimant denied that that was mentioned but his own reference to EAP is consistent with it and we therefore accept Ms Austin's evidence on this point.

Subsequently the Claimant had a number of counseling sessions funded by the Respondent.

- 10.54 On 17<sup>th</sup> September 2015, the Claimant was to be told that he was under investigation for a potential disciplinary action but would not be suspended. His manager, Mr Roberts was to read him a script but had to abandon the process part way through because the script he had been given referred to the Claimant being under investigation in relation to allegations of age discrimination as well as for breaches of IT security. Ultimately on 23<sup>rd</sup> September the Claimant was sent a letter confirming that he was being investigated into an allegation of

“serious breach of the company’s IT Policy which brings into question your integrity.”

- 10.55 At no stage was it explained to the Claimant how his integrity was in question. He had admitted what had happened, what he had done and the reason for it, i.e. pressing business deadlines and purely for business purposes.
- 10.56 On 29<sup>th</sup> September 2015 KP met Ms West and Mr Snodgrass. Ms Austin was also in attendance and took notes and these have been produced to us. KP was told that she too had acted in breach of policy by giving the Claimant her password. She was told that the elements of her grievance relating to the Claimant acting in breach of the IT Policy had been upheld, as had her allegation of age discrimination as the Claimant had stated that older people were “slower to learn”.
- 10.57 A letter setting out the outcome of the grievance was sent to KP on 2<sup>nd</sup> October by which time she had on 20<sup>th</sup> September (her last day of work) set out a substantial number of other complaints and grievances. The Respondent considered that these warranted further investigation notwithstanding the fact that KP was after 30<sup>th</sup> September, not an employee of the Respondent (the Respondent’s grievance policy stated that grievances from former employees may not be investigated).
- 10.58 Mr Snodgrass recommended that there should be disciplinary action for breach of IT security (without naming who should face them but by this stage KP was no longer an employee) and that the Claimant should face disciplinary action for age discrimination; further that his annual rating should be reduced because of his failure to carry out one to one meetings.
- 10.59 The Claimant had not been told that he faced potential disciplinary action for age discrimination when he was told he was under investigation.
- 10.60 The Claimant was called to a disciplinary meeting by a letter dated 12<sup>th</sup> October 2015 which said that the Claimant had

“breached IT Security Policy specifically

- Password sharing (safeboot and LAN passwords)



- Kamani Perara's LAN and email access to perform business related tasks”

- 10.61 The Claimant was told that this could amount to serious misconduct and that he could be summarily dismissed if the allegations were found to be proven. Mr O’Gorman was to chair the disciplinary hearing which was, as a potential gross misconduct matter, to be held at stage three of the Respondent’s disciplinary process.
- 10.62 No action was taken on the age discrimination complaint because on further investigation the independent witness at the one to one meeting (Mr Roberts) said that the reference made to age at the time of the one to one hearing was made in a positive way regarding experience. Indeed this was referred to by KP in her original complaint as she said the Claimant had said he wanted to refer to age in “a positive way” and the Claimant himself had said this.
- 10.63 The Claimant’s rating was not reviewed because that was not permitted under the relevant policies.
- 10.64 The Claimant attended a disciplinary hearing on 21<sup>st</sup> October 2015. He attended the hearing with the contents of his desk in a cardboard box, claiming the female members of SIU and HR had discriminated against him. He questioned why the statements of other witnesses had not been disclosed, suggested he had been coerced into admitting the allegation and said that there was no “IT Security Policy” as a named document and so he could not be in breach of it. He further said that within the policies asking for another person’s password was not prohibited, only sharing your password with another was not allowed.
- 10.65 According to Mr O’Gorman, KP had said that she had shared her password with the Claimant out of “fear” but that did not appear in any of the information given to the Claimant and nor had it previously been suggested to him. When the Claimant referred to the December 2014 incident Mr O’Gorman had not heard that previously (notwithstanding that it was specifically referred to in the lengthy taped interview conducted by Ms West and Ms Austin, the contents of which had clearly not been shared with Mr O’Gorman).
- 10.66 Mr O’Gorman was concerned that the trigger for KP’s complaint was not the events about which she was complaining and which had led to the disciplinary hearing but rather her unhappiness about her one to one rating. That motivation was put by the Tribunal to both Ms West and Ms Austin, to neither of whom had the matter ever occurred.
- 10.67 Mr O’Gorman concluded that the Claimant was in breach of the Respondent’s policies and procedures regarding password sharing. He felt the issue of there being no specific document called “IT Security Policy” was no more than the Claimant playing with words. The Claimant had accepted that the IT Equipment and Systems Policy, The Intranet, Email and Workstations

- Acceptable Use Policy and the Security Principles and Users Policy, each referred to not sharing passwords that in Mr O’Gorman’s view that means not asking for, or using other people’s passwords as well as giving your password to another.
- 10.68 Mr O’Gorman’s conclusions after the hearing were that the Claimant had been in breach of policy, that he did what he did for business reasons only, without any malice or intention of personal gain and that in part the Respondent itself had put the Claimant in a difficult position to meet a deadline at which point the Claimant should have sought the approval from a senior manager of his intended actions rather than proceeded as he did. In Mr O’Gorman’s view the Claimant made the wrong decision. He took into account the long hours the Claimant had worked, that the IT systems were not adequately fit for purpose and that these had contributed to the situation. He was concerned for the Claimant’s health which was discussed at some length.
- 10.69 Mr O’Gorman determined that the appropriate sanction was a stage one warning which is extinguished after six months being the lowest form of formal sanction which he could give the Claimant in the circumstances.
- 10.70 The Claimant appealed against that decision on 4<sup>th</sup> November 2015 and also raised a grievance on 10<sup>th</sup> November 2015. He began a period of sick leave on 22<sup>nd</sup> October and on 27<sup>th</sup> October was sent a text by Ms Penn confirming that he would not face any action regarding allegations of age discrimination.
- 10.71 The Claimant’s appeal against for O’Gorman’s decision was heard by Mr Mukherjee on 9<sup>th</sup> December 2015. The Claimant had submitted a fifty four page document regarding his appeal which dealt at length with the language of various policies of the Respondent. His appeal was on five grounds being
- 10.71.1 There was no such policy as the “IT Security Policy” he was alleged to have broken,
  - 10.71.2 That the policies did not prohibit asking another person for a password,
  - 10.71.3 That disclosure by him of his “safeboot” password to KP was, if a breach at all, a minor one,
  - 10.71.4 That asking KP for a password was not a breach of policy,
  - 10.71.5 Sending an email from KP’s workstation was done for the benefit and the interests of the business and
  - 10.71.6 There had been disparity of treatment between him and KP.
- 10.72 Mr Mukherjee’s conduct of this hearing is not the subject of complaint by the Claimant.
- 10.73 As regards the password sharing Mr Mukherjee concluded that asking a junior employee to share a password was clearly not in accordance with the policy as it was putting that colleague in a position where they were being asked to breach the policy. He

confirmed that the Claimant should – if he was in the position he was – have consulted a more senior manager for guidance as to what to do. There was discussion of the Claimant’s rating and any possible impact on his bonus following the disciplinary outcome. After discussion between Mr Mukherjee and Ms Penn it was confirmed that there would be no effect on either his bonus or his rating.

10.74 On dealing with the outcome of the appeal Mr Mukherjee spent some time seeking to encourage the Claimant to come back to the business as soon as he was able. He considered that a breach of IT security was inevitably investigated as a stage three hearing and the fact that that had led to a stage one warning did not alter the fact that it was appropriate to investigate it at stage three. He also determined that the reason why there had been no disciplinary action taken against KP was that she had left the business and for no other reason.

10.75 Mr Mukherjee emphasised to the Claimant that his “personal brand” at the bank was undamaged and that both he and Mr O’Gorman were content to act as sounding boards or supporters to help the Claimant back to work. In summary he upheld the stage one warning and rejected the appeal.

10.76 On the following day the Claimant attended his first hearing regarding the grievance he had advanced. Mr Hawes had been appointed to chair the grievance. He is no longer employed by the Respondent having been previously Director of People Engagement. At the meeting on 10<sup>th</sup> December 2015 Ms Smith attended as note taker and to give HR support to Mr Hawes. There were eight grounds of the Claimant’s grievance and the grievance and supporting documents which had been submitted by the Claimant ran to thirty eight pages. The grounds of the grievance were that the Claimant felt that

10.76.1 There had been a failure to follow process and delay in relation to matters investigated against him.

10.76.2 That SIU were investigating a disciplinary issue that was not fraud, theft or dishonesty (and thus should not have been involved).

10.76.3 That there had been a failure of duty of care to him as an employee.

10.76.4 That there had been an unfair disciplinary hearing due to misrepresentation and inadequate disclosure.

10.76.5 That there had been damage to the relationship and trust between the Claimant and his managers

10.76.6 That the Claimant’s relationship with the company “had been ruined”

10.76.7 That there was discrimination by comparison to the way KP had been treated.

10.76.8 That as a result of all of this his health had suffered.

- 10.77 The meeting on 10<sup>th</sup> December was to clarify the issues to be investigated and Mr Hawes and Ms Smith prepared a list of questions which required answers from Sally West, Lesley Penn, Tom Snodgrass and Suzie Austin.
- 10.78 After the meeting on 10<sup>th</sup> December Ms Smith sent notes of the meeting to Mr Hawes, a list of the relevant questions and a covering email which said inter alia that
- “due to the nature of this case, please can you ensure that thorough notes are taken in case these are needed as part of an employment tribunal. I would offer to assist with the notes for this, however, on this occasion it would not be appropriate due to me working closely with Suzie and SIU”.
- Suzie is Ms Austin.
- 10.79 No alternative note taker was offered and accordingly Mr Hawes was left to his own devices.
- 10.80 As a result of this abdication of involvement by Ms Smith in particular and HR generally, coupled with the fact that the Claimant now raised further issues in writing, Mr Hawes own medical issues, his involvement in a motor vehicle accident, his requirement to conduct a number of road shows for the business and his dealing with matters relating to his own redundancy, the investigation of the Claimant’s grievance took longer than anticipated. Mr Hawes had originally hoped to deal with the matter before Christmas 2015. The Claimant was advised from time to time of progress and delay in the conduct of the grievance investigation.
- 10.81 In fact, Mr Hawes was not able to complete his investigation with all witnesses until early February 2016 by which stage he was preparing a response so that all the Claimant’s questions and issues were covered. Mr Hawes in his evidence admitted to “struggling with the volume and complexity of the matter” which was exacerbated by first Ms Smith confirming to him that he had to address every point raised by the Claimant in all of his documents rather than just the points established in the initial grievance meeting and secondly, by an indication from the Claimant that he expected disclosure of full witness statements when Mr Hawes was given no support as to the preparation of such documents.
- 10.82 A grievance outcome meeting was arranged for 2 March 2016.
- 10.83 At that meeting Mr Hawes’ intention was to address each of the issues in turn but the Claimant felt that some of the facts he was setting out were wrong and raised yet further issues which

required investigation. We know that Ms Smith felt able to attend at that meeting as a note taker.

- 10.84 On 15<sup>th</sup> March 2016 Mr Hawes began his period of garden leave but had confirmed that he would remain available to deal with the grievance.
- 10.85 On 30<sup>th</sup> March 2016 the Claimant raised a further series of complaints addressed to Mr Roberts. This lengthy discursive document identified that he was about to commence employment tribunal proceedings and listed thirteen individuals who he said had acted “arrogantly and without consideration of the duty of care towards [him]” which had “contributed towards the continuing discrimination and less favourable treatment of [the Claimant] on the grounds of sex, age and race”. He alleged that the Company acted in fear of allegations of discrimination by KP and that the people making the decisions to pursue and harass him and not KP shared the female gender characteristic with KP. The people he referred to was Sally West, Joanne Webster, Anne Clarke, Liz Lloyd, Suzie Austin, Jess Wardle, Kate Holmes, Peter O’Gorman, Maxine McMenamin (who was the HR support at the appeal conducted by Mr Mukherjee), Mr Mukherjee, Debbie Coolman (HR) who had, according to the Claimant, rejected the prospect of confidential discussions to resolve the Claimant’s position because she considered the relationship between the Claimant and the Respondent to still be intact, Grace Smith and Clive Hawes.
- 10.86 During the grievance process with Mr Hawes the Claimant stated on more than one occasion that he wished to leave the company. He said in December 2015 that his “strategy was to exit” and that he “would like to exit the business”. A proposal was made on his behalf by his Trade Union representative that there should be a protected discussion which the Respondent decided they did not wish to engage in.
- 10.87 Further in a meeting in March 2016, the Claimant referred to seeking alternative employment and to having been in contact with ACAS for the purpose of early conciliation.
- 10.88 The chronology at this point is important and we set it out below.
- 10.88.1 2.3.16 The Claimant attends a grievance outcome meeting and raises further issues.
  - 10.88.2 30.3.16 The Claimant raises a second grievance.
  - 10.88.3 30.3.16 The Claimant lodges ET1.
  - 10.88.4 6.5.16 The Claimant resigns.
  - 10.88.5 10.6.16 The grievance outcome letter is sent to the Claimant.

- 10.88.6 4.7.16 The Claimant appeals the grievance outcome.
- 10.89 In his application to the Employment Tribunal on 30<sup>th</sup> March 2016, the Claimant referred to “an ongoing employment relationship” and his concern “for his career... should the employment relationship be unable to continue”.
- 10.90 On 6<sup>th</sup> May the Claimant’s resignation letter to Mr Roberts expressed a view that the Claimant had no choice but to resign in the light of
- 10.90.1 A breach of trust and confidence due to the continuing failure to exercise a duty of care and the unreasonable delays for failure to engage with me to resolve our differences. The Claimant said it continued to cause him distress and anxiety.
  - 10.90.2 The failure to properly investigate or conclude his formal grievance of 2010 (he having been told on 29<sup>th</sup> April it was still in the process of further investigation).
  - 10.90.3 The failure to respond with an adequate response to letters from his solicitor which was received on 29<sup>th</sup> April 2016.
  - 10.90.4 The failure to arrange a meeting in relation to his grievance of 30<sup>th</sup> March 2016 which was acknowledged on 4<sup>th</sup> April.
  - 10.90.5 The handling of the complaints raised by KP and the investigation that commenced on 15<sup>th</sup> September 2015 which the Claimant believed was discriminatory and the subsequent failure to properly consider that during the hearing appeal and grievance further discrimination took place.
- 10.91 It is against that factual background that the Claimant brings this complaint before the Tribunal.

## 11. Conclusions

Analysing the relevant law to the facts as found we have reached the following conclusions.

- 11.1 There are preliminary points which we unanimously feel must be made as part of our conclusions.
- 11.2 The first relates to the conduct of the initial investigation of the grievance launched by KP on 24<sup>th</sup> August 2015. The vast bulk of this email complaint related to the unhappiness of KP regarding her rating. At no stage, however, was this considered to be a catalyst for a complaint about a matter which had occurred six weeks previously. Rather than enquiring into the way password

sharing had come about and determine whether this was a bona fide grievance or complaint it was treated as a major matter by the Respondent, to the extent that the Claimant was subject to an investigatory process which he found, justifiably, intimidating.

- 11.3 The failure to properly separate issues of potential disciplinary action from areas of grievance raised by KP, the carrying out of “joint interviews” (in the Claimant’s case subsequently followed by a further disciplinary “fact find” the following day), the failure to provide notes of the joint interview with SIU which was taped (but in respect of which the Respondent provides no transcript either for itself or anyone else) took place in circumstances which Ms West said in her evidence “might be seen as intimidating” but which was nonetheless “SIU standard operating process” appears to us to be excessive in a case of this type. The Respondent ought to have made a simple enquiry of KP of the circumstances of which she had given the Claimant her password and why. That ought to have led the Respondent to conduct matters in a somewhat different way and we consider the way that they approached the investigation to the Claimant to be over zealous and, by mixing matters of grievance with matters of discipline, confusing.
- 11.4 It is noted that a meeting on 9<sup>th</sup> September between KP, Ms West and Ms Austin, notwithstanding that Ms West was conducting an investigation via SIU, no notes or recording was made yet this meeting was held to discuss how and why KP had shared her password with the Claimant. The only reference to the “how” is a report in evidence that KP said that the Claimant had asked her for it and she “felt she had no choice”. No evidence of the “why” appears to have been taken at all. This failure to properly have the complainant, KP, explain the circumstances in which she had given her password to another (the Claimant) is in our unanimous view inexplicable.
- 11.5 The result of the approach, coupled with the forensic over analysis of every document in which the Claimant has engaged added to the (to us) inexplicable failure to provide Mr Hawes a grievance manager with proper HR assistance to conduct the investigation into the Claimant’s grievance has led to the inflation of what, factually, is a relatively straight forward case into an unnecessary prolonged and complex one.
- 11.6 During the course of the first investigation meeting the Claimant admitted that he had requested (on more than one occasion) that KP give him her password, or that he expressed a need to use her password, so that he could complete work for the Respondent against deadlines which were looming.

- 11.7 The extent of the password sharing and its purpose were therefore known to the Respondent at a very early stage and the Claimant admitted what he had done.
- 11.8 The failure by the Respondent to properly identify the policy or policies that they relied in forming this into a disciplinary charge is redolent of the haphazard way in which this matter was progressed within the Respondent. The Respondent could and should have specifically referred to the relevant part of a specific policy and explained why they considered that the Claimant was in breach of it. Instead they referred to a non-existent "IT Security Policy" which served only to confuse the Claimant and clearly caused him substantial angst and irritation so that there followed a forensic analysis of each of the policies that were subsequently sent to the Claimant (none of which bore the title "IT Security Policy").
- 11.9 The letter advising the Claimant that he was under investigation referred to questions of his integrity. This was never raised again and no one on behalf of the Respondent explained how the events in question, as found by the Respondent, could cause the Claimant's integrity to come into question. There was never any suggestion that the Claimant acted as he did for any reason other than the for the benefit of the Respondent.
- 11.10 The Claimant was greatly exercised by three particular things throughout this process. First the question of which precise policy he was said to have breached, a position with which we have some sympathy.
- 11.11 The second was whether asking for a password was a breach of the relevant policies which referred to not sharing a password with another person. The Respondent did not consider this to be a viable argument, and in our view reasonably so. But it was repeated and raised over and over again. The Claimant had admitted at an early stage that he knew what he had done was wrong. Instead of accepting the fact that he had sought and used another person's password as prohibited by the various policies (in particular the Employee Handbook and the Acceptable Use of Internet Policy which refers to "not using a workstation logged on with someone else's password"), the question of asking/giving/taking another person's password was allowed to fester and grow. The proper analysis of the Respondent's policies by the HR and SIU teams which were investigating the matter, at a time when a disciplinary charge was being formed would have prevented this.
- 11.12 The known facts, however, clearly indicated that this could never reasonably be considered an act of gross misconduct. Although the Respondent suggests that all IT breaches were investigated



at stage three, under the disciplinary policy “minor breaches of IT policy” are treated as misconduct and not gross misconduct. But it was not explained to us and nor was it explained to the Claimant why the events were considered serious rather than minor breaches, given that the Respondent had at all times known that the Claimant was merely seeking to ensure deadlines were met to advance the position of the Respondent. There was never any suggestion that he was acting for personal benefit, maliciously or for any reason other than to complete work for the Respondent.

- 11.13 The third matter which exercised in the Claimant’s mind was the alleged disparity of treatment between himself and KP. Had someone taken the time to explain to the Claimant at a very early stage that the outcome of KP’s grievance was a recommendation that disciplinary action should be taken for breaches of IT policy; that this included action against KP and that the only reason why action had not been taken against her was that at the time the recommendation was made she had already left the business that ought to have assuaged the Claimant’s concerns. No one on behalf of the Respondent, however, took time to properly explain that to the Claimant.
- 11.14 As a result of these issues a relatively straight forward matter spiraled out of all proportion as a result of which a hearing lasting ten days followed by Tribunal deliberations has been necessary to resolve matters in hand.
- 11.15 It is clear the Claimant obtained, by consent, KP’s password to carry out work which was requiring urgent completion and in respect of which she had made errors.
- 11.16 It is clear that the Claimant admitted that at an early stage.
- 11.17 Further no reasonable reading of any of the policies to which we have been directed could lead one to the conclusion that whilst giving another person your password is an act of misconduct, asking them to do so is not. That is obvious and is amplified when the person asking for the disclosure of the password is in a position of seniority.
- 11.18 The Claimant was subject to a process of investigation into the matter which was in our view excessive and draconian. He was subjected to a lengthy tape recorded interview in respect of which no notes were taken or provided and he therefore had to obtain at his own expense a transcript of the interview. He was accused of an act of potentially gross misconduct ( and we consider that no reasonable employer could ever have considered the events in question to amount to such) and had his integrity brought into question (when at all times the Respondent knew that he was

acting with the interests of and with the best interests of the business at heart).

- 11.19 The Claimant was subject to disciplinary action because he was in breach of various IT policies and we are satisfied that had KP remained in employment she too would have been subject to disciplinary action as was said by various witnesses in particular Mr O’Gorman.
- 11.20 The punishment handed out to the Claimant was entirely reasonable. The Claimant admitted using another person’s password and received a warning to last 6 months which was the lowest level of formal sanction that he could have been given in the circumstances. This was in the face of an (at some stages at least) admitted act of misconduct. It was entirely reasonable for the Appeal Hearing to reach the conclusion that the outcome of the original hearing was fair.
- 11.21 The Claimant’s grievance was raised and investigated. Mr Hawes was hampered by the unwillingness of human resources to provide a note-taker which we consider to be inexplicable, particularly when coupled with a failure to offer an alternative person if the issue related purely to Miss Smith. The refusal by Miss Smith to involve herself in the interviews of witnesses in the grievance investigation appeared to relate to her personally and was not one which related to the whole of the human resources team, so why Mr Hawes’ was left to struggle on alone is a mystery to us. We cannot see why a human resources officer cannot be engaged in the process of note taking at interviews, irrespective of who is being interviewed. If one specific human resources officer finds that to be difficult due to working relationships, it is obvious that another should stand in their place. This caused substantial delay, particularly bearing in mind Mr Hawes’ personal circumstances to which we will return.
- 11.22 That was not, however, the only cause of the delay in dealing with the Claimant’s grievance. The Claimant himself contributed to it by bringing more matters at what was supposed to be the outcome, for consideration. Further Mr Hawes had additional problems due to the fact that he was at risk of redundancy and was negotiating with the company at the relevant time, was engaged in a motor accident, suffered a cancer scare and was required as part of his duties to conduct road shows up and down the country for the Respondent business. All of this would have been significantly mitigated if HR had provided note taking and administrative support to Mr Hawes who admitted to be struggling with the “volume and complexity of the matter”.
- 11.23 The process, whilst over long as a result, is not one which we can otherwise criticise. Mr Hawes did a thorough job of investigating

the issues which the Claimant raised and did so, given the all the circumstances, as expeditiously as he could.

- 11.24 The appeal against the grievance outcome did not proceed. The Claimant had left the business and the Respondent's grievance policy anticipates that in such circumstances no further action will be taken.
- 11.25 Further the Claimant's second grievance did not proceed at all but the Claimant accepted during his evidence that the second grievance did not raise any new matters but rather set out further matters which he sought to draw to Mr Hawes' attention and which he wanted taking into account when dealing with his original grievance lodged on the 30<sup>th</sup> March 2016.
- 11.26 Turning to the specific issues which we are required to determine, we set out our conclusions as follows.
- 11.27 With regards to the claim for constructive unfair dismissal, the first question is whether there was a fundamental breach of contract by the Respondent.
- 11.28 The Claimant's claim form identified three specific matters set out at the beginning of this Judgment upon which he relied as constituting a fundamental breach of contract.
- 11.29 The first was allegedly subjecting him to disparity of treatment in the context of internal proceedings.
- 11.30 We have expressed our views about the way the investigation in to the Claimant's wrongdoing was conducted, one that we find heavy handed and confused. However, there is no evidence to suggest that it was discriminatory. It is notable that the various findings about which the Claimant complains were not put to the witness as constituting discriminatory conduct.
- 11.31 The allegation that he was discriminated against in the handling of the case by KP, at the disciplinary hearing, the appeal and in relation to his own grievance, is lacking any evidential basis.
- 11.32 The fact is that the Claimant is subject to any disciplinary action and KP was not, but we have found that that was a matter of timing. The decision not to investigate the matters raised by KP on the 24<sup>th</sup> August 2015 until she went on holiday on 11<sup>th</sup> September 2015, resulted in a lack of time being available to properly consider her position until she had left the business. But there is no evidence that the decision was tainted by discrimination and nor was that ever put to the witnesses.

- 11.33 There was a difference in treatment in that the Claimant was subject to disciplinary action and KP was not but that was entirely due to the issue of timing and KP having left the business. We accept that had KP not left the business on 30<sup>th</sup> September 2015, she would have faced disciplinary action as a result of her sharing her password with the Claimant which was contrary to the Respondent's various policies.
- 11.34 We do not find any basis to criticise the way the disciplinary hearing was conducted. It was conducted within the terms of the Respondent's policies and procedures and it is, we find, the fact that the Claimant faced disciplinary action at all (not withstanding his admitted use of another person's password) and the fact that he was disciplined at all (not withstanding the admission) that lies at the heart of that complaint. The Claimant seems unable to understand that, whatever the motivation, what he did by seeking or obtaining the password of another employee to use systems in their name was a disciplinary offence.
- 11.35 We note that the Claimant makes no criticism of the conduct of the appeal hearing.
- 11.36 The grievance raised by the Claimant on the 10<sup>th</sup> November 2015 took a considerable period of time to resolve, but the Claimant was made aware of progress/delay throughout and by his own raising of new matters, what was intended to be the outcome meeting on 2<sup>nd</sup> March 2016 then yet further matters on 30<sup>th</sup> March 2016, was at least contributing to, if not the material cause of, further delay.
- 11.37 The third matter relied upon by the Claimant in relation to his claim for constructive unfair dismissal was the stated failure by the Respondent to address his second grievance of 30<sup>th</sup> March 2016 but in evidence he confirmed that there were no new issues raised in that grievance and that he was raising matters he wished Mr Hawes to take into account when giving the final grievance outcome.
- 11.38 We do not find that any of these matters, individually or collectively, amount to a fundamental breach of contract by the Respondent. The issue regarding the investigation process, which had been the subject of criticism by us, and the contribution to delay in dealing with the grievance brought about by the non provision of a note taker or human resource support contributed to the matters about which the Claimant complains but at no stage did the Respondent act or fail to act in a way which could amount to a breach of the term of mutual trust and confidence as alleged. The Claimant at the commencement of the hearing indicated that the "final straw" upon which he relied was the failure to consider his grievance of 30<sup>th</sup> March 2016 but in evidence he

accepted that that was not a new grievance but a serious of matters which he wished Mr Hawes to consider when dealing with the first grievance. Given that that was raised on the 30<sup>th</sup> March and the Claimant resigned 37 days later that delay cannot be considered to be in any way blameworthy.

- 11.39 In any event there is a fundamental difficulty for the Claimant because in his initial claim form dated 30<sup>th</sup> March 2016 he referred to an ongoing relationship with the Respondent and to his concerns for his career “if that could not continue”. Thus at that stage he must have concluded that the acts of the Respondent about which he complained were not sufficiently serious to warrant resignation, that the relationship was still in tact, albeit at risk. The only the thing which occurred after 30<sup>th</sup> March and before his resignation was the lack of response to the Claimant’s grievance of 30<sup>th</sup> March which we have dealt with above. The period of time between 30<sup>th</sup> March and 6<sup>th</sup> May 2016 was not, in our view, sufficient to amount to a “final straw” in the context of this case nor did it amount in our view to any blameworthy conduct on the part of the Respondent.
- 11.40 For those reasons the Claimant’s complaint that he was unfairly dismissed fails. There was no dismissal, the Claimant resigned his employment. The Respondent’s conduct was not such that he was entitled to terminate his contract without notice.
- 11.41 Although not part of his complaint the Claimant did also state that he took the step of resigning when he did because of the Respondent’s failure to engage in a protected discussion to bring his employment to an end. The Claimant had already, during the course of the internal procedures, and in particular in his discussions with Mr Hawes regarding his grievance, indicated a preference to leave the business. It cannot be a matter of criticism that the Respondent did not wish him to leave and did not wish to engage in a protected discussion to bring his employment to an end.
- 11.42 The Claimant brought his discrimination claims on the grounds of sex, race and age. During the course of the hearing he made no reference to race or age. No allegations were made or evidence adduced in support of any claim based on the Claimant’s age or race.
- 11.43 So far as the allegations of direct discrimination are concerned this rests on the Claimant being subjected to stage 3 proceedings when KP was not subject to any disciplinary action at all.
- 11.44 During cross examination the Claimant sought to shift the emphasis of this claim to the fact that the Respondent did not act quickly enough against KP so that by the time action could be

taken it was too late because she had already left the business. We deal with both aspects of that complaint briefly.

- 11.45 Clearly there was a difference in treatment between the Claimant and KP. He was subject to investigation and disciplinary action, she was not. There is a difference in their gender, their race and their age. But as has been clear since the decision in Madarassy there must be some evidence to suggest that the reason for that different treatment was a protected characteristic.
- 11.46 The Claimant has not set out in any way the basis for on which he considers that those who he alleges subjected him to discrimination (which list includes 3 men, in particular Mr O’Gorman, Mr Mukherjee and Mr Hawes) were motivated in their treatment of him by any protected characteristics. To merely assert as he has that the women who have discriminated against him did so because they were female and therefore prone to give preferential treatment to a member of the same sex as apposed to a man is utterly groundless and was not put to any of the witnesses in this case.
- 11.47 Even if the Claimant had established some evidential link, however, between the treatment he received and the relevant protected characteristics, such as to shift the burden of proof under Section 136 of the Act, the Respondent has established a non discriminatory reason for the difference in treatment so that even if the burden of proof had shifted, the Respondent has satisfied us that there was no breach of the Act. The reason for the difference in treatment, and the sole reason, was an issue of timing in that at the stage when Mr O’Gorman’s investigation into KP’s grievance was complete and he made the recommendation that disciplinary action should follow, KP had already left the business and could not be disciplined.
- 11.48 A suggestion that the Respondent deliberately delayed any action against KP because of her race, gender or age (or because of the Claimant’s race, gender or age) equally lacks any evidential basis. The decision was taken by Ms Austin after meeting KP on the 27<sup>th</sup> August that no investigation would take place until KP was on holiday as KP was concerned about being identified as the person raising the grievance and said she had fear of repercussions. It is no part of our role to determine whether KP was genuinely so concerned, the relevant point is that Ms Austin accepted that she was and it was for that reason and no other that the investigation was delayed. The result of that was a lack of time within which KP could be subjected to disciplinary action but that was a consequence of and not the reason for the decision.

- 11.49 Accordingly the Claimant has not established that the difference in treatment was in any way connected to a protected characteristic and the Respondent has in any event established a non discriminatory reason for the difference in treatment. We accept the Respondent's evidence that had KP remained in employment she would have been subject to disciplinary proceedings, there was no evidence to gain say that whatsoever.
- 11.50 The final claim relates to allegations of harassment. The Claimant identified four allegations in his claim form.
- 11.51 The first was "the approach of female members of SIU, the Head of Financial Crime and HR in the investigation of KP's grievance.
- 11.52 This generalised an open ended allegation at any particularity. In his closing submissions Mr Nichols went through each aspect of the history of the matter but before doing so made some general points which we consider to be entirely appropriate.
- 11.53 The first was that not every unfortunate act amounts to harassment (per Dhaliwal). The conduct must, under the Section 26 of the Equality Act, be unwanted, must relate to a relevant protected characteristic, and must have one of the substantial effects which are set out in that section.
- 11.54 Second, we remind ourselves that under Section 26 it must be reasonable, in the circumstances of the case, for the conduct to have the effect complained of.
- 11.55 Third, in the circumstances of a generalised accusation, Mr Nichols took us to occasions when the people who are the alleged harassers could have take action against the Claimant, legitimately, yet did not do so. In particular no action was taken for his failure to carry out one to one meetings with his staff as required and the allegations of age discrimination, where there was a divergence of evidence, was not tested in any disciplinary hearing but rather the Respondent decided that no action should be taken at all.
- 11.56 In relation to the generalised allegations of the "approach" of various people it is right to repeat our earlier criticisms. A lack of note taking, the conduct of a lengthy taped interview without proper provision to provide a copy of the interview to the person being interviewed, a failure to properly separate out issues of potential discipline and issues solely relating to a colleagues grievance, together with a failure to explain properly why KP did not face disciplinary action or contributed to the Claimant's sense of injustice.

- 11.57 However, we have found no evidence and the Claimant has not advanced any cogent argument in support of the suggestion that any of that conduct related to a protected characteristic. For some of the matters (the delay in dealing with the investigation pending KP's holiday) there was a cogent reason. For others the Respondent said (and it was not challenged) that it was following its standard practices. But for none of those did the Claimant bring forward any evidence, nor indeed did he put it to the Respondent's witnesses in cross examination that this was not the "general approach" nor that the way in which it was put into effect related to any of the protected characteristics on which he relied.
- 11.58 On that basis the generalized complaint fails at the first hurdle because none of the matters about which he complained related to any of his protected characteristics. There were, clearly, things which the Respondent could and should have done better but that is not sufficient to found a claim of harassment. Conduct complained of must, to constitute harassment, be identified and be shown to relate to a protected characteristic as well as meeting the other requirements of Section 26. None of the matters about which the Claimant complained in relation to this generalised complaint clear that hurdle.
- 11.59 We now turn to the three separate complaints of harassment in respect of which we have the following comments.
- 11.60 The first is the alleged failure by the Respondent to provide a specific policy that the Claimant was said to have broken. It is correct that the Claimant was told that he was in breach of the "IT Security Policy" when no such named policy existed and that he had to request copies of the policies he was said to have broken before they were provided to him. However, they were provided. It is also true, however, that when the Claimant was interviewed by Mr Roberts on 16<sup>th</sup> September 2015 he stated that he had reviewed the relevant policies and further accepted at that very early stage that he had acted in breach of them and he said he was aware of this from training received. Again this is an area in which the Respondent could have done better. The precise part of the specific policy or policies being allegedly broken should have been identified to the Claimant at the start of the process. We cannot find any link, however, between that error or process and a protected characteristic, nor do we find that the conduct would amount to harassment within the meaning of the Act. The Respondent committed an error by failing to provide the Claimant with the appropriate policies. It was rectified and matters proceeded. At no stage did the Claimant identify any feelings of intimidation, degradation, humiliation, offence or any violation of his dignity caused by this matter and had he done so we would



have found that it was not reasonable for him to consider the act as reasonably causing such a feeling.

- 11.61 The second and third specific allegations of harassment fail because they are not factually made out.
- 11.62 There was no requirement imposed by Human Resources that an allegation of age discrimination be investigated at stage 3 when it had been “previously resolved” during KP’s grievance. There was a fact finding process after an allegation of discrimination had been made but no disciplinary action was taken. In so far as the issue had been “resolved” as part of KP’s grievance, it was resolved in her favour by Mr Snodgrass who conducted KP’s grievance and who found her allegation of age discrimination to be well founded. It is noted that Mr Snodgrass is not identified by the Claimant as a discriminator. Thereafter, however, a decision was taken by Human Resources not to proceed further against the Claimant due to the equivocal nature of Mr Roberts’ evidence. In fact, therefore, the decision not to proceed against the Claimant for age discrimination was a decision taken by HR contrary to the Claimant’s claim that it was they who were insistent on pursuing the matter at stage 3.
- 11.63 Finally we come to the “attempt” to downgrade the Claimant’s rating. This again was a recommendation of Mr Snodgrass as part of his investigation into KP’s grievance which Human Resources and Miss Penn refused to implement as they said there was no power to retrospectively reduce the rating of the Claimant or any other employee. Thus again it was not the series of females within Human Resources and other parts of the business about whom the Claimant raised his complaint who were “attempting” to reduce the Claimant’s rating. Rather it was Mr Snodgrass who considered that that was an appropriate step and it was Human Resources and others who said that it could not be done.
- 11.64 With both of those cases, therefore, it was Mr Snodgrass who made decisions adverse to the Claimant which were not implemented as a result of the intervention of Human Resources and others.
- 11.65 Against that factual matrix the Claimant’s claims of harassment are not made out and fail.

## 12. Summary

- 12.1 The Claimant was not dismissed. His contract of employment was terminated by his resignation and that did not fall within the terms of Section 95(1)(c) of the Employment Rights Act 1996.

- 12.2 The Claimant's complaints of discrimination contrary to Sections 13 and 26 of the Equality Act 2010 were not made out for the reasons set out above.
- 12.3 The Claimant's claim is therefore dismissed.

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Employment Judge Ord, Bedford

Date: 20 February 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS