Case Numbers: 3202411/2019
3201011/2020 & 3200203/2020

EMPLOYMENT TRIBUNALS

Claimant:	**Ms E. Volkova**
Respondents:	**(1) Credit Suisse (UK) Limited** **(2) Ms L. Falk** **(3) Mr R. Keogh** **(4) Ms T. Griffin**
Heard at:	**East London Hearing Centre**
On:	**9-12, 16-19, 23- 24 March 2021; and** **31 March, 1 and 26 April 2021 (in chambers)**
Before:	**Employment Judge Massarella**
Members:	**Mrs B. Saund** **Mr J. Webb**

Representation

Claimant:	Mr M. Purchase QC
Respondent:	Ms D. Sen Gupta QC

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **the Tribunal has no jurisdiction to hear the claims of detriment (s.47B ERA) against the Second and Third Respondents as named Respondents (contained in Case No. 3201011/2020), because they were presented outside the statutory time limit, and there was no application to extend time; accordingly, they are dismissed;**

2. **the Claimant made the protected disclosures alleged under Issues 6.1, 6.2(A)(i) and (ii), 6.2(B)(ii), and 6.2(C)(i)-(iii), insofar as they relate to training, supervision and support;**

3. **the other matters relied on under Issue 6 did not amount to protected disclosures;**

4. **the Claimant was not subjected to detriments (s.47B ERA) by the First or Fourth Respondents on the ground that she had made protected disclosures, and those claims are dismissed;**

5. **the Claimant was not automatically unfairly dismissal (s.103A ERA) by reason of her having made protected disclosures, and that claim is dismissed;**

6. **the Claimant's claim of ordinary unfair dismissal (s.94 Employment Rights Act 1996 ('ERA')) succeeds: the dismissal was unfair, having regard to the delay by the First Respondent in conducting the disciplinary process;**

7. **the Claimant contributed to the dismissal by her own conduct;**

8. **there will be a remedy hearing to determine the compensation to which the Claimant is entitled, including consideration of the extent to which compensation should be reduced by reason of contribution, and whether there should be a *Polkey* reduction and/or an ACAS uplift.**

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was V (CVP). A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

Procedural history

1. The Claimant brought three cases against the Respondent.

2. On 7 October 2019, Case no. 3202411/2019 was presented, after an ACAS early conciliation procedure between 8 August and 8 September 2019 ('Claim 1'). It was brought while the Claimant was still in employment, against the First Respondent ('R1') only, and it contained claims of public interest disclosure ('PIDA') detriment, by reference to disclosures made by her on 10 September 2018.

3. R1 presented its response to Claim 1 on 9 December 2019. It was amended on 17 April 2020 in response to the Claimant's replies (dated 13 March 2020) to a request for further information. R1 denied that the Claimant had made protected disclosures and/or that she had been subjected to any detriment. R1 also raised time limit issues.

4. On 15 January 2020, Case No. 3200203/2020 was presented ('Claim 2'), after an ACAS early conciliation period between 8 August and 8 September 2019. This claim was also brought against R1 only. It contained further allegations of PIDA detriment, and a claim of automatically unfair dismissal, by reason of the Claimant's having made protected disclosures. It contained an application for interim relief, which was later withdrawn.

5. On 30 January 2020, the second ET3 was presented. The allegations of PIDA detriment were denied. R1 resisted the claim of automatic unfair dismissal and contended that the dismissal was for gross misconduct.

6. A preliminary hearing for case management took place before EJ Scott on 14 February 2020, at which the final hearing was listed to determine liability only.

7. On 15 April 2020, Case no. 3201011/2020 ('Claim 3') was presented, after an ACAS Early Conciliation period between 6 and 8 April 2020. This claim was brought against all four Respondents. The Claimant alleged that the Second, Third and Fourth Respondents, individually and collectively, subjected her to PIDA detriments, and that R1 was vicariously liable for their actions.

8. On 23 July 2020, the third ET3 was presented. The Respondents denied that the Claimant made protected disclosures and/or had been subjected to any detriments.

9. By an order dated 20 August 2020, the three claims were consolidated.

The hearing

10. The Tribunal had an agreed bundle of documents of some 3,500 pages; a witness statement bundle, which ran to over 200 pages; an agreed chronology and cast list; an agreed list of issues, approved by EJ McLaren (see Annex 1); and a joint suggested reading list. The Respondents provided us with an (unagreed) glossary of terms.

11. On behalf of the Claimant, we heard evidence from the Claimant herself, Ms Ellina Volkova, and from Ms Shan Shan Wong (formerly Head of Product Offering and Sales Management), whom Ms Sen Gupta (Counsel for the Respondent) chose not to cross-examine. We also read a statement from Ms Djamila Tiberghien-Kurmanbaeva (the Claimant's colleague from a previous employment).

12. For the Respondents we heard from the Second, Third and Fourth Respondents and from Ms Jill Cuthbert (Director and Employee Relations Specialist).

13. The Respondents sought to rely on two supplementary witness statements from Mr Keogh and Ms Falk, dated 7 March 2021. By consent, we admitted them into evidence.

14. Ms Falk and Mr Keogh gave evidence by video link from Switzerland. Under Swiss law, foreign authorities are not permitted to conduct legal proceedings in Switzerland without the express prior consent of the High Court of the Canton of Zürich and the Swiss Federal Department of Justice and Police. The process for securing that consent, under the relevant provisions of the Hague Convention, is described in correspondence between the parties and the Tribunal, which is retained on the Tribunal's file. For the purposes of this judgment, I need only record that authorisation was granted on 8 March 2021, and the Tribunal was provided with a translation of that document on 8 March 2021. On 11 March 2021, several days before the relevant evidence was given, the Tribunal asked Counsel to prepare an agreed summary of any matters, to which it should have regard. They did so, and we were satisfied

that the evidence could proceed in the usual way, without any special arrangements.

15. An application for a witness order in respect of Ms Wong was made by the Claimant's solicitors on 4 March 2021, explaining the potential relevance of her evidence. Although it was made very late in the day, it was considered and granted by REJ Taylor on 5 March 2021. At the hearing, Ms Wong applied to revoke the order. The Tribunal has a power under Rule 29 to vary or revoke a previous case management order, made by another judge, but it may only do so when it is necessary in the interest of justice. That will usually mean a material change of circumstances. There was no such change here. In any event, the only ground relied on by Ms Wong was that she did not wish to participate in the proceedings. We considered that this did not provide good grounds for discharging the order. The application was refused.

16. Both Counsel provided extensive written submissions (which they supplemented orally). They are a matter of record, and we will not attempt to summarise them in what is already a long judgment. We are grateful to them both for their assistance.

Findings of fact

17. The Claimant grew up in Russia. She has been living permanently in the UK since 1997 and is a British citizen. She has a PhD in economics from the Russian Academy of Foreign Trade, an MSc in World Politics and Economics from the Moscow State University of Foreign Relations and a degree from the London School of Economics. She has been working in investment banks in London since 2000.

18. R1 is a member of the Credit Suisse group of companies, which provides investment banking, retail banking and wealth management services to clients. In the UK, it is regulated by the Financial Conduct Authority and the Prudential Regulation Authority.

<u>The Compliance department</u>

19. R1's compliance department is responsible for providing training on compliance policies, monitoring compliance with regulatory requirements and the First Respondent's own policies and providing advice on individual cases.

20. The Second Respondent (Ms Lindsay Falk) was employed at the relevant time as a Director, and as Head of UK Compliance. From October 2018 onwards, she assumed additional responsibility for Northern Europe, International Wealth Management ('IWM'), Luxembourg and its branches within Europe. She was the Chief Compliance Officer for the First Respondent until March 2020. In September 2020 she moved to Zürich as Head of Compliance Europe for Private Banking and Investment Banking.

21. At the relevant time the Third Respondent (Mr Ross Keogh) was employed by R1 as a Director, and as Head of the UK IWM Advisory Compliance team; he reported to Ms Falk. His role was to provide compliance advice to the various teams, and to investigate breaches, when the need arose. From 9 April 2019, Mr Keogh took up a role in Zürich, where he now works as Head of Compliance Investigations Switzerland for IWM and Investment Banking.

Human resources

22. The Fourth Respondent (Ms Griffin) is employed by R1 as a Director and Employee Relations ('ER') Specialist. Her focus is on investigations, grievances and disciplinary procedures. She is an experienced HR professional, who had been the decision-maker in numerous disciplinary processes during her employment with R1 whose outcomes ranged from no sanction, through warnings up to dismissal. Ms Griffin reported to Ms Amanda Clarke (Head of ER).

Account management

23. The account management department is responsible for the administrative setup of accounts under a shared relationship. Account management in Zürich is not bound by UK regulation or procedure. Its role is to administer accounts. It has no advisory role in relation to clients or client-facing employees, such as Relationship Managers ('RMs') or Investment Consultants ('ICs').

The Claimant's role

24. On 10 April 2017, the Claimant commenced employment with R1 in an RM role. As an RM, she was R1's contact point with clients, and was responsible for getting to know the client's portfolio and building R1's relationship with the client.

25. On 1 December 2017, the Claimant became an IC in IWM - Private Banking, reporting to Mr Eugenio Giancotti (Head of Advisory and Sales in Switzerland) in Switzerland, where he was based, and Mr Rudi de Mendonca, Director, who was based in the UK. The Claimant was not subject to a probation period in this role.

26. The IC role involved advising wealth management clients about financial products they may wish to invest in, in accordance with the particular risk profile, selected by the client when s/he became a client of R1. The client could adjust the risk profile from time to time. The Claimant focused on working with Russian clients.

27. The IC is responsible for providing suitable, personal investment recommendations, and for the dialogue with the client in relation to those specific investments. The IC makes specific recommendations to individual clients as to what products they consider the client should invest in. It is not the IC's primary role to provide more general information. The Credit Suisse Invest Expert Procedure Manual provides that ICs may provide 'market commentary, research and trade ideas to clients', but adds that an IC must 'ensure relevant eligibility before sending'.

28. Both the RM and IC roles were certified roles, meaning that R1 was required to ensure that those carrying out these roles were 'fit and proper persons' within the meaning of the FCA Handbook.

Relevant policies

29. The FCA Handbook (Individual conduct rules) provides:

> 'Rule 1: You must act with integrity.
>
> Rule 2: You must act with due skill, care and diligence.
>
> […]'

30. In relation to acting with integrity, the Handbook gives specific guidance on individual conduct rules (at 4.1.1):

> 'The following is a nonexhaustive list of examples of conduct that would be in breach of rule 1.
>
> (1) Misleading (or attempting to mislead) by act or omission:
>
> (a) a client; or
>
> (b) the firm for whom the person works
>
> […]
>
> (9) Providing false or inaccurate information to:
>
> (a) the firm […]
>
> (13) Recommending an investment to a customer, or carrying out a discretionary transaction for a customer where the person knows that they are unable to justify its suitability for that customer.'

31. R1 requires its employees to adhere to six *Conduct and Ethics Standards*, one of which is transparency, which is defined as:

> 'Build and maintain trust
>
> Be honest
>
> Foster and encourage open dialogue.'

32. R1's *Bank Compliance Manual* states at section 2.1:

> 'As an employee, you are personally accountable for your actions and must comply with all applicable laws and regulations, as well as bank policies and act in good faith and with due care at all times […] You will be held personally responsible for any improper or illegal acts, or policy violations, committed by you during your employment. Ignorance of the law or rules is not a defence for acting improperly or illegally. If you are uncertain about the laws, regulations or bank policies that relate to your business activities, contact your supervisor or your local compliance officer.'

33. The *Manual* at section 2.3 states:

> 'Be alert for red flags and for unusual incidents that pose, or may pose, significant risks so that Credit Suisse may assess and manage these issues in an effective and timely manner. If you have doubts about a course of action, consult the relevant policy. Escalate your concerns to

your manager, your Compliance, Human Resources, or General Counsel contact all the integrity hotline […].'

34. The *Credit Suisse Invest Expert Procedure Manual* sets standards in relation to the conduct of individual trades. Section 4.1 states, under Provision of Advice:

> 'As part of our commitment to an ongoing advisory service, the intention is for trades to be assessed for suitability on a pre-trade basis through completion of the checks listed below. This includes trades initiated by the client (unsolicited trades). The IC must follow the following guidance:
>
> - All trades within a CSIE portfolio should be suitable for the client. Prior to making a personal recommendation, the IC must assess, by the information fed into the EW TOF, that:
>
> - […]
>
> - the transaction is in line with the client's stated portfolio investment objectives, time horizon and risk budget
>
> - […]
>
> - P&M must be used to model all personal recommendations […] and any client solicited instructions and the IC must ensure that the resulting investment proposal is attached to the EW Trade Order Form.
>
> - The rationale for any personal recommendation must be clearly articulated to the client and will also be noted in the Statement on Suitability. Minutes of the client discussion must be supported by an accompanying client note in RMPlus.
>
> […]
>
> The process for handling insisting clients is covered in section 4.4. Other exceptions may be approved on an exceptional basis at the discretion of the IC Desk Head.'

35. Sections 4.5-4.6 of the *CS Invest Expert Procedure Manual* states:

> 'Waiving suitability assessment – unadvised trades
>
> Where a client is insistent on placing a trade without the completion of a suitability assessment due to concerns with speed of execution (e.g. in fluctuating markets where they want to execute for a specific or current price), the IC will be able to book the trade as 'unadvised' and therefore bypass the requirement to complete pre-trade suitability. However, the fact that the client was insistent on proceeding without suitability assessment must be documented in the Product Source questions in EWF […].'

36. R1's *Suitability and Appropriateness Policy* states at para 1.2 ('Assessing suitability'):

'A suitability assessment must be undertaken before providing investment advice or portfolio management services. To be suitable, investment advice or portfolio management services to be provided must:

- meet the client's investment objectives/strategy;
- be such that the client appears reasonably able to financially bear the investment risks associated with the transaction/service; and
- be such that the client is capable of understanding the transaction or service, including the risks involved'.

37. The *Suitability and Appropriateness Guide* states:

'The FCA define investment advice as advice that relates to a specific investment and must be given to the person in their capacity as an investor/potential investor (or their agent) and relates to the merits of them buying or selling the investment.

At CSUK, when we comment on the merits of investing in a specific investment this is deemed to constitute a personal recommendation and is referred to as INVESTMENT ADVICE.

The provision of investment advice is only triggered when we are speaking to a client regarding a specific investment and commenting on the merits of buying or selling that particular investment.

CSIE clients should always be given personal recommendations. In general, there should not be an advised trade is being executed on a CSIE portfolio, unless the client is insistent (please see slide 30 for details on insistent clients).

Investment advice should be provided only after the relevant Suitability and Appropriateness checks have been undertaken.

The Advisor must:

1. Model the trade in PAM

2. Complete a Suitability and Appropriateness assessment via the EW TOF [Electronic Workflow Trade Order Form].'

38. R1's disciplinary policy gives examples of gross misconduct. They include:

38.1. refusal to carry out a reasonable instruction given by an appropriate person in the Company;

38.2. conduct which, in the opinion of the Company, could adversely affect the Company's reputation;

38.3. breach of the rules of those bodies regulating the Company's business or any other relevant body or professional organisation;

38.4. failure to meet or comply with the requirements set out in the Company's compliance policies;

38.5. failure to cooperate fully and honestly with internal Legal and Compliance or other investigations or formal investigations carried out by those bodies regulating the Company's business.'

39. The policy permits stages in the disciplinary process to be bypassed; a second warning may be issued without a first having been given.

The induction process/other training in 2017

40. As a new joiner, the Claimant had what R1 describes as 'onboarding training' in its policies between 20 March and 27 April 2017, which counted as eighteen hours continuing professional development, and was signed off by her team leader on 18 May 2017. The training gave an overview of the cross-border requirements, including links to manuals relating to specific countries, located on R1's intranet; it covered the Credit Suisse Advisory Process ('CSAP'), and the Portfolio Advisory and Monitoring system ('PAM'). PAM is a portfolio management tool, used to create investment proposals for clients, to assess suitability, and to monitor the portfolio. It allows the IC to input proposed trades, and to calculate whether they are suitable for the client. PAM reviews the risk of the proposed financial product against the level of the client's portfolio risk and his/her selected risk profile. It then calculates whether the proposal is suitable and, if it is, generates a trade proposal which the IC sends to the client. The Claimant received additional training in PAM on 23 May 2017.

41. On 11 September 2017, Compliance circulated by email information about Cross Border Compass, an app which covered 'all Private Banking markets and provided access to Country Manuals, Dos and Don'ts, and other relevant information in a user-friendly format'. That email was recirculated on 17 April 2018.

42. On 10 October 2017, the Claimant was sent an invitation to attend a mandatory one-day CSAP training for all team leaders, RMs and ICs. She replied on 20 October 2017:

> 'I did a full day in Zürich (race to perform) 2 weeks ago which was all about advisory process. Can I be please released from this one below?'

43. The Claimant attended further PAM training on 20 and 26 October 2017, and 30 May 2018. She was provided with the Credit Suisse Invest Expert Procedure Manual, which she confirmed she was familiar with from May 2018. This includes guidance on cross-border training.

The first compliance review

44. R1 has a Product Approval Committee ('PAC'), whose function is to review the appropriateness of new investment products, which R1 is considering offering to clients, and to ensure that existing products remain appropriate. In February 2018, the PAC consisted of Mr Patrick Haller (Head of Advisory and Sales), Mr Ian Hale (Head of R1's risk function) and Ms Falk.

45. On 5 February 2018, the Claimant sought approval of a trade in a structured product. It was a reverse enquiry trade, with a product risk classification ('PRC') of five. A reverse enquiry trade when the client approaches the IC with the idea of a specific trade and asks the IC to structure it according to the terms they want. PRC is a risk ratio which ranges from one to five, one being the lowest risk, and five the highest. The Claimant told the PAC that two of her clients had approached her on a reverse enquiry basis to trade in the same structured product. Because it was a reverse enquiry trade, the Claimant acted properly in approaching the PAC to seek approval. After making further enquiries, the PAC approved the trade.

46. On 12 February 2018, the Claimant sent another request to the PAC relating to a different client who, she said, wished to do a trade in the same product, also on a reverse enquiry basis. The PAC approved the trade. However, Mr Keogh, who overheard the discussion about the trades made some enquiries and formed the view that the Claimant had actively approached at least one of the clients with the trade idea herself, and that it was not a reverse enquiry situation.

47. A compliance review was initiated the same month, conducted by Mr Keogh and Ms Hélène Sieffert (Local US Policy Officer, IWM UK Advisory Compliance).

48. On 16 March 2018, Mr Keogh emailed Ms Falk, alleging that the Claimant may have committed other significant breaches of policy. They met the Claimant on 20 March 2018, to explore her account of the February 2018 trades.

49. The review found multiple breaches by the Claimant of R1's policies, which were set out in a report ('the first compliance review report'), including the following: at least two of the three trades had been solicited by the Claimant, and were not reverse enquiries; one of them had been solicited by her before PAC approval was given; further, the Claimant had promoted the product to other retail clients without approval, and in breach of R1's policies. The review also made findings of poor record-keeping and a failure by the Claimant to conduct client calls on recorded lines, as she was required to do.

50. On 22 March 2018, the Claimant emailed Ms Sieffert, apologising for her actions [*original spelling and punctuation retained in all extracts from contemporaneous documents*]:

> 'As discussed over the phone, I went through the meeting notes, and (apart from the fact how obnoxious and superficial I seemed to treat the internal data collection, even if under time and work pressure, really baffling) everything is very clear: I will await for your comments on soonest remediation of this situation.
>
> I deeply apologise to those members of the committee might feel that I let them down, it was not my intention to mislead put anyone into risk or uncomfortable position. The discussion brought clarity in understanding of concepts which are vital for healthy functioning of the bank: solicitation, advisory process and cross-border.

> Once again, my sincere apologies to my colleagues for causing such a mess.'

51. Ms Falk and the Claimant spoke on 23 March 2018. Ms Falk told the Claimant that the most concerning aspect of her conduct was the misleading information she had provided to PAC, a governance committee of R1. According to the note, the Claimant recognised the seriousness of this and accepted that it could not be regarded as a simple mistake on her part. The note records:

> 'LF explained that the information in the evidence she had seen pointed to EV doing more than just misleading the PAC but had demonstrated she had not told the truth about how the trade ideas had come to the client's attention. EV had told the PAC they were all reverse enquiry, but Compliance had reached a different view for three trades and found them to be solicited.'

52. Ms Falk explained that the matter would be referred to the UK Conduct and Ethics Review Panel (CERP), which in turn might lead to disciplinary action. She told the Claimant that, because of the seriousness of the matter, the Claimant would be placed on heightened supervision, for her own protection and the protection of R1.

53. The Claimant later alleged, in her grievance of 10 September 2018, that at a further meeting with Ms Falk in this context, on or around 22/23 March 2018, at which Mr Haller was also present, Ms Falk 'yelled/spoke in a very high aggressive tone and in a very disrespectful manner called me a "liar"'. At an interview in December 2018, Mr Haller said that Ms Falk had not used the word 'liar' in relation to the Claimant; he agreed that she raised her voice, but went on:

> 'it had been a mutually heated discussion. He believed [the Claimant] had been overwhelmed by the facts and the potential consequences. He stated that [Ms Falk] had not threatened [the Claimant] or 'yelled' at her.'

54. We find that the discussion became heated, and that Ms Falk stated that the Claimant had misled the PAC. We think it likely that she also said that the Claimant had not told the truth to the PAC. That was her genuinely held view, and she expressed it in the context of trying to bring home to the Claimant the seriousness of her actions. She did not call her 'a liar', which suggests a broader attack on the Claimant's character; that was an exaggeration on the Claimant's part. Nor did she spread the suggestion that the Claimant was a liar within the organisation. We reject the Claimant's evidence that Ms Falk 'yelled' at her; that too was an exaggeration. We note that the Claimant made no complaint about Ms Falk's conduct at the time, and only made these allegations when she was facing serious disciplinary charges.

55. Ms Wong alleged in her evidence in chief that Ms Falk had shouted at her in meetings in Jan/March 2018. That was the first time such an allegation was made in these proceedings. Ms Wong was unable to give anything other than the most generalised evidence: she could not recall the dates of the alleged incidents, or anything substantial about the context. Mr Keogh was at those meetings and stated that Ms Falk did not raise her voice; indeed, he said that he had never heard Ms Falk do so at a meeting or in a telephone call,

although he accepted that she might adopt a frustrated tone. We prefer Mr Keogh's evidence in this respect and reject that of Ms Wong.

56. In light of the findings from the first compliance review, on 26 March 2018, Ms Falk asked that all advised trades executed by the Claimant from December 2017 to February 2018 be reviewed to ensure compliance. Fifty-five trades were reviewed. Record-keeping deficiencies were identified in each of them. Other failings were identified: eight of the trades were in products not on the Respondent's UK approved platform; six were in products which were not on any of the Respondent's platforms, in or outside the UK.

Heightened supervision: March to August 2018

57. On 23 March 2018 the Claimant was placed on 'heightened supervision'. This is a preventative measure, used by R1 to manage regulatory and operational risk where there are conduct concerns, while allowing employees to continue in their role, without the need for suspension. The Claimant was still permitted to engage with clients, provided she was appropriately chaperoned by Ms Galina Bezuglaya.

58. On 27 March 2018, Ms Falk emailed the Claimant, copying in her supervisor, Mr Rudi de Mendonca, setting out the terms of the supervision. The email began:

> 'Per our call on Friday 23rd March, I am setting out the terms of the heightened supervision that you have been placed under by Compliance and your supervisor whilst we undergo the compliance review which has been discussed with you by myself.'

59. The terms included the following:

> 'You must copy your supervisor (Rudi [de Mendonca]) on all client facing emails.
>
> You must be chaperoned by your Russian speaking Investment Consultant colleague on all client phone calls from w/c 3rd April until Compliance/Supervisor advise you otherwise.
>
> If attending client meetings, then you must do so with a Relationship Manager. You remain responsible for the timely and completeness of RMPlus notes concerning investment ideas discussed during any meetings. The notes must be comprehensive.
>
> In accordance with normal course of business, you must retain (and increase) focus on record-keeping generally. Ensuring the correct trade documentation is provided to clients, timely, and internal records of material client conversations are stored on RMPlus promptly.
>
> Should you require any additional support from a policy/procedural training perspective then your Supervisor will be able to arrange this for you, and Compliance would be happy to provide guidance as needed.
>
> You will remain under heightened supervision until myself and your Supervisor advise otherwise, and we expect you to comply fully with the

terms outlined above. Therefore, if anything is unclear, please do let me know and I will provide clarification.'

The first disciplinary process

60. The issues which had arisen in relation to the Claimant's conduct in March 2018 were reviewed by the Conduct Escalation Review Panel ('CERP'). The function of CERP is to review alleged misconduct, and determine next steps, including whether the matter should be escalated to a disciplinary process. On 10 May 2018, CERP decided that the matter should proceed to a disciplinary hearing.

61. On 18 June 2018 the Claimant attended a first disciplinary meeting in relation to her conduct in March 2018; it was conducted by Ms Sarah Blay (Director, ER). On 17 July 2018 the outcome of the disciplinary meeting was communicated to the Claimant by letter dated 17 July 2018. Ms Blay found that the Claimant had provided misinformation to the PAC, but had not intended to mislead it; that she had shown poor judgement; that her actions could have exposed the Respondent to a complaint from the client; that she had not paid sufficient attention to the relevant policies, but that the resultant breaches were not intentional, rather she had taken insufficient care and attention when dealing with the matter; and the standard of her recordkeeping were below the standards expected by the Respondent. She also concluded that the Claimant should have received additional training and guidance on key policies and procedures upon her transfer to the role of IC. She concluded:

> 'I would like to reiterate that you should not make assumptions about the policies and procedures of the Bank. You should seek guidance from your line manager, the compliance department and/or other relevant Subject Matter Expert if you are unsure at any time in the future. You must also act in a more considered way going forward, with enhanced due care and attention to the policies and procedures of the Bank.'

62. If there had ever been any doubt, the terms of this letter made it clear to the Claimant that, if she ever found herself in difficulty in relation to a particular transaction, her first port of call must be her line manager, and that she must not proceed on the basis of assumption as to policy and procedure.

63. The Claimant was issued with a second written warning, with an expiry date of 16 July 2019. She did not appeal.

Change of supervisor

64. At the end of July 2018, Ms Kanupriya Khare (Director, Head of Investment Consulting UK, Advisory and Sales) took over from Mr de Mendonca as the Claimant's London-based supervisor; the Claimant continued to report to Mr Giancotti in Zürich. At the beginning of August 2018, Ms Khare asked Ms Falk if the Claimant could be taken off heightened supervision. That enquiry was unresolved at the time of the trade on 6 August 2018, which is the central event in these proceedings.

Further training

65. As a consequence of the disciplinary investigation, the Claimant was required to undergo further training, which involved her taking all the IC onboarding training again. Both the Claimant and her managers, Mr Giancotti and Ms Khare, had input into what would be most useful for her in a series of emails in July 2018, although the Claimant later said that she was dissatisfied with the focus of the training.

66. On 18 July 2018, the Suitability and Appropriateness Policy/Manual was re-sent to her, and she was required to reread it. On 24 July 2018 she attended a training session with Ms Sieffert on suitability and appropriateness assessments.

The events leading up to the trade on behalf of Client A on 6 August 2018

67. In late July 2018, the Claimant was asked to work with a Russian-speaking, ultra-high net worth individual ('Client A'). Client A had shared accounts between Zürich and London. Advice could only be provided from London. Ms Bezuglaya was the designated IC, and usually looked after Client A. Because she was on holiday, Ms Julia Sukhareva (who was Client A's RM) asked the Claimant to cover him in Ms Bezuglaya's absence.

68. On 27 July 2018 Ms Sukhareva emailed the Claimant as follows:

> 'We now have USD35M cash on Swiss account for [A] and he can invest up to USD5M and EUR5M in structured products. This is a complex portfolio in Zürich with leverage so the level of capital protection, diversification and the medium risk of underlying assets are the key. Please have a look at his existing portfolio there and make a proposal for USD and EUR by mid next week if possible. He will then select on the amount and currency.'

69. On 30 July 2018, the Claimant sought advice from Compliance in relation to the cross-border rules, given Client A's nationality. In an email at 10:55 she briefly set out the circumstances, and asked Mr Keogh:

> 'Can I advise to the client (provided cross-border is completed) from the UK for his Zürich account? We need an answer asap, as the portfolio proposal should be ready by end of tomorrow.'

70. Mr Keogh sent a detailed response, addressing the cross-border issues which arose in a situation such as that of Client A, providing the Claimant with a link to the relevant Country Manual. Among other things, his email made a clear distinction between sending a promotion, based on investment research material, and sending a personalised investment proposal.

71. The Claimant replied at 12:11 with some further information, and concluded:

> 'what are your thoughts? Can we make a proposal to client?'

72. Mr Keogh replied at 14:32:

> 'Thanks. I am happy for you to provide the proposal.'

73. On the same day, at 15:41, the Claimant spoke to Mr Nevzet Khasanov, the Russian-speaking account manager in Zürich. He said:

> 'I wanted to tell you that Client A had a few safekeeping accounts, as you noted correctly: on safekeeping - 05 he used to keep Arab Bank, on 05-1 he keeps structured notes/bonds which [Ms Bezuglaya] used to sell to him before.'

74. Account 05-1 was labelled as an advisory/safekeeping account. Account 05 was an 'execution only' account. Such accounts are reserved for trades in respect of which no advice has been given by the IC; they are execution and custody accounts for clients who direct the IC to place a particular trade on their account.

75. The Claimant asked Mr Khasanov if the 05-1 account could be used for trading. He replied:

> 'I assume yes. This is the account on which the structured notes had been bought before. But whether we can trade on this account or not I don't know […] the only thing – I am not sure which one, out of all of these accounts, can be traded on, I don't know.'

76. On 31 July 2018, the Claimant sent Ms Sukhareva a list of structured notes which she intended to send to Client A. She wrote:

> 'Please have a look at the email I will be sending provided the client confirmed his willingness to receive from us in promotion on SNs as a reverse enquiry. Please also provide a loan agreement where he initially specifies this need to receive investment opportunistic ideas from CS ICs.'

77. Ms Sukhareva replied:

> 'I would rather leave the product selection to you. Happy to help however it may take longer and the client likes quite dynamic communication. I once again would like to confirm that it is not a reverse enquiry. The client gave us initial generic parameters of his risk return preference and expects us to send him ideas within the profile. Please feel free to check with [Ms Bezuglaya] or your colleagues.'

78. At 18:27 on 31 July 2018, the Claimant emailed Client A:

> 'Please confirm that you as before would like to receive from us investment ideas re SN for the purpose of reinvestment an ongoing income generation. I will be able to send you the list of products as soon as I receive your confirmation.'

The client replied: 'OK'. The Claimant did not save this email exchange to RMPlus.

79. On 1 August 2018 the Claimant and Ms Sukhareva spoke at 10:33. In the course of that discussion, the Claimant referred to the fact that Client A was 'waiting for a proposal to come from us'.

80. At 10:33 on 1 August 2018, the Claimant had a telephone conversation with Ms Sukhareva, the result of which was that Ms Sukhareva told the Claimant to

call the client and 'ask whatever you need from him'. Shortly thereafter, the Claimant spoke to the client, in the course of which she said the following:

> 'OK, then I will be sending to you at this moment the promotion. I have never worked with you before, but I have sent to you a large list of notes to choose from, for stocks and indexes. The volatility level now is a bit lower than at the time of you purchasing the now maturing notes. Now volatility level is 13.3%, but the coupons are not bad, please have a look. I have sent a very conservative level of capital protection barrier, 50-55%, so that you have a large space for price variation about 50%. If anything is unclear, please note this and I will call you back, we will discuss it and I will send to you the documentation. Agreed?'

81. She then followed up with an email to Client A at 10:45 on 1 August 2018:

> 'following on our telephone call and according to your request, please consider the suggested options of structured notes linked to different equities and indices. If you are interested in any of these SNs, I would be happy to discuss them with you and to explain to you their associated risks in detail. After we will discuss the idea and product structure, I will send you the KID, Fact Sheet, Addendum to the SNs.'

82. At 12:47 on 1 August 2018, Ms Sukhareva emailed the Claimant again:

> 'Please could you send me the timesheets of the product you are investing into. The client's request is to maintain the overall medium risk […] if you have EUR5M matured, you may invest same EUR5M subject to the product risk/client risk profile.'

83. At 18:20 1 August 2018, the Claimant sent a reduced list of products to Client A, including a risk 4 (high risk) structured product, again without first assessing their suitability:

> 'please find below the preliminary SN's calculations that we discussed. Unfortunately we were unable to simulate the risks and LTV in the portfolios, as the trading desk in Switzerland is closed today due to a day off. We will be able to send you the rest of the information tomorrow.'

84. On 2 August 2018, the Claimant asked Mr Iannis Laekanidis to provide the PRCs for the products she had sent to the client, to enable her to perform the simulations in PAM. At 12:32 he told her that the EUR5M bespoke structured note was PRC 4. At 14:36, the Claimant opened the 05-1 account, which was identified as advisory safekeeping, and discovered that it was in breach, i.e. the products in the portfolio already exceeded the client's medium risk mandate, before any other action was taken. In an email to Ms Sakharova and Mr Khasanov at 14:49 the Claimant wrote:

> 'we will be trading the EUR5m structured notes for the 05-1 but can't even approach the trade until the risk breach is fixed on the account by way of cash transfer.'

85. In a call with Mr Khasanov at 15:46, the Claimant said:

> 'on this advisory account, where we are going to book it, the risks are in breach.'

86. The Claimant told Ms Griffin during the disciplinary procedure that 'the simulation showed that the trade was impossible'.

87. In a call with Mr Khasanov at 15:40, the Claimant said:

> 'Yes Nevzet, do not move the money to the XO [execution only account]. If you move it to the XO account I won't see that money ever again. Because that money is reflected as I can see on the XO, and the XO [in the UK] I am not allowed to touch even with a pole, ever. So, please do not move the money for an hour to the XO please. I am at present speaking with Julia, she will be thinking.'

88. On 2 August 2018 at 15:47, the Claimant conducted a suitability assessment on PAM of the Stuctured Note by reference to the 05 account (i.e. the execution only account) notwithstanding the fact that she had previously been told it was an execution only account. She later explained that she did so because the account showed as advisory on the London PAM system; it also showed the portfolio accommodating the product within risk budget.

89. On 3 August 2018 the Claimant had a one-to-one meeting with her supervisor, Ms Khare. She did not ask her advice about this trade.

<u>The execution of the trade</u>

90. At 11:40, the Claimant sent execution orders for a number of trades to the Zürich trading desk, including the trade for Client A, which she asked to be executed on the 05 account. Ms Khare was copied into the email. Ms Khare told Ms Griffin during the disciplinary investigation that she 'probably received tens of emails every few minutes and she would not look at the table in detail'.

91. The Claimant's evidence in her witness statement was that, on 7 August 2018, Ms Bezuglaya (who had returned from holiday) told her that the 05 account 'was execution only in Zürich and could not be booked on, even if it showed as advisory in the UK.'

92. The Claimant sent an email to Mr Khasanov, asking him to confirm that the way the trade had been booked had been correct. She wrote:

> 'This should be sorted ASAP, because otherwise we again will have issues explaining FLDS and Poland that we did not violate the procedures, but merely coped with the inconsistencies of the systems between Zürich and London'.

93. On the same day, the Claimant sent a list of twelve trades she had closed the previous week to Mr Giancotti, copying in Ms Khare.

<u>The events after the execution of the trade</u>

94. On 8 August 2018 at 13:12, Mr Khasanov emailed the Claimant, copying in Ms Sukhareva:

> '[We] have simulated the addition of the Note purchased into the safekeeping 05-1 and with the selected risk budget "Medium" as per CSAP you would have a breach. So the solution we discussed yesterday would not help. To resolve this only a new CSAP with the Risk Budget "High" or further diversification of the portfolio can help … Apologies for not better news.'

95. On 8 August 2018, the Claimant spoke with Client A at 15:01. The transcript of the call runs as follows:

> 'EV: The thing is because of the concentration in this portfolio (10m) these only in notes, if I buy the note (EUR with coupon 5.65), then portfolio risk is breached for these 10m. However looking at your overall portfolio in Zürich, these notes will fit nicely and the 5m note don't have impact on your overall portfolio. OK? That is, if we are buying this note, you need to confirm to me that, even if the risk is increased for this safekeeping advisory account you are OK with it. Can we buy this note or would you like to cancel?
>
> A: yes, let's buy. Nothing to worry about.
>
> EV: It's only 10m, which at the moment is just sitting there in notes. Thank you very much. I am then accepting based on you insisting that even though the risk is increased for this 10m portfolio, we are going ahead regardless. Yes?
>
> A: Yes.
>
> […]
>
> EV: I am accepting and executing your order.'

96. The Claimant prepared a file note (in English) of her conversation with Client A on RMPlus. It included the following passage:

> 'The client is aware of the situation. I said that if we reinvest right now the EUR5m of redeemed cash from one of the notes into the note PRC4, he would still be in breach of risk budget, hence there what would he prefer to do: to stop the trade and consider another product with lower risk and different payout parameters? Or could he re-sign the CSAP? The client insisted that he doesn't want to change the product parameters and would like to proceed with the trade.'

97. At 15:12 on 8 August 2018, the Claimant spoke to Ms Vlada Philippides (a VP, First Line of Defence Support), who is a Russian speaker. She said:

> 'Can you send me a list of things to do in order to book unsuitable trade due to increased portfolio risk? Client wants to go ahead regardless, insists on buying. I'll do TOF, I've done file note, we had a call with client. What else do I need to do so that I am not going to be in trouble again?'

The Claimant did not tell Ms Philippides that the trade had already been executed.

98. On the same day the Claimant had a one-to-one meeting by telephone with Mr Giancotti. There were difficulties with the phone line, and the Claimant agreed that Mr Giancotti could phone her on her personal mobile number; as a result it was not recorded. Mr Giancotti was interviewed about this discussion on 23 September 2019. He stated that they had discussed the trade and, when he learnt that the trade would breach the client's risk budget, he said he did not think that would be acceptable, and would very possibly 'get Compliance attention and lead to a possible negative repercussion for the person who made the investment'. He stated that he had strongly urged her to seek advice on the trade from Compliance in the UK and/or her local line management.

The events of 9 August 2018

99. On 9 August 2018 at 12:03 the Claimant emailed Ms Jade Beale (VP, CSUK Coverage Compliance, London), copying in Mr Keogh, Ms Bezuglaya, and Ms Khare, asking for advice. The subject heading was: 'Transaction advised but unsuitable'. Given the importance of this email, we set out its text in full:

> 'Dear Jade, seeking your advice confirmation you are OK/or NOT OK for me to proceed with the trade for Zurich account:
>
> Client's portfolio (safekeeping advisory) has 2 structured notes only PRC4. The account is in breach of enhanced risk budget. One of the notes redeemed and the client wants to asap re-invest EUR5mio into another PRC4 product. This PRC3 and PRC4 for his Zurich and London portfolios. In the initial conversation the client said that he is Medium risk, whereas the CSAP he signed with CS is Zurich DAC – HIGH, Zurich Advisory Safekeeping – Enhanced, UK Advisory – Medium. Upon choosing the products from the list, he decided to go for PRC4 products.
>
> Having simulated PAM for suitability purposes, the issue with the Zurich advisory safekeeping came up last Friday, and I sleeked advise [*sic*] from Account Manager there, who pointed out complicated linking of the account to the overall portfolio where the cash is taken for investments and advisory safekeeping. Bottomline, RM+ calls the safekeeping account advisory (as it also in CSAP) and even if the PRC4 product fits the overall Zurich portfolio, it wouldn't fit risk budget of the advisory safekeeping. I needed to check with the client whether he wants still to trade the PRC4 produce, provided his safekeeping advisory is in breach of risk budget, or would be consider a different product, with lower risk which was shown to him before. So I made a call to the client with Galina Bezuglaya as his previous IC.
>
> The call:
> The client was still in location A and answered his UK tel number. I went through the situation with Zurich account deemed for safekeeping advisory where EUR10m only had been kept just in 2 structured notes. I pointed out that this is a very concentrated portfolio and does not fit enhanced risk budget (which was pointed out to him during the SARs by Galina Bezuglaya). The client is aware of the situation. I said that if we reinvest right now the EUR5m of redeemed cash from one of the notes into the note PRC4, he would still be in breach of risk budget, hence

there what would he prefer to do: to stop the trade and consider another product with lower risk and different payout parameters? Or could he re-sign the CSAP?

The client insisted that he doesn't want to change the product parameters and would like to proceed with the trade. I asked him, how he would like to deal with this situation in his portfolio for the future? The client answered that when the second Structured note redeems, he will think then what to do with the cash and this account overall. I once again re-confirmed, whether he goes ahead with the PRC4 note, but in this case this trade will be solicited advised but unsuitable for him. He confirmed he understood.

CAN I BOOK THE TRADE, BASED ON THE ABOVE CONFIRMATION?

The client is leveraged and usually keeps all his cash at work in Finers or structured notes traditionally and less in cash, to compensate for the loans he took to buy the boat. He has a very solid KnE in these type of products, and until recently his portfolio consisted of PRC3,4,5 products. After the Semi-annual review Galina has reduced the risk of the UK Portfolio by reducing the client's exposure to PRC5 products. As the client has a leverage, one of his objectives is to avoid margin calls in adverse market conditions on the CIF basis.'

100. Shortly after sending the email, the Claimant went to see Mr Keogh and Ms Beale. Mr Keogh asked the Claimant to send them a copy of the original email, in which she had sent the proposal to Client A, which she did.

101. Ms Beale replied at 14:19. Her email included the following passages:

'It would not usually be a Compliance/any second line of defence role to approve the booking of any individual trades.

[…]

For this scenario, it appears that you had a telephone conversation with this client about his specific portfolio, the email that followed would not be seen as a 'distribution of content' or 'fin prom' and I believe the client will have expected to have been provided with a personal recommendation, containing suitable options

My understanding is that following this call, you should have reviewed his portfolio and sent in personal recommendations (i.e. doing the suitability checks first) rather than sending a list of ideas that could potentially continue his portfolio's unsuitability. If you knew that he was already breaching risk budget then I would have expected this to have been discussed upfront with him and more conservative recommendations to have been made. It is unclear why we would have shown him any PRC4 products when we knew his portfolio was already breaching risk budget and therefore unsuitable. From our Google translation of your email (please note you should be keeping translated records yourself) we cannot see that you referenced the breach and risk budget when sending these 'ideas' across.'

102. Ms Beale offered to meet to discuss the matter later that afternoon, and the Claimant agreed.

103. At 14:58 the Claimant conducted a call with Client A relating to a different product. A trader had called her to tell her that the price was rising; he wanted her to inform the client and ask him if he still wanted to proceed at the new price. Because the order was time-sensitive, and there were no other Russian speakers available, the Claimant called the client without a chaperone, and without consulting Ms Khare; she did not make a record of these calls, nor did she save them to RMPlus.

104. On 9 August 2018 at 15:10 the Claimant had a meeting with Compliance (Ms Beale and Mr Keogh) and her supervisor, Ms Khare, to discuss her email, in which she sought guidance. There are no notes of that meeting. The central dispute was as to whether the Claimant told the other attendees, or whether they already knew, that the trade had already been executed, or whether they thought they were talking about a prospective trade.

105. An issue arose as to what would have been understand by the term 'book' in the Claimant's question: 'Can I book the trade, based on the above confirmation?' It was her case that it would have been clear from the use of that word that the trade had already been executed. By contrast, Mr Keogh told the Tribunal told the Tribunal that 'booking a trade' means executing it, but that it is also used loosely by some traders to refer to the administrative process of recording a trade, which has been booked in the Zürich, in the UK system by the completion of a suitability trade order form.

106. The Claimant was adamant that all the attendees knew, or ought to have known, that the trade had been executed, and that Mr Keogh instructed her to cancel the trade, alternatively to ask Client A to re-sign the CSAP.

107. In a telephone call to account management at 16:05, the Claimant began as follows:

> 'Guys, there is a situation. Compliance does not permit me to go ahead with the trade because it does not pass by advisory [criteria]. It doesn't pass the risk, we don't have the right, they are not inclined to take the risk of having client already in breach based on annual review, they … We can't recommend him [this product] as an IC. Client A wants this product, he confirmed to me today over the phone. Is there a way to book it on your side in Switzerland?

The response was:

> 'No, there is absolutely no way. We had exactly the same rules for advised trades, where we can't book risk budget breaches for advised trades.'

108. At 16:50, the Claimant spoke to account management again and discussed a possible cash transfer of EUR 4.3m to deal with the account breach on the advisory safekeeping account. In the course of that discussion she said:

> 'Elina: Do I need client's agreement for this? Or are you going to discuss it with him?

> Account Management: what are you talking about, of course you need it.'

109. At 17:06 the Claimant made a call to Mr Lekanidis, with whom she had placed the trade order on 6 August 2018. At 17:08 Mr Lekanidis called her back. The Claimant told him that there was a problem with the trade, and that she thought it was going to settle the following day. Mr Lekanidis told her that it had already settled. The Claimant asked him what the consequences of unwinding the trade would be. He told her that any loss would need to be taken on by the bank.

110. The Claimant then called Client A at 17:33. She did so without a chaperone. She told him that the account in Switzerland was 'creating a lot of problems'. The client replied: 'let's not do it… I just need to stay in Medium and not to take too much risk.' The Claimant thanked him and concluded: 'we are cancelling then'.

111. It was the Respondent's case that, later in the afternoon, the Claimant told Ms Khare that the trade had already been executed. Ms Griffin found that it was likely that she told Ms Khare between 17:30 and 18:30, after she found out that the trade had already settled. The Claimant's case was that they had known all along.

112. In an email at 17:50 to Ms Lea Blinoff (Ms Khare's supervisor), copying the Claimant in, Ms Khare asked to speak to her as soon as possible 'to discuss a trade for Ellina'.

113. At 18:57, Ms Khare emailed Mr Keogh and Ms Beale, copying in Ms Bezuglaya, Ms Falk, Ms Blinoff, and Mr Giancotti as follows:

> 'Thanks for your time with this. At the time of our meeting this afternoon, I did not realise that this was an already executed trade. We traded on Monday, the settlement is tomorrow. This does change things and I have discussed with Lea and Ellina a few minutes ago. Ellina is cancelling the trade now, discuss tonight/tomorrow.'

114. The Claimant was also copied into this email. She did not seek to correct the information it contained.

115. The following morning, 10 August 2018 at 07:19, Mr Keogh replied to Ms Beale's email:

> 'Wow. This worries me even more. She didn't mention this key fact at any time and shows how badly she understands the S&A Framework; you assess suitability first, then trade. Not the other way round. Sigh….'

116. On 9 or 10 August 2018, the August 2018 trade was cancelled/unwound. The Respondent bore the cost: CHF 22,000.

117. On 10 August 2018, a meeting took place between Ms Falk, Mr Keogh, Mr Giancotti, and Ms Khare to discuss the August 2018 trade. Compliance decided to keep the Claimant on heightened supervision.

118. The Claimant was away on leave between 10 and 20 August 2018; Ms Falk was also away between 13 and 27 August 2018.

The fact-finding investigation

119. On 13 August 2018, a fact-finding investigation into the August 2018 trade began. It was conducted by Mr Keogh and Ms Beale. Mr Keogh asked Ms Beale to be the lead investigator. He oversaw her work, and helped her to direct the investigation, as required.

120. The investigation focused on the collation of contemporaneous evidence, and took a number of forms: systems were manually searched to identify relevant documents; an email surveillance tool was used to conduct keyword searches; telephone records were reviewed, and recordings of telephone conversations collated; and relevant records from the RMPlus and PAM systems were identified. A Russian speaker in the Compliance Monitoring team, Ms Natalia Serra, reviewed and translated a number of calls which were in Russian. At that stage, Compliance did not conduct any interviews.

121. On 28 August 2018, Ms Falk sent an email to Mr Giancotti, Ms Khare and others, setting up a meeting for the following morning, so that Compliance could present some preliminary observations regarding the August trade.

122. In an email of the same day, Ms Beale forwarded to Ms Falk a copy of the draft fact-finding investigation report. In her covering email Ms Beale identified the key issues, among which were the following matters:

> 'Lack of transparency. It was not communicated on the 9th August when asking whether she could go ahead, that the trade had already happened on the 6th August.
>
> […]
>
> Documenting the client was insistent when the call does not evidence this to be the case.'

123. The meeting took place on the morning 29 August 2018. Later the same morning Ms Falk circulated a summary.

> 'Compliance re-capped on the circumstances we had been made aware of concerning a SP trade executed by EV which was unsuitable due to the trade breaching the risk budget.
>
> Meeting participants agreed that EV should be removed from having any client contact whilst Compliance continue to investigatethe matter (it should be noted that EV has not yet been spoken with to obtain her version of events, but given the number of high risk flags it was agreed that is the most prudent course of action to protect the firm and clients whilst the investigation continues). The reasons for removing her from client contact are due to:
>
> EV apparently not complying with her the terms of her heightened supervision (i.e. being chaperoned on client calls).
>
> EV soliciting an unsuitable trade to the client.
>
> EV not being fully transparent that she had executed the trade with the cient. None of EG/KK/JB and RK knew she had actually executed the

> trade despite all having had a discussion with EV. The trade was ultimately unwound leading to a GBP22k loss.
>
> EV noting calls with the client were reverse inquiry and the client was insistent to trade when all records Compliance has located demonstrate EV is leading the discussions and pro-actively contacting the client.
>
> General lack of judgement, inability to follow the sales process despite recently being re-onboarded following a disciplinary process concerning the same types of issues.'

124. It is clear from this summary that both the issue of 'lack of transparency' on the Claimant's part, and the issue of whether Client A was 'insistent', were highlighted at that meeting as being of concern.

125. One aspect of transparency in R1's *Conduct and Ethics Standards* is honesty (para 31). We are satisfied that the references in the summary above to the Claimant 'not being fully transparent' reflected the belief that she had been dishonest. This concern was identified before the Claimant made her grievance in September 2018.

126. On 29 August 2018 Mr Giancotti informed the Claimant that she was under investigation because of the August 2018 trade.

Occupational Health advice

127. At this point, we group together our findings as to the advice the Respondent received from OH.

128. The Claimant was signed off work for medical reasons between 3 and 9 September 2018. She attended an appointment with Occupational Health on 11 September 2018. The subsequent report recorded, among other things, the Claimant's concern that the investigation process might be 'prolonged in nature'; it also recorded that she felt 'stressed and anxious', and that she had suffered with severe headaches and had experience sleeplessness. The OH specialist advised that the Claimant was not fit to engage with the Compliance investigation at that stage.

129. By letter dated 5 October 2018, OH advised that the Claimant was now fit to engage with the grievance process, including attendance at meetings. The importance of expediting the process was emphasised, as the Claimant was finding it increasingly difficult to cope with the Compliance investigation and the situation at work.

130. On 6 December 2018, OH reported that the Claimant remained at work, on restricted duties. She had been feeling 'increasingly stressed as a result of her situation', and advised that there was significant risk of her becoming more stressed and anxious should she be asked to undertake duties which might lead to her making mistakes. The report recommended 'more basic tasks until the grievance and compliance processes have been completed'. The report strongly encouraged the business to expedite the grievance process as far as possible, as this would help to allay some of the Claimant's anxieties.

131. On 16 January 2019, a further report again advised that internal investigations should be expedited. It recorded that the Claimant had indicated that she would be happy to engage with the Compliance investigation at that stage.

The First Grievance and the division of the issues

132. On 10 September 2018, the Claimant raised what she described as a 'formal grievance and whistleblowing disclosure' in a 14-page letter to Employee Relations ('the First Grievance'). This letter is relied on by the Claimant as containing the alleged protected disclosures referred to at para 6.1 in the list of issues. It will be referred to further in the section below dealing with the issue of disclosures.

133. In brief, the Claimant alleged: unfair treatment by Ms Falk and Mr Keogh and Mr Giancotti since February 2018; wide-ranging criticisms of Compliance; and criticisms of R1's systems; and an inadequate approach to training. The Claimant provided a detailed chronology of her own experiences since joining the firm in April 2017, including allegations relating to unsupportive management, unwelcoming, aggressive and bullying behaviour by individuals, inadequate provision of advice and mentoring, and poor provision of phone and IT facilities. She was particularly critical of the investigation and disciplinary sanction imposed in July 2018. The last section of the grievance contained a detailed defence of her conduct in relation to the August 2018 trade. The grievance concluded by setting out desired outcomes, including a move to a different desk.

134. The matters raised by the Claimant in the First Grievance were split into two categories: grievances and 'reportable concerns' and dealt with separately. The reportable concerns procedure is an established, separate line of escalation within R1. The aspects of the Claimant's grievance which related to the conduct of individuals were dealt with under the grievance procedure; those that related to alleged systemic issues were dealt with under the reportable concerns procedure.

135. In the last paragraph of the grievance letter, the Claimant wrote:

> 'I look forward to hearing from you with the date and time of my grievance meeting. Please also confirm which aspects of my complaint will be dealt with under the grievance procedure and which will be considered under the Company's whistleblowing procedure.'

136. Ms Cuthbert wrote to the Claimant on 25 October 2018, explaining how the issues would be split. The Claimant replied the same day: 'thank you very much for getting back to me and this structured approach'. We are satisfied that the Claimant consented to this division of the issues into two strands.

137. The investigation into the reportable concerns was conducted by Mr Kirt Tailor (Director, Compliance Investigations UK).

138. On 6 December 2018 the Claimant raised the Second Grievance. This related to the restrictions imposed on her work in consequence of the August 2018 trade.

139. The fact-finding investigation was paused, pending the completion of the investigations into the First Grievance. In October 2018, while the grievance was being investigated, Ms Beale went on maternity leave.

Chronology of the investigation into the Claimant's grievances

140. At this point, we group together our findings as to the chronology of the grievances and reportable concerns. Apart from an allegation relating to the Claimant's correspondence with CISI in June 2019 (see below) the investigation was into events which took place between 27 July and 9 August 2018. The process was completed some seventeen months later.

141. On 10 September 2018, Ms Cuthbert was appointed to investigate the grievance. On 27 September 2018, the investigation into the First Grievance and the investigation into the Reportable Concerns began.

142. It took a month after the first grievance was issued for Ms Cuthbert to interview the Claimant. On 11 and 15 October 2018 the hearing and fact-finding meeting in the First Grievance took place. The Claimant alleges that she made further protected disclosures at these meetings.

143. Ms Cuthbert did not then interview the next witness until 27 November 2018. She completed her first set of interviews on 7 December 2018, but notes were not sent to the Claimant until 4 January 2019. She then conducted four further interviews in January.

144. The second, shorter grievance was presented on 20 December 2018. The Claimant was interviewed on 20 December 2018. Ms Cuthbert did not then interview the next witness until nine weeks later, on 21 February 2019. Ms Cuthbert interviewed Ms Falk about the second grievance on 26 February 2019.

145. The outcome of both grievances was sent to the Claimant on 4 April 2019. The fact that the Claimant provided some comments on interview notes in the intervening period does not, in our view, account for the fact that it took nearly 7 months to complete the grievance process. Ms Cuthbert was right to accept in cross-examination that she had not dealt with the grievance with reasonable expedition.

Reportable concerns

146. On 25 January 2019, Mr Tailor met with the Claimant to inform her of the outcome of his investigation.

147. It was standard practice to give oral feedback in relation to reportable concerns, rather than providing the complainant with a written report. At the request of the Claimant's solicitor, a written report into the reportable concerns was completed on 10 October 2019. The Claimant was provided with a redacted copy. Learning points were highlighted. The Claimant was not provided with an unredacted copy until shortly before the final hearing in the Employment Tribunal.

The outcome of the grievances/reportable concerns

148. Mr Tailor recorded a summary of his discussion with the Claimant about the outcome of his investigation in an email of 25 January 2019. He explained that that, although he had found no evidence of misconduct, there was a number of areas where he had concluded lessons could be learnt, including the new joiner induction process (especially as it relates to systems training), the SPS recertification process and the trade approval/review process, involving IC management. He went on:

> 'EV confirmed that she found the feedback helpful, that she had taken the process very seriously and had reported concerns with no mal-intention. She stated that she was keen to put what had happened in the past behind her and to move forward with a positive attitude.'

149. As for the two grievances, Ms Cuthbert dismissed most of the complaints. In relation to certain matters she concluded that she was unable to conclude one way or another whether the incident alleged had occurred. She upheld a number of complaints: she was critical of the delay in dealing with the Claimant's SPS renewal; she found that there had been poor communication between Compliance and Mr Giancotti, which resulted in the Claimant being incorrectly informed at the outset of her heightened supervision about the restrictions to her role; and she concluded that this state of affairs was not corrected quickly enough, when the Claimant raised it in meetings with Mr Giancotti. None of the allegations made against Ms Falk or Mr Keogh were upheld.

The named Respondents' knowledge of the alleged protected disclosures

150. Although Compliance was instructed to pause its fact-finding investigation into the August trade, it was not initially told why, only that it was for 'HR reasons'. Ms Falk believed that this related to the Claimant's absence on sick leave. Mr Keogh learnt that the Claimant had raised a grievance towards the end of November 2018, although he did not know its nature. He inferred that this was the reason why the fact-finding investigation was on hold. He did not know that he had been named in that grievance until these proceedings.

151. Ms Falk, Mr Keogh and Ms Griffin did not see a copy of the First Grievance letter until these proceedings.

152. Ms Cuthbert interviewed Mr Keogh on 27 November 2018. The focus of that interview was on the Claimant's SPS form (see below) and specifically the advice he had given her in relation to it. He did not know about the other allegations the Claimant had made against him.

153. On 6 November 2018 Ms Falk contacted Mr Keogh to inform him that Mr Tailor was looking into a reportable concern relating to the training of ICs by R1. She asked him, on behalf of Mr Tailor, to provide information about training provided to ICs from 2017 onwards, copies of training decks, details of any upcoming training, copies of any investigation reports which involved an IC from January 2016 onwards.

154. Around this time, Mr Keogh was interviewed by Mr Tailor; he was asked to provide insight into the types of training offered by R1 to client-facing employees. We accept Mr Keogh's evidence that he did not know that Mr

Tailor's investigation had been prompted by concerns raised by the Claimant; on the contrary, he suspected they had been raised by Ms Khare.

155. As recorded above, the Claimant raised the Second Grievance on 6 December 2018. Ms Cuthbert put questions to Mr Keogh by email; they focused on the heightened supervision framework.

156. Ms Clarke told Ms Falk in around December 2018 that the Claimant had lodged a formal grievance against her. Ms Cuthbert interviewed Ms Falk on 7 December 2018, and again on 26 February 2019 in relation to the Second Grievance. She denied that she had shouted at the Claimant on 22 March 2018. Ms Falk stated that she was later told by Ms Cuthbert that no allegation against had been upheld. We find it likely that Ms Falk understood the nature of the allegations against her from the content of the interview itself.

157. As for Ms Griffin, she knew about the grievances, but was not told of any reportable concerns when she was briefed as part of the disciplinary process; she became aware of them from the letter from the Claimant's solicitor to Ms Clarke, dated 10 June 2019.

Resumption of the fact-finding Investigation

158. At this point we group together our findings as to the remaining chronology in relation to the fact-finding investigation process.

159. On 20 March 2019 the fact-finding investigation resumed. Because Ms Beale was on maternity leave, Ms Sieffert took over from her.

160. Because Mr Keogh was in the process of moving to take up a new role in Zürich, Ms Falk became more involved in the conduct of the investigation. She specifically asked her manager, Ms Clarke, whether someone else should replace her in dealing with the investigation, given that the Claimant had brought a grievance against her. Ms Clarke advised her that it was appropriate for her to proceed.

161. Ms Sieffert and Mr Keogh interviewed Ms Sukhareva on 20 March 2019, and Ms Khare on 27 March 2019. The investigation meeting with the Claimant took place on 5 April 2019 and was conducted by Ms Falk and Ms Sieffert. Mr Spencer Rix, member of the Employee Relations team attended to support the Claimant. The Claimant did not object to Ms Falk conducting the interview, nor did she object to her involvement prior to these proceedings.

162. Following the meeting, on 5 April 2019, the Claimant sent Ms Falk an email attaching a set of 24 pages of documents, which she wanted her to take into account. Ms Falk did not read them herself, she passed them to Ms Sieffert to read. Nor did she listen to the twelve sound files (mostly short calls), which the Claimant sent through; she was unable to say whether transcripts were made. On the other hand, Ms Falk did work through, with Ms Sieffert, the eleven pages of additional information, which the Claimant sent to her on 25 April 2019.

163. The Claimant was sent a copy of the notes of the meeting; she provided comments, which were incorporated into the final version.

164. On 12 April 2019 Ms Falk spoke to Mr Keogh and Ms Beale, to check their account of the meeting on 9 August 2018. Neither Mr Keogh nor Ms Beale had access to their contemporaneous records, including emails, when they provided these comments. Ms Falk summarised their accounts in emails, for their approval.

165. The summary of the discussion with Mr Keogh (which he approved) recorded Mr Keogh saying that the Claimant told the attendees at the meeting on 9 August 2018 that the trade had already been placed.

166. The summary of the discussion with Ms Beale recorded Ms Beale saying: 'JB does not recall EV stating in this meeting that the trade had already been placed, she thought this had happened outside the meeting shortly afterwards.' Ms Beale, having reviewed the notes, commented that she was:

> '90% sure this wasn't discussed in that meeting, as part of our issue/surprise with the whole thing was that there had been clear opportunity within that meeting for her to have told us that she had committed to it already.'

167. Ms Beale was also recorded as saying that she 'was surprised that EV was *proposing* the SNP trade in light of the trade breaching the risk budget…' [*emphasis added*].

168. By email of 12 April 2019, copied to Mr Keogh, Ms Falk specifically asked Ms Sieffert to include these two accounts in the investigation report. That did not happen. Ms Falk's evidence was that they were omitted from the pack because of an oversight. We accept that evidence. If it was her intention that the evidence should be excluded, she would hardly have made a point of recording it, submitting it for checking, and forwarding it for inclusion.

169. On 15 April 2019, Mr Khasanov sent through further information, by way emails relating to the August 2018 trade. On 25 April 2019, Mr Keogh wrote a further email to Ms Falk, from which it is clear that he had now reviewed contemporaneous emails. He produced a timeline, recording that the Claimant had not mentioned at the meeting that the trade had been executed, rather she had confirmed this later in the afternoon, he thought around 5 p.m.

170. On 26 April 2019, Ms Falk completed an E-CASE submission in relation to this matter. E-CASE is a tool used by the Respondent to assess conduct matters. Information is inputted into the system and an algorithm calculates the severity of each conduct matter, giving rise to what is called an 'initial severity level estimate', which identifies the severity and the associated sanction. It is then reviewed by the relevant member of staff. In this instance, the algorithm calculated the severity as Level 4, and the sanction as 'final written warning'. Ms Falk could have overridden this but did not do so; we conclude from this that Ms Falk was not advocating a more serious sanction, such as dismissal.

171. In early May 2019, the first fact-finding Investigation Report was completed by Ms Falk, and sent to the Claimant. The following breaches were identified:

171.1. a breach of Conduct and Ethics Standards: client focus, transparency and accountability;

171.2. not following the suitability processes for the CSIE service, by sending out ideas without first conducting a suitability assessment, and asking clients for their view;

171.3. executing a trade in breach of risk budget and marking the trade is suitable;

171.4. no Trade Order Form or Statement of Suitability completed for this trade;

171.5. poor record-keeping of client meetings and calls;

171.6. breach of telephone recording requirements (conducting calls on an unrecorded line); and

171.7. breach of heightened supervision requirements by executing client calls without any other Bank employee present.

172. We note that this summary includes reference to a breach of standards in relation to transparency, but it does not include an allegation relating to wrongly describing Client A as 'insistent'.

173. Mr Keogh forwarded the report to CERP on the morning of the committees meeting on 10 May 2019 for its consideration. Although Ms Falk usually sat on the CERP panel, she did not do so on this occasion as she was on holiday by then. Mr Keogh attended the meeting to answer questions, but then left to allow the panel to deliberate. CERP resolved that the matters relating to the August 2018 Trade should be progressed to a formal disciplinary investigation.

<u>The disciplinary procedure conducted by Ms Griffin</u>

174. On 10 May 2019, Ms Clarke asked Ms Griffin if she had capacity to take the matter on. Ms Griffin, who did not know the Claimant, agreed.

175. Ms Griffin was briefed on the matter by Ms Clarke and Mr Keogh on 22 May 2019. We accept Mr Keogh's evidence that it was standard practice for the fact-finding investigators to provide a factual briefing for the newly appointed disciplinary decision maker, to help them get up to speed with the scope of the investigation. On the same day Ms Clarke sent an updated schedule of allegations to Ms Griffin.

176. On 24 May 2019, Ms Clarke sent what she described as 'the final version [of the allegations], subject to any tweaks you may need to make regarding specific sections of policies/supplements'. The disciplinary allegations were set out more fully, and by reference to specific policies. She also attached the investigation report produced by Compliance, and the transcript of the interview with the Claimant. She asked Ms Griffin to indicate when she would be able to hold the disciplinary meeting.

177. This version of the disciplinary allegations referred more explicitly to questions of honesty and integrity, although as we have already found, references to lack of transparency (which includes dishonesty) had been present throughout the documents previously been prepared. There was still no reference to the 'insistent client' matter.

178. On 29 May 2019, Ms Griffin wrote to the Claimant, inviting her to attend a disciplinary hearing on 3 June 2019. She attached a copy of the report. In her covering letter she set out the allegations of misconduct and warned her that they may amount to gross misconduct.

> '1. On 6 August 2018 you traded an unsuitable structured product for a retail client ("the trade") on an advisory basis, in breach of section 4.1 of the CS Invest Expert Procedure Manual and section 1 of the Suitability & Appropriateness Policy (GP-00017). The trade was subsequently unwound, resulting in a loss to the bank of CHF 22,000 and creating potential reputational damage.
>
> 2. On 9 August 2018 you asked CS UK Compliance to review the suitability of the trade. Ross Keogh and Jade Beale from Compliance and your Supervisor Kanu Khare, all agreed that the trade would be unsuitable and instructed you not to proceed. Later that evening it transpired that you had in fact already executed the trade. Your decision to seek advice on the suitability of the trade 3 days after you had the CS Invest Expert Procedure Manual, the provisions set out in the CS Suitability and Appropriateness Guide and section 2.3.6.2 of the IWM Supplement to Suitability Appropriateness European Economic Area States (GP-00017-S11). Further, your failure to inform Compliance and your Supervisor of such an important fact when seeking advice on suitability of the trade has led the bank to question your honesty and integrity and may be a breach of the Conduct & Ethics Standards.
>
> 3. You conducted telephone calls with the client in relation to the trade without a chaperone, in breach of the heightened supervision requirements placed upon you by the Head of Compliance, Lindsay Falk, on 27 Marcy 2018.
>
> 4. You conducted telephone conversations with the client in relation to the trade on an unrecorded line whilst working from the Pall Mall office, in beach of section 3.1 of the Records Management Policy (GP-11002) and section 5 of the Telephone Voice Recording and Mobile Telephone Usage Policy (P-00691) both of which were emphasised during the Compliance induction training you undertook on 18 April 2017 and again on 24 July 2018.
>
> 5. You failed to record a number of client conversations in respect of the trade in RMPlus, in breach of section 3.1 of the Records Management Policy (GP-11002) and section 4.7 of the CS Invest Expel Procedure Manual.'

179. On 30 May 2019, the Claimant raised a query in relation to these allegations:

> 'As to allegations 4 and 5, please provide material evidence (ie call logs and dates of those in question, as well as reconciliation of missing documents in the RM+system). Without those, I find it difficult to understand what I have to argue, if I was logged into the phone line, and emails as follow up of the calls were saved in RM+.'

180. On 10 June 2019 the Claimant's solicitor, Mr Tim Johnson, wrote to Ms Clarke, pointing out that his client had not yet received a written account of the findings of the Reportable Concerns investigation, and asking to be provided with one as soon as possible. Ms Clark responded on 18 June 2019, explaining that it was standard practice not to provide written outcomes to individuals, but that feedback had been given to the Claimant. She wrote:

> 'In the light of your letter, to ensure that due consideration is given to the points in the context of the disciplinary process, I propose to pass your letter to Toni Griffin. She can then discuss with Ellina the points which you are raising in her defence and make further enquiries, including of Kirt Tailor, should that be necessary. Toni is currently on holiday so I will make sure that she sees your letter on her return.'

181. Having reviewed the disciplinary allegations, and the Claimant's query, Ms Griffin concluded that further clarity was required. On 10 June 2019, she wrote to Ms Falk, asking that the fact-finding report be updated:

> 'Following the request from Ellina Volkova for further information regarding allegations 3,4 and 5, I have some follow-up questions which should be considered by the investigators and confirmed back to me.
>
> In summary, where the investigation report makes reference to a record or email could this please be attached in the Appendix of the report? Could the report also make it clear exactly when a breach has occurred. I have included my specific questions in the attached investigation report. Please could you mark-up any changes made to the report so that both Ellina and I are clear on what additions have been made.
>
> As far as I have been able to ascertain the specific breaches are in red below but could you please confirm these following review of the report?'

182. We find that her primary reason for making these requests was to ensure that the Claimant understood the allegations against her, before the disciplinary meeting took place. She also had a secondary purpose, which was to ensure that any changes from the version that had already been sent to the Claimant would be immediately apparent to the Claimant. In the event, Ms Falk did not use track changes, and so Ms Griffin produced her own comparison document, which she sent to the Claimant.

183. Between 14 June 2019 and 5 July 2019, the schedule of allegations went through a series of versions, sent between Ms Falk/Ms Sieffert and Ms Griffin. The allegations were refined, and a number of defects remedied. For example, Ms Falk noticed that Client A had been referred to as being a retail client, when he was in fact a professional client. It was at this point that she noticed that the allegation concerning the Claimant's referring to Client A as an 'insistent client' had been omitted; she asked for it to be included. We accept her evidence that it had been inadvertently omitted: the allegation had been present from the outset in late August 2018 (paras 122-124).

<u>SPS renewal 2019</u>

184. A further, potential disciplinary issue arose in June/July 2019 in relation to the Claimant's Statement of Professional Standing ('SPS'). The FCA requires all

retail investment advisers to hold an SPS, which confirms that they have adhered to a code of ethical standards, hold the required qualifications for the activities they undertake, have completed CPD and complied with appropriate regulation. Without an SPS, an individual cannot advise retail clients. The accreditation is renewed annually and includes a section regarding disciplinary matters.

185. The CISI wrote to the Claimant on 12 June 2019, asking for information from the bank about the disciplinary process in relation to the August 2018 trade. They specifically asked for 'a brief summary of the case'. The Claimant forwarded the email to Ms Clarke on 18 June 2019 and, the following day, Ms Clarke provided the Claimant with draft wording to send on to the CISI:

> 'Ms Volkova is currently the subject of a formal disciplinary process, which has yet to conclude.
>
> To date, the Company have conducted an investigation and the matter will be reviewed as part of our internal disciplinary process by an independent disciplinary decision manager. The Regulator has not been informed at this juncture.
>
> The disciplinary allegations include (i) alleged breach of heightened supervision requirements; (ii) alleged breach of the CS UK Invest Expert Procedure manual and the Suitability and Appropriateness policy; (iii) alleged breach of both the Records Management and Telephone Voice Recording and Mobile Telephone Usage policies; and (iv) concerns as to Ms Volkova's honesty and integrity.'

186. The Claimant asked for a sentence to be added, confirming that the disciplinary procedure had only recently begun, and that no decision had been reached in relation to any of the allegations. On 20 June 2019, Ms Clarke agreed to add the following:

> 'For the avoidance of doubt, the disciplinary process has only recently commenced. Consequently, no decision has been made in relation to any of the disciplinary allegations listed above, all of which Ms Volkova refutes. Nor has Ms Volkova had an opportunity to draw the disciplinary decision manager's attention to any additional information she considers to be relevant for the purposes of contesting the allegations.'

187. Later the same day, the Claimant proposed different wording to Ms Clarke, incorporating part, but not all, of Ms Clarke's wording:

> 'The disciplinary process relating to Ms Volkova has only recently commenced. Consequently, no decision has been made in relation to any of the disciplinary allegations. Nor has Ms Volkova had an opportunity to draw the disciplinary decision manager's attention to additional information she considers to be relevant for the purposes of contesting the allegations.
>
> The matter is being reviewed as part of our internal disciplinary process by an independent disciplinary decision manager. The Regulator has not been informed at this juncture. Depending on how the investigation

progresses the Company will provide you with further information at a later date should this become appropriate.'

188. Ms Clarke rejected this draft, because it did not contain 'a brief summary of the case', as required by the CISI. She explained to the Claimant that, if CISI changed their request, she would be willing to reconsider. Otherwise, the Bank's response remained as set out in her draft of 20 June 2019.

189. On 24 June 2019, the Claimant replied to CISI, without using Ms Clarke's wording, as follows:

> 'I believe that it will take at least a further two weeks to clarify my situation. I understand that Amanda Clarke, Head of UK Employee Relations at Credit Suisse, will confirm that:
>
> 1. The disciplinary process has only recently commenced and no decision has yet been made in relation to any of the disciplinary allegations.
> 2. I have recently drawn the disciplinary decision manager's attention to additional information I consider to be relevant for the purposes of contesting the allegations.
> 3. In these circumstances the FCA has not yet been informed.
>
> I would therefore be grateful for a further two weeks for my position to be clarified before I reply further.'

190. The Claimant then forwarded this response to Ms Clarke. Ms Clarke replied the same day to the Claimant, expressing her dissatisfaction with what she had done, concluding:

> 'Please could you kindly ensure that the bank's summary as it currently stands is accurately represented to CISI.'

191. On 27 June 2019, CISI wrote to the Claimant:

> 'As your case is still under review and as yet no allegations have been set or sanctions reached, the Disciplinary Review panel have agreed to issue your SPS.
>
> We ask however that you please keep us up to date of the final decision and provide the relevant documentation so we are able to review your case at that time.'

192. On 1 July 2019, Ms Clarke, having seen this, wrote to the Claimant:

> 'I am in receipt of CISI's email of 27 June, relating to your SPS renewal (pasted below for ease of reference).
>
> I note that the CISI disciplinary panel appear to be under the impression that the Bank has not set any disciplinary allegations as yet, and that this appears to have been a factor when reaching their decision to reissue your SPS certificate. As you are aware, disciplinary allegations have in fact been set and have been communicated to you in writing. The

disciplinary allegations are also summarised in the Bank's response to CISI's request for further information, which I provided to you on 20 June and have reiterated several times since (attached and below).

Please could you call me today to discuss what information you have provided to CISI, in particular since my email of 24 June below, and what steps you have taken since 27 June to correct CISI's misunderstanding. Thank you.'

193. The Claimant replied the same day:

'I have not provided any information to CISI since 24th June. I intend to reply to its email of the 27th June today as follows:

Dear Coleen,

Thank you for your email of 27th June. It is not correct to say that no allegations have yet been set but its correct that no decision has been made in relation to them and that they are all denied. I suggest I write to you again in two weeks time to update you.

Please confirm that this is acceptable.'

194. Ms Clarke replied the same day, asking to discuss the matter with the Claimant, and asking her to ensure that she shared the Bank's original response, as drafted by Ms Clarke. The Claimant replied the same day:

'Please find attached an email I have sent to CISI today.

I note your request that I should ensure you share [*sic*] the Bank's response as outlined in your emails. I have already explained that this would provide an incomplete picture of the current situation. For instance it leaves out any reference to Kirt Tailor's findings. Your response to that on 21 June was to say:

If you wish to contact them to point out that the disciplinary is at an early stage, and query the level of information they therefore require from the Bank, that is of course your prerogative. If, as a result of such a discussion, the CISI alter their request please do let me know. Otherwise, the Bank's response is set out in my email of 20 June.

It seems to me that is in effect what I have done.'

195. Ms Clarke took the view that the Claimant had failed to follow her instructions, and was concerned that the Claimant had intended to mislead CISI. She referred the matter to the CERP and recused herself from its decision. On 17 July 2019, CERP decided that this matter should form an additional disciplinary allegation.

<u>The disciplinary hearing</u>

196. On 19 July 2019, Ms Griffin sent the Claimant a further letter, inviting her to a disciplinary hearing on 25 July 2019. She attached the revised, final version of the allegations, along with a comparison version of the updated investigation

report, showing the amendments which had been made. The final version included two allegations (Allegations 2 and 7), relating to the Claimant's description of the client as an insistent client. Allegation 8 was entirely new, because the SPS issue had only recently emerged. One of the allegations under Allegation 6 had been removed by Ms Falk. Ms Griffin also provided the Claimant with the underlying documents and the relevant policies.

197. The final version of the disciplinary allegations is attached to this judgment at Annex 2.

198. On 21 July 2019, the Claimant queried the amendments, and Ms Griffin explained them in her response. On 23 July 2019, the Claimant wrote to Ms Griffin, asking for an adjournment of the disciplinary meeting, to enable her to assemble relevant documents and provide them to Ms Griffin in time for her to consider them before the meeting. Ms Griffin agreed and postponed the hearing to 30 July 2019.

199. On 29 July 2019, the Claimant sent Ms Griffin a pack of contemporaneous emails and documents, running to 214 pages, and a comparative chronology document, containing comments on R1's chronology.

200. The disciplinary hearing took place over two days, on 30 and 31 July 2019, Ms Griffin conducted the disciplinary hearing.

201. On the first day of the hearing, the Claimant and Ms Griffin worked through the documents the Claimant had provided. Because that process took around three hours, Ms Griffin scheduled a second meeting for the following day, at which she took the Claimant through the allegations in detail, giving her the opportunity to provide her comments. That meeting also lasted for around three hours.

202. At the second meeting, the Claimant summarised in broad terms the nature of the reportable concerns which she had raised, and again said that she wished to have a copy of any report which Mr Tailor had produced.

203. Both meetings were attended by a professional notetaker. Ms Griffin sent the summary notes to the Claimant for review. Although the Claimant challenged the accuracy of the note, she provided only a few clarifying comments. In evidence to the Tribunal, she said that there were '112 errors' in the summary, but she did not explain why she did not identify them at the time, when given the opportunity to do so. We accept that this is an accurate record of the meeting. It was professionally prepared, and the Claimant had an opportunity to make corrections at the time but elected not to do so.

204. After the meetings Ms Griffin went through the documents again in detail. On 10 September 2019, she sent follow-up questions to the Claimant by email. The Claimant provided answers and additional documents on 17 and 19 September 2019.

205. Between 16 September 2019 and 26 November 2019, Ms Griffin then interviewed the following individuals: Mr Khasanov, Ms Khare, Mr Keogh, Mr Giancotti, Mr Tailor, Ms Beale, Ms Falk and Ms Blay. Summary notes were sent to the Claimant, who provided comments, which Ms Griffin then followed up.

206. Around this time the Claimant raised concerns about the length of time the disciplinary process was taking.

207. On 15 November 2019 Ms Griffin sent the Claimant a heavily redacted copy of the Reportable Concerns investigation report. She wrote:

> 'As previously discussed, please find attached the Investigation Report relating to the Reportable Concerns that you raised. It has had to be quite significantly redacted for data protection reasons. However, you can see what was investigated and the conclusions. You should read this in conjunction with the notes of my interview with Kirt Tailor, who prepared the report.
>
> Please could you let me know if you have any further comments you would like me to consider which relate to the disciplinary matter currently under consideration by close of business on Wednesday 20 November.
>
> […]'

208. On 29 November 2019, Mr Rich Kerner, a senior member of the Compliance team, spoke to Ms Sukhareva about the August 2018 trade. He raised with her a concern that she did not escalate concerns as soon as she realised there was an issue. He set out his conclusions in an email to the CERP, dated 3 December 2019. CERP decided to take no further action. On 9 December 2019, Ms Falk and Mr Kerner spoke to Ms Bezuglaya, who had left the bank on 4 December 2018, to discuss her involvement in the August 2018 trade. Ms Griffin would have conducted the interview herself, but she was about to go away to Australia for a period of leave; rather than delay the process further, she assigned the task to Ms Falk.

<u>The dismissal</u>

209. Ms Griffin met with the Claimant on 8 January 2020. She informed her that she had upheld the majority of the allegations and that she was dismissed for gross misconduct.

210. The outcome was set out in a detailed letter of the same date, which she gave to the Claimant at the meeting. Ms Griffin upheld the following allegations.

    210.1. Allegation 1: trading an unsuitable structured product for a client on an advisory basis, in breach of section 4.1 of the *CS Invest Expert Procedure Manual* and section 1 of the *Suitability & Appropriateness Policy.* Ms Griffin found that this resulted in: a financial loss to R1 of CHF 22,000; potential reputational damage; potentially exposing the client to the risk of loss by not observing his specified risk mandate; and potentially exposing R1 to a complaint/claim by the client.

    210.2. Allegations 2 and 7: incorrectly recording the client as an 'insistent client' as defined by the *CSUK Suitability & Appropriateness Guide* and the *CS Invest Expert Procedure Manual*. Ms Griffin found that the Claimant had attempted retrospectively to establish the client as 'insisting' in order to get the trade through on his advisory account. She then attempted to document the trade on an insistent client basis which did not reflect the true circumstances. She also found that the

Claimant had not made clear to Ms Philippides that the trade had already been executed, when she sought advice from her, which suggested a lack of transparency on her part.

210.3. Allegation 3: misleading Compliance and the Claimant's supervisor on 9 August 2018 by seeking advice on the suitability of a trade, without informing them that the trade had been executed three days earlier, and that it had been booked on an execution-only account. Ms Griffin found that the Claimant was misleading both in the email sent at 12:03 and at the subsequent meeting. She specifically found that the Claimant's actions were in breach of the *CS Conduct & Ethics Standards*, because the Claimant was not wholly transparent or honest in these respects.

210.4. Allegation 4.3(a): calling Client A without a chaperone at 14:58 and 17:33 on 9 August 2018. Ms Griffin accepted that the Claimant was busy, and working on time-sensitive issues, but concluded that she should have reached out to her supervisor for guidance. However, she accepted that there were mitigating circumstances: the heightened supervision guidance could have been clearer in relation to time-sensitive issues; and there were no other Russian speakers available to chaperone the Claimant. Ms Griffin recorded that these matters did not contribute materially to her decision to dismiss.

210.5. Allegation 5.2: conducting a client-related call with Mr Giancotti on her personal mobile on the afternoon of 8 August 2018. Ms Griffin concluded that she should not have agreed that Mr Giancotti call her on her personal mobile number.

210.6. Allegation 6.1: failing to save to RMPlus the email she sent to the client on 31 July 2018 at 18:27 and the client's response at 18:54. Ms Griffin concluded this was a breach of section 4.7 of the *CS Invest Expert Procedure Manual*.

210.7. Allegation 6.3: failing to record in call notes and save to RMPlus the calls she had with the client on 9 August 2018 at 14:56 and 17:33. Ms Griffin acknowledged that the situation was chaotic, but concluded that it was a situation of her own making and that she was not absolved from the relevant record-keeping requirements.

210.8. Allegation 8: disobeying reasonable instructions given by Ms Clarke in relation to the SPS renewal. Ms Griffin concluded that the response the Claimant provided to the CISI on 24 June 2019 was misleading.

211. Ms Griffin dismissed the other allegations.

212. By way of background, Ms Griffin made reference to the previous disciplinary sanction, issued on 17 July 2018, and noted the similarities between the matters upheld on that occasion and her own findings in relation to the August trade. In her opinion, this showed a pattern of behaviour which reinforced the concerns she had regarding the Claimant's conduct, specifically her repeated policy breaches and her failure to ask for assistance when required. She expressly recorded that, had there been no previous disciplinary sanction

against the Claimant, she would still have dismissed the Claimant for the matters which she had upheld.

213. Ms Griffin also recorded that she was satisfied that the Claimant had been appropriately trained. She dealt with the mitigation which the Claimant's legal representatives had advanced on her behalf. Her conclusion, however, was that the Claimant's initial action in sending the client a list of ideas, rather than a properly formulated proposal, was 'not systems-related but judgment-related.'

214. There was also a section in the outcome letter, in which Ms Griffin dealt with the additional evidence she had collected, and shared with the Claimant, during the disciplinary process; she recorded that she had taken into account the Claimant's comments on that evidence. Although she accepted that the initial investigation could have been more comprehensive, she rejected the Claimant's allegation that the investigation report was biased, or that there had been retaliation against the Claimant for issues raised by her.

215. The letter concluded with a section entitled 'Overall Summary Finding', the first paragraph of which reads:

> 'The events under consideration hinge on an initial incident (the unsuitable trade) and your judgment, honesty and integrity in dealing with the repercussions. While I think that the initial incident is itself a serious concern, in reaching my decision that dismissal is the appropriate sanction and that a lesser sanction is not appropriate, I am particularly focused on your subsequent actions over a period of days in dealing with the situation, including an email communication and meeting with your supervisor and Compliance, which was misleading. My view is that, even if I were to give you the benefit of the doubt that placing the trade was an error, your subsequent actions exacerbated it to the extent that it must significantly impact the trust which the bank can have in you. I appreciate that you have been permitted to continue to work since these events, but again under heightened supervision with limits on what you are able to do. The alternative would have been to suspend you, which is recognised as a significant step for you and one which we try to use as seldom as possible if there are practical short-term alternatives. Now that I have made my findings, I do not believe that the bank can continue to employ you, even on this basis.'

216. Ms Griffin concluded that Allegations 2/7, 3 and 8, individually and cumulatively, demonstrated dishonesty and a lack of integrity on the Claimant's part. She concluded that the Claimant's actions amounted to gross misconduct.

217. Although the Respondent's disciplinary procedure provided for an appeal process (and she was notified of that in Ms Griffin's letter), the Claimant did not appeal.

The law to be applied: public interest disclosure claims

<u>Time limits in PIDA detriment claims</u>

218. With regard to time limits, s.48(3) and (4) ERA 1996 provide (as relevant):

> **(3) An employment Tribunal shall not consider a complaint under this section unless it is presented–**
>
> > **(a) before the end of the period of three months, beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or**
> >
> > **(b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.**
>
> **(4) For the purposes of subsection (3)**
>
> > **(a) where an act extends over a period, the "date of the act" means the last day of that period**

219. A disciplinary investigation which comprises a number of steps or stages is an act extending over a period (*Hale v Brighton and Sussex University Hospitals NHS Trust,* UKEAT/0342/16/LA). Choudhury P held (at [44]):

> **'That outcome avoids a multiplicity of claims. If an employee is not permitted to rely upon an ongoing state of affairs in situations such as this, then time would begin to run as soon as each step is taken under the procedure. Disciplinary procedures in some employment contexts - including the medical profession - can take many months, if not years, to complete. In such contexts, in order to avoid losing the right to claim in respect of an act of discrimination at an earlier stage, the employee would have to lodge a claim after each stage unless he could be confident that time would be extended on just and equitable grounds. It seems to me that that would impose an unnecessary burden on claimants when they could rely upon the act extending over a period provision.'**

Protected disclosures

220. A protected disclosure is a qualifying disclosure made by a worker in accordance with any of sections 43C to 43H. A qualifying disclosure is defined by section 43B, as follows:

> **(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—**
>
> > **[…]**
> >
> > **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
> >
> > **[…]**
> >
> > **(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.**

221. In *Williams v Michelle Brown AM*, UKEAT/0044/19/OO at [9], HHJ Auerbach identified five issues, which a Tribunal is required to decide in relation to whether something amounts to a qualifying disclosure:

> **'It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.'**

What was the disclosure of information?

222. As for what might constitute a disclosure of information for the purposes of s.43B ERA, in *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 CA, Sales LJ provided the following guidance:

> **'30. the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the Judgment below at [30], set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other […]**
>
> **31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.**
>
> **[…]**
>
> **35. In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1).**
>
> **[…]**
>
> **36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a Tribunal in the light of all the facts of the case.**
>
> **[…]**
>
> **41. It is true that whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in in the *Cavendish Munro* case [at paragraph 24], the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says "You are not complying with health and safety requirements", the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made. If such a disclosure was to be relied upon for the purposes of a whistleblowing claim under the protected disclosures regime in Part IVA of the ERA, the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the Claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner.'**

223. In *Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540, the EAT held that two or more communications taken together may amount to a qualifying disclosure even if, taken on their own, each communication would not.

224. Where a disclosure is vague and lacks specificity, it will not provide sufficient information: *Leclerc v Amtac Certification Ltd* UKEAT/0244/19 at [26-31].

225. Where the link to the subject matter of any of ERA s.43B(1) is not stated or referred to, or is not obvious, a Tribunal may regard this as evidence pointing to the conclusion that the information is not specific enough to be capable of

qualifying as a protected disclosure (*Twist DX Ltd v Armes* UKEAT/0030/20 at [86] and [87]).

Did the worker believe that the disclosure tended to show one or more of the matters listed in sub-paragraphs (a) to (f)? If he did hold that belief, it must be reasonably held.

226. The issues arising in relation to the Claimant's beliefs about the information disclosed were comprehensively reviewed by Linden J. in *Twist DX Ltd*, from which the following principles emerge.

226.1. Whether the Claimant held the belief that the disclosed information tended to show one or more of the matters specified in s.43B(1)(a)-(f) ('the specified matters') and, if so, which of those matters, is a subjective question to be decided on the evidence as to the Claimant's beliefs (at [64]).

226.2. It is important for the ET to identify which of the specified matters are relevant, as this will affect the reasonableness question (at [65]).

226.3. The belief must be as to what the information 'tends to show', which is a lower hurdle than having to believe that it 'does show' one of more of the specified matters. The fact that the whistleblower may be wrong is not relevant, provided his belief is reasonable (at [66]).

226.4. There is no rule that there must be a reference to a specific legal obligation and/or a statement of the relevant obligations or, alternatively, that the implied reference to legal obligations must be obvious, if the disclosure is to be capable of falling within section 43B(1)(b). Indeed, the cases establish that such a belief may be reasonable despite the fact that it falls so far short of being obvious as to be wrong (at [95]).

Disclosure in the public interest

227. The Court of Appeal considered the 'public interest' test in *Chesterton Global Ltd v Nurmohamed* [2018] ICR 731. The following principles emerge.

227.1. The Tribunal must ask: did the worker believe, at the time he was making it, that the making of the disclosure was in the public interest (at [27])? That is the subjective element.

227.2. There is then an objective element: was that belief reasonable? That exercise requires that the Tribunal recognise that there may be more than one reasonable view as to whether a particular disclosure was in the public interest (at [28]).

227.3. While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it (at [30]).

227.4. 'Public interest' involves a distinction between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest (at [31]).

227.5. It is still possible that the disclosure of a breach of the Claimant's own contract may satisfy the public interest test, if a sufficiently large number of other employees share the same interest (at [36]).

PIDA detriment claims

228. S.47B(1) ERA provides:

> **A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.**

229. Care must be taken to establish the 'reason why' the employer acted as it did. The 'reason why' is the set of facts operating on the mind of the relevant decision-maker, it is not a 'but for' test. The correct test is whether 'the protected disclosure materially influences (in the sense of being more than a trivial influence on) the employer's treatment of the whistleblower (*Fecitt v NHS* Manchester [2012] IRLR 64 at [45]).

230. S.48 ERA provides:

> **(1A) A worker may present a complaint to an employment Tribunal that he has been subjected to a detriment in contravention of section 47B.**
>
> **[…]**
>
> **(2) On a complaint under subsection […](1A)[…] it is for the employer to show the ground on which any act, or deliberate failure to act, was done.**

231. If an employment tribunal can find no evidence to indicate the ground on which a Respondent subjected a Claimant to a detriment, it does not follow that the claim succeeds by default. In *Ibekwe v Sussex Partnership NHS Foundation Trust*, UKEAT/0072/14/MC EAT adopted the same approach as that taken by the Court of Appeal in *Kuzel* (see below). In *Ibekwe*, the EAT concluded that there were no grounds for interfering with the tribunal's unequivocal finding that there was no evidence that an unexplained managerial failure to deal with an employee's grievance was on the ground that the grievance contained a protected disclosure.

232. It is unlawful for another worker of the employer to subject the Claimant to a detriment during the course of their employment, on the ground that they made a protected disclosure (s.47B(1A) ERA). This may include deciding to dismiss an employee as well as steps prior to dismissal (*Timis v Osipov* [2019] ICR 655 at [68 and 77]). The employer is vicariously liable for any such detriment (s.47B(1B) ERA).

Automatically unfair dismissal

233. There is an important distinction between detriment cases, where it is sufficient that the disclosure is a material factor in the treatment, and dismissal cases, where it must be the sole or principal reason.

234. S.103A ERA provides:

> **An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.**

235. The approach to the burden of proof in section 103A claims was summarised by Mummery LJ in *Kuzel v Roche Products* [2008] ICR 799 as follows:

> **'[…]**
>
> **[52] Thirdly, the unfair dismissal provisions, including the protected disclosure provisions, pre-suppose that, in order to establish unfair dismissal, it is necessary for the ET to identify only one reason or one principal reason for the dismissal.**
>
> **[53] Fourthly, the reason or principal reason for a dismissal is a question of fact for the ET. As such it is a matter of either direct evidence or of inference from primary facts established by evidence.**
>
> **[…]**
>
> **[57] I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.**
>
> **[58] Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.**
>
> **[59] The ET must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, it is not necessarily so.**
>
> **[60] As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the Tribunal to find that, on a consideration of all the evidence, in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.'**

236. For the purposes of section 103A, the 'employer' will include the dismissing officer, but it may also include others who 'substantially influenced' the decision-maker, including managers with some responsibility for the investigation (*Royal Mail Group v Jhuti* [2020] ICR 731 at [53]).

<u>Ordinary unfair dismissal</u>

237. S.94 Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer.

238. S.98 ERA provides so far as relevant:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it— ...

(b) relates to the conduct of the employee ... ...

(4) ... where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

239. In *Orr v Milton Keynes Council* [2011] ICR 704 at [78], Aikens LJ summarised the correct approach to the application of s.98 in misconduct cases:

'(1) The reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss an employee.

(2) An employer cannot rely on facts of which he did not know at the time of the dismissal of an employee to establish that the "real reason" for dismissing the employee was one of those set out in the statute or was of a kind that justified the dismissal of the employee holding the position he did.

(3) Once the employer has established before an employment Tribunal that the "real reason" for dismissing the employee is one within what is now section 98(1)(b), ie that it was a "valid reason", the Tribunal has to decide whether the dismissal was fair or unfair. That requires, first and foremost, the application of the statutory test set out in section 98(4)(a).

(4) In applying that subsection, the employment Tribunal must decide on the reasonableness of the employer's decision to dismiss for the 'real reason'. That involves a consideration, at least in misconduct cases, of three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of; and, thirdly, did the employer have reasonable grounds for that belief."

If the answer to each of those questions is 'yes', the employment Tribunal must then decide on the reasonableness of the response of the employer.

(5) In doing the exercise set out at (4), the employment Tribunal must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a 'band or range of reasonable responses' to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.

(6) The employment Tribunal must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The Tribunal must determine whether the

> **decision of the employer to dismiss the employee fell within the band of reasonable responses which 'a reasonable employer might have adopted'.**
>
> **(7) A particular application of (5) and (6) is that an employment Tribunal may not substitute their own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances.**
>
> **(8) An employment Tribunal must focus their attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice.'**

240. At (4) above, Aikens LJ was summarising the well-known test in *British Homes Stores Ltd v Burchell* [1980] ICR 303 at p.304.

241. In *Turner v East Midlands Trains Ltd* [2013] ICR 525, Elias LJ (at paras 16–17) cited paragraphs (4) to (8) from that extract in Aikens LJ's judgment in *Orr* and added:

> **'As that extract makes clear, the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see *J Sainsbury plc v Hitt* [2003] ICR 111.**

242. In its assessment of reasonableness, the Tribunal may only take into account facts that were known to the decision-maker at the time when the decision to dismiss was made: *W Devis and Sons Ltd v Atkins* [1977] AC 931 at 952. When considering whether the employer acted reasonably, the Tribunal has to look at the question in the round and without regard to a lawyer's technicalities (*Taylor v OCS Group Limited* [2006] ICR 1602 at [48]).

243. It is impermissible for a Tribunal to substitute its own findings of fact for those of the decision-maker (*London Ambulance Service NHS Trust v Small* [2009] IRLR 563 at [40-43]). Nor is it for the Tribunal to make its own assessment of the credibility of witnesses on the basis of evidence given before it (*Linfood Cash and Carry Ltd v Thomson* [1989] ICR 518). The relevant question is whether an employer acting reasonably and fairly in the circumstances could properly have accepted the facts and opinions which he did.

244. Even if the dismissal decision falls within the band of reasonable responses, it may still be unfair, if the Respondent has not followed a fair procedure. The Tribunal must evaluate the significance of the procedural failing, because 'it will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer's process' (*Sharkey v Lloyds Bank Plc* UKEATS/0005/15/JW at [26]).

245. Circumstances will dictate how extensive an investigation is required. In *Shrestha v Genesis Housing Association Ltd* [2015] IRLR 399 at [23], the Court of Appeal held (*per* Richards LJ):

> **'To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but**

whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole.'

246. In deciding whether the employer carried out such investigation as was reasonable in the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee. In serious cases, where the finding could affect the employee's reputation and prospects of securing future employment in their chosen field, the allegations must be the subject of the most careful and conscientious investigation. The investigator should focus no less on potential evidence that may favour the employee than on evidence directed towards proving the charges (*A v B* [2003] IRLR 405 at [58, 60 and 64]).

247. A delay in the conduct of an investigation might, in itself, render an otherwise fair dismissal unfair. This is so even if it does not prejudice the employee, though the existence of such prejudice (for example, because of the effect of the delay on fading memories) will provide additional and independent concerns: *A v B* at [66 to 68]; and paras 5 and 6 of the ACAS Code of Practice.

248. An employer should normally provide all relevant evidence, including statements, to the employee (*A v B* at [83]). Further, if someone responsible for the investigation does not share a material fact with the decision-maker, this can render the dismissal unfair (*Uddin v Ealing LBC* [2020] IRLR 332 at [78-87]).

249. Natural justice requires that decision-makers and investigators must be free of apparent, as well as actual, bias. A breach of the rules of natural justice will be an important matter when considering the fairness of a dismissal (*Slater v Leicestershire Health Authority* [1989] IRLR 16 at [33-34]). However, in that case, the Court of Appeal It could not be held that because the person conducting the disciplinary hearing had conducted the investigation, he was unable to conduct a fair inquiry. Whilst it is a general principle that a person who holds an inquiry must be seen to be impartial, the rules of natural justice do not form an independent ground upon which a decision to dismiss may be attacked, although a breach will clearly be an important matter when a Tribunal considers the question of fairness.

250. In *Jinadu v Dockland Buses Ltd*, EAT 0434/14, Supperstone J. held that the fact that a disciplinary investigation was conducted by a manager against whom the employee has previously raised a grievance did not make the process unfair, in circumstances where the disciplinary hearing itself was conducted (and the decision to dismiss taken) by an independent manager who had no connection to the grievance.

251. It is an elementary principle of justice that the employee should know the case he or she has to meet. It is equally obvious that it is the employer's obligation to put that case so that on a fair and common sense reading of the relevant documentation, the employee could be expected to know what charges he or she has to address. The question is not what charges the employer may have been entitled to charge on the material provided to the employee; it is what charges have in fact been made (*Sattar v Citibank NA* [2020] IRLR 104 at [56]).

252. An employee should be found guilty only of the offence with which he has been charged. The charge must be precisely framed and the evidence and findings must be confined to the particulars set out (*Strouthos v London Underground Ltd* [2004] IRLR 636 at [13 and 38].

253. If the investigation is defective, it is no answer to say that it made no difference to the decision (*A v B* at [86]).

254. In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the Tribunal's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses. The fact that other employers might reasonably have been more lenient is irrelevant (*British Leyland (UK) Ltd v Swift* [1981] IRLR 91).

Contribution

255. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it will reduce the amount of the basic and compensatory awards by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA). In order for a deduction to be made, the conduct in question must be culpable or blameworthy in the sense that, whether or not it amounted to a breach of contract or tort, it was foolish or perverse or unreasonable in the circumstances (*Nelson v BBC (No.2)* [1980] ICR 110).

Conclusions: PIDA disclosures

256. In his closing submissions, Mr Purchase divided the alleged protected disclosures into two groups: inadequate training, advice, guidance and support; and bullying by Ms Falk and Mr Keogh. We have followed his division in our conclusions. A number of the alleged protected disclosures were barely pursued in evidence and/or submissions, in some cases not at all. We record this below.

Protected Disclosures relating to training, supervision and support (Issues 6.1; 6.2(A)(i) and (ii); 6.2(B)(ii); 6.2(C)(i)-(iii))

257. We are satisfied that, in the First Grievance of 10 September 2018, in the October meetings/email, and at the disciplinary meeting of 31 July 2019, the Claimant disclosed information, containing the requisite degree of content and specificity, about the training, supervision and support provided by R1 to ICs, including that: Compliance was failing to provide qualified and reliable training; that the training provided, and in particular the onboarding process, was too generic to equip professionals properly to perform specific duties; that some of the information provided within that process was outdated or contradictory; that Compliance sometimes declined to provide guidance; and that line management was insufficiently accessible and/or rigorous to provide meaningful supervision and support. The Claimant gave examples of the ways in which she considered these alleged failures manifested themselves, both generally and by reference to her own experience.

258. We accept that the Claimant subjectively believed that R1 was subject to legal/regulatory obligations to provide ICs with adequate training, supervision and support, to ensure that they were capable of providing regulated services

to the required standard. We remind ourselves that there need not be a reference to a specific legal obligation and/or a statement of the relevant obligations; an implied reference to legal obligations need not be obvious (*Twist* at [95]). We also accept that the Claimant subjectively believed that the information she was disclosing tended to show that R1 was failing to comply with its obligations.

259. In relation to these matters, we are satisfied that it was reasonable for the Claimant to believe that, in such a highly regulated sector, failures of training, supervision and support would constitute breaches of legal obligations on the part of R1. Further, we accept Mr Purchase's submission that the Claimant's belief that her disclosures tended to show such breaches was reasonable, in circumstances where others, including her own managers, had expressed reservations about the adequacy of the regime: in an email of 9 May 2018, Mr Mendonca referred to 'the lack of structured training for new hires around both systems and processes'; Ms Blay, in her letter of 17 July 2018, found that the Claimant should have received additional guidance when she moved into the IC role; in an email exchange on 18/19 July 2018, a number of managers, including Mr Bangher, identified shortcomings in the training regime; in an email of 21 July 2018, Ms Khare identified specific weaknesses in training; and Mr Tailor, in his Reportable Concerns outcome, concluded that there were lessons to be learned in relation to the induction, systems training and trade approval/review processes.

260. Turning to the public interest issue, we have concluded that the Claimant was in large part motivated, in making the disclosure when she did, by the fact that she was facing very serious disciplinary charges: she was seeking to justify her conduct, deflect the criticisms of her, and blame others for her errors. However, the authorities are clear that acting in the public interest need not be the employee's predominant motive, and the focus must be on the Claimant's belief. We accept that she subjectively believed that her disclosure in relation to training, supervision and support were in the public interest.

261. We further conclude that that belief was reasonable. We accept Mr Purchase's submission that it cannot seriously be questioned that compliance with legal/regulatory obligations in the provision of financial services is a matter of public interest. Moreover, the Claimant was responsible for a range of clients, and it was reasonable for her to believe that it was in the public interest that she be properly trained to advise them. In the First Grievance she explicitly, and repeatedly, referred to the adverse effects of the alleged failures not only on her, but on others (some of whom she named); she characterised the failings as systemic, their potential consequences as grave, and called into question R1's operation at senior levels.

262. For these reasons, we have concluded that the Claimant made qualifying protected disclosures in relation to training, supervision and support in the First Grievance, the October 2018 meetings and email, and the disciplinary meeting of 31 July 2019.

<u>Protected Disclosures relating to alleged bullying and harassment of the Claimant and other ICs by Ms Falk and Mr Keogh (Issues 6.1 and 6.2D)</u>

263. We are not satisfied that there were any disclosures in relation to Mr Keogh, which had the necessary degree of specificity to qualify for protection. We have concluded that there was no evidence of bullying/harassment by him, and we note that Mr Purchase barely pursued this aspect of the alleged protected disclosure in closing submissions.

264. We accept that the Claimant disclosed information about alleged bullying by Ms Falk, consisting of her shouting at the Claimant and calling her a liar.

265. We are prepared to accept that, by the time she made the disclosures, the Claimant subjectively believed that the information she was disclosing about Ms Falk tended to show that R1 was failing to comply with its legal obligation, which was to provide a safe place of work, free from bullying, although we have concluded that this was something she had convinced herself of after the event. We have already noted that she did not complain about it at the time.

266. However, in our judgement, that belief was not reasonable. We have already found that the incidents did not occur as alleged: Ms Falk did not shout at the Claimant, she merely raised her voice in a discussion which was heated on both sides; nor did Ms Falk call her a liar, or spread the suggestion that the Claimant was a liar. We have found that she did tell the Claimant that she thought she had not told the truth to the PAC in this matter. That was her genuinely-held view. No doubt, it was something which was difficult for the Claimant to hear, but we agree with Ms Sen Gupta that a heated conversation, which took place some seven months before it was complained about, in circumstances where the head of Compliance had concerns that the Claimant did not understand the seriousness of a situation, which had been brought about by her own actions, is insufficient to support a reasonable belief that the Claimant was being subjected to bullying and harassment and/or that R1 was failing to discharge its duty to provide a workplace free of bullying.

267. If we are wrong about that, we have concluded that the Claimant did not subjectively believe that disclosing this information was in the public interest. We agree with Ms Sen Gupta that, if the Claimant genuinely had the interests of others in mind, she would have raised these matters earlier.

268. If the Claimant did believe that making the disclosures was in the public interest, that belief was not reasonably held. We have concluded that the interests served by the disclosure were entirely personal to the Claimant: her own sense of grievance at having been investigated by Ms Falk and Mr Keogh, and criticised by Ms Falk; and her hope that making these allegations might forestall the disciplinary proceedings she was facing, by suggesting that Ms Falk and Mr Keogh were biased against her.

269. The Claimant's allegations of alleged bullying/harassment against Ms Falk and Mr Keogh were not protected disclosures.

<u>Alleged protected disclosures referred to in Issues 6.2(A)(iii) and (iv), and 6.2(B)(i) and (iii)</u>

270. These alleged disclosures are set out in full in the list of issues at Annex 1. In brief they relate to: R1 making inaccurate representations to UK regulatory authorities (6.2(A)(iii)); R1 failing to disclose to employees that it was

investigating them (6.2(A)(iv)); R1 maintaining different systems in the UK and Switzerland (6.2(B)(i)); and R1 requiring ICs to input data manually into some systems (6.2(B)(iii)).

271. Although these alleged protected disclosures were not formally abandoned, they were barely pursued, if at all, at the hearing. We consider it proportionate to deal with them briefly. The Claimant was professionally represented throughout these proceedings; she had every opportunity to address the relevant issues, both in evidence and through her representatives.

272. Other than pasting in the relevant extract from the list of issues, there was no specific reference to these disclosures in the Claimant's witness statement, or in her oral evidence. In particular, she led no evidence in relation to them which could support a finding that she believed that they tended to show a breach of a legal obligation.

273. Further, the Claimant has not discharged the burden on her to show that she believed these disclosures were in the public interest. Other than a bare, catch-all assertion in her witness statement (in relation to all the alleged protected disclosures made at the meetings on 11 and 15 October 2018), she gave no further explanation as to why she formed that belief, if indeed she did. Nor did Mr Purchase make any submissions on the public interest issue in relation to these specific alleged disclosures. By contrast, Ms Sen Gupta made detailed and cogent submissions in relation to each of these alleged disclosures, which we found persuasive.

274. Absent any cogent evidence or submissions, the Tribunal concludes that the Claimant did not subjectively believe that disclosing this information tended to show a breach of a legal obligation. Nor did she subjectively believe that the disclosures were in the public interest: the matters raised were all by way of explanation of her failure to comply with policy during the August 2018 trade. We have concluded that she believed that it was in her own, private interest to raise these issues, in the hope that they might provide some justification for her conduct and assist her in the disciplinary process.

275. Accordingly, we have concluded that these were not qualifying protected disclosures. For the avoidance of doubt, we record the following additional observations in relation to three of these matters.

276. As for Issue 6.2(A)(iv) (disclosing that employees were under investigation), the alleged protected disclosure is inconsistent with the evidence in the Claimant's witness statement that she was informed timeously that Compliance had started investigating the August trade.

277. As for Issues 6.2(B)(i) and (iii) (management of operations), we agree with Ms Sen Gupta that these disclosures related to technical features of R1's operation, in a complex, multinational regulatory context. We accept her submission that the fact that the Claimant believed that the internal systems could have been improved in some respects is not equivalent to a belief that R1 was breaching a legal obligation.

Conclusions: alleged PIDA detriments by R1

278. In relation to the alleged detriments below, we must decide whether the conduct occurred and, if so**,** whether the act/failure was, in part at least, on the ground that the Claimant had made the protected disclosures.

279. With regard to the claims in Claim 1, any complaint about an act, or a series of similar acts/act extending over a period treated as occurring or ending on or after 9 May 2019, is in time. Links can exist between the different claim forms, but only as against the same Respondent. That is particularly relevant to the claims against the named Respondents in Claim 3.

Issue 9.1. - 'Between August 2018 and the end of July 2019 R1 conducted an unfair, biased and incomplete investigation of the Claimant's role in a trade made in August 2018 (para 8.2 of GOC1)?'

280. We are satisfied that the conduct of the investigation between August 2018 and the end of July 2019 constituted an act extending over a period, and that this claim was presented in time.

281. Mr Purchase relied on a number of matters in support of this allegation, which he set out in the section of his submissions dealing with the fairness of the dismissal, and then incorporated by reference in the section dealing with the PIDA detriment claims.

282. He identified the role played by Ms Falk as an aspect of unfairness/bias. It is right that Ms Falk started the investigation believing the Claimant had not been honest in relation to the August 2018 trade, and that she gave an update to management on 28 August 2018, in which she expressed a firm view, which identified dishonesty as a concern, before any witnesses had been interviewed. She formed that view on the basis of an analysis of the documents. An investigator is entitled, indeed required, to express a view as to the strength of the evidence of misconduct; it is then for the disciplinary officer to form her own, independent conclusion. It would have been wrong not to state clearly that potential dishonesty was in play. Part of the purpose of the meeting on 28 August 2018 was to brief managers as to what Compliance's preliminary view was, and to notify them of the serious implications for the Claimant, given that she was already on heightened supervision.

283. In any event, Ms Falk had formed her view that the Claimant had been dishonest before the Claimant made the protected disclosure.

284. The investigation process had been set in train, and decisions taken as to who should conduct and supervise it, before the Claimant made the protected disclosure; those decisions cannot have been influenced by it. We agree with Ms Sen Gupta that there is no reason to believe that the fact that Ms Falk and Mr Keogh were kept in post to continue the investigation when it resumed in March 2019 was on the ground of the Claimant having made protected disclosures. It is far more likely that they continued to conduct the investigation because it was a normal part of their role.

285. It is right that Ms Falk was the one of the subjects of the Claimant's grievance. However, we are not satisfied that there is evidence to suggest that Ms Falk's views, or her conduct of the process, were adversely affected by such knowledge as she had of the grievance. On the contrary, we have concluded

that her conduct was remarkably consistent and professional throughout. We have already recorded that Ms Falk asked Ms Clarke as to whether she ought to step aside; she was advised that she should not. In our view, that is further evidence of her acting conscientiously.

286. Mr Purchase then criticised the fact that Ms Falk performed a number of functions in the course of the process. We accept Ms Sen Gupta's submission that this merely reflected her role as Head of Compliance; they were an ordinary part of that role. It was natural that she would be involved at various stages, especially when Mr Keogh moved on; other members of the compliance team were either too junior or lacked the specific expertise necessary to carry out the investigation.

287. Mr Purchase criticised Ms Falk for not personally looking at some of the material the Claimant provided to the investigation (para 162). However, he did not identify any specific piece of evidence, which was overlooked as a result, to the Claimant's disadvantage.

288. Mr Purchase refers to the fact that Ms Falk was a member of the CERP. However, she took no part in the decision to escalate the Claimant's case: she was away on holiday when the decision was taken.

289. He relied on the changes to the disciplinary allegations, which we have recorded above. He suggests that that Ms Falk 'took the opportunity' to expand them, when the Claimant sought further particulars, the suggestion being that the changes were calculated to disadvantage the Claimant. We reject that submission. We are satisfied that the amendments were partly in response to requests from Ms Griffin for clarification, partly out of her own wish to achieve maximum clarity, partly because she noticed accidental omissions of matters which had been identified at the outset, and partly because of new developments. With the exception of the SPS matter, all the charges were either explicitly stated, or impliedly present, in the original concerns, as recorded in August 2018. We are satisfied that this process was in no sense influenced by the fact that the Claimant made a protected disclosure.

290. Mr Purchase suggests that the fact that Ms Falk was herself interviewed, and that she later interviewed Ms Bezuglaya, was in some way tainted by the fact that the Claimant had made a protected disclosure. It was Ms Griffin's decision to interview Ms Falk; there was nothing improper in that. She did so because she thought Ms Falk had relevant evidence to give, and for no other reason. Indeed, it was further demonstration that Ms Griffin was approaching her task conscientiously. As for Ms Falk's interviewing Ms Bezuglaya, nothing was put to Ms Falk in cross-examination about this; we have already found that there was an innocent explanation for her involvement at this later stage (para 208).

291. As for the involvement of Mr Keogh, we have already found that he did not know that the Claimant had made the protected disclosure. Insofar as he knew that someone had raised issues about training, he believed that person to be Ms Khare (para 154). For that reason alone, Mr Keogh's actions cannot have been influenced by the fact that the Claimant had made the disclosure.

292. The only respect in which we have concluded that the investigation was unfair was the delay, for the reasons we give below in our conclusions about the

fairness of the dismissal. As regards the investigation stage of the process, we conclude that there were a number of reasons why it took until July 2019 to complete: the subject-matter was intricate; the investigation was paused while the Claimant's grievances were dealt with; and the grievances was not dealt with efficiently; the Claimant also contributed to a degree to the delay by submitting her own material, as she was entitled to do.

293. Accordingly, we do not accept that the investigation was unfair or biased. As regards the incompleteness of the investigation, we deal with this under the next subheading.

294. We are satisfied that the conduct of those investigating was in no sense influenced by the fact that the Claimant had made a protected disclosure: they had reached their provisional conclusions before she did so; the concerns raised in the eventual report were the essentially the same concerns raised in the preliminary report, which predated the disclosure.

Issue 9.2 - 'Provided misleading and incomplete information about the circumstances surrounding the trade in August 2018 in its April 2019 and the July 2019 versions of its investigation report (para 8.3 of GOC1)?'

295. Insofar as the allegation relates to matters occurring in April 2019, it is *prima facie* out of time. However, matters which occurred in July 2019 are in time, and we are satisfied that the investigation process constituted an act extending over a period.

296. Mr Purchase again relies on steps taken/not taken by Mr Keogh, we have already found that Mr Keogh did not know the Claimant had made the disclosure. Consequently, any acts/omissions of his cannot have been on that ground.

297. As for the facts/pieces of evidence, which Mr Purchase contended had been omitted from the investigation report (and consequently not provided to Ms Griffin), we record our conclusions as follows.

298. The account given by Mr Keogh, and recorded in an email of April 2019, in which he said that he thought that the Claimant had told the attendees at the meeting of 9 August 2018 that the trade had already been executed, ought to have been in the pack. It was evidence which supported the Claimant's account of that meeting. However, we are satisfied that it was not deliberately omitted. On the contrary, Ms Falk explicitly instructed Ms Siefert to include it. We have concluded that its omission was a simple administrative error. We are not satisfied that Ms Falk provided misleading information in the reports. In any event, it was the least probative piece of evidence as to what was/was not said at the meeting: it was an account given many months after the event, at a time when Mr Keogh was in Switzerland and did not have access to his contemporaneous emails; the account was difficult to reconcile with those emails, in particular his email of the day after the meeting (para 115), in which he spontaneously expressed surprise that the trade had already been executed.

299. As for the other documents/evidence identified by Mr Purchase not included in the report, these fall into two categories: evidence which might go to the

question of mitigation (such as whether the Claimant was under stress at the material time); and documents which contained the Claimant's elaboration on answers given by her at the interview.

300. We accept Ms Sen Gupta's submission that the purpose of the investigation was to establish what had happened during the August 2018 trade, principally by reference to the documentary evidence. The object was to assemble the core material, on the basis of which a decision could be taken as to whether there was a case to answer, which there plainly was. It was inescapable that the Claimant was the IC who was responsible for, and executed, the trade. It was her responsibility to ensure that the trade was suitable. It was her responsibility to be transparent with her line management and Compliance, and not to seek to mislead them. Questions of mitigation, and opportunities for point by point rebuttal, were matters for later in the process, when Ms Griffin took over.

301. Even if it is right that the investigation could have been improved by interviewing additional witnesses at this stage, we are not satisfied that there was any connection between any such shortcomings and the fact that the Claimant had made the protected disclosure. The approach taken by the investigators was essentially the same, both before and after the disclosure.

Issue 9.3 - 'Failed to subject others with responsibility for the trade in question to disciplinary investigation (para 8.4 of GOC1)?'

302. It is right that the only individual who was subjected to a disciplinary investigation in relation to the August trade was the Claimant. In our judgment, there is a straightforward explanation for that: the fact that others were not subjected to disciplinary simply reflects the fact that, once their role had been investigated, they were regarded as less culpable than the Claimant. It was she, as the relevant IC, who was responsible for executing the trade; and it was she who provided/did not provide information to a line management and to Compliance. The decision to focus the disciplinary investigation on the Claimant had been taken before she made the disclosure. There is no evidence that the reason why R1 did not subject others to disciplinary investigation was because the Claimant had made a protected disclosure.

303. In any event, we are not satisfied that the decision amounted to a detriment to the Claimant. This is not a comparative exercise. Not subjecting others to disciplinary action did not put the Claimant at a disadvantage; it did not prevent her at the disciplinary stage from relying on evidence relating to the involvement of others, by way of mitigation for her own conduct.

Issue 9.4 - 'Refused to provide written evidence of the conclusions reached by Kirt Tailor's team when asked to do so on 10 June 2019 (para 8.1 of GOC1)?'

304. This allegation is in time. There is no dispute that, at least when asked to do so on 10 June 2019, R1 declined to provide written conclusions of the Tailor process.

305. We have concluded that the sole reason why that decision was taken was because there was a general practice not to provide written reports of Reportable Concerns investigations to complainants. The decision was not

taken because the Claimant had made a protected disclosure. The fact she had done so merely formed part of the background to the decision.

306. In any event, Mr Purchase did not identify in his written or oral closing submissions any specific disadvantage to the Claimant by the later provision of the written report, for example a matter covered in the report, which the Claimant had been prevented from relying on in her defence. The Claimant knew the outcome of the report, because it had been discussed with her in some detail on 25 January 2019. The Respondent then made an exception in her case and provided her with a written report before the disciplinary procedure was completed. In all the circumstances, we have concluded that there was no detriment.

Issue 9.5 - 'When the Claimant answered the allegations made against her in her submissions to Toni Griffin, R1 devised and added supplementary disciplinary allegations against her to increase the likelihood of the Claimant being disciplined and dismissed (para 8.5 of GOC1)?'

307. This allegation is in time.

308. However, the events did not occur as alleged. The allegations were finalised before any submissions were made by the Claimant to Ms Griffin. The claim is misconceived.

309. Insofar as the Claimant complains more generally of the amendment to the allegations (although that is not how this detriment is particularised), we have already set out our conclusions as to the reasons why this occurred: it was partly in response to requests from Ms Griffin for clarification, partly out of Ms Falk's own wish to achieve maximum clarity, partly because Ms Falk noticed accidental omissions of matters which had been identified as concerns at the outset, and partly because of new events (the issue relating to the SPS). It was in no sense because the Claimant had made a protected disclosure.

Issue 9.6 - 'Unfairly prolonged the progress of the disciplinary investigation and, as a result, the period during which the Claimant was prevented from working normally (para 8.7 of GOC1)?'

310. We have concluded below that the process was unjustifiably delayed. This allegation suggests that this was done deliberately. We are satisfied that it was not.

311. The disciplinary investigation was delayed in part because the issues were complex, in part because the evidence was extensive, in part because the Claimant continued to submit additional evidence and submissions which required consideration, but (most importantly) because it was not dealt with efficiently. We are satisfied that there is no evidence that any of the decision-makers prolonged the process because the Claimant had made a protected disclosure.

Issue 9.7 - 'Failed to remove or reduce restrictions on the work that the Claimant could carry out (para 8.6/8.8 of GOC1)?'

312. Mr Purchase confirmed in his closing submissions that 'the Claimant does not rely on this as an independent act of whistleblowing detriment, but it adds to

the extent of the other detriments'. The Tribunal understood this to mean that the allegation was withdrawn.

313. Had it not been withdrawn, we would have dismissed it. The sole reason why the restrictions on the work the Claimant could carry out was not lifted was because she was being investigated for gross misconduct, in relation to charges which called into question her honesty.

Issue 9.8 - 'Prevent the Claimant from leaving R1's employment by prolonging the on-going investigation and allegations of dishonesty (para 8.10 of GOC1)?'

314. Again, this was not pursued by Mr Purchase as a separate allegation of detriment; in his words, it merely identifies 'an obvious consequence of the Claimant being subject to a disciplinary investigation of this nature in the financial services industry [which was] that she could not obtain a job elsewhere'.

315. Had we been required to determine this allegation, we would have dismissed it as misconceived. R1 did not prevent the Claimant from leaving its employment; she could have resigned at any point in the process.

Issue 9.9 - 'Needlessly carry out several investigations over an unnecessarily long period of time from August 2018 to July 2019 despite the Claimant writing to R1 to ask R1 to stop (para 27.2(iii) of GOC2)?'

316. As for the allegations of detriment contained in the Second Claim ('GOC2'), any complaint about an act or series of similar acts treated as occurring or ending on or after 16 October 2019 is in time.

317. This allegation is in time, because the investigatory processes constitute an act extending over a period. We have found (see below) that the investigations were carried out over an unjustifiably long period of time. However, none of them were 'needless'. All of the investigations, including the investigations into the Claimant's grievances, were necessary.

318. Insofar as there was delay in concluding the processes, we have already stated our conclusions as to why the disciplinary process was delayed; as for the grievance processes, we have concluded that the sole reason for the delay was a lack of efficiency on the part of the decision-maker. We are satisfied that the delay was neither deliberate, retaliatory, nor on the ground of the fact that the Claimant had made a protected disclosure.

Conclusions on Claim 3: alleged PIDA detriments by R1, the Second Respondent (Ms Falk) and/or the Third Respondent (Mr Keogh) and/or the Fourth Respondent (Ms Griffin)

319. Although not specifically identified in the list of issues, an issue arose as to whether the Tribunal had jurisdiction to hear the claims presented in Claim 3 as against the three named Respondents. Both Counsel lodged supplementary, written submissions to deal with these issues.

320. For the purposes of Claim 3, any complaint about an act/omission, or an act extending over a period, treated as occurring or ending on or after 7 January 2020 is in time.

321. Ms Sen Gupta accepted that all the allegations against the Fourth Respondent, Ms Griffin are in time, because her conduct of the disciplinary process amounted to an act extending over a period, which ended with the Claimant's dismissal on 8 January 2020.

322. The position is different in relation to the Second and Third Respondents. Mr Keogh's involvement in the events in question ended when he moved to Zürich at the end of April 2019, or at the very latest with the conclusion of the investigation in July 2019. Ms Falk's last involvement was in December 2019, when she interviewed Ms Bezuglaya.

323. Mr Purchase submitted that, because Ms Falk and Mr Keogh started and engaged in the process, which ultimately led to the Claimant's dismissal, they were, at least to a material extent, responsible for the dismissal. In that respect, he argued, this constituted an act extending over a period, which continued until the end of the process started by them.

324. We reject that analysis. There was no act by Mr Keogh *as an individual* after July 2019, and there was no act by Ms Falk *as an individual* after December 2019. Consequently, there was no 'series of similar acts' or 'act extending over a period' *done by them as individuals*, because neither of them acted at all after those dates. Consequently, the claims against them as named Respondents were all presented outside the statutory time limits. The fact that their acts/omissions before those dates may have had continuing consequences after that date does not assist the Claimant. It is trite law that the concept of an act with continuing consequences is different from the concept of an act extending over a period (see, for example, *Sougrin v Haringey Health Authority* [1992] IRLR 416).

325. Because Mr Purchase confirmed that there was no application by the Claimant for an extension of time, if any claim was found to be *prima facie* out of time, the Tribunal has no jurisdiction to hear the claims against Ms Falk and Mr Keogh as named Respondents, and those claims are dismissed as against them.

326. The analysis is different in relation to R1's vicarious liability for the acts/omissions alleged against Ms Falk and/or Mr Keogh in Claim 3, and these are dealt with below.

<u>Issue 10.1 (GOC3): 'Did the Second or Third Respondent carry out or supervise an investigation into a trade the Claimant had made in August 2018?'; Issue 10.2 (GOC3): 'Was that investigation unfair, misleading or biased?'; Issue 10.3 (GOC3): 'Did that investigation wrongly allege that the Claimant had been dishonest?'; Issue 10.4 (GOC3): 'Did that investigation put forward a misleading case for the Claimant to be dismissed?'</u>

327. These three allegations all relate to the investigation process which was concluded in July 2019. With the exception of issue 10.3, they restate allegations which we have already rejected above.

328. In relation to issue 10.3, we concluded that the investigation did not 'wrongly allege that the Claimant had been dishonest'. Strictly speaking, the claim is misconceived: whether an allegation is 'wrong' is a matter to be decided at the

conclusion of the process. Even if the issue is reframed to suggest that the investigation unreasonably alleged that the Claimant had been dishonest, it would have failed on its facts. It will be apparent from the Tribunal's findings as to contribution (below) that it has concluded that there was evidence to support an allegation that the Claimant had been dishonest.

329. As for issue 10.4, the claim that the investigation 'put forward a misleading case for the Claimant to be dismissed' is factually unsound. The investigation report did not advocate for the sanction of dismissal, nor did it put forward a misleading case; on the contrary, it put forward a cogent case, properly supported by evidence.

330. In any event, we have already concluded that the conduct of the investigation was not in any way influenced by the fact that the Claimant had made a protected disclosure.

Issue 10.5 (GOC3): 'Did that alleged detrimental treatment of the Claimant by the Second and/or Third Respondent(s) lead to the Claimant's dismissal or materially affect the decision to dismiss the Claimant?'

331. Mr Purchase acknowledged in his closing submissions that this claim 'is not strictly relevant to liability'. We agree.

Conclusions: alleged PIDA detriments by the Fourth Respondent (Toni Griffin)

Issue 11.1 (GOC3): 'Was the Fourth Respondent's investigation of the allegations against the Claimant unfair?'
Issue 11.2 (GOC3): 'Did the Fourth Respondent develop an unfair, biased and/or misleading rationale to dismiss the Claimant?'

332. We are satisfied that Ms Griffin's investigation of the allegations against the Claimant was not unfair; nor did she develop an unfair, biased or misleading rationale to dismiss the Claimant.

333. Her sole focus was on the Claimant's conduct, and on seeking to establish what had happened.

334. In developing his submission, Mr Purchase focused in particular on the issues relating to the 'insistent client' matter. We reject his suggestion that Ms Griffin ought to have listened to the Claimant's call with Client A on 6 August 2018 'to get a sense of the tone of the conversation'. It would have been senseless for her to do so: she is not a Russian speaker; other than in the most obvious case, little can be divined as to 'tone' in a language whose cadences are unfamiliar to the listener.

335. Mr Purchase criticises Ms Griffin for not researching the Claimant's explanation that there might have been an error of translation in relation to her use of the word 'insist' about Client A. This is a red herring. The Claimant's own evidence to Ms Griffin was that Ms Bezuglaya had explained the concept of an 'insistent client' to her on 8 August 2018, after which the Claimant had the call with Client A, in which she recorded him as insisting on going ahead (although we find below that she already knew about the concept). Ms Griffin noted that the Claimant subsequently described an insistent client scenario in a conversation with Ms Philippides (para 97). Ms Griffin noted that the

Claimant also used the English word 'insisting' to describe Client A in her notes on the RMPlus system (para 96). There was ample evidence for her to conclude that the Claimant 'prompted the client' and 'put words into his mouth', and that she was seeking to document the trade on an insistent client when that was not, in fact, the case.

336. Mr Purchase then criticises Ms Griffin for not considering the possibility that, even if the Claimant did not explicitly state that she had executed the trade at the meeting on 9 August 2018, she was not being dishonest, because she believed that the fact was known to other attendees. We reject that criticism. In her outcome letter (at para 3.5) Ms Griffin specifically alluded to the Claimant's argument that Ms Khare must have known at the meeting that the trade had been executed and rejected it. Moreover, a finding to that effect would have been inconsistent with her other findings, for example her finding at para 3.2, that the Claimant, in her email raising the issue, sought to give the impression that she had not already executed the trade, but was seeking approval for doing so.

337. Mr Purchase also suggested that the Claimant 'might have misremembered exactly what she said at the meeting' and that Ms Griffin ought to have considered that. That was an entirely new suggestion, which was not put to Ms Griffin in cross-examination.

338. We are satisfied that Ms Griffin had ample material from which to conclude that the Claimant had acted dishonestly, and that she approached this issue thoughtfully and rigorously. She was entitled to form her own view of the Claimant's credibility. She wrote about this in her statement, when dealing with the Claimant's refusal to engage with the notes of the disciplinary hearing:

> 'She was given the opportunity to review and amend them, however, she would not commit to the notes of the meeting either way. This caused me to question how certain she was in relation to the explanations she gave me during the disciplinary hearing meetings. Many of the explanations Ellina gave to me during the disciplinary hearing meetings did not, in my view, amount to clear and unambiguous explanations relating to the allegations against her. I felt her answers were at times confusing which caused me to question whether she was unsure of her own answers or whether she was trying to obfuscate rather than clarify events.'

339. Finally, Mr Purchase argues that Ms Griffin focused exclusively on obtaining evidence to support the case against the Claimant. We reject that submission: Ms Griffin cast the net wide; she gave the Claimant every opportunity to develop her defence; and she took that defence seriously. We are not persuaded that the interviews with Mr Khasanov and Mr Tailor (to which Mr Purchase referred in closing) disclosed a partial mindset. On our reading, they were conducted properly; the notes do not suggest that Ms Griffin was trying to skew the process to the disadvantage of the Claimant. The fact that Mr Purchase might be able to point to additional matters which might have been covered merely reflects his greater experience as a forensic advocate.

340. We have concluded that these allegations fail on their facts: Ms Griffin did not conduct an unfair, biased or misleading investigation into, or analysis of, the misconduct allegations. Nor are we persuaded that her approach to her task

was in any sense influenced by the fact that the Claimant had made a protected disclosure.

Issue 11.3 (GOC3): 'Did that lead to the Claimant's dismissal on 8 January 2020 or materially affect the decision to dismiss the Claimant?'

341. Again, Mr Purchase acknowledged in his closing submissions that this claim 'is not strictly relevant to liability'.

Conclusion: automatically unfair dismissal (s.103A ERA)

Was the sole or principal reason for the Claimant's dismissal the fact that she had made public interest disclosures?

342. R1 has shown to the satisfaction of the Tribunal that the sole reason for the decision to dismiss the Claimant was her conduct. We are satisfied that the fact that she made a protected disclosure played no part whatsoever in the decision.

Conclusion: ordinary unfair dismissal

What was the sole or principal reason for the dismissal? Was it a permissible reason?

343. See our conclusion above.

Did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case?

344. We have already given our reasons for rejecting the majority of Mr Purchases's criticisms of the investigation. We deal with some additional points in the following paragraphs.

345. Insofar as he criticises the involvement of Ms Falk, Mr Keogh and Ms Beale in the investigatory stage, any unfairness was cured at the disciplinary stage, because Ms Griffin, who was independent of them, took over the process and made the final determinations. She was not bound by the investigation conducted at fact-finding stage; she conducted her own investigations, and within that process she gave the Claimant scope to raise any issues she wanted to.

346. The only matter which, in the Tribunal's view, was not resolved satisfactorily was the absence of the email from Ms Falk, recording Mr Keogh's recollection that the Claimant had mentioned at the meeting that the trade had been executed (para 165). For reasons we have already given, we do not consider that the absence of that email was sufficient in itself to render the dismissal unfair.

347. Although a different employer might have adopted a different approach, taken as a whole, we are satisfied that this investigation fell within the band of reasonable responses. Insofar as there were matters which might have been investigated more extensively at the fact-finding stage, any unfairness was cured by the scrupulous approach of Ms Griffin. If anything, her approach might be criticised for being over-scrupulous, since it led to significant delay, an issue to which we return below.

Did the Respondent believe in the guilt of the Claimant of that misconduct at that time?

348. We have no hesitation in concluding that Ms Griffin believed in the Claimant's guilt.

Did the Respondent have reasonable grounds for that belief?

349. We remind ourselves that the assessment of whether there were reasonable grounds for belief in misconduct must be undertaken by reference to the facts and matters known to the decision-maker at the time of the dismissal. We also bore in mind that the band of reasonable responses applies equally to the decision-maker's findings of fact and her assessment of credibility.

350. We are satisfied that Ms Griffin had reasonable grounds for her belief that the Claimant had committed the misconduct. Indeed, Mr Purchase had to work extremely hard, and subject her reasoning to a minute degree of scrutiny, in order to raise any doubt at all as to Ms Griffin's ability to arrive at her conclusions.

351. The grounds for Ms Griffin's belief in relation to each allegation are set out by her at length in her outcome letter, and we had regard to all of them. We do not reproduce those reasons in full here, because they are a matter of record. The Tribunal has concluded that those grounds were reasonable, indeed cogent and compelling. We focus below on Allegations 2/7, 3 and 8 because those were the matters which led Ms Griffin to the conclusion that the Claimant had demonstrated dishonesty and lack of integrity.

352. In relation to Allegation 2/7 (the 'insistent client' allegations), Ms Griffin had regard to: the Claimant's own evidence that she had a discussion with Ms Bezuglaya, in which the possibility of the client been characterised as an insistent client was raised (thereby confirming to Ms Griffin that she was familiar with the concept); the transcript of the call at 15:01 on 8 August 2018, which she concluded showed the Claimant prompting the client with leading questions and putting the word 'insisting' into his mouth; the fact that the Claimant did not approach her supervisor to talk through her proposed actions, from which Ms Griffin inferred that the Claimant was trying to 'fix the issue and keep it away from her for fear of getting into trouble'; and the transcript of the Claimant's conversation with Ms Philippides, which Ms Griffin considered showed her seeking to conduct a 'papering exercise' to document the trade on an insistent client basis. Despite the Claimant's attempt to portray this as a translation issue, Ms Griffin noted that the Claimant also used the English word 'insisting' to describe Client A in her notes on the RMPlus system (para 96). In our judgment, it was reasonable for Ms Griffin to conclude, on the evidence before her, that the Claimant had used the words deliberately to create a false impression that Client A was an insistent client.

353. In relation to Allegation 3 (misleading Compliance and Ms Khare on 9 August 2018), Ms Griffin had regard to: the fact that the Claimant had realised by that point that Account Management could not provide a solution to the situation she found herself in; that her email at 12:03 makes no reference to the fact that the trade had already been executed, rather it gave the impression that she was seeking permission to execute the trade; the evidence of Ms Khare, Mr Keogh and Ms Beale (which she accepted) that the Claimant did not

mention at the meeting that the trade had already been executed; and the record of the phone conversation with Account Management at 16:05, in which the Claimant continued to try and make the trade work, notwithstanding the fact that (in her own words) 'Compliance does not permit me to go ahead with the trade because it does not pass by advisory criteria'. In our judgment, Ms Griffin acted reasonably in concluding that the Claimant set out to mislead her colleagues.

354. In relation to Allegation 8, Ms Griffin had before her the full run of correspondence between the Claimant and Ms Clarke, and between the Claimant and CISI, which showed Ms Clarke giving the Claimant clear (and in Ms Griffin's view reasonable) instructions. The evidence that the Claimant disobeyed those instructions was overwhelming.

355. In each instance, we are satisfied that Ms Griffin's conclusions were open to her on the evidence before her. Moreover, it is clear from the outcome letter itself, that her scrutiny of the material before her was careful and conscientious. Insofar as Mr Purchase invites us, in the context of the unfair dismissal claim, to make a different assessment of the evidence before Ms Griffin, and the credibility of the witnesses she heard from, that is the wrong approach: provided we are satisfied that Ms Griffin's assessment was reasonably open to her (which we are), we must not substitute our own view.

356. Mr Purchase submitted that a conclusion that the Claimant was dishonest was not open to Ms Griffin, in view of the evidence the Claimant gave that she believed Ms Khare knew that the trade had been executed, and that everybody at the 15:10 meeting would have realised that it had been executed. Ms Griffin dealt with that explanation expressly in her outcome letter (at paras 3.3 and 3.4) and rejected it. Her explanation for doing so was detailed and reasonable. Ms Griffin further commented in re-examination that, had the Claimant been acting honestly, Ms Griffin would have expected her to be clear that, in fact, she had already executed that trade, but that it had been brought to her attention that she may have executed it on the wrong account, and so she was seeking to move the trade to the correct advisory account, albeit it would still be an unsuitable trade. We accept that this was an accurate reflection of her view at the time, and one which was open to her in the circumstances.

<u>By the objective standards of the hypothetical reasonable employer, did the decision to dismiss the Claimant fall within the band of reasonable responses which a reasonable employer might have adopted in response to the misconduct?</u>

357. For all the reasons given above, we conclude that the sanction of dismissal was reasonably open to Ms Griffin: she had concluded that the Claimant had committed gross misconduct, because she had been dishonest.

358. We went on to consider whether there were any other factors, procedural or otherwise, which rendered the dismissal unfair. We have already rejected a number of the criticisms made by Mr Purchase in our conclusions above about the whistleblowing allegations.

359. We considered whether the role played by Mr Keogh rendered the dismissal unfair and concluded that it did not. The fact that Mr Keogh formed a different

view from Ms Bray in relation to the February 2018 matter did not disqualify him from conducting the later investigation. While it is right that he was a witness to one of the key events, that is how he was treated by Ms Griffin: no greater weight was attached to his evidence because he had some involvement in the investigatory process. It is also right that he had expressed concerns about the Claimant's ability to perform in the role. However, the ultimate decision was not his, it was Ms Griffin's. Mr Keogh was not a decision-maker at the CERP stage. We have already accepted his evidence that he did not know that he was the subject of a grievance by the Claimant. Insofar as he was aware that someone had raised reportable concerns, he believed that person to be Ms Khare. The fact that he took responsibility for the investigation, and supervised Ms Beale's writing of the report in 2018 merely reflects one of his roles within compliance, and his personal view as to the earlier misconduct did not disqualify him from discharging those functions. A single reference by Mr Keogh in cross-examination to looking for evidence to 'corroborate' his initial view of the Claimant's conduct was, in our judgment, nothing more than loose language. We do not consider that it was sufficient to demonstrate that he was biased against the Claimant.

360. As for Ms Beale, her involvement in the process was required because she was familiar with this area of work, in a way which others were not. In any event, she was not the ultimate decision maker.

361. Mr Purchase criticises the investigators for starting to draft the report before conducting interviews. The Tribunal is not surprised that they were able to do so, because so much information was readily discernible from the contemporaneous documents, including emails, notes and transcripts of conversations.

362. The fact that Ms Griffin was charged with deciding an allegation made by her own line manager (in relation to the SPS matter) did not render the dismissal unfair. Ms Griffin identified the potential conflict and resolved it: she agreed with Ms Clarke that she would not discuss that issue with her, but with the head of HR in the UK, Ms Victoria Buck.

363. For the reasons already given, we reject the argument that the process of refining the allegations of misconduct rendered the dismissal unfair.

364. Mr Purchase suggests that, in two respects, Ms Griffin went further than the particularised allegations made against Claimant.

365. He argued that Allegation 1 did not expressly refer to the failure to undertake a suitability assessment, yet Ms Griffin identified that failure as part of her decision. We do not accept that criticism. Allegation 1 expressly refers to a breach of section 4.1 of the *CS Invest Expert Procedure Manual*. Section 4.1 contains multiple requirements, including the requirement to conduct a suitability assessment. The failure to do so was an intrinsic part of the action of trading an unsuitable product, which Ms Griffin duly found the Claimant had done. The worst that might be said was that she reached the conclusion by a somewhat circuitous route; on another view, she discharged her duty to give adequate reasons, explaining how she had reached that conclusion.

366. Mr Purchase then turns to Allegation 7 and criticises Ms Griffin for concluding that the Claimant described Client A as 'insistent', when the relevant note recorded her saying 'the client insisted'. That is a distinction without a difference.

367. As for the failure to provide an unredacted copy of the Tailor report, we accept Ms Sen Gupta's submission that Mr Purchase never explained why the substance of the report could or would have changed Ms Griffin's decision.

368. However, we have reached the conclusion that the dismissal was unfair in one respect.

369. We agree with Mr Purchase that the delay in concluding the disciplinary process was disproportionate. We accept that part of the delay can be justified. We acknowledge that the disciplinary process was properly paused while the Claimant's grievance was investigated. That was a permissible, and indeed the usual, approach in the circumstances; but even that process was, as Ms Cuthbert accepted in cross-examination, unreasonably protracted. No reasonable employer would have taken as long to conclude the grievance investigation.

370. We then turn to Ms Griffin's involvement. We have already stated our view that she approached her responsibilities carefully and conscientiously. We also acknowledge that the issues she had to decide were intricate, and that the Claimant contributed to the time it took to complete the process, by providing counter-responses and evidence in rebuttal. She was entitled to do so. Even taking into account the extent to which the Claimant contributed to the delay, the length of time it took between March 2019, when the disciplinary process began, and January 2020, when it was finally concluded, has not been adequately explained.

371. By way of example, the Claimant provided further information of documents on 17 and 19 September 2019. It took a further four months for the decision to be finalised. Within that period, Ms Griffin conducted a number of interviews (para 205). They took over two months to complete. We do not consider that that length of time was justified.

372. We bore in mind that this was a disciplinary investigation into events which took place over a period of around two weeks. We have concluded that R1 acted unreasonably in not ensuring that the matter was concluded within a reasonable time. If necessary, R1 should have ensured that Ms Griffin was given additional time or support, so that she could prioritise the process.

373. It was all the more unreasonable in circumstances where the Claimant's professional activities were effectively on hold. She could not do her usual job for R1, because (for entirely proper reasons) she had been put on restricted duties. Further, it must have been difficult for her to continue working in circumstances where all her colleagues knew that she was on restricted duties.

374. The unreasonableness was compounded by the evidence R1 received that her health was suffering, and that she found the process extremely stressful. R1's OH adviser stressed the importance of resolving the matter expeditiously.

375. We are not satisfied that there was actual prejudice to the Claimant in terms of the eventual outcome of the disciplinary process, for example because it had adverse impact on the cogency of the evidence. Nonetheless, and even absent specific prejudice, we have concluded that this is one of the rare cases in which excessive and unjustifiable delay itself rendered the dismissal unfair.

Findings relevant to contribution

376. The findings of fact in the following paragraphs are the Tribunal's own findings, relevant to the question of whether the Claimant contributed to the dismissal by her own conduct. We reminded ourselves that the conduct in question must be culpable or blameworthy in the sense that, whether or not it amounted to a breach of contract or tort, it was foolish or perverse or unreasonable in the circumstances.

377. The Claimant accepted in cross-examination that she had not done any suitability checks before putting together her list of 'ideas' and sending them to Client A on 1 August 2018. Her explanation was that she was encountering difficulties doing the checks on the system. In those circumstances, we find that she should not have sent anything to the client and should have immediately sought advice from Ms Khare.

378. We are satisfied that in her communications with Client A on 1 August 2018 the Claimant gave investment advice, both as to the merits of the products and the prevailing market conditions. It was a proposal, not a promotion. It is right that she told Client A that there was no risk rating, but she then went on to give advice which she should not have given in the absence of such ratings.

379. The Claimant said that she felt under pressure from Ms Sukhareva. If that is right, she ought to have resisted that pressure, and immediately sought the support of her supervisor, Ms Khare.

380. The Claimant in her witness evidence before us said that she was not familiar with the structure of these accounts, and did not feel she been adequately trained in them. If that was the case, she should have immediately sought advice from Ms Khare.

381. The Claimant also relied on the fact that that the 05 account was labelled on the UK system as being advisory (para 88). We find that she should have approached that indicator with extreme caution: it was incompatible with the information she had received from Mr Khasanov that this was an execution-only account, and her own view, expressed to him on 2 August 2018 (para 87), that 'I am not allowed to touch even with a barge pole, ever.' To proceed without first addressing, and resolving, this obvious anomaly was perverse. This was another obvious trigger-point, when she should have approached Ms Khare for support.

382. Insofar as the Claimant suggested in evidence that she did approach Ms Khare for support, we disbelieve her. She accepted in cross-examination that she did not ask Ms Khare's advice about this trade at all, even at the one-to-one meeting she had with her on 3 August 2018. Her explanation was that Ms Khare was a new person in the team, was not familiar with Russian clients, and the Claimant thought she would probably not be able to do anything.

383. Those reservations were irrelevant. After the first compliance review, she had been given the following express instruction by Ms Blay:

> 'I would like to reiterate that you should not make assumptions about the policies and procedures of the Bank. You should seek guidance from your line manager, the compliance department and/or other relevant Subject Matter Expert if you are unsure at any time in the future. You must also act in a more considered way going forward, with enhanced due care and attention to the policies and procedures of the Bank.'

384. Even if Ms Khare had not known the answer, she could have worked with the Claimant to decide next steps, if necessary referring her on to someone else. The overwhelming likelihood is that Ms Khare would have given the same advice as was given when the Claimant eventually did approach Ms Khare and Compliance: not to proceed. Whatever her advice, had the Claimant acted in accordance with it, she would have had the protection of having acted in accordance with the guidance she had been given, in other words she would have been covered.

385. By not seeking advice from Ms Khare and/or Compliance before executing the trade, in circumstances when she was already under heightened supervision, on her own account was at points 'totally unclear' how to proceed, the information she was receiving was contradictory, and she had been explicitly warned not to proceed on the basis of assumptions, we have concluded that the Claimant acted recklessly.

386. A PRC 4 trade was not suitable to book on the 05-1 account, because it was already in breach; nor was it suitable to book on the 05 account, because that was an execution-only account. We accept Ms Sen Gupta's submission that this trade should never have been executed at all, as it was outside Client A's risk profile. It was a breach of the Respondent's own policies, and its regulatory obligations, and gave rise to potential reputational harm. The Claimant acted improperly in executing this trade.

387. We find that, once Ms Bezuglaya had told the Claimant that the solution she had arrived at (booking the trade on the 05 account) was not workable, the Claimant was in a position where she was desperately seeking a solution. The 'insistent client' doctrine was the solution she fixed on.

388. We are satisfied that, at the time when the Claimant spoke to Client A on 6 August 2018, if not before, she was familiar with the insistent client policy. That is consistent with her grievance letter:

> 'I realised … that the trade he wanted to carry out on the account under advisory services could be carried out in two separate ways:
>
> […]
>
> - by carrying out the trade on this portfolio which is already in breach but to put this trade internally as advised BUT Unsuitable (this can be done if the client insists on proceeding with the trade despite the risk budget breach).

> Since Galina was on holidays and unreachable, I informed Julia and the relevant Account Manager in Zürich (Nevzed Khasanov) that I could not proceed with the trade if the account did not have extra cash to mitigate the risk or would not sign a documentation to increase the risk budget.'

389. We note that, according to this account, the Claimant was already considering the applicability of the 'insistent client' doctrine before Ms Bezuglaya returned from holiday.

390. We accept Ms Sen Gupta's submission that, in the conversation on 6 August 2018 (para 95), Client A is was not in any way 'insistent'. If anything, he was following the Claimant's advice, who was encouraging him to pursue the investment ('these notes will fit nicely…').

391. The Claimant said in cross-examination that, in Russian, there is no difference between the concept of a person saying they *would like to* keep something and a person *insisting* that they want to keep something. There was no evidence to support that assertion; we found it implausible. It was she, not Client A, who used the word 'insisting' in the transcript of the phone call, but in her own notes of that conversation she gave the impression that it was Client A who used the word (para 96). She used the English word 'insisting' to describe Client A in her email to Compliance of 9 August 2018 (para 99).

392. We accept Ms Sen Gupta's submission that the Claimant artificially inserted the word 'insisting' into the conversation with Client A, in the hope that it would provide her with cover, should an issue arise. That is consistent with her communication with Ms Philippides (para 97), in which she asked her what else she needed to do 'so that I am not going to be in trouble again.' We also accept Ms Sen Gupta's submission that the Claimant deliberately misrepresented Client A as an insistent client to Ms Philippides and failed to mention to her that the trade had already been executed. We note that Ms Philippides appeared surprised by the request, and reluctant to get involved.

393. The Claimant accepted in cross-examination that she did not point out to Client A that she had already executed the trade. She said that she believed he would assume that it had already been bought, because the order had been taken from him on 3 August 2018. We found that unpersuasive: the transcript records Client A as saying 'let's buy', which suggests that he thought he hadn't already bought; the Claimant finishes the exchange by saying 'I am accepting and executing your order'. We find that the Claimant withheld from Client A that the trade had already been executed. That was misleading.

394. With regard to the Claimant's conversation with Mr Giancotti on 8 August 2018, we find on the balance probabilities that Mr Giancotti's account (para 98) of his advice to the Claimant (urging her to seek advice on the trade from Compliance and her local line management) was accurate: the Claimant did not deny that he said this, merely stating that she 'did not recollect it happening'. The Claimant did approach Ms Khare and Compliance the next day.

395. Turning to the events of 9 August 2018, at no point in her email (para 99) did the Claimant state that the transaction had already been executed. That fact which ought to have been front and centre in her account. We have concluded

that she did that deliberately, because she did not want to get into trouble again. In our view, she acted dishonestly. We do not believe her evidence that she thought the recipients knew the trade had been executed. If she had genuinely believed that, her questions would have been different, and would have included questions as to what remedial steps would need to be taken to unwind the trade, if they advised her that it was unsuitable. As to the Claimant's question ('can I book the trade…?'), we accept Mr Keogh's evidence that this would have been understood as 'can I execute the trade?'

396. We find that in her email at 14:19 on 9 August 2018 (para 101) Ms Beale was clearly providing guidance about what she thought was a prospective trade. If she knew that the trade had already been executed, the email would have been expressed in different language, and would have addressed different issues, such as whether the trade should be cancelled and, if so, what steps should be taken. Instead, her focus was on the Claimant's approach to the advisory stages.

397. As for whether the Claimant withheld from the attendees at the meeting on 9 August 2018 that the trade had already been executed, there is no doubt that there was some equivocal evidence as to this, including Mr Keogh's different accounts on 12 and 25 April 2019 (paras 165 and 169). We note also that Ms Beale said in an interview on 12 April 2019 that she 'does not recall EV stating this meeting that the trade had already been placed, she thought this had happened outside the meeting shortly afterwards', but later commented that she was '90% sure' that she had not. Ms Khare said in an interview on 18 September 2019 'that EV had not told anyone that she had actually already done the trade when they had been discussing whether or not to do the trade', but, as the Claimant pointed out in her statement, she did not say when the Claimant had told her.

398. On the balance of probabilities, we find that the Claimant did not tell the attendees at the meeting that the trade had already been executed. We consider that the best evidence of this is the immediate contemporaneous evidence of the emails which Ms Khare and Mr Keogh exchanged at the time (paras 113 to 115). In our view, Ms Khare's email can only be read as her recording that she had discovered something after the meeting, which she had not known during the meeting. We also note that the Claimant was copied into that email and did not take issue with Ms Khare's account at the time. In another contemporaneous email, sent to Mr Michael Kilsby on 13 August 2018, Mr Keogh wrote: 'we were only told late on Thursday night that in fact EV had traded'. We have concluded that the Claimant withheld the information deliberately and dishonestly.

399. We also note that the Claimant's evidence to us was that Mr Keogh, at the meeting, instructed her either to cancel the trade or to ask the client to sign a new CSAP. We find it unlikely that Mr Keogh would have advised the Claimant to ask Client A to sign a new CSAP, if he had known that the trade had already been executed, because that would not have solved the problem. Ms Falk's unchallenged evidence was that a new CSAP could not retrospectively cover a trade which had already been executed. Mr Keogh accepted in cross-examination that he mentioned the possibility of asking the client whether he

wanted to review his mandate, but in the context of a trade which he believed had not yet been executed. We accept his account.

400. We note that in her telephone call to account management after the meeting (para 107), the Claimant continued to try and find ways of making the trade work, without asking Client A to sign a new CSAP, contrary to Mr Keogh's advice. In our view, the fact that she did so, even after the meeting in the afternoon, is consistent with her not having told the attendees at the meeting that it had already been executed. She was desperately trying to save a situation which she had made yet more serious by not being frank with her colleagues.

401. We agree with Ms Griffin's conclusion that it was only when she discovered that the trade had already settled that she confirmed the true position to Ms Khare, and that this was probably between 17:33 (when she spoke to Client A) and 17:50, when Ms Khare asked to speak to Ms Blinoff (para 112). As soon as she knew what the true position was, Ms Khare took action to start the cancellation of trade. Had she known the true position during the meeting, there is no reason to think that she would not have done the same, but much earlier in the day.

402. In short, the Respondent's case is consistent with a plain reading of the contemporaneous documents; the Claimant's case requires a strained interpretation at each stage.

403. Finally, we have considered the Claimant's conduct in relation to the SPS renewal. We find that the original text proposed by Ms Clarke was appropriately neutral. She was then flexible in agreeing to add a sentence to clarify that the disciplinary procedure had only recently begun, and that no decision had been reached in relation to any of the allegations. Ms Clarke was entitled to reject the Claimant's version, because it was silent as to the nature of the allegations, and consequently did not provide the information requested by CISI ('a brief summary of the case').

404. Ms Clarke rejected the Claimant's counter-draft, and expressly instructed her to send the version agreed by her. The Claimant disregarded that instruction, and sent a draft of her own, which had not even been run past Ms Clarke. The Claimant's draft led to CISI to believe that no disciplinary allegations had been set. That was untrue.

405. She then disregarded Ms Clarke's further instruction to send the Bank's original draft.

406. The Claimant unreasonably refused to follow Ms Clarke's clear and repeated instructions; she did so because she disagreed with them, and they were not to her advantage. Her decision to send CISI a draft of her own devising, without the approval of Ms Clarke, was wilful and unprofessional. The response she provided to CISI was misleading, because it gave the impression that it represented the Bank's position, which it did not. These actions demonstrated a lack of integrity on her part.

407. For the avoidance of doubt, we do not accept that any lack of training can account for, or excuse, the Claimant's conduct in these respects. The ability to

follow clear guidance, to carry out express instructions, and to act with honesty and integrity, are not matters in which an experienced professional should require training at all.

Remedy

408. Although we have made findings as to contribution, as we agreed with the parties, we have not determined what impact they should have on compensation; we have not determined the *Polkey* issue at all.

409. We will hear further submissions (but no further evidence) as to extent to which the award in respect of unfair dismissal should be reduced by reason of the Claimant's own conduct, or on a *Polkey* basis. Although we left open the possibility of hearing further evidence on the *Polkey* issue, given the narrow basis on which we have found the dismissal to be unfair, we think it unlikely that it is required. If either party strongly disagrees, they may set out their reasons in correspondence.

410. The parties must write to the Tribunal within 21 days of the promulgation of this judgment, providing dates to avoid for a one-day remedy hearing. If they consider that longer is required, they should explain why, and propose agreed directions. A separate case management order will then be sent out.

Employment Judge Massarella
Date: 2 August 2021

ANNEX 1: AGREED LIST OF ISSUES

References

"GOC 1" refers to the Claimant's Grounds of Claim dated 7 September 2019 in Claim No. 3202411/19 ('Claim 1'), which is against R1 only, and "GOR 1" refers to R1's Grounds of Resistance dated 9 December 2019.

"GOC 2" refers to the Claimant's Grounds of Claim dated 15 January 2020 in Claim No. 3200203/20 ('Claim 2'), which is against R1 only, and "GOR 2" refers to R1's Grounds of Resistance dated 30 January2020.

"GOC 3" refers to the Claimant's Grounds of Claim dated 14 April 2020 in Claim No 3201011/20 ('Claim 3'), which is against all four Respondents, and "GOR 3" refers to the four Respondents' Grounds of Resistance dated 22 July 2020.

"RRFI" refers to the Claimant's Replies to R1's Request for Further Information in Claim 1, and

"AGOR 1" refers to the Respondent's Amended 17 Grounds of Resistance in Claim 1.

Preliminary Issues

1 Did any of the alleged acts or failures to act by R1 which the Claimant alleges in paragraph 8 of the GOC 1 occur prior to 9 May 2019?

2 If so, do those acts or failures to act form part of series of similar acts or failures (section 48(3) of the ERA) which continued after 9 May 2019?

3 Did any of the alleged acts or failures to act by R1 which the Claimant alleges in the GOC 2 but not in the GOC1 occur prior to 16 October 2019?

4 If so, do those acts or failures to act form part of series of similar acts or failures (section 48(3) of the ERA) which continued after 16 October 2019?

Alleged Protected Disclosures

5 Did the Claimant make the disclosures alleged by the Claimant in the GOR1, GOR2 and GOR3?

6 In particular,

6.1 In a letter dated 10 September 2018 to Karen Bailey did the Claimant disclose to R1 detailed information that it was failing to provide adequate training, advice, guidance and support to Investment Consultants in relation to compliance matters and that Lindsay Falk and Ross Keogh were bullying and harassing the Claimant and other Investment Consultants?

6.2 On 11 and 15 October 2018 and by email dated 25 October 2018, did the Claimant tell Kirt Tailor and Jill Cuthbertson that:

A. R1's compliance function was failing:

i. To provide advice on compliance and regulatory matters to the Claimant and other Investment Consultants based in London in a timely and consistent manner, or at all in some cases;

ii. To provide adequate compliance training to the Claimant and to other Investment Consultants (including new joiner training as well as on-going and refresher training) particularly on suitability and appropriateness, advisory vs non-advisory trades, trade booking and record keeping;

iii. To make accurate representations to UK regulatory authorities (or related bodies) regarding the training and competency status of the Claimant and other Investment Consultants;

iv. To disclose to employees that it was investigating them thereby allowing employee under investigation to continue making compliance mistakes while the investigation continued;

B. R1 was failing to manage its operations by:

i. Maintaining incompatible or differing internal booking systems and procedures, product offerings/buffets, and risk profiles/approach to modelling risk for trades with respect to the UK and Switzerland booking centres as well as having frequently changing procedures covering other areas relevant to Investment Consultant;

ii. Not having adequate new joiner set-up processes, procedures and training (e.g. not being provided with relevant front office related procedures documents, not being notified of the Investment Consultant's team Shared Drive, not receiving adequate training on the use of internal systems relevant to Investment Consultants, telephone lines not being recorded for a period of time, etc.);

iii. Requiring Investment Consultants to manually input data into multiple internal electronic systems which creates a high risk of human error (and therefore operational risk for R1), and where the system often does not detect these errors in a timely manner;

C. R1 was providing poor supervisory oversight, support and guidance to the Claimant and other Investment Consultants in that:

i. Eugenio Giancotti was supervising remotely from Switzerland and therefore limiting the level of oversight, support and guidance that could be given to the Claimant and other Investment Consultants within his reporting line in London;

ii. Rudi Mendonca had been signing off the Claimant's trades without flagging any errors or issues and providing no guidance or support to the Claimant; and

iii. Eugenio and Rudi had not ensured that immediate colleagues cooperated and provided sufficient guidance and support to each other;

D. Lindsay Falk and Ross Keogh were bullying and harassing the Claimant and other Investment Consultants?

6.3 Did the Claimant repeat these disclosures to the Fourth Respondent during a disciplinary meeting on 31 July 2019?

7 In relation to each of the alleged disclosures, does it constitute a protected disclosure for the purposes of s43A of the ERA 1996? In particular:

7.1 Was there a disclosure of information?

7.2 If yes, did the Claimant have a reasonable belief that the disclosure tended to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject (section 43B(1)(b) of the ERA)?

7.3 If yes, did the Claimant have a reasonable belief that the disclosure was made in the public interest?

Alleged Detriments

8 Did R1s individually or collectively, subject the Claimant to any of the alleged detriments described in this section of this List of Issues on the ground that the Claimant made the alleged protected disclosures in section 2 of this List of Issues?

9 In particular, did R1:

9.1 Between August 2018 and the end of July 2019 conduct an unfair, biased and incomplete investigation of the Claimant's role in a trade made in August 2018 (para 8.2 of GOC1)?

9.2 Provide misleading and incomplete information about the circumstances surrounding the trade in August 2018 in its April 2019 and the July 2019 versions of its investigation report (para 8.3 of GOC1)?

9.3 Fail to subject others with responsibility for the trade in question to disciplinary investigation (para 8.4 of GOC1)?

9.4 Refuse to provide written evidence of the conclusions reached by Kirt Tailor's team when asked to do so on 10 June 2019 (para 8.1 of GOC1)?

9.5 When the Claimant answered the allegations made against her in her submissions to Toni Griffin, devise and add supplementary disciplinary allegations against her to increase the likelihood of the Claimant being disciplined and dismissed (para 8.5 of GOC1)?

9.6 Unfairly prolong the progress of the disciplinary investigation and, as a result, the period during which the Claimant was prevented from working normally (para 8.7 of GOC1)?

9.7 Fail to remove or reduce restrictions on the work that the Claimant could carry out (para 8.6/8.8 of GOC1) ?

9.8 Prevent the Claimant from leaving R1's employment by prolonging the on-going investigation and allegations of dishonesty (para 8.10 of GOC1)?

9.9 Needlessly carry out several investigations over an unnecessarily long period of time from August 2018 to July 2019 despite the Claimant writing to R1 to ask R1 to stop (para 27.2(iii) of GOC2)?

10 Did the Second or Third Respondent subject the Claimant to the alleged detriments in paragraph 8 of the GOC 3 on the ground that the Claimant made the alleged protected disclosures in section 2 of this List of Issues? In particular:

10.1 Did the Second or Third Respondent carry out or supervise an investigation into a trade the Claimant had made in August 2018?

10.2 Was that investigation unfair, misleading or biased?

10.3 Did that investigation wrongly allege that the Claimant had been dishonest?

10.4 Did that investigation put forward a misleading case for the Claimant to be dismissed?

10.5 Did that alleged detrimental treatment of the Claimant by the Second and/or Third Respondent(s) lead to the Claimant's dismissal or materially affect the decision to dismiss the Claimant?

11 Did the Fourth Respondent subject the Claimant to the alleged detriments in paragraph 8 of the GOC 3 on the ground that the Claimant made the alleged protected disclosures in section 2 of this List of Issues? In particular:

11.1 Was the Fourth Respondent's investigation of the allegations against the Claimant unfair?

11.2 Did the Fourth Respondent develop an unfair, biased and/or misleading rationale to dismiss the Claimant?

11.3 Did that lead to the Claimant's dismissal on 8 January 2020 or materially affect the decision to dismiss the Claimant?

Unfair dismissal

12 Did R1 act reasonably in formulating its allegations against the Claimant?

13 Was its investigation of the allegations against the Claimant reasonable and fair?

14 Was the procedure followed by R1 during the dismissal process fair?

15 In particular, was it fair that Toni Griffin investigated the Claimant and made the decision to dismiss?

16 What was the reason, or what were the reasons, for which the Claimant was dismissed?

17 Were the reasons for dismissal fair?

18 Did R1 act reasonably and fairly in dismissing the Claimant for the reason it did?

19 Was the Claimant given an opportunity to answer the allegations for which she was dismissed?

20 Was the dismissal automatically unfair under section 103A ERA? Was the principal reason for the Claimant's dismissal by R1 that she had made protected disclosures?

21 In all the circumstances was the Claimant's dismissal fair or unfair under section 98 ERA?

Remedy

22 Is the Claimant entitled to a declaration that:

22.1 she was subjected to a detriment contrary to section 47B of the ERA?

22.2 she was unfairly dismissed contrary to section 103A ERA?

22.3 she was unfairly dismissed contrary to section 98 ERA?

23 Is the Claimant entitled to compensation including an award for injury to feelings?

24 Should there be any just and equitable uplift to the compensation awarded of up to 25% due to any failure to comply with the ACAS Code (section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992)?

25 Should there be any reduction in compensation on the basis that:

25.1 it would be just and equitable to do so (pursuant to section 49(2) of the ERA), and/or

25.2 the Claimant caused or contributed to any act or failure to act (section 49(5) of the ERA); and/or

25.3 it appears to the Tribunal that the protected disclosures were not made in good faith and it would be just and equitable to reduce any award by no more than 25% (section 49(6A) of the ERA); and/or

25.4 on the basis of any failure by the Claimant to comply with the ACAS Code such that it would be just and equitable to reduce any award by up to 25% (section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992)?

ANNEX 2: FINAL VERSION OF THE DISCIPLINARY ALLEGATIONS

‘Allegation 1

On 6 August 2018 you traded an unsuitable structured product for a client (“the trade”) on an advisory basis, in breach of section 4.1 of the CS Invest Expert Procedure Manual and section 1 of the Suitability & Appropriateness Policy (GP-00017). The trade was subsequently unwound, resulting in a loss to the bank of CHF 22,000 and creating potential reputational damage.

Allegation 2

On 8 August 2018 at 15:12 you called Vlada Philippides to confirm the process for booking unsuitable trades. During the call, you failed to mention that you had already placed the trade and you misrepresented the conversation you had with the client by describing the client as ‘insisting’ on the trade, despite the situation not meeting the definition of an ‘insistent client’ per the CSUK Suitability & Appropriateness Guide and section 4.4 of the CS Invest Expert Procedure Manual.

Allegation 3

On 9 August 2018 you asked CS UK Compliance to review the suitability of the trade. Ross Keogh and Jade Beale from Compliance and your Supervisor Kanu Khare, all agreed that the trade would be unsuitable and instructed you not to proceed. Later that evening it transpired that you had in fact already executed the trade. Your decision to seek advice on the suitability of the trade 3 days after you had executed it raises significant concerns regarding your judgement and constitutes breach of section 4 of the CS Invest Expert Procedure Manual, the provisions set out in the CS Suitability and Appropriateness Guide and section 2.3.6.2 of the IWM Supplement to Suitability and Appropriateness for PB Offices and European Economic Area States (GP-00017-S11). Further, your failure to inform Compliance and your Supervisor of such an important fact when seeking advice on the suitability of the trade has led the bank to question your honesty and integrity and may be a breach of the Conduct & Ethics Standards.

Allegation 4

You conducted your telephone calls with the client in relation to trade without a chaperone, in breach of the heightened supervision requirements placed upon you by the Head of Compliance, Lindsay Falk, on 27 March 2018. Specifically:

4.1 You were not chaperoned on the unrecorded call with the client on 1 August 2018.

4.2 You were not chaperoned on the call with the client on 6 August 2018.

4.3 You were not chaperoned on the call with the client on 9 August 2018 at 14:58 and 17:33.

Allegation 5

You conducted telephone conversations with the client in relation to the trade on an unrecorded line in breach of section 3.1 of the Records Management Policy (GP-11002) and section 5 of the Telephone Voice Recording and Mobile Telephone Usage

Policy (P-00691) both of which were emphasised during the Compliance induction training and undertook on 18 April 2017 and again on 24 July 2018. Specifically:

1.1 You attended a call with the client while working from the Pall Mall office on 6 August 2018 and took orders from the client on an unrecorded extension line. In addition to a breach of the aforementioned policies this is also a regulatory breach.

1.2 You conducted a client-related call with Eugenio Giancotti on your personal mobile, which is an unrecorded line, during the afternoon of 8 August 2018.

Allegation 6

You failed to record a number of client conversations in respect of the trade in RMPlus, in breach of section 4.7 of the CS Invest Expert Procedure Manual. Specifically:

6.1 The email you sent to the client on 31 July 2019 at 18:27 and the client's response back at 18:54 were not saved to RMPlus.

6.2 You appear to have attended a call with the client on 1 August 2018. However there is no corresponding call note saved to RMPlus.

6.4 The calls you attended with the client on 9 August at 14:58 and 17:33 were not recorded in call notes and saved to RMPlus.

Allegation 7

In relation to the call you attended with the client on 8 August 2018 at 15:01 you incorrectly recorded the client as an 'insistent client' in the subsequent call note saved to RMPlus on 8 August 2018 at 15:04, in breach of section 3.1 of the Records Management Policy (GP-11002).

Allegation 8

In relation to your correspondence between 12 June – 1 July 2019 with the Chartered Institute for Securities & Investments (CISI) and your correspondence with Amanda Clarke (AC) over the same period relating to your SPS renewal, it is alleged that you disobeyed reasonable instructions given to you by AC and in doing so intended to mislead CISI, in breach of the Conduct & Ethics Standards.

The background to this exchange is as follows:

a. Your CISI was due for renewal and as part of this process, you informed CISI that there was a disciplinary process in progress;

b. CISI (Coleen Petersen) asked you for information about this CS: "Please could I ask if your firm could also provide us some information on this case. We are looking for a brief summary of the case, any actions the firm may have taken and also if the regulator had been informed. If we are able to see a copy of the initial and final Disciplinary notification letter this would be sufficient."

c. You contacted HR and Amanda Clarke (AC) provided some wording for you to send to CISI, which she amended to address some of your concerns – see Section 1 below;

d. You sent a response to CISI, but it was not what had been stipulated by AC - see Section 2 below;

e. CISI then responded as set out in Section 3 below, suggesting that they did not understand that allegations had already been made against you, which they would have understood, had you sent the wording provided by AC;

f. Concerned that CISI appeared to be under misconception, AC asked you to confirm what you had sent to CISI (you confirmed that you had sent the email in Section 2), pointing out that CISI appeared to be under the (incorrect) impression that CS had not yet set any disciplinary allegations;

g. You then wrote to CISI as set out in Section 4 below, correcting any misconception;

h. CISI responded with the email in Section 5.'