Case Nos: 1400148/2013
1401077/2014
1401466/2014

EMPLOYMENT TRIBUNALS

Claimant: **Mr G E Yagomba**

Respondent: **AXA Services Limited**

Heard at: **The University of the West of England, Bristol**

On: **18 to 20 September 2017 (Tribunal reading time), 21, 22, 25 to 29 September, 2 to 5 and 9 October (hearing of evidence and submissions) and 10 to 13 and 16 October 2017 (Tribunal deliberations in Chambers)**

Before: **Employment Judge Livesey**
Mr J Howard
Mr C Williams

Representation:
Claimant: In person
Respondent: Ms Davis, counsel

JUDGMENT

1. The Claimant's claims of unfair dismissal, discrimination on the grounds of race, harassment and victimisation are all dismissed.

2. The telephone Case Management Preliminary Hearing listed for 3 November 2017 is cancelled.

REASONS

1. THE CLAIMS

1.1 The Claimant brought four claims;

(i) 1400148/2013 ('Claim 1'); claims of unfair dismissal and discrimination on the grounds of race against the Respondent, issued on 16 January 2013;

(ii) 14010077/2014 ('Claim 2'); claims of discrimination on the grounds of race against the Respondent and 16 others, issued on 29 May 2014;

(iii) 1401466/2014 ('Claim 3'); claims of discrimination on the grounds of race against this Respondent and 5 others, issued on 26 September 2014;

(iv) 1401099/2016 ('Claim 4'); claims of discrimination on the grounds of race and disability against this Respondent and 16 others, issued on 22 June 2016.

1.1 The claims against all respondents other than this one, AXA Services Limited, were withdrawn on 19 October 2016. Claim 4 was also withdrawn in its entirety on 29 March 2017.

2. THE ISSUES

2.1 The issues which fell to be determined had been discussed at a number of preliminary hearings. The issues in Claim 1 had initially been identified within the Case Management Summary of 16 April 2014, subject to the additional points which were raised in the Claimant's e-mail of 1 May 2014. Although the issues in Claim 2 appeared to have been extensive and had potentially overlapped with some of those within Claim 1 (47 incidents were identified at the Preliminary Hearing which took place on 29 March 2017), it had been narrowed at subsequent hearings. Claim 3 related to the Respondent's referral of the Claimant's case to the City of London Police.

2.2 The issues were confirmed at the telephone Case Management Hearing which took place on 11 August 2017 at which the Claimant withdrew some further allegations. A comprehensive List of Issues was then prepared.

2.3 On 18 September 2017, the first day of the hearing, the Claimant wrote to withdraw all of the complaints of discrimination and harassment save those which concerned the issues surrounding the misconduct process and his dismissal. In respect of those allegations which concerned the investigation, he nevertheless wanted to argue that the factual complaints which had supported them were relevant to a consideration of his dismissal under s. 98 (4).

2.4 Further correspondence followed and the matter had to be addressed at the start of the hearing. The result was that;

- The Claimant withdrew all of his allegations of direct discrimination and harassment under ss. 13 and 26, save one;

- In relation to those which were withdrawn as allegations, he did not seek to rely upon them in support of other allegations. For example, he did not wish us to draw inferences from the evidence which had been prepared on those matters and proposed not to give evidence and/or cross-examine on them.

2.5 The Respondent did not object to those changes.

2.6 The overall effect of the changes that had been made on 29 March, 11 August and 18 September 2017, served to shift the focus of the case considerably; from one which had included several separate strands of race discrimination separate from the complaint of unfair dismissal, it became almost exclusively about the Claimant's dismissal, with the remaining allegations of discrimination associated with it. The change in emphasis was, perhaps, most starkly revealed by the Claimant's closing submissions, 16 pages of which dealt with the complaint of unfair dismissal, with the other claims under the Equality Act only occupying one page.

2.7 Two further matters arose during the hearing which were not reflected in the List of Issues;

2.7.1 The Claimant stated that there had been an omission in respect of his complaint in relation to the police referral. The complaint was of victimisation, but he had originally brought alternative complaints under ss. 13 and 26 which had been missed off the List. The Respondent did not object to him arguing that paragraphs 10 (c)(ii) and (iii) of the List ought to have been considered under those sections as well;

2.7.2 At the end of the evidence, the Respondent raised the issues of *Polkey* and contributory conduct, both of which had been identified *as* issues at an earlier Preliminary Hearing on 16 April 2014, but which had been omitted from the List. The Respondent had assumed that they might have been dealt with at any remedy hearing, if applicable, but invited us to consider them at this stage. The Claimant was prepared to have been guided by us as their inclusion.

We considered that the evidence had not been dealt with in such a way as to have made it possible for the parties, particularly the Claimant, to have dealt with issues relating to contributory conduct. Our view was, however, different in respect of *Polkey*; there appeared to have been nothing to prevent the Respondent from pursuing its arguments on the basis of the evidence that had been heard. Having explained the principles again to the Claimant, he did not suggest that he was prejudiced in dealing with those arguments in closing submissions.

2.8 Extracts from the final List of Issues have been set out below where relevant and a full copy is attached at the end of the Reasons. The List of obviously subject to the two matters referred to in paragraph 2.7 above.

3. THE EVIDENCE

3.1 The following witnesses gave evidence;

- The Claimant;

On behalf of the Respondent and in the following order;

- Mr Sinho;
- Mr Bennett;
- Mr Bowling;
- Mr Davies;
- Mr Crowther;
- Mr Goss;
- Ms Clark;
- Ms Owens;
- Mr Fretter.

3.2 The following documents were produced;

- C1; Claimant's Chronology;
- C2; Claimant's closing submissions;
- R1; The hearing bundle, which comprised a pleadings bundle, P1, three core bundles of documents, C1-3, and eight extended bundles of additional documents, E1-8;
- R2; Respondent's Chronology;
- R3; Respondent's cast list;
- R4; Respondent's closing submissions and authorities bundle.

3.3 On the first day of evidence, day 4 of the listing, the Respondent sought disclosure of two documents from the Claimant; the compromise/buyout agreement reached between him and the other partners of the Duncan Stanley Partnership (which the Claimant initially stated did not exist, but later stated may have) and a copy of the partnership agreement upon which the Duncan Stanley Partnership was based, part of which the Claimant had supplied to Mr Fretter at the appeal stage [C1026]. The Claimant did not oppose the application in principle, but was unsure whether he was going to have been able to find the documents and, in the former case, whether any issues of privilege attached.

3.4 At the start of the fifth day, he informed the Tribunal that he had neither document; his copy of the partnership deed had been the subject of a theft in Kenya and the compromise agreement never existed *as* a written agreement he said, a restatement of his first position.

3.5 The Claimant produced some further documents on Day 12. Their introduction was not opposed and they became pages C938a-b.

4. THE PROCEDURAL BACKGROUND

4.1 The claims had a complicated and lengthy procedural background during which there had been 12 case management and/or preliminary hearings and the Claimant had pursued two appeals to the Employment Appeal Tribunal. The claims had also been stayed for more than a year, between 23 July 2014 and 30 November 2015, as a result of an investigation that was conducted by the City of London Police.

4.2 We have not considered it necessary to set out a detailed chronology of the procedural background to the case within these Reasons but much of it was reflected within the Case Management Summaries and Orders which were contained within the pleadings bundles.

5. THE HEARING

5.1 A broad timetable for the hearing had been set out within the Preliminary Hearing Summary of 20 February 2017. That timetable was discussed in more detail on 11 August 2017, refined and agreed with the parties.

5.2 The hearing had been listed for 23 days on 20 February 2017 when the issues had been considerably more complex. Given the significant reduction in the scope of the case, the listing was generous. It was therefore surprising that the Respondent's counsel nevertheless nearly filled her time allocation in which to cross-examine the Claimant. The Claimant struggled to keep to his allocation and, by the second day of his cross-examination, the eighth day of the hearing, it became clear that his estimate was beginning to slip significantly. We had expressed concern during the day, but his pace had not improved and a conversation took place towards the end of the session about his time management (we were particularly concerned that he was continuing to spend a lot of time on peripheral detail). A timetable for the use of his time (5 days of cross-examination) was discussed and agreed. He was grateful for the assistance.

5.3 The Claimant continued to be given a good deal of leeway. He cross-examined Mr Bennett, for example, for over 10 hours. We had little doubt that, if not managed, it would have taken considerably longer.

6. THE FACTS

6.1 We made the following factual findings on the balance of probabilities. We attempted to restrict our findings to those matters which were necessary for a determination of the issues.

6.2 Any page references within these Reasons are to pages within the hearing bundle, R1, unless otherwise specified and have been cited in square brackets with a 'P', 'C' or 'E' number to indicate whether the evidence appeared within the 'pleadings', 'core' or 'extended' bundles.

6.3 We made it clear to the parties at the start of the hearing that we had read the documents which had been referred to within each party's witness statements, but that we had not read other documents and would not have done so unless we had been taken to them.

Initial observations in relation to the oral evidence

6.4 There were differences between the parties on many of the factual issues in the case. These Reasons cannot hope to capture every single one of those differences. We have attempted to highlight the parties' respective cases on some of the central disputes, but our factual findings on other matters have been made without setting out the competing cases.

6.5 We found the Claimant to have been a poor witness. On some issues, he appeared certain of his ground, but was then undermined when confronted with a previous account or documents which suggested that he might have been wrong. On other issues about which we had expected him to have had a firm grasp, he was often rather vague.

6.6 There were many several issues which served to undermine his credibility. The following were some examples;

- He appeared to give three conflicting accounts as to the establishment of the Swindon office of the Duncan Stanley Partnership ('DSP') (see paragraph 6.36 below);

- One of those involved in DSP was said to have been a Mr Price (see the Claimant's written account [C91]). During his evidence, he said that he was mistaken and that 'Mr Price' was in fact a 'Mr Crips'. A day later, 'Mr Crips' became 'Mr Crisp'. We found the Claimant's mistakes difficult to understand given his level of involvement in DSP (see paragraph 6.30 below);

- He stated that he and the other DSP partners had been in a dispute during which they had been separately represented by solicitors. The dispute resulted in a compromise or buyout agreement which he initially thought had not been reduced to writing, despite it being worth £100,000 or £110,000 to him. We considered that to have been surprising. Later in his evidence, he stated that there probably *was* a written agreement somewhere. Disclosure of it was then sought by the Respondent but, the morning after that application was made, the Claimant stated that there was no agreement because, at the stage that a final agreement was reached, solicitors were no longer involved. His initial account had therefore changed twice;

- The partners of DSP informed Group Fraud that the Claimant had been a party to the compromise agreement [E481]. The Claimant agreed that that had been the case during his evidence on numerous occasions. He was then at a loss to explain how or why he had told Group Fraud in 2012 that he had had nothing to do with it, the notes of which he did not dispute [C546 and 553];

- He claimed that he had not been accused of having 'siphoned' money from the partners of DSP in 2011, but then accepted that a document of his own acknowledged that that allegation had been made [C92];

- He challenged the accuracy of the notes of several meetings which had been recorded in manuscript and then transcribed. When asked about the notes of the meeting of 15 June 2012, for example, he stated that he did not dispute them. He was then asked about some of the evidence in more detail and, at that point, he then took issue with one particular entry. Upon reviewing the notes in full, it was *only* that entry with which he took issue. From the Respondent's perspective it was arguably the most important one (see 6.82 paragraph below);

- He had to accept that an important concession that he made during his evidence concerning the provenance of a letter which was written to his line manager in October 2011 by Ms Tailby, was made for the first time during the hearing (see paragraph 6.64 below). It was a surprising revelation given the importance of the letter;

- Several grievances upon which the Claimant relied had not been received by the Respondent. Despite having been an adept user of IT, he had not kept electronic copies, nor had he backed up the personal computer upon which they had been written which was subsequently lost without explanation. He also claimed to have sent them in an unusually cumbersome fashion; by scanning and emailing them from the scanner, rather than by simply attaching them to an email which appeared to have been his usual means of communication on most other occasions. The Claimant asserted that he had sent three grievances which he not retained electronic copies of, none of which the Respondent had received (those of 1 September 2011 and 18 June and 11 July 2012).

6.7 Mr Fretter, who heard the Claimant's appeal, described him as "*a highly intelligent, articulate and credible individual*" but also one who was "*evasive, defensive and uncooperative where he felt that he might incriminate himself*" (see his appeal outcome [C1431]). That analysis matched ours entirely.

6.8 The Respondent's witnesses were generally credible and forthright. They were not universally impressive, but our views about the main ones were as follows;

Mr Sinho; he was a strong witness who, having considered his answers, conceded ground readily when it was warranted. His evidence proved less important in light of the manner in which the Claimant's case changed (see paragraph 2.3-2.4 above *Issues etc..*);

Mr Bennett; he required a good deal of patience as he was cross-examined for a long time. He maintained his composure well and impressed us with his dispassionate and rather clinical approach. He only appeared to display emotion when it was suggested that he may have

been motivated by the Claimant's race and/or when his integrity was challenged;

Mr Goss; we found him to have been robust and disarmingly honest, so much so on occasions, that it was to his own disadvantage;

Ms Owens and Ms Clark; both HR witnesses were rather vague about some of the events and the chronology, which were nevertheless well chronicled in the correspondence and documentation. Ms Clark's recollection, in particular, improved as she gave evidence;

Mr Fretter; having left AXA nearly 5 years earlier, he too seemed rather vague on occasions about some of the issues in the case. He remained confident that the views expressed by him at the time (for example, in his appeal outcome letter), had been properly reached after a detailed consideration of the issues.

The Respondent

6.9 The AXA UK Group comprises a number of financial services and insurance businesses ('the Group'). It is part of a global business which has its headquarters in Paris. AXA Insurance UK plc is the UK Group's main insurance business but the Respondent, AXA Services Ltd, is the services company through which it actually undertakes its work. The Respondent also provides intra-group services across the Group's undertakings.

6.10 From about 2010, AXA split its business into two main parts; AXA Personal Lines, which handled personal insurance contracts including motor policies, and AXA Commercial Lines, with which we were not concerned.

6.11 The following personnel from the Respondent and the wider AXA Group featured significantly within the evidence (the titles given were their operative roles during the material period);

- Mr Evans; Chief Executive Officer of the Respondent;
- Ms Georgalakis; Managing Director of Claims within AXA Personal Lines;
- Mr Fretter; Managing Director of Customer Services within AXA Personal Lines;
- Mr Goss; Managing Director of Risk and Compliance within AXA Personal Lines;
- Mr Sinho; Head of Technical and Knight Businesses within AXA Personal Lines;
- Ms Tighe; Head of Intermediary Motor Claims at AXA Personal Lines;
- Mr Davies; Head of Group Fraud for AXA UK;
- Mr Crowther; Group Fraud Investigation Manager;
- Mr Bennett; Group Fraud Risk Manager;
- Mr Dalton; another member of the Group Fraud team;
- Mr Thomas; Head of Internal Audit;
- Mr Bowling; Manager within Internal Audit;
- Ms Helsdon; HR Director;

- Ms Clark (nee Bennett); HR Manager;
- Ms Owens; HR Consultant;
- Messrs Ward, Peppard and Hopkinson; founders of SIMS and, subsequently, Directors of the Respondent post-acquisition by AXA;
- Mr Springham; Principal Solicitor within Knight Legal Services ('KLS');
- Ms Halinen; Administrator at KLS.

6.12 Swiftcover Insurance Services Ltd ('Swiftcover') is another of the subsidiaries of the Group, having been purchased by the Respondent on 1 February 2007. It appeared to operate as an insurance brand within the AXA umbrella.

SIMS Claims Solutions Limited, Knight Legal Services and the Claimant

6.13 In 2003, Supplier and Incident Management Solutions Claims Ltd ('SIMS') was set up as a civil litigation claims management company by its three owners, Mr Ward, Mr Peppard and Mr Hopkinson. It was based in Tunbridge Wells, East Sussex. SIMS had 3 subsidiaries;

(i) Knight Costs Drafting Ltd;
(ii) SIMS Claims Services Ltd; this company was led by Mr Green and predominantly provided outsourced motor claims handling services to Swiftcover, even before its acquisition by AXA in 2007 (see above);
(iii) Knight Rehabilitation Services Ltd.

6.14 The Claimant was initially employed by SIMS as an IT Consultant within its costs litigation team from 27 June 2005, under a contract dated 19 June [C96-9]. He was then line managed by Mr Ward. He also undertook work in Knight Costs Drafting Ltd and acted as its head of litigation.

6.15 On 1 June 2006, the Claimant was promoted to the position of Head of Legal Services within Knight Costs Drafting Ltd which, in October 2006, was renamed Knight Law Ltd but which traded as Knight Legal Services ('KLS'). KLS was, and is, based at Elmbridge Court, Gloucester.

6.16 The Claimant accepted that he occupied a position of trust and seniority. Although he could not remember it, he accepted that an email dated 14 July 2008 [E1] indicated that he had read the SIMS eHandbook which included the following provision in relation to conflicts of interest [E1969];

> *"If you wish to take up any other paid employment whilst employed by SIMS, you must obtain the written consent of Human Resources. Unless there is deemed to be a conflict of interest, consent will not be unreasonably withheld.*"

That was a policy which may have changed over the years, but Ms Clark believed that that section remained consistent. The Claimant also subsequently informed Mr Sinho that he had probably seen the Handbook [C105].

Swiftcover's acquisition of SIMS

6.17 On 5 June 2009, Swiftcover acquired SIMS. SIMS then took over the management of all of Swiftcover's motor claims activities. Accordingly, KLS became AXA Insurance UK plc's motor claims legal services unit and

was responsible for managing and negotiating legal costs and damages claims in relation to its Swiftcover policies.

6.18 In November 2010, an external report was commissioned from Peter Holding Consulting Ltd in relation to the management and processes within KLS [E272-287]. Concerns were expressed over certain elements of the business structure, about which counsel's advice was sought. The nature of the concerns included KLS' use of Swiftcover's name to gain its registration with the Law Society.

6.19 Upon acquisition, Messrs Ward, Peppard and Hopkinson were appointed as Directors of the Respondent. The Claimant continued to be line managed by Mr Ward until, on 29 June 2011, Messrs Ward, Peppard and Hopkinson resigned and left the business. Ms Georgalakis was then appointed as Managing Director of AXA Personal Lines following their departure [C130]. Mr Sinho then became the Claimant's line manager as the new Head of Technical and Knight Businesses [C130-1].

6.20 After the acquisition, Swiftcover decided to establish its own legal services unit on the same premises as KLS which effectively merged with KLS and became one and the same, but business continued to be undertaken in KLS' name and invoices were rendered to Swiftcover in that way too.

6.21 On 19 June 2009, Mr Springham was appointed as the Principal Solicitor to the unit. It was a regulatory requirement under Law Society rules that that legal work was conducted in his name.

6.22 At that point, KLS comprised approximately 20 to 30 members of staff who all reported to the Claimant as their manager, including Mr Springham.

Factual outline

6.23 Before setting out our factual findings in relation to the main areas of the evidence, which necessarily involved some jumping around within the chronology, we considered that a preview of the timeline of the main events would have been helpful;

- The Claimant became involved in the Duncan Stanley Partnership ('DSP') which received outsourced claims management work from KLS;
- In 2011, the Claimant was investigated by AXA's Group Fraud team as a result of allegations made by the other partners of DSP;
- In October, DSP appeared to retract their complaint and the investigation ceased;
- In the Spring of 2012, the Group Fraud investigation into the Claimant's activities was reinvigorated;
- The investigation culminated in the Claimant facing allegations of misconduct;
- Mr Goss dealt with the disciplinary hearing in two parts, in September and October 2012. The hearing had initially been expected to consider four main allegations but a fifth one came to light just before the first part of the hearing which was considered in more depth at the second part;

- The Claimant was dismissed for gross misconduct; three of the five allegations were upheld. He received a warning for one allegation and a further two were considered to have been acts of gross misconduct;
- The Claimant appealed. His appeal, together with a grievance which had been issued in September 2012, were both considered by Mr Fretter. In respect of the allegations for which he had been dismissed, his appeal failed;
- The Respondent referred the Claimant's case to the City of London Police in May 2013. The Police investigation lasted until October 2015. No prosecution was ultimately pursued.

The Duncan Stanley Partnership

6.24 Prior to the acquisition of SIMS/KLS by AXA/Swiftcover, KLS had obtained additional outsourced costs assessment, management and negotiation services from the Duncan Stanley Partnership ('DSP') from 2008. That relationship continued after the June 2009 acquisition. The Claimant had claimed that no contract had existed in respect of those services [C21], but it became clear that a Service Agreement had in fact been entered into between KLS and DSP in April 2011 and he had to accept that his earlier statement had been an error.

6.25 The Claimant was questioned extensively about the establishment and structure of DSP and the precise nature of his role within it. He maintained that the partnership was established by him, Mr Andaro and Ms Tailby, his girlfriend until 2008. He asserted that he was not an equity partner, but that he had invested money in the venture which had been given to him by his father, William Yagomba. He described his role as having been that of 'consultancy partner' (see his description in the meeting of 29 September 2011 [C83-8]). As a result of his involvement and investment, he said in evidence that he had received 50% of DSP's turnover until 2011, when it dropped to 30%. That appeared to have been at odds with what he told Group Fraud in August 2012 (that he had received no money personally but that a separate company, Fedha, had done, from which he had taken no drawings [C533]).

6.26 One of the features of the subsequent disciplinary investigation and process was that the Claimant never produced the DSP partnership deed, any of the employment documents or copy accounts in order to demonstrate the precise nature of his relationship, despite his stated intention to do so [C966].

6.27 Ms Tailby's role in DSP was the subject of much dispute. The Claimant described her as an active manager within the business, effectively Mr Andaro's '*right hand woman*'. He stated that her later account to the Police and those of Mr Dhaudi and Mr Andaro, in which she was described as a distant, ignorant and uninvolved nominal partner, were wrong. The Respondent's understanding as to her level of involvement was relevant in light of the control of a particular bank account (see below).

6.28 From 2009, after the SIMS' acquisition by AXA/Swiftcover, the Claimant provided IT services to DSP, subsequently through a business which he

established, the Fedha Collection Group Ltd ('Fedha'). Two employees of Fedha were supplied to work for DSP. The Claimant's evidence changed as to who paid the employees; he initially stated that it had been DSP, but that changed to Fedha. There was an IT team which was headed up by the Claimant's brother, Justus Yagomba, which managed DSP's IT platform and those of other businesses in which the Claimant was involved (including Madhuka Tours, a safari business).

6.29 According to the Claimant's evidence, by 2011, Mr Dhaudi had become a partner in DSP too, as had a Mr Woody. His account about Mr Dhaudi changed because he had told Group Fraud in August 2012 that he had '*never*' been a partner [C521]. The Respondent had doubts about Mr Woody's involvement (or existence) and pointed to the absence of communications to/from him as having been suspicious (for example, the Claimant's termination email of 20 July 2011 [C21]; see paragraph 6.45 below).

6.30 There was also a Mr Stanley Crisp involved in DSP according to the Claimant (who was referred to initially as 'Crips' during his evidence and elsewhere, hence the spelling in the Cast List, R3). His first name had been borrowed for the 'Duncan' in the DSP name, according to the Claimant, who alleged that he had been a consultant, not a partner, which seemed odd given the alleged use of his name. Mr Andaro's account of where the name had come from was very different; he stated that it had nothing to do with a Mr Crisp/Crips [E3184]. As has been said above, Mr Crisp was first identified, both in the documents [C91] and in oral evidence, as 'Mr Price'.

6.31 Accordingly, the precise structure and genesis of the DSP partnership remained shrouded in a degree of confusion, both from Group Fraud and the Tribunal. The Claimant clearly had the opportunity to clear it up, at least in part, since he had the Partnership Deed/Agreement but only chose to produce part of it to Mr Fretter in 2012 and did not even reveal the partners' identities [C1026]. At one stage, he had stated that there had been "*about six partners*" [C521].

6.32 As to DSP's cash flow and finances, the Claimant informed Group Fraud that DSP had two accounts, one with Lloyds in Clifton, Bristol (No. 0015****) and one with Barclays (No. 2389****). He said that he was one of three signatories to the first account and the sole signatory to the second [C57]. He subsequently alleged that Ms Tailby was also a signatory to the Barclays account, but her level of involvement with DSP on any practical level was very much in issue as has been said.

6.33 The Barclays account became the focus of much interest and attention, first to Group Fraud and the internal investigation and, subsequently, to the Police. The partners stated that they had not believed that the Barclays account was being used and were surprised when they found that it had. The Claimant alleged that they had always known and had approved of its use. What was clear much later once the Police became involved, was that some very significant sums moved from the account to

the Claimant's family and/or businesses associated with them; about £90,000 to the Claimant's father through different payments and £4,000 to his brother. A further sum of £40,000 was extracted from cashpoint machines and £40,000 was found to have been spent on hotels and similar [E2775].

6.34 DSP initially charged their services to KLS at the rate of £125 per claim that was handled + 10% of any saving that was achieved on a costs bill that they negotiated. In February 2010, an exchange of emails appeared to show that DSP and KLS (through the Claimant) agreed a reduced fee of £125 + 5% on that work [C1]. DSP were subsequently to allege that that reduction was achieved as a result of the Claimant informing them that a competitor had offered to do the same work at that reduced rate, hence DSP reducing their rate to stay competitive [C53]. There was considerable dispute as to the meaning and effect of that email exchange, which has been considered below.

6.35 It was also relevant that the Service Agreement entered into between KLS and DSP indicated DSP had been appointed as its exclusive supplier of services in the UK (Clause 3.2 [E470]). QM was another business which provided costs drafting and negotiation services to SIMS/KLS. In the Claimant's role, he managed that relationship too. QM also had a Service Agreement which stated that they were exclusive suppliers to KLS. The agreements were subsequently amended with those clauses removed.

6.36 DSP had offices in Tewkesbury. A second DSP business was established in Swindon. It was unclear precisely when, although it appeared to have been during 2011. Again, there was considerable dispute as to how that came about. The Claimant initially told Group Fraud that the Swindon office had been set up on his initiative and that he had used Mr Woody to run it. He had done so without the permission or authority of the Tewkesbury partners but nevertheless saw a market for further outsourced work from other firms outside the DSP/KLS relationship [C57]. That account changed when he was subsequently interviewed by Mr Sinho; he then claimed that Mr Woody had wanted to set it up on his own and that he merely provided services to it as a contractor [C85]. In a further written account [C91], he stated that Ms Tailby, Mr Woody and Mr Price had set up the office. During his evidence to the Tribunal, the Claimant initially stated that Swindon was established by four partners together (Messrs Andaro, Dhaudi, Woody and Tailby). Much later on, he maintained that he was also a partner.

6.37 It was clear that Mr Dhaudi and Mr Andaro initially stated that the Swindon office had been set up covertly and against their wishes. They were upset that the DSP name and trading style had been used. They were not only the accounts which they gave to the Respondent in 2011, but they were repeated to the Police in 2014 (see, for example, Mr Andaro's account [E3219]). It also accorded with the Claimant's own account which he first gave to Group Fraud (see paragraph 6.36 (one above)).

6.38 DSP then stopped using the Claimant's IT services in or around April 2011, the ramifications of which have been considered below. A dispute then raged within DSP, the reason for which was also disputed. The argument was eventually compromised in 2011. There was an agreement or buyout which resulted, according to the Claimant, on him receiving 30% of DSP's net profits going forward until the total figure which had been agreed was paid (either £100,000 or £110,000, he could not remember). His evidence changed on that issue too; first, he had said that he had received 30% of the business' turnover (see paragraph 6.25 above), then it became a profit figure. He said that payments under that agreement continued into 2014.

6.39 The Claimant stated that he had disclosed his relationship with DSP to the original SIMS owners, Messrs Ward, Peppard and Hopkinson, in 2008. He could not remember the precise details of the disclosure, but he stated in evidence that he told them that he had had a financial interest in it and that he was '*making money*' from it. Again, he had been inconsistent on that issue because, when interviewed by Mr Bennett and Mr Crowther in August 2011, he said something wholly different (see paragraph 6.54 below). He also told Mr Sinho that he had made the disclosure to Mr Peppard *before* the arrangement with DSP had even been established [C102]. No further disclosure was made to Mr Sinho or anyone else in AXA post-acquisition and after Messrs Ward, Peppard and Hopkinson had left.

2011/12; the Claimant's role and responsibilities

6.40 Many of the Claimant's original complaints had concerned a diminution of his role and responsibilities over the period from Summer 2011 to Spring 2012, as set out in the List of Issues prior to 18 September 2017 [P335-346]. As previously stated, those allegations were withdrawn and there was therefore no need for us to explore issues relating to the Claimant's work within KLS and its restructure post-acquisition by AXA, save that the following matters provided context to what followed.

6.41 The steps of assimilation had included, in November 2011, the training of SIMS/KLS staff on AXA's policies. The Claimant accepted that he was trained on the AXA Code of Conduct at that time, part of which concerned conflicts of interest [E1970].

6.42 Later on, the issues which the Holding report had addressed in 2010 concerning KLS' structure and activities (referred to in paragraph 6.18 above) were addressed by AXA in 2012. The report was seen by the Claimant in March 2012 and he had not seemed surprised by it (see his email of 13 March [C233a]). AXA Group Legal subsequently visited KLS in 2012 and a review of its structure and work was conducted from a regulatory standpoint with the involvement of local solicitors, DAC Beachcroft. The concern was that KLS was operating as an in-house legal unit which, under Law Society regulations, was only allowed if it carried out work for its employer. The problem was that SIMS/KLS employees were not employed by the body for whom they carried out their legal services work. Even Swiftcover was no more than an intermediary and not

the insurer itself. The decision was therefore made to transfer the staff into the employment of the Respondent. That transition occurred for all employees, including the Claimant, on 1 June 2012 [C278-9]. The transfer did not affect the continued management of KLS by the Claimant.

6.43 After Mr Sinho had taken over as Head of Technical and Knight businesses, he and the Claimant worked to agree the wording of his Job Description and role profile [154-8] until a final version was agreed [C170-2]. During that process, the Claimant described his role as follows [C156];

> "*Having built the company from scratch, and from no employees to 30 employees, and to an industry leading in-house legal model, the Head of Legal Services is accountable to AXA UK Personal Lines through the Head of Technical* [Mr Sinho] *for the overall performance and general function and responsibility of Knight Legal Services and all its activities.*"

The 2011 investigation

6.44 The Claimant ultimately faced 5 allegations of misconduct at a disciplinary hearing. It is worth identifying the allegations before considering their genesis and the manner in which they were investigated, although the following list does not necessarily reflect how each allegation was framed by the Respondent;

Allegation 1; that he fraudulently redirected sums paid by AXA to DSP into a bank account that he was the signatory to but the DSP partners (Mr Andaro and Mr Dhaudi) were not;

Allegation 2; that he deceived DSP by fraudulently producing a list of false invoices to cover up the redirection of sums;

Allegation 3; a compromise agreement was entered into between the Claimant and DSP to conceal evidence from the Respondent relating to Allegations 1 and 2;

Allegation 4; he sanctioned litigation work to be carried out by KLS for private individuals within the business;

Allegation 5; he affected payments from AXA to the same account referred to in 1 above, purportedly owned/operated by DSP, in respect of work which he completed whilst working for KLS but which was purported to have been undertaken by DSP.

6.45 On 20 July 2011, the Claimant purported to terminate the arrangement between KLS and DSP [C21]. He cited "*the internal disagreement within the Duncan Stanley Partnership*" as the reason for doing so. It was noteworthy that the termination was communicated to Mr Dhaudi and Mr Andaro but not to any others who were said to have been partners by the Claimant at the time (see paragraphs 6.25 and 6.29 above).

6.46 Mr Andaro then sent an email to AXA's management on 24 August in which he and his fellow partner raised complaints about the Claimant's conduct [C52-4]; they complained about the termination of the relationship with DSP because of an internal dispute which had arisen and stated that it revolved around issues which were thought to have been '*of great interest'* to Swiftcover/AXA, namely, that the Claimant had encouraged

DSP to charge a reduced rate for the services it provided to KLS (from £125 per claim + 10% to £125 + 5%) but that he, as DSP's system's administrator, had been able to manipulate the invoices so that Swiftcover had received them at the previous, higher rate and had therefore paid them at that rate. In his role with KLS, the Claimant had allegedly written to DSP in February 2010 to tell them that their work was in danger of being undercut by a competitor. It was in the face of that information that DSP had agreed to reduce their fees to £125 + 5% but they had not been aware that Swiftcover had continued to be charged at the old rate;

> "*As the Partnership's system administrator, Mr Yagomba adjusted the figures to reflect the agreed changes in respect of the partnership changes. It subsequently came to light that Mr Yagomba only amended the system's monthly reporting upon which Partners earning* [sic] *were calculated to reflect the new changes. However, he manipulated the same system so that invoices to Swiftcover were raised and submitted at the former rate of £125+10% of total savings.*"

6.47 Mr Andaro also complained about the Claimant's establishment of a competing DSP business in Swindon. When they had confronted him with the allegations, the partners alleged that the Claimant had produced a list of 'zero supplementary invoices' which showed how Swiftcover was to have recouped an alleged overpayment that it had made to DSP. They provided the list of invoices [C28-30] and five examples of them [C34, 37, 41, 45 and 47]. They wanted the representative at Swiftcover to have been identified because they had not believed that what they had been told had been true.

6.48 Upon receipt of these allegations, AXA Group Fraud became involved. It commenced an investigation which was led by Mr Crowther, assisted by Mr Bennett. The Claimant appreciated why the allegations which the DSP partners had made would have caused concern to the Respondent.

6.49 On 30 August, Mr Bennett met with Mr Andaro and Mr Dhaudi at DSP's offices in Tewkesbury [C26-7]. They provided more detail of their complaints and of the Claimant's payment for the IT services which he had provided, which was said to have been 30% of DSP's income. Mr Bennett was told that the Claimant had been able to draw on the DSP Lloyds Clifton account for expenses. In respect of the work which DSP had done for SIMS, DSP had requested payment to the same Lloyds account but had discovered that, between February and June 2010, SIMS payments had gone to a Barclays account about which they had not been provided with any details. They reiterated that their internal Management Information ('M.I.') had shown a billing rate of £125 + 5%, but that the billing rate had still been at £125 + 10%. The partners were advised to seek legal advice and Mr Crowther expected them to return to him and Mr Bennett once they had done so.

6.50 The Claimant complained that the typed notes of the meeting, which were prepared by Mr Crowther, did not match his own handwritten notes, particularly with regard to the partners' stated ignorance of the use of the

Barclays account [E1292-3]. Mr Crowther, however, told us that he had prepared the typed version approximately one hour after the meeting. We also noted that what the partners were recorded to have said about the Barclays account then, was broadly consistent with what they later told the Police in 2014.

6.51 Accordingly, we were satisfied that Mr Crowther's notes were likely to have been a reasonably accurate account of what was said. The Claimant had, of course, not been present at the meeting.

6.52 On 31 August 2011, Mr Bennett and Mr Crowther then attended Elmbridge Court to speak to the Claimant [C57-8]. No warning was given to him, as was standard practice in such circumstances according to the investigators.

6.53 Mr Bennett found the Claimant to have been evasive, but he nevertheless made a number of important concessions which have been referred to above (see paragraphs 6.32 about the control of the Barclays account and 6.36 concerning the establishment of Swindon). The Claimant stated that he was involved in many other external business ventures, approximately half of which he named [C58].

6.54 As with other notes, the Claimant alleged that Mr Crowther's record of that meeting were also inaccurate in certain material respects. It was true that the typed version of the notes was fuller than his original handwritten version, which the Claimant had accepted was accurate [E1298-1302], but the Claimant's allegations went further than that. For example, he claimed that he had told Group Fraud that both he and Ms Tailby had been signatories to the Barclays account; the handwritten notes clearly indicated that he said that it had just been him [E1299], as was then repeated in the typed version. There were also some very significant concessions which appeared in both versions and in Mr Bennett's notes [E139-143], with reasonable consistency;

- That no one in KLS knew of the Claimant's involvement in DSP ([C57] and [E142] and [E1298]);
- The Claimant had decided to set up the Swindon office. In doing so, he had acted against the other partners' wishes ([C57] and [E1298]).

6.55 The Claimant alleged that Mr Bennett's attitude towards him during the meeting had been "*racially offensive*" and that he had referred to African foreigners as "*nobodies*". Those allegations were strongly resisted by Mr Bennett, who denied that there was any discussion of race in any way. Mr Crowther was adamant that no such comments were made and such a discussion was certainly not reflected in the notes [C57-8]. They were, however, reflected in a letter of complaint that the Claimant said that he sent to Ms Clark in HR the following day [C59-60], which we have considered below.

6.56 Having heard all of the relevant evidence on these issues and having made findings in relation to the subsequent written complaint (see paragraph 6.108 below), we were of the view that the notes handwritten

notes were likely to have been broadly accurate and that the comments attributed to Mr Bennett probably had not been said, as alleged.

6.57 Mr Crowther and Mr Bennett then produced a report. It went through several drafts until it was approved and signed off by Mr Davies on 9 September [C78-81]. In the Executive Summary, they identified the Claimant's business interests as having been "*an apparent conflict of interest, which also breaches the KLL* [sic] *employee Handbook and other requirements to disclose business interests as outlined in AXA's Code of Conduct*". Disciplinary action was recommended. Evidence of fraud against AXA had not been identified. They were also unable to say whether there had been fraud against DSP and, on the basis of the evidence available, the Group Fraud investigations were considered closed at that stage (paragraph 6 [C80]).

6.58 Group Fraud's report went to Mr Sinho and Mrs Georgalakis, amongst others. Mr Sinho was then asked to take up the conflict of interest issues with the Claimant. He then spoke to the Claimant on 26 September about the matters which the report had revealed, the notes of which the Claimant subsequently amended and approved [C100-5]. At that stage, it appeared that the Claimant had then seen the original complaint from the DSP partners [E166 &170].

6.59 During their meeting, the Claimant alleged that, although there was discussion about a reduced charging rate of £125 + 5%, the change was never put into effect. He stated that, if DSP had believed that the rate had changed, it was a mistake and the email confirming the change was incorrect [C1]. Bills therefore continued to be sent at £125 + 10% and any emails which had suggested otherwise were simply wrong.

6.60 It was worth noting that, during his cross-examination of the Respondent's witnesses, he sought to suggest some importance in the use of the words '*bulk work*' in the 2010 emails [C1]. That did not appear to have been a definition in respect the work which had been used within the subsequent written Service Agreement [E470] and it was one which had been used in other emails in which the reduction was repeated (for example [C784]).

6.61 As to his relationship with DSP, he said that the contractual documentation had styled him as a 'consultancy partner' but that he was not entitled to any of the profits, nor did he bear any of the losses. He also maintained that KLS paid none of the DSP invoices; they went straight to Swiftcover and were paid directly. Whilst he accepted that he had access to DSP's accounts for *making* payments, he denied having an account into which he received sums from DSP. As we have already said, the Claimant also maintained that he had discussed the possibility of there having been a conflict of interest with Mr Peppard, and concluded that there would not have been one (see paragraph 6.39 above).

6.62 In relation to Swindon, he claimed that Mr Woody had wanted to set it up on his own. He said that that account was not inconsistent with his evidence to the Tribunal (that Swindon was set up as a result of a

consensus of all four partners), but that was simply not what the notes said in our view. The accounts were not the same (see paragraph 6.36 above).

6.63 After the 26 September meeting, the Claimant provided a '*Further Statement of Clarification*' [C91-4] in which he stated that the Tewkesbury office had sent out invoices which had shown billed rates of £125 + 5% in error. The rate, he said, "*has never changed since…2006*". He said that Swindon had been set up by Tailby, Woody and Price and that a row had broken out between the Swindon and Tewkesbury offices because, amongst other things, the Tewkesbury partners believed that they would not have had a slice of Swindon's profits and had suspected that the others had wanted to get rid of them. In relation to their belief that monies might have been siphoned off, he said that DSP would "*now accept that this was a mistake*". He concluded that "*without wanting to pre-empt any outcome, I am at a stage where I would welcome a mutually agreeable solution e.g. exiting the business instead of a sanction as my treatment & erosion of my role has left me in a position where I do not have any other option other than to consider my career elsewhere.*"

6.64 On 6 October, Ms Tailby wrote to Mr Sinho. It was a letter which had clearly been designed to have exculpated the Claimant from any wrongdoing. She described the squabble between the Tewkesbury and Swindon DSP businesses as having been something which had seemingly emanated from a disagreement over the partnership's growth and matters which were wholly unrelated to the Claimant and/or the Swiftcover work [C89]. During his evidence, the Claimant accepted that the letter contained a number of mistakes; apart from errors regarding Ms Tailby's email address, he accepted that it was odd that it had did not mentioned Mr Price's involvement and/or his own role in the Swindon office. What was far more remarkable, however, was the fact that the Claimant's admission of having helped to draft it.

6.65 Similarly, later in October, as predicted by the Claimant, Mr Sinho spoke to the DSP partners who said that they wanted to "*retract the adverse comments directed at Elvis*" and that the mail (presumably that of 24 August [C52-4]) was "*sent in error*" [C127]).

6.66 The change in stance was explained by the Claimant on the basis that he had informed Mr Dhaudi and Mr Andaro that the partners' missing funds had been caused by Swiftcover's failure to pay DSP about £40,000 and, having shown them a spreadsheet evidencing the shortfall, the misunderstanding was cleared up. We tried hard to understand that explanation. The Claimant never demonstrated which claims or invoices amounting to £40,000 were unpaid and/or how an explanation that DSP were owed money by Swiftcover soothed the partners' complaint that they had been given a list of their invoices that DSP had sent *to* Swiftcover which had been reduced to zero. The explanation did not appear to match their original complaint.

6.67 The Respondent remained circumspect about the motives for the partners' altered position and alleged that it was evident from Mr Dhaudi's and Mr Andaro's subsequent meeting with Group Fraud in 2012 that their silence had been bought under the terms of a compromise agreement with the Claimant.

6.68 At that point, a decision was taken not to charge the Claimant with any allegation of misconduct relating to the conflict of interest issue which Group Fraud had identified. According to Mr Sinho, the main reasons for that decision were the possibility that the Claimant had not been aware of the AXA Code of Conduct and the fact that his activities may have been known to, and therefore implicitly condoned by, the former SIMS Directors (paragraph 62 of his statement).

6.69 According to the Claimant, in November 2011, the matter was therefore "*closed….without any sanctions or restrictions*" (paragraph 14 of the Claim Form, Claim 1). He was, however, required to send a list of his outside business interests to Mr Sinho, which he did in December. Within it, he stated that had "*no involvement*" in Fedha save for having been a director and secretary [C147]. Group Fraud considered that the list needed to show all of the web domains that he owned as well and a further list was submitted in January 2012 [C226] which was then forwarded to Mr Crowther [E258]. In Mr Sinho's eyes, that then closed the issue (paragraph 63), although it was clear that Mr Crowther continued to investigate the Claimant's various websites into March [E256-260].

The 2012 investigation

6.70 In February 2012, as a result of an email exchange about the sharing of Group Fraud reports within AXA generally, the Claimant's case and the Group Fraud report of 2011 was referred to by Mr Evans, the CEO [E254-5]. At an Audit Committee meeting in mid-March, Mr Evans then reportedly asked why the Claimant was still employed. It was explained to him that there had been insufficient evidence of any wrongdoing to have justified allegations of misconduct in 2011, but Ms Georgalakis, Mr Sinho and Mr Davies were called upon to justify the position [E325-9]. That led to the production of a report (which appeared in various guises, but the differences did not appear to have been material [E299-301, 312-4 and 318-320] and [C238-240]) and a file note [C242-3], both of which confirmed that no wrongdoing had been demonstrated on the Claimant's part up to that point. Nevertheless, Mr Davies believed that there were further lines of enquiry which warranted investigation.

6.71 He and Mr Bennett then met with Mr Sinho to discuss the position, which was eventually summarised in an email of 12 March 2012 [C233]. One of Mr Davies' main concerns was the Claimant's apparent need to have raised a series of 'nil-value' invoices which was said to have been "*highly unusual*" [C240]. He was keen that the matter was pursued quickly at that time to avoid it "*simmering along for the next six months*" [E307].

6.72 The Claimant complained that Mr Davies started to question and research his professional qualifications [E263 & 288-9] which he believed reflected

a level of suspicion which cast a shadow over the independence and objectivity of what followed. He was nevertheless able to satisfy Group Fraud in that respect [E302-5]. Those enquiries had had mixed motives in our judgment; not only did Group Fraud undertake background checks into the Claimant once interest in his activities had resurfaced, but there were separate considerations concerning the running of KLS from a regulatory standpoint which had arisen at that stage (see paragraph 6.42 above). Mr Sinho also recalled there having been a query regarding the Claimant's capacity to have acted in a particular way in one specific case.

6.73 At about the same time (24 May), the Claimant complained that Ms Owens took a copy of his passport whilst visiting his office (paragraph 57 of his statement). Ms Owens told us that that may well have occurred as part of an exercise to obtain copies from *all* KLS employees who were then about to have been transferred into AXA as its employees (see paragraph 6.42 above).

6.74 In early April 2012, Mr Bennett was given access to a data file which contained claims data which he had not previously seen, but which had been produced by an Audit team during a routine audit of SIMS/KLS which was then being conducted under Mr Bowling's leadership and which eventually concluded in July [E510-526]. The spreadsheet showed all payments which had been made to suppliers by SIMS/KLS. That enabled further investigations and cross-checks to take place and Mr Bowling and Mr Bennett put their heads together to undertake that work [E359-360]. Meanwhile, Mr Davies continued to write in terms of exerting "*pressure from all sides*" in order to "*get to the right decision*" [E361].

6.75 The Claimant complained that Audit's evidence would have been available in 2011. Whilst it may have been available then, in the sense that it may have existed in some form, it was not uncovered or asked for by Group Fraud.

6.76 Further data produced on 23 May 2012 by Ms Halinen within KLS, revealed to Mr Bennett that, from 12 May 2011, there had been a change in the way that the Claimant's team had recorded cases allocated to DSP [C720-750] and also that, before May, work had been allocated by SIMS/KLS to DSP Tewkesbury but was invoiced to DSP Swindon and payment had been requested to the Barclay's account.

6.77 The Claimant alleged that the data which had been sent with the email of 23 May had been extracted from Ms Halinen by way of a 'fishing expedition' and 'behind his back' (the last bullet point within paragraph 6 (iv) of the List of Issues). Mr Bowling explained that he had tried to get the information from the Claimant, only some of which was produced after a delay [C249-251]. Ms Halinen was then asked instead (see paragraphs 7 and 8).

6.78 Mr Bennett sent the Audit team the list of 330 'zero supplementary invoices' which DSP had given him at the meeting in August 2011 [C413-5]. A check was made to see whether any payments had in fact been

made to DSP in relation to those cancelled invoices. On 22 May, he received an analysis which showed that payments had been made by SIMS in the majority of cases [C254-5]. The analysis also showed a pattern of payments to the Barclays and Lloyds (Clifton) accounts in respect of which the Claimant was a signatory.

6.79 As a result on this new information, the Fraud Team decided to formally re-open their investigation and the Claimant was informed. Mr Bennett took the lead, Mr Crowther having left the business in March 2012. The Claimant was clearly initially unhappy about the re-opening of what he understood were allegations concerning DSP [C256-7], but he subsequently welcomed the investigation and the possibility of the matter having been "*escalated for a full disciplinary*" [C295].

6.80 Initially, it was proposed that there would be informal meetings with the Claimant and Mr Andaro of DSP in order to gain a clearer understanding of the relationship between KLS and DSP (see the email 28 May 2012 [C262]). It appeared that some of Mr Davies' zeal had rubbed off onto Mr Bennett who was then writing in terms of trying to '*sink*' the Claimant [E384]. Mr Sinho subsequently referred to the "*personal drivers*" behind Mr Davies' and Mr Bennett's pursuit of the matter [E407] which he explained in evidence as having related to the investigators' feeling that they had ended their 2011 investigation too soon.

6.81 Upon consideration of this new evidence, Mr Bennett invited the Claimant to attend a further investigatory meeting in order to "*investigate and discuss the background, chronology and management of contracts, service agreement and any other legal documentation which exists or have existed between Knight Legal Services and its cost containment suppliers*" [C265]. That was met with an indication from the Claimant that he was in the process of filing a grievance. Since he was to have been on holiday at the time of the propose meeting, he proposed alternative dates and requested assurances about any questions in relation to KLS' alleged criminal activities since 2006 [C266-7]. After a series of further emails in which a convenient date for both parties was discussed and the precise purpose of it was clarified [C295-6], the meeting eventually took place on 15 June, with Mr Sinho and Mr Davies also present [C298-305].

6.82 The Claimant did not materially challenge the accuracy of the notes of the meeting of 15 June until he was asked a specific question about having told the investigators that, by June 2012, he had "*no financial interests with any version of DSP*" [C304]. He then denied having given that account which, on the basis of his evidence to the Tribunal, would have been entirely wrong. After a careful re-reading of the notes, it was the only error that he found and he accepted that the typed version closely accorded with the original manuscript [E2217]. Mr Sinho also told us about how structured and careful the notetaking had been and, again, we formed the view that the notes were likely to have been reasonably accurate.

6.83 The Claimant was asked about the three versions of the KLS/DSP contract which had been produced [E1980, 1991 & 2003]. He was asked

to explain why the earliest version had contained an exclusivity clause which had obviously not been adhered to, given that KLS was sending work to DSP and QM at the same time. The Claimant explained that contracts were not his strong point. Mr Bennett found him to have been more aggressive and evasive than when they had first met in 2011.

6.84 It was important to note that the notes of the meeting did not reflect the Claimant's alleged reference to a Mr Green and/or his breach of contract by entering into a similar exclusivity deal with Berrymans, as paragraph 69 of his statement had suggested.

6.85 Mr Bennett then took steps to speak to DSP again. He contacted Mr Andaro, who told him that he could not speak to him until the end of July because he was so busy. Mr Dhaudi declined to speak to him at all but he did send Mr Bennett a copy of the 2011 DSP/KLS Agreement.

6.86 Mr Bennett persevered and a meeting did take place with both partners on 22 June. Mr Bennett kept handwritten notes of what was said [E479-482] which were subsequently typed [C399-404]. The Claimant complained that the versions "*varied wildly*" (paragraph 72). He said in evidence that they had been "*manipulated*". Specific issues of inaccuracy were not highlighted. We did not agree with the Claimant; the typed version captured the spirit and sense of the original, albeit that the wording was not identical and Mr Bennett's evidence on this issue impressed us.

6.87 The Claimant's challenge to the accuracy of Mr Bennett's notes of the meeting was also difficult to understand given that he had not been present and that Mr Bennett had been able to confirm their accuracy with the partners after the meeting. Although the emails which passed between him and them after the meeting revealed the partners' unhappiness about some of the entries, their objections came nowhere close to an assertion that they had been manipulated or falsified in some way. Rather, they stemmed from the formality which had been adopted and the possibility of their accounts having been used other than in the improvement of the DSP/AXA/SIMS relationship [C353-5]. The Claimant accepted that Mr Andaro and Mr Dhaudi had never sought to amend the notes in any way.

6.88 Mr Bennett sensed that the partners had been nervous at their meeting and they had not been prepared to provide witness statements. Nevertheless, they confirmed that the Claimant had not invoiced for the IT services which he had provided to DSP and that he had withdrawn cash, cheques or used a debit card against the business' account (the Lloyds account in Clifton). They told Mr Bennett that the Claimant had designed, custom built, coded and managed DSP's IT system until May or June 2011 when they had been able to replace it, following the partnership fall out.

6.89 They were also asked about the 'zero supplementary invoices' which they understood to have been a random collection of invoices which were nullified to enable SIMS/KLS to recoup an alleged overpayment of approximately £30,000. They were not at liberty to discuss the matter

further due to the terms of the compromise agreement which then existed. The partners also confirmed that the DSP Barclays account was not theirs; they believed that it was owned and operated by Ms Tailby. They stated that DSP had had no control over it [E481].

6.90 Mr Bennett stated that, when he showed the partners his analysis of the amounts that they should have received from SIMS, the response was that of "*complete surprise*" (paragraph 38 of his statement). However, in the partners' subsequent correspondence, they appeared satisfied with the figures [C356 and 391] which Mr Bennett interpreted to mean that they had been satisfied with the level of payment after a settlement had been achieved with the Claimant or that their change in stance since the meeting was due to their desire to adhere to the compromise agreement and/or protect their relationship with the Claimant.

6.91 In late July, Mr Bennett and Mr Davies produced a further report [C365-377]. Group Fraud considered that there were "*clear indications*" that the Claimant had not been acting as an independent supplier to DSP and that there was evidence that the two Tewkesbury partners had been the victims of a fraud. In particular, they pointed to the fact that approximately £290,000 had been paid by AXA/SIMS into the Barclays account which was controlled by Ms Tailby with whom the Claimant was known to have had a close personal and/or business relationship. The presentation of over 300 'nil value' invoices to AXA/SIMS demonstrated a level of overpayment to DSP, yet AXA/SIMS did not consider that any such overpayments had in fact been made. A formal interview of the Claimant was recommended. A short, pithy and less formal version of Mr Davies' views at the time was set out in an email of 17 July [E544];

> "*We believe that c£300k of payments due to a legal costs assessment firm has been diverted into a bank account controlled by a female that I can show EY (Head of Legal Services at Knight Legal) was in a personal relationship with between 2005 and 2008...*
>
> *We can show that EY produced false documents which purport to write-off fees due to the cost assessor by AXA...*
>
> *We believe this scam would have worked because the partners of the cost assessor thought they were billing at a rate of £125 + 5% of costs savings achieved per case. In reality, AXA were receiving invoices with a billing rate of £125 + 10% of cost savings achieved...*
>
> *AXA have suffered no loss and this muddies the disciplinary situation... My opinion is that the seniority of EY within the KLS business means that we cannot separate his actions as an independent contractor from his AXA role, particularly as he also controlled and continues to control the flow of work to that supplier…*"

He concluded;

> "*Victoria* [Georgalakis] *is clearly frustrated with EY, as the more we dig the more we find, and this is driving her towards concerted action.*"

6.92 Senior managers then authorised Group Fraud to proceed with a further formal meeting with the Claimant, which took place on 2 August. The letter inviting him to the meeting contained three allegations which were to become Allegations 1, 2 and 3 (see paragraph 6.44 above) and he was provided with the most important appendices to the Group Fraud report which contained the evidence which they wanted him to address [C406-9]. The Claimant asked for more evidence [C411] and was then provided with the list of the 330 'zero supplementary invoices' [413-425] and a full breakdown of the payments to DSP [C426-430]. Those documents contained the source material which sat behind the summaries that he had already received.

6.93 Immediately ahead of the meeting on 2 August, the Claimant was suspended by Mr Sinho [C442-3].

6.94 Mr Bennett and Mr Davies led the discussions and the meeting was recorded and transcribed [C518-588]. Mr Bennett felt that many of the questions which he asked in relation to the bank accounts and the Claimant's relationship with DSP did not elicit satisfactory answers. He found the Claimant to have been antagonistic and evasive and we noted that he suggested that the matter should have been referred to the police in order to put an end to the allegations [C519].

6.95 It was clear that some of the evidence that the Claimant gave during that meeting was also inconsistent with his evidence to the Tribunal and/or other accounts which had been given to Group Fraud. For example, he stated that he had not been involved in the DSP compromise agreement [C546] (see paragraph 6.6 above) and of the partnership having not included Mr Dhaudi [C521]. Further, he informed Group Fraud that he was no longer a signatory to Barclays account at that point [C543-5], but he accepted in evidence that he had been a signatory until July 2012. We considered that many of his answers on the crucial questions had been vague and woolly, particularly with regard to DSP's composition (for example [C569-571]).

6.96 The July Group Fraud report [C365-377] was then updated in August following the Claimant's interview [C457-468]. A consideration of disciplinary action was then recommended.

6.97 The report considered that DSP had suffered a loss estimated in the sum of £290,000; money which AXA had paid into the Barclays account over which the partners had no control. It was alleged that the 'zero supplementary invoice' list was false since there was no evidence of any AXA/SIMS overpayment to DSP which had needed correcting. It was also said to have contained invoices which had been paid and some which concerned claims which had pre-dated the DSP/KLS relationship (see Appendix 5 [C467-8]).

6.98 In August 2012, information came to light which caused a separate line of enquiry to have been pursued; that KLS had been involved in litigation relating to private claims brought by their employees. That was therefore

litigation which had not been related to the Respondent's business and which was prevented by Law Society rules. It became Allegation 4 (see paragraph 6.44 above). Two particular cases involved proceedings which had concerned people within KLS, Mr Taylor [E633] and Mr Hughes [E641-4]. Since Mr Springham's name appeared on the court documents in each case, he too faced investigation.

6.99 Ms Tighe, from an associated arm of the AXA Personal Lines business, was asked to investigate. She invited the Claimant to an investigatory meeting [C470 and 487-490] and then produced a report on 24 August in which she concluded that, whilst the practice of using the in-house legal team to do private work might have been sanctioned by the previous directors, she was not certain whether it had complied with the Solicitors Regulatory Authority's rules. She recommended that further advice was sought on that point and that all matters ought to have been explored through conduct proceedings [C649-700].

6.100 Ms Tighe also issued a report in respect of Mr Springham's actions on 10 September 2012; she concluded that he had acted, at least in part, on the instruction of the Claimant, his line manager. In other respects, her findings were similar and she also recommended that the matter proceed to a disciplinary hearing [E851-865].

6.101 All matters were then considered by Mr Sinho and Ms Georgalakis. The decision was then taken to move the matter to a disciplinary hearing.

6.102 Mr Goss had been appointed to hear all of the allegations in late July [C378]. He had only met the Claimant once before and, although he was aware that he had been the subject of an investigation and had been copied into some of the email traffic concerning the investigation and the reports because of his position within the business, he was unaware of the detail. He believed that he had not even read the reports since he received 15-20 such reports a year together with a number of Audit and other reports.

6.103 It was determined that Mr Bennett should meet Mr Goss to provide him with a face to face presentation of the file. Mr Davies told us that that was standard practice in a complex case. Mr Bennett had described it as a means of anticipating the way in which the Claimant might have challenged the evidence [E659]. They met on 5 September in Birmingham when Mr Goss was presented with a large amount of documentation in two lever arch files and Mr Bennett explained the nature of the allegations, how the cost claims business operated and offered to answer any questions. Mr Goss also received Ms Tighe's evidence.

6.104 Having read the witness statements, we had certain misgivings about that process, but having heard Mr Goss' evidence in particular, we were not concerned that he had been influenced or led to a particular view of the evidence by the investigator. He described the meeting as one in which Mr Bennett had simply explained the documents to him. It was clear that Mr Bennett was available to answer questions about the investigation as and

when they arose from Mr Goss after their meeting on an informal basis as they worked in close proximity in London at the time.

6.105 The Claimant was invited to a disciplinary hearing on 4 September in order to face Allegations 1-4 [C607-8]. Evidence was attached, including the Group Fraud report from August [C457-468]. He was warned that the allegations may have amounted to gross misconduct which might have resulted in his dismissal. He was given the right to be accompanied. A further letter was sent when the meeting was re-arranged [C701-2].

6.106 Meanwhile, once Mr Goss had considered the evidence, he requested that certain further enquiries were made in an attempt to see what funds the Barclays account had received and from what sources (see paragraph 6 of his statement). Mr Bennett went back through the Claimant's email account and found another piece of evidence which concerned him; that the Claimant had personally negotiated a number of costs and/or damages claims for KLS which had 'SLC' references [C1730]. It appeared to Mr Bennett that the work was recorded as having been undertaken by DSP and was billed to AXA/SIMS and payment was requested to the DSP Barclays account. There were 12 such claims for which AXA/SIMS paid £7,166 to DSP, work which the Claimant was understood to have done for and on behalf of KLS. Mr Bennett referred to the details of an example within paragraph 50 of his statement. That element of the case became Allegation 5 which was subsequently supported by a separate Group Fraud report on 24 September [C844-7].

The Claimant's grievances

6.107 The Claimant alleged that he had raised a number of grievances in 2011 and 2012. Those which were important to his claim were dated 22 May, 11 July and 25 September 2012 (see paragraph 10 (b)(i) of the List of Issues), but earlier ones were also said to have been sent. He had referred to four grievances within the Claim Form for Claim 1, three of which the Respondent maintained it had never received. A fifth became evident during the development of the case.

6.108 According to the Respondent, the first grievance, which was allegedly sent to Ms Clark on 1 September 2011, was not received by her [C59-60]. The Claimant had no electronic copy of it and he could not explain the fate of his domestic computer upon which it had been written. He had apparently taken a hard copy of it to the office, scanned and sent it from the scanner. He accepted that that was a more cumbersome way of having sent it than simply emailing it from the source computer. A number of conversations took place in early September between the Claimant and Ms Clark about recruitment during which, she said, he raised no issues in relation to any grievance that had been supposedly sent. The same method had allegedly been used in respect of a further grievance dated 18 June 2012 [C276-7]. The Claimant's usual means of communication was by email, although he clearly had scan-copied on other rare occasions (for example, on 1 September 2011 [C90]). On that occasion, however, he had cross-copied himself into the email and, if he had done so in the other cases, he would have retained an electronic copy. The hard copies of both were first

produced by the Claimant at the Preliminary Hearing which took place on 24 July 2013.

6.109 Having considered the evidence concerning the other grievances which were relied upon in support of the Claimant's victimisation complaints, we made the following findings;

(i) 22 May 2012;

The Claimant asserted that an email was sent to Ms Owens which amounted to a grievance which had contained complaints about the re-opening of the 2011 investigation [C256-7].

The email actually stated that the Claimant had wanted *to* make a grievance and wanted advice as to how to do so. It contained no allegations of racism or discrimination. In the Claimant's statement too, he did not claim that the email itself had been a grievance (see paragraph 55).

The Respondent denied that it had received any grievance from the Claimant at that time. Ms Owens accepted that she had discussed a *potential* grievance with him at the end of May and invited him to submit a formal document in accordance with the Grievance Policy, but nothing had been forthcoming. That accorded with subsequent correspondence from him which indicated a continuing desire to "*proceed with a formal grievance*" at the end of May and into June [C266, 273 and 295].

We could not accept that a grievance had been filed on 22 May. The email itself did not read as a grievance, but as an intention to lodge one at some point in the future and the subsequent correspondence indicated that the Claimant himself thought that he had not yet started the process. The label that was attached to the document, however, was less important than its contents which we have considered below;

(ii) 11 July 2012;

The Claimant sent an email to Mr Sinho in which he referred to a formal grievance which had been (or was to have been) sent to AXA HR [C343-5]. The email contained complaints about how he felt that his role had become confused, particularly his IT function, but it concentrated upon his dissatisfaction with the outcome of a review which had been undertaken about AXA's panel of suppliers and the allocation of legal services work generally. It did not contain any reference to his race or to any alleged breaches of the Equality Act.

The Claimant alleged that he sent a separate letter on the same day to the AXA Group HR Director [C325] which was headed 'Formal Grievance' and which included a long complaint document [C326-342]. The complaint echoed much of what had been written to Mr Sinho, but it also referred to his colour [C326] and explained that he might have been regarded as 'easy prey' who could have been side lined 'because

he was African and could simply go back home'. He accused Mr Green of having been "*a complete and utter racist*" [C335] and made a number of other similar complaints against specific individuals, including Mr Bennett [C337-9] and Ms Georgalakis. He asked for a prompt investigation.

The Claimant's case was that he had posted the letter and had not retained an electronic copy, having produced it on the same domestic computer which was said to have produced the other grievances discussed above which were since lost [C1672-3].

Mr Sinho met the Claimant on 13 July as part of his regular one-to-one meetings. He recalled that they discussed the contents of the email which the Claimant had sent to *him,* but their discussions did not extend to any grievance which he had allegedly sent to HR. Further, in Claimant's subsequent emails, he made no reference to earlier grievances, particularly this one (for example, within the grievance of 25 September 2012 dealt with below and the emails of 3 October [C911], and 19 December 2012 [C1063]). Yet further, if the letter had been sent and received by Group HR, it did not appear to have been acknowledged.

We concluded that it was probable that the grievance was not sent or received. More importantly, if it had been, there was no evidence that the recipient (the AXA Group HR Director) communicated its contents to anyone else of relevance to the Claimant's case;

(iii) 25 September 2012;

It was agreed between the parties that the Claimant filed a formal grievance on that day [C940-950]. His complaints concentrated upon the disciplinary investigation; that some of the evidence was "*a setup*", having been "*deliberately manufactured, maliciously generated and carefully compiled by AXA Investigators*", that the final Group Fraud report had been unsupported by the DSP partners, that he had been ambushed at the original investigatory meeting on 31 August 2011 and that Mr Goss had acted unreasonably in his reliance upon that evidence. There were fleeting, general references to AXA not having been genuine in respect of its adherence to its own diversity policies [C945 and 948] and a brief reference to alleged discrimination [C949].

Since most of the points raised within the grievance related to the disciplinary process, it was decided that it should have been heard as part of the Claimant's appeal by Mr Fretter [C982]. The Claimant was notified of that decision on 29 October [C973] and did not object. It seemed a sensible decision given the subject matter of the complaints, although we noted that the Respondent might legitimately have chosen not to have dealt with the grievance at all, given that both the Conduct and Grievance Policies stated that it was not to have been used for complaints about a disciplinary issue [C269 and 606].

Mr Fretter ultimately rejected the grievance on 8 March 2013 (see below).

The disciplinary hearing

6.110 The Claimant had been provided with the evidence which had been referred to within the invitation letter [C701] which Mr Goss had received from Group Fraud on 5 September, but it was only a small proportion of what Mr Goss had, which included those other documents referred to in paragraph 3 of his statement.

6.111 Before the hearing, however, as a result of several queries raised by the Claimant, a good deal more documentation was sent to him; on 24 August, his personnel file [C478], on 13 September, a tranche of documents concerning and supporting several of the allegations, together with Ms Owens' answers to various questions which the Claimant had raised and missing parts of his personnel file [C614-8, 620-702, 703, 704 and, therefore, 620-702 in hard copy also], on 14 September, file notes of the DSP interviews [C751-771] and, on 17 September, evidence supporting Allegation 5 in the main, including the initial Group Fraud report [C778-829 and 772-7]. Mr Goss also received documents from Mr Hockley, a SIMS claims manager, which appeared to show that DSP had requested payment to its Lloyds account in emails, but the actual invoice identified the Barclays account as the desired payment destination (a sample was at [C1a-c]). It seems that some later bank account analysis work which was undertaken was overlooked [C504-608]. It was subsequently provided in answer to various requests for further documentation.

6.112 The Claimant complained that not all of the documentation in the list within paragraph 3 of Mr Goss' statement was provided (for example, the Company searches). He did not, however, indicate to us and/or Mr Goss what importance that other evidence had insofar as his defence was concerned. Those documents which were not provided seemed to have been unused by Mr Goss himself.

6.113 The hearing started on 18 September 2012. Mr Goss was supported by Ms Kharood who took the notes [C866-883]. Having been given the opportunity to have been accompanied and/or represented, the Claimant attended on his own. Again, he did not accept the accuracy of the hearing notes in their entirety.

6.114 Mr Goss described the Claimant as having been '*uncooperative*' and '*vague'* (paragraph 10). At one point, when the Claimant implied that a list of work allocation between the Tewkesbury and Swindon DSP offices had been fabricated during the investigation, Mr Goss adjourned the hearing to put that accusation to Mr Bennett over the telephone. It was denied, albeit that Mr Bennett accepted that the data about which the Claimant had complained had been supplemented with more information, but not changed.

6.115 Mr Goss discussed matters concerning Allegations 1-4 in the main and little time was devoted to the issues which had been uncovered more recently (Allegation 5 [C890-1]) but, when it was, the Claimant alleged that the audit trails were incomplete and that there was paperwork at the Gloucester office which could have exculpated him. Mr Goss tried to elicit the location of the evidence, but the Claimant was unable to help [C835-6]. Nevertheless, Mr Bennett attended Gloucester on 21 September and went through a cabinet which, according to Ms Halinen who was present and oversaw the search with Mr Springham, contained documentation which had previously been held in the Claimant's cupboard. Mr Bennett took photographs of what he found [E1205-10]. No one found evidence of DSP's involvement in the 12 cases which were the subject of Allegation 5.

6.116 Mr Goss also released further information which the Claimant had requested; documents concerning DSP's M.I. in relation to Allegation 1 and documents relevant to Allegation 5 documents [E924-1081]. Two copies of the Claimant's entire email cache were also provided, which he claimed to have been corrupted and which prevented him accessing them until before the appeal hearing. He was also offered the chance to access the SIMS claims system, which he did not pursue [C833 and 841-2].

6.117 One line of enquiry, which had followed the first hearing and which had been raised by the Claimant, revealed that an IT error had affected the original May consideration of the 330 'zero supply invoices' to a small extent in respect of invoice numbers which had ended with a '0'. Once corrected, the data revealed that 218 out of 330 allegedly unpaid invoices had been paid for by AXA/SIMS, not 243 as originally thought. The error also then excluded all invoices which had apparently pre-dated DSP's relationship with KLS and which had not surprisingly been the focus of particular interest on the part of Group Fraud. The cause of the error was explained further in correspondence [C851-2], but the evidence as a whole was subsequently treated as unreliable and was discounted by Mr Goss.

6.118 Meanwhile, on 24 September, Mr Goss dealt with the case against Mr Springham in respect of Allegation 4 (see paragraph 6.100 above). The allegation was dismissed [E843-7 & 1098].

6.119 Between the two halves of the disciplinary hearing, the Claimant accepted that he had had time to absorb and deal with Allegation 5. Although he complained that it was not framed or put to him *as* an allegation in advance of the first part of the disciplinary hearing, he had received Group Fraud's report as soon as Mr Goss had received it and the covering email had made it clear to him what he had wanted to explore at the next part of the hearing [C772].

6.120 On 25 September, the Claimant produced a written account of his case in relation to each allegation, save for Allegation 5, with attachments [C951-7 and 866-892]. On that day, he also shared his grievance with Mr Goss, which prompted an assurance that he was an objective and impartial chairman. That assertion was not challenged further [C848-9].

6.121 Mr Goss had intended to reconvene the disciplinary hearing on 25 September but the Claimant was ill and it was put back to 1 October [C883-892].

6.122 At the reconvened hearing, the Claimant continued to insist that Group Fraud's search of the Gloucester office had been incomplete and there were further discussions about Allegation 5 [C890-1]. On 4 October therefore, Mr Goss visited the Gloucester offices himself with the 12 case files in question to see if anything could have been found on the KLS system to show that DSP had undertaken any work on the files. Again, he found no such evidence.

6.123 Even after the second half of the disciplinary hearing, the Claimant continued to attempt to explain his position in relation to the allegations within a further long email, a good deal of which concerned Allegation 5 [C893-6]. At that point, he still had access to (and produced evidence from) the DSP server and offered to "*produce whatever evidence is needed from the DSP side of things*" [C895]. No further evidence, however, was produced by him on that issue. Meanwhile, he had also been provided with the entire system files of the 12 cases which formed Allegation 5 [E1431-1912].

The disciplinary decision

6.124 On 17 October 2012, Mr Goss wrote to the Claimant with his decision [C915-929]; he had concluded that there were reasonable grounds to have believed that the Claimant had diverted funds payable to DSP to the Barclays account and that he had therefore been guilty of fraud and, consequently, acts of gross misconduct. He effectively found against the Claimant in respect of Allegations 1 and 5. Mr Goss also considered that the manner in which he had behaved prior to and during the disciplinary process had resulted in a fundamental breach of trust and confidence between him and the Respondent. The Claimant was summarily dismissed.

6.125 The reasons for Mr Goss' conclusions in respect of each of the five allegations were expressed within his letter and his statement to the Tribunal (paragraphs 28-40). We have considered the reasonableness of the basis of those conclusions in paragraph 7 below. His belief that the relationship of trust and confidence had broken down was based upon the following matters;

- A poor approach to professional ethics had been exposed, including the issuing of contracts to two suppliers which had both contained exclusivity clauses and the manner in which he had purportedly cancelled the DSP contract in June 2011 (which was considered to have been aggressive and inappropriate) [C926];
- His failure to disclose the full extent of his relationship with DSP during the investigation or to the original SIMS owners [C927];
- His conduct during the disciplinary process had also been a cause for concern, specifically his lack of openness and his assertions that documents must have existed when Mr Goss considered that reasonable investigations had demonstrated that his claims had been

wrong and, on one occasion, untruthful in relation to the source of an email [C927];

6.126 In relation to Allegation 4, Mr Goss concluded that both the Claimant and Mr Springham had acted in breach of the SRA's rules in relation to pro bono work in the absence of indemnity insurance. It was accepted, however, that at least some of the work had been undertaken at the request of senior management. Although people had questioned the legality of the practice, it had continued and Mr Goss considered that, as head of KLS, the Claimant had the primary responsibility for ensuring that the work which had been undertaken had complied with the relevant rules. The Claimant was issued with a written warning in that respect [C923-4].

The appeal

6.127 On 24 October, the Claimant appealed the outcome of the disciplinary hearing [C959-971]. He claimed that he would "*produce bank statements, financial documents and accounts, partnership agreement and deeds, employment documents etc as evidence to dispel*" a number of what he claimed had been false assumptions in relation to his alleged diversion of DSP funds [C966]. He provided a large amount of supplementary documentation [C978-980, 986-7, 1011-2 and 1023-4], including a written response to Allegation 5 [977], but the documents did not include many of the documents which had been promised; no full copy of the DSP partnership deed, no bank statements, no evidence of the DSP partners' knowledge of the Barclays account and/or of cash flow through that account was ever produced, as suggested [C966-7]. The documents included pieces of what might have been important evidence; for example, a fragment of the partnership agreement which did not even show who the signatories and/or partners had been [C1026].

6.128 Mr Fretter was appointed to hear the appeal and the Claimant's grievance of 25 September together as we have previously stated. He had never met the Claimant before, having worked in a different part of the business, and had no prior knowledge of the issues in the case. He had become somewhat disenchanted with his role following AXA's acquisition and had asked to be made redundant. He was under notice of redundancy when he dealt with the case. He thought that he had been chosen because of his likely independence.

6.129 Mr Fretter then met Mr Goss who handed over the file and explained the process that he had gone through in order to reach his conclusions and a hearing was then set up to take place on 12 November [C988-1000]. Again, the Claimant criticised this process and we were concerned that it may have given the opportunity for Mr Goss to have primed Mr Fretter to have considered the evidence in a certain way, without the Claimant present. Mr Fretter stated that, due to the complexity of the evidence, he felt that he had needed to have a conversation to understand the allegations. It was suggested to him that he had been swayed or biased against the Claimant as a result of their discussions, but his response impressed us; he resented the suggestion and pointed back to the fact that it was well known that he did not hold AXA in high regard at the time and would not have been swayed in the way which was suggested.

6.130 On 12 November, Mr Fretter was supported by Ms Richardson as a note taker and her record of the meeting was not challenged by the Claimant [C1035-1045]. As we have said, Mr Fretter found the Claimant to have been articulate and intelligent, but evasive and defensive (paragraph 10 of his statement). He did not find that the Claimant provided him with a great deal more information than he already had. That surprised him because, based upon what he been told, he had expected to see a large amount of exculpatory documents.

6.131 At the end of the hearing, Mr Fretter considered what further investigations to undertake since the Claimant had again referred to evidence which had allegedly existed within a filing cabinet at the Gloucester office for which he retained a key. He was "*almost 100% sure that one of the drawers*" contained evidence that would have vindicated him in relation to Allegation 5 [C977].

6.132 Mr Bennett visited the offices on 13 December, having received the Claimant's key from him. He was supported by either Mr Springham or Ms Halinen (see paragraphs 58 and 59 of his statement). Nothing was found.

6.133 It was decided that the Claimant should attend the offices in person and a further visit took place on 20 December. Mr Bennett from Group Fraud was present with Mr Springham. According to Mr Bennett, no further documents of any significance were produced during the search of many filing cabinets, one of which had to be broken into at the Claimant's express wish. The Claimant suggested that they might have been found within a different archive area, but he did not have time to stay to search on that occasion.

6.134 The documents which were retrieved on 20 December were forwarded to Mr Fretter [C1076-1301]. Meanwhile, on 21 December, the Claimant emailed a separate set of documents to Ms Owens and Mr Fretter which he said that he had always had access to and which apparently supported his case [C1302-1400]. Mr Fretter claimed not to have received either set of documents, despite his name appearing as the recipient on Mr Springham's email and as a cross-copied recipient on the Claimant's. His explanation was that both emails had been sent to his AXA email address which he had had no access to on the last days of his work, when he had been based at his Swiftcover office.

6.135 The question had to be asked whether the documents that he did not see at the time had been important and/or may have affected his decision and, on that issue, Mr Fretter was clear; the documents included invoices which had shown that payments in respect of the 12 cases which were the subject of Allegation 5 had been requested to the Barclays account, Mr Fretter felt that that corroborated his view rather than diluted it.

6.136 After the hearing, Mr Fretter spoke to Mr Ward. That was because the Claimant had assured him that Mr Ward would have confirmed that the 10% to 5% change had never been actioned [C1040]. Mr Ward, however,

told him that no conversation about any change in payment rates had *ever* taken place.

6.137 Mr Fretter also spoke to Mr Goss and Mr Bennett again about the Claimant's suspension and to Mr Reames, Mr Alderton and HR as a result of complaints that had been raised about the Claimant's grading and IT responsibilities, all of which had formed part of his grievance.

6.138 Mr Fretter's outcome letters were sent on 8 March 2013 in respect of the grievance [C1419-1422] and the disciplinary issues [C1423-1432]; the Claimant's appeal was rejected. Despite the Claimant having said that he would have produced documents to demonstrate that the original conclusions had been wrong about the destination of the funds and/or his relationship with DSP, he had not done so and the evidence supporting the original findings had not been undermined. Mr Fretter therefore considered that there had been reasonable grounds upon which Mr Goss had concluded that he had been guilty of the allegations which had caused him to have been dismissed. He did, however consider that the written warning issued in respect of Allegation 4 had been excessive in view of Claimant's ignorance of the guidelines regarding the conducting of private work before SIMS' acquisition by AXA.

Police referral

6.139 It was decided to make the Claimant's conduct the subject of a referral to the Police. Although the referral appeared to have been initiated by Group Fraud, particularly Mr Davies who had been keen to pursue that course in order to gain access to further evidence from the DSP bank accounts [C933], it was approved by Mr Goss [C1055] and Mr Evans [C1053]. In fact, it had been Mr Goss who had made the recommendation in the first place at the conclusion of the disciplinary process [C928].

6.140 The referral accorded with the Respondent's policies at the time; the 2012 and 2013 Group Fraud Management Policies, both at paragraph 5.4 [C1735-1759]. We were told that over the seven year period over which records had been maintained, 25 cases of fraud were investigated by Group Fraud, 15 of which were then referred to the Police. The other 10 were not considered to have been sufficiently strong to have supported a referral.

6.141 It was agreed that the referral would not take place until the Claimant's appeal had been dealt with and it was not therefore made until 20 May 2013. It was Mr Dalton who then first made contact with the City of London Police [C1433]. A visit followed on 30 May; Mr Dalton and Mr Bennett went to see DI Rogers and they then supplied their evidence [C1434-1639] and a formal referral document was completed [C1640-1].

6.142 The Police requested a further meeting with Group Fraud, but not until 25 September 2013. Some further evidence (interview notes) was sought and subsequently sent.

6.143 Mr Bennett did not hear from the Police again until January 2014. At that stage, they had still not interviewed the Claimant. The interview eventually took place in June, but he answered 'no comment' to all questions, having supplied a pre-prepared statement. Investigations continued.

6.144 Mr Bennett met the Police again in October and they told him that, whilst they considered there to have been evidence to show that the Claimant had manipulated systems so as to have caused loss to DSP, they considered it to have been a civil matter and one which ought not to have resulted in criminal charges. They wished to pursue their investigations in respect of Allegation 5, however, and further information was requested [C1732] which was not provided until February 2015 [C1700-1715].

6.145 Ultimately, the Police decided not pursue a prosecution. The decision was communicated on 8 October 2015 [C1727-8] in the following terms;

> "*A secondary complaint concerned the reported 'double invoicing' of work by Mr Yagomba for work carried out in his salaried role at an Axa* [sic] *subsidiary, which was also invoiced to the third party company. Axa provided evidence of these suspicions. Mr Yagomba provided a defence to this in police interview via his prepared statement, claiming that DSP (and other third parties) were often used to handle background work for the services rendered for Mr Yagomba's caseload. Although Axa provided strong evidence with regard to these claims, it is impossible to entirely discount Mr Yagomba's statement without reviewing the DSP IT system. The location of which is unknown and may well no longer exist.*"

Due to the fact that the losses in respect of Allegation 5 were considered to have been closer to £7,000 than the original £17,000, the Police did not consider it to have been in the public interest to have pursued the matter further. They were also concerned that the Respondent may have been using the investigation as '*leverage*', although Mr Bennett could see no reason for that view. We shared his confusion.

6.146 The Claimant complained that the documents given to the Police had been incomplete and had therefore given a skewed picture of his involvement (paragraph 154 of his statement). He had, however, provided 15 attachments with his written statement to them in an attempt to demonstrate his innocence. Despite that, the Police had still found there to have been "*strong evidence*" of AXA's claims.

7. CONCLUSIONS

7.1 Unfair dismissal; the reason for dismissal

7.1.1 What was the reason or, if more than one, the principal reason for the Claimant's dismissal? The Respondent alleges that it related to the Claimant's conduct. The Claimant asserted that he was dismissed for reasons relating to his race.

7.1.2 For the reasons explained more fully below, we were satisfied that the Respondent had demonstrated that the principal reason for the Claimant's

dismissal had been its view that he had committed the acts of misconduct alleged. We were satisfied that that had been Mr Goss' view and one which was subsequently shared by Mr Fretter. We concluded that it was the principal reason, and not necessarily the only one, because Mr Goss' view had also been that the Claimant had breached the duty of trust and confidence in addition to the two acts of proven misconduct, Allegations 1 and 5. Whether that additional strand should have been viewed as a further act of misconduct (as in *Kids City Limited-v-Gayle* UKEAT/0106/13/MC) or as some other substantial reason under s. 98 (1)(b) as the Respondent had suggested (see paragraph 28 of the Response [P108]), was a moot point.

7.1.3 We noted that the Claimant did not, himself, suggest an alternate reason for his dismissal, either in his statement (paragraph 120 perhaps came closest) or through the cross-examination of Mr Goss.

7.2 <u>Unfair dismissal; fairness under s. 98 (4); relevant legal principles</u>

7.2.1 In cases involving dismissals for reasons relating to an employee's conduct such as this, we had to consider the three stage test in *BHS-v-Burchell* [1980] ICR 303 (see paragraph 6 (a)-(c) of the List of issues);

(i) Had the Respondent genuinely believed that the Claimant was guilty of the misconduct alleged?;
(ii) Was that belief based upon reasonable grounds?;
(iii) Was there a reasonable investigation prior to the Respondent reaching that view?

Crucially, it was not for the tribunal to decide whether the employee had actually committed the acts complained of.

7.2.2 Situations in which employees faced serious allegations of quasi-criminal misconduct which were in dispute, warranted particularly diligent investigations, but an employer did not need to demonstrate that its investigation mirrored what might have been expected prior to a criminal prosecution (*A-v-B* [2003] IRLR 405). There should have been regard to the nature and consequences of the allegations and to the employee's future in the event that they were proven (*Tuner-v-East Midlands Trains* [2013] ICR 525).

7.2.3 An employer would not necessarily be found to have proceeded unfairly if an investigation considered previous incidents which had not been treated as disciplinary issues at the time (*NHS 24-v-Pillar* UKEATS/0005/16/JW). Lady Wise stated that the *Burchell* test was one of sufficiency and it was unlikely for an employer to fail the test because it included too *much* information. Similarly, there was no rule that a second disciplinary investigation or process could not have been pursued in respect of the same matter. The *res judicata* principle did not apply but the circumstances of each case had to be considered. We had in mind the guidance in *Chawla-v-Northamptonshire Healthcare NHS Foundation Trust* UKEAT/0075/15/JOJ in that respect and the decision in *Christou-v-London Borough of Haringey* [2013] ICR 613.

7.2.4 Further, the Claimant alleged that the decision to dismiss fell outside the band of responses available to a reasonable employer in the circumstances (see paragraph 6 (d) of the List of Issues). The Tribunal was not permitted to impose its own view of the appropriate sanction, but had to look at the totality of the conduct complained of before deciding whether the decision fell within or outside the range (*Iceland Frozen Foods-v-Jones* [1982] IRLR 439 and *Foley-v-Post Office, HSBC-v-Madden* [2000] ICR 1283). An employer should have considered any mitigating features which might have justified a lesser sanction and the ACAS Guidance and its own Conduct Policy [C600-6] were to have been considered in that respect. It was entitled to take into account both the actual or potential impact of the conduct alleged upon its business.

7.2.5 Section 98 (4)(b) of the Act required us to approach the question in relation to sanction "*in accordance with equity and the substantial merits of the case*". A tribunal was entitled to find that a sanction *was* outside the band of reasonable responses without being accused of having taken the decision again; we were reminded, in *Newbound-v-Thames Water* [2015] EWCA Civ 677, that the "*band is not infinitely wide*".

7.2.6 The band of reasonable responses test also applied to the procedure adopted by an employer (see *Foley* above). We had to consider the Respondent's disciplinary procedure and the ACAS Code of Practice in that regard. The following principles were important in the context of the case;

- An employee should ordinarily have known of the nature of the complaint or allegation that he was facing prior to a disciplinary hearing. He had to understand what it was which was being alleged; for example, in the case of missing money, whether it was said to have been due to incompetence or theft (*Celebi-v-Scolarest Compass Group* UKEAT/0032/10/LA), but it was the substance or essence of the allegation which was important, not necessarily how it was labelled or phrased (*Brito-Babapulle-v-Ealing Hospital NHS Trust* [2014] EWCA Civ 1626);

- An employee ought to be provided with all of the evidence which the employer had when it made its decision. Whether an employer's failure to disclose information rendered a dismissal unfair would, however, always remain a fact sensitive question;

- Although an employee may argue that the circumstances of his dismissal had given rise to an appearance of bias, the strict rules of apparent bias did not apply for the purposes of considering the test under s. 98 (4). The question remained one of fact for a tribunal (*O'Adeshina-v-St George's University Hospitals NHS Foundation Trust* [2015] IRLR 704);

- An employer's failure to follow its own disciplinary code, even if contractually enforceable, would not inevitably lead to a finding of unfair dismissal. Although it was undoubtedly a factor to be taken

into account, the weight of any breach depended upon the circumstances and tribunals were not to be tempted to have looked at issues in isolation, rather than questions of fairness in the round (*Bailey-v-BP Oil* [1980] ICR 642 and *Stoker-v-Lancashire County Council* [1992] IRLR 75);

- Whilst there was no rule of law that a fair appeal could have only cured earlier procedural flaws if it was a rehearing, we had to examine the fairness of the disciplinary procedure as a whole when judging whether the dismissal had been fair (*Taylor-v-OCS* [2006] ICR 1602 and *D'Silva-v-Manchester Metropolitan University* UKEAT/0328/16);

7.3 Unfair dismissal; fairness under s. 98 (4); conclusions

7.3.1 The Claimant's case under s. 98 (4) was set out within paragraph 6 (i)-(v) of the List of Issues, which we examined in turn. Although the List was not set out in the most logical way to approach the questions (for example, (i) before (ii), (iii) and (iv)), we have reproduced it (in italics) and followed the order in the List for ease of reference;

(i) The decision to dismiss fell outside the band of responses available to a reasonable employer;

Having concluded that the Claimant was guilty of Allegations 1 and 5 and that his conduct in other respects had served to breach the relationship of trust and confidence (more of which below), we did not consider it surprising that he had been dismissed.

The Claimant accepted that his position was one which had required him to demonstrate integrity, honesty and faith. The allegations clearly called his possession of those qualities into doubt. The Respondent's Conduct Policy also predictably identified fraud as an example of gross misconduct [C600].

We were left in no doubt, therefore, that the decision to dismiss fell somewhere within the band of reasonable responses that would have been available to an employer in the circumstances. It was the type of misconduct considered within paragraph 23 of the ACAS Code.

(ii) The Respondent did not genuinely believe that the Claimant had committed the acts of misconduct alleged.

It was clear to the Tribunal that the Respondent's witnesses not only believed him to have been guilty, but suspected that he had been more obviously guilty than they had been able to demonstrate.

Since we had been satisfied that the principal reason for the Claimant's dismissal had related to his conduct, we were also satisfied that the Respondent had genuinely believed that he had committed the acts alleged.

(iii) The belief in the Claimant's guilt was not reasonable, in view of the nature and quality of the evidence that had been obtained.

An examination of the evidence and counter-arguments in respect of the allegations for which he was dismissed was necessary;

Allegation 1

The Respondent relied upon the following evidence;

- There was clear evidence of the DSP and KLS having agreed a reduction in price for DSP's work in February 2010, from £125 per case + 10% of the value of any saving, to 5%. The change was the subject of the DSP partners' original complaint [C26 and 53] and was also evidenced by the email at the time [C1]. At least 24 subsequent emails between DSP and KLS referred to the rate as having been + 5% [C845 and 1760-1773];

- Subsequently, DSP believed that it had received fees at the rate of £125 + 5% because of the management information ('MI') which then reflected a 5% rate [C26, 873-4 and 1760-1773];

- The Claimant had control of DSP's IT system which included the generation of the MI [C53 and 874-5];

- DSP's invoices, however, continued to go to SIMS at the rate of 10% and were paid at that level. The Claimant accepted that that was always the case [C101];

- Between 2008 and 2012, AXA/SIMS paid DSP £1.5m for work which it had undertaken. Over £800,000 had gone into the Lloyds account, £321,000 into the Barclays account and the remainder into a third account which was not in issue [C459-460];

- In relation to the Barclays account, the Claimant stated that he had been a signatory [C57 and 951]. It had been either controlled by, or nominally held by, Ms Tailby, with whom the Claimant had a close personal and business relationship [C460 and 535];

- The Claimant initially stated that he had access to the account in order to make payments into it only [C102 and 951]. He subsequently stated that he had not paid into it nor received money from it [C535-6]. By August 2012, the account was reported to have been non-operational [C534];

- The Claimant initially suggested that the Barclays account had not received payments from AXA/SIMS [C105], but the AXA/SIMS data showed otherwise. The Claimant also altered his story on 2 August 2012 [C459] and went further, in that he asserted that the partners had received payments into the Lloyds account *from* the

Barclays account, which conflicted with their stated ignorance of the account's operation [C26 and 571-2];

- A significant proportion of invoices to AXA/SIMS had been sent under emails which had requested payments to the Lloyds account, but the attached invoices had provided the details of the Barclays account. Although there was no direct evidence of the Claimant having manipulated the invoices, he was considered to have had the opportunity to have done so [C919];

- Up until July 2010, the majority of DSP payments went to KLS for payment, via the Claimant [C919]. The majority of such payments went to the Barclays account. After July, when the invoicing mechanism circumvented the Claimant, the Lloyds (Clifton) account received the funds;

- On 22 June 2012, the DSP partners had been very surprised when confronted with the evidence of the sums that DSP *ought* to have received;

- Accordingly, the Claimant was considered to have deliberately created a situation in which DSP thought that the fee structure had changed when it had not. That gave him the opportunity to divert the difference into the Barclays account which the partners had been ignorant of;

- Although there was considered to have been evidence of dishonesty, there was no actual evidence of loss. Group Fraud had identified the *potential* differential to have been in the region of £290,000 [C458 and 460], but neither Mr Goss nor Mr Fretter had ever been satisfied that any particular figure of loss had been sustained. They had been satisfied that the Claimant had created the mechanism and opportunity for the loss. In other words, the 5% differential was not traced into that Barclays account discreetly;

- The Claimant had not sought approval from anyone in SIMS/KLS before he had become involved in DSP [C57]. Although he subsequently stated that he had spoken to Mr Peppard about the potential for conflict, that was before his relationship with DSP had in fact started [C102] and there was no suggestion that he had spoken to anyone at KLS, SIMS or AXA after he had become involved.

The Claimant's case, most helpfully summarised in his statement to Mr Goss [C951-7], was that;

- The rate change was never put into effect. It was "*not accepted*" [C100]. The emails in February 2010 had been "*simply a mistake*" [C91];

- Further and in any event, the emails had referred to a change in rate in respect of '*bulk work'* only [C1];

- There was evidence that DSP had still charged at £125 + 10% after February 2010 [E37-9];

- There was an email from DSP to KLS (Mr Thompson) in September 2010 which showed that DSP were still invoicing at £125 + 10% [C904-5];

- The DSP partners had never complained about a loss of money and retracted their allegations.

The Respondent discounted the Claimant's arguments. Its reasons for doing so were as follows.

As to the MI which showed a continued charging rate of 10% [E37-9], that was on work which had been started before the rate had been changed and the subsequent MI then showed the lower rate [C1761-1773].

As to the email of 1 September 2010 which the Claimant produced after the second half of the disciplinary hearing [C904-5], it was suspicious to the Respondent that it had not been traced on AXA/Swiftcover's own system. The email was in conflict with much other evidence (the 24 emails referred to above) and also contradicted part of the Claimant's case (that the 5% rate was never implemented) since it purported to revert to 10% *from* 5%. Mr Goss' enquiries showed that the document had originated from the Claimant's own account [C920 and 927].

As a result of what the Claimant had said at the appeal, Mr Fretter had been encouraged to speak to Mr Ward who told him that there had been no conversation about a rate change at any time. His analysis of the strength of the competing accounts seemed careful, balanced and, above all, reasonable [C1426-7].

It was important to note that, through his cross-examination of Mr Goss, the Claimant succeeded in demonstrating that part of the Group Fraud evidence was wrong, which threw at least one of Mr Goss' conclusions from it into doubt; he had thought that DSP's change in invoicing in July 2010 had coincided with a cessation of payments into the Barclays account, as reflected in his conclusions [C919] and paragraph 29 of his statement. He accepted that he had misinterpreted the Group Fraud report since the table in Appendix 3 had shown payments into the account up to and including June 2012 [C465]. The flat line shown in the Barclays graph on that page was difficult to understand against the data above it, a point that had not been raised with Mr Bennett sadly.

What did that mean for Mr Goss? When confronted with that realisation during his evidence, he was confident that it in fact painted a worse picture for the Claimant since, although the evidence of coincidence was undermined (his paragraph 29), it nevertheless demonstrated that there had been an account that the partners had had no access to which had received money over a much longer period. That could have been through the route considered in Allegation 1 or that which formed the basis of Allegation 5.

As to the Claimant's assertion that the email of February 2010 had been restricted to 'bulk work', that was not a point which had been raised before Mr Goss. It was raised as part of his appeal, but there he never indicated to Mr Fretter or the Tribunal what the definition of 'bulk work' was. It was not a term that had been used in DSP/KLS contract and other emails had not referred to the reduction as having been restricted to a particular type or amount of work. (for example, [C784]). The Respondent saw no magic in the use of the words.

The lack of a complaint about a loss of revenue from DSP was hardly surprising given that the process was hidden from them such that their MI showed figures of £125 + 5%. Although strictly part of Allegation 3, the manner of DSP's change of stance in relation to the allegation raised further suspicions. It looked to the Respondent as if their silence had been bought and the Claimant's attempt to describe the 'misunderstanding' that the partners seemed to make no sense (see paragraph 6.66 above).

The Respondent was also unimpressed by the vague and incomplete answers that they had received from the Claimant. His formal response to the Allegation was thin [C951-2].

The reasonableness of the Respondent's views had to be judged at the time, but we could not simply ignore the evidence subsequently given to the police by the DSP partners in 2014; that DSP Swindon was set up without their knowledge and approval, that they were unaware of payments having been made to the DSP account, that they understood that their payments had been calculated at the rate of £125 + 5%, that, when faced with the allegations, the Claimant produced a list of alleged overpayments to DSP and that he had access and control of the IT systems run by DSP. Their interviews corroborated their first complaints and certainly supported the Respondent's views of the compromise agreement at the time, which fed into the conclusions which were reached in respect of Allegation 1.

Accordingly, we were satisfied that the Respondent's conclusions in respect of the Claimant's culpability under Allegations 1 were held on reasonable grounds.

<u>Allegation 4</u>

Whilst the Claimant had clearly approved litigation work on behalf of KLS staff which was thought to have been in breach of SRA rules, Mr Goss considered that that had arisen because of his lack of appreciation of the rules and/or as a result of instruction from senior management. Although he recommended a written warning, Mr Fretter overturned that on appeal on the basis of the mitigation which existed (the Director's instruction and the pre-AXA environment).

Allegation 5

The Respondent's decision was based upon the following evidence;

- The Claimant undertook costs work personally on 12 files at KLS with 'SLC' references. His work was evidenced by the paper files held by KLS [C492-502, 846-7 and 924-5];

- Payments had been requested by DSP from SIMS/KLS to the Barclays account in respect of work undertaken on the 12 files. The claims were made between May 2011 and February 2012 in the total sum of £7,165.95 [C846-7];

- The Claimant repeatedly referred to the existence of exculpatory documents at Gloucester which were said to have proved DSP's involvement in the work; he was '*almost 100% sure'* that one of the drawers contained evidence that would have vindicated him [C977]. Despite several visits, it was never found and Mr Goss and Mr Fretter were satisfied that such evidence was unlikely to have existed given their own searches of the KLS system and the paper files.

Claimant's account was that;

- DSP had in fact worked on the 12 cases by preparing 'points of dispute' and had therefore legitimately charged SIMS/KLS for the work [C1302-1400]. He alleged that he merely managed the "*costs process and used costs experts and barristers to do the groundwork*" [C977];

- The fact that documents were not found where the Claimant had expected them was because of Mr Bennett's intervention and concealment of crucial evidence [C1302-4].

We concluded that the Respondent's conclusions on this allegation were also based upon reasonable grounds, as had been summarised within Mr Goss' outcome letter [C924-6].

The fact that the files demonstrated the Claimant's work on them on KLS' behalf was not in issue, nor was it in doubt that bills had been levied by DSP in respect of the same files, for payment to the

Barcalys account [C1302-1400]. The focus then shifted to the Claimant to demonstrate that DSP had somehow been involved. He was never able to produce that evidence, despite repeated promises that he would have done so. It was never shown that DSP had worked on the files and, if so, in what way, who and/or when.

For example, the Claimant had not been able produce the lists of 'points of dispute' ('PODs') allegedly created by DSP. Such work would ordinarily have billed at an hourly rate, yet DSP's bills had been on the usual percentage of savings basis, which called the Claimant's case further into doubt [C924-5].

As to the allegation that documents had been taken and/or concealed by Mr Bennett, we noted that the Claimant shied away from putting that case to him directly. Nevertheless, there had been four visits to the Gloucester offices during the course of the disciplinary process; on 21 September 2012 (when Mr Bennett was accompanied by Mr Springham), 4 October (Mr Goss met Ms Halinen), 13 December (Mr Bennett in the company of Mr Springham and/or Ms Halinen) and 20 December (the Claimant, Mr Bennett and Mr Springham). Having heard the evidence, we were satisfied that there were reasonable grounds for the Respondent having rejected the assertion that Mr Bennett had deliberately concealed evidence. They concluded that the alternative explanation was more reasonable; that the evidence was missing because it did not exist.

Despite the broad findings that we made, we nevertheless had to deal with each of the Claimant's further specific criticisms of the investigation and the alleged unreasonable findings as a result of insufficient evidence within the List of Issues.

(iv) The investigation was flawed in that:

- *Given that the Claimant was accused of fraudulent conduct, the Respondent had a duty and obligation to carefully, diligently and thoroughly conduct investigations into the Claimant's conduct and it failed to do so;*

  That was a general allegation which contained no more than a summary of the more specific allegations made elsewhere.

- *In 1 year of investigation, the Respondent failed to produce a single invoice out of the alleged 1,123 allegedly diverted invoices and the Claimant was unaware whether any such invoices existed;*
- *In 1 year of investigation, the Respondent failed to produce a single email with an attached request for payment from DSP that was allegedly diverted by the Claimant;*

  Those allegations were, together, similar to an employee suggesting that he should not have been found guilty of

violence in the absence of CCTV footage of the punch that was thrown. Here, the Respondent simply relied upon other evidence. The absence of direct evidence of guilt did not mean that conclusions drawn from other elements were necessarily unreasonable.

Further, the 'diversion' of funds was only one element of Allegation 1. What had chiefly concerned the Respondent was the mechanism which had been set up which had facilitated the opportunity for diversion. Neither Mr Goss nor Mr Fretter had been satisfied that any particular sum had been diverted or lost by DSP.

The invoices which sat behind the raw data were not produced because the Claimant did not call the data itself into question. Those emails which were thought to have evidenced the Claimant's wrongdoing (for example, those relating to the change in the charging rate) were produced.

- *Most 'evidence' gathered, was concealed form* [sic] *the Claimant until 14 months after his dismissal, including investigation reports, spreadsheets, emails and meeting notes;*

  It is true that the evidence behind the allegations was not released to the Claimant until he faced the disciplinary hearing in October 2012, which was 14 months after he had been interviewed in August 2011. However, the Respondent had decided that a disciplinary hearing had not been warranted sooner and we saw no justification for the Claimant to have been furnished with any evidence until the disciplinary process had been on foot.

- *The Respondent interviewed 2 witnesses in total over a one year period and took no statement;*
- *The Respondent failed to produce a single statement from anyone in support of the allegations against the Claimant;*

  Although formal statements were not taken from Mr Dhaudi and Mr Andaro, they had provided an original letter of complaint and were interviewed twice. There was no requirement for formal statements to have been taken. The Claimant was also interviewed on several occasions and electronic and hard copy evidence was obtained from other sources. Many of the conclusions reached by the Respondent were subsequently based upon data which was generated by the investigation.

- *The Respondent failed to interview the following witnesses, all of whom are said by the Claimant to be "extremely relevant" and who allegedly received DSP reports and authorised all their payments: Elizabeth Tailby, Sam Woody, Mike Price, Stanley*

Crisp, Deborah Westcoat, Matthew Springham, Julie Tomlinson and Riina Newman [Halinen]*;*

It is true that those witnesses were not interviewed, but it is also true that the Claimant had not suggested that they should have been.

Although we could not understand what evidence Mr Springham, Mr Westcoat (who the Claimant had once interviewed for a job) and/or Ms Tomlinson (who worked for another supplier, QM) may have had, there were others whose names had featured so heavily in the evidence that we might have expected to have been considered by the investigators;

- Ms Tailby; given her letter to Mr Sinho on 6 October 2011 [C95] and her alleged involvement, particularly from the Claimant's perspective, why was she not interviewed?

  Mr Bennett's answer was that he felt that she may have been 'in league' with the Claimant (paragraph 54) and he considered that his view was ultimately vindicated by the police investigation, which suggested that the Claimant may have used her and that she knew little of his activities within KLS or DSP. His view was also vindicated by the surprising revelation during the hearing that her letter of 6 October 2011 had been drafted by the Claimant himself.

- Mr Woody, Mr Price and/or Mr Crisp; there were conflicting views as to who had been the motivation for the establishment of the Swindon DSP outfit, but that was not central to either Allegations 1 or 5;

- Ms Halinen; the investigators did approach Ms Halinen, the Claimant's administrative assistant. She was unable to assist (see Mr Bennett's statement, paragraph 54), save that she did have access to some of the missing financial evidence which the Claimant had failed to produce himself;

It was important to note that the Claimant himself did not seek to adduce evidence from any of those witnesses and/or call them to the disciplinary hearing or the tribunal hearing on his behalf.

We noted that this point was really not developed by the Claimant with Mr Bennett, Mr Goss and/or in his closing submissions (paragraph 27 of C2);

- *The allegation against the Claimant was that a third party, in another organisation outside of the Respondent, had been 'victims' of fraud. The dismissing allegation was not by the 'victims' but by the Respondent's investigators on their behalf*

and was not supported by any statement or evidence from the 'victims';

- *The alleged 'victims' explicitly confirmed that they were not victims and had lost no money but the Respondent persisted anyway, when it had no duty nor obligation to do so as it suffered no loss;*

  There had been evidence from the 'victims', Messrs Dhaudi and Andaro, referred to above.

  The reasonableness of the Respondent's approach to the retraction of the August 2011 complaint has also been considered above. We were entirely satisfied that the Respondent acted within a range of reasonable responses by continuing its investigation and by treating the DSP partners' retraction with circumspect and suspicion.

  The Claimant himself accepted in cross-examination that his employers had been entitled to continue with their investigation to get a clearer picture.

- *There was no reasonable timescale of investigation as it was not focussed on the actual complaint but instead moved from one allegation until the final allegation, which bore no resemblance to the complaint, and was purely based on speculation;*

  The Claimant's complaint here appeared to relate to the changing focus of the investigation; from a conflict of interest issue in 2011, to questions over his qualifications, to Allegations 1-4, then Allegation 5 (paragraph 29 of his submissions, C2).

  It was certainly true that the focus shifted as evidence became available and different hypotheses were tested. As Mr Davies said, 'the more they dug, the more they found'. Whilst we had accepted that Mr Evans and Group Fraud (Mr Davies in particular) appeared to exhibit a rather energetic appetite to pursue the Claimant at the start of 2012, we did not ultimately conclude that the investigation became slanted or biased as a result and, crucially, there were the subsequent filters of Mr Goss and Mr Fretter through which the evidence was ultimately tested. Some of it then fell away when it was scrutinised closely (for example, the 'zero supplementary invoices' issue).

- *The Claimant was unaware he was being investigated having been told investigations were complete and closed and there was endless delays in the investigation, it was open and closed without any reasonable or legitimate basis yet all the evidence used to support the final dismissal was evidence that was available at the time of the initial complaint and before the initial investigation was closed;*

The Claimant always held great store by the fact that he was told that the investigation had ended in 2011 (see paragraph 6 of the Group Fraud report [C80]). An employer was, however, not precluded from reopening or recommencing an investigation if there were reasonable grounds for doing so and we noted that the 2011 report had been inconclusive and that further, new evidence came to light in 2012 from Audit which had warranted examination.

On the basis of the facts that we found and the principles that we had considered from cases such as *Christou* and *Pillar* (above), we did not consider that the 2012 investigation and disciplinary process was rendered unfair simply because some other matters previously been investigated in 2011.

- *The Respondent's investigators were biased in their investigations and closed-minded and when the Claimant complained of their bias in May 2012 he was ignored;*
- *the Respondent's investigators focused their energies on obtaining incriminating evidence and not rebuttal evidence that would assist the Claimant, for example, another explanation or motivation for the DSP complaint and another explanation for the lack of electronic trail of DSP's involvement;*

These allegations were aimed at Mr Bennett in the main since the Claimant took no issue with Mr Crowther's involvement in the 2011 investigation.

In broad times, we did not accept the general allegation of bias. We had acknowledged that Mr Bennett had appeared overly keen to look for evidence which might have supported, rather than diluted, his suspicions, but he then found it. The Claimant repeatedly said that exculpatory evidence would have been produced, but it never was, and his allegations of deliberate manipulation and/or concealment were rejected by the Respondent on reasonable grounds.

Although the Claimant had complained about Mr Bennett's involvement during the investigation, it was never in such forceful terms as he did within the proceedings. He certainly asked Mr Bennett to step aside [C294-5]. Mr Bennett considered the request and took the view that the Claimant was attempting to divert attention from own his wrongdoing and remove the person who knew most about the evidence from the investigation. He regarded it as an attempt to impede the process but he nevertheless raised the issue with HR to check his view, which was confirmed.

In hindsight and having seen the internal emails from the start of 2012, we can see why the Claimant was suspicious of Mr

Bennett's motives, but we were ultimately satisfied of his objectivity and, more importantly, the independence of the disciplinary and appeal managers.

We considered the points contained within paragraph 31 of the Claimant's submissions (C2); they appeared to have been peripheral to the findings on Allegations 1 and 5.

- *investigations were carried out even when there was substantial doubt as to the facts of the case;*

  This allegation was not understood; the investigation continued *because* the facts remained unclear.

- *the Respondent failed to take into account the surrounding circumstances, not just the Claimant's actions in isolation and breached the Respondent's policies in conducting investigations;*

  We had specifically asked the Claimant what this allegation had meant and were told that he relied upon breaches of the Respondent's Conduct Policy [C600-6]. Of the potential breaches that were identified, two warranted scrutiny.

  First, he complained that his manager, Mr Sinho, had not appointed the investigator as stipulated by Stage 1 of the Policy [C601]. Mr Bennett had been asked to lead the 2012 enquiry as a result of an initiative which had come from Mr Evans and Mr Davies. It seemed inevitable that the Group Fraud would have been shouldered with the investigation and the Claimant had never suggested that some other person or body ought to have been involved. Given Mr Bennett's previous involvement in the 2011 investigation, he was the obvious choice. We could not see how the Claimant had been caused any unfairness as a result of Mr Sinho not having personally appointed Mr Bennett.

  Secondly, he complained that he had not been given at least 5 days' notice of the investigatory meetings, as suggested within Stage 1 [C602]. In our judgment, however, that part of the Policy related to the disciplinary hearing, which the Claimant did have proper notice of. Investigatory meetings were dealt with elsewhere within Stage 1 [C601]. In our experience, employers did not usually bind themselves to giving notice of investigatory hearings for fairly obvious reasons and the Respondent's Policy had not required them to do so here.

- *the Respondent's investigators were too close to the facts and investigated even whilst being investigated themselves;*

  The Claimant explained that this complaint related to the grievance; that investigations continued despite the fact that Mr

Bennett became the subject of an investigation into his grievance. The allegation effectively mirrored others that were made in relation to the Respondent's failure to suspend the disciplinary process whilst the grievance was dealt with.

Once the Claimant had been notified that the grievance was to have been heard within the appeal due to the degree of overlap, he did not complain (see paragraph 6.109 (iii) above). We considered that to have been a sensible and pragmatic approach and we noted that the Conduct and Grievance Policies had suggested that the Respondent might not have entertained the grievance at all.

- *the following documents were concealed, manipulated and/or falsified: Investigators Minutes of Meeting with DSP (30.08.2011), Meeting with Claimant (31.08.2011), Meeting with DSP (22.06.2012), Mr Bennett's Supplementary List, List of 23 Non-DSP claims, eDiscovery Report (17.09.2012), eDiscovery Spreadsheet (17.09.2012) and Investigators 'data spreadsheets';*

  We dealt with the complaints made about the alleged manipulation of certain documents above, to the extent that they were relevant to the matters which had brought about the Claimant's dismissal.

- *the Respondent failed to consider various important documents including: DSP emails attaching invoices, Panel Solicitors Files (allegation 5), evidence uncovered in November 2012 and documents submitted in December 2012 to Mr Fretter by Mr Springham and the Claimant;*

  The Claimant's closing submissions, C2, merely cross-referred to paragraph 113 of his witness statement on this issue;

  DSP invoices; these related to claims other than the 12 which concerned Allegation 12 [E902-912];

  Panel Solicitors Files; Mr Goss stated that he had asked Ms Halinen about the files and was told that there were no annotations upon them when they had gone back to the solicitors;

  Evidence uncovered in November 2012; this appeared to concern the documentation which the Claimant filed ahead of his appeal which *might* have been helpful had it been complete (see paragraph 6.127 above);

  Documents submitted in December 2012; we have dealt with the relevance of the documents that Mr Fretter did not see (see paragraph 6.134-5).

- *on 12 March 2012, the Claimant was required to produce fresh copies of his qualification certificates with full details of where each could be verified;*

  That complaint was not directly linked to Allegations 1 and 5 (see paragraph 6.72 above). It arose partly from regulatory concerns regarding the management of KLS we could not see how it rendered the investigation unfair or unreasonable in the *Burchell* sense.

- *on 24 May 2012, the Claimant was required to produce copies of his original documents giving him the right to work in the UK;*

  The complaint had been that he had been asked to produce a copy of his passport, which we dealt with in paragraph 6.73 above. It had had nothing to do with the investigation into the his wrongdoing.

- *on 15 June 2012, the Claimant was subjected to a disciplinary investigation meeting for alleged breaches of contract when in fact the breaches of contract had been committed by another Head of Department [Anthony Green] on the authority of the Managing Director [Victoria Georgalakis], despite the Claimant's vehement protests and raising numerous concerns with no action being taken against them;*

  The allegation against Mr Green was that he had breached similar exclusivity clauses to those which had appeared in the DSP and QM contracts when he had entered into a similar outsourcing arrangement with a firm of solicitors, Berrymans. The Claimant maintained that he raised the issue with Group Fraud on 15 June (paragraph 69 of his statement), but it was not reflected in the notes of the meeting [C298-305], nor was the matter put to Mr Bennett in such terms.

  The exclusivity issue had clearly been raised with Mr Bennett by the DSP partners [C357]. He indicated that Mr Sinho was to have picked it up [C353]. When asked about the issue during his evidence, Mr Sinho acknowledged that, if exclusivity clauses had existed in the contracts with DSP and QM, any arrangement which Mr Green had achieved with Berrymans may well have been in breach too, but the problem for him was that no one knew of the DSP and/or QM contracts. Crucially, he was not prepared to accept that Mr Green had known of those contracts before having decided to enter into another one. We had no evidence to show that Mr Green had possessed that knowledge.

  This issue was not central to the findings in respect of Allegations 1 or 5 in any event.

- *in September 2011* [presumed to have been 31 August 2011]*, the Claimant was subjected to racially offensive remarks by Mr Bennett at a meeting and ignoring complaints against Mr Bennett's racist views;*

  We did not accept the Claimant's evidence on that issue (see paragraph 6.56 above).

- *in May 2012, the Respondent's audit directors covertly approached the Claimant's employees behind his back in a fishing expedition search for any information to warrant action against the Claimant.*

  We dealt with that allegation in paragraph 6.76-7 above. We were not satisfied that there had been any 'fishing' or other covert activity.

(v) *The process which led to the Claimant's dismissal was flawed in that:*

- *He was given insufficient notice of the investigation meeting;*

  See above; no notice was required under the Policy and the fact that Group Fraud had wanted to gain spontaneous answers to their questions did not render the investigation unfair.

- *The disciplinary manager was appointed even before the Claimant knew of the allegations he had to face;*

  Mr Goss was appointed two days before the Claimant had notice of the disciplinary hearing, but we could not understand what unfairness that was said to have caused.

- *The fraud team's report of 16 August had been substantially completed before he was even interviewed;*

  See paragraph 43 of C2.

  Group Fraud prepared a draft report on 27 July 2012 [C365-377], before the Claimant's 2 August interview. The report was then finalised on 16 August [C457-468]. That was merely part of the development of the investigation. The fact that the reports changed reflected the development of the evidence and Group Fraud's conclusions also changed following the interview.

- *A second investigation was undertaken in 2012 in relation to the same matters which had been investigated in 2011;*

  We have dealt with this issue above. No double jeopardy principle applied. We noted, too, that the Claimant had 'welcomed' the investigation in June 2012.

- *The Claimant did not receive any documents or a letter of outcome in relation to the first investigation until two years later;*

  We could not understand how the Claimant's failure to receive documents as a result of the 2011 investigation rendered the 2012 investigation and disciplinary process unfair. He not been entitled to any documentation in 2011 because no formal disciplinary process was ever commenced.

- *The 2nd investigation took too long;*

  Contrary to the Claimant's assertion in paragraph 45 of his submissions, C2, the investigation had not been between September 2011 and 18 September 2012. Rather, it ran between May and September 2012 as he had been aware. That did not appear to have been unduly lengthy and the Claimant never pointed to any particular prejudice which was allegedly caused by the period of the investigation.

- *His suspension was unfair and unnecessary;*

  The Claimant's suspension accorded with the Respondent's Policy [C601] and, given the nature of the allegations, was to have been expected in our experience.

- *At the 18 September 2012 hearing, the 5th allegation that he faced was only presented to him hours before, he was not provided with any of the documents that the hearing manager relied upon and Mr Goss's independence had been challenged;*

  There were two points to consider here; the timing of Allegation 5 and Mr Goss' independence.

  Allegation 5 certainly came too late for it to have been fairly considered at the first stage of the disciplinary hearing. The process was, however, postponed until 1 October 2012 by which time the Claimant had had all of the relevant evidence and he confirmed that he had understood the nature of the allegation that he faced.

  As to Mr Goss' independence, the Claimant certainly raised complaints about him [C937 and 945] which Mr Goss considered to have been totally unfounded. Nevertheless, he raised the issue with Group Legal and HR (Ms Helsdon and/or Ms Butler). His reiteration of his independence was not countered by the Claimant [C848-9]. In the absence of any credible reason why Mr Goss ought to have stepped aside, we concluded that it was reasonable for him to have continued.

- *At the hearing on 1 October 2012, new evidence was produced (13 lever arch files) which the Claimant had never seen before;*

These were the 12 original case files printed from the KLS system which formed the basis of Allegation 5. They were not physically produced by Mr Goss at the hearing or examined by the Claimant, but they were nevertheless offered to him (paragraph 21 of Mr Goss' statement). What they showed was the Claimant's involvement in costs work. What they did *not* show was DSP's involvement.

- *After the hearings, Mr Goss undertook further investigations which the Claimant was not told about before the decision to dismiss was taken;*

  The Claimant complained that Mr Goss had spoken to Mr Hockley (paragraph 49, C2). The question which Mr Goss had wanted answered was why certain cases contained had administrator payment requests to the Lloyds account, yet the invoices which had accompanied them had sought payment to the Barclays account (for example, [C1a-c]). Those were questions which the Claimant himself had been asked to address. It was not a new line of enquiry.

  Mr Goss also spoke to Ms Halinen to bottom out the Claimant's contention that there was handwritten evidence on the files which had gone back to the solicitors, allegedly evidencing DSP's involvement.

  These enquiries had therefore been caused by what the Claimant told Mr Goss. We had little doubt that he would have been criticised by the Claimant if he had *not* followed them up.

- *The Claimant raised a grievance in September which contained concerns about the disciplinary process and he asked for the disciplinary process to be frozen while the grievance was investigated, but it was not.*

  This allegation has been dealt with.

- *In relation to the appeal and appeal process, Mr Fretter took a decision in relation to the 5th allegation despite having encouraged the Claimant to produce further evidence about it at the hearing. Further, he ignored a 96 page document produced by the Claimant on 21 December. Further, as a result of the Claimant's grievance, he said that he would exclude the people referred to in the grievance from any further involvement in the disciplinary process. It is claimed that he did not do so. It is also alleged that Mr Fretter interviewed other witnesses without inviting the Claimant to comment before the outcome was reached. Finally, bias is alleged against Mr Fretter. It is said that he was one of the managers who explicitly sanctioned the litigation conducted by KLS for which the Claimant was disciplined.*

Allegations of bias against Mr Fretter were less viable against him than, perhaps, anyone else for the reasons explained within paragraph 6.128 above. The accusation was never put to Mr Fretter in cross-examination and we saw no merit in it.

As to Mr Fetter's failure to take into account the documents which were sent to him on 20 and 21 December, we refer back to paragraph 6.134-5 above.

The appeal was a review, not a rehearing. Mr Fretter therefore approached it on the basis that the decision would not have been changed unless the Claimant had produced evidence and/or argument to suggest that the procedure had been unfair or that Mr Goss' conclusions had been flawed.

As to his interview of other witnesses, he closed off issues which the Claimant had raised in the same way that Mr Goss had (for example, with Mr Ward), but most of those who he spoke to had only been relevant to the grievance issues (Mr Reames and Mr Alderton).

7.3.2 Although not expressly raised by the Claimant or within the List of Issues, he had complained that Allegation 5 had never been framed *as* an allegation even at the second part of the disciplinary hearing. The substance of the accusation was nevertheless clear from the Group Fraud report and the Claimant did not claim to have been confused by it when he addressed it on 1 October and/or in the further documentation that he produced to Mr Fretter.

7.3.3 There was a final matter which concerned us but which, perhaps surprisingly, the Claimant did not appear to rely upon to any great extent; the fact that part of Mr Goss' decision had been based upon an issue of trust which was never separately framed as an allegation before the hearing. The Claimant was nevertheless able to deal with the separate elements of it which were relied upon by Mr Goss for his conclusion (see paragraph 6.125 above), because they had been an integral part of the other allegations. In relation to the last point, however, (that the Claimant's conduct during the disciplinary process also contributed to a lack of trust) it was difficult to see what more he could have said; the fact that exculpatory documents were not been found in Gloucester was not in dispute. The reason for their non-existence was, however, in; sabotage and/or concealment on the part of Mr Bennett or a lack of credibility on the part of the Claimant. There was no doubt that the Claimant was able to make his case in respect of his argument during the process, but there was also no doubt that it was rejected.

7.4 Polkey

7.4.1 Even if we had been wrong in our analysis of the fairness of the procedure adopted by the Respondent in the case, we considered how the principle in *Polkey* might have applied.

7.4.2 The decision in *Polkey-v-AE Dayton Services* [1988] ICR 142 introduced an approach which required a tribunal to reduce compensation if it found that there was a possibility that the employee would still have been dismissed if a fair procedure had been adopted. Compensation could have been reduced to reflect the percentage chance of that possibility. Alternatively, a tribunal might have concluded that a fair of procedure would have delayed the dismissal, in which case compensation could have been tailored to reflect the likely delay.

7.4.3 It was for the employer to adduce relevant evidence on the issue, although a tribunal should have had regard to any relevant evidence when making the assessment. A degree of uncertainty was inevitable but there may well have been circumstances when the nature of the evidence was such as to make a prediction so unreliable that it was unsafe to attempt to reconstruct what might have happened had a fair procedure been used. However, a tribunal ought not to have been reluctant to undertake an examination of a *Polkey* issue simply because it had involved some degree of speculation (*Software 2000 Ltd.-v-Andrews* [2007] ICR 825 and *Contract Bottling Ltd-v-Cave* [2014] UKEAT/0100/14).

7.4.4 The areas in which we had been critical of the Respondent's procedural approach in the case had been, first, in respect of the appointment of the disciplinary investigator in non-compliance with the Policy, secondly, Mr Goss' briefing from Mr Bennett, thirdly, the failure to formulate Allegation 5 and/or the breach of trust issue *as* allegations and, lastly, Mr Fretter's failure to receive the documents on 20 and 21 December.

7.4.5 As to the Policy breach, we could not see that any material difference would have been caused to the eventual outcome if Mr Singho had appointed Mr Bennett. Secondly, had Mr Bennett, for example, presented his evidence to Mr Goss for the first time at the hearing in front of the Claimant, it was reasonable to conclude that there would have been no difference to Mr Goss's conclusions. Thirdly, had Allegation 5 been framed in the manner set out in paragraph 6.44 above, it would not affected the Claimant's response to it since he well knew what the substance of the accusation had been. As to the breach of trust point, that element of Mr Goss' conclusion was a consequential add-on. Without it, the Claimant would still have been found to have committed Allegations 1 and 5.

7.4.6 We were more concerned about the last point. We considered the evidence carefully and, in particular, Mr Fetter's answers to questions in cross-examination and we did not accept that there was any material evidence that would have changed his mind. In fact, he felt that the documents corroborated his view.

7.4.7 For the sake of completeness, we dealt with an issue which the Respondent had raised with reference to the *Polkey* principle; it was alleged that, had Mr Goss known that the Claimant had been receiving 30% of DSP's turnover, he would have been dismissed in any event. Although he may have held that view, we could not see how a fair

procedure would have brought that evidence out. That point may have sounded in other ways.

7.5 Discrimination; jurisdictional issues; the relevant legal principles

7.5.1 It was contended that many of the claims of discrimination had been brought out of time. The Tribunal had to determine;

(a) Whether the Claimant presented his complaint to the Employment Tribunal before the end of the period of three months beginning when the act complained of was done, pursuant to s. 123 (1)(a);

(b) If not, whether any of the alleged acts taken together, constituted an act extending over a period such that they should be treated as done at the end of that period pursuant to s. 123 (3);

(c) Insofar as any complaint or claim was out of time, whether the Employment Tribunal nonetheless should have considered it; was it is just and equitable to consider to do so pursuant to s. 123 (1)(b)?

(see paragraph 1-3 of the List of Issues).

7.5.2 Under s. 123 of the Equality Act 2010, a complaint of discrimination had to have been brought within three months of the date of the act to which the complaint related (s. 123 (1)(a)). For the purposes of interpreting the section, conduct extending over a period was to have been treated as done at the end of the period (s. 123 (3)(a)) and the provision covered the maintenance of a continuing policy or state of affairs, as well as a continuing course of discriminatory conduct.

7.5.3 Should a claim have been brought outside the three month period, it was nevertheless possible for a claimant to pursue it if the tribunal considered that it was just and equitable to extend time (s. 123 (1)(b)). There was no presumption in favour of an extension. The onus remained on a claimant to prove that it was just and equitable to extend time. Time limits were not just targets, they were 'limits'. Tribunals had been encouraged to consider the factors listed within s. 33 of the Limitation Act 1980. Although it was not mandatory to do so, we considered the length of and reasons for the delay, the extent to which the Claimant had sought professional help and the extent to which information, which he said that he needed, was not known by him until much later and the degree to which the Respondent should have been blamed for any late disclosure in that respect. We also had to consider whether the Claimant had dragged his feet once he knew all of the relevant information. The touchstone, however, was the issue of prejudice and, critically, we had to consider whether and to what extent the delay had caused prejudice to either side.

7.6 Discrimination; jurisdictional issues; conclusions

7.6.1 The Respondent alleged that the Claimant's complaints of discrimination had not extended to the dismissal itself. We did not accept that argument; his complaint had always been about the process which had led to and had included his dismissal. Paragraphs 8 (i) and 9 (i) of the List of Issues had been poorly worded but it would have been disingenuous to have

believed that they had not included the fact of the Claimant's dismissal itself.

7.6.2 The complaint about the dismissal itself was in time; Claim 1 had been issued on 16 January 2013, within 3 months of the effective date of termination. It was artificial to separate the process which had led to the dismissal from the decision itself and, in our judgment, it all fell to be dealt with as a series of acts extending over a period within the meaning of s. 123 (3).

7.6.3 Even if we were wrong, we considered that it was just and equitable to extend time under s. 123 (1)(b). We were acutely aware of the fact that the Claimant had not specifically led evidence on the issue or addressed it in his submissions, but he had asked for an extension of time in his various tribunal documents if one had been required. Ms Davis ran no positive case on prejudice on the Respondent's behalf and, given the fact that the relevant witnesses were available and that the documentation still existed, we could not see what difficulties arose as a result of dealing with the complaints out of time.

7.6.4 Different considerations applied to the three acts of victimisation within paragraph 10 (c)(i)-(iii) of the List of Issues, which were also complaints of direct discrimination or harassment too as a result of the matters set out in paragraph 2.7.1 above.

7.6.5 Paragraph 10 (c)(i) mirrored paragraphs 8 (i) and 9 (i) and the same considerations applied. Paragraphs 10 (c)(ii) and (iii) concerned the police referral and had their origins within Claim 3, which had been issued on 26 September 2014. The police referral had actually taken place in May 2013, following Mr Goss' recommendation in October 2012, none of which the Claimant had known about until early June 2014 [P221]. Although the Respondent appeared to doubt that assertion, there was nothing to demonstrate that it was wrong and we had no reason to disbelieve it. Nevertheless, Claim 3 was still issued more than 3 months after the Claimant acquired that knowledge, but only just.

7.6.7 Again and for similar reasons to those expressed above, we considered it just and equitable to extend time in order to deal with those allegations; the witnesses and documentation were available and the Respondent did not allege that it was prejudiced in dealing with them.

7.7 <u>Direct discrimination and harassment; the relevant law</u>

7.7.1 Some of the Claimant's claims were brought under s. 13 of the Act;

> "*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*"

7.7.2 The protected characteristic relied upon was race. The comparison that we had to make under s. 13 was that which was set out within s. 23 (1):

> "*On a comparison of cases for the purposes of sections 13, 14 or 19, there must be no material difference between the circumstances relating to each case.*"

7.7.3 We approached the case by applying the test in *Igen v Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

> "*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision."*

7.7.4 The *Igen* approach, however, also had to be considered in light of the recent decision in *Efobi-v-Royal Mail* UKEAT/0203/16/DA which reminded us that the former provisions (in this case, the Race Relations Act), placed the primary burden upon a claimant, whereas s. 136 was in fact silent as to where the burden lay. Accordingly, we had to consider all of the available evidence, whatever its source, before deciding whether the burden shifted.

7.7.5 In order to trigger the reversal of the burden, it needed to be shown, either directly or by reasonable inference, that a prohibited factor may have been the reason for the treatment alleged. More than a difference in treatment and a difference in protected characteristic needed to have been shown before the burden would have moved shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could have been drawn might have sufficed. Unreasonable treatment of itself was generally of little helpful relevance when considering the test. The treatment ought to have been connected to the protected characteristic. What we were looking for, therefore, was evidence from which we could see, either directly or by reasonable inference, that the Claimant had been treated less favourably than others not of his race, because of his race.

7.7.6 If we had made clear findings of fact in relation to what had been allegedly discriminatory conduct, the reverse burden within the Act may have had little practical effect (per Lord Hope in *Hewage-v-Grampian Health Board* [2012] UKSC 37, at paragraph 32).

7.7.7 When dealing with a multitude of discrimination allegations, a tribunal was permitted to go beyond the first stage of the burden of proof test and step back to look at the issue holistically and look at 'the reasons why' something happened (see *Fraser-v-Leicester University* UKEAT/0155/13/DM). In *Shamoon-v-Royal Ulster Constabulary* [2003] UKHL 11, the House of Lords considered that, in an appropriate case, it might have been appropriate to consider 'the reason why' something happened first, in other words, before addressing the treatment itself.

7.7.8 The test within s. 136 encouraged us to ignore the Respondent's explanation for any poor treatment until the second stage of the exercise. We were permitted to take into account its factual evidence at the first stage, but ignore explanations or evidence as to motive within it (see

Madarassy-v-Nomura International plc [2007] EWCA Civ 33 and *Osoba-v-Chief Constable of Hertfordshire* [2013] EqLR 1072).

7.7.9 As to the treatment itself, we always had to remember that the legislation did not protect against unfavourable treatment per se, but *less* favourable treatment. Whether the treatment was less favourable was an objective question. Unreasonable treatment could not, of itself, found an inference of discrimination, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (*Law Society-v-Bahl* [2004] EWCA Civ 1070).

7.7.10 We reminded ourselves of Sedley LJ's well known judgment in the case of *Anya-v-University of Oxford* [2001] ICR 847 which encouraged reasoned conclusions to be reached from factual findings, unless they had been rendered otiose by those findings. A single finding in respect of credibility did not, it was said, necessarily make other issues otiose.

7.7.11 Complaints of detriment under s. 13 could not also have been allegations of harassment; they were one thing or the other (see s. 212 (1) and (5)).

7.7.12 We also reminded ourselves of the wording of s. 26 and the test set out in the case of *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336. The test that we had to apply was essentially objective, but with a subjective element; if the objective bystander was likely to have viewed the behaviour as having satisfied the test in s. 26, the claim would have succeeded, but the bystander was entitled to take into account the particular Claimant's perception before concluding whether the test had been met.

7.7.13 It was important to remember that the words in the statute imported treatment of a particularly bad nature; it was said, in *Grant-v-HM Land Registry* [2011] IRLR 748 CA, that "*Tribunals must not cheapen the significance of these words. They are important to prevent less trivial acts causing minor upset being caught by the concept of harassment*" (see, also, similar dicta from the EAT in *Betsi Cadwaladr Health Board-v-Hughes* UKEAT/0179/13/JOJ).

7.8 Direct discrimination and harassment; conclusions

7.8.1 We had to consider whether the Respondent had treated the Claimant less favourably because of his race within the meaning of s. 9 (1) and 13 (1) of the Act. The Claimant described himself as a black African, specifically of Kenyan origin, although that said that it had been his colour which had caused the discrimination complained of.

7.8.2 The allegations which had been made were reduced to one on the first day of the hearing (paragraph 8 (i) of the List of Issues), an allegation that fell to be considered under s. 26 in the alternative under paragraph 9 (i);

(i) [the Respondent] *suspended him based on malicious and deliberately manipulated evidence and subjected him to an unfair and discriminatory disciplinary procedure which had the intention of dismissing the Claimant at all costs.*

7.8.3 The alternative claims under ss. 13 or 26 which were added to those under s. 27 in respect of paragraph 10 (c)(i)-(iii) of the List of Issues have been considered later.

7.8.4 We rejected the thrust of the Claimant's case, namely that the whole investigatory and disciplinary process would not have been proceeded had he not been black. We had found that there had been reasonable grounds, wholly unrelated to his race, upon which the Respondent could have concluded that the Claimant was guilty of the misconduct alleged. The evidence that was given Mr Bennett, Mr Goss and Mr Fretter became particularly impressive when they were challenged on their motives for their actions; they were all affronted by the suggestion that they had been motivated by the Claimant's race and we found their evidence compelling.

7.8.5 There was nothing within the Claimant's case which legitimately amounted to anything more than complaints of unfairness generally. The evidence did not enable us to say that he had been treated less favourably than others not of his race, but because of his race under s. 13. Similarly, we were not satisfied that he had been the subject of harassment as alleged. None of the treatment complained of had related to the protected characteristic which was relied upon.

7.8.6 We were invited to consider the position of two white comparators; Mr Springham and Mr Green. The Claimant complained that Mr Springham was vindicated of wrongdoing in respect of Allegation 4, whereas he had received a warning from Mr Goss. We were satisfied that the difference in treatment had been justified for reasons not related to the Claimant's race; the fact that he had been responsible for the management of KLS, including Mr Springham, whereas Mr Springham, as the Principal Solicitor, had been required to issue proceedings in his name for regulatory purposes. In any event, the comparison was illusory since Allegation 4 formed no part of the reason for the Claimant's dismissal.

7.8.7 The position of Mr Green was dealt with in paragraph 7.3.1 (iv) above; there was no evidence to indicate that he was in the same or a similar position in respect of the breach of exclusivity clauses. Further and in any event, the Claimant was not dismissed for acting in breach of any such clause.

7.8.8 For the avoidance of doubt, we considered the position of a hypothetical white comparator in our analysis above.

7.9 <u>Victimisation; relevant law</u>

7.9.1 There were also claims to consider under s. 27. Although the Respondent did not dispute the fact that the Claimant had performed at least one protected act within the meaning of s. 27 (1) (the issuing of Claim 1), it disputed that he had been subjected to detrimental treatment because of that and/or any other acts.

7.9.2 The test of causation under s. 27 was similar to that under s. 13 in that it required us to consider whether the Claimant had been victimised '*because*' he had done a protected act, but we did not apply the 'but for' test; the act had to have been an effective cause of the detriment, but it did not have to have been the principal cause. In order to succeed under s. 27 therefore, the Claimant needed to show two things; that he was subjected to a detriment and, secondly, that it was because of the protected act(s). We applied the 'shifting' burden of proof s. 136 to that test as well (see above).

7.9.3 The threat of a protected act could have been sufficient for the protection to have arisen (s. 27 (1)(a)), but we noted that it would have had to have been the threat of one or more of the matters covered by s. 27 (2), not just the threat of a complaint generally.

7.10 Victimisation; conclusions

7.10.1 The Claimant relied upon the following protected acts;

(a) The grievances allegedly submitted by the Claimant to the Respondent on 22 May, 11 July and 25 September 2012; and

(b) The Claimant's first Claim Form presented to the Employment Tribunal on 16 January 2013.

7.10.2 The Respondent did not dispute that the Claim 1 constituted a protected act, but it disputed all others (see paragraph 10.2 of R4). Our conclusions were as follows;

(i) 22 May 2012;
No protected act was performed on that date. The Claimant's email [C256-7] contained no reference to discrimination and/or the Equality Act and the intimation that a grievance may have been pursued was not sufficient to have qualified as an intention to perform a protected act within s. 27 (1)(a) since there had been no means of anticipating its content;

(ii) 11 July 2012;
We were not satisfied that the grievance to the HR Director had been sent or received [C325-342] (see paragraph 6.109 (ii) above);

(iii) 25 September 2012;
Despite the Respondent's submissions, we accepted that this grievance constituted a protected act since it contained several over allegations of discrimination [C945, 948 and 949].

7.10.3 Next, we had to consider the detriments upon:

(i) Between July 2012 and March 2013, the Respondent ignored his formal grievance and instead suspended him based on malicious and deliberately manipulated evidence and subjected him to an unfair and discriminatory investigation and disciplinary procedure which had the intention of dismissing the Claimant at all costs;

Although the Claimant's suspension predated any of the protected acts, the disciplinary process was completed after the grievance 25 September 2012, since it was issued between the two parts of the disciplinary hearing. Mr Bennett's actions could also not have been affected by the grievance because the results of his investigation were then in the hands of Mr Goss. There was therefore no merit in the allegation that the evidence had been 'maliciously and deliberately manipulated' as a result.

It might, however, have been claimed that Mr Goss and, subsequently, Mr Fretter have taken adverse decisions against the Claimant because of his grievance. We did not accept that that was the case. Strangely, the Claimant did not put such an accusation to Mr Goss, although he had clearly known of the grievance.

Generally, we refer to the findings we made in respect of the complaint of direct discrimination concerning the dismissal; we were not able to conclude that the Claimant's grievance had played any part in the findings of misconduct and his dismissal. Those findings had been reached for entirely different reasons which were wholly unattributed to the fact or content of the grievance.

(ii) The Respondent's referral of the Claimant to the City of London Police, which the Claimant alleges was done in bad faith and in retaliation against the Claimant; and

We refer to paragraph 6.139 above; it was the Respondent's invariable practice to consider a police referral in cases of misconduct, a practice which was reflected by the Group Fraud Management Policies [C1735-9]. The Claimant had also positively encouraged a police referral in August 2012 [C520].

It was Mr Goss who had included the recommendation to refer the matter to the Police within his report. Mr Davies, who was instrumental in the referral, told the Tribunal that he had not even been aware of the Claimant's grievance.

Accordingly, not only because of our earlier findings in relation to Mr Goss' conclusions in respect of the allegations, but also because of the Respondent's general practice to refer such matters, we rejected this complaint; the referral had not been for any reason associated with the grievance.

(iii) The Respondent provided the police with inaccurate documents in the sense that the Claimant says that he did not commit fraud, contrary to what is set out in the documents, and losses said to be incurred were either not incurred or not to the extent set out in those documents.

The Claimant complained that Mr Bennett's initial statement to the Police [C1436-1440] and its annexes had been misleading. In particular, he complained that paragraph 19 contained cut off dates for

his analysis of the data which artificially excluded information which had been helpful to the Claimant [C1438]. Whilst he accepted that MI which had pre-dated March 2010 may have shown billing continuing at the rate of 10%, this had been explained on the basis that it had been work which had been commenced before the rate had changed. He also pointed that that the dates which had been used had also served to cut off further 5% bills after April 2011 because, although the rate was changed back then, some work was completed after that date which had been commenced under the 5% regime. He accepted that the figure of £134,000 mentioned in paragraph 22 would not have been accurate for that reason, but it was at least what he felt the documents revealed and it ultimately up to the Police to decide what could have been proved to the criminal standard.

Again, we did not accept that the Claimant's grievance had been any reason for the manner in which Mr Bennett had compiled his evidence for the Police.

7.10.4 Finally, we rejected the alternative complaints under ss. 13 or 26 which had been added during the hearing. We did not consider that the referral of the matter to the Police had been because of or had related to the Claimant's race. There was no direct evidence that his race had had anything to do with the Respondent's decision, nor was there evidence from which such an inference could have been drawn. The final letter from the Police corroborated the Respondent's case that there had been reasonable grounds upon which the referral had been made [C1727-8].

7.10.5 As to the evidence which was supplied, we need not repeat what has been said above. The documents which had apparently demonstrated the Claimant's innocence, particularly in relation to Allegation 5, were never produced to the Respondent by him. The Respondent produced the evidence which it considered to have proved Allegations 1 and 5 and we could not accept that its decision to have done so was motivated by his race.

Employment Judge Livesey

Date - 18 October 2017

JUDGMENT & REASONS SENT TO THE PARTIES ON

27th October 2017

.....

.....

FOR THE TRIBUNAL OFFICE

IN THE BRISTOL EMPLOYMENT TRIBUNAL

BETWEEN:-

MR G.E. YAGOMBA

Claimant

- and –

AXA SERVICES LIMITED

Respondent

LIST OF ISSUES

Jurisdictional issues

1. In respect of the alleged acts of discrimination, has the Claimant presented his complaint to the Employment Tribunal before the end of the period of three months beginning when the act complained of was done, pursuant to section 123(1)(a) of the Equality Act 2012 (the "**EA**")?

2. Do any of the alleged acts taken together constitute an act extending over a period such that they should be treated as done at the end of that period pursuant to section 123(3) of the EA?

3. Insofar as any complaint or claim is out of time, does the Employment Tribunal nonetheless consider, in all the circumstances of the case, it is just and equitable to consider the complaint or claim pursuant to section 123(1)(b) of the EA?

Unfair dismissal claim

4. What was/were the reason(s) for the Claimant's dismissal? The Respondent alleges that the fair reason for dismissal related to the Claimant's conduct. The Claimant asserts that he was dismissed for reasons relating to his race.

5. Did the Respondent show a potentially fair reason within the meaning of s.98(1) and (2) of the Employment Rights Act 1996 ("**ERA**")?

6. If the Respondent shows such a reason, did it act reasonably in the circumstances in treating the reason for dismissal as a sufficient reason for dismissing the Claimant and in particular;

   (a) Did the Respondent have a reasonable belief in the alleged misconduct?

   (b) Was that belief based on reasonable grounds?

   (c) Did the Respondent follow such investigation as was reasonable in the circumstances?

   (d) Was summary dismissal within the range or band of reasonable responses open to a reasonable employer?

   In summary, it is the Claimant's case under s.98(4) of the ERA that:

(i) The decision to dismiss fell outside the band of responses available to a reasonable employer.

(ii) The Respondent did not genuinely believe that the Claimant had committed the acts of misconduct alleged.

(iii) The belief in the Claimant's guilt was not reasonable, in view of the nature and quality of the evidence that had been obtained.

(iv) The investigation was flawed in that:

- Given that the Claimant was accused of fraudulent conduct, the Respondent had a duty and obligation to carefully, diligently and thoroughly conduct investigations into the Claimant's conduct and it failed to do so;
- In 1 year of investigation, the Respondent failed to produce a single invoice out of the alleged 1,123 allegedly diverted invoices and the Claimant was unaware whether any such invoices existed;
- In 1 year of investigation, the Respondent failed to produce a single email with an attached request for payment from DSP that was allegedly diverted by the Claimant;
- Most 'evidence' gathered, was concealed form the Claimant until 14 months after his dismissal, including investigation reports, spreadsheets, emails and meeting notes;
- The Respondent interviewed 2 witnesses in total over a one year period and took no statement;
- The Respondent failed to produce a single statement from anyone in support of the allegations against the Claimant;
- The Respondent failed to interview the following witnesses, all of whom are said by the Claimant to be *"extremely relevant"* and who allegedly received DSP reports and authorised all their payments: Elizabeth Tailby, Sam Woody, Mike Price, Stanley Crisp, Deborah Westcoat, Matthew Springham, Julie Tomlinson and Riina Newman;
- The allegation against the Claimant was that a third party, in another organization outside of the Respondent, had been 'victims' of fraud. The dismissing allegation was not by the 'victims' but by the Respondent's investigators on their behalf and was not supported by any statement or evidence from the 'victims';
- The alleged 'victims' explicitly confirmed that they were not victims and had lost no money but the Respondent persisted anyway, when it had no duty nor obligation to do so as it suffered no loss;
- There was no reasonable timescale of investigation as it was not focused on the actual complaint but instead moved from one allegation until the final

allegation, which bore no resemblance to the complaint, and was purely based on speculation;

- The Claimant was unaware he was being investigated having been told investigations were complete and closed and there was endless delays in the investigation, it was open and closed without any reasonable or legitimate basis yet all the evidence used to support the final dismissal was evidence that was available at the time of the initial complaint and before the initial investigation was closed;

- The Respondent's investigators were biased in their investigations and closed-minded and when the Claimant complained of their bias in May 2012 he was ignored;

- The Respondent's investigators focused their energies on obtaining incriminating evidence and not rebuttal evidence that would assist the Claimant, for example, another explanation or motivation for the DSP complaint and another explanation for the lack of electronic trail of DSP's involvement;

- Investigations were carried out even when there was substantial doubt as to the facts of the case;

- The Respondent failed to take into account the surrounding circumstances, not just the Claimant's actions in isolation and breached the Respondent's policies in conducting investigations;

- The Respondent's investigators were too close to the facts and investigated even whilst being investigated themselves;

- The following documents were concealed, manipulated and/or falsified: Investigators Minutes of Meeting with DSP (30.08.2011), Meeting with Claimant (31.08.2011), Meeting with DSP (22.06.2012), Mr Bennett's Supplementary List, List of 23 Non-DSP claims, eDiscovery Report (17.09.2012), eDiscovery Spreadsheet (17.09.2012) and Investigators 'data spreadsheets';

- The Respondent failed to consider various important documents including: DSP emails attaching invoices, Panel Solicitors Files (allegation 5), evidence uncovered in November 2012 and documents submitted in December 2012 to Mr Fretter by Mr Springham and the Claimant.

- On 12 March 2012, the Claimant was required to produce fresh copies of his qualification certificates with full details of where each could be verified.

- On 24 May 2012, the Claimant was required to produce copies of his original documents giving him the right to work in the UK.

- On 15 June 2012, the Claimant was subjected to a disciplinary investigation meeting for alleged breaches of contract when in fact the breaches of contract had been committed by another Head of Department [Anthony Green] on the authority of the Managing Director [Victoria Georgalakis], despite the Claimant's vehement protests and raising numerous concerns with no action being taken against them.

- In September 2011, the Claimant was subjected to racially offensive remarks by Mr Bennett at a meeting.

- In May 2012, the Respondent's audit directors covertly approached the Claimant's employees behind his back in a fishing expedition search for any information to warrant action against the Claimant.

(v) The process which led to the Claimant's dismissal was flawed in that:

- He was given insufficient notice of the investigation meeting;

- The disciplinary manager was appointed even before the Claimant knew of the allegations he had to face;

- The fraud team's report of 16 August had been substantially completed before he was even interviewed;

- A second investigation was undertaken in 2012 in relation to the same matters which had been investigated in 2011;

- The Claimant did not receive any documents or a letter of outcome in relation to the first investigation until two years later;

- The 2nd investigation took too long;

- His suspension was unfair and unnecessary;

- At the 18 September 2012 hearing, the 5th allegation that he faced was only presented to him hours before, he was not provided with any of the documents that the hearing manager relied upon and Mr Goss's independence had been challenged;

- At the hearing on 1 October 2012, new evidence was produced (13 lever arch files) which the Claimant had never seen before;

- After the hearings, Mr Goss undertook further investigations which the Claimant was not told about before the decision to dismiss was taken;

- The Claimant raised a grievance in September which contained concerns about the disciplinary process and he asked for the disciplinary process to be frozen while the grievance was investigated, but it was not.

- In relation to the appeal and appeal process, Mr Fretter took a decision in relation to the 5th allegation despite having encouraged the Claimant to produce further evidence about it at the hearing. Further, he ignored a 96 page document produced by the Claimant on 21 December. Further, as a result of the Claimant's grievance, he said that he would exclude the people referred to in the grievance from any further involvement in the disciplinary process. It is claimed that he did not do so. It is also alleged that Mr Fretter interviewed other witnesses without inviting the Claimant to comment before the outcome was reached. Finally, bias is alleged against Mr Fretter. It is said that

he was one of the managers who explicitly sanctioned the litigation conducted by KLS for which the Claimant was disciplined.

Direct race discrimination claim

7. Did the Respondent treat the Claimant less favourably because of his race within the meaning of section 9(1) and 13(1) of the EA. Specifically:

   (a) Did the Respondent treat the Claimant less favourably than it treated (or would treat) others?

   (b) Was the reason why the Respondent so treated the Claimant because of the protected characteristic of his race?

8. Who is/are the appropriate comparator(s) being relied upon by the Claimant in respect of the direct race discrimination claim?

   The Claimant relies on the following allegation:

   (i) The Respondent suspended him based on malicious and deliberately manipulated evidence and subjected him to an unfair and discriminatory disciplinary procedure which had the intention of dismissing the Claimant at all costs.

Harassment

9. Did the Respondent harass the Claimant within the meaning of section 9(1) and 26(1) of the EA. Specifically:

   (a) Did the Respondent engage in unwanted conduct related to a relevant protected characteristic?

   (b) Did that conduct have the purpose or effect of violating the Claimant's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for B?

The Claimant relies on the following allegations:

   (i) The allegations relied on by the Claimant for the purpose of his direct discrimination Claim are relied on in the alternative for the purposes of the Claimant's harassment claim.

Victimisation

10. Did the Respondent victimise the Claimant within the meaning of section 9(1) and 27(1) of the EA. Specifically:

   (a) Did the Respondent subject the Claimant to a detriment because B had done a protected act, or because the Respondent believed that the Claimant had done, or may do, a protected act?

   (b) The Claimant relies on the following alleged protected acts:

      (i) The grievances allegedly submitted by the Claimant to the Respondent on 22

May 2012, 11 July 2012 and 25 September 2012; and

(ii) The Claimant's First Claim Form presented to the Employment Tribunal on 16 January 2014.

(c) The detriments upon which the Claimant relies are as follows:

(i) the Respondent suspended him based on malicious and deliberately manipulated evidence and subjected him to an unfair and discriminatory investigation and disciplinary procedure which had the intention of dismissing the Claimant at all costs; and

(ii) the Respondent's referral of the Claimant to the City of London Police, which the Claimant alleges was done in bad faith and in retaliation against the Claimant; and

(iii) the Respondent provided the police with inaccurate documents in the sense that the Claimant says that he did not commit fraud, contrary to what is set out in the documents, and losses said to be incurred were either not incurred or not to the extent set out in those documents.

21 September 2017