5056/98

Case Number: 3200440/2005

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THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
XY

Respondent
AB Bank

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: Stratford **ON:** 7 to 13 September 2007
14 September 2007 (In chambers)

CHAIRMAN: Mr M F Haynes **MEMBERS:** Dr R W Dungu
Mr A R Smith

Appearances
For the Claimant: Mr C Quinn (Counsel)
For the Respondent: Mr A Hochhauser Q C
Mr T Linden QC

JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant's complaints are not well-founded and are accordingly dismissed.

REASONS

1 The Claimant has made a Claim to the Tribunal complaining that he has been discriminated against on the grounds of his sexual orientation, contrary to Regulations 3(1)(a) and 6(2)(d) of the Employment Equality (Sexual Orientation) Regulations 2003. This Claim was presented on 3 March 2005 and identified 15 individual complaints, or issues, of such discrimination. On 5 May 2006 judgment on the those issues was given by a Tribunal at Stratford (hereinafter called the 'Lamb Judgement"). In short, that judgment found that the Claimant's complaints on 4 of those issues were well-founded, but decided that the complaints in respect of the other 11 issues were not well-founded. That decision was appealed by both parties to the Employment Appeal Tribunal who handed down a judgment on 19 December 2006. It allowed the Respondent's appeal in respect of the four issues which had been found in favour of the Claimant and remitted those complaints to a fresh Employment Tribunal for a hearing. The cross appeal by the Claimant was dismissed. This Tribunal has to rehear the complaints which have been so referred. We have decided to retain the

numbering of the Issues agreed at the Lamb Tribunal, for ease of reference. Thus we are dealing with Issues 3, 4, 5 and 6.

2 There have since been a series of Case Management Discussions and Pre Hearing Reviews in which our conduct of this Hearing have been considered and decisions made about how that process would be managed. These may be summarised as follows

2.1 It was agreed and ordered that we should not have the Lamb Judgment before us. We were also asked by the parties not to read the judgment of the Employment Appeal Tribunal although it was produced to us by Mr Quinn during his final submissions, and, as a result, we considered it briefly. Accordingly, we have little understanding of how the Lamb Tribunal arrived at their judgment, although we were conscious, at least during the latter part of our deliberations, of the reasons for that judgment being overturned. We find it necessary, therefore, to record that we have made our findings solely on the evidence which we have heard from the 3 witnesses who were called by the parties and the extensive bundle of documentation which was produced to us

2.2 It had further been decided, at a Case Management Discussion held on 1 August 2007, that we should not, at least at the initial stage of our Hearing, consider any issues which related to whether the Claimant would have been dismissed but for any discrimination at the preliminary investigation stage.

2.3 It was further agreed by the parties, at the same Case Management Discussion, that the Lamb Judgment's finding as to the characteristics of the hypothetical comparator would be accepted for the purposes of this Hearing. These are set out hereafter.

2.4 It was also confirmed that the Lamb Tribunal's findings in relation to the remaining 11 issues would stand. The Tribunal experienced some difficulty with this because of the overlap with some of the matters with which we were concerned. Some of the Lamb findings related to the whole of the process of investigating, disciplinary proceedings and appeal in relation to the Claimant's alleged misconduct. As a result some of those findings are very relevant to the issues which this Tribunal has had to consider. In particular the following matters, in relation to which the Respondent was found not to have discriminated against the Claimant, are important;

Issue 1

"making the Claimant's sexual orientation the primary focus of his investigation into an incident alleged to have occurred on 4 November 2004 in the changing room of the Respondent's gym".

Issue 2

"Treating the Claimant's giving of a false name to a man identified as "A" as being probative of his guilt".

Issue 7

"Considering that there was some probative value arising from the frequency of the Claimant's visits to the gym".

Issue 8

"Considering that any inconsistencies in the Claimant's accounts were due to his desire to conceal improper behaviour".

Issue 12

"Failing to challenge A's account in any of the interviews that he had with him".

Issue 13

"Relying on the account given by A".

The considerations which arose in each of those Issues would apply to some extent to the issues which we have to consider and could be very relevant to our findings. We have to consider how we were to make our decisions on the outstanding issues, bearing in mind that the Respondent has been found not to have discriminated against the Claimant in respect of the matters identified in the other issues. The greatest difficulty is caused by us not being aware of the basis upon which the Lamb Tribunal had reached its conclusions that these matters did not constitute discrimination. It could make a great difference to our decision whether the Lamb Tribunal had made their findings because:-

(a) The acts did not constitute less favourable treatment.

(b) That there were no inferences of discrimination which could be drawn or

(c) That they had proceeded to the second stage of the burden of proof test and found that the Respondent's explanation satisfactory.

We would have preferred to have considered all of these matters ourselves, so that we could consider whether they have any relevance to the Issues which we are considering. We find ourselves precluded from doing so by the terms of the Judgment of the Employment Appeal Tribunal, which expressly states that the Lamb Judgment findings in relation to Issues 1-2 and 7-16 stand. This, we find, considerably narrows the scope of our consideration of the issues. We have to presume that, in so far as Issues 1,2,7,8,12 and13 are relevant to our Issues, no less favourable treatment occurred by reason of the facts relevant to those issues, and that no inferences of discrimination could be drawn from such facts. This will be a complex exercise since we do not know what facts were found by the Lamb Tribunal in reaching their conclusions.

2.6 It was emphasised to us by both advocates on many occasions, that it was not our purpose to decide whether the Claimant had committed the acts

which were alleged against him.

2.7 Finally, we turn to the restrictions on the identification of the individuals involved in these proceedings. This falls under two parts.

2.7.1 **Rule 49.**
It was generally accepted that the allegations in this matter involved the possible commission of a sexual offence. The rule is obligatory and requires the Chairman and/or the Secretary to omit from the register and the judgment, any identifying matter which is likely to lead to members of the public identifying any person affected by the making of the allegation. For that reason the case will continue to be officially known as XY v AB Bank. This must be so even though neither the Claimant nor the Respondent seeks that protection.

2.7.2 **Restricted reporting Order under Rule 50.**
Neither the Claimant nor the Respondent sought an Order in respect of themselves, but did require an Order in respect of the 3 individuals known to the Tribunal as Mr A, Mr B and Mr z. An Order was made that these individuals will be referred to as such, and not by their true names.

FACTS AND ISSUES

3 The issues which this Tribunal are to consider are agreed to be whether the Claimant was discriminated against by the Respondent by reason of his sexual orientation contrary to regulation 3(1)(a) and regulation 6(2)(d) of the Employment Equality (Sexual Orientation) Regulations 2003 in respect of the following matters.

Issue 3
Reaching the conclusions that it did reach in the initial investigation report prepared on or about 10 November 2004 by Nathalie Hattrell.

Issue 4.
Suspending the Claimant on 10 November 2004 by Louise Dilworth and Nathalie Hattrell.

Issue 5.
Requesting the Claimant attend at a disciplinary investigation interview on 12 November 2004 by Louise Dilworth and Nathalie Hattrell.

Issue 6.
Including each of the two allegations contained in its letter to the Claimant dated 11 November 2004 as pleaded at paragraph 23 of the Claim Form by Louise Dilworth and Nathalie Hattrell.

4 The first matter for a Tribunal in every case of discrimination is to make findings of fact. It is for the Claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination. For this purpose we heard evidence from the Claimant in person and from Nathalie Hattrell, who at the relevant

time was Head of H R for Global Equities and Markets, and Louise Dilworth who was the Senior H R Manager for Investment Banking. We also had presented to us a large quantity of documentary evidence contained in four ring binders. We were greatly assisted by the transcription service engaged by the Respondent which provided each day a transcript of the previous day's evidence. We were also ably assisted by the three advocates instructed in the matter. We have carefully considered all of their submissions. Any failure to specifically refer to them in this judgment is not an indication that we have not taken them into account. This is a long judgement and it has not been possible to record every point which has been put to us. With regard to the witnesses, we would make a general comment which applied to each of them. It was quite apparent from the carefulness with which each gave their answers that this was a matter which had already been thoroughly gone into at the previous Hearing. We also had to note it was nearly three years from when the relevant incidents took place. There was an obvious lack of spontaneity in the answers of all of the witnesses which made it clear that they were carefully weighing their answer to each question. No doubt this was due to their experience of giving evidence at the previous Hearing. Whilst we do not say this as a criticism of any of them, the obvious lack of spontaneity was a matter which we have had to take into account. We, also, appreciate that this is high profile case, with much depending on the final decision. Obviously each of the witnesses had prepared themselves very carefully for their attendance before us.

The facts

5 Based on the evidence before us, we have made the following findings of fact.

5.1 The Respondent's policies and procedures form an important background to the events which we have to consider. We find it advisable, therefore, to set out what we consider to be the relevant ones. They are contained in the Employee handbook. Section 4 deals with "Policies and Procedures"

> ***4.11 Dignity at Work***
> *No form of harassment, victimisation or bullying will be tolerated or condoned and all complaints of such behaviour will be properly investigated.*
>
> ***4.13 Discrimination and harrassment***
> *The Company is committed to providing a workplace which promotes equal opportunities and prohibits discriminatory practices. The Company will not tolerate any form of discrimination or harassment by employees or against other employees.....*
>
> ***4.13. 4 Sexual Harassment***
> *Sexual harassment is a form of sexual discrimination and as such is unlawful under the Sex Discrimination Act 1975. Generally this is where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.*
>
> *The following type of behaviour may amount to sexual harassment....*
>
> - *Non verbal conduct of a sexual nature*

4.14 Discrimination, harassment and victimisation complaints procedure

Failure to comply with the Company's Equal Opportunities Policy or to co-operate with it with it operating effectively may constitute a disciplinary offence leading to disciplinary action which may result in dismissal.

It is the company's aim to resolve any complaints as quickly as possible. All complaints will be treated seriously and with appropriate confidentiality.

4.14.1 Making a complaint.
Where a formal written complaint is made, a full investigation will be conducted which may be followed by a disciplinary interview with the employee/employees against whom the allegation has been made. Such action will not normally be initiated without the agreement of the complainant. However, there are some circumstances where, despite the reservations of the complainant, the company may need to pursue the matter formally (for example, where it is felt that other members of the company could be at risk if no action is taken). The matter will be dealt with promptly, fairly and impartially. Maximum care will be taken to ensure the career and reputation of each party is not unfair affected.

4.14.2 *Investigation*.
The first step is to investigate the allegations carefully and as discreetly as possible. This will involve hearing detailed accounts from both the alleged discriminator or harasser and the complainant. Other employees may also be asked to provide information. Documents, email and other evidence may be considered. A full record of the progress and outcome of the investigation and any steps taken will be reported to the complainant at the earliest opportunity. Those conducting the investigations will not be parties directly involved in the allegation.

4.13.3 *Disciplinary procedures*.
Where a formal investigation has been conducted and where it has been concluded that there are reasonable grounds to believe that some form of discrimination, harassment or victimisation has taken place, the employee or employees against whom the allegation is being made will be subject to the Company's disciplinary procedures. These disciplinary procedures will be conducted by a more senior member of line management, assisted by a member of HR, both of whom will not have been previously involved.

The outcome of the disciplinary procedures will depend on the circumstances. Serious acts of discrimination, harassment or victimisation will be regarded as gross misconduct and may lead to instant dismissal…

Where a complaint is discovered to be wholly false and/or malicious, the complainant will normally be subject to action under the Company's disciplinary procedures.

4.15 Discipline and performance at work

4.15.2 Principles.

Disciplinary action may be necessary where expected standards of performance or behaviour are not met. The company is responsible for ensuring that disciplinary action is not taken until the case has been investigated and, so far as is possible, the facts have been established....

At every stage in the procedure the employee will be advised of the nature of the complaint against him/her, will be given time to consider the complaint and will then be given the opportunity to state his/her case before any decision is made.

An employee may be suspended from employment on full pay while investigations are conducted. The company will endeavour to ensure that such a period is no longer than reasonably necessary for the investigations to be completed.

4.15.3 The Procedure

Disciplinary interviews

Before any warning is given or disciplinary action or decision is taken by the company, the employee will be notified in writing of the alleged conduct, characteristics or circumstances which have led to disciplinary action being contemplated. The employee should also be informed of how the company became aware or suspected that the alleged conduct or circumstances occurred. The employee will be given sufficient time to prepare for the interview and consider his/her response and then an interview will be held with the employee at which he/she will have every opportunity to comment on the complaints against him/her.

4.15.5 Suspension.

The employee may be suspended from work on full pay while any investigations are carried out and suspension in these circumstances will not be regarded as a disciplinary penalty. The suspension will usually last no more than 10 working days initially, but may be renewed or extended at the company's discretion.

At the time of receiving a written warning or when dismissal is being contemplated or recommended or if the alleged misconduct is sufficiently serious, the employee may be suspended from work on full pay while further investigations are made. Suspension will last no more 10 days initially but may be renewed or extended at the discretion of the company.

4.15.7 Examples of gross misconduct

The following are non-exhaustive examples of offences which will normally be regarded as gross misconduct which, if proven, may result in instant dismissal without notice or payment in lieu of notice. An employee who is accused or is suspected of gross misconduct will

normally be suspended from work on full pay while the company investigates the alleged offence. The employee will normally be required to attend a disciplinary hearing within 10 working days, or longer if the period of suspension has been extended or renewed.

Gross misconduct includes (but is not limited to)

- *A serious breach of the company's procedure on discrimination and harassment.*

5.2 The Claimant, who has had a very successful career in banking, was headhunted by the Respondent to fill the new post of Global Head of Equity Trading. This was a senior role, the importance of which can be gauged by the very substantial remuneration and benefits package which was agreed to be paid to him. We have no doubt that he fully merited the promotion and is highly skilled in his chosen sphere. He agreed that one of his attributes was an ability to give careful attention to detail. He commenced work on 13 September 2004.

5.3 He is a gay man, being in a permanent relationship which has existed for 9 years. We shall refer to his sexual orientation as being "*gay*" which is a term which was used by all parties during our Hearing without objection. He indicated that he has made no efforts to hide his sexual orientation and it may be that this was known to the Respondent when he was appointed. The extent to which his orientation was known within the Respondents' business is impossible for us to gauge. Miss Hattrell told us that she was aware of that orientation before the events with which we are concerned.

5.4 Miss Hattrell had, to some extent, been involved in the negotiations leading up to the Claimant's appointment but only to the extent of negotiations regarding the details of his employment package. After his appointment, she was the HR contact for his part of the business. They met regularly, particularly during an investigation into possible financial misconduct by another employee. She spoke highly, and we find, genuinely, of his skills and probity. There was no suggestion that they did not get on, as fellow professions, prior to the incident.

5.5 As part of the Claimant's package he was given membership of the Respondent's health club which was situated in the basement of their building. This included a gymnasium and associated facilities for showering. A plan of the area was agreed, showing the location of where the alleged incidents took place. A schedule of the Claimant's use of the health club had been agreed. This was based upon computer records made automatically on entry and exit. It showed that, following his induction on 24 September, he did not use the faculties until the morning of 14 October, on his return overnight from a business trip to New York. Thereafter, until 4 November, he used the health club on 8 days although this period includes 10 days when he was absent in Hong Kong on business. He had visited the gym for 3 separate sessions on Monday 1 November, the first being to shower and freshen up on his return overnight from Hong Kong. He did not attend the health club on Tuesday 2 November. On Wednesday 3 November he is recorded as having had 2 visits without any booking out time. It was agreed that this represented one visit with the second recorded "entry time" probably reflecting an "exit time". On Thursday 4 November he was recorded as attending for 35

minutes from 7.28 am, for 55 minutes from 11.48 am and for 2 hours 20 minutes from 6.29 pm. On his last visit, no time was recorded for his leaving the gym. It was agreed that this was because the turnstile system was turned off at 8.45 and that he had accordingly left the health club shortly after that time.

5.6 The Claimant has two prolapsed discs in his back and had been advised to exercise and to apply heat to alleviate the symptoms of that condition. This, he explained, was one of the reasons for his attending the health club. He had received medical advice that he should undertake an exercise regime which lasted 30 minutes. However, this regime could be extended for longer periods.

5.7 An incident was alleged to have occurred in the shower area of the health club on the evening of 4 November. The Claimant accepted that he was in the health club at about the time that the alleged incident was supposed to have taken place.

5.8 On Sunday 7 November 2004 Pat Ryan, the Respondent's Duty Security Manager wrote a report (375-378) about the alleged incident which he circulated that day to a number of individuals, who are not easily identified and whose need to know the information conveyed is unclear to us. It is unnecessary for us to record in detail what the report said. The salient features are as follows:-

5.8.1 That Mr Ryan was reporting a matter which had been reported to him by another employee, which he had then investigated.

5.8.2 He had spoken to Mr A who had informed him that he had noticed another man in the locker room who was naked and who was staring at him as he undressed.

5.8.3 When Mr A went for a shower, he had observed the other man in the adjoining shower cubicle although the water was not turned on. He said that he saw the man masturbating.

5.8.4 After leaving the shower to dry off he noticed that the man was erect and that he continued to stare at Mr A.

5.8.5 Mr A asked the man his name and the response was *"Paul Broadway"*.

5.8.6 On leaving the gym he reported the matter and was advised that there was no membership allocated to a Mr Broadway. The matter was then reported to, Mr Ryan, the Duty Manager.

5.8.7 Mr A looked through camera footage with Mr Ryan and identified the person alleged to be involved from various CCTV recordings. A Level 4 Nedap report established that this person was the Claimant.

5.8.8 Mr A said that his colleague, Mr B, who had been in the gym at the same time, had noticed the same man in the steam room *"who he claims had stared at him in an odd way but thought nothing of it"*.

5.8.9 Mr Ryan reported the matter to Stuart McLeod of Human Resources and also to Fiona Wheeler who was the Claimant's HR representative.

5.8.10 He also commented, *"Details of Mr A's colleague were also passed on, however unlikely that this evidence would be relevant, as nothing untoward had occurred".*

5.8.11 Mr Ryan also met with Helen Atherton, who was the Respondent's manger responsible for that level, to whom he identified the Claimant.

5.8.12 Mr Ryan and Ms Atherton saw Mr A to apologise in case he had been put off using the gym. Mr Ryan recorded that there *"appeared to be a lot of laughing, finger pointing and discussions occurring while we spoke a few metres away, which suggested that Mr A, having had this experience, has advised a number of his colleagues (as anyone would)".*

5.8.13 Subsequently he met with a another colleague and suggested that there be further attendances by male members of staff within the locker rooms and concluded *"I then suggested that as there appeared to be cottaging occurring in 8 CS (how much obviously, we don't know) that they should perhaps have a regular sweep of the locker rooms (male especially) as much as possible, if nothing else to promote some sort of presence in an attempt to curb this, should this be a common occurrence".*

5.9 We know from Miss Hattrell's evidence that she was phoned by Fiona Wheeler on Friday afternoon while she was driving to a social event. She says that she was told that the Claimant had been identified as having been in the gym and had allegedly been *"looking at a guy in an inappropriate way and masturbating in the shower".*

5.10 On Friday 5 November, Mr McLeod, who is a senior HR manager of a similar rank to Miss Hattrell, was approached by Mr Ryan and informed of the alleged incident. He made a file note on Monday 8 November, recording what he had done on the Friday (379). He decided to carry out a fact finding interview with Mr A, which he arranged for Monday 8 November.

5.11 Mr McLeod carried out the fact finding interview with Mr A at 10.00am on 8 November. Two typed versions of the interview were produced to us, both of which had been signed by Mr A (393 – 394 and 394a – 394b). In the absence of evidence from Mr McLeod we do not know why it was necessary to have two notes of the interview. They are substantially the same, with the difference which we set out below.

5.12 It is, again, unnecessary for us to record everything that was recorded from the interview and the relevant matters are the following:-

5.12.1 Mr A reported that he had attended the gym between 7.55 and 8.00pm on Thursday 4 November with a work colleague, Mr B. At about 8.40 he went into the changing rooms.

5.12.2 Whilst changing with a view to having a shower, he noticed that a

man in an adjoining cubicle, who was already naked, was watching him and walked backwards and forwards past where Mr A was standing.

5.12.3 Mr A then went into a shower, which he turned on. He then became conscious that the adjoining cubicle was also occupied by the same man. Whilst the cubicles were separated by frosted glass, it was sufficiently clear that he was able to observe movements. He was aware that the adjoining shower was not switched on and became even more uncomfortable *"when he could see the individual pleasuring himself"*.

5.12.4 Despite feeling worried about coming out of the shower, he did so and started to dry himself in front of the mirrors which are in the area. He observed the man in the adjoining shower come out and stare into the next mirror. He saw that the man had an erection.

5.12.5 Mr A said that *"at this juncture A was concerned that if the man said something or advanced towards him, he would need to revert to physical action"*. After a minute the man walked off around the corner but twice looked around that corner to see if Mr A was still there.

5.12.6 At this point the statements vary. The first account (393 – 4) said that he was uncomfortable because he believed the other person was likely to be a senior manager and thought that he might be a particular senior manager whom he understood to be gay. This was a reference to Mr Z. In the other account he only said that *"He may be a senior manager and he really didn't feel comfortable confronting him"*.

5.12.7 Mr A then began to quickly change as did the other man. Mr A decided to say something and the following exchange took place:-

Mr A said: *"Excuse me, what is your name?"*
The man immediately replied: *"Paul"*
Mr A said; *"Paul"?* to which the man went red and said *"Why do you want to know?"*
Mr A reiterated *"Paul?"* to which the man responded *"Paul Broadway"*.
Mr A responded by saying *"Oh, sorry I thought you were someone else"* and turned around and left.

5.12.8 Mr A went to the front desk to report the incident where the attendant confirmed that Paul Broadway was not a member. Mr A asked that the matter be taken further.

5.12.9 As Mr A had missed his train he went to the Respondent's Security at the ground floor reception and explained what had happened. He was contacted the next day by the Security and asked to check the video footage of the previous night. He identified the Claimant as the person responsible.

5.12.10 After speaking to Security *"He also spoke to B to ask him if he had seen anything. B confirmed that he had seen a man in the steam room who had removed his towel and appeared to be in an excited state"*

5.12.11 At the end of the meeting Mr McLeod thanked Mr A *"for having the courage to bring this to the Bank's attention and explained* that *it was* likely *that an external law firm would be appointed to conduct an investigation and depending on their findings, a disciplinary hearing may follow, both of these were likely to entail further interviews for Mr A".*

5.13 At some time on Monday 8 November, Miss Hattrell spoke to Mr McLeod who handed her the notes he had taken of his interview with Mr A. We understand this to be the first version at page 393 – 394 rather than the other version. He also handed her his note of 8 November.

5.14 It is necessary for the Tribunal to decide whether either Mr McLeod or Miss Hattrell had a copy of Mr Ryan's report. Miss Hattrell is adamant that she did not have it and, indeed, did not see it until she saw the trial bundle for the Lamb Tribunal Hearing. We did not hear from Mr McLeod as to whether he had the report or whether he gave it to Miss Hattrell. Neither are on the distribution list for Mr Ryan's email of 7 November. Neither party gave evidence about or queried where the Ryan report had been obtained from, so as to be included within the trial bundle. Mr Quinn made it clear that he did not allege that Miss Hattrell was falsifying her evidence to conceal the fact that she had this report at the time. His case was that she should have made more vigorous efforts to obtain all relevant documentation and was accordingly negligent in not having obtained it. We were referred to a letter from the Respondent's Solicitors of 5 October 2005 (185g) in which it was stated that the report was forwarded to both Mr McLeod and Miss Hattrell and *"The latter recalls that she gave a copy of the report to Louise Dilworth and David Burnett".* As the Claimant was precluded from pursuing the implications of this statement, we have to assume that this was written in error by those Solicitors even though what they say is entirely clear. On the evidence before us we are not able to say whether Mr McLeod did or did not have the report from Mr Ryan but we find that it was not in the possession of Miss Hattrell at any time between its preparation and the end of the period which we are considering.

5.15 In her statement Miss Hattrell said that during her conversation with Mr McLeod he had told her that he had looked at Mr A's personnel file and that *"he appeared to be well respected and had recently been promoted".* In her evidence to us she said that she had asked Mr McLeod to look at Mr A's personnel file and at a time, which she could not recall, he had advised her to the above effect. In a Reply to a Request for Further and Better Particulars, dated 7 June 2005,(101) it is stated that the enquiry was instigated by Ms Dilworth on 15 November 2004. We have to consider whether these discrepancy in evidence are material to our findings. We note again that it is not the Claimant's case that Miss Hattrell has been intentionally dishonest. She may have been careless in her "rush to judgment". It is not suggested that she has been guilty of bad faith or misconduct. We have balanced these various matters, and have decided, on balance, that she made that enquiry of Mr McLeod which produced the result stated, Whilst we are not clear when the result was communicated to Miss Hattrell, we conclude that it was before she finalised her report on 8 November.

5.16 Miss Hattrell then decided to use the services of Miss Nathalie Godrey who was a Senior Associate of Messrs Allen and Overy, the Respondent's Solicitors, who was working on secondment with the Respondent at the time. We

can understand that this was a sensible and natural step to take in what was likely to be a high profile and contentious investigation. Our only concern is Mr McLeod's comment about the use of external Solicitors which appears to show that such a decision had been made before he and Miss Hattrell had spoken. No enquiry was made as to whether this had been a practice adopted in previous high profile investigations. The decision to employ Miss Godfrey was approved by Ms Almeida, who was the Director of HR for this particular part of the Respondent's business. It is difficult to assess the timing of the events on Monday 8th. It must have taken Mr McLeod some time to interview Mr A, to produce a typescript of his interview notes, then to amend them and have them signed. Miss Hattrell does not indicate at what point in the day she met with him or what other communication they had during that day. Apart from meeting Mr McLeod, it seems that Miss Hattrell did nothing on that Monday apart from speaking to Mrs Almeida and advising two senior managers, Mr M Powell and Mr S Gulliver of the allegations. Also in attendance at her meeting with them was Mr Pierre Goad who was the Global Head of Corporate Communications. He was present in case there were any PR issues arising from the allegations. We do not consider this unusual in itself since the nature of the allegations was such that they might well attract publicity. What was unusual was that Miss Hattrell omitted to tell the Claimant of his presence, when she mentioned the meeting at her subsequent interview with him. Her explanation was that this was an oversight on her part. We have considered whether this is a reasonable explanation. We find on balance that her explanation of it being an oversight is credible and we accept it. We can see no point in her intentionally hiding the matter from the Claimant.

5.17 Miss Hattrell and Ms Godfrey in consultation with each other, agreed that the allegation should be investigated using the Discrimination, Harassment and Victimisation complaints procedure at paragraph 4.14 of their Policies and Procedures rather than proceeding straight to disciplinary action. The essential difference between these policies was that the Discrimination, Harassment and Victimisation policy provides for a preliminary investigation of the allegations, before disciplinary action is considered. Miss Hattrell felt that this would give the Claimant more opportunity to raise points and make representations. It was only if the initial investigation concluded that there were reasonable grounds to believe that some form of discrimination, harassment or victimisation had taken place that the matter would be referred for a formal disciplinary investigation.

5.18 The Claimant told us that, in the weeks preceding these events, he and his partner had been receiving nuisance calls, both on their landline and the Claimant's mobile phone. Some were silent, while others accused him of being a "*faggot*". Others indicated that it was known that he was employed by the Respondent. His partner had reported the matter to BT on 1 November but the phone calls had substantially increased over the weekend of 6 to 7 November. When questioned by Mr Hochhauser about the calls, he was unable to give clear details of those particular calls.

5.19 Because of the reference to his work at the Respondent, the Claimant formed the suspicion that the calls had originated from someone who worked for them. He, therefore, decided to mention the matter to Miss Hattrell, because she was his HR contact. He had intended to do so on Monday 8 November but forgot because he was very busy. On Tuesday 9 November the Claimant told us that he

made a call to Miss Hattrell's assistant to ask for a return call from Miss Hattrell. His reason, although he did not so advise the assistant, was to discuss the nuisance calls. On the same morning Miss Hattrell decided that she had to meet with the Claimant that day to discuss the allegations. She phoned his secretary to ask him to book a room so that he could take the call in private. This was to save him the embarrassment of taking such a call in a public situation.

5.20 There was a good deal of dispute about the timing of these calls. The Claimant denied that he had ever been requested to book a room. He recalled that the call to his secretary had been made about lunchtime and not in the morning, as claimed by Miss Hattrell. Miss Hattrell was clear, however, that she had phoned his secretary in the morning, and certainly before she saw Mr A at 11.45. We note that the Claimant sent a blank email to Miss Hattrell at 11.34 (379M) for which he could offer no explanation save that it was a mistake. Miss Hattrell acknowledged that he had rung her assistant but she had intentionally decided not to ring him back, even though she did not know the reason for his call, because of the likely embarrassment of having to contact him later about her investigation.

5.21 On balance we prefer the evidence of Miss Hattrell about the timing of these calls. She had to meet with the Claimant at some time that day, after seeing Mr A. It is likely that she made those arrangements as early as possible and before she tried to contact Mr A. We find, therefore, that she made her call to his assistant prior to the Claimant contacting her about the nuisance calls. The blank email, which at one time the Claimant disputed having sent, shows that he was trying to communicate with her at that time. As she met Mr A at 11.45 it would seem unlikely that she delayed communicating with the Claimant's secretary until as late as 11.34.

5.22 During Tuesday 9th Miss Hattrell began her investigation. We know that at 11.45 she interviewed Mr A. She did this in the presence of Miss Godfrey and with Catherine Antcliffe, a trainee at Allen and Overy, who was to take notes. We have before us a typescript of those notes (415 – 424). We have also had produced to us Ms Antcliffe's manuscript notes (379a – 379l) from which it appears that part of those notes had been omitted from the typed record. The part omitted begins three lines from the bottom of a page (379k) and includes the subsequent page. In view of the fact that the omission was spread over two pages, it seemed unlikely to the Tribunal that the omission was unintentional. Someone had made a decision not to record those parts in the subsequent note. No investigation was made before us as to who had been responsible for the typescript of the notes, although Miss Hattrell confirmed that she had checked them. It would seem likely, although we do not know, that it was done by Messrs Allen and Overy, since the font used for the interview is similar to that of the investigation report which was agreed to have been prepared by them. Miss Hattrell must be at fault to some extent in respect of this omission. The document is not a statement but a record of an interview and the information omitted should have been included. The typescript was available the next day, since it is included in Miss Hattrell's report. She is to be criticised, at the very least, for failing to notice the omission of a substantial amount of text from an interview that had only happened on the previous day. Whether she had the ability to check the document against Miss Anticliffe's notes, we do not know. We accept her evidence that she was not herself responsible for the omission.

5.23 .The interview with Mr A recorded substantially the same information which

had already been recorded by Mr McLeod, although in more detail. There is again no need for us to repeat the information contained in the report in detail although we note the following matters.

5.23.1 After seeing the other man looking at him in what he considered to be an inappropriate way Mr A said that he thought "*What are you fucking looking at*", but then thought "*Whatever, just carry on with getting ready*".

5.23.2 He referred to there being 20 to 25 showers where in fact there are only 13. With regard to the cubicles, he said "*There is frosted glass between the cubicles. You cannot see through but it is fairly transparent*".

5.23.3 He gave details of the positioning of the other man and confirmed that he could see him masturbating.

5,23.4 He said about the person :-
"*I thought about the fact that there is allegedly a high profile individual who is homosexual at HSBC. I also thought that whoever was working late was likely to be a manager of one description or another, probably a senior manager. I was not going to confront him. If we met on the street I would confront him verbally, maybe physically, but I have worked at HSBC for 15 years and I know how to behave here*".

5.23.5 After he had got out of the showers as had the other man, he said

"*I could see him looking at me but I was just towelling down, I decided I was not going to say anything. I am a big guy and I knew that I could handle myself if necessary*".

Later he said

"*Twice after that he popped his head round the corner and I thought "you are a nonce"* and *"I am the wrong guy to do this to*".

5.23.6 As he was about to leave he said that
"*I was irritated and couldn't leave without saying something so I asked him his name. He immediately said "Paul" so I asked "Paul what?" and he asked why I wanted to know. He immediately turned red and flustered. I have met lots of people in my job and it clear he was flustered. He said "Paul Broadway" so I said that I had thought that he was someone else. I then smiled and left*".

5.23.6 Subsequently after talking to the people at the gym reception, he spoke of Mr B's involvement as follows:

"*When B came out, the guy from the gym asked him if he had seen a guy acting strangely, B said that a guy had sat down next to him in the sauna/steam room, opened his towel and stared at B. Generally men in saunas don't look at each other. B had caught the guy's eye a couple of times and he had looked away. B had thought the guy was high profile and therefore didn't say anything*".

5.23.7 When asked why he thought the guy was high profile Mr A said:-

"We work in an environment where these things get exaggerated. People hear that someone is homosexual and then hear rumours, so he didn't want to approach him."

The other person is in the gym late in the evening, the chances are that it will be someone senior, for example a manager".

5.23.8 Subsequently Mr A gave details of his viewing of the camera footage and how he had identified the Claimant.

5.23.9 Because of the omission from the report, we find it important to record what was omitted, which was the following:-

*"**NH** We will be interviewing other people including the guy. We won't disclose your name/where work.*

***A** Don't have ???????. I + guy know what he was doing*
Know he is senior. He might be connected to certain people. Say cannot prove anything. Chance I am going to come across other people. Just don't need agro. But if I need to be identified that is OK.

***NH**. We only need to give details of a complaint to individual rather than names.*

A *He should know that behaviour inappropriate. If all that happens that he knows that, that is OK. I am not interested **complaint/compensation.** I am not upset. If not discipline, no real skin off my nose.*

***NG** Anyone you would like us to speak to?*

***A** B gone to stay with his brother in Egypt. Message to AOL to call me in office. If he calls I will say please speak to HR. Won't say anything re what's been said. Would like to speak today. Have tried mobile, now going to send text. He knows this going on".*

5.24 There was a difference of opinion as to what Miss Antcliffe had recorded in the phrase entered in bold above – "***complaint/compensation***". "Complaint" was Mr Quinn's interpretation whereas "compensation" was Mr Hochhauser's view. Examination of the hand-written text did not assist us in identifying what the word was. It was not obviously either "complaint" or "compensation" and it is inappropriate for the Tribunal to speculate on what other alternatives, if any, Miss Antcliffe intended. Miss Hattrell's evidence was that she could not remember the exact words used but that she was confident that Mr A was not intending to withdraw his complaint. The words we can identify in the record do not indicate any sign that Mr A intended to withdraw his complaint. His recorded words show a concern at the implications of making the complaint but nothing stronger. On reading the whole of what he said, we find that he was concerned at what had happened and had actively sought to bring the matter to the attention of the appropriate authorities. Viewed in that manner and with the evidence which we have, we find that on balance that there is no indication in the document that Mr A had indicate a desire to withdraw his complaint.

5.25 After interviewing Mr A, Miss Hattrell spoke on the phone to Mr Ryan on what must have been a conference call with Miss Godfrey and Miss Antcliffe (425). The note only records conversation about the manner in which he and Mr A identified the Claimant from CCTV records and the Nedap system. It does not appear that Mr Ryan was asked if he had any documents which ought to be shown to the investigatory team. With the benefit of hindsight it is possible to criticise Miss Hattrell for not making an enquiry as to whether any such documents existed. She looked at the CCTV records herself, as we record subsequently. On the other hand, Mr Ryan was only a Security Manager and the particular relevance of his evidence was the attempts which he had made with Mr A to identify the Claimant.

5.26 At 2.40 the same individuals interviewed Mr Austin whom they went to see. He was the Duty Manager of the gym. He recalled that Mr A had wanted to know the names of someone who was in the gym at the time. After initially stating that he could not provide information such information, he agreed to see if there was any user called "Paul Broadway". He had found that no such person was registered with them. Mr A then substantially repeated the complaint which we have already recorded. He recalled Mr B saying

"He could confirm that a man had been acting strangely in the changing rooms. The man had been in the sauna with him and B had thought he was behaving strangely. Obviously B and A had talked about it".

5.27 Sometime during the same day Miss Hattrell also contacted Mr Ian Bradley, the Duty Security Manager, and viewed the CCTV footage upon which the Claimant had been identified. She confirmed that this identified the Claimant. She also spoke to Helen Atherton who then organised the meeting with Mr Austin.

5.28 Between 3.15 and 3.20 she telephoned to the Claimant on his mobile phone, anticipating that he was in a private meeting room at the time. The Claimant disputes this, saying that he was on the business floor. Miss Hattrell doubted that this was so because she could not hear any background noise on the phone. We appreciate that it is 3 years since the incident and the point is not very material in any event. There is also a dispute as to what then happened. Miss Hattrell says she expressly asked the Claimant to come to the Allen and Overy offices and gave him directions. The Claimant agrees that he was asked to attend at an external office but says that he was asked to meet her in *"another HSBC building"* because *"there had been a complaint about someone in my team and unfortunately that person was me. As the complaint was of a sensitive nature, could I meet her in another HSBC building".* We find on balance that the Claimant's account is more likely.

5.29 On arriving at the other office the Claimant quickly realised that he was in the offices of Allen and Overy. He was met by Miss Hattrell and introduced to Ms Godfrey and Miss Antcliffe. A note was taken of this meeting, which in some places has been challenged by the Claimant. It was agreed by all that it was not a transcript of every word that was spoken, but notes of the discussion which took place. The Claimant was not supplied with a copy of these notes until he received the details of Miss Hattrell's investigation and, therefore, had no opportunity of correcting any perceived errors at the time. The only evidence we received about

the notes was from Miss Hattrell who was, of course, not the person who had prepared them. We have no doubt that she entirely believed in the accuracy of the notes, supported by her own recollection of events. However, it may be that there was room for misunderstanding in the circumstances.

5.30 In general the Claimant accepted that the notes reflected what he had said. Again, we do not need to repeat in full what was said. On a number of occasions the Claimant said that the allegation was nonsense and incorrect. He said that he was *"absolutely shocked, by it"*. His consistent approach was that the allegations were entirely untrue.

5.30.1 He was asked if he used the HSBC gym and said

> *"I have been in the gym 3 or 4 times. I cannot remember whether I was there on Thursday. I sometimes go at lunchtime or in the evenings or maybe in the morning".*

The Claimant subsequently said that he had understood that he was being asked how often he had been there in the preceding week, to which question this answer would have been accurate. We were referred to a separate note made by Miss Hattrell at 424B which confirms the main note. We find that the record is accurate. The Claimant may have misunderstood the question but his response was reasonably understood to be to the question recorded.

5.30.2 He was asked about the allegation that a false name had been given by him, to which he replied:-

"There was once a guy who came over and say "who are you". *He was so aggressive that I didn't want to tell him my name. I asked him why he wanted to know and he said he had a right to know. I just made up a name and have no idea what it was that I said.*

All I can remember is that when I was leaving the changing room there was someone in the corridor and it was clear he was going to say something. He looked hostile and the way he asked me was aggressive and hostile. Is this the same guy who made the allegation?".

Miss Godfrey replied

"..What you have said mirrors the conversation that he mentions".

5.30.3 He was asked whether he remembered working out and whether he had a routine. He replied: *"I have a routine which lasts 30 minutes".* The Claimant believed that he had said that his routine went on for more than 30 minutes. In Miss Hattrell's separate notes, the figure of 30 minutes is referred to and we find that this confirms the formal note also. He could not remember being in the shower, only the incident when he was asked his name. Later on he stated *"but you cannot see through the showers",* to which Miss Hattrell replied *"He is alleging that it is possible to see".* The Claimant said *"You can see shadows but nothing more than that".*

5.30.4 Later the Claimant questioned the motives of the person who had made the allegation and mentioned that he had spoken to Miss Hattrell's assistant about the nuisance phone calls. He stated that

"It is no secret that I am gay and have had a partner for 9 years. For the last 4 weeks my partner and I have been receiving calls at home. They started anonymously and whoever it was would call at a strange time and then put the phone down".

Later he said

"It is someone who knows that I work at HSBC because he mentioned it. He said something along the lines of "I know who you are and I know you are a faggot". *We had decided that if it continued we would go to the Police. The calls are usually when I have not been there. This is why I called NH this morning. The person who called knew what I did – the calls are always very short. He knows where I live and where I work, he mentioned HSBC. This is not the first time this has happened. It was becoming annoying and upsetting for my partner. It has been suggested that the calls are being made by someone I used to work with or work with now".*

5.30.5 The Claimant also said

"I have been working in the City 21 years in a senior position and have been accused of all sorts of things. This happens when you are gay and it was pretty horrible 10 years ago. There are still people who think I have no right to have a job, never mind be senior. Over the years I have been accused of having an affair with someone I hired. Some people are convinced that you fancy all the men on earth".

5.30.6 The Claimant was then asked about what he had done on Thursday and whether he was going out that evening

"***PL:*** *I honestly can't remember.*
NH: *I know you had a big meeting on Friday morning. You finished that usual meeting on Thursday and you rushed off to do some work for Stephen Green.*
PL: *I cannot remember.*
NG: *Do you remember if the incident you mention in the gym happened on Thursday.*
PL: *I would have thought it was longer ago than that. I remember thinking that it was strange. Why would someone behave like that? I have no reason to think that anything led up to that".*

5.30.7 He was asked why he had given a false name and said

"**PL:** *Because of the way I was asked, he demanded to know. Why should I have told him.*
NG: *Did you not want to complain about it?*
PL: *What should I have said. Someone came up to me and spoke to me in an inappropriate manner? Maybe I should have done. Maybe I should*

complain more".

5.30.8 The Claimant again queried whether there was any link with the nuisance calls and then said

"That incident in the shower is completely untrue. From what I can remember you can see a shape and not a person. It wouldn't be true that I would have a shower without water. He was saying what happened happened in the cubicle – at best you can see a silhouette, and that I had an erection – oh please, please, this is nonsense. I think he must have a hidden motive. I need to go away and think about it".

5.30.9 The remainder of the interview was concerned with formalities and general discussion. Throughout the Claimant denied the allegations. Miss Hattrell informed him, without being asked, that Mike Power and Stuart Gulliver knew about the allegations. The Claimant thought this was unfair but it was explained to him that they had been advised on a confidential basis. No mention was made of the presence of Mr Goad, as previously noted.

5.31 Miss Hattrell commented in her witness statement that *"the Claimant did not seem credible as he seemed to be changing his story as the meeting went along".* She also found it odd that he had dwelt on the allegation that he was alleged to have looked at Mr A inappropriately and had suggested that he could never defend this and had enquired what *"inappropriate"* meant. She was also concerned about the fact that he was raising the issue of nuisance calls during this interview and not before. We must presume that these views were held by her at the time of the preparation of her report and were not matters which were subsequently recorded to justify her decision. She does not mention them in her report.

5.32 Following the interview she visited the gym, noting that the Claimant had visited it 3 times on 4 November. She checked the female showers which are agreed to be identical to the male ones, and decided that there was sufficient visibility for the alleged act to be seen. It has been conceded by the Claimant that this was a correct conclusion.

5.33 Having carried out these investigations Miss Hattrell started to prepare her report in conjunction with Ms Godfrey. She decided that, on balance, Mr A's account was corroborated by Mr Ryan and Mr Austin. The gym records show that both Mr A and the Claimant had been in the gym at the time of the incident. The Claimant had corroborated this when he recalled being approached and asked for his name. She felt Mr A's account had been credible. In contrast, she did not believe that the Claimant had been entirely credible. He had been unable to remember whether he had been in the gym on the evening in question, or on that day, yet the gym records showed that he had been there three times. She found it surprising that the Claimant could not recall this a few days later when interviewed. She took account of the fact that the Claimant had denied that it would be possible for Mr A to see the actions he described through the shower glass. She had found that it would have been possible. She was not convinced by the Claimant's reasoning for giving Mr A a false name. She thought it odd that he should feel the need to do so on work premises. On this basis she decided that there were

reasonable grounds to believe that the alleged incident had taken place. She asked Natalie Godfrey to prepare a first draft of the investigation report, having communicated her decision and reasoning to her. She believed that Ms Godfrey could draft the report more expeditiously than herself and in a clearer format.

5.34 We are not entirely clear as to the sequence and timing of the production of the final report. We have been taken in the bundle to three drafts of it. The fact that it has been amended and re-amended shows that detailed consideration and thought was given to the process of preparing it. The final report appears to have been concluded not later than 9.30 on Wednesday 10 November because it was at that time presented to Mrs Dilworth. No doubt both Miss Hattrell and Ms Godfrey had to work both late on Tuesday and early on Wednesday to achieve this objective.

5.35 The final report records the evidence, which had been put before her, in what we find to be a fair and balanced reflection of the factual details of Mr A's complaint and the responses of the Claimant at the meeting on 9 November. There is no need to repeat in this judgment the findings of the report which are recorded at pages 380 to 387 of the bundle. At paragraphs 18 – 25 she concluded that on the evidence, which she assessed, and on the facts which she had referred to:

> *"the evidence suggests that PL was in the gym at the relevant time of the incident and was the person identified by A whilst with G (Mr Ryan)".*

She then went on to consider the allegations which had been made. She concludes, at paragraphs 57 – 65 the following:

57 *A and PL are consistent in respect of there being an incident where A asked for PI's name and PL provided a fake name. PL says he cannot recall any of the incidents leading up to this, nor when it happened. PL also stated he did not think he would be able to identify the individual who had challenged him in an aggressive manner.*

58: *On the evidence it appears that PL felt he was being challenged aggressively. We note that it is possibly unexpected that, particularly given his seniority and that it was on bank's premises, PL gave a false name. In addition we note that despite PL saying he felt that he had been challenged aggressively to the extent that he felt compelled to give a false name, he did not then report the incident and could not recall when the incident had taken place. He said that he did not think he would be able to identify the individual who had approached him.*

59: *PL stated that he had not visited the gym particularly often but the documentary evidence did not support this. PL said he could not recall anything about the events of last Thursday and in particular whether he was at the gym and what he was doing after he left working on Thursday 4 November 2004.*

60: *Whilst PL maintained that it was not really possible to look through the glass partitions in the showers, when we investigated what could be seen*

through the glass it was reasonable to conclude the glass was in fact fairly transparent.

61: On balance there is evidence to support the fact there was an incident which led A to challenge PL and this took place on 4 November 2004.

62: The evidence does not conclusively point to exactly what happened in the male changing rooms but it is clear that A reported an incident to the duty manger, tried to check the identity of the individual, went to security and subsequently reported the matter to Human Resources.

63: On the evidence it appears that A did not know who PL was and, in fact, thought he might have been Z. Consequently A took a number of steps to try to identify him immediately after the incident on the following morning. Although PL thought that A must have known him, the evidence does not support that assertion, particularly given that A does not work with PL.

64: We also note that PL stated he was trying to contact Nathalie Hattrell on the day he was interviewed regarding the concerning calls he and his partner had received. He did not state that he thought it was A who had made the calls but he was concerned that it may have been someone at HSBC. This is a matter that should be followed up by the Bank.

65: In light of the above, there is evidence to support that A's evidence was largely consistent and he did believe he was subjected to conduct that was of a non-verbal sexual nature by PL and this was in breach of his right to dignity in the workplace. This conduct could constitute gross misconduct under the company's disciplinary procedures".

5.36 Miss Hattrell has been criticised for the speed at which she conducted the investigation. It was, after all, largely completed during the course of Tuesday and the early hours of Wednesday. No evidence was given to us as to whether this was usual or unusual. The explanation she gave in her evidence was that she understood how difficult the situation was and she did not wish to draw matters out unnecessarily for either the Claimant or Mr A. It was not queried whether it was the usual practice for her to come in so early or to stay so late for such purposes.

5.37 She was further criticised for failing to give Mr A a warning of the consequences of giving false evidence. The Respondent's procedures indicate that making false allegations would result in disciplinary action. We heard no evidence that it was the usual practice of the Respondent to warn individuals making complaints under the Discrimination, Harassment and Victimisation policy, of such consequences.

5.38 She was also criticised for not questioning the Claimant about his attitude to relationships, exhibitionism, masturbation and casual sex. It was obvious that such a thought had not crossed Miss Hattrell's mind as being relevant to the issues. We have no evidence as to whether it was usual or unusual to ask such questions.

5.39 On the morning of Wednesday 10 November, having concluded her report, Miss Hattrell went to see Mrs Almeida to advise her of the conclusions. As a

result Mrs Almeida instructed Louise Dilworth to deal with the next stage of the process which would be a formal disciplinary investigation of the facts. At about 9.30 Miss Hattrell went to see Ms Dilworth with her report. She gave this to Ms Dilworth, together with the notes, interviews and CCTV footage. This was only a very brief discussion lasting only between 10 and 15 minutes. Miss Hattrell accepts that during this visit she suggested that the Claimant should be suspended because of his seniority and the need to keep the matter confidential. Both Miss Hattrell and Ms Dilworth agreed that this was said and were equally clear that the ultimate decision rested with Ms Dilworth.

5.40 Later both Ms Dilworth and Miss Hattrell then went to see Mr Bucknell who had been nominated as the person to conduct the disciplinary investigation. This meeting took place at between 10.30 and 11.00am and again lasted only 10 minutes. Miss Hattrell was taken as Ms Dilworth thought that she would be in a better position to answer questions because she had only had approximately half an hour to familiarise herself with the file.

5.41 Prior to this Ms Dilworth had given some consideration as to whether the Claimant should be suspended. She decided that it was possible that he could bump into Mr A at the gym, in the lifts or anywhere in the building. She thought it important that this possibility was removed. Secondly she considered that a risk could not be taken that a further incident would occur because of the duty of care owed to all of their staff. She balanced this against whether it was appropriate that the Claimant remain at work during the investigation because there were no allegations of a breach of trading conditions. On balance she decided that it was more appropriate to suspend. She said that this was common practice in the Respondent's business when allegations of sexual harassment were involved. She telephoned the Claimant to make an appointment to tell him of her decision, prior to going to meet with Mr Bucknell.

5.42 Ms Dilworth met the Claimant at 12.00 noon, together with a note-taker, and gave him a letter suspending him from work on the grounds that he had subjected A

"to unwanted behaviour of a non-verbal sexual nature contrary to the Bank's discrimination, harassment and victimisation policy".

The letter further advised him that a formal disciplinary investigation had been commenced and reminded him that he would be required to co-operate with this.

5.43 The Claimant had a subsequent conversation on the telephone with Ms Dilworth in which he made a note recording that she had said

"We just want to find out what really happened and you are best placed to tell us. This is your chance to go away and think over the weekend and to explain and tell us what really happened. You can add to the statement you made yesterday".

Ms Dilworth remembered the conversation but could not remember the use of the word *"really"*. If she had said it, she believed that it was used as a neutral word rather than an indication of any subconscious belief or disbelief. Having considered the evidence, we find that the word was used and that the Claimant's note is

accurate.

5.44 Miss Dilworth had intended to give the Claimant a letter regarding the disciplinary investigation at the 12.00 meeting. However, because steps were still being taken to anonymise the witness statement, she could not do this until the following day. On 11 November she wrote a letter to the Claimant (436 - 437) requiring him to attend an investigatory interview under the disciplinary procedure on the following Friday, the 12th. She identified the allegations which were to be investigated. The first was:

"***Allegation one***
On 4 November 2004 between 20.40 and 21.00 you subjected an employee (X) of the Bank to unwanted behaviour of a non-verbal sexual nature, contrary to the Bank's Discrimination, Harassment and Victimisation policy".

She then set out 5 individual aspects of that alleged behaviour. She also referred to the following:

Allegation two:
In addition another employee (Y) (who has not raised a complaint) alleges that you were in the steam room and had removed your towel and appeared to be in an excited state".

5.45 We were referred to a note which Ms Dilworth had appended to an email from the Claimant of 24 November (562 – 563) where she wrote –

"N. *The second allegation was raised as a material part of the whole allegations during the complaints procedure and as such it was included in the investigation. Nathalie and LD included allegation 2 in the investigation."*

In cross-examination she commented on the bad grammar of the note and said that she had become aware of the second allegation through Nathalie Hattrell's investigation and that she had decided to include it in the disciplinary investigation. She was very firm that it was her decision and not Miss Hattrell's. She said that she was aware that Mr B had not been interviewed but she felt it was appropriate to include such a reference because she thought that the Claimant ought to be aware of all the information she had. She also did it because she believed it was her role to flag up all the potential issues for the disciplinary hearing to consider and, as she was aware of the second allegation, she believed it should be included in her letter to the Claimant. We have some concerns about the nature of the allegation which she chose to use, since there were several versions of the words which Mr B was supposed to have used. She did not use the wording in Miss Hattrell's report but that of Mr Mcleod's notes. She was not questioned as to why she made that decision. Her choice shows that she did not just follow Miss Hattrell's lead and had read all the papers. Having considered all of the evidence before us we find that the decision to include the second allegation was made by Ms Dilworth alone and not jointly with Miss Hattrell

5.46 The disciplinary procedures continued after these events but we are not required to make any findings in relation to them. These are therefore the total facts upon which we found our decisions.

THE LAW

6 The Claimant's complaints are founded on the provisions of the Employment Equality (Sexual Orientation) Regulations 2003. The following are the regulations to which we must have regard.

> ***3 Discrimination on grounds of sexual orientation***
> *(1) For the purposes of these regulations a person ("A") discriminates against another person ("B") if –*
>
> *(a) On grounds of sexual orientation A treats B less favourably than he treats or would treat other persons.*
>
> *(b) A comparison of B's case is that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.*
>
> ***6 Applicants and employees***
>
> *(2) it is unlawful for an employer in relation to a person whom he employs at an establishment in Great Britain, to discriminate against that person*
> .....
> *(d) by dismissing him, or subjecting him to any other detriment.*
>
> ***29 Burden of proof: Employment Tribunals***
> *(i) This regulation applies to any complaint presented under regulation 28 to an Employment Tribunal.*
>
> *(ii) Where on the hearing of the complaint the complainant proves facts from which the Tribunal could, apart from this regulation, conclude in the absence of an adequate explanation that the Respondent -*
>
> *(a) has committed against the complainant an act to which regulation 28 applies; or*
>
> *(b) is by virtue of regulation 22 (liability of employers and principles) or 23 (aiding unlawful acts) to be treated as having committed against the complainant such an act.*
>
> *The Tribunal shall uphold the complaint unless the Respondent proves that he did not commit or as the case may be, is not to be treated as having committed that act."*

7 The approach to be adopted under the Burden of Proof provisions has been firmly established in ***Igen Limited v Wong [2005] ICR 931***. The same approach applies over the whole field of discrimination where those provisions apply. It is unnecessary for us to set out in detail the 12 principles proposed there. In essence they are:-

7.1 That it is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, without considering the explanation of the Respondent, that an act of discrimination had occurred. If the Claimant does not provide such facts, the claim will fail.

7.2 We are to remind ourselves that there may not be obvious evidence of discrimination since few employers are prepared to admit that it exists. We, therefore, have to consider whether the facts which we find give rise to any inferences that such discrimination might have occurred. In doing so we must not take into account the explanation of the Respondent for its conduct.

7.3 If the Claimant has proved facts from which inferences could be drawn that less favourable treatment has been on the grounds of his sexual orientation, the burden of proof moves to the Respondent.

7.4 It is therefore for the Respondent to prove, on the balance of probabilities, that the treatment was in so sense whatever on the grounds of sexual orientation.

8 The test has been further considered in ***Madarassy v Nomura International Plc [2007] IRLR 246***. In the headnote to that authority the following is stated:-

"The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could" conclude that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination

"Could conclude" in section 63A(2) must mean that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence produced by the Claimant in support of the allegation of sex discrimination, such as evidence of difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the Respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage, the Tribunal needs to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the Claimant to prove less favourable treatment, evidence as to whether the comparisons being made by the Claimant were of like with like, as required by section 5(3) ot the 1975 Act, and available evidence of the reasons for the differential treatment".

9 We were also referred to ***Bahl v The Law Society [2004] IRLR 799***, at paragraph 101 of which, Lord Justice Peter Gibson said:

"It is correct, as Sedley LJ said, that racial and sexual discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it...it is not the case that an alleged discriminator can only avoid an adverse inference by proving that he behaved equally unreasonably to everybody. As Elias J observed (paragraph 97):

> *"Were it so the employer could never do so where the situation he was dealing with was a novel one, as in this case".*

Accordingly, proof of equally reasonable treatment of all is merely one way of avoiding an inference of unlawful discrimination. It is not the only way. He added

> *"The inference may also be rebutted – and indeed this will, we suspect, be far more common – by the employer leading evidence of a genuine reason which is not discriminatory and which was the ground of his conduct. Employers will often have unjustified albeit genuine reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination to be made. Even if they are not accepted, the Tribunal's own findings of fact may identify an obvious reason for the treatment in issue, other than a discriminatory reason."*

10 We also have to consider that the motivation may be sub conscious. Mr Quinn has referred us to a number of authorities but in particular:–

> ***Chief Constable of the West Yorkshire Police v Khan [2001] ICR 1065***
> ***Nagarajan v London Regional Transport [1999] ICR 377***

He specifically refers us to the judgment of Lord Nicholas in ***Nagarajan*** at 885:

> *"I turn to the question of sub conscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim, members of an Employment Tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realises at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference, the Tribunal must first make findings of primary fact from which the inference may be properly drawn. Conduct of this nature by an employer when the inference is legitimately drawn falls squarely within the language of section 1(1)(a). The employer treated the complainant less favourably on racial grounds. Such conduct also falls within the purpose of the legislation. Members of racial groups need protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination".*

11 We have also been referred to the decision of ***R v Immigration Officer at Prague Airport [2005] 2 AC 1.*** Baroness Hayle stated as follows:-

> *"If direct discrimination... is shown, that is that. Save for some very limited exceptions, there is no defence of objective justification. The whole point of the law is to require suppliers to treat each person as an individual and not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not*

most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping. Even if, for example, most women are less strong than most men, it must not be assumed that the individual woman who has applied for the job, does not have the strength to do it. Nor, for that matter, should it be assumed that an individual man does have that strength".

Later in that decision she approved comments made by Laws LJ in the Court of Appeal. He stated:-

"One asks Lord Steyn's question in ***Nagarajan v London Regional Transport [1999] IRLR 572:*** *why did he treat the Roma less favourably? It may be said that there are two possible answers:*

(1) Because he is Roma;

(2) Because he is more likely to be advancing a false application for leave to enter as a visitor.

But it seems to me inescapable that the reality is that the officer treated the Roma less favourably because Roma are (for very well understood reasons) more likely to wish to seek asylum and thus, more likely to put forward a false claim to enter as a visitor. The officer has applied a stereotype: though one which may very likely be true. This is not permissible. More pointedly, he has an entirely proper reason (or motive) for treating the Roma less favourably on racial grounds; his duty to refuse those without a claim under the rules, manifestly including covert asylum seekers and his knowledge that the Roma is more likely to be a covert asylum seeker. That is irrelevant to the claim under section 1(1)(a) of the 1976 Act".

On the factual premises adopted by the Court of Appeal this conclusion must be correct as a matter of law".

We have applied all the above dicta to our findings in this matter

Findings

12 We start our decision making process, therefore, by considering whether, in accordance with the provisions of regulation 29, the Claimant has proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of unlawful discrimination. The first stage in that process is to make findings of fact. We have done this and our findings are set out above. The next step is to consider whether the Claimant has been treated less favourably than the Respondent has treated others or would have treated others in respect of the four Issues with which we are concerned. No specific comparator was relied upon by the Claimant. We therefore have to consider how the Respondent would have treated a hypothetical comparator. Lord Nicholls in ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337*** suggested that in many cases it would be preferable to deal with *"the reason why issue"* first, before dealing with comparators, because this might resolve the less favourable treatment issue in any event. We have decided that this is not a course which we should adopt in this case because it seems to us that the issue of whether the Claimant was less

favourably treated than others would have been, is an important issue in the matter.

13 To assist us in our task the parties have agreed on the attributes of the hypothetical comparator by substantially adopted the findings of the Lamb Judgment in that connection. The following are the agreed characteristics.

> *"To summarise then: these are the characteristics of the comparator:-*
>
> *(i) accused of gross misconduct in the form of sexual harassment, of a nature agreed to be a sexual offence.*
>
> *(ii) has a sexual orientation which is "*clearly relevant*" to the allegation.*
>
> *(iii) does not know his accuser and accused does not know him.*
>
> *(iv) he gives a false name.*
>
> *(v) he gives a version of events which is in dispute with that of his accuser so that any "*adjudication*" must decide whether he or his accuser is being untruthful.*
>
> *(vi) there is no rational basis for explaining the accusation by reference to a plot or scheme to have him dismissed.*
>
> *The accused is interviewed and found to be "*convincing*".*

It has greatly eased the task of the Tribunal that the parties have agreed on these matters. However, there still remains the difficulty for the Tribunal in deciding how such a hypothetical comparator would have been treated in the same or not materially different circumstances. We received very little evidence which would assist us in this task. We were not told of what had happened in any other investigations under the Discrimination, Victimisation and Harassment Policy. As a result we have no picture of what the Respondent has done in other cases. In these circumstances we have decided that we can gain some assistance from the policies and procedures which we have set out in some detail earlier in this judgment. These are important since they establish the aspirations of the Respondent, as an organisation, as to the ways in which it would propose to deal with its employees in various circumstances. A departure from such procedures might be instructive in considering whether the Claimant had been less favourably treated. Having said this, we must also comment, that we are conscious, from the many cases which are brought before us, that the employers' hopes and expectations set out in their policies and procedures are frequently not maintained in practice. Even so the policies are written as a yardstick for the treatment of employees and it is only appropriate that they be used as a yardstick to judge the employer's treatment of a particular employee. We have no other evidence, apart from the Tribunal's employment experience, on which to assess whether the treatment, which we find has occurred, was in fact less favourable than would have been afforded to others. We have also decided that we must consider the Claimant's treatment in the context of the each individual stage of the procedures which were invoked. A separate stage of the procedure was relevant to each of the four issues that we have to consider. We must look at the relevant procedure for each issue.

14 We propose, therefore, to look at each of the four issues individually and decide whether in each case there has been less favourably treatment. If we decide that there has been less favourably treatment, we will go on to decide whether that could have been on the grounds of the Claimant's sexual orientation, bearing in mind the dicta set out above. If we decide that there are such inferences and the Claimant could have been subject to an act of discrimination, we will then consider the Respondent's explanation.

Issue 1 – The conclusions in the initial investigation

15 We have set out earlier, in some detail, the nature of the conclusions which Miss Hattrell reached. To summarise, she found that the Claimant was in the gym at the relevant time and was the person identified by Mr A. The Claimant does not now dispute this. Later in the report at paragraphs 57 to 65 she sets out her findings that there was an incident which led Mr A to challenge the Claimant. She then states that the *"evidence does not conclusively point to exactly what happened"*. She finally concludes that there was evidence to support the consistency of Mr A's evidence that he had been subjected to conduct that was of a non verbal sexual nature of a type that could constitute gross misconduct. In reaching that decision she appears to balance the evidence and establish that there is corroboration in Mr A's immediate report of the matter. She is concerned about the Claimant's use of a false name. We find her report to be a carefully considered document which does not leap to the immediate conclusion that the Claimant was guilty as alleged. The framework for the investigation which she carried out is set out at paragraph 4.14 in the Discrimination, Harassment and Victimisation Complaints Procedures. The acts alleged by Mr A fell within the definition of sexual harassment as being *"non verbal conduct of a sexual nature"*. There is an obligation on managers to investigate allegations of harassment. At paragraph 4.14 the Respondent's aim is stated to be to *"resolve any complaints as quickly as possible"*. Paragraph 4.14(2) requires that the allegations be investigated carefully and discreetly. At the end of an investigation it was only required that it should be "*concluded that there are reasonable grounds to believe that some form of discrimination, harassment or victimisation has taken place*" for any further action to be considered. It is only if that conclusion is reached that the matter proceeds to disciplinary procedures which involve more senior members of line management who are to carry out a detailed investigation into the allegations.

16 The investigation carried out under the Discrimination, Harassment and Victimisation Complaints Procedure is a preliminary investigation only. Its purpose is to consider whether there is any reasonable basis to the allegations. A formal decision as to what should be done about any such reasonable belief is taken subsequently in the disciplinary investigation and procedures.

17 The Claimant criticises what Miss Hattrell did in a number of ways:-

The deletion of part of the interview of Mr A.

17.1 We have found that the latter part of the interview of Mr A was not transcribed. We have had no explanation as to why this was not done. Our conclusion has been that it was omitted intentionally, but it is not clear to us that the decision was that of Miss Hattrell. It is more likely to have been that of Ms Godfrey or the note-taker, in editing the notes. We have found that there was some degree

of carelessness on the part of Miss Hattrell in not noticing that part of the interview had been omitted. Such carelessness is based on her failing to recall that more had been said in the interview than was finally recorded. We do not find that the parts omitted were of great relevance. In this part of the interview, Mr A was talking about general matters rather than the nature of his allegations. One very important matter was whether Mr A was indicating an intention to withdraw his complaint, and we deal with that subsequently. The issue which we have to decide is not whether this omission is less favourable treatment in itself, but whether it can be considered to have affected the conclusions which she reached. It is not alleged to be a free-standing issue of discrimination. We must judge Miss Hattrell upon the high standards which the Respondent expects in such matters and find that the omission should not have occurred. On the other hand, we cannot find that this omission of information, which was not specifically relevant to the allegations which were being investigated, has in any way affected her final conclusion.

Checking that Mr A wanted to make a formal complaint

17.2 Miss Hattrell is criticised for not confirming with Mr A that he wanted to make a formal complaint. This criticism is coupled with the omission of part of the interview with Mr A. There was contention over whether Mr A had indicated that he was not interested in *"compensation"* or *"complaint"*. We have already found that we cannot decipher the word ourselves and we were not assisted by any evidence from the author of the document. The general tenor of the several interviews with Mr A, however, make it quite clear that he had intended to make a formal complaint, although he had, by the time of this interview, some reservations should the complaint involve a senior member of management. We can understand such reservations entirely. Having considered the document carefully we can see nothing in what he said to suggest that he had any reluctance to the matter going ahead as a formal complaint. He had instigated the procedures and had cooperated with all of the Respondent's investigations, where his complaints had several times been recorded in writing. We do not see anything to support the contention that Mr A was a reluctant complainer or that the complaint was pursued against his wishes.

Mr A's homophobic language

17.3 An examination of the evidence of Mr A, as recorded at each stage, reveals a use of language which shows that he had immediately jumped to the conclusion that the person, about whom he had complained, was gay. We are not clear that his use of the word *"nonce"*, which was technically a reference to a paedophile, falls within this general finding, since that would have made little sense in the circumstances. However, we believe that it is also a word of abuse used towards gay individuals. When coupled with A's immediate reaction that it was Mr Z who was present, it is clear that he had jumped to the conclusion that the alleged offender was gay. There are also indications in his evidence that he had an antipathy towards gay individuals. He shows himself ready to offer violence towards such a person. We cannot deduce from that evidence, that these views affected Miss Hattrell in the conclusions to which she came. She was merely recording his evidence. It is also suggested that Mr A was treated with undue consideration. Specifically, he was thanked by Mr McLeod for reporting the matter and was informed of progress in the investigation on a regular basis. This we note is entirely in accordance with the policies which require the complainant to be reported to at the *"earliest opportunity"*.

Ryan report

17.4 We have found that Miss Hattrell did not see the Ryan report. The criticism levelled at her is that she never checked or asked Mr Ryan during her telephone interview with him, whether he had had any relevant documentation. On the evidence before us, we find that she did not do so. With the benefit of hindsight, this can be seen to be an error. We did not know when this document eventually surfaced and from where. Mr Hattrell told us that she had first seen it during the disclosure process for these hearings. We were not informed whether Mr McLeod had the document and failed to hand it over or whether he too had not seen it. At the highest, therefore, the criticism is that Miss Hattrell failed to make enquiries about whether Mr Ryan had any document which might be relevant. We are not convinced that this in itself is an act of serious carelessness. We are not, after all dealing with the skilled investigation which a Police Officer or other trained investigator might carry out. It would have been best if she had made enquiries about documents but we find ourselves unable to conclude that, in any other investigation, she would not have acted in exactly the same way in view of the preliminary nature of the investigation which she was carrying out. It is also not clear to us what benefit that report would have been to her. It substantially agreed with the details which both she and Mr McLeod had obtained.

Checking on Mr A's personal file

17.5 Miss Hattrell was further criticised for not having made enquiring as to Mr A's background and personal file. The purpose of such enquiries would have been to establish whether he was a reliable complainant. There is some dispute on the evidence on this matter. Miss Hattrell says that she was given the information by Mr McLeod but could not recall exactly when. Her written statement suggests this was done at their initial discussion. This conflicted with the answer given by the Respondent's Solicitors in a Reply to a Request for Further and Better Particulars which stated that the investigation was not carried out until 15 November 2004, at the request of Ms Dilworth. In view of other inconsistencies in communications from the Respondent's Solicitors, we have decided that we should not attach great weight to what is said there. Despite the uncertainty on the matter we find, on the balance of probabilities that at some stage during the two day period of her involvement in the investigation, Miss Hattrell was advised by Mr McLeod that he had looked at Mr A's file and had found nothing adverse to Mr A therein. It was not suggested that this information was inaccurate. We can see nothing inappropriate in her relying on the assurance of Mr McLeod a fellow Human Resource Officer

Failing to warn Mr A about disciplinary procedures

17.6 Mr Quinn suggested that Mr A should have been warned of the disciplinary implications of making false accusations. The policy makes it clear that disciplinary procedures will follow false accusations. No evidence was adduced that such warnings were usually given and we cannot find any basis upon which we could decide that there was any departure from normal procedure. Indeed, we would comment that it would be entirely inappropriate to issue such a warning in most complaints of harassment since this might have the effect of deterring genuine complaints.

Nuisance calls

17.7 The Respondent was further criticised for not pursuing the report made by the

Claimant about nuisance calls. They were of importance since the Claimant suggested they might have emanated from someone within the Respondent's business. Miss Hattrell was only advised about them on the afternoon of Tuesday 8 November and proposed in her report that the matter should be followed up. It is difficult to see what more she could have done in the circumstances.

Questioning the Claimant on his attitude

17.8 Mr Quinn suggested that questions should have been put the Claimant as to his attitudes to relationships, exhibitionism, masturbation and casual sex. We find it to be an entirely inappropriate that such questions should have been put. If they had been put there is little doubt that Miss Hattrell would have been criticised heavily for asking questions which related to the Claimant's sexual orientation. We have no hesitation in stating that she was right not to have done so, even if the thought had passed her mind, which we doubt it did. This matter is part of submissions made by Mr Quinn about stereotyping which we deal with hereafter.

Not interviewing Mr B

17.9 Mr B was not interviewed at any stage. He had gone on holiday before the Monday and it was, therefore, impossible to do so. Miss Hattrell's report makes this situation clear. She makes no comments upon his supposed allegations. This is a situation where there was a balance between obtaining the available information and proceeding on that or waiting until Mr B returned from holiday. Attempts were made to contact him, which established that he was out of the country for several weeks. We note that at no time was it suggested that he had seen the incidents but could possibly give details of other actions which the suspected person might have done at around the same time. She chose to go ahead with what was available and as she did not rely on Mr B's reported statement, we cannot find that she acted inappropriately, or would have behaved differently with the hypothetical comparator.

Checking the statement

17.10 It was pointed out that whilst Mr A had the opportunity of checking the statement which had been prepared by Mr McLeod, the Claimant did not have the opportunity of checking his notes of interview. We do not consider that there is a straight comparison in this with Mr McLeod's actions. We have to compare what Miss Hattrell did to others in her investigation. We have to observe that Mr A also was not allowed the opportunity of checking the notes of his interview by Miss Hattrell and her team. The Claimant was given every opportunity to consider the notes at a later stages of the procedures. We had no evidence that such an option was allowed to others. We do not consider that she afforded the Claimant any less favourable treatment in this connection.

The speed of the enquiry

17.11 It has been part of the Claimant's case that there was a rush to judgment against him. He pointed to the fact that Miss Hattrell was instructed on Monday, undertook all her investigations on Tuesday and prepared a report by early Wednesday morning. This is indeed a very speedy handling of the investigation. We have recorded that the policy requires complaints to be resolved *"as quickly as possible"* and also that *"the matter will be dealt with promptly, fairly and impartially"*. There is, therefore, a clear indication in the policies that complaints should be dealt with speedily. We have had no detailed evidence about how other investigations of harassment had been conducted. We were referred to an investigation which the

Claimant and Miss Hattrell had carried out into another member of staff in relation to financial irregularities. However, this was not conducted under the harassment procedure but under the disciplinary procedure to which different criteria apply. We do not find that investigation to be an appropriate yardstick to judge Miss Hattrell's activities by. Her investigation was speedy, but we have no basis of finding that it was more speedy than other investigations would have been. It was carried out in a manner which complies with the spirit of the procedures. Mr Quinn submits that the speed led to the omissions which we have already referred to,above. We are not convinced that these omissions and errors arose from the speed of the inquiry or that that speed was less favourable to the Claimant. Ultimately her conclusions must be judged against the fairness and extent of her investigation, and the manner in which she arrived at those conclusions, rather than the speed at which they were conducted.

18 Bearing in mind all of the above matters both individually and cumulatively, we return to consider the First Issue, that is whether the Claimant has been treated less favourable by reason of the conclusions reached by Miss Hattrell. To do this we have to consider the thought processes revealed in her report and in her evidence and the evidence on which those conclusions were founded. We have found the report to be generally a well balanced and detailed assessment of the situation. A considerable amount of detailed evidence was available from Mr A. His initial complaint was corroborated by the reports that he had made to Mr Ryan and to Mr McLeod. Her investigation was thorough. All appropriate witnesses were seen and details taken from them. The fact that this was done very quickly seems to the Tribunal to be more of a credit than a disadvantage. However, we must also take into account the reasoning which she described in her witness statement as matters which assisted her in reaching her conclusions. She refers to the Claimant's failure to ask her any questions, when inviting him to the meeting, that he looked ashen-faced and worried, as if he was going to be sick when he arrived and that he seemed to be changing his story as the meeting went along. These matters are not referred to in her report. Because it is included in her statement, we must accept that this was part of her thought process. In every investigation such matters influence an investigator. We have to consider whether they and the other issues raised by the Claimant resulted in her reaching conclusions which were different from those which she would have been reached in respect of the hypothetical comparator.

19 When we return to the hypothetical comparator, we have to consider the conclusions which would have been drawn in respect of allegations made against such ar person by an accuser who is found to be convincing, where there is a dispute of evidence where one or other party must be untruthful, a false name has been given, neither party knows the other and there are no grounds to believe that there is a plot against the comparator. We must also take into account that, in relation to this issue, we are dealing with a preliminary stage of investigation to ascertain whether there is a prima facie case to be answered. If that is found to be the case, then the more detailed investigation at the disciplinary stage will follow. We have found that Miss Hattrell carried out a very thorough investigation, having interview carefully the relevant witnesses. There was a dispute between the main witnesses, the Claimant and Mr A, which had ultimately to be resolved. Her conclusion was that there were grounds of suspicion against the Claimant and, on the balance of that evidence, we have no reason to doubt that she would have come to a similar conclusion in respect of the hypothetical comparator. In reaching that conclusion we have taken into account all

the various criticisms that are made of her. It was a speedy investigation but despite that, a careful and detailed one. There can now be seen, with the benefit of hindsight, to have been some errors. She might well have asked Mr Ryan questions about additional documentation. She might well have realised the omission from the transcript of Mr A's interview. It is impossible for us to say that similar errors would not have occurred in relation to the hypothetical comparator. No one is perfect and errors do occur. We are not entitled to find that any of these omissions were intentional. We do not find that they occurred intrinsically because of the speed at which the investigation was carried out. In view of the weight of evidence which supports her conclusions, those conclusions were perfectly reasonable ones to arrive at in the circumstances. There is no basis upon which we could find that she would not have reached the same conclusions in relation to the hypothetical comparator. That comparator is accused by someone who is convincing, there is no basis for explaining the accusation by reference to a plot and a false name is given for reasons connected with the comparator's sexual orientation. She may have formed views about the Claimant's veracity from his conduct at the meeting, but she does not include these in her report. The evidence which she does rely on is strong enough, at this preliminary stage to warrant a finding that there were reasonable grounds to go to the next stage. The complaint was corroborated by contemporaneous reports and was felt to convincing. The Claimant had been unconvincing in his explanation for giving a false name. On the evidence available to us we are unable to find that the hypothetical comparator would have been treated any differently. Those conclusions should not be discounted by the errors.

20. Mr Quinn proposes that we take a step beyond this finding. He asks us to find that because of the knowledge of the Claimant's orientation, Miss Hattrell came to her conclusions with a preconceived belief in his guilt. The reasoning might go something like, *"Only a gay man might commit these acts, the Claimant is gay, therefore, he must have committed those acts".* If not expressed consciously, this was her subconscious view. By reason of that view the whole of her investigation is tainted. Unconsciously she allowed herself to commit the various errors and failings which he has identified to us in detail. As a result she has reached conclusions which she would not have reached in the case of the hypothetical comparator. Even if this was the way in which Miss Hattrell had approached the investigation, we are by no means convinced that this is the correct approach for this stage of our decision, which is only to decide whether the Claimant has been less favourably treated. It would be relevant at the next stage, the consideration of any inferences which might lead us to find that any less favourable treatment was on the grounds of his orientation. We remind ourselves of the first part Regulation 29(2), namely that it is for the Claimant to prove facts from which the Tribunal could conclude that discrimination has taken place. This must require him to prove firstly that there has been less favourable treatment. If he does not do that, then the Tribunal has no basis to move onto a consideration of the "grounds" for that treatment. This must be the case even if we were likely to find that there were inferences which might cause us to find that the Respondent was not well inclined towards gay men. Credit must be available to individuals who have prejudices, but who keep them under control and manage to treat others equally. Their actions are likely to be regarded with suspicion, but it will not be enough to rely on that prejudice alone to categorise their actions as discrimination. There will have to be less favourable treatment as well. We have not, therefore, followed Mr Quinn's approach in this connection. In considering this submission, we have made a presumption that Miss Hattrell was affected by such subconscious beliefs. We do not, in fact, make

such a finding and our reasoning is set out later in this judgement

21 Balancing all the facts which have been put before us we find that the Claimant was not less favourably treated by reason of the conclusions reached by Miss Hattrell in her report at the end of her investigation. For this reason this complaint is not well founded because we cannot find that we could have concluded that an act of discrimination had been committed. It is accordingly dismissed. Whilst we, therefore, have no need to consider the matter further, we have decided to do so, as is set out hereafter.

Issue 2 – Suspending the Claimant on 10 November 2004

22 We have found that the decision to suspend the Claimant on 10 November was made by Ms Dilworth alone. However, we can see that this decision was influenced by Miss Hattrell's comments, both because it was agreed that she did make the suggestion and by the obvious fact that Ms Dilworth was new to the matter and had a very short time within which to assimilate the evidence before her. We have to judge her actions against what she would have done in respect of the hypothetical comparator. The procedural rules establish that an employee may be suspended while investigations are carried out. Ms Dilworth's evidence was that she deemed it appropriate to suspend in view of the nature of the allegations and the possibility that the Claimant would bump into Mr A *"at the gym, in the lifts or wherever and I thought it was important that this possibility was removed"* and, secondly, because she could not risk a further incident occurring because of the duty of care owed to the other staff. We have heard very little evidence about whether suspension occurred in other disciplinary procedures. When financial irregularity was alleged, the Financial Services Commission required suspension. The Claimant suggested that it was an unnecessary step and proposed that he should have been allowed to continue to work and only be excluded from the gym. This was a perfectly reasonable suggestion. We do not have to consider what would have been the most reasonable course, but have to decide whether the hypothetical comparator would have been suspended in such circumstances. The important factors in the decision would have been the seriousness of the allegation and the likely implications. If true, the allegation was of a serious breach of the Discrimination Harassment and Victimisation policy. In the absence of any evidence of contrary action in other cases, we find that suspension, which was permitted by the rules of procedure, was likely to have been ordered in respect of the hypothetical comparator in similar circumstances. We, again, find that there was no less favourable treatment and this complaint also must be dismissed as being not well founded.

Issue 3 - Requesting the Claimant's attendance at a disciplinary investigation interview on 12 November 2004.

23 The Claimant was next required to attend a disciplinary interview. This was the inevitable result of the decision by Miss Hattrell that there were reasonable grounds for suspecting that he had committed the alleged acts. Paragraph 4.14.3 provides that where the investigation has concluded that there are reasonable grounds to believe that some form of harassment has taken place:- *"the employee or employees against whom the allegation has been made will be the subject of the company's disciplinary procedures"*. From that wording it would seem that there was little option for the Respondent but to proceed to the disciplinary stage. Indeed, that is common sense. If

the preliminary investigation produces evidence that there are reasonable grounds to believe that an offence has occurred, then it is only right and proper that that matter should proceed to the formal disciplinary procedures. Under this procedure there is a more detailed and formal investigation, and, most importantly, formal opportunities for the accused employee to explain their case. No evidence was given to us that in any other case, where the initial investigation had produced reasonable grounds for belief that an offence had occurred, disciplinary proceedings had not followed. The weight of the evidence produced by the preliminary investigation certainly suggested that the matter should go to the disciplinary stage. We, therefore, cannot find that the Claimant was treated less favourably by this. This complaint is also found to be not well founded and is dismissed.

Issue 4 – Including each of the 2 allegations in the letter dated 11 November 2004

24 We have accepted the evidence of Ms Dilworth that it was her decision to write the letter of 11 November 2004. It does not appear that Miss Hattrell had any input into the decisions indicated in that document. The letter required the Claimant to attend an investigatory interview under the disciplinary procedure on Friday 12 November. The allegations which he had to answer were set out. Allegation One was that he had subjected Mr A to unwanted behaviour of a non verbal, sexual nature. This conduct was itemised in 5 bullet points. There was then a further "**Allegation two**". This was that

> "In *addition another employee Y (who has not raised a complaint) alleges that you were in the steam room and had removed your towel and appeared to be in an excited state".*

The Claimant was sent copies of all of the evidence which Ms Dilworth had in her possession regarding the matter.

25 We are concerned that Ms Dilworth included this allegation in this way. Firstly, Mr B had made no formal complaint and had not had the chance to do so. He had therefore not been interviewed. We further note that the wording of the allegation is taken verbatim from the statement which Mr McLeod had prepared. She did not explain why she adopted this wording rather than the evidence of Mr A in his interview with Miss Hattrell which was only that

> *"B said that a guy had sat down next to him in the sauna/steam room, opened his towel and stared at B. Generally men in saunas don't look at each other".*

Further, the incident is not recorded at all in Miss Hattrell's report. As we have noted, her motivation for this selection was not investigated by either of the parties. Ms Dilworth's explained in her statement that she felt that it was appropriate to include a reference to the second allegation because she thought the Claimant should be made aware of all the information which the Respondent possessed at that stage. She considered that her role was to flag up all the potential issues for the disciplinary hearing to consider and that, as she was aware of the second allegation, it should be included.

26 As in the previous issues, we have had no evidence as to what has happened in other cases when there has been a change between the allegations considered at the

initial investigation stage and the framing of the matters to be considered at the disciplinary issue. We note that the purpose of this letter is not to make formal charges under the disciplinary procedures but only to inform the Claimant that these were the matters about which he would be interviewed. Formal charges, if any, would only be made at a later stage, at the end of the disciplinary investigation process. We understand that the second allegation was not pursued, but that is a matter which has no relevance to our present consideration. In the absence of evidence of what has actually happened in other circumstances, we again seek assistance from the disciplinary rules of procedure. They are set out at paragraph 4.15.2. They state

> *"The company is responsible for ensuring that disciplinary action is not taken until the case has been investigated and so far as is possible, the facts have been established".*

This was the process which Ms Dilworth was instigating. The procedure also requires that:

> *"At every stage in the procedure the employee will be advised of the nature of the complaint against him/her, be given time to consider the complaint, and will be given the opportunity to stage his/her case before any decision is made".*

27 The Tribunal finds that this procedure places an obligation on the Respondent, at the commencement of a disciplinary investigation, to advise an employee of the nature of the allegations which are to be investigated. Ms Dilworth had quite rightly identified that what Mr B had said was relevant. It was something that might have to be considered in the investigation. In these circumstances it was not inappropriate to identify the worst possible scenario that his evidence would place the Claimant in. What Mr B had or had not said might have to be considered as part of the general investigation of the allegations.

28 Applying those procedures to the situation of a hypothetical comparator, we have to conclude that to fairly comply with those procedures Ms Dilworth would have had to tell him about the other allegations and that these, too, might be investigated. Whilst on the one hand the extra allegation could be considered merely corroborative of Mr A's complaints, they had the potential of being a separate offence. She quite rightly advised the Claimant that Mr B had not yet been interviewed. The status of the allegation was clearly established. It was a possible disciplinary issue. On that basis it is impossible for the Tribunal to conclude that the hypothetical comparator would have been treated any differently. These were matters which legitimately needed to be looked into as part of the main incident but might form a separate incident as well. It was entirely appropriate that the Claimant be informed of the allegation so that he could prepare his evidence about them. If he had not been so advised, and Mr B's comments had been raised, he would legitimately have had some grounds for concern that he had not been informed of the allegations prior to the hearing. For these reasons also we find that this issue does not constitute less favourable treatment of the Claimant and the complaint is accordingly dismissed as not well founded.

Inferences

29 It follows from the above that we have found all of the Claimant's complaints not well founded and they have been dismissed. We have decided that it might be helpful to the parties if we further considered the matter on the basis that we might be incorrect in reaching those findings. If we had found that one or other of the above issues had constituted less favourable treatment, we have gone on to consider whether there are inferences that the Claimant's sexual orientation played some part in the Claimant's treatment. He was known by all relevant individuals to be gay. There is no overt evidence of antagonism to gay men within the Respondent's organisation, apart from the comments of Mr A, which we have detailed, and of Mr Ryan in relation to "cottaging". It seems likely that both these individuals had jumped to the conclusion that the alleged acts had been committed by a man who was gay. Mr A coupled his comments with aggressive remarks about what he might do. The issue is whether that conclusion went beyond their individual views and was shared by Miss Hattrell and Ms Dilworth. We do not find that the comments of Mr Ryan and Mr A in themselves show that there is any atmosphere of antagonism to gay individuals within the Respondent's organisation. Mr A's comments were made in the light of what he claimed to be unacceptable behaviour towards him. Mr Ryan's comment was a reaction to the allegations and a consideration of his duties to ensure that the gymnasium area was safe. We have examined very carefully the conduct of Miss Hattrell and Ms Dilworth. Each can be criticised in minor detail for the way in which they have handled the matters with which we are concerned. We have identified those matters and considered them above. We do not consider any of them to be of such a nature that we can draw from them the inference that they had a subconscious inclination to believe that the Claimant was guilty of the allegations because of his sexual orientation. They were both aware of his orientation and might have been so influenced. However, as ***Madarassey*** points out, there is a need to establish more than a difference in status and a difference in treatment. We appreciate that their prejudice might have been subconscious. Generally we find that they have been scrupulous in carrying out their tasks. We do not consider that the various errors made by each of them were more than minor errors. We are also bound by the previous findings that they had not discriminated against the Claimant by making the Claimant's sexual orientation the primary focus of their investigation, by treating the giving of a false name as probative of his guilt, by considering that there was probative value in the frequency of his visits to the gym, by considering that any inconsistencies in the Claimant's accounts were due to a desire to conceal improper behaviour, or by failing to challenge A's accounts during interview. Without these matters there is, we find, despite Mr Quinn's valiant efforts to persuade us otherwise, nothing upon which we could draw an inference that Miss Hattrell and Ms Dilworth had been influenced by his sexual orientation. We can, therefore, find nothing in the evidence before us which would enable us to draw an inference that either was subconsciously influenced by the Claimant's orientation to come to conclusions and decisions which were less favourable than they would have come to in respect of the hypothetical comparator. For this reason, also, we would have come to the conclusion that the Claimant's complaint has failed. He would not have established that the treatment was on the grounds of his orientation.

Respondent's explanation

30 Finally, we have considered the explanations given by the Respondent for its conduct. In relation to the first issue we are entirely satisfied that Miss Hattrell carried

out a detailed and careful investigation assisted by Miss Godfrey into all of the allegations. She saw all the witnesses who were relevant. There were some errors in her procedure but these were not substantial and they did not in any way affect the content of her conclusions. The major points of evidence were subsumed into a report which, in our view, was balanced, careful and accurate. There was very adequate evidence that the Claimant might have committed these acts and it was appropriate for her to make the findings which she did. Her conclusions were carefully phrased so as not to attribute definite blame at that stage. We find on balance that she has satisfied us that the reason for coming to those conclusions was a genuine belief in the strength of the evidence which was a ground entirely unconnected with the Claimant's sexual orientation.

31 So far as Ms Dilworth is concerned, we have concluded that proceeding to the disciplinary interview stage was a natural result of the conclusions of Miss Hattrell in her report. Her requirement to do so, in accordance with the Procedures, is a reasonable explanation unconnected with the Claimant's sexual orientation. Her decision to suspend him was based on reasonable concerns and we find also that that satisfies us on the balance of probabilities that it had no connection whatever with the Claimant's sexual orientation.

32 Finally, in relation to the adding of the additional charge, we find ourselves satisfied on balance that she believed that she was doing the right thing by including this allegation when it was a matter which the Claimant would have to explain when the matter was fully investigated. She was entitled to use the worst case scenario from the evidence which she had so that the Claimant would know exactly what the strength of the evidence was against him. We have found that she did use the word "really" in her telephone conversation with the Claimant. It is suggested that this indicated a preconceived belief in his guilt. That could be one interpretation of the use of the word. There are others. We find it more likely that in was a mannerism from which no inference can be drawn. This had no connection with the Claimant's sexual orientation.

33 It follows therefore that if we had proceeded further in the matter we would have again dismissed the Claimant's complaints for all of the reasons set out above.

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CHAIRMAN

JUDGMENT SENT TO THE PARTIES ON

18th October 2007

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AND ENTERED IN THE REGISTER

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FOR SECRETARY OF THE TRIBUNALS