RESERVED DECISION

EMPLOYMENT TRIBUNALS

Claimant
Mr P Horsley

Respondent
The Commissioners of HM Revenue & Customs

Heard at: **London Central** **On:** **19 to 25 June 2018**

Before: **Employment Judge Gordon**
Ms C I Ihnatowicz
Ms L Jones

Representation

For Claimant: **David Stephenson (counsel)**

For Respondent: **Lucinda Harris (counsel)**

JUDGMENT ON LIABILITY

1. The Claimant was dismissed for a reason relating to his conduct but the dismissal was substantively unfair. The Claimant did not cause or contribute to his dismissal.

2. The Claimant did not commit gross misconduct and he was entitled to notice of dismissal.

3. The Respondent did not discriminate against the Claimant because of something arising from a disability. The Respondent did not fail to make reasonable adjustments. These claims are dismissed.

4. Reinstatement is the appropriate remedy. The tribunal will be making orders that:-
   (a) the Claimant is to be reinstated as from 25 July 2018;
   (b) will restore the Claimant, as far as can be done in the context of his employment, to the financial position in which he would have been if he had not been dismissed.

5. The parties shall use their best endeavours to agree a form of order to achieve 4(b) above in the light of the necessary enquiries of the pension scheme administrators and are directed to report to the tribunal by 25 July 2018.

REASONS

1. This claim was presented by Mr P Horsley on 4 January 2018. He claims that his dismissal which was with effect from 14 August 2017 was unfair, he claims that he should have been given three months' notice, and he claims disability discrimination and failure to make reasonable adjustments in the disciplinary process.

2. The Respondent says that he was fairly dismissed for gross misconduct and the other claims are denied.

3. There was a Preliminary Hearing for the purpose of case management held by Employment Judge Pearl on 14 March 2018 which gave directions for the furtherance of the claim and which noted a list of issues agreed between the parties. There was a further Preliminary Hearing on 15 June 2018 to deal with an issue about disclosure of documents.

4. We heard this matter over five days starting on 19 June 2018 and now give our reserved decision.

5. In a nutshell, the Claimant was employed by the Respondent and had 40 years' service. He was dismissed for searching the Respondent's computer database of taxpayers on a number of occasions. It was said that on these occasions he did not have a proper, legitimate and specific business reason to do the searches and therefore he had breached internal guidance and policies.

The issues

6. The issues were agreed between the parties and noted in the tribunal's order of 14 March 2018. They were as follows.

> **Disability discrimination claim.** It is accepted by the Respondent that the Claimant has a disability within the statutory definition set out in section 6(1) of the Equality Act 2010 in respect of his high blood pressure.
>
> **Discrimination arising from a disability [section 15(1) of the Equality Act 2010].**
>
> **1.** Did the Respondent treat the Claimant unfavourably as a result of something arising in consequence of his disability (his non-attendance at the meeting) by a) holding or proceeding with the disciplinary meeting of 7 August 2017 in the Claimant's absence and b) dismissing the Claimant?
> **2.** If yes, was the unfavourable treatment a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments (section 20 of the Equality Act 2010).

3. Did the Respondent have the following PCPs[1] a. the disciplinary policy procedure; and/or b. proceeding with a disciplinary hearing where the employee is unable to attend in person.

4. If so, did the PCP put the Claimant as a disabled person at a substantial disadvantage in comparison with persons who are not disabled? The Claimant contends that disabled people are more likely to have sickness-related absences and so are therefore more likely, as in this case, not to be able to attend their own disciplinary hearings, and that he was at a substantial disadvantage as a result of not being able to attend his disciplinary hearing.

5. If so, did the Respondent fail to make reasonable adjustments, by not: a. Postponing the hearing or conducting it via telephone hearing; and/or b. Obtaining an additional OH report about when the Claimant would be able to attend.

Unfair dismissal.

6. Was the Claimant's dismissal for a potentially fair reason in accordance with section 98(2) of the Employment Rights Act 1996?

7. Was the Claimant's dismissal fair having regard to section 98(4) of the Employment Rights Act 1996, having regard to: (a) whether in the circumstances (including its size and administrative resources) the Respondent acted reasonably in treating the Claimant's conduct as sufficient reason for dismissing the Claimant, and (b) Equity and the substantial merits of the case?

8. Did the Respondent follow a fair procedure?

9. If not, would any procedural unfairness have made any difference in accordance with the principles in *Polkey v AE Dayton Services Limited* [1988] ICR 142?

10. If the dismissal is found to have been unfair, should there be a reduction in awards to take into account contributory fault of the Claimant. If so what reduction do the tribunal consider would be the appropriate reduction for:

a. the basic award (which may be reduced where the Tribunal considers that any conduct of the complainant before the dismissal .. was such that it would be just and equitable to reduce or reduce further the amount of the award to any extent')

b. the compensatory award (where the Tribunal finds that the [act] was to any extent caused or contributed to by any action of the complainant, [the tribunal] shall reduce the amount of the compensatory award by such proportion as it considers just and equitable)

11. Did the Respondent comply with the ACAS Code of Practice 1 on Disciplinary Procedure?

Notice pay

12. Did the Claimant commit gross misconduct?

7. The directions given on 14 March 2018 provided that we should hear remedy as well as liability. We heard evidence as to remedy at the same time as hearing the case on liability. We heard submissions on liability and remedy, but it was

[1] Provision, criterion or practice.

understood that we would be unable to make a final order as to the remedy if we were to reach that point, until certain enquiries had been made.

8. If successful in his unfair dismissal claim, the Claimant seeks reinstatement or reengagement and/or compensation. In the disability discrimination claim he seeks compensation for injury to feelings, and for his financial loss.

9. The Claimant submitted a schedule of loss setting out the heads of his claim and the Respondent submitted a counter schedule. In discussion with the parties, on the basis that the Claimant were successful in the unfair dismissal claim there was agreement that he was entitled to a basic award of £14,181 subject to any adjustment for contributory conduct or uplift. There was agreement that if he was successful in his claim for notice pay, he should be awarded £15,737. These orders would be subject to any order for reinstatement which would be in lieu of these awards.

10. For the compensatory award, on the basis that the Claimant were successful in the unfair dismissal claim there is disagreement about the period over which the Claimant should be compensated for loss of earnings. The Claimant who was aged 58 at the time of his dismissal, claimed to the age of 60, subject to the applicable cap. The Respondent says that the compensatory award should be limited to 3 months loss of earnings from the date of dismissal on the basis that the Claimant should have mitigated his loss by finding a job within the private sector. In any case the position of the parties is that the compensatory award may be adjusted for contributory conduct or uplift.

11. There is also a claim for pension loss. The Claimant's evidence was that after his dismissal he took his pension early, and because he had done that it was actuarially reduced. He believes that, should there be an order of reinstatement or reengagement, he may be able to unwind this action. It seems possible that in this way he could reduce his pension loss to zero.

12. There is a dispute between the parties as to whether the Claimant should be reinstated or reengaged if he is successful in his unfair dismissal claim. The Respondent is saying that it is not practicable to make an order for reinstatement.

13. On the basis that the Claimant is not reinstated or reengaged, then there is a dispute between the parties about the correct method of calculating his pension loss – the Claimant contending for the actuarial method and the Respondent contending for the contributions method despite the Claimant's pension scheme being a defined benefit one, on the basis set out in paragraphs 5.30 to 5.33 of the Employment Tribunals Principles for Compensating Pensions Loss (fourth edition August 2017).

14. It was agreed that we would make our findings on liability and finding of fact on the issues related to remedy and whether or not reinstatement is the correct order to make. This would be with a view to finalising our remedy judgment after further submissions or agreement between the parties.

The evidence

15. In order to resolve the issues in the case we heard from the following witnesses:-

Called on behalf of the Respondent

Jake Hillier - the Claimant's line manager
Sarah Bamford - investigating officer
Laurie Feather - decision manager
Richard McConaughey - appeal manager

Called on behalf of the Claimant

The Claimant
Carolyn Williams - the Claimant's TU representative

Witness statement read and accepted in evidence

Ann Smith - the Claimant's former manager

16. Mr Feather gave evidence on day 2, but was recalled on day 3 to produce a new exhibit. The tribunal intended anyway to ask for him to be recalled to clarify his decision making process with respect to allegations 4, 5 and 6. Unfortunately Mr Feather was unable to continue his evidence and we were unable to complete our questions of him. We decided however that the answers to our questions were not essential and we could complete the hearing without them.

17. We were given a bundle of documents comprised of about 800 pages.

18. There were also a number of exhibits handed up which we marked as follows:-

R1 - the Respondent's Diversity and Equality policy
R2 - exhibit SB25 - the Human Intelligence (HUMINT) policy
R3 - email to Claimant giving link to HUMINT policy
R4 - unconscious bias policy
C1 - envelope sent to the Claimant containing documents
C2 - copy of the envelope
C3 - bundle of documents received by the Claimant
C4 - Royal Mail tracing documents

The law

19. It is unnecessary for us to recite the applicable statutory provisions, that is sections 15 and 20 of the Equality Act 2010 and section 98 of the Employment Rights Act 1996, because the important elements of those provisions as they apply in this case, are set out in the agreed issues.

20. We would point out however, that in the claims under the Equality Act 2010, section 136 requires us to consider whether there are facts from which we could decide, in the absence of any other explanation, that the Respondent contravened the provision concerned. If so, we must hold the contravention occurred. But this does not apply if the Respondent shows that it did not contravene the provision. Effectively this shifts the burden to the Respondent to show that there was no contravention in any way whatsoever, once a prima facie case appears from the evidence.

21. We are aware that when considering whether the Claimant was unfairly dismissed we should not substitute our own view for that of the Respondent just

because we think that we would have acted differently. Instead, we should recognise that there is not one reasonable response to any given situation – employers will differ in their responses – some will be more robust than others. We should only find unfair dismissal if the employer's response was outside the band of reasonable responses.

22. We would also point out that in the claim for notice pay, the agreed list of issues describe our task as deciding whether the Claimant was guilty of "gross misconduct". As can be seen below in our reasons, in the particular circumstances of this case it is more accurate to say that in determining whether the Claimant was entitled to a period of notice on the termination of his employment we need to decide whether he had repudiated his contract of employment so that the Respondent had a right to decide that it had come to an end.

The basic facts

23. The Claimant started work for the Inland Revenue on 1 July 1977 at the age of 18. He had various roles over the years. In 1984 he was promoted to tax inspector and subsequently further promoted to the position he held when he was dismissed: Grade 7 Fraud and Bespoke Avoidance Investigator in the Fraud Investigation Service (FIS). He had an exemplary disciplinary record and was well respected at work.

24. Since 1983 the Claimant had been doing investigation type work of one sort or another. At the time when the events occurred which led to his dismissal he was also in a full time investigation role.

25. The Claimant's team comprised three investigators at his level, twelve investigators at a more junior level and one clerical support officer. The team leader was the Claimant's line manager Mr Hillier. Mr Hillier reported to Mr Wood who had been the Claimant' line manager for a period of 10 months in 2015 when the Claimant was acting up as team leader.

26. The Claimant's team was responsible for the geographical area of London and South East England. The Claimant was the designated point of contact for a large town near where he lived. This meant that for part of the week he could work an office local to his home.

27. At any one time the Claimant had 12 to 15 enquiry cases to investigate. These were serious cases.

28. This matter concerns the Respondent's Taxpayer Business Service (TBS) database. This is essentially an index of people known to HMRC. It contains the name, address, national insurance number and date of birth for each person in the database. It also keeps a record of any known former addresses for the person. Generally if a person is on the database it is because that person has a self-assessment reference number (that is the Unique Taxpayer Reference for persons who are self-employed) or a PAYE reference number (for employees)

or has a tax credit record. The database also holds which tax office deals with the person.

29. Searches of the TBS can be carried out by postcode, by name (or part name) or address (or part address) or by date of birth or national insurance number or a combination of these.

30. The results of searches appear on a "landing page" which can list up to 50 results. The landing page shows the title, initials and family name of the person and the person's street number, street and postcode, the person's date of birth and national insurance number. It is then possible to click on a search result and go to another window called "View Taxpayer Summary Details". This window shows the person's full name, and full address, the date of birth, national insurance number, tax reference number and the tax office which deals with the person.

31. The TBS is generally used as an index of taxpayers. It does not itself display any tax records of the person. Those are held on an entirely separate system.

32. Relevant to the allegations against the Claimant that he had accessed the TBS in breach of the rules, is the fact that he moved in 1993 from an address in *postcode A* and moved to an address in *postcode B* in the same town. *Postcodes C and D* are different postcodes in the same town as postcode A and B. *Postcode E* is in a different town.

33. In 2017 when the Claimant conducted a search on the TBS for *postcode B*, which was the same postcode as his own home, the system alerted those monitoring its use. They informed the Claimant's line manager Mr Hillier. He asked for an audit of the Claimant's use of the TBS to be carried out. He then held a meeting with the Claimant and decided that a formal investigation should be commenced.

34. Mr Hillier appointed Sarah Bamford to act as investigation manager and Laurie Feather as decision manager.[2]

The allegations and how they were dealt with

35. On 27 July 2017 the Claimant was called by the decision manager to a disciplinary meeting which was to consider the following allegations (the postcodes and addresses have been anonymised):-

> **Allegation 1.** That you searched for or accessed customer data without a proper, legitimate and specific business reason, contrary to the HMRC policy set out at HR22005 and the HMRC Acceptable Use Policy, when on 10/07/2014 you undertook a search on TBS for *postcode C* and subsequently accessed the records for JM*******B & PP******C.
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> **Allegation 2.** That you searched for or accessed customer data without a proper, legitimate and specific business reason, contrary to the HMRC

[2] Page 121.

policy set out at HR22005 and the HMRC Acceptable Use Policy, when on 08/08/2014 you undertook a search on TBS for *postcode B*.

Allegation 3. That you searched for or accessed customer data without a proper, legitimate and specific business reason, contrary to the HMRC policy set out at HR22005 and the HMRC Acceptable Use Policy, when on 26/08/2014 you undertook a search on TBS for *postcode B*.

This allegation has been corrected in these reasons to remove an agreed error.

Allegation 4. That you searched for or accessed customer data without a proper, legitimate and specific business reason, contrary to the HMRC policy set out at HR22005 and the HMRC Acceptable Use Policy, when on 12/01/2015 you undertook a search on TBS (a) *removed*, (b) for *postcode D* (c) *an address* (d) *an address and postcode A* and subsequently accessed the records for NP********B & NY********D.

Allegation 5. That you searched for or accessed customer data without a proper, legitimate and specific business reason, contrary to the HMRC policy set out at HR22005 and the HMRC Acceptable Use Policy, when on 04/04/2017 you undertook a search on TBS for *postcode B*.

Allegation 6. That you searched for or accessed customer data without a proper, legitimate and specific business reason, contrary to the HMRC policy set out at HR22005 and the HMRC Acceptable Use Policy, when on 13/04/2017 you undertook a search on TBS for *part address and postcode E* and then accessed the record for NS*********A..

36. The disciplinary meeting went ahead without the Claimant and was conducted by the decision manager. We have explained the circumstances surrounding this when considering the disability discrimination claim below. The Claimant had prepared written submissions for the meeting,[3] and his trade union representative Carolyn Williams attended the meeting on his behalf. Ms Williams had little further information about the Claimant's response to the allegations than was in his written submissions, so the decision manager decided not to go through each allegation in detail. Instead he heard submissions on the Claimant's behalf from Ms Williams on the question of mitigation.

37. The Claimant's written submissions were in two parts. One part dealt with the investigation report and the other dealt with the specific allegations. The Claimant criticised the investigation report for expressing opinion against him, and for omitting points in his favour which he had made to the investigating officer, and he corrected factual errors in allegation 4.

38. The following is a summary of the main points made by the Claimant in his submissions. He accepted that he had carried out the searches as described in the allegations. He said that in each case he was looking on the TBS to see if the persons concerned had a tax record with HMRC, in other words to see if they were "ghosts". Ghosts are people who should declare their earnings for the purposes of tax but are not known to HMRC. He said that his understanding was that he had always been empowered and authorised to access any customer

[3] Pages 363 and 370

record if there is a legitimate business need. He said that each search was done for a legitimate business reason and certainly not for personal curiosity as suggested in the investigation report.

39. The Claimant said that he had been a tax investigator since 1983 and that he regarded his role as being to bring in money for the Exchequer. He referred to the extensive training that he had given about self-generated cases, which had been approved and for which he was commended. He explained that in his statement, Nigel Wood (an Assistant Director in the Claimant's section and who had been his line manager when the Claimant was team leader), also referred to self-generated cases. He explained that they may cover failure to notify (ghosts) but also for example, where from a common sense view the taxpayer's known incomings are sufficient to fund their apparent lifestyle. He supported his submissions with HMRC job adverts to show that tax officers were expected to be proactive and use their own judgement to identify risks ("risks" here referring to tax evasion or tax credit fraud).[4] He pointed out that local knowledge was therefore important to carry out this role. In conducting the searches, he honestly believed that he was carrying out his duties as an Inspector of Taxes. He said that there had been no intentional breach of HMRC rules.

40. He pointed out that he had not looked at anyone's actual tax records and his searches were limited to the TBS. He said that the investigation report had questioned his honesty. In that respect he had asked that his former manager Ann Smith be asked whether he had ever been dishonest or lied to them, but this had not happened. He had been entrusted to work with many sensitive cases and his honesty and integrity had never been in doubt.

41. He said that he did not know that accessing his own postcode on the TBS where there was a proper and legitimate business reason was not allowed, and he pointed out that although his line manager Mr Hillier had said in his statement that he would expect a team member to tell him if he intended to search on the TBS using his own postcode, Mr Hillier had never informed him of this and it had not been discussed in the team.[5]

42. The decision manager also had the investigation report,[6] which included a full description of each allegation, and the Claimant's comments on each allegation, countered by comments from the investigating officer on what the Claimant was saying. There were also a number of exhibits to the investigation report, the most important of which were the records of interview with Mr Wood and Mr Hillier, the record of interview with the Claimant himself and the Claimant's Amendments/Comments re Notes of Meeting – 14 June 2017. In the latter document the Claimant said that if he is allowed to keep his job he would educate himself about new policies and in future use sources to process intelligence rather than doing it himself.[7]

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4 These job advertisements start on page 658 of the bundle
5 Paragraphs 17 to 19 on page 371.
6 Page 257.
7 Paragraph 96 on page 154.

43. After the meeting the decision manager reached the conclusion that 5 out of 6 of the allegations were proved, that this was gross misconduct and that the Claimant should be dismissed without notice. He prepared notes of how had reached that view, to be sent out to the Claimant. He showed these to HR who suggested that the notes should also cover other points. The decision manager then added parts to the notes.[8]

44. **Allegation 1** was the search carried out on 10 July 2014. The Claimant said in his written submissions that he could not remember what had triggered the search and did not know the persons concerned.

45. The decision manager found this allegation proved. Although he said that he would not necessarily expect the Claimant to recall the reason why he had undertaken the search because it was a number of years before, he could not be satisfied that there was a proper business reason to make the search.

46. When giving evidence about this, the decision manager confirmed that it was the lack of explanation about the search from the Claimant that he found persuasive. He confirmed that effectively he had given the Claimant the burden of showing that there had been a business case for this search, and because the Claimant had been unable to do so, the allegation was proved.

47. This was in the light of other things which he found suspicious about this search set out in his deliberations – that he could not see how the Claimant could have been satisfied from the search that there was no risk because the search did not show that there was a self assessment or PAYE record, and there had been no explanation why the Claimant clicked on two of the search results to go to the "View Taxpayer Summary Details" window.

48. **Allegation 2** was the search carried out on 8 August 2014. The Claimant recited what he had said when asked about this by the investigation manager. He had said that he did remember carrying out a search in 2014 on the TBS for an address in his street and this appeared to be it. He said that the search was triggered by an ostentatious lifestyle and a white van at that address which was loaded and unloaded with tools and driven off in the morning. The Claimant suspected the man was self employed and he wanted to see if there was a tax record. On finding that there was a record he took no further action.

49. The decision manager found this allegation not proved. He said that he was satisfied that in the Claimant's mind there was a proper business reason for the search in order to establish that the person was known to HMRC.

50. This was despite the fact that the decision manager could not understand how the search carried out by the Claimant could show that he was registered as self employed because the search did not show the self assessment reference number (the search ended on the landing page).

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[8] They appear in their final form on page 393.

51. **Allegation 3** was the search carried out on 28 August 2014. The Claimant said in his written submissions that he could not remember what had triggered the search. The search was his own postcode. The Claimant speculated that he had typed this in error when he was doing a routine search or training a colleague.

52. The decision manager found this allegation proved. Although he said that he would not necessarily expect the Claimant to recall the reason why he had undertaken the search because it was done a number of years ago, he then said that he would expect an experienced manager to remember why they had searched their own postcode bearing in mind the manager should be aware of the relevant HMRC policy.

53. Since there was no evidence showing that there was any business reason for the search it was found proven. Again the decision manager confirmed to the tribunal that he had looked to the Claimant to prove that he had a business case for conducting the search.

54. **Allegation 4** was the search done on 12 January 2015. The relevant search was of the postcode where the Claimant used to live in 1993 and a street in that postcode with clicks on the search results for two persons to reach the "View Taxpayer Summary Details".

55. The Claimant said that this search was triggered by his observation of a van parked in the drive of a house advertising a trader's business, causing him to suspect that the occupier of the house was self employed. He therefore carried out a search to satisfy himself that there was a record for the person concerned. Having found this record he did not take the matter further.

56. The decision maker found this allegation proved. There were two reasons for this. One was that the searches would not have provided the information whether or not the occupier's business was registered for tax and paying the correct amount of tax.

57. The second reason was that the Claimant may have had a personal interest in carrying out the search for the reason stated in the deliberations.[9] On this basis the decision manager decided that on the balance of probabilities the Claimant had a personal curiosity about the person concerned.

58. **Allegation 5** was the search done on 4 April 2017. The Claimant simply said that this was linked to allegation 6, and therefore did not deal with it any further.

59. The decision manager did not accept that this search was linked to allegation 6 and seemingly on that basis found it proved.

60. **Allegation 6** was the search done on 28 August 2014. Here the Claimant was trying to identify a member of the medical profession who appeared to have moved to a house with another who had not sold their existing house. The

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[9] Page 396.

existing house had an address in the same postcode as he lived. The question was whether they were properly registered for tax and whether further enquiries should be made. The Claimant was interested in this particular case because of a project on the medical profession which we refer to below when dealing with contributory fault.

61. The decision manager found this allegation proved. This appears to be because there were certain unknowns but also because although the search revealed self assessment references for the persons concerned that did not give any indication of their financial and fiscal position. A third reason was that the Claimant should have known that it was inappropriate to conduct detailed enquiries into a former neighbour.

62. Having found 5 or the 6 allegations proved, the decision manager decided that the Claimant was guilty of gross misconduct and should be dismissed with immediate effect.

63. The Claimant appealed and the appeal was heard by Richard McConaughey as appeal manager. The appeal meeting was held on 9 November 2017, which the Claimant attended. The appeal was unsuccessful and the Claimant's dismissal was upheld.[10]

64. For the appeal meeting the Claimant prepared a fully argued letter of appeal.[11] The copy of this in the bundle has handwriting on it, seemingly questioning the points made by the Claimant. We are satisfied that the appeal manager did not see these notes. Prior to the meeting however, the appeal manager set out his thoughts about the appeal.[12] These are said to indicate that he had pre-judged the matter.

65. After the hearing the appeal manager contacted Ann Smith. She was one of the Claimant's previous managers who he wanted to provide some input. She confirmed to the appeal manager that there had been no discussion with the Claimant about when it was right, or wrong, to search the TBS but she confirmed that the Claimant was a first class professional and an excellent team player. She said that he was her deputy and she relied on his for many responsible tasks and had no reason to doubt his judgement. She found him trustworthy and dedicated to his compliance role and HMRC responsibilities.[13]

66. We consider below whether the appeal process repaired the defects in the disciplinary process.

The Claimant's disability

67. The Respondent accepts that at the relevant time the Claimant had a disability under the Equality Act 2010. This was the Claimant's condition of high blood

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10 Appeal outcome letter page 527.
11 Page 416.
12 Page 458.
13 Page 509.

pressure and anxiety. This has the effect described by the Claimant in his witness statement.[14]

68. The Respondent was first aware of this disability when the Claimant's manager Mr Hillier received an Occupational Health report about him on 22 June 2017.

The policies

69. We are going to consider these at this stage in our decision because our interpretation of the relevant policies has a significant effect on the way we have approached the issues before us.

70. In the letter calling the Claimant to the disciplinary meeting, he was charged with breaching the HMRC policy set out in HR22005 and with breaching the HMRC Acceptable Use Policy.

71. Two other policy documents were relied on by the Respondent to demonstrate the Claimant's culpability, that is the HUMINT policy and the definition of gross misconduct in the disciplinary policy.

72. Since the Claimant was not charged with breach of these policies, they were not directly relevant for the decision manager when deciding whether the charges were substantiated. They may have been relevant for the decision manager on the question of penalty. For us, they are relevant when considering whether the dismissal was fair and may be relevant on the question of penalty. They are also certainly relevant when considering the degree of any contributory fault and any *Polkey* issues, and whether the Claimant had repudiated his contract of employment.

73. We now consider each of these policies in turn.

74. HR22005 is a document within HR Policies and Guidance and is headed "Conduct: Confidentiality and customer privacy". It was in place from 2 August 2011. The policy makes it clear that a breach of the policy may result in dismissal.[15]

75. The policy covers confidentiality of personal data held by HMRC and states:-

> - You have the authority to look at or ask others for information about our customers only if you need it for your particular job and are legally entitled to the information.
> - Confidential information about the affairs of individual customers is given to us on the basis that it will not be:
>   - revealed to anyone who does not have a right to know it
>   - used for any purpose other than a proper business need
>
> You must:
> only use the computer tracing facilities for your work

[14] Paragraphs 23 to 27.
[15] "Overview" on page 555.

only access a computer record where you have a clear and unambiguous reason for doing so

You must not:
use the computer tracing facilities to trace information for entertainment, personal or casual interests
access or attempt to access a customer record, including your own, held on a HMRC database:

- for curiosity
- for any personal, non-business related reason
- where there could be a conflict of interest, either real or perceived
- to check the compliance status of a customer for personal reasons
- that relates to you or your spouse, partner, family or friends.

Computer records include the main business file(s) and records containing, for example, personal addresses.

76. The HMRC Acceptable Use Policy governs access to HMRC IT systems and networks. It points out that it is essential that customers and the wider public have confidence that records held by HMRC are secure, confidential and not at risk of misuse. It makes it clear that if breached it could result in disciplinary action.

77. The policy states:-[16]

> You must exercise due care when holding, processing or disclosing any data and must not:
> - Access, share, disclose, trace or search for any Customer data, HMRC staff details or your own HMRC records unless you have a legitimate business need and are authorised to do so.
> - Trace or search for any customer or staff information for entertainment, personal or casual interests.
> - Create, amend or delete records unless there is a clear business need and you are authorised to do so. Records also include recordings of telephone calls.

The HUMINT policy

78. The HUMINT policy deals with "human intelligence". It describes an online system which can be used by HMRC employees to report information received. The report should be made on a SEES Humint Contact Report.[17]

79. The policy is important because it is said by the Respondent that the policy required the Claimant, even if he had a legitimate business need for the searches that he made, to make out a HUMINT report instead of doing those searches. It is said that this is because on his case the searches were triggered by information that had come to him in his private life rather than at work. This

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16 Page 547.
17 Page 664J.

interpretation of the HUMINT policy had a considerable impact on the decision making in the disciplinary process and appeal.

80. It is necessary therefore for us to decide whether the Respondent is right in this interpretation of this policy. This is also important for us because it is relevant to our consideration of the issue about contributory fault, to any *Polkey* issues and also to the claim for notice pay.

81. When construing the policy to see whether it indeed has the effect that is claimed, it is necessary to consider the policy as a whole and its context and purpose. During the hearing we called for the full policy and were provided with another copy of what we already had in the bundle. The new copy was printed out on an earlier date, and had pages in a different order. Whilst we are not sure that we have the whole policy we do think we have sufficient to resolve the issues which arise.

82. The reason for the policy appears in a part of it called "frequently asked questions". This explains that that policy was introduced in 2003 in response to judicial criticism about the way in which HM Customs and Excise recorded and controlled information received from members of the public.[18] The document then says:-

> The Humint policy makes sure that information given by individuals is recorded, handled and stored correctly. HMRC needs to assess:
> - Where the information has come from.
> - Why we were given the information.
> - How this was gathered.
> - Whether using it could put people at risk.
>
> We have to establish this before any action is taken on it. This allows HMRC to meet its legal requirements and manages the risk to the people providing the information and potential problems to our criminal prosecutions and compliance activity through Status Drift.

83. Earlier in the FAQs Status Drift is said to be "where an individual provides information already known to them, but then proceeds to gather further information or encourage others to do so, in order to provide information to HMRC".

84. Another section explains that people who provide Humint information are called Human Intelligence Sources or just "Humint".

85. A Humint report goes to the National Humint Centre (NHC). NHC assesses where the information has come from, why it was given, how it was gathered and whether it could put people at risk. This is a legal requirement before any action is taken on the information. A risk assessment is carried out to identify risks to the information and to the person who provided the information.

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[18] Page 664C. There is a reference to the Butterfield report for more information.

86. The part of the HUMINT policy which is said to have the effect alleged in this claim is in the FAQs and says:-[19]

> **If I obtain information in my personal life how should I report this?**
> You must report any information that you personally become aware of even if it occurs outside work.
> If you have been passed information by a member of the public in your private life, this should be reported to the NHC on a SEES Humint Contact Report form. See the how to report pages. Complete the Humint Details section with their name and any contact details they have provided. Do not undertake checks to establish any details they have not provided.
> If you have personally observed or obtained information through your private life, fill in a Humint Contact Report, entering your details in the Humint Details section.
> For further information please read the Humint pages on the Criminal Justice Procedure.

87. It is clear therefore that an HMRC employee who from their own observation outside work has Humint information, and who wishes to pass on that information to HMRC, should not investigate that information but instead should complete a Humint report naming themselves as the source of the information.

88. In our consideration about whether the Claimant should have done this instead of looking on the TBS as he did, it is important for us to understand what information is referred to here.

89. Here we are assisted by these passages:-[20]

> **What is Humint?**
> Allegations received from people about criminal offences or non-compliance is called Humint information.
>
> **What is the National Humint Centre (NHC)?**
> From 1st October 2006, all employees in HMRC wherever they work must report allegations that they receive from people about tax, benefit offences, smuggling, criminal offences regularity breaches or non-compliance.

90. During the hearing the parties discussed with the tribunal the scenario of a tax officer who observes that over a period of time a trader's van is in daily use but is parked overnight at a particular address. Contrary to the view of witnesses who appeared before us, the tribunal does not think that the only thing the tax officer should do with the observation is to make a Humint report. This is because, in our view, the information gathered by such an observation is not Humint information. This is because it does not by itself indicate non-compliance. All it indicates is that the person may be in a trader's business or employed as a trader. But if the tax officer searches for the address on the TBS and finds no HMRC record, that that tends to indicate non-compliance. At that point it would

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19 Page 664E.
20 Page 664B.

be right to report the matter. This report would be made directly to the Risk and Intelligence Service. It would still not be necessary to make a Humint report to NHC however, because it would be information obtained by the HMRC employee at work, and so it would still not be Humint information.

91. The above finding is important for our decision in this case because we believe the requirements of the Humint policy were misunderstood by all those who gave evidence to the tribunal and who handled the Claimant's disciplinary and appeal.

The significance of HR23007: gross misconduct

92. The Respondent says that this policy makes it an act of gross misconduct for a tax officer to access the records of a neighbour. Like the HUMINT policy, this interpretation had a considerable impact on the decision making in the disciplinary process and may have affected the decision on appeal. It is necessary for us to decide whether the Respondent's interpretation of this policy is correct.

93. This is also important for us because we must decide whether the Claimant committed an act of gross misconduct. This is relevant to his culpability, to the issue of contributory fault, to any *Polkey* issues and also to the claim for notice pay.

94. HR23007 is part of the Respondent's HR Policies and Guidance. Its full title is "HR23007 Discipline: How to: Assess the level of misconduct".[21] This sets out what is "minor misconduct", what is "serious misconduct" and what is "repeated misconduct" and what is "gross misconduct". It says that identifying the level of misconduct will steer managers to the appropriate level of action to deal with a disciplinary matter. It makes it clear that the levels of misconduct are neither exhaustive nor mutually exclusive.

95. There is disagreement between the parties as to the meaning of section 23 of the document. We set it out in full (retaining the formatting in the document):-

> 23. **Unauthorised access**, or attempted access, to corporate or customer information (including any tracing functions and/or HR functions) without a proper, legitimate and specific business reason will **always** be treated as gross misconduct. It is not for individual managers to take a view on the employee's action – all unauthorised and/or inappropriate accessing of customer records is considered serious and must be investigated as such. This includes –
>
> - attempting to access or obtaining access to an employee's own, or family members', friends', persons known to them or **neighbours' records** (even if it relates to an activity the Department has to carry out or they have written authority from the individual)
> - testing a corporate system
>
> *emphasis added*

[21] HR23007 on page 577.

96. It was submitted on the Claimant's behalf that this does not mean that accessing a neighbour's record will be considered to be gross misconduct, but that this is merely an instruction that such an event should be investigated as gross misconduct. The Respondent says it means accessing a neighbour's record will always be gross misconduct.

97. The meaning of section 23 must be considered in the context and purpose of the document as a whole.

98. The document seems to have two purposes.

99. Firstly, it informs managers how to deal with a disciplinary matter. For example it is suggested that most cases of minor misconduct should be dealt with informally if they are a first offence. Serious misconduct requires formal management action. Repeated misconduct may result in a higher penalty than before. Repeated misconduct during the life of a final written warning requires decision managers to seek HR advice because one of the potential penalties is dismissal. For matters which are to be treated as serious or gross misconduct but which do not involve criminal activity, there must be an investigation carried out by an investigation manager and a separate person appointed as decision manager. The procedure document showing this is HR23003 Discipline: Procedure, with a flowchart showing the procedures in HR23013 Discipline: Process overview.[22]

100. Secondly, the document defines what is gross misconduct. In that respect it will be guidance to employees and to the decision manager about this. The definition of gross misconduct is in section 25 and is in comprehensive terms. We think section 25 acts as a definition of gross misconduct for the HR Policies and Guidance because this is by far the most comprehensive definition of gross misconduct in all the documents with which we have been provided. We note that the definition includes failure to comply with HMRC Acceptable Use Policy (which is was what the Claimant was charged with in the letter calling him to the disciplinary meeting).[23]

101. The question is whether section 23 also defines what is gross misconduct. If so, then the Respondent is right that accessing records of a neighbour will always be gross misconduct, according to this policy.

102. We think however, that section 23 is only intended to establish the correct procedure to follow in the case of unauthorised access as described, and in the type of case described in the two bullet points. This is shown by the use of the words "must be investigated as such", and by the fact that section 25 contains such a comprehensive definition of what is gross misconduct.

103. It follows that HR23007 does not describe a rule that if a tax officer accesses a neighbour's record this will be gross misconduct.

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22 Pages 562 and 586 respectively.

23 Top of page 580. The letter is that dated 27 July 2017 on page 335

104. This tends to be confirmed by the fact that there is no guidance or policy which states that a tax officer may not search the TBS for a neighbour. Having regard to the comprehensive array of applicable guidance and policies covering this subject matter, the correct place for such a rule is in such guidance and policies and not in the disciplinary procedure.

105. There would be good reason for section 23 to require that an allegation of unauthorised access to a neighbour's records should be investigated as an allegation of gross misconduct. The reason is that if a tax officer has accessed the records of a neighbour there is a clear possibility that such access was out of personal curiosity. Hence it is appropriate for a full investigation and disciplinary process to be followed to be satisfied as to the matter.

106. In the light of the above analysis, HR23007 is not guidance or policy about accessing neighbour's records on the TBS. This means also that accessing a neighbour's record on the TBS is not necessarily gross misconduct.

107. Like the HUMINT policy we think that this misunderstanding has had considerable impact upon the Respondent's decision making process in the disciplinary proceedings.

108. Finally, it is clear that what is listed in HR23007 as gross misconduct in section 25 is not intended to bind the decision manager in every case to find that such conduct is gross misconduct. This is because of the use of the word "may" in the opening words of section 25:-

> The following is a comprehensive, although not exhaustive, list of examples of offences which **may** be considered gross misconduct.
>
> *emphasis added*

109. It is also clear that such conduct which may be considered gross misconduct does not necessarily have to result in dismissal. This appears in HR23007 itself, which says that "the potential penalty" for gross misconduct "may be dismissal, with or without notice, for a first offence".[24] With respect to the allegations in this matter, it also appears in policy HR22005 (Conduct: Confidentiality and customer privacy) where it is said:-[25]

> Accessing customer's records without a legitimate business reason – is a serious disciplinary offence which may result in disciplinary procedures and possible dismissal if proven.

110. In the Acceptable Use Policy the consequences of a breach are simply said to be that a breach could lead to disciplinary action.[26]

Issues 1 to 5 – disability discrimination and failure to make reasonable adjustments

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24 Paragraph 22, page 579.
25 Page 557.
26 Page 549.

111. We are going to return to these issues after we have considered the unfair dismissal claim because our findings and considerations in that claim are relevant to the question of unfavourable treatment and substantial disadvantage.

Issue 6 – was the Claimant's dismissal for a potentially fair reason?

112. We are satisfied that the Claimant's dismissal was for a reason relating to his conduct and therefore it was a potentially fair reason under section 98(2) of the Employment Rights Act 1996.

Issue 7 – was the Claimant's dismissal fair?

113. We refer back to our explanation of how the decision manager dealt with the allegations.

114. **Allegations 1, 2 and 3** were for searches done some three years prior to the investigation. Given that the Claimant routinely searched the TBS for his work and had done so several hundred times, requiring the Claimant to prove a business case for the search was clearly unreasonable and unfair. The decision manager accepted in his reasoning that the Claimant would not be expected to remember what had triggered the search, yet he still required him to do so.

115. The decision manager's explanation for requiring an explanation for the search when dealing with **allegation 3** was that a manager should remember searching for his own postcode because of HMRC policy. However, the Claimant was saying that he did not know of any policy prohibiting a search of one's own postcode. It is true there is no such policy in those terms as we have found above. Although the decision manager knew that Mr Hillier as team manager believed that he should be told about such a search, he had only became the Claimant's line manager some 15 months after these searches had been done.[27] The Claimant's line manager at the time of these searches, Ann Smith, had not been interviewed. So there was nothing before the decision manager which enabled him to say that the Claimant should have recalled this search (being his own postcode) because of HMRC policy.

116. It was submitted to us on behalf of the Claimant that if it was so wrong to search one's own postcode in 2014 then the computer system should have been configured to trigger an alert about it. It was said that, if that had happened in 2014 the Claimant could have been warned then about searching his own postcode. He would not have done it again and he would not have faced disciplinary action in 2017. It was said that this was a management failure by HMRC and tended to make the dismissal unfair. We do agree this would have been a good management approach but we think that it contributes to the unfairness of the dismissal only with respect to **allegations 1, 2 and 3** and then only to the limited extent of emphasising the unfairness of expecting the Claimant to remember what triggered those searches.

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[27] He was the Claimant's line manager from 23 November 2015.

117. With respect to **allegation 4** at least one reason expressed by the decision manager for finding the allegation proved is incorrect. This was the finding that the search carried out by the Claimant would not have provided the information (a) whether or not the occupier's business was registered for tax and (b) paying the correct amount of tax. As for (a) this is incorrect because as can be seen from the relevant reconstructed search screenshot,[28] the two persons who lived, or had previously lived, at the address of interest to the Claimant did in fact have a self assessment reference number. So the search did reveal that the business was probably registered for tax. As for (b) the Claimant was not saying that he was checking whether the person or persons of interest were paying the correct amount of tax. He was simply checking whether HMRC had a tax record. And he found this to be the case.

118. This issue of exactly what the search revealed is also relevant with respect to **allegations 1, 2 and 6**. In each of those allegations the decision manager thought that the search results would not have been enough to satisfy the checks that the Claimant said he wished to make. We think this is based on an inaccurate premise and a misunderstanding of the Claimant's submissions. The Claimant was saying that he only needed to check that the person was known to HMRC. All persons shown in the search results on the landing page were known to HMRC. If the person was known to HMRC, then the person would have a tax record of one sort or another and it was for the tax office dealing with that person to try to ensure that the correct amount of tax was paid. The Claimant told us that the tax office dealing with the person was given in the "View Taxpayer Summary Details" window which appeared if one clicked on a search result. Each tax office has a "Responsible OU" reference which appears in that window. Whilst the Claimant did not explain in his written submissions to the decision manager about this OU reference number or precisely what was shown by the search results on the landing page, we do think that if the decision manager was not aware of the precise workings of the TBS he should have familiarised himself with it in order to carry out his task in the disciplinary proceedings.

119. There are numerous instances in the deliberations where the decision manager has said there are unknowns. It would appear that these unknowns formed part of his reasoning to find the allegations proved. In **allegation 4** he said that there was no explanation why the Claimant clicked on the two persons concerned in the search result. The tribunal thinks that the Claimant did in fact explain this, but if the decision manager was to hold the lack of explanation against the Claimant then clearly he should have asked the Claimant to explain why he clicked on those search results. This could have been done by telephone or letter but was not done.

120. The decision manager said there was also an unknown in **allegation 5**. Here he said that he did not know why the Claimant started a search on 4 April 2017 and continued it 11 days later. In fact, the continuation of the search was 9 days later on 13 April 2017. To the tribunal it is obvious there is a link between **allegation 5 and 6** (the first search produced too many results and the later search was a more specific one). To the decision manager there was no link because of

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[28] Page 111.

unexplained delay. However, the decision manager did not ask the Claimant to explain further.

121. There were also a number of unknowns expressed by the decision manager in **allegation 6**. One was why the Claimant believed the property was unsold, another was why he believed the person was in the medical profession and finally there was a query whether the Claimant was saying that he carried out the searches because of the project about the medical profession. It seems that the fact that these things were unexplained formed part of the decision manager's reasoning to find the allegation proved.

122. The Claimant says that in fact the second and third unknowns were explained in the interview notes with the investigation manager and this indicates that the decision manager had not read those notes properly or at all.[29] We agree that if the decision manager relied on these unknowns to find against the Claimant he should have sought an answer to them first and a starting point would have been the interview note.

123. The decision manager was aware that the Claimant did not attend the disciplinary meeting for medical reasons. He knew that the Claimant had been signed off sick by his doctor.[30] In the circumstances the decision manager should have considered whether it was possible for these unknowns to be resolved if they formed part of his decision making. Contact could have been made with the Claimant by telephone, internet video call, email or letter but this was not done.

124. **Allegation 6** and **allegation 5** which was linked to it were not properly dealt with. The decision manager not only made the decision based on certain unknowns as set out above, but also for two other reasons.

125. One reason was that the search revealed self assessment references for the persons concerned that did not give any indication of their financial and fiscal position. However, this was not what the Claimant was looking for. He would have had no authority to access any records showing this.

126. The other reason was that the Claimant should have known that it was inappropriate to conduct detailed enquiries into a former neighbour. However, there was no policy to say that this was inappropriate. We have found above that there was no policy prohibiting a search on neighbours. Even HR23007 which is said to contain such a prohibition did not refer to former neighbours, only to neighbours. In any case this was not the charge that the Claimant was facing (there was no mention of neighbours in the policy HR22005 nor in the HMRC Acceptable Use Policy).

127. We think these errors seriously undermine the conclusion reached by the decision maker as to whether or not the allegations were substantiated.

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29 Paragraphs 82 to 85 on page 152.

30 This was stated in the investigation manager's report, page 275 but also discussed between the decision manager and the Claimant's TU representative prior to the disciplinary meeting.

128. Turning to the **investigation**, it was submitted on the Claimant's behalf that the investigation was unfair in many respects. We agree that the investigation report reads like a prosecutor's brief containing the investigator's strongly expressed view as to the Claimant's guilt, in the "Details of Consideration" section and subsequent sections.[31]

129. HR23009 Discipline: How to investigate discipline cases explains that the investigation manager's task is to establish facts and gather evidence including witness statements where appropriate. The policy says that the investigation should be fair and impartial and done with an open mind, and that evidence should be looked for which both supports the employee's case and against it.[32]

130. We appreciate that in many cases when an investigation report presents effectively only a prosecuting case, arguing for a finding of guilt and expressing opinions, and omitting important points for the employee, this will be recognised by the decision manager and the balance can be redressed by giving the employee a full opportunity to comment. Here the Claimant was given that opportunity and he made written submissions criticising the report, explaining that the report did not completely explain his case.

131. However, the investigation report misstated the effect of the polices to a significant extent. We think that the decision manager was misled by this. And neither the Claimant nor his TU representative were aware that this had happened because they had not looked at the HUMINT policy nor HR23007 in the context of what was being said in the investigation report. Neither of them were provided with these policies during the disciplinary process. Soon after the investigation started however, the Claimant was sent a link to the disciplinary policy but he did not look at it.[33] And the Claimant had undertaken training under the HUMINT policy in 2009 and had been instructed to read it again in 2016.[34]

132. The HUMINT policy was dealt with at page 17 of the investigation report.[35] The investigation manager expressed the view that the information held by the Claimant which triggered the searches in allegations 5 and 6 should have instead been put in a HUMINT report. The excerpt from the HUMINT policy recited in the investigation report refers to the need to report "any information" in a Humint report. But it did not explain as it should have done that it is only information which is about criminal offences, regularity breaches or non-compliance which needs to be reported.

133. As for HR23007, the investigation report said that it "clearly states that accessing or attempting to access an employee's own, or family members' friends', persons known to them or neighbours' records will be treated as gross misconduct". This as we have found above should have been qualified by explaining that this was only for the purpose of deciding which disciplinary process should be followed,

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31 Pages 263 to 275.
32 Paragraphs 1, 3, 6, 23 and 27.
33 Page 118.
34 Email of 12 August 2916, exhibit R3.
35 Page 273.

and that in fact there was no policy which said that accessing neighbours' records was prohibited, provided of course there was a business case to do so.

134. It was the first disciplinary hearing which this decision manager had conducted and it is clear from the evidence that he was heavily reliant on advice from others, particularly HR but also from the investigation manager. This is also shown by his unquestioning acceptance of everything said in the investigation report and his adoption of the arguments in that report.

135. Regrettably we also believe that he had largely made up his mind about the Claimant's guilt prior to reading his submissions and prior to the meeting. We think this is shown by the fact that the hearing itself with the Claimant's representative would have been a good opportunity to go through the allegations and his response, so that any queries could be identified. This was not done, and the meeting was largely limited to discussing mitigation. In his deliberations the decision manager on a number of occasions stated that he did not have explanations for various things which seemingly persuaded him of the Claimant's guilt, yet he did not think of seeking clarification from the Claimant about them.

136. And during his evidence, he was asked why he decided that the allegations should proceed to a disciplinary meeting which turned on whether there was a case to answer. He said:-

> I decided there was a case to answer because it appeared that (the Claimant) had committed gross misconduct.

137. This was not a mistake. At the end of his evidence the tribunal read this back to him twice and asked him about it. He did not say that he had mistakenly said the wrong thing earlier in his evidence. Instead, he did not understand that there was anything wrong in what he had said.

138. When the decision manager considered the appropriate penalty we also think that he jumped from finding of guilt to dismissal without properly considering the seriousness of the conduct or the Claimant's culpability. Although the decision manager was aware that he could give a final written warning instead of dismissing the Claimant, we do not think on the evidence that he gave this sufficient consideration.

139. The decision manager's considerations about penalty appear in his amended deliberations under "decision". Here he explained that again he had taken into account that the Claimant could not have been satisfied with the limited searches that he undertook about the identified risk. As said above when dealing with the allegations, this was both incorrect and a misunderstanding of what the Claimant was saying.

140. The decision manager then referred to the Claimant's long service with the Revenue and this was referred to again at the end of the deliberations. But the decision manager only seemed to hold the long service against the Claimant, and not in his favour. This was on the basis that he should have been aware that the searches were inappropriate and of their potential consequences. There is

nothing to suggest that he gave the Claimant any credit for his long service and excellent record. When the decision manager gave evidence, this approach seemed to be confirmed from what he told us.

141. In his deliberations about penalty the decision manager then said again that the Claimant should have known that he should not search near or former neighbours, or of people known to him. However, as we have said above this is not what is stated in any guidance or policy on the TBS. Further down in his amended deliberation note he again referred to this on two further occasions, when considering mitigation points.

142. The decision manager also said that even an inadvertent search of that type should be reported immediately to his manager, and later in the deliberations he said that this was "the expected practice". This as we have said was the view of his manager Mr Hillier, but the Claimant said in his submissions to the decision manager that he had never been informed of this and it had never been discussed in the team. The decision manager did not check the correctness of what the Claimant said with Mr Hillier so he had no way of knowing whether or not this was simply Mr Hillier's view not passed down to the team as the Claimant said.

143. Turning to the **appeal process**, we need to consider whether it repaired the defects which we have identified in the disciplinary process.

144. One difficulty with this is that the appeal process was a review of the disciplinary process only – in accordance with the disciplinary policy it was not to reconsider the case in detail.[36] However, it was able to consider the process which had been followed and whether the penalty was appropriate.

145. The appeal manager did however reduce the issue of guilt to two questions:-
    (1) Was it the Claimant's job to check if a tax record was in place?
    (2) When searching on his own postcode, both current and previous was the guidance followed?

146. He answered question (1) as "no" because HMRC had units across the country whose specific function is to tackle the hidden economy.

147. He answered question (2) as "no" because the HUMINT policy required him to make a report instead. Also it was universally known that searching one's own postcode triggered an alert and so he would have expected the Claimant to raise the fact of his search with his manager at the time.

148. He took a different view from the decision manager on the question of the Claimant's truthfulness. He said he was "not accusing (the Claimant) of being untruthful when it comes to his rationale for accessing the TBS records".

149. When the appeal manager gave evidence one main focus was, in the light of his finding that the Claimant had been truthful about his rationale for accessing the

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[36] HR23003: paragraph 65 on page 567.

TBS records, in other words that the Claimant genuinely believed he had a business case to conduct the searches, why it was right to dismiss him. It was clear from his evidence that this question had not occurred to him. He was closed to the notion that an employee with such a long and unblemished service record, who has breached the rules but not deliberately, should be warned rather than dismissed. It was clear that he had not approached the appeal with that possibility open to him.

150. That he had pre-judged the appeal and not been open to revising the penalty tends to be demonstrated by his pre-hearing deliberations.[37] In those he sets out his views on the points made by the Claimant – effectively dismissing them all and even deciding in advance of the hearing that dismissal was the correct penalty.[38]

151. It is clear from those notes and the deliberations that a major factor in the appeal manager's consideration was that the HUMINT policy had not been followed. However, as we have found, the HUMINT policy is only engaged where there is information about criminal offences, regularity breaches or non-compliance. At the level at which the Claimant was carrying out his searches, to see if a particular person or person at an address was known to HMRC, there was no Humint information which he needed to report.

152. In his pre-meeting notes the appeal manager also set out HR23007 which is the only place where accessing data about neighbours is mentioned. Like the investigation manager, he failed to consider this in context and failed to see that it describes which conduct should be investigated as gross misconduct rather than definitively saying that accessing a neighbour's record will always be gross misconduct.

153. In the circumstances, the appeal process did not repair the defects which we have found in the disciplinary process when reaching a view on guilt. Nor did the appeal process repair the defects in the disciplinary process when reaching a view on penalty. To the contrary, it introduced a new defect, because having decided on appeal that the Claimant had a genuine belief that he had a good business reason to conduct the searches, it was then necessary to consider whether dismissal was indeed the appropriate penalty, and this was not done.

154. Overall, it is our view that the response of HMRC to what the Claimant was alleged to have done was unreasonable, in the sense that it was outside the band of reasonable responses. The dismissal was unfair.

Issues 8 and 9 – did the Respondent follow a fair procedure and if not, apply *Polkey* principles

155. We have found that the dismissal was unfair for substantive rather than procedural reasons. In the circumstances it is unnecessary for us to consider this issue.

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37 Page 458.
38 Page 461.

Issues 11 – did the Respondent comply with the ACAS Code of Practice 1 on Disciplinary procedure

156. It is said that there was a failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. If there was such a failure, then by section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, if it were just and equitable in all the circumstances to do so we could increase the award by no more than 25%.

157. We have not identified any provision of the code of practice which was not complied with by the Respondent.

Issues 1 to 5 – disability discrimination and failure to make reasonable adjustments

158. We can now return to these issues.

159. On the Claimant's behalf it is said that he was unable to attend the disciplinary meeting on 7 August 2017 and this was a consequence of his disability.

160. What happened was that the Claimant was off work sick continuously from 15 June 2017 until his dismissal. He was referred to Occupational Health and a report was obtained dated 21 June 2017.[39] The Occupational Health Advisor was asked whether the Claimant was fit to participate in the disciplinary process, but the answer was not conclusive.

161. There were internal discussions about how to deal with the disciplinary process in the light of the Claimant's sickness and from time to time the Claimant spoke to his manager about whether he was well enough to attend a meeting. The Claimant said he was not, and on advice from his GP he should not attend the office. The Claimant told his manager that he had been advised that he would not be fit again until after the completion of the disciplinary process.

162. The decision manager met with the Claimant's TU representative and it was agreed between them that the meeting would proceed in the Claimant's absence and that he would make submissions in writing. The Claimant was given a set of questions to answer in his written submissions.[40] As we have said, the Claimant made written submissions and his TU representative attended the disciplinary meeting on his behalf. At the start of the meeting the TU representative confirmed that the Claimant could not attend the meeting for health reasons. The Claimant did not object to this procedure being followed, nor ask for the meeting to be postponed.

163. We accept that the Claimant was not fit to attend the meeting, and that this was a consequence of his disability.

164. In the first limb of issue 1 it is said that it was unfavourable treatment to hold or proceed with the disciplinary meeting in the Claimant's absence. We do not think

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39 Page 172.
40 Page 367.

this is the case. It is common for employers to have to deal with a disciplinary process where the employee either does not wish to attend a disciplinary meeting or is unable to do so. In such circumstances fairness and balance is ensured by making adjustments, and this requirement is noted in the Respondent's disciplinary policy.[41] Where as in this case, the employee is given an opportunity to make written submissions and be represented at the hearing by his TU representative, then in our view proceeding with the meeting in his absence is not unfavourable.

165. In so far as the meeting should have been followed by a telephone meeting or further written correspondence as we have found above, this unfavourable treatment was not as a result of his inability to attend the meeting (being a consequence of his disability). Instead it was as a result of decisions made or omissions by the decision manager, which have partly contributed to the Claimant's success in the unfair dismissal claim.

166. As for the second limb of issue 1, where it is said that it was unfavourable treatment to dismiss the Claimant, it was clarified at the hearing that this is really part of the first limb and that what is being said here was that because the meeting proceeded in his absence, this resulted in his dismissal. In those circumstances the second limb does not provide a better case than the first.

167. In any case, it is our finding under section 15(2) that if it was unfavourable treatment of the Claimant to hold or proceed with the meeting in his absence, this was a proportionate means of achieving a legitimate aim. The legitimate aim was to complete the disciplinary process with reasonable efficiency. In the light of the medical advice that the Claimant would not be better until the disciplinary process was completed, the Respondent was right to decide to proceed.

168. In issues 3 to 5, the provision, criterion or practice is said to be the disciplinary policy procedure and more particularly proceeding with a disciplinary meeting where the employee is unable to attend in person. Again we do not think that the PCP to proceed with the meeting did put the Claimant at a substantial disadvantage in comparison with persons who are not disabled. This is for the same reason that we think that proceeding with the meeting in his absence was not unfavourable treatment.

169. In any case, in our view we do not think that it would not have been a reasonable adjustment capable of avoiding any disadvantage suffered by the Claimant by not attending the meeting, to postpone the meeting or to hold a telephone meeting. The Claimant did not ask for the meeting to be postponed, nor for a telephone meeting. Instead he accepted the proposition that he should present written material to the meeting and be represented in the meeting by the TU representative. In those circumstances, and in the light of its policy for employees absent from work who face disciplinaries, there were no further reasonable steps to be taken to avoid the disadvantage. Further, in those circumstances we do not think it would have been reasonable to obtain another Occupation Health report about when the Claimant would be fit to attend.

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[41] It suggests "communicating by telephone, meeting at a neutral place or location near the employee's home, or inviting the employee to submit a written statement" – page 574.

170. Therefore the discrimination arising from a disability claim and the failure to make reasonable adjustments claim both fail.

Issues 10 (contributory fault) and 12 (whether the Claimant committed gross misconduct)

171. On issue 10 we are considering whether there was any extent to which the Claimant caused or contributed to his dismissal. If so we must reduce the amount of any compensatory award by such proportion as we consider it just and equitable having regard to that finding.[42]

172. When considering a reduction in the basic award, the statutory wording is slightly different. We are to consider whether any conduct of the Claimant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, and if so we must do so accordingly.[43]

173. Issue 12 is said to determine the question whether the Claimant was entitled to three months notice. We think to be wholly accurate it should be recast as whether the Claimant acted in such a way as to entitle the Respondent to treat his employment contract as at an end. In other words, was he in repudiatory breach of his employment contract? If so, then he could be summarily dismissed, that is to say dismissed without notice.

174. These issues are also important for remedy because they need to be considered when deciding whether or not to make an order for reinstatement.[44]

175. We have found that the HUMINT policy did not apply to the searches of the TBS carried out by the Claimant. We have also found that HR23007 Discipline: How to Assess the level of misconduct only defined what was and what was not gross misconduct so that managers could use the disciplinary procedure appropriate to the level of misconduct alleged. There was no guidance or policy about using the TBS which prohibited a search on a neighbour or former neighbour.

176. The HR22005 Conduct: Confidentiality and customer policy and the HMRC Acceptable Use Policy are however, relevant to this issue. The questions we ask ourselves when deciding this issue are based on the relevant parts of these policies (in so far as they may fit the facts of this case) and are as follows:-

    (a) In breach of HR22005 or the Acceptable Use Policy did the Claimant search the TBS:-
        (i) when he did not have a legitimate business need or was not authorised to do so;
        (ii) for entertainment, personal or casual interests;
        (iii) where there could be a conflict of interest real or perceived;
        (iv) for personal reasons; or

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42 Section 123(6) of the Employment Rights Act 1996.
43 Section 122(2) of the Employment Rights Act 1996.
44 Section 116(1)(c) of the Employment Rights Act 1996.

(v) relating to friends.

(b) If the answer to (a) is "yes" did what was the level of his culpability for example did he do so deliberately, that is to say knowing that he was breaching the rules or was he grossly negligent in that respect?

177. When considering question (a)(i) in this list, we think it is right to apply an objective test. In other words, for any particular search, as a matter of fact there either was or was not a legitimate business need and authorisation. This would be irrespective of the Claimant's thoughts on the matter. We think also that tests a(iii) and a(v) are objective. Tests a(ii), a(iv) and (b) are however largely subjective, and require an enquiry into the Claimant's motives, knowledge and beliefs.

178. As for authorisation, the Claimant was generally authorised to search the TBS. He did not need specific authority to do so. We think the test for authorisation merges into the legitimate business need test. This is in the sense that, if the Claimant had no legitimate business need to conduct a particular search then he would not be authorised to conduct that search.

179. The tribunal has had difficulty understanding the "legitimate business need" test. It is not defined in any of the policies and to answer this question properly probably requires a detailed and extensive knowledge of the inner workings of HMRC, and in particular the work that the Claimant did, and the work done by the Risk and Intelligence Service.

180. This evidence was not before us. We are left with trying to understand from the witnesses and other information in the documents what might or might not be a business case for the Claimant. Since the evidence we heard on this matter was largely opinion rather than factual, we have had to approach it with caution.

181. We accept the Claimant's evidence that when the computers were first introduced staff were actively encouraged to search friends, neighbours and celebrities to understand how the system worked but that this was not now the case. What was regarded as acceptable use of the TBS was dictated by custom and practice and differed from one area to another. Inevitably therefore, views would differ as to what access was acceptable where the guidance was unclear about this.

182. The Claimant told us that at any one time he would have some 12 to 15 cases to deal with. These were quite serious cases. He also told us some enquiry cases arose from project work. We heard about one particular project of the Risk and Intelligence Service which was enquiring into the medical profession. We heard that work on such projects would become generally known by teams such as the Claimants and that he, and members of his team, could offer enquiry cases to such projects. We were shown emails which tended to support this notion.[45]

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[45] Pages 77 and 78.

183. The Claimant also told us that enquiry cases were referred between teams, in the sense that they shared intelligence about taxpayers or passed on enquiry cases to another team.

184. There would also be "spin off" cases from existing enquiries, where for example there were individuals whose names and addresses were identified from existing fraud investigations. Again a search of the TBS would be the starting point to see if that person had a tax record.

185. We accept the Claimant's evidence about "self-generated", or "self-sourced" cases. These were where fraud investigators like himself started or referred an enquiry case. He told us that fraud investigators were expected to be on the lookout to self-generate cases. He gave an example of a self-generated case would be where a tax officer read an article in a national or local newspaper about an individual or a company which showed that there ought to be a tax record for that person. Then, if the tax officer found from a search of the TBS that in fact there was no tax record this would be reported to the Risk and Intelligence Service.

186. In his interview with the investigation manager the Claimant went further than this and explained that he was trained to "police the system" and to trace the "bad guys", and this was expected of tax officers at work and by the public. This would involve checking whether people are on the system, through checks such as the TBS. He regarded himself as "never off duty", like a police officer, and that a tax officer should never walk round with their eyes closed.[46]

187. For a period of time in 2015 when he was acting up as team leader of his team in a temporary Grade 6 position, the Claimant was line managed by Nigel Wood, an Assistant Director. In his interview, Mr Wood confirmed that "many years ago" new people were told not to turn off when they see something, that they have a duty to report things and are never off duty.[47]

188. We accept that Mr Wood told the Claimant that "Anyone is fair game, provided that there is a business case" and that he said similar such things over the years.

189. The Claimant in 2016-17 delivered about 20 presentations to over 500 colleagues about self-generating cases, and he was commended for this work by the Deputy Director in the Fraud Investigation Service.[48]

190. It is clear from the evidence however, that others in HMRC have quite a different view about what is a legitimate business need. In particular, the appeal manager when giving evidence seemed to be of the view that a tax officer who is not in one of the teams tasked to deal with the hidden economy should not act at all on own information or observation, other than completing a Humint report. As we have said, we think that he has misunderstood the HUMINT policy, so his views on this may be tainted by that misunderstanding. The same applies we think to the view expressed by the investigation manager.

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46 Paragraphs 18, 65, 70, 85 and 87 on page 145.

47 Paragraph 15 on page 189.

48 Page 366.

191. In his interview Mr Wood said that he did not think that a tax officer's own concern about a person's money or wealth was itself enough to justify a business need to look at something – there would have to be something else to justify a business need. He confirmed that cases were sometimes self-sourced. He implied that provided there was a business need searching on the TBS for friends, family and neighbours was acceptable.[49]

192. In her statement which was not challenged apart from some opinion expressed in the last paragraph, Ann Smith who was the Claimant's manager until February 2015 said that it was the practice of the team to self-generate a small number of cases and that searches for ghosts were made during the time when she was team leader. She says that there were no business restrictions preventing a tax officer from generating such cases, and indeed development of new cases in this way was encouraged. This was of course, provided the Acceptable Use Policy was followed.[50]

193. This therefore accords with the Claimant's evidence about this. We have seen no written policy which alters this approach.

194. The Claimant's manager however, told us that in his view self-sourced or self-generated cases were those resulting from existing casework. He said it was not a term that translates into a case started on the back of information or intelligence that a tax officer has received or personally observed outside of work.[51] He confirmed this in cross examination.

195. But it is clear that he this view because of the HUMINT policy. As we have said, this policy is only engaged when there is information about criminal offences, regularity breaches or non-compliance.

196. In so far as the Claimant's manager in 2017 took a different view, we accept the Claimant's evidence that he was never told about this and it was never discussed within the team.

197. In the circumstances we consider that it is right to accept the Claimant's evidence that each of the searches that he carried out was for a legitimate business need and that he was authorised to carry out the search.

198. As for whether the Claimant searched the TBS for entertainment, personal or casual interests or for personal reasons, he tells us that he did not. We would point out that when the Claimant gave evidence we are quite sure that he answered all questions truthfully. He was not defensive in any way, he gave information which did not help his case, he did not try to avoid any questions or try to read into the purpose of a line of questioning. His probity is unimpeachable. There is no reason for us to disbelieve him when he says that he did not carry out any search out of personal interest.

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49 Paragraphs 9, 10 and 14 on page 188.

50 Paragraphs 7 and 8 of her witness statement.

51 Paragraph 25 of his witness statement.

199. In the circumstances we accept his evidence that he did not search the TBS for entertainment, personal or casual interests or for personal reasons.

200. It is not suggested that the Claimant searched the TBS relating to friends. And although the prohibition against searching when there was a conflict of interest real or perceived was referred to us in the hearing, this did not develop into a suggestion that the Claimant had breached that prohibition.

201. So we find that the answer both to issue 10 and to issue 12 is "no".

Remedy

202. Our considerations as to remedy are limited to the unfair dismissal claim in which the Claimant has been successful. We must first decide whether to make an order for reinstatement or reengagement. Only if we do not do so may we award a basic award in the agreed sum or a compensatory award which may include an award for pension loss.

203. In deciding whether to make an order for reinstatement we have taken into account those matters set out in section 116(1) of the Employment Rights Act 1996. The Claimant does wish to be reinstated. The Claimant did not cause or contribute to his dismissal to any extent. As for the question whether it is practicable for the Respondent to comply with an order for reinstatement, we think this is practicable. We accept that there is some loss of trust between the Claimant and his current team leader Mr Hillier, but we think the Claimant is genuine in his view that it can be rebuilt. We think the fact that Mr Hillier did not suspend the Claimant during the investigation process does indicate the same from Mr Hillier's point of view as well. Although it may well be the case that at the time of our hearing there was no vacancy in the Claimant's team of 16 people we think that bearing in mind the natural movement of people between various teams at HMRC (some which we heard were doing closely similar work to that done by the Claimant's team) and the fact that it is such a large employer it will be practicable for the Claimant to return to his existing team in compliance with our order.

204. Under section 114 of the Employment Rights Act 1996 our order for reinstatement will have the effect that the Respondent shall treat the Claimant in all respects as if he had not been dismissed.

205. Under section 114(2) we need to specify certain things in our reinstatement order. We will be making an order that it must be complied with 28 days after the date of our judgment on liability, that is 25 July 2018. We will be making an order that will restore the Claimant, as far as can be done in the context of his employment, to the financial position in which he would have been if he had not been dismissed. This will require an order that the Claimant should receive all arrears of pay between the date of his dismissal and the date of reinstatement, including any improvement in his terms and conditions between these dates. If necessary we will order that his pension rights should be restored in full and this may involve a monetary calculation if taking his pension early cannot be

unwound. If it can be rewound our order may require a refund to the pension scheme.

206. The order that the Claimant should receive all arrears of pay between the date of his dismissal and the date of reinstatement is an award specified in column 3 of regulation 3 of the Employment Protection (Recoupment of Benefits) Regulations 1996. Therefore under regulation 4(1) no regard shall be had to the small amount of Job Seeker's Allowance received by the Claimant (it ought not to be deducted). Instead there will be an order containing the necessary particulars under the regulations.

207. As for the arguments put forward by the Respondent on the question of mitigation it does not appear to us that there is any room under section 114 to take that into account, and this is confirmed by *City and Hackney Health Authority v Crisp* 1990 ICR 95. In any case, having regard to the fact that we think reinstatement is appropriate and that the Claimant asked for it in his ET1 claim form, we think the Claimant acted reasonably in awaiting the outcome of the tribunal proceedings before seeking other work.

Conclusions

208. We find that the Claimant was unfairly dismissed. We will be making an order that he be reinstated as from 25 July 2018 and that there are orders which are made which will restore him, as far as can be done in the context of his employment, to the financial position in which he would have been if he had not been dismissed.

209. The claims that the Respondent had discriminated against the Claimant because of something arising from a disability and that it failed to make reasonable adjustments are dismissed.

210. The parties are asked to try to agree a form of order to achieve the above in the light of the necessary enquiries of the pension scheme administrators.

Employment Judge Gordon on 27 June 2018