EMPLOYMENT TRIBUNALS

Miss L Hudson

Secretary of State for the Home Department

Claimant **Respondent**

v

Heard at: **Watford Employment Tribunal** **On:** **1, 2, 3, 4 October 2018**

Before: Employment Judge Tuck
Mr Bury
Mr Leslie

Appearances:

For the Claimant: In person
For the Respondent: Mr Massaralla of counsel.

JUDGMENT

1. **The claimants claim of unfair dismissal fails and is dismissed.**
2. **The claimant's claim for breach of contract fails and is dismissed**
3. **The claimant's claim of direct sex discrimination fails and is dismissed.**

REASONS

1. By an ET1 presented on 9 October 2017, following a period of Early Conciliation between 21 August 2017 and 20 September 2017, the claimant brought claims of unfair dismissal, breach of contract, unlawful deductions from wages and direct discrimination because of her sex. The claim for unlawful deductions from wages was dismissed on withdrawal on 22 March 2018.

2. The issues for determination by this tribunal were discussed at the outset of the hearing. Some time was spent considering the scope of the breach of contract claim being pursued by the claimant in this tribunal, particularly in light of her ongoing complaints and claims in other jurisdictions and before other bodies, including in the High Court and with the Information Commissioner. The claimant confirmed that she did not seek to bring any claim for compensation for breach of contract flowing from the grievance procedure before this tribunal; it may be that this is a matter she is pursuing in a personal injury claim elsewhere. Before evidence was heard, the issues before this tribunal were agreed to be (and therefore limited) as follows:

Unfair Dismissal:

a. Did the Respondent dismiss the claimant for a potentially fair reason within section 98 ERA 1996?
   The respondent relies on "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held"; s98(1)(b) ERA.
b. If so, and having regard to the band of reasonable responses, did the Respondent act reasonably in treating that reason as a sufficient reason for dismissing C?
c. If the tribunal finds that the dismissal was unfair, was there a chance that the claimant would have been dismissed in any event had there been no unfairness (Polkey).
d. If the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, should it reduce the basic and compensatory award having regard to that finding?

Sex Discrimination:

e. Was the claimant labelled as a "vulnerable target" because she is female? Was she treated less favourably than Martin Mirner contrary to section 13 of the Equality Act 2010?
f. Was the claim issued within the three month limitation period and if not is it just and equitable to extend the time limit?

Breach of contract:

g. Did the Respondent breach the claimant's contract by paying her 6 months' notice rather than two years notice?

Preliminary matters.

3. **Disclosure**: the Respondent provided to the tribunal two bundles of documents consisting of 1123 pages; the claimant stated that there had been breaches of orders for disclosure and production of the bundle and that she had received it in hard copy only a week before – though she had received it electronically earlier. She had chosen not to open the package containing the bundle and did so for the first time in the ET. The Claimant had a bundle which contained around 75 pages – some of which the Respondent stated had never previously been disclosed. There was a delay in commencing the case on 1 October 2018 as one of the two boxes of bundles intended to be

sent to the tribunal had erroneously not been sent. The claimant was specifically asked whether she was seeking any adjournment or postponement of this full merits hearing and stated she was not. Neither party sought to make any applications for disclosure, inspection or otherwise at the outset, and in the case of the claimant she was specifically asked whether there were any additional documents she considered were outstanding, and she confirmed there were not. The tribunal did not thereafter consider it necessary or proportionate to establish the facts as to what disclosure took place when and how documents were or were not delivered as all parties were content that the files before the tribunal were such that they enabled evidence relevant to the issues to be adduced and examined as appropriate.

4. The parties of their own volition had anonymised various non-parties who were referred to in the course of the evidence and in the documents. This included the claimant's current partner who was referred to by his initials, EDS. This anonymization was questioned by a member of the press, and on 2 October 2018 the tribunal, of its own volition, made an Order under rule 50 of schedule 1 to the ET (Constitution and Rules of Procedure) 2014 that his identity be protected by the use of anonymization until 10am on 3 October 2018 when the parties could make submissions on the issue as to whether the order should be continued and/or made permanently.

5. The claimant sought an order that the identity of EDS be protected as he was not present to answer any questions. She accepted that his criminal convictions were a matter of public record, and that his trial following his being found in possession of 2kgs of class A drugs had been conducted in public, and that his conviction and sentencing were both conducted in open court. Whilst the claimant did not expressly refer to her own Art 8 right to a private life, we inferred by her commenting that she had had her photograph taken and was not used to it, that she was also concerned about her own right to privacy. The Respondent helpfully flagged up the relevant considerations for this tribunal as to the potentially applicable convention rights of article 8 (right to private life) and article 10 (right to freedom of expression), but was neutral as to the application. Ms Grainne of National News provided the tribunal with brief written submissions urging the tribunal to set aside the order protecting the identity of EDS. She emphasised that there were no factors such as national security or the need to protect identities of children involved in this case.

6. Rule 50, so far as is relevant, provides:

> **50 Privacy and restrictions on disclosure**
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> (1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.

> (2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.
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> (3) Such orders may include—
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> (a) …
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> (b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;
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> (c) …
>
> (d) …
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> (4) Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing.

7. The facts of this case do not involve any allegations of sexual misconduct, and there is no claim of disability discrimination involving evidence of a personal nature or at all so as to require consideration or application of sections 11 or 12 of the Employment Tribunals Act 1996.
8. The Tribunal reminded itself of the protections afforded by Article 8 and Article 10, and also considered the requirement of Art 6 in that member states must afford access to effective remedies for victims of unlawful sex discrimination, though it noted that there was no application to protect the identity of the claimant lest she be deterred from pursuing a claim.
9. As was rehearsed in ***EF v AB*** [2015] IRLR 619 by Slade J:

> It is worth setting out the classic expression of the exercise to be undertaken by a court faced with conflicting ECHR rights. Of Articles 8 and 10 in *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 Lord Steyn held at paragraph 17 of the opinions of the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457 :
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> > 'What does, however, emerge clearly from the opinions are four propositions. First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.'

10. We have considered carefully the fact that EDS is not here to make any submissions. However, we do not consider that there are any elements of his affairs over which he has a legitimate interest of privacy which are being discussed. The Respondent's concern related solely to his criminal convictions which are a matter of public record. We do not find that any Art 8

right to privacy is engaged in that regard. Certainly, there is no right which should set aside the important principle of open justice, and the rights of non-parties to freedom of expression.

11. We have also considered the rights of the claimant. As set out above she has not expressly asserted that her Art 8 rights are engaged, but we feel she has done so by implication. She has not been deterred from brining her claims of unfair dismissal, breach of contract and sex discrimination before the ET, and there is no suggestion that if the identity of EDS is revealed she would seek to withdraw her claims. She knew at all times, that in seeking and continuing employment as a Boarder force officer she would require security vetting which would involve consideration of who her partner was. There is in this case, no examination of any intimate element of her relationship, but simply the fact of her being in a relationship as "a partner" of EDS. In the circumstances of her employment, and of her seeking to have a tribunal examine that employment and its termination we do not consider she has a legitimate expectation of privacy as to the identity of her partner. In these circumstances we do NOT order that he is referred to in an anonymised form.

12. The claimant sought to have the address she had given on her ET1 and had confirmed at the outset of her evidence be subjected to an order such that it could not be included in any press reports. She said that her family's right to privacy was engaged because they are not here and have not been mentioned. She as a Border officer she had arrested people which has led to their imprisonment. She stated that she feared that the safety and security of her home might be breached by such individuals who would have a grievance against her.

13. Rule 50 (1) Rules of Procedure permits the tribunal to make an order in relation to 'any aspect' of its proceedings, and the list in sub rule (3) is not exhaustive. I have no doubt that the tribunal has the power to make an order preventing the public disclosure of her address in any reporting of the proceedings is within the power of the tribunal. Solely on the basis of the submission the claimant has made that, as a former Border Officer her actions have led to the arrest, conviction and incarceration of individuals. We are satisfied that her Article 8 right to privacy in relation to her home is engaged.

14. We do not consider that the interference with the article 10 right to freedom of expression and the important principle of open justice are impeded to any significant degree by permitting the claimant's address to be kept private. Balancing the claimant's right to privacy and her fear as to her family address being public as against the art 10 right, we do consider that it is proportionate that any reporting of this matter claimant's address is <u>not</u> disclosed. Ms Grainne was invited to make any submissions in relation to this order, and made clear that she did not object to this order and was content to omit the address in any report.

FACTS.

15. The tribunal heard evidence from the claimant, and for the Respondent from Jaqueline Sharland, Amjid Rana, Alistair Jackson, Martin Mirner, Nick Jariwalla and Gemma Glanville. It read such documents as it was referred to, and has not sought to make findings of fact in relation to all matters of dispute about which it heard, but rather has made such findings of fact as were necessary to determine the issues before it.

16. The claimant commenced employment with the Respondent in 1994 when she was aged just 16. At all material times she was employed as a Border Force Officer working at Heathrow Airport. Her duties included checking the passports of people arriving into the UK on the PCP – primary contact point, and also working in the customs channels. She would work as part of a team and was trained in both customs and immigration work, and from 2011 she reported to Gemma Glanville. Like all customs and immigration officers she could search individuals /their possessions, and could arrest them, for example if they were discovered to be carrying drugs. While she worked as part of a team, she was able to make decisions autonomously as to whom to stop and search.

17. All Border Force Officers are offered employment subject to security clearance and national security vetting. There are different levels of security clearance namely BPSS (baseline personnel security standard), CTC (counter terrorist check), SC (security check), and DV (developed vetting). Each is said in the HMG Personnel Security Controls policy "to be configured to provide an appropriate level of assurance in respect of a range of threats, and the impact and damage that could arise from compromise, loss or improper exploitation of the information or other assets to which an individual has access". Border Force Officers are required to have a minimum level SC. All home office employees must have at least a CTC. Elsewhere in the civil service there are positions which require only BPSS.

18. As is set out in the frequently asked questions attached to the Personnel Security Controls policy, national security vetting questions are intrusive. Individuals are told that they are considered necessary to safeguard national security and that there is no obligation to go through the vetting process, but that if they choose not to, they may not be appointed to the post they applied for. As well as candidates for jobs completing vetting questionnaires, employees are required to undergo vetting again periodically- in the claimant's case every ten years, though they are told clearly that "personnel security is an ongoing process and as such your security clearance is always subject to review". Home Office security guidelines for SC post holders includes instruction that Corporate Security should be notified:

"of any of the following changes in your personal circumstances:

a) on marriage, civil partnership or living with a new partner

b) any other changes in your personal circumstances that might have a bearing on your security clearance (e.g. serious financial difficulties, criminal conviction, disciplinary action etc.)"

The Online Vetting Forms Statement of HM Government's Vetting Policy provides that individuals subject to vetting will be asked to provide via questionnaire, personal information about themselves, partners, family members and other associates, and that this information will be checked against, among other things, criminal records – both spent and unspent convictions as defined by the Rehabilitation of Offenders Act 1974. It goes on to state that security clearances may be refused or withdrawn where there are security concerns related to an individual's involvement or connection with activities, organisations or individuals associated with "the threats described in this Statement", where personal circumstances, current or past conduct indicate that an individual may be susceptible to pressure or improper influence. Finally individuals are warned that:

> "Failure to disclose relevant circumstances or information is likely of itself to be regarded as evidence of unreliability and will be taken into account in assessing your suitability for security clearance. It is therefore in your own interests to be honest and open in your replies to the questions set out below".

19. In her evidence Ms Sharland stated that within the context of national security vetting, the term "vulnerable" is used to denote susceptibility to improper influence to exploit legitimate access to sensitive assets or information. This is consistent with the usage of the term in the various policy documents such as the HMG Personnel Security Controls Policy, and we accept her evidence in this regard. In cross examination the claimant accepted that the numerous examples of the word "vulnerable" being used in the policy documents were all in a gender neutral way.

20. The Claimant completed her online vetting form on 19 June 2015. At this time she was the co-owner of a house with her ex-partner, LC, and told us that her post was delivered to that house and she was liable to pay bills such as utilities, council tax etc there. She put this address on her vetting form as her home address. The claimant stayed at that address some of the time, but also stayed at premises occupied by her mother in order to provide care, and also at the property of a Mr Emmanuel De Silva. The claimant stated that she had discussed with her manager, Gemma Glanville, that she was no longer in a relationship with LC, but understood that she had to list all partners she had had over the previous three years, and she therefore put LC as her partner. Ms Glanville told us she thought the claimant was still in a relationship with LC; in any event both agree that Ms Glanville's advice in relation to the form was to "put everything", and that the claimant made no mention of Mr De Silva to Ms Glanville. The claimant made no mention on the form of Mr De Silva nor his address, nor indeed of the family address at which she frequently stayed. Her evidence is that she considered the co-owned property

shared with LC to be her home address. As to her 'partner' the claimant stated that as at June 2015 she did not consider herself to be in a stable relationship with Mr De Silva such that she did not have any obligation include him on the form.

21. The claimant met Mr De Silva in or around March 2014 and began a romantic involvement. By June 2015 the claimant knew that Mr De Silva had served over 10 years in prison, but she was unaware that he was in fact on licence. As set out above, she did not consider herself to be in a stable relationship with him, though she was romantically involved with him. Accounts which the claimant has given during various interviews and in statements have not always been entirely consistent in her description of him (friend / boyfriend / partner). Whilst we accept the claimant's evidence that her relationship developed over a period of time, given the purpose of the vetting forms, and the stated policy of checking partners, family "and other associates" against criminal records, we do consider that the claimant ought to have declared her connection – whether at that time described as a friendship, association or partnership – to Mr De Silva on her June 2015 vetting form.

22. On 18 July 2015 - Mr De Sliva was arrested in possession of 2 kgs of class A drugs; 1kg of these were cocaine which the parties stated to us is not capable of being produced in the UK. The Claimant was in bed at Mr De Silva's home when the police arrived to search the property looking for controlled drugs, drugs paraphernalia, and cash evidence. The police saw the claimant's uniform hanging in the wardrobe; they seized her laptop and documents from her workbag which included a manuscript flight list, and told her that they would have to inform her work. She gave the police relevant telephone numbers. The Border force duty manager then received a phone call from the police on the evening of 18th July telling him that the "boyfriend / acquaintance of Laura Hudson" had been arrested in possession of 2 kilos of cocaine, and that when his premises had been raided Laura had been there. The police also told the duty manager that Mr De Silva had been disqualified from driving "a year ago driving Laura's car". Whilst the duty manager was telling Gemma Glanville about the call he had received, the claimant telephoned her, saying that she had been staying in a "friend's flat" when the police had raided it. The claimant was too upset to attend work that night.

23. On 19 July 2015 Ms Glanville emailed "Corporate Security Directorate", copying her line managers Mr Rana and Ms Kyle – the assistant director of the Tactical Response Command, setting out the information she had been provided with.

24. On 21 July 2015 the Police Detective Sergeant dealing with Mr De Silva told Ms Kyle, that the claimant "had possessions stored at [Mr De Silva's] address in one half of the wardrobe and photos of the couple were on display so this is not a fleeting relationship". In this email it also stated that the claimant's "partner is a career criminal who is believed to be on licence for armed robbery and subsequently arrested for possession with intent to supply a large amount of drugs. These drugs are packaged as they would be if directly imported". On 24 July 2015 Ms Glanville emailed corporate security again. She noted that the claimant had reported that "her boyfriend has been in touch"; while the account as to what the drugs he had been in possession of

differed between the police report and the claimant's, Ms Glanville noted that both said it was class A drugs including cocaine. Ms Glanville then asked:

> "as our role is the detection of Class A can you please give me some direction / your views in relation to the situation … one of my main concerns is Laura's vulnerability, should she, for example, detect a quantity of Class A".

Email correspondence indicates that both Ms Glanville and Mr Rana telephoned the Central Referrals Team of Corporate security about the matter on 24 July 2015, and by this time Ms Glanville was under the impression that Mr De Silva had been "Laura's partner [for] around a year". The reply from Corporate Security was that "given the partner's alleged involvement in Serious Organised Crime" and her position within the border force, "risks will need to be urgently identified and mitigated". Ms Kyle considered that appropriate "mitigation" was to remove the claimant from 'channel duties' and place her on PCP, they did not consider suspension was necessary at that time.

25. On 7 August 2015 Ms Glanville asked Corporate Security if they intended to refer the claimant to the SCAU – Security Anti -Corruption Unit. Ms Glanville was advised to speak to the Professional Standards Unit (PSU) and they in turn advised (on 13 August 2015) she speak to Barbara Fraser - a Senior Personnel Security Manager within the Personnel Security Team of Corporate Security. On 17 August 2015 Ms Glanville, having spoken to HR, emailed her line managers saying "as neither PSU nor Investigations and Integrity wish to investigate then Sue [Curtis of HR] is happy to close the case. She is happy that we have done everything necessary to protect both Laura and the Business. I propose brining Laura back to dual duties from tomorrow". The claimant in cross examination said that it seemed to her that those managing her at Heathrow were not clear as to what policy they were supposed to be following.

26. The evidence before us from Mr Alistair Jackson, Deputy Head of Security Vetting, was that Ms Hudson's case "first came to my team's attention when Barbara Fraser was contacted by the claimant's line manager". This conversation is likely to have been at some point between 13 and 17 August 2015. Thereafter, on 18 August 2015 Barbara Fraser emailed the PSU that she had "considerable disquiet about Emmanuel De Silva having googled his name" and "wonder if it is even appropriate for Laura Hudson to be on the PCP". She went on to write that "in the fullness of time I will consider any impact on her suitability to hold security clearance under the provisions of the National Security Vetting so I'll stand back from this now". She went on to ask the Integrity and Assurance team at Border Force on 19 August if they were aware of the claimant whose boyfriend had been arrested. Julie McSweeney, Assistant Director, replied saying they were and that "Heathrow have now closed the case with no case to answer", but noting that "your team will be looking at it from a vetting point of view".

27. Ms Fraser on 18 September 2015 invited the claimant to a meeting with her on 27 September 2015. We have no explanation as to why there was a delay of a month in issuing an invitation to a meeting. During this month we understand that the claimant had returned to full duties.

28. The claimant met Ms Fraser on 27 September 2015; the claimant said that she was told this would be a "chit chat" and was not afforded an opportunity to be accompanied. The minutes of the meeting – which were sent to the claimant after its conclusion - state that the conversation "was classified as 'vetting in confidence', that [BF] would take a note which would be disclosed to her for comment and that the starting point for any consideration of suitability to hold security clearance was that of risk management". The claimant described how she had met Mr De Silva 12 – 18 months earlier, that she knew he had served a prison sentence of over 10 years for robbery and she thought he had been released three years or more ago. She described how she stayed at three properties – that she co-owned with her ex-partner, her mother's and Mr De Silva's. She was frank that she had remained in contact with Mr De Silva after his arrest and being held on remand and had visited him in prison as well as spoken to him on the phone.

29. On 12 October 2015 Ms Fraser wrote a report to Alistair Jackson, the Deputy Head of Security Vetting. She outlined the results of internet searches concerning Mr Emmanuel De Silva which indicated that he had been a member of a criminal gang which had raided six security vans in 18 months gaining £100k, which led to his being jailed for 23 years for conspiracy to rob and firearms offences. His son was also noted to have been convicted of murder in February 2014 and had been given a life sentence with a tariff initially set at 32 years, reduced to 28 years on appeal. Ms Fraser wrote that she hesitated to call Mr De Silva the "partner" of the claimant "because she did not do so and I wish to avoid jumping to conclusions"; nevertheless her conclusion was that Mr De Silva "may well be charismatic and manipulative and well connected in criminal circles so I have a concern that LH may be unknowingly vulnerable to committing wrongdoing, possibly in ignorance…. We know from the police that there are photos of LH in EDS's home so her image could be available to any associates he may have with criminal intent". She went on "EDS has reportedly been found in possession of cocaine and amphetamines of such a quantity it is extremely unlikely to be for minor personal use. LH has an official role in uncovering illegal drugs and preventing criminals from entering the UK. This relationship with EDS does, in my view put her in jeopardy of being exploited." Her recommendation was that LH's association with EDS made her unsuitable to hold SC level security clearance.

30. On 10 November 2015 Mr Jackson wrote to the claimant stating that following the vetting investigation he was minded to withdraw her SC level security clearance, and that the particular concern focused on her maintaining a relationship with a known criminal and the incompatibility of that with her role as an Immigration officer dealing with entry of people to the UK and searching for illegal or contraband substances. A meeting then took place with Mr Jackson, at which the claimant was accompanied by a union representative, on 23 November 2015. During this meeting the claimant's representative asked what the impact on the claimant's security clearance would be if she cut all ties with Mr De Silva, and Mr Jackson said that would be a "positive response." After a brief adjournment the claimant's representative announced that she would cut ties with him, and Mr Jackson indicated that the claimant

might retain CTC clearance though not SC clearance. Following this meeting the claimant was permitted to return to PCP for her working shifts.

31. On 2 December 2015 the claimant's representative emailed Mr Jackson telling him that the claimant, "after some sole searching" believed that she was unable to cut all contact with Mr De Silva as her feelings for him were very strong.

32. The next day, on 3 December 2015, Mr Rana wrote to the claimant suspending her from duty until the outcome of the review into her security clearance was known. We do not consider that the "vulnerability" of the claimant in December 2015 was at any different level to that which it had been at since July 2015, and indeed the matters set out in Mr Rana's witness statement to us which refer to a "clear conflict of interest" for a border officer to be in a "close relationship with someone charged with possession with intent to supply class A drugs that were produced outside the UK" had been clear to the Respondent since at least late July 2015. We have been given no explanation for the protracted delays which occurred between the events of July and the claimant being suspended. We understand entirely why the claimant, having been moved onto PCP initially, then back to full duties, then back again to PCP only, was initially (and for quite a long period during 2015) under the impression that her security clearance was not at risk.

33. In light of the information that the claimant did not intend to cut her ties with Mr De Silva, Mr Jackson held a second "minded to remove security clearance" meeting on 28 January 2016. It was stated expressly in this meeting by the claimant's union representative, that she was aware that "personnel security's position of 'minded to withdraw' could, hypothetically result in her not having a job", to which Mr Jackson replied that if both SC and CTC clearance were removed, the claimant could not be employed by the Home Office, though elsewhere in the civil service BPSS was sufficient and that the claimant's level of integrity for holding that was not under consideration. The claimant had a copy of the notes taken at that meeting and was able to review them. Before us the claimant has raised questions of breaches of data protection principles / privacy in the conduct of the meetings of September, November 2015 and January 2016, but none of the matters raised in our view go to the substantive merits of this case; significantly the claimant had notice of the concerns held by the Respondent and was able to address all the issues around whether her security should be maintained or revoked.

34. By a report dated 1 March 2016 Mr Jackson concluded that the claimant's SC and CTC clearances should be revoked. The basis of this decision was her relationship with Mr De Silva, which was noted to be "exceedingly important to Ms Hudson as she has refused to end it even appreciating that her job is at stake. Her feelings for him are clearly very powerful and genuine…". He stated that "the extremely close association with a serious criminal is inconsistent with any level of national security clearance", and that had the relationship been broken off he would have recommended maintaining CTC (though not SC) clearance. He raised as an issue whether the claimant had been sufficiently frank in completing her June 2015 security questionnaire but

did not base his decision on this. Mr Jackson wrote on 4 March communicating his decision to withdrawn SC clearance. At this point Mr De Silva's trial had not been concluded, though his possession of 2 kgs of Class A drugs was not disputed.

35. The claimant appealed to the Permanent Secretary to the Home office against the revocation of her security clearance by letter dated 28 March 2016. On 12 April 2016 Jacqueline Sharland wrote to the claimant stating that she could be considering the appeal and then making a recommendation to the Permanent Secretary. She requested a statement of case from Mr Jackson and compiled a bundle of all relevant documents, which were sent to the claimant. This included a "Defence statement" obtained from Mr De Silva's trail – while this was in the appeal documents it was not drawn to the claimant's attention and she was not asked about it. An appeal hearing took place on 7 July 2016; again the claimant was represented by a trade union official and was sent minutes afterwards. She essentially argued that she had done nothing wrong and the decision was therefore disproportionate.

36. The tribunal pause here to note that it has (quite properly) never been suggested that the claimant has ever engaged in any criminal activity. Nor has her conduct of her duties as a border officer ever been called into question. She had very long service, and a clean disciplinary record.

37. Ms Sharland wrote a report to the Permanent Secretary dated 14 September 2016 recommending that the appeal be rejected. As set out in her witness statement:

> I considered that AJ's decision to withdraw CTC and SC security clearance had been reasonable based on the vulnerability of the claimant as a direct result of her relationship with EDS. I further found that, whereas the vetting decision officers had accepted the claimant's statements about her relationship with EDS, it had become clear during the appeal stage that the claimant had not been honest when she had completed her security questionnaire for SC clearance.
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> …
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> The claimant put forward as mitigation during her appeal the fact that she had been in a relationship with EDS for two years. Her rationale in using this as mitigation being that she had continued to work on the border preventing and detecting illegal drug smuggling throughout the course of the relationship and at no time in the last two years had her professional integrity been called into question. The new position adopted by the Claimant at the appeal stage was of great concern to me as it showed that the Claimant had intentionally left EDS off her security questionnaire."

38. By letter dated 14 October 2016 the Permanent Secretary, Mark Sedwill rejected the claimant's appeal, upholding the decision to remove SC clearance. Her relationship with Mr De Silva and his involvement in organised crime was said to give rise to a direct opportunity for him or his associates to

"exploit the privileged access your role affords" and the risk of vulnerability to exploitation was real, present and ongoing. Further it was said to be incompatible with SC clearance because of the conflict of interest between your duties in disrupting and identifying the actions of organised crimes such as the importation of drugs, and the aims of organised crime in evading these controls. Mr Sedwell went on to say that his "primary concern is your personal dishonesty in failing to disclose EDS as your partner on your security questionnaire. Whilst you were not permanently co-habiting, the evidence supports the view that this was an established relationship and I consider your non-disclosure a deliberate attempt to avoid drawing attention to an individual of security concern".

39. On 17 November 2016 Mr Rana invited the claimant to a meeting to discuss her future employment with the home office, and her potential dismissal. The claimant said, and we accept, that within a few minutes of the meeting starting on 25 November 2016 Mr Rana told her that as her security vetting had been withdrawn and her appeal against this unsuccessful, she would no longer be able to be employed by the Home Office. This was confirmed in letter dated 30 November 2016, which stated that she would be afforded six months' notice such that her effective date of termination would be 25 May 2017. She was told that she had a further right of appeal in relation to her security vetting, to the SVAP – Security Vetting Appeals Panel, but that her employment would not be maintained whilst this appeal was outstanding. She was also told that she could be eligible to apply for roles in the wider civil service, but that it was her responsibility to find such a role. Mr Rana gave evidence that in order to access internal vacancies on the civil service website, he had to receive notification and reply to it confirming that he was the claimant's line manager. We accept his evidence that as soon as the claimant made that request, Mr Rana promptly granted it.

40. The claimant appealed against her dismissal, and this was rejected by Mustafa Khan on 29 January 2017 after a hearing on 24 January 2017.

41. The claimant's dismissal and the rejection of her appeal against the dismissal were, we find, inevitable given the withdrawal of her security clearances.

42. The claimant also exercised her right to appeal to the SVAP. A hearing before Sir George Newman and two members was heard on 16 June 2017, and by a report dated 18 August 2017 that appeal was rejected. Sir George Newman noted that: "A stark and obvious conflict of circumstances exists when a Border Force officer of 22 years' standing, with responsibility and power in policing and border control of drug importations, enters into an intimate relationship with a convicted drug dealer who is currently serving an eight year prison sentence." There is, so far as this tribunal is aware, no evidence that Mr De Silva's previous conviction was for drug offences or dealing, but the statement Sir George Newman goes on to make - that upon Mr De Silva's arrest for serious drug offences "the risk to [Miss Hudson's] professional status must have been obvious to her" - is one we also adopt.

43. Whilst these various procedures were ongoing, the claimant also raised a grievance – in March 2016. The claimant told us that the way in which this grievance was conducted is the subject matter of a claim in the High Court for personal injuries. The only matter which we considered was within the

grievance about which we are obliged to make findings in order to determine the issues before us, was one relating to Mr Martin Mirner, whom the claimant relies upon as a comparator for the purposes of her claim of sex discrimination.

44. Mr Mirner is a long serving Border Force Officer who holds SC level security clearance. In November 2014 he received a telephone call from the son of a friend of his, saying that his father (Mr Mirner's friend) had been arrested after drugs had been found in one of his trucks. The friend was the owner of a haulage company. Mr Mirner at that time was line managed by Yemisi Jenkins, and he told her on his next shift the information he had received. Mr Mirner gave evidence to us which was unchallenged, that he "became aware that the drugs found in one of my friends trucks were cannabis and although he had initially been charged the charges were dropped". It is not clear when he became aware of this, nor is it clear if/when he passed this on to his line management. We have before is in the bundle an email Ms Jenkins sent to her line manager, Mr Rana, on 29 November 2014. It says

> "Just to give you the heads up that Martin received a call from his friends [sic] son to inform him that his father (Martin's close friend) had been arrested for the importation of class A".

Mr Rana in his witness statement said that he did not recall seeing this email, but that on viewing it to prepare his statement, he believed he would have been concerned, but as the email was vague he would have needed to know more about what had happened. Mr Mirner was not at any point referred to Corporate Security or interviewed by them to ascertain the facts. The claimant's complaints about the inconsistent treatment she had received when compared to Mr Mirner were set out in her appeal against dismissal and in her grievance. We heard no evidence from Mr Khan who in dismissing the claimant's appeal against dismissal simply stated that he had no evidence about Mr Mirner and he considered it the claimant's responsibility to collate evidence. Mr Jariwalla determined the claimant's grievance after an investigation had been carried out by a Ms Elaine Bowman. In the course of that grievance investigation Mr Rana was not questioned about Mr Mirner's disclosure, and Ms Bowman's report simply stated "we are not able to comment on any other cases however there are distinct differences between each case." It is not clear what her evidential basis for this finding was. Mr Jariwalla concluded that

> "the Home Office Security Vetting Unit does not comment on other cases and therefore I can make no findings on this point. I note their comment that there are distinct differences between these cases."

When questioned by the tribunal about whose comments are being referred to ("I note *their* comments") Mr Jariwalla was unable to assist. It is apparent that Home Office Security vetting never considered Mr Mirner / his relationship with a friend who had been charged with importation of drugs, and therefore it could not have been that entity which remarked on the differences. None of the respondent's witnesses – indeed including Mr Mirner himself – were able to state what assessment of risk or vulnerability took place, by whom or when. The tribunal – whilst underlining that it does not

criticise Mr Mirner at all (it is apparent he volunteered such information as he had appropriately and swiftly) - considered this to be wholly unsatisfactory.

45. The claimant did not take us to any provisions within her contract nor the Civil Service Compensation Scheme indicating a contractual entitlement to two years notice. Further, in cross examination she accepted that none of the sections within that scheme were in any way applicable to her circumstance.

LAW.

46. In a claim of unfair dismissal where the Respondent admits that it dismissed the claimant, it bears the burden of proving a potentially fair reason for dismissal. Some other Substantial Reason is stated to be a potentially fair reason, and the Court of Appeal in *Willow Oak Developments Ltd t/a Windsor Recruitment v Silverwood* [2006] ICR 1552 commented that the question for the ET is whether the reason for which the dismissal took place "could" be a substantial reason – such that if it is based on an inadmissible ground such as race or sex then it will be excluded by section 98(1) ERA.

47. If the respondent satisfied this burden, the ET must then consider whether the respondent acted reasonably in treating that as a sufficient reason to dismiss – and in engaging in this exercise must consider whether dismissal was within a range of reasonable responses. Whilst an ET must not substitute its own view for that of the Respondent, nor is this a 'perversity test'. The approach to section 98(4) was considered in the recent case of *Connolly v Western Health and Social Care Trust* [2018] IRLR 239, in which the Northern Ireland Court of Appeal, applying art 130 of the Employment Rights (Northern Ireland) Order 1996 (SI 1996/1919) (which is equivalent to section 98 ERA 1996). Lord Denny acknowledged that "whether an employer acted reasonably or unreasonably is to be addressed as whether an employer acted within a band of available decisions for a reasonable employer even if not the decision the tribunal would have made." But he adds that it is necessary for tribunals to read the test "alongside the statutory provision of equal status … ie that that decision 'shall be determined in accordance with equity and the substantial merits of the case'." This means the tribunal should decide whether dismissal "was equitable and merited".

48. In *Scott v EC Maritime PCC Ltd* (Case no 0032/16) a maritime security officer was dismissed for SOSR – namely pressure for his removal for working for a specific client. The EAT upheld the judgment of the ET that in a case where there was no evidence of alternative work being available, and in circumstances where the respondent operated a "cell structure" (a company which has a central hub or core with a number of separate cells into which the company can segregate its assets whilst remaining one single legal entity) a failure to look for alternatives roles had not rendered the dismissal unfair.

49. The claimant has presented a complaint that contrary to s39(2)(d) EqA 2010, she has been discriminated against in employment by being subject to a

detriment. The discrimination she contends she suffered is direct discrimination contrary to section 13(1) EqA, i.e. that she was treated "less favourably" than an actual or hypothetical comparator would have been, because of her sex. The EAT in *Cordant Security Limited v Singh* [2016] IRLR 4 held that in order to find a breach of section 39(2)(d) EqA, there must be both "less favourable treatment" to show discrimination, and also a "detriment" to the claimant.

50. Section 23(1) EqA makes clear that in conducting a comparison exercise, there must be "no material differences" between the circumstances relating to each case. It is frequently sufficient to consider whether a person has suffered less favourable treatment, to ask the question why they have been treated as they have, as that may demonstrate whether the protected characteristic played any part in the decision. It is not always necessary to go through a two –stage test to consider whether in the first place a claimant has established a prima facie case, and if they have, to require a respondent to prove that there has been no discrimination whatsoever, as set out by s136 EqA, and in the guidance given in *Igen v Wong* and the cases thereafter.

51. In relation to the claims for discrimination brought by the Claimant, the relevant time limit is set out in s.123 EqA 2010. The tribunal has jurisdiction to consider a complaint if the claim is presented within three months of the act of which complaint is made. In *Apelogen-Gabriels v Lambeth London Borough Council* [2002] ICR 713 the Court of Appeal stated that the pursuit by an employee of internal or domestic grievance or appeal procedures does not normally constitute sufficient ground for delaying the presentation of a complaint to an employment tribunal. Lord Justice Peter Gibson stated;

> "It has long been known to those practicing in this field that the pursuit of the domestic grievance or appeals procedure will not normally constitute sufficient ground for delaying the presentation of an appeal".

The submission that the time limit runs from the communication to the employee of the outcome of the grievance through the employees grievance procedure was said in *Apelogen* to be "hopeless" as the statutory wording makes it clear that the three month period begins when the act complained of was done.

52. If the claim is presented outside the primary limitation period, that is after the relevant three month period, the tribunal may still have jurisdiction if, in all the circumstances, it is just and equitable to extend time. The claimant bears the burden of persuading the tribunal that it is just and equitable to extend time. There is no presumption that time will be extended. I have been referred to the case of *Chief Constable of Lincolnshire Police v Caston*

[2010] IRLR 327, in which this principle was again set out by the Court of Appeal, at paragraph 26:

> "The burden of persuading the tribunal to exercise its discretion to extend time is on the complainant".

She, after all, is seeking the exercise of the discretion in her favour. Lord Justice Sedley summarised it thus:

> "There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal in the EAT is a well known example) policy has led to a consistently sparing use of the power. This has not happened and ought not to happen in relation to the power to enlarge the time for bringing ET proceedings."

53. The tribunal takes into account anything which it judges to be relevant and may form and consider a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for a respondent to be put to defending a late weak claim and less prejudicial for a claimant to be deprived of such a claim.

Submissions.

54. Both parties helpfully produced written submissions which were supplemented orally. A significant time was spent discussing the claimant's claim of direct sex discrimination and precisely what act of the Respondent's she sought to rely upon. Whilst her ET1 and the list of issues made it clear that she claimed that she had been labelled as 'a vulnerable target', in relation to her complaint of less favourable treatment as compared to Mr Mirner, it could have been either the decision to refer her to Corporate Security that was being complained of, or the decision to remove her security clearance; neither of which happened to Mr Mirner. The claimant stated clearly, having had these different formulations put to her that her complaint was that she had been referred to Corporate Security in July 2015 whereas he had not. Mr Massarella submitted that this could not amount to a 'detriment' for the purposes of section 39(2)(d) EqA 2010 – even if it was "less favourable treatment" – because the relevant focus was what happened to the claimant; he relied on *Cordant Securities Ltd v Singh* [2016] IRLR 4. In that case a claimant who had established less favourable treatment in his grievance not being investigated when that of his comparator had been, but the EAT held that in circumstances where the grievance had been fabricated, he had not suffered any sense of grievance or injustice as a result of the less favourable treatment and had therefore suffered no detriment.

Conclusions on the issues.

Unfair Dismissal:

55. We are entirely satisfied that the reason for the claimant's dismissal was the removal of her security clearances, and that this amounts to 'some other substantial reason' for the dismissal of a border force officer.

56. We are further satisfied that dismissing the claimant for that reason was within a range of reasonable responses.

57. The tribunal was troubled by the unexplained delay between the events of 18 July 2015 and the suspension of the claimant on 3 December 2015, and in particular about how "Heathrow had closed the case" (as per Ms McSweeney's email of 19 August 2015), but that this would still be subject to Ms Fraser "looking at it from a vetting / aftercare point of view". We have great sympathy with claimant's evidence that it seemed to her that "Heathrow" didn't have a set policy and were not sure what was going on. We do not however consider, particularly in light of this answer from the claimant, that she had understood the respondent to have affirmed her contract, and indeed, even allowing for the fact that the claimant was in person, she never asserted any facts which could lead to such a view.

58. We do find that once Barbara Fraser became aware of this case and it was within the scope of Mr Jackson's team, whilst there were still various delays, the process followed was a reasonable one. The claimant was invited to a fact finding meeting – and it is not rendered unfair that she had no union representative at that meeting, as it was an initial fact find. Further, whether or not the claimant was told it would be a "chit chat", the purpose to which the notes of the meeting could be put was always made clear to her.

59. Ms Fraser made her recommendation which was considered by Mr Jackson, who followed a fair procedure in inviting the claimant to a "minded to withdraw meeting". When the prospect of the claimant cutting ties with Mr De Silva was raised, he indicated a nuanced approach which he was proposing – this does not indicate some "premeditated coercion by the respondent to revoke my clearances and dismiss me" as alleged in her statement by the claimant. When that situation changed and the claimant said that she could not sever links with Mr De Silva, Mr Jackson conducted a further meeting – and by this point the tribunal is satisfied that the claimant was well aware of the consequence which would flow from her ongoing relationship with him, both of having her security clearance revoked and being dismissed from the home office.

60. We are satisfied that Mr Jackson's conclusion was within a range of reasonable responses open to the respondent faced with the facts as it understood them after the enquiries it had properly made.

61. The appeal process followed by Ms Sharland was also within a range of reasonable responses. We reject the submission of the claimant that in contrasting the account she had given to Ms Fraser about the events of 18 July 2015, with a copy of a defence statement produced for Mr De Silva's trial rendered the process unfair. The statement, however obtained, was something which, once shown to Ms Sharland, she was duty bound to consider, and it is of significance that it was not hidden from the Claimant, but included in the documents set to her. Further, we agree with the submission of Mr Massarella, that the impression being given to Ms Fraser, of the claimant using Mr De Silva's flat to sleep in as a matter of convenience, was

quite different to the impression in the defence statement of the claimant and Mr De Silva spending time together as a couple completing domestic chores together before she returned to his flat to rest before her night shift.

62. We reject the contention that the appeal by Ms Sharland was in some way unfair because it went beyond the findings of Mr Jackson. It is open to a reasonable employer when conducting a detailed appeal process to make further findings, and indeed in the specific context of considering the suitability of an individual to have national security clearance, we consider Ms Sharland was duty bound to include the additional matters she had discovered.

63. Thereafter Mr Rana had no alternative but to dismiss the Claimant from the home office given the requirement for CTC security clearance and the fact she did not have it. We do note however, that despite the findings that the claimant had not been open and honest on her vetting from in June 2015, the Respondent did not seek to dismiss the claimant for this as an act of misconduct – but proceeded as a "no fault" dismissal in her failing to have the security clearances required for her post.

64. We have considered carefully the argument that in failing to find the claimant a suitable post in the wider civil service there was some unfairness in this process. However, we accept that as the employer was "the home office", and the could not employ the claimant without at least CTC clearance, this essentially is the end of the matter. There was no obligation on the respondent to assist the claimant in seeking employment elsewhere in the civil service. In any event, we accept Mr Rana's evidence that once he received a request via the computer system to confirm he was the claimant's manager, he acceded to it to permit the claimant access to details of internal civil service vacancies.

65. If we are wrong as to the claimant's dismissal being procedurally fair, we find alternatively that it was inevitable that the claimant would have been dismissed in any event. As the SVAP found, the position of being a border officer is entirely incompatible with maintaining a relationship with a person who has been convicted of possession with intent to supply of a significant amount of class A drugs. This relationship would inevitably lead to a security vetting conclusion that the claimant is "vulnerability" - meaning susceptible to improper influence, and not being granted either CTC or SC clearance.

66. Further, we do find that the claimant in not volunteering her association with Mr De Silva at any point prior to July 2015 and choosing not to terminate their relationship, caused her own dismissal entirely.

Sex Discrimination:

67. Having clarified with the claimant the scope of her complaints of sex discrimination – of being labelled "vulnerable" and being referred to Corporate Security when Mr Mirner in the same material circumstances was not – it was clear that both date from July, or at the latest August 2015. The ET1 in this

case was not presented until 9 October 2017 after an early conciliation period between 21 August and 20 September 2017. It is apparent the complaints from the summer of 2015 are very significantly out of time. The claimant was very clear that she was not complaining about the removal of her security clearance as an act of discrimination comparing herself to Mr Mirner – and of course their material circumstances by that time were significantly different.

68. The claimant has not – and in our view it would not be open to her – argued that there was discrimination extending over a period. Nor has she put forward any explanations whatsoever as to why we should extend the time period permitted for her to bring a compliant. She was able to express her discrimination allegation in her grievance letter of March 2016, and in her appeal against dismissal. No new facts came to light thereafter – and it is well settled that waiting to go through a grievance process does not provide a good explanation for missing the primary limitation period.

69. In these circumstances we consider that the claimant's claim for discrimination has been presented outside the necessary limitation period, and it is not just and equitable to extend the time permitted to present a claim to October 2017.

70. In any event, we would have dismissed the claimant's claims of direct sex discrimination.

71. The claim that the claimant was labelled as "vulnerable" or a "vulnerable target" because she was female was, we find, without foundation. As the claimant accepted in the course of her cross examination, the word vulnerable is used throughout policy documents concerned with national security and vetting decisions and is used in an entirely gender neutral way.

72. We found the claim of being treated less favourably compared to Mr Mirner more difficult, and as set out above, have been provided with no evidence to explain why he, when he told his managers that a close friend of his had been arrested "for importing class A" was not subject to further investigation. Indeed, Mr Rana's evidence accepted that further investigation was necessary. It is apparent that he was not referred to Corporate security. The decision being complained of is Ms Glenville's emailing corporate security about the claimant on 19 July 2015. She did this, according to her statement (which was not challenged in this regard) on the advice of Michelle Kyle, Assistant Director.

73. We considered whether Mr Mirne was a comparator in the same material circumstances as the claimant for the purposes of section 23 EqA, and cannot find that he was:

    a. On 29 November 2014 Ms Jenkins knew only that a "close friend" of Mirner's had been arrested for "the importation of class A". Mr Mirner had received this information second hand and had volunteered it to his manager on his next shift. Seemingly with this information, and nothing more, Ms Jenkins emailed Mr Rana, but did not escalate the

matter to either to the assistant director nor to corporate security. We do however infer that there was some agreement for Mr Mirner to keep the Respondent informed of any developments, and indeed Mr Rana in his statement sets out becoming aware (albeit he does not recall when) of the charges relating to cannabis (class B) and later being dropped.

b. On 19 July 2015 Ms Glanville knew that the "boyfriend/acquaintance" of the claimant had been arrested with 2 kilos of cocaine, and she had been at his accommodation when it was raided. The duty manager who had taken a call from the police had escalated the matter to the on call assistant director who had considered suspension options and advised that if the claimant was arrested she should be suspended immediately. Whilst the claimant did telephone her manager Ms Glanville, the Respondent's primary source of information was from the police, and indeed on 19 July the claimant reported that she did not know the reason for Mr De Silva's arrest. Ms Glanville realised on speaking to the claimant that she was very upset, such that she could not come into work and did not feel able to drive; Ms Glanville was concerned as to whether there was anybody to stay with the claimant who remained in Mr De Silva's flat.

c. In assessing "vulnerability" – as used by the respondent's policy – the position of the claimant of being present during a police raid, possibly living with the accused, and being so upset about the situation she was not even fit to drive, is not akin to that of Mr Mirner who had received information second hand, and about whom there was no question of him living with the accused.

d. In any event, it is not disputed that there were different decision makers involved, and while Mr Rana was copied into emails from both his subordinates, Ms Jenkins and Ms Glanville, it was not he who made 'the call' to refer the matter to corporate security or not.

74. Having found that Mr Mirner was not in materially the same circumstances to be properly considered as a comparator, we have gone on to consider the position of a hypothetical comparator. We do not accept that if Ms Glanville was faced with circumstances which were materially the same in relation to a male border officer whose girlfriend had been arrested, she would have behaved any differently.

75. We do not therefore conclude that the claimant has established that she was treated "less favourably" for the purposes of section 13 EqA.

76. It is unfortunate that the relationship between "corporate security" and Mr Jackson's team – especially Ms Fraser – whose email footer states she is part of corporate security, was not explored in evidence as this may have assisted in explaining "Heathrow" had decided to close a case which Ms Fraser describes as causing her significant disquiet. However, we are satisfied, for the avoidance of doubt, that the steps followed from August 2015 resulting in the removal of the claimant's security clearances were not tainted in any way by her sex.

Breach of contract:

77. Claimant has not evidenced any factual basis to show an entitlement to receive 2 years notice. Her claim for notice over and above the six months she received is dismissed.

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Employment Judge Tuck

5/10/2018

Sent to the parties on:

15/10/2018

For the Tribunal:

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