**Case Number: 1401486/2016**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr David Mabaso**

**Respondent:** **Commissioners for Her Majesty's Revenue and Customs**

**Employment Judge Hargrove sitting with Members Mr H Launder and Mrs P Ray at Bristol CFJC on 29,30 April,1,2 and 3 May 2019**

# RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

The following claims are not well-founded and are dismissed:

1. Unfair dismissal;
2. Wrongful dismissal;
3. Victimisation contrary to Sections 26 and 39(2) of Equality Act;

# REASONS

1. By an ET1 presented to the Employment Tribunal on the 1st of August 2016 the claimant made claims of wrongful dismissal, unfair dismissal and of direct and indirect discrimination on the protected characteristics of his racial origins and of his disability, in relation to his dismissal, and other acts of victimisation and harassment. He had been employed as an Administrative Assistant, from September 2004, and from 2013 an Administrative Officer until his summary dismissal on the 6th of May 2016.

2. The respondent submitted a response on the 4th of November 2016 in which it asserted that the claimant had been fairly summarily dismissed for gross misconduct, being the claimant's access and attempted access to confidential taxpayer information in breach of the respondent's acceptable use policy (AUP). It denied any act of discrimination or victimisation. Subsequent

applications were made by the claimant to add other heads of claim, to which there were objections.

## 3. Case management history

(1) The claims have been the subject of a series of case management hearings, which explains the delay in listing this hearing now nearly 3 years after the claimant was dismissed. There was an initial case management hearing on the 24th of February 2017 at which successful applications were made by the respondent for a strikeout of claims for indirect discrimination, harassment and direct disability discrimination. However, the refusal by the tribunal to make further strikeout or deposit orders was the subject of an appeal by the respondent to the EAT. The claimant did not cross appeal. The matter was remitted for a further hearing in front of EJ Ford QC which took place on the 15th of January 2018, the outcome of which is set out at pages 108 K-X of the current bundle of documents. Helpfully this document sets out the outstanding issues, in particular of victimisation, at paragraph 25 to 27. The tribunal permitted claims of wrongful and unfair dismissal, race discrimination and victimisation, and two allegations of failure to make reasonable adjustments, to proceed, but made deposit orders in respect of the claims of race discrimination and failure to make reasonable adjustments. The claimant did not pay the deposit and in consequence the race and disability claims were struck out.

(2) At a further case management hearing on the 12th of October 2018 further orders were made listing the present hearing and subsidiary orders were made including for the exchange of documents and the preparation of a bundle, limited to 300 pages, and for exchange of witness statements.

(3) The hearing commenced on the 29th of April 2019 with a reading day. On day four, before he was due to give evidence, the claimant made an application to strike out the response on two grounds; the first being the respondent's alleged denial, in particular by the decision-makers, of knowledge that the claimant had, prior to his dismissal, done protected acts; The second being that the respondent had deliberately failed or refused to disclose documents which he asserted were material to his claims. By way of background, it is established that the claimant had brought two separate sets of proceedings in the ET claiming various acts of discrimination under the Equality Act. They are not both identified in the joint chronology ordered by the tribunal, even in its amended form. However, it appears that – we have not been provided with any dates or documents- in 2012 the claimant brought a first discrimination claim in respect of his mobility impairment of a failure to provide him with a specialist chair. That claim was struck out as out of time but was the subject of an unsuccessful appeal to the EAT on 13 December 2012. There were 2 further claims of other acts of discrimination brought in 2012. The claimant had failed an Inspector training course and was placed on a redeployment register because there was no substantive role; and in the course of which the claimant had to undertake online tests in respect of specific open posts, which allegedly disadvantaged him because of his disability of dyslexia. The claimant was also unsuccessful at first instance, the reasons being sent out on 13 November 2013, but it was the subject of an appeal by the claimant to the EAT, to the Court of Appeal and to the Supreme Court (in February 2019), which resulted in one part of the claims being remitted to the ET. The remitted hearing has yet to be listed. It is still outstanding.

(4) We unanimously refused the application to strike out the response. A claim or response may be struck out under rule 37 if a party has acted vexatiously abusively or otherwise unreasonably either in bringing or conducting the proceedings, or if a claim or response or any part of it has no reasonable prospect of success. The claimant had during cross-examination of the respondent's witnesses drawn attention to documents in the bundle in which reference was made to his previous ET proceedings as a result of which the decision-makers would or should have been aware of them. However, those decision-makers did not deny that knowledge during their evidence and the respondent did not take any point either in the original or the amended ET3 that they did not have such knowledge. The essential issue which was live before this tribunal was whether that knowledge on the part of the decision-makers materially influenced their decisions including to dismiss and to subject the claimant to acts said to constitute detriments. Knowledge alone did not prove that they were so influenced.

(5) As to the second ground, the claimant had, shortly before the hearing was due to begin raised in correspondence with the tribunal that certain documents had not been disclosed by the respondent. These included a second Humint disclosure document which he claims to have sent and emails of complaint to Nick Sharp about his Line Manager, Mr Cascadden. That matter was considered by the REJ who dismissed the application as having been made too late before the hearing. In any event the claimant did not raise the matter at the outset of this substantive hearing on 29 April . We were satisfied on further consideration during our deliberations that even if there had been any failure to disclose relevant documents by the respondent, which was denied by the respondents, the contents claimed by the claimant would not have made any difference to the ET's conclusions.

## 4. The issues remaining for consideration by the tribunal

4.1. The heads of claim remaining are of unfair and wrongful dismissal, and of the various acts of victimisation, including dismissal and the acts of detriment Identified in paragraphs 25 to 27 of the reasons of EJ Ford referred to above. It is to be noted however that at the hearing the claimant only relied upon a limited number of those detriments, and we reach conclusions only upon those upon which he did rely.

4.2. As to the unfair dismissal claim, dismissal being admitted, the burden of proof lay upon the respondent to establish on the balance of probabilities a reason for dismissal of a kind identified in section 98 of the Employment Act 1996. In this case the respondent relied upon conduct as being the reason or principal reason for dismissal. The claimant asserts that the reason was because he had done the protected acts. It is to be noted that the burden of proof on the claimant in that respect is a lesser one for two reasons, the first being that there is a different burden of proof in discrimination cases; and, secondly, an act of victimisation is established if the protected act materially influences the decision-maker's decision, for example to dismiss. It does not have to be the reason or principal reason for it. It is in theory possible for a conduct reason to be the principal reason for a dismissal, but that reason

to have been also materially influenced, consciously or unconsciously, by the fact of the protected act.

4.3. If the respondent proves that the reason or principal reason was a reason related to conduct, the tribunal then has to consider whether or not the dismissal for that reason was fair or unfair applying section 98(4) of the 1996 Act. That provides that:

4.4. "The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case."

4.5. In the case of a misconduct dismissal there is a three stage test set out in British Home Stores v Burchell 1980 ICR page 303, and many other cases following it, including, in the Court of Appeal, J Sainsbury plc v Hitt, 2003 ICR page 111. It must be established, with a neutral burden of proof, that the employer carried out as much investigation as was reasonable in the circumstances; that the dismisser both at the initial stage and at the stage of any appeal, had a reasonable belief in the misconduct alleged based on that investigation; and that the decision to dismiss fell within a band of reasonable responses by the employer in the circumstances in question. The band of reasonable responses test applies to each of these three elements. In other words, the tribunal must not substitute Its own view as to what would be reasonable in relation to the investigation, the belief of the dismisser and the decision to dismiss, for that of the hypothetically reasonable employer. There is a range of responses which may differ between one employer and another, under which one employer may decide reasonably to dismiss, and another may decide not to dismiss but to impose some lesser penalty. Provided the decision to dismiss falls within the band, the fact that another employer might decide not to dismiss, does not mean that a decision to dismiss is unreasonable. This is of particular relevance in the present case because the HMRC has an established policy of treating certain breaches of the AUP including unauthorised access as gross misconduct.

## 5. Wrongful dismissal

(1) Here the burden of proof lies upon the employer to establish at the hearing that the claimant was in fact guilty of conduct which constituted gross misconduct justifying summary dismissal. In that respect, the tribunal has to descend into the primary fact-finding role, and not apply the band of reasonable responses test for unfair dismissal. If the tribunal were to find that the claimant was not in fact guilty of gross misconduct, the claimant would be entitled to a finding of wrongful dismissal and to an award of compensation limited to the notice period. The employer is entitled to rely upon evidence before the tribunal which it may not have been aware of at the time of the original dismissal.

## 6. Victimisation

(1) Section 27 of the Equality Act 2010 provides as follows: –

A person (A) victimises another person (B) If A subjects B to a detriment because –

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –
(a) Bringing proceedings under this Act;
(b) Giving evidence or information in connection with proceedings under this Act;
(c) Doing any other thing for the purposes of or in connection with this Act;
(d) Making an allegation (whether or not express) that A or another person has contravened this Act. "

7. As has been indicated above, it is conceded not only that the claimant had done at least two protected acts in bringing two sets of proceedings under the Equality Act from 2012 onwards, the latter of which was still outstanding at the time of his dismissal, and at the time of other acts or failures to act said to constitute detriments. In this connection, section 39 of the Act, which incorporates the provisions into the employment field, provides that it is discrimination or victimisation in relation to an employee to dismiss him or to subject him to any other detriment. Detriment is not defined in the Act, but the tribunal adopts the definition approved by the then House of Lords in Shamoon v the Chief Constable of the Royal Ulster Constabulary, 2003 ICR page 337: "a detriment exists if a reasonable worker would or might take the view that the treatment accorded it to him or her had in all the circumstances been to his or her detriment; and that it was not necessary to demonstrate some physical or economic consequence. However, an unjustified sense of grievance is not a detriment". See paragraphs 28 and 35 in the judgement of Lord Hope.

8. As to the necessary causative link between the protected act and the act said to constitute detriment (or the dismissal), the tribunal adopted the test set out by Lord Nichols in Nagarajan v London Regional Transport 1999 ICR page 877; if protected acts have a "significant influence" on the employer's decision-making, discrimination (or victimisation) will be made out. As was further stated by Lord Justice Gibson in Igen Ltd v Wong 2005 ICR page 931, for an influence to be "significant" it does not have to be of great importance. A significant influence is rather "an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial". It is also to be noted that treatment on the part of the discriminator or victimiser may be conscious or unconscious.

9. As to the burden of proof in discrimination cases, section 136 (2) provides that:-

"If there are facts from which the court or tribunal could decide, in the absence of any other explanation, that a person A contravened a provision of the Equality Act the court must hold that the contravention occurred."

**10. Section 136 (3) provides: –**

> "But section 136 (3) does not apply if A shows that he or she did not contravene the relevant provision."

11. This provision encapsulates a two-stage test whereby an initial burden lies upon the claimant to prove either from his own evidence or that of his witnesses, or from cross-examination of the respondent's witnesses, or from other sources of evidence such as documentary evidence, facts from which a tribunal could reasonably conclude that he had been treated badly because of a protected characteristic (or a protected act), the burden shifts to the employer to prove that the treatment had nothing whatsoever to do with the protected characteristic or protected act. See Madarassy v Nomura International 2007 ICR p. 867.

**12. Time Points**

(1) There is a three months time limit for the bringing of claims of discrimination under Section 123 of the Equality Act. There is no doubt that the claims in relation to the dismissal were presented in time. However, a time limit issue arises in respect of the majority if not all of the claims of detriment. If the claimant were to establish that those claims were all claims of the same or a similar character establishing a pattern of behaviour over a time the time does not start to run until the date of the last act. In addition, a claimant may establish that it would be just and equitable to permit his claim to be heard out of time. The respondent asserts that the claimant in this case has not evidentially established either ground for an extension.

**13. Chronology of Main Events**

(1) It was agreed that the burden lying upon the respondent to establish a reason for dismissal, the respondent's evidence was to be heard first. The respondent called the following witnesses in order.

- Jessica Hobbs (herein after referred to as JH), a Senior Officer who took over as the claimant's line manager in the Criminal Intelligence Service in Bristol (RIS) in January 2015 from Mr Craig Carscadden, who had since retired and gave evidence later.

- David Walker, Internal Investigator, Internal Governance Civil Investigations (IG) who took over the investigation into the claimant's alleged misconduct from Chris Watts, a local investigator.

- Nicholas Sharp, who was Senior Manager of the RIS and a Line Manager of Mr Carscadden and Ms Hobbs. A limited number of detriment claims are made against him in particular in relation to an alleged complaint by the claimant about the conduct of Carscadden.

- Peter Seamal, who was the decision maker appointed in June 2015 in relation to Mr Walker's investigation who gave his decision in May 2016. This was the first disciplinary hearing which she had chaired.

- John McGee (J McGee) who heard the claimant's appeal against his dismissal at an appeal hearing in June 2016, and who had received a grievance from the claimant in May 2015. In relation to the allegation that the claimant had misled Chris Watts, the initial local investigator, and that the investigation had been wrongly transferred to IG (DW).

- Chris Watts. Medical evidence was submitted to the Employment Tribunal that he was unfit to attend the hearing. His witness statement albeit unsigned was relied upon by the respondent.

- Craig Carscadden (CC) who had line managed the claimant from his appointment as Assistant Officer in RIS from July 2013 until handing over to Hobbs (JH) in January 2015. He retired from the respondent in November 2018. Many of the allegations of detriment were made against him although he was not the decision maker at any of the claimant's disciplinary hearings.

(2) The claimant's employment with the respondent began in 2004 as an Administrative Assistant at the St Austell office.

(3) In 2011 – 2012 he moved to Bristol where he joined the Inspector Training Panel Pruning Programme. We have already catalogued the claims of discrimination which he brought in 2012.

(4) At the first appeal hearing before the EAT, he raised a complaint that Counsel for the respondent had falsely informed the EAT that he had been suspended or dismissed for gross misconduct which was in fact untrue. The respondent gave a written apology (see pages 118 – 119).

(5) The claimant failed his inspector training in late 2012. He alleges that there was a subsequent failure following that he made his second claim to the Employment Tribunal in late 2012. These are the proceedings which are still outstanding on remission from the Court of Appeal to the Employment Tribunal.

(6) It is a matter of record that the respondent has admitted in the present proceedings that the claimant's impairments of mobility and dyslexia and a third of anxiety and depression all constituted disability, although there are no disability discrimination claims in these proceedings.

(7) The claimant was sent home and placed on the redeployment register having failed inspector exams. He was off sick at the time. He asserts that he was only given temporary clerical work in this period; was under

threat of dismissal; and that senior managers had tried to prevent him from returning to full-time work. He claims that there was an enquiry into whether he had any outstanding driving convictions when he had none.

(8) In January 2013 he was notified that he would be joining RIS in Bristol. Checks were done to give the claimant security clearance which were not completed until April/May 2013 despite the fact that as he claimed he had been previously security checked when in the RAF, presumably before 2004.

(9) These allegations are not relied upon as freestanding claims of victimisation and are clearly out of time, but the claimant relies upon them to indicate that the respondent was minded to victimise him.

(10) The claimant commenced working in RIS in July 2013 under the line management of CC. He asserts that he was not given a job description nor was he given a day book in which inter alia a record could be made to external secure systems such as Moneyweb and could be used as a matter of best practice to record access to centaur. CC's case is that he did not refuse to give the claimant a day book. He said that the claimant had never asked him for one. It transpired that when the claimant asked for a day book from JH, having been trained on Moneyweb, she requested a day book from CC, who was one of the few managers authorised to do so, and one was issued to the claimant.

(11) On 19 January 2015, he a submitted tax credit (TC) claim on his own behalf (see pages 311 – 323). This appears to have been initiated because his working hours had been reduced due to his disability of depression. The application was refused on 2 February apparently because he did not have enough income and he did not have any dependant children (see page 329).

(12) It is alleged that the claimant attempted to gain access to his tax credit records in breach of the AUP on 4 February (see pages 323 – 324), the 6 February (pages 325 – 326), and on 10 February 2015 (pages 327 – 328). On that day, he applied for mandatory reconsideration of the refusal, which was refused on 11 February (see page 334). The claimant now adamantly denies making any attempt to access his TC record and it is apparent that it was in fact possible for him to gain TC records successfully.

(13) On 11 March 2015, his then line manager JH was notified by email from Faisal Mustapha of IG of potential misuse of the system by the claimant on 4 February by making unauthorised access to his TC records contrary to the AUP. The email gave instructions including for the appointment of a local fact finder, and if the incident appeared to be more serious than originally thought, a reference back to IG (see page 167). JH was appointed as decision maker, and herself appointed Mr Watts (CW) as local investigator on 18 March 2015 (see page 171) JH completed a manager's checklist on 16 March (see pages 181 – 183).

(14) On 20 March 2015 JH had a meeting with the claimant and informed him of the allegation and of the investigation. The notes of the meeting are at page 190. The notes record that the claimant told JH that the allegation, which he denied, related to the ongoing case which he had against the HMRC in the EAT. JH claims that this was the first that she was aware of the earlier ET proceedings. There were further meetings between the claimant and JH on 23 and 24 March in the latter of which it is recorded that the claimant said he did not have a day book and it was agreed that the claimant should not access two systems, Centaur and Connect, until he had a day book in which to record his access. JH recorded this in an email of the same date at page 193.

(15) The claimant attended a fact finding meeting with EW, accompanied by his trade union representative, Mr Young, on 8 April 2015. The notes of that meeting are at pages 352 – 353. (We note and record that the bundle of documents is not in any intelligible or chronological order). It is recorded that at that meeting on 8 April the claimant said that he did not recall entering the TC system for any of his details on that date, 4 February, although he conceded that he was at work on that date. It is also recorded that he said that neither he nor his ex wife had any tax credit profile. He claimed that it had been drummed into him from the start that he should not access his own or his family's records.

(16) This was the first occasion that the claimant was questioned about his access to his tax records and he was only questioned about the alleged access on 4 February, not those on 6 and 10 February. It is also recorded that the claimant asked CW to investigate key strokes by reference to the asset tag on his computer. We will return to this issue later.

(17) On 15 April Mr Hulbert from IG emailed JH notifying her that further potentially serious conduct issues had arisen. This was copied to McGee who emailed a reply on 16 April requesting that IG take over the investigation of all matters as they may be serious misconduct. McGee was contemplating removing the claimant's security clearance (see page 200). At about this time the claimant's security clearance was removed. However, McGee does not refer to this in his witness statement. Also on 16 April, CW sent an email to IG raising the issue about the examination of the key strokes on the claimant's computer (see page 196). CW had no opportunity to complete his investigation report because on the same day he was notified by IG. The matter was now to be investigated by themselves.

(18) There was a meeting between CC and the claimant on 27 April 2015 the notes of which are at page 203. The claimant was notified that further matters were being considered by IG but not what they were. It is also recorded that the claimant said that he wished that CC would be less aggressive and stop shouting at him. However, the claimant emailed CC the same day at page 205 and made no mention of any complaint about CC. He sent a second email on 28 April which ended "…. I have never doubted your good will" (see page 211).

(19) On 22 May 2015, JH wrote to the claimant notifying him formally that DW from IG had been appointed to investigate. This was the first notification to the claimant that he was being investigated for accessing a customer's TC records, in addition to attempting to access his own, but no details or dates were given (see page 230). In addition, a further allegation was made that the claimant had attempted to mislead CW at his fact finding meeting on 8 April when he said that he did not have a TC profile. The format of that letter had originally come from DW.

(20) The claimant raised a formal grievance in writing to JH on 26 May 2015. In particular, he claimed of the reference of the local investigation to IG which he claims was unauthorised, he claimed it was the continuation of a pattern of bullying, harassment and victimisation (see page 236). A more formal version of the grievance letter addressed to McGee is at page 239. It was in fact sent on 28 May (see page 243). JH had a meeting with the claimant on the same day which discussed the grievance (see page 237). McGee acknowledged receipt of the grievance on 29 May. However, McGee did not contact the claimant again in relation to his grievance. In his witness statement at paragraph 7 McGee claimed that he had decided to wait until the Walker investigation had concluded before considering the grievance complaint but there is no evidence that he ever notified the claimant of that decision.

(21) On 3 June 2015 DW emailed JH at 10.11am notifying her of the latest research and asking her to investigate whether the claimant had a legitimate business reason for accessing the records of the third party. JH responded at 11.58am stating her belief that the claimant had no legitimate business reason for doing so. An issue arises as to whether JH properly investigated the matter in the limited time between the request and the response.

(22) DW had originally intended to hold a fact finding meeting with the claimant on 8 June but it was postponed due to the claimant's sickness absence at that time. The claimant was eventually interviewed by DW in the presence of his trade union representative on 22 July 2015. The notes are at pages 370 – 451.

(23) On 1 July 2015, DW had emailed the claimant (page 250) enclosing a redacted copy of the relevant papers also sent to his trade union representative. This included the details of the claimant's further attempted accesses to his own tax credit records on 6 and 10 February and the redacted records of the claimed access to the third party tax payer's records. An unredacted version of those records, obtained by AFAS, was sent to JH to show to the claimant under controlled access. These would have included the actual name and address of the tax payer (see page 249). The redacted version in the pack at page 362 showed that access had been obtained by the claimant on 19 September 2013, and at page 364 on 21 July 2014. JH claims that she showed the claimant the unredacted version after his return to work from sickness on 13 July and before the date of the investigatory interview on 22 July. The claimant accepts he and his representative were shown the unredacted versions fifteen minutes before the

interview began. It is to be noted that the claimant has never denied that he accessed the third party's records on the dates claimed. We will consider his explanation for that later.

(24) At the investigatory meeting on 22 July, the claimant was questioned in detail about his access to his own tax records. He did not admit that he had accessed or attempted to access those records, but he did admit that he had accessed the third party records and gave a reason for it.

(25) On 24 November, DW completed his report and sent it to Peter Seamal (PS). A summary of the investigation is to be found at pages 259 – 268. In his recommendation at page 266 onward he concluded allegations of gross misconduct were appropriate for attempted access to his own tax credit record on 4, 6 and 10 February; that a similar allegation of gross misconduct was appropriate in respect of his unauthorised access to the third party records on 19 February 2013 (that should read 19 September 2013) and 21 July 2014. There should be a further charge of gross misconduct in attempting to mislead Mr Watts on 8 April 2015 by failing to provide full information concerning his tax credit application.

(26) These charges were identified to the claimant in a letter from PS to the claimant dated 26 January 2016. That letter enclosed a copy of the Walker report. He was notified that the meeting was to take place on 11 February 2016. The interview on that date was tape recorded and there is no dispute about the record which began about midday and ended at 15:07 (see pages 486 – 541).

(27) On 18 February 2016, PS wrote to the claimant (see page 556) affording him the opportunity to provide additional documents which the claimant had referred to during the interview. The documents to which he referred included the 2013 letter of apology from HMRC concerning what had been said at the EAT hearing back in 2013, and copies of any reports concerning the claimant's suggestion in his letter to Mr McGee of 26 May that his computer system had been hacked or remotely accessed. The claimant responded on 2 March 2016, by email attaching a whole series of EARS documents allegedly supporting the claimant's general allegation which he had made during the disciplinary hearing that somebody must have accessed his tax credit records. These are at pages 563 – 590.

(28) On 5 May 2016, PS wrote to the claimant notifying him of his finding that as the first two allegations had been found proved, he had decided not to proceed with the third allegation. He was notified that his employment was to be terminated without notice and without pay in lieu and that the last day of service was to be 6 May 2016. Attached to that letter was a copy of his deliberations which are to be found at pages 614 – 630.

(29) On 17 May 2016, the claimant submitted a letter of appeal to Mr McGee who had, much earlier, been appointed as the Appeals Officer see pages 640 – 643). The claimant's appeal meeting was fixed for the 9 June 2016. The claimant attended on his own as his union representative was ill. He confirmed that he was happy to continue in his absence. It appears that he submitted the appeal hearing document

(pages 654 – 657). There was a notetaker present and the notes of the hearing are at pages 658 – 665.

(30) On 8 July 2016, Mr McGee wrote to the claimant dismissing his appeal (see pages 666 – 672). That concludes a chronology of the main events.

## 14. Conclusions

(1) Does the respondent prove on the balance of probabilities that the reason or principal reason for dismissal was belief in misconduct? We are satisfied that at least the principal reason for dismissal was a belief in misconduct in respect of the claimant's access or attempted access to his own and another tax payer's records. We accept, having considered the evidence of PS and of McGee at the appeal stage that they both made a considered decision that the claimant was guilty of what was genuinely believed to amount to gross misconduct taking into account the nature of the breaches of the AUP and of the disciplinary procedure. The 2013 AUP document at page 282 clearly states:

- "All staff should 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. There is a very similar passage in the 2014 AUP at page 288. Both versions of the policy state expressly that breach of the AUP could lead to disciplinary action. In the policy document HR23007 Discipline; how to access the level of misconduct begins at page 304 of the bundle to page 308, unauthorised access or attempted access to corporate or customer information without 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 employees' 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 employees' own, or family members, friends, persons known to them or neighbours' records even if it relates to an activity that the department has to carry out or they have written authority from the individual".

(2) The third relevant policy is HR23009 Discipline; how to investigate discipline cases, which is to be found at pages 743. Under the heading of deciding who is the best person to investigate stated at paragraph 3:

> 3 For minor misconduct or misconduct cases the investigation will be carried out locally by the manager or local investigation manager.

> 4 Where there is a potential case of gross misconduct (excluding unauthorised access – unless there is suspicion of criminal activity - …) internal grievance will conduct the investigation or in exceptional circumstances will discuss the investigation being conducted by a local investigation manager.
>
> 5 Where there is a potential case of serious misconduct or gross misconduct relating to unauthorised access (unless there is suspicion of criminal activity) or absence without leave, the decision maker should seek to appoint an independent investigation manager locally".

(3) Page 744 under the heading "Unauthorised Access paragraph 13:

> "These cases will always be investigated locally as gross misconduct unless there is suspicion of criminal activity/disclosure at which point internal governance should be contacted immediately".

(4) Paragraph 10, also on page 744, states:

> "If at any time the matter appears more serious then first thought and
>
> - It now appears to meet the definition of gross misconduct, suspend action and inform the decision manager who will consult internal governance.
>
> - It is already being dealt with as gross misconduct, continue with the investigation unless there is a potential criminal matter. Criminal matters must be referred to internal governance".

(5) We accept that at the start, when only the attempted access on 4 February 2015 come to light, JH decided to appoint a local investigation manager, Mr Watts, who commenced an investigation. It then came to light that there were, on the face of it, two other instances of attempts to access the claimant's own records, and two further successful accesses nine months apart of a third party tax payer's records. It was at this point, on 15 April 2015 that IG contacted JH and McGee to stop the local action. McGee responded the next day "please accept this as a request for IG to investigate all matters relating to (the claimant) that may be serious – gross misconduct." McGee when challenged in cross examination by the claimant said he did not know whether it would be criminal or civil, and when he saw the number of instances, he decided to refer it up for investigation by IG. Taken in combination, we accept these as the genuine reasons for the referral of the investigation up to IG and we do not consider that this was a breach of the policy. There is no sensible basis for a conclusion that it was done as an act of victimisation to further the chances of the claimant's dismissal. Until the outcome of the investigation was known, it was unclear whether there would be a criminal element or not.

(6) Furthermore, in deciding whether or not there was an oblique motive for referring the investigation to IG, and on the basis of the subsequent investigation, we are also entitled to consider the strength of the evidence against the claimant that he was in fact guilty of a breach of the AUP constituting gross misconduct.

(7) PS and McGee clearly rejected the claimant's denial of attempting to access his own TC records and, moving into the Burchell test, we conclude that, on the basis that the claimant's eventual explanation was that someone else had obtained unauthorised access to his records either on his own computer or remotely, we find it entirely reasonable that the decision makers should conclude that it was indeed the claimant who had attempted the access. There was also an alternative explanation that there was some prior computer malfunction, purported records of which were produced by the claimant at the request of PS after the initial disciplinary hearing. However, in none of these was it suggested by the claimant that someone else might have had access to his computer; and the last reference is to a communication in September 2013 when, following a negative investigation, it was recommended that the claimant should raise a security incident if he was still concerned. There is no record that he did. The attempted accesses, all in February 2015, coincided with the claimant's TC application in January 2015 which was rejected in early February. This suggests strongly an attempt to check the record to ascertain possible reasons for the refusal of tax credits. It is difficult to see a motive for someone else accessing the claimant's TC records and it is far fetched that someone else would have had access to his PID and password, and then his National Insurance number or date of birth. Based on DW's thorough investigation, we have accepted that the dismissing officer's belief in this misconduct explained by PS in great detail in his deliberations document, was entirely reasonable. We took particular note that at the appeal stage the claimant said to McGee that he would disclose the identity of the supposed hacker on several occasions but did not do so either then or at any time thereafter, even at the tribunal hearing.

(8) There is also to consider the circumstances of the claimant's submitted access to third party tax records in September 2013 and July 2014. The claimant's explanation was and is that he was living in the same block as a woman whom he believed to be Romanian and who came to him for advice on making an application for tax credits. He stated a belief that she was intending to make an application mascarading as a Hungarian because at the time Romanians were not eligible to apply for tax credits. Using the HUMINT policy, he notified the authorities anonymously via an email address which he had subsequently expunged. He did it privately rather than by using the HUMINT contact form annexed to the policy. He claimed he had made the enquiries of the tax credit application by accessing her records in order to check that she had made such an application. The claimant told Walker during his investigation that he had contacted three people. Walker's investigation revealed that such a report had been made on 1 August 2013 and addressed to three individuals. No other record of a further report came

to light and the claimant has been unable to produce any such record or to state when any further report was made. The record of 1 August 2013 to which Walker referred was however not disclosed, apparently for reasons of confidentiality and security of sources.

(9) Since the claimant had made this report some seven weeks before his first access, the dismissing officer was entitled to conclude that the access cannot have been for any good business reason and in the event it was without permission in breach of the policy. The claimant was only entitled to access records of tax payers whose names and details had been disclosed in the shared mailbox or in circumstances where there was an active official investigation.

(10) The fact there was such strong evidence of a breach of the AUP amounting to gross misconduct makes it far more likely that that was the reason for dismissal; and not that the claimant had made protected disclosures in 2012, even if the tribunal proceedings were still extant in 2015/2016.

(11) We can state our conclusions about the application of the Burchell test, and the fairness of process quite shortly. As to the Walker investigation, we have rejected the claim that it was a breach of policy to raise the investigation to the IG we can detect no clear defect in Walker's investigation. There are two criticisms made by the claimant. The first was that Walker had failed to follow up the suggestion that an investigation should have been conducted into key strokes via his computer asset tags. This would not have identified if someone had accessed the claimant's own computer terminal but might have if access was via another terminal. We regard the claimant's explanation as far fetched in any event and we can find no evidence that the claimant mentioned it to Walker. The second criticism was that Walker did not interview two colleagues who sat with him and could have supported his contention that he had problems with his computer. We do not consider that this would have taken matters any further even if they could remember back to 2013. We find that the investigation was thorough and adequate in the circumstances.

(12) We have already dealt with the reasonableness of the dismissing officer's belief and we turn to issue whether dismissal fell within a band of reasonable responses. PS's deliberations at page 630 set out in detail reasons for dismissal. It is clear that the respondent treated unauthorised access extremely seriously on the basis that they had privileged access to a vast amount of data belonging to tax payers. There was evidence that one hundred and seventy-seven employees of HMRC had been dismissed for unauthorised access in recent times. In this connection, the claimant produced to the tribunal a first instance authority from 2018 in which there was a finding of unfair dismissal for unauthorised access in a case in the London Central tribunal. It is to be noted that other Employment Tribunal decisions are not binding on this tribunal. Furthermore, as we notified the parties during the hearing, We had contacted the EAT and it had been confirmed that the case is listed for appeal before the EAT for a full day on 4 September 2019. In his witness statement to the Employment Tribunal, PS stated a view that a

final written warning would not have been an adequate sanction for the gravity of the offences. It is clear from his deliberations document at page 627 that PS did consider the claimant's psychiatric record including two Occupational Health reports from 2013 and 2014. It concluded that the claimant's psychiatric condition could not account for his actions in accessing unauthorised records without a legitimate reason. In these circumstances, we conclude that dismissal clearly fell within a band of reasonable responses.

(13) Next, we considered whether the decision to dismiss was materially influenced by considerations of the claimant's previous protected acts. We accept at once that both decision makers were aware that the claimant had made previous claims to the Employment Tribunal, and PS mentions this point at some length in his deliberations at page 628. The evidence from which we could reasonably conclude that his bringing of previous Employment Tribunal proceedings played a material or any part in the decision making process is in our view extremely weak. It is limited to a note of a phone call, which is at page 140, which Mr G McDermott made to a Mr Entwhistle of IG on 12 May 2004. Mr McDermott was a colleague and fellow Senior Officer in RIS with CC. It records "a potential problem we have on the team", referring to the claimant. ~It goes onto state that he had had two recent holidays in France at Christmas and two weeks in West Africa recently and was planning to take a trip to New York very shortly. It continued that he lived in Bristol where he rented a property and his wife lived in Devon, although it was unclear whether the property was rented or mortgaged. The note continues "I mention that he has also taken the department to tribunal on a number of occasions". There was then a suggestion that he might have misused flexi leave or sickness leave by taking a holiday in Ghana and suggested that financial checks could be made that he may have lied to his manager. There was a further suggestion that his security clearance might be called into question. The implication from the first paragraph of that document is that CC was aware of these matters. There are also other acts much earlier in the chronology which we have told and come from the claimant's witness evidence. However, we note that the dismissing officer PS was completely independent of RIS although we accept that McGee who was CC's line manager was not. We do not regard it as reasonable to infer that because Entwhistle was a member of IG, Walker must have been aware of that communication. Walker himself says that his only recollection of any mention of earlier ET proceedings was made by the trade union representative in a telephone conversation prior to the investigatory interview on 22 July 2015. Walker denied all knowledge of the content of the telephone call of 12 May 2015, and we accepted his evidence in this respect.

(14) On balance we do not accept that the claimant has proved facts from which we could reasonably infer that his dismissal was materially influenced by the fact that he had done the protected acts. None of the respondent's witnesses who have given evidence in this case had anything to do with the allegations raised by the claimant in his earlier ET proceedings which date back to 2012 and the witnesses' involvement with the claimant did not begin until 2013. Even on the

assumption that the burden of proof does shift, we are satisfied that neither decision maker was influenced consciously or subconsciously by the knowledge of the claimant's past claims in the Employment Tribunal in their decision making. Nor was the content of Walker's investigation report so influenced.

Wrongful Dismissal

(15) Not only do we conclude the dismissing officer's belief was reasonable, but, based on the evidence put before the tribunal, we have also reached the same conclusion unanimously that the claimant **did** access his own tax claim records as well as those of the third party tax payer on the dates alleged without any proper business reason and without permission, and that the claimant was in fact guilty of gross misconduct justifying summary dismissal.

Detrimental Acts Short of Dismissal

(16) It is to be noted that the claimant has not pursued some of the detriments set out in paragraphs 25 – 27 of the reasons attached to the Judgment of Employment Judge Ford dated 17 January 2018 at pages 108Q – 108T. We state our conclusions upon those he has expressly pursued. There are three issues we had to consider.

- Did the act or failures to act constitute a detriment?
- Is there a causative link between any of the acts and the claimant's protected acts?
- Did the protected acts materially influence them?
- Was the claim brought within time.

We deal with each allegation.

- Post Duties. Did CC require the claimant to perform post duties? We find that both the claimant and Monica were rostered on occasions to distribute post because there was no longer a dedicated post delivery person within the office. The claimant and Monica were both Administrative Officers. This was not a detriment, and the fact that Monica who had not done a protected act was also asked to do it, demonstrates that it had nothing to do with the claimant's protected act. CC took into account the claimant's mobility problems constituting a disability by arranging the claimant not having to carry any item over 2kg. This was not in any event a detriment.

Recording of the claimant's sickness absence on a white board

- The board was on display to record staff absent for reasons such as sickness or annual leave. The claimant complained that his

sickness absence was recorded for four days in week commencing 13 April (year not identified but we presume it was 2014). (see page 786). We are not satisfied that this was anything other than normal practice. It did not constitute a detriment. The link with the protected acts is absent.

- CC required the claimant to provide sicknotes to cover absences, often when the reasons for an absence was a disability reason. We are not satisfied this was anything other than a reasonable management request. It did not constitute a detriment.

- Negative feedback following PMR meetings. No example of this action has been referred to us. We are not satisfied that it constituted a detriment.

- The claimant complains that he was accused by CC in 2014 of "undesirable behaviour" after he had confided at an ATOS Occupational Health meeting that CC was worrying him, which was subsequently reported back to CC. CC claims that the "undesirable behaviour" about which he spoke to the claimant was the aggressive "shouty" tone of the claimant's emails to ATOS. We reject the claimant's account.

Non provision of a mandatory Audit Book

- The claimant complains that CC refused to issue one to him. We are satisfied that the proper term was day book, which was provided to officers but not normally to AOs to record for example, access to external sources of confidential information such as Centaur. It was not mandatory. CC denies that the claimant ever asked for one. We accept the explanation that the claimant was not initially required to access these sources of information. When Hobbs took over as line manager from CC in early 2015 the claimant asked for one and Hobbs contacted CC who had sole access to the relevant store, and one was provided to the claimant.

Threat of violence by CC at a meeting on 5 June 2014

- There are notes of the meeting at page 142 – 146 (respondent's version) and 148 – 150 (claimant's version). A number of allegations were made at the meeting, for example, the claimant said he believed that CC had had it in for him since the day he started in the office. The claimant also mentioned that he had a number of court cases with HMRC. It is also recorded that CC said "it did not help that the claimant sat opposite with a smirk on his face". The claimant's version records that CC said that he (the claimant) should wipe the smirk off his face. There is no mention in either version of any threat of violence. It appears that the meeting was at times confrontational but we do not accept that there were any threats of violence by CC.

Complaints to Mr Sharp relating to CC's PMR assessment and his comment about undesirable behaviour towards ATOS

- The claimant raised these points in an email to Mr Sharp on 29 July 2014. At the end he asked Mr Sharp to "internally and amicably discuss the matters raised here". We accept that following that email Mr Sharp had an informal meeting at Bristol to discuss the matters with the claimant. It was unusual for such a meeting to take place between an AO and a manager of senior staff. Mr Sharp said that he thought the matter was resolved and has no recollection of any formal grievance being raised thereafter.

The claimant not provided with a job description for his new job in RIS in 2013

- It appears that the claimant believed that there was a statutory duty to do so. There is only a statutory duty to provide statement of terms and conditions. There is a practice in HMRC to provide job descriptions but only to recruits through external competition.

Contents of paragraphs 26.6 – 26.10

- These are matters relating to the fairness of the dismissal. They have been dealt with above.

15. In summary, we do not accept that any of the matters about which the claimant complained constituted, on examination of the evidence, detriments. In addition, there is no evidence of any connection whatsoever established with any of the claimant's protected acts. Furthermore, most if not all of the allegations occurred well over three months before the presentation of the claims to the Employment Tribunal and are out of time.

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Employment Judge Hargrove

Date: 29 May 2019