EMPLOYMENT TRIBUNALS

Claimant: Mr P Mace

Respondent: Department for Work and Pensions

Heard at: Hull **On:** 4, 5, 6, & & October 2021

Before: Employment Judge Miller
Mr C Childs
Mr K Smith

Representation
Claimant: In person
Respondent: Mr J McHugh – Counsel

JUDGMENT having been sent to the parties on ***20 October 2021*** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant, Mr Mace, was employed by the DWP latterly as a fraud investigator until more recently when he was seconded to the Universal Credit department. He had worked for the DWP for 39 years from 26 May 1981 until his dismissal with effect from 20 November 2020.

2. The claimant brought claims of unfair dismissal and disability discrimination in a claim form dated 12 February 2021 following a period of early conciliation from 10 February 2021 to 11 February 2021.

3. The claimant's claims are centred around his dismissal for allegedly accessing computer records about individuals with no good cause on three separate dates. He said in his claim form that the investigation, disciplinary and appeal process was flawed and that the respondent failed to take into account his mental health problems.

4. The respondent's response was to the effect (and as far as is relevant) that although they accept that the claimant was at the material time disabled by reason of anxiety and depression, the claimant was not treated

unfavourably as a result of something arising from his disability. In respect of the claimant's claim for unfair dismissal, the respondent says that the claimant committed clear acts of gross misconduct and that dismissal was within the band of reasonable responses and following a fair process.

5. There was a case management hearing on 28 April 2021 following which a list of issues was agreed. Those issues are as follows:

6. In respect of unfair dismissal

    a. It was agreed that the claimant was dismissed.

    b. The respondent asserts that the reason was conduct and specifically gross misconduct.

    c. In respect of fairness, the issues are recorded as:

        i. Did the respondent have a genuine belief that the claimant had committed gross misconduct

        ii. Did the respondent carry out an investigation that was within the range of reasonable responses

        iii. Did the respondent adopt a procedure that was within the band of reasonable responses

        iv. Was dismissal within the band of reasonable responses

        v. If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct and if so to what degree

        vi. If there were any procedural failings what is the likelihood that the claimant would have been fairly dismissed in any event?

7. In respect of disability discrimination, the claimant relies on section 15 Equality Act 2010 (discrimination arising from disability) in respect of which the issues are:

    a. Was the claimant disabled at all material times? – It is agreed that the claimant was disabled within the meaning of s6 Equality Act 2010 by reason of anxiety and depression

    b. Did the respondent treat the claimant unfavourably? – It is agreed that dismissing the claimant is unfavourable treatment

    c. Did something arise in consequence of the claimant's disability? – The claimant says that the unauthorised searches of the computer in breach of the respondent's policies were in consequence of his disability.

    d. Although it is not explicitly set out in the previous list of issues, the tribunal will also need to consider whether the claimant was dismissed because he accessed the records without authorisation.

e. Was disciplining the claimant (including dismissal) a proportionate means of achieving a legitimate aim? The respondent relies on the aim of maintaining data security.

8. We were provided with an agreed bundle of documents comprising 416 numbered pages which included some sub-numbered pages. The claimant produced a witness statement and gave oral evidence. The claimant's witness statement was brief and did not explicitly deal with many matters in issue. Predominantly, the statement exhibited a letter from his GP dated 16 September 2021 obtained for the purposes of this hearing.

9. The respondent called four witnesses who each produced a witness statement and attended and gave evidence. They were:

   a. Ian Mason – senior leader and dismissing manager.

   b. Ralph Couldwell – fraud and compliance team leader in Hull and investigating officer,

   c. Andy Johnson – fraud and compliance team leader in Scunthorpe and the claimant's line manager.

   d. Alistair Mews – Counter fraud compliance director and appeal manager

10. We checked with the claimant at the start of the hearing whether he needed any adjustments and he asked that we ensure that we finish on time each day which we tried to do. The claimant was also afforded breaks as and when necessary. We explained to the claimant at the start of the hearing about the need to ensure that all relevant evidence was recorded in his witness statement and the respondent referred, in the course of the hearing, to the orders of EJ Brain explaining this. We therefore explained to the claimant that he could not give his own additional new evidence in the course of cross examination. This meant that if he asked a question about which he had brought none of his own evidence, we would be likely to give the witness' answer greater weight where there was no evidence to the contrary.

Findings of fact

11. We make only such findings as are necessary to make our decision. Where incidents are disputed, we have made our findings on the balance of probabilities. As far as possible we address the incidents chronologically.

Training on policies

12. On or around 30 October 2019, the claimant completed some training on various policies including the respondent's Acceptable Use Policy which referred to the appropriate use of the DWP's information technology resources. That policy included the instruction that "Users will not attempt to access personal data unless there is a valid business need that is appropriate to your job role".

13. The claimant agreed that training was provided every three years on data security and IT. In any event, the claimant accepted that a data breach in his role, being a fraud investigator, was serious.

Incident 1

14. On 29 January 2020 the claimant accessed information on the respondent's database called CIS Searchlight. This is a bespoke database that contains a large amount of personal information about, as far as we can understand, virtually everybody in the country. Searchlight is the search tool used to access information in CIS which is the Customer Information System.

15. The information that the claimant accessed was about an individual who lived in the same village as the claimant. Broadly speaking, the claimant had a conversation with a colleague called Nicky Burton about an investigation she was undertaking following which the claimant accessed the information. There is a dispute as to how the claimant came to access that information. The claimant says in the notes of the investigation meeting (to which we will refer later) that Ms Burton asked the claimant if he knew of any builders in the area where he lived because she said that she had a case of a person who worked for a named individual (who we will refer to as RW) and she thought that RW was picking the suspect (the person who Ms Burton was investigating) up. The claimant says in the investigation that he didn't know RW but would have a look when walking his dog and that he then looked on Searchlight so he knew where to keep an eye out. The claimant said that he then told Ms Burton that he had not seen the van but he did know that there was an RW in the village as he had seen a sign outside the property but not a van. The claimant said that this enquiry of the system did not generate a test check, which is a flag warning a person that their search would be checked, and he didn't think that there was anything wrong with undertaking this search. He said in the interview that his reasons for accessing the database and searching for RW information was to assist Ms Burton. The claimant also said that he was given RW's national insurance number by Ms Burton and that she asked him to have a look around.

16. Ms Burton was subsequently interviewed about this and her account was slightly different. She told Mr Couldwell that she remembered the case of RW and that she did have a discussion with the claimant about it. She said that she could not remember the details, but she did remember asking the claimant if he'd seen the van, that she was struggling to find RW's company details and that the claimant helped by checking companies house for her. Ms Burton was asked if she ever asked the claimant to conduct any investigation activity relating to RW such as a drive-by. A drive-by is what it sounds like - an investigator will go past the relevant premises to see if they can spot anything relevant or suspicious. Ms Burton said that she could not remember asking the claimant to undertake an official drive-by but she could remember asking if he had seen the van. She said that she would never ask the claimant to do a drive-by on the alleged employer (RW) as she was investigating the alleged employee (rather than the alleged employer). Ms Burton said she could not remember specific details about what she had asked the claimant and then she volunteered that she would not have asked him to access searchlight in respect of RW.

17. After the investigation interview the claimant sent further information to Mr Couldwell in which he addresses this incident. He says there that he believed it was a legitimate search as outlined in his discussions with Mr Couldwell. The claimant further said in that document that he had not recorded the search on his systems access log for January as it did not come up as a test check and there was evidence available to show the case involved. He said that he would then record matters on the system access log in circumstances where a test check arose or if the search had disclosed no evidence.

18. The relevance of the systems access log is that employees record occasions when they have accessed CIS and, as we understand it, that access might look suspicious.

19. The claimant accepted in oral evidence that if Ms Burton's account was correct, namely that if he had taken it upon himself to access this information, that would have been in breach of policy. However, the claimant's clear contemporaneous evidence was that he believed he was doing the correct thing in accessing the information.

20. We do not know the exact nature of the conversation between Ms Burton and the claimant. However, the claimant did agree in oral evidence that neither Ms Burton nor anyone else asked him to look up RW's details. The claimant did not produce any evidence in his witness statement to suggest that any of his decisions in relation to this incident, referred to as incident 1, were affected by his mental health at the time. In oral evidence the claimant said, when asked specifically about this, that he did not realise he had mental health issues at the time. He said that at the time he wasn't thinking straight and it just seemed to him easier to look the details up without having to walk all the way round the village.

21. We find, on the balance of probabilities, that the claimant made the decision to look up the details of RW on 29 January 2020 for the reasons set out in his interview with Mr Couldwell and the subsequent information he sent to Mr Couldwell. Namely, he thought he was doing something helpful for his colleague and that it would be easier for him to find out where RW lived rather than just walk around the village trying to spot his van. We have heard no evidence to suggest that incident 1 was in any way connected with the claimant's mental health problems and we find that it was not.

Incident 2

22. The next alleged access by the claimant of unauthorised information was on 12 February 2020. In this case, the claimant decided to search for his son's details on CIS Searchlight. The claimant was candid in his explanation to Mr Couldwell in the investigation and to the tribunal in that he stated that he did it for his own reasons which were to put his mind at ease regarding something going on at that time in his personal life. Specifically he said that his son asked him to be a guarantor on a new rented property he wanted to move into. This caused the claimant concerns because his son had had financial difficulties and personal difficulties some years previously and the claimant believed that his son was now back on the straight and narrow. The claimant considered that the request to be a guarantor was indicative

that his son was potentially again in similar financial and personal difficulties and this caused the claimant deep concern. The claimant said that he needed to put his mind at rest to ensure his son was still in employment. He said that he did not use the information he obtained for anything except for his peace of mind.

23. In the interview with Mr Couldwell, the claimant accepted that his actions were wrong by which we conclude he means they were in breach of the respondent's information security policies.

24. The claimant's case about this incident was that his judgement was impaired because of his mental health problems at that time. He said a number of things. In the interview he said "I did have reasons. I was going a bit manic at the time with regard to something happening at the time, and I just needed to put my mind at rest. And I will send you a full explanation in writing". In that written explanation he says "I wanted to check this to put my mind at rest as following his request my mind was all over the place as by asking for this I thought he was in financial trouble again". He then says towards the end of the further information document he sent to Mr Couldwell "I realise, as does my GP and the counsellor, that I have had major depression for at least five years. A lot has happened to me and my family in that time. Since I have a major operation in 2015 which saved my life, I have not been the same". He then refers to his son's personal and financial problems. The claimant explained some further difficult personal circumstances which it is not necessary to set out here and continues "I kept all of this to myself I did not tell my colleagues or manager at work what had been going on. I'm a very private person. I was not the same person when I returned to work after that. Withdrew from team socialising. It also transpires through the counselling that I was being bullied to a certain extent at work". The claimant then described some further personal difficulties which again it is not necessary to expand upon. He then continues "the stress that I and my family have been through has changed me. Just prior to lockdown I had a stand-up slanging match with a colleague in front of the whole team, including TFL. I was talked to about this by my TFL and he agreed he was shocked by this as it was totally out of character for me. I am now getting the help I need to address my depression through the counselling and medication from the GP. My wife is also being treated for depression anxiety again through counselling and medication". Then, importantly, he says "next May I will have done 40 years in the department and looking forward to applying for partial retirement which will help with my depression. I was not in my right mind when I made the searches in February and May. I got nothing from the searches and there has been no impact on the individuals that were searched. I would not knowingly jeopardise my partial retirement on the 40 years' service and of course regret the mistake I made at a difficult time for me."

25. We also refer to the letter the claimant produced recently from his doctor, Dr O'Mara. The letter is dated 16 September 2021. Again, we need to set out a substantial part of that letter.

26. Dr O'Mara says that he first met the claimant in July 2020. He says that he was honest about the situation that occurred at work and was seeking help for severe stress and low mood. We note in July 2020 the claimant went off

sick and by that time he had not been made aware of any concerns relating to data breaches or any disciplinary investigation. We therefore conclude that the reference to the situation that had occurred at work was in relation to the data breaches.

27. Dr O'Mara then says that he had noticed his most recent consultations with Dr O'Mara's colleagues had been about things such as palpitations, tummy upset, fainting and feeling generally unwell but no real cause was found. Dr O'Mara opines that these were physical symptoms of low mood and anxiety.

28. Dr O'Mara says "he was clearly fraught, suffering with persistent pervasive negative thoughts for some time long preceding the events which took place at work. This was all to do with tumultuous family fallout and breakdown in communication with his son and quite valid concerns about his son's financial welfare". We conclude from this that Dr O'Mara is identifying that the claimant's mental ill health became significantly worse from there. We conclude that this related to the period either from February 2020 or the period some years before when the claimant's son had first had his personal and financial difficulties.

29. Dr O'Mara then says "I found him to have very disjointed thinking, losing his trail of thought and seemingly confused at times almost in a fog. He really was hopeless for the future and this was compounded by the fact that his wife was going through similar (perhaps even more affected arguably)."

30. We conclude that this latter sentence refers to how the claimant actually was presenting in July 2020 as it relates to Dr O'Mara's impression of the claimant which must have been as a result of direct observations.

31. Dr O'Mara then says "I quickly diagnosed him with depressive disorder and we commenced medication called SSRIs. However it took many months before we saw any improvement and we have had to increase the doses often. I do not think we have yet really got the symptoms under control even to this day [being 16 September 2021] but there is some improvement."

32. We conclude from this part, taken with the earlier parts, that Dr O'Mara considered that the claimant had a depressive disorder and had had that for some significant time previously. Further, we conclude that it was serious as over a year later the claimant was still experiencing problems.

33. Dr O'Mara concluded substantively that "my job here is not to justify his actions; merely to provide context that he was going through a clinical condition which would affect his usual judgement".

34. Reading that final sentence in the context of all that we have set out previously, we conclude that throughout the period from February 2020 certainly up to July 2020 the claimant had a clinical condition which would affect his usual judgement. That clinical condition is depressive disorder and consequently we think very closely associated with his disability if not the same thing by a different name. We further find that Dr O'Mara's statement that this would affect the claimant's usual judgement refers back

to the claimant's "disjointed thinking, losing his trail of thought and seemingly confused at times almost in a fog".

35. The claimant said in the additional information sent to Mr Couldwell that "I have not dealt with working from home/lockdown well at all and my mental health has deteriorated considerably resulting in me going off sick with depression at the end of July". This was in the document sent on 15 October 2020. We think it likely that the claimant's mental health had deteriorated by July 2020, but given the claimant's evidence about his change in personality from January or February 2020 and Mr Johnson's evidence that the claimant's unauthorised data accesses were wholly out of character, we think it likely that the claimant was suffering with symptoms as described by Dr O'Mara or similar symptoms by February 2020.

36. Further, we accept the claimant's evidence was that he had been experiencing mental health problems of one kind or another since 2015 and we note that the respondent agreed that by November 2020 the claimant met the statutory definition of a disabled person in section 6 Equality Act 2010.

37. We find on the balance of probabilities that the claimant's judgement was adversely impacted by his disability by February 2020.

38. We think, therefore, that the claimant's statement made on 15 October 2020 that he was not in his right mind when he made the searches in February and May is correct and that his mental health problems did play a part in his decision to search for his son's details on CIS Searchlight.

39. Further, the claimant's oral evidence to the tribunal was that looking up his son's details was wrong, but that didn't matter to him at the time - he said that he did not care about the outcome. He said he acted irrationally; he did not weigh the risks he just needed to set his mind at rest regardless of the outcome.

40. We find, therefore, that although the claimant made a conscious decision to look up his son's details and he did so for his own purposes, that final decision was affected by his depression and anxiety in that the claimant was not thinking as he usually would when he was not under the effects of depression and anxiety so that he was heedless of the consequences of his actions and therefore, we conclude, did not exercise restraint in the way that he might otherwise have done.

Incidents 3 – 7

41. The next incidents were incidents 3 to 7 which all happened on 15 May 2020.

42. The claimant again accessed CIS Searchlight of his own volition to undertake searches outside of his work and in breach of the respondent's policies. What is undisputed is that the claimant, somehow, put his own postcode into Searchlight and searched for his postcode. He then accessed four records at that postcode. In the record of Mr Couldwell's interview of the claimant, the incident 7 identified as number is actually the first incident in which the claimant conducted a search of his own postcode. Incidents 3,

4, 5 and 6 are each occasions on which the claimant accessed the records of individuals. One of those individuals was RW whose information the claimant had accessed in January 2020, and two of them were family members of RW. The fourth individual was, as far as we are aware, wholly unrelated to RW.

43. The claimant's explanation to Mr Couldwell was that he had accidentally put his postcode into Searchlight which brought up a number of addresses. He then clicked on some of the addresses and the individuals' information associated with those addresses, but he has no idea why he did that. He said that he just clicked on some random addresses and potentially his Surface mousepad operated in such a way that it opened a few records.

44. Mr McHugh invited us to find that the claimant's evidence about the surrounding circumstances and what happened next is implausible, and consequently that his account about accessing the information is unreliable, for the following reasons.

45. Firstly, he says that the claimant's explanation of how his postcode got into Searchlight changed throughout his oral evidence. He says that on some occasions the claimant said that his computer auto-populated the search field which, Mr Johnson said, was not possible and on other occasions, he said that the claimant said he had accidentally pasted the postcode into Searchlight.

46. With respect to Mr McHugh, we do not think that the claimant's explanation was inconsistent. We think his explanation was confused and confusing on the afternoon of the first day of evidence but was clear on the morning of the second day when it was revisited. Mr McHugh invited us to find that this was because the claimant had by then heard Mr McHugh's instructions on how it worked. However, we note that the explanation that the claimant gave on the Tuesday morning was entirely consistent with the first account he gave to Mr Couldwell and in fact consistent with the brief account recorded in the System Access Log of the incident. It is not clear from my note of evidence where the suggestion that Searchlight auto-populated come from, but it does not appear to have been a clear explanation from the claimant. In fact, it appears to be a term that was introduced into oral evidence with no clear explanation.

47. The second factor we are asked to consider is that the claimant, very soon after the claimant accessed the information, contacted his line manager Mr Johnson to notify him of the access. The claimant said that this was as soon as he received the "test check" notification which caused him to realise his mistake. The claimant said, in his interview with Mr Couldwell, that he contacted Mr Johnson even though Mr Johnson was not at work and told him that he had inadvertently put his own postcode in the search bar. Mr Johnson's note of his conversation with the claimant was that the claimant said "he had been using his surface pro during his lunch break to arrange his online grocery shopping and pasted his own postcode in error into CIS. He immediately withdrew from the system on noticing his error". Mr Johnson asked the claimant to complete a system access log (SAL) logging the details of his mistake and send him a copy. The system access log that the claimant initially provided did not in Mr Johnson's opinion include

enough information so that on 18 May 2020 Mr Johnson asked the claimant to include details of the actual case he was working on at the time. The claimant responded to say that he could no longer find out which case it was as another member of staff had completed the work.

48. The system access log that the claimant completed records as follows "benefits check for UC claimant because NINO not on claim using address search. But cut and pasted my name postcode into CIS (having earlier used this using surface pro to place grocery order). And it brought up account which I did not view and closed immediately as realised error but saw the yellow test check warning. Called FTL immediately to inform of error".

49. It is perfectly clear that the claimant did not accurately record in the SAL what had happened, and nor did he give a full account to Mr Johnson as to what had happened. The claimant said on both occasions that he had immediately closed the account without looking at the information. This was not true. He had in fact accessed four individuals' information.

50. The claimant's explanation in oral evidence as to why he did not give full information to Mr Johnson or on the SAL was unconvincing. He effectively said that he thought he'd given as much information as needed to because it would be clear from the record what information he had actually accessed. We think it more likely that the claimant was trying to either cover up or minimise the extent of his unauthorised access. Mr Johnson said that in circumstances where a person accidentally accesses unauthorised information, they are merely required to record it. It seems likely that the claimant was aware of this and thought that by admitting to an inadvertent breach, there was little chance that it will be further investigated and he would get into trouble.

51. Ultimately, however, we prefer the claimant's more contemporaneous account that he accidentally copied and pasted his postcode into Searchlight. Although Mr Couldwell stated his suspicions that it was too much of a coincidence that the claimant had accessed the same record in respect of RW as he had four months previously, the respondent was not able to offer any explanation, or even a suggestion, as to why the claimant would deliberately have accessed the information. There was no suggestion at any time that the claimant was in any way associated with any of the individuals – whether by way of a positive or negative association.

52. The fact that the claimant then tried to minimise or cover up his mistake or wrongdoing does not have any bearing on the reliability of the claimant's account of how his postcode got into the search bar in the first place,. Further, even if the claimant did deliberately try to cover up his access, it does not necessarily have any bearing on the impact of his mental health on the first decision to access that information – there is nothing inconsistent in the two propositions that firstly the claimant's decision to access records was adversely affected by his mental health and/or a mistake and secondly that the claimant then tried to cover up that access to avoid getting into trouble.

53. The next point for us to consider in respect of incidents 3 to 7, is the reason for the claimant accessing that information and the extent to which his mental health was a factor in that.

54. The claimant's account is quite simply that he has no idea why he accessed that information. The respondent is not able to offer or suggest an alternative reason for the claimant accessing that information. Unlike incident 2, there is no suggestion that the claimant has benefited in any way from accessing that information.

55. The claimant has provided additional information about his thinking at that time in the document he sent to Mr Couldwell after the investigation meeting. Although we have referred to it previously, we highlight again that he says in the document "I do not know why I looked at the accounts I did. I've gained nothing from this. I have not dealt with working from home/lockdown well at all and my mental health has deteriorated considerably resulting in me going off sick with depression at the end of July".

56. We refer back to the observations and findings we have made in respect of the claimant's mental health and its impact on incident 2. Mr Johnson's clear evidence to the tribunal was that he was surprised about the allegations levelled at the claimant. The claimant had an unblemished record of almost 40 years working for the DWP and he was nearing his retirement.

57. Having regard to our findings about the impact of the claimant's mental health on his judgement and decision-making abilities as set out previously and in the absence of any explanation as to why the claimant might have taken the extraordinarily rash step of accessing strangers' accounts for no obvious reason, we have to conclude on the balance of probabilities that the claimant's disability was at this time affecting him in such a way that he took this surprising action without any clear understanding as to why he was doing it. We do not say that the claimant was incapacitated or not in control of his actions, but in light of all the surrounding circumstances and the medical evidence it seems to us more likely than not, and we find, that the claimant's mental health did have an effect on his decision to access those records. Even if the claimant did then try to cover it up, this would not detract, in our view, from the impact of his mental health on the decision to access those records.

Sickness in July

58. On 24 July 2020, the claimant went off work sick with depression. He initially contacted Mr Johnson to inform him and he produced a fit note dated 30 July 2020 confirming that he has depression. We conclude that 30 July is when the claimant visited his doctor.

59. Mr Johnson also referred the claimant to occupational health and the claimant undertook a series of counselling sessions organised through occupational health. There is an Occupational Health report dated 5 August 2020 which records some of the personal and family background to the claimant's depression. The Occupational Health advisor records that the

claimant was unfit for work, he had difficulty conveying how he was feeling and that the claimant perceived workplace stressors to be institutional issues, rather than any specific individuals at work.

Suspension and investigation

60. On 12 August 2020, while the claimant remained of sick, the unauthorised access to Searchlight CIS came to the respondent's attention through its Internal Abuse Team and Mr Johnson was notified. Following some internal discussions, a Mr Gilmartin took the decision to suspend the claimant from 19 August 2020. Mr Johnson first phoned the claimant to inform him of the decision and then attended his home on 19 August 2020 to give him the suspension letter. Mr Johnson also removed the claimant's computer equipment, office pass and warrant card from him. The claimant takes no issue with the decision to suspend him and in our view this was an appropriate decision. The claimant's complaint about this incident is that, while he understood the removal of his computer and pass, there was no need to take away his warrant card. He described this as part of his identity.

61. We understand why this might have been distressing for the claimant, but we accept the points put by Mr McHugh in cross examination that this card was the claimant's proof of who he was and we conclude that in the normal course of events a fraud investigator could use a card to obtain access to people and information. The claimant said he was in no fit state to be undertaking any investigations and that may well be the case, but the respondent's decision to remove the claimant's warrant card was a reasonable and understandable one.

62. Mr Johnson gave the claimant two letters on 19 August 2020 – one informing him that he was suspended with pay from 19 August 2020 and the other setting out the allegations and explaining that Mr Couldwell had been appointed to investigate the allegations. The allegations were that the claimant accessed departmental computer systems on 29 January 2020, 12 February 2020 and 15 May 2020 without a valid business reason. It then specified the details of the people whose information the claimant had accessed.

63. Both of these letters state that a guide is enclosed with information about the disciplinary process and referred the claimant to the respondent's intranet, although of course the claimant had had his computer equipment removed so it seems unlikely that the claimant would have been able to access that additional information. The claimant agreed that he received the guide which is the respondent's discipline procedure at pages 376 – 394 of the bundle.

64. The letter does not say that the claimant can or should consider providing his own evidence. It says that "The purpose of the investigation is to gather and present evidence" and it says "any information that emerges from this investigation might be used in any discipline investigation against you.

65. The respondent relied on the policy that was provided to the claimant with the investigation letter (and subsequently) as providing information to the effect that the claimant could or should provide any information he wants to

rely on. It does not include any such information or guidance (and we were not taken to any) for employees. The closest it gets is at page 388 of the bundle where it says, in respect of appeals, that "the employee should provide new information or evidence if this is the reason for the appeal".

66. The only reference to the provision of information by employees was in Mr Mason's statement which referred to a document called "how to assess the level of misconduct and decide a discipline penalty". This guide is clearly directed at managers dealing with disciplinary processes and was not provided to the claimant in the course of his disciplinary process. This says, that "it is for the employee to put forward mitigating factors together with supporting evidence".

67. Before meeting the claimant, Mr Couldwell asked Mr Johnson to make a referral to occupational health on the basis that the claimant was off sick with depression. The claimant had a telephone appointment with an occupational health adviser on or around 22 September 2020 and they produced a report of that date. That report sets out that the claimant had a long history of recurring anxiety and depression. The adviser records that the claimant is fit to attend a meeting (by which we conclude they mean the investigation meeting, although the occupational health referral form was not available so we do not actually know what questions were asked). They say the claimant wanted a meeting in four weeks' time but that "undue delay in dealing with 'stressors' can result in an exacerbation of symptoms so our advice is to conclude matters with care, concern and sensitivity and in a timely manner by scheduling a meeting".

68. The advisor also says "The assessment indicates that [the claimant] has the ability to understand allegations, distinguish right from wrong and a reasonable understanding of proceedings but reports feeling vulnerable at this time". It was agreed that this assessment was relating only to how the claimant was at the time of the assessment, being 22 September 2020, and that no questions were asked of the advisor about the claimant's mental state at the time of the allegations.

69. Consequently, Mr Couldwell delayed the investigation meeting to 14 October 2020. In the interim, Mr Couldwell had also obtained a statement from Mr Johnson dated 25 August 2020 about the claimant's interaction with Mr Johnson immediately following his access of the system on 15 May 2020. We have already referred to that interaction and the statement of Mr Johnson sets out the basis of the conversation between him and the claimant.

70. The claimant was provided with the investigation pack, including Mr Johnson's statement, and details of the computer audit and system access logs. The claimant takes no issue with this and we find that the claimant was given all the evidence gathered by the DWP two weeks before the investigation meeting.

71. Mr Couldwell conducted his investigation meeting with the claimant by telephone. This is because the claimant did not have access to a computer at the time. The claimant says he would have preferred the meeting to be face to face but he did not raise that with Mr Couldwell at any time. The

claimant was at that point in a vulnerable category due to covid so was required to minimise contact with people. We find that in the circumstances, including the Occupational Health guidance to conclude matters quickly and the claimant's vulnerable status, Mr Couldwell had a good reason for conducting he interview by phone and did not know and could not have known that the claimant had any reason to object to that.

72. We have already discussed the investigation meeting at some length. We simply add that the claimant stated on a number of occasions that he considered his actions were related to his mental health and at no point did Mr Couldwell suggest that medical evidence – whether obtained by the claimant or the respondent – might assist the investigation. In his statement, Mr Couldwell said "Mr Mace stated that he was suffering with stress when these incidents occurred but I did not feel that it was my place, as the investigating officer, to take his mental health into account, as it was the role of the decision maker to consider any mitigating factors". We understand that it is not the role of an investigating officer to make decisions, but in our view it would have been appropriate and reasonable for Mr Couldwell to have clarified to the claimant that the onus was on him to obtain evidence in support of his mitigation. In fact, in light of the occupational health recommendations requiring the claimant to be treated with care, concern and sensitivity, we find that there was an obligation on Mr Couldwell to ensure that the claimant fully understood his role, rights and obligations in the process. This included ensuring that the claimant knew that the onus was on him to provide any supporting evidence on which he relied. The claimant said in evidence that he thought the DWP would obtain relevant medical evidence and, having regard to the letters that were sent to him and the absence of any information to the contrary, we find that this was a reasonable assumption on his part.

73. After the investigation meeting, the claimant sent Mr Couldwell some further information to which we have also referred at some length. Although this document refers to the claimant's mitigation generally and his mental health specifically, Mr Couldwell did not undertake any further enquiries in response to this additional information. He said that he would put this information before the decision maker and they would take it into account. Mr Couldwell said that because the claimant had not provided him with a good business reason for accessing the information, there was a case to answer.

74. It was put, on behalf of the respondent, that further information at this point from the claimant's GP would not have provided any additional useful information. We do not agree. We have found that the letter from Dr O Mara does give useful information about the claimant's state of mind at the times of the relevant incidents. It is likely that medical information obtained at the time would have provided the same or similar information which could have affected subsequent events.

75. On 22 October, Mr Couldwell interviewed Ms Burton and her statement formed part of the information that was subsequently sent to Mr Mason. Again, we have considered this previously. We also note that Mr Couldwell made further enquiries about the way that CIS Searchlight works and it was confirmed to him that if searching for an address, the operator would then

need to click on the individual address and then the individual's details to access that record. This is consistent with the claimant's earlier statement in the investigation meeting that he had searched by postcode on 15 May, not by NINO.

76. On 29 October, Mr Couldwell submitted his investigation report to Mr Mason together with his recommendations that there was a case to answer for each access of information. Mr Couldwell refers to the claimant's mental health in the report in respect of incidents 2 – 7, but suggests that it might constitute mitigation only in respect of allegation 2 (relating to the claimant's son).

Third occupational health report

77. Around 28 October 2020, the claimant was again referred to occupational health as part of his ongoing sickness management by Mr Johnson. This report was solely about the claimant's potential return to work although, again, we do not have the referral so do not know what information was given to Occupational Health or what questions were asked. However, in this report, the Occupational Health advisor has set out the questions to which she is responding. In summary, the report records the claimant's history of anxiety and depression and that he was likely to require further counselling and treatment. At that time, the Occupational Health adviser was unable to say when the claimant was likely to be well enough to return to work.

Disciplinary meeting

78. On receiving the disciplinary referral, Mr Mason wrote to the claimant on 3 November 2020 setting out the allegations, which were the specific unauthorised access to the system on 7 occasions, together with the evidence pack. However, in respect of each allegation, the letter records that "this is considered gross misconduct", rather than could be, as did the letter inviting the claimant to the investigation meeting. Mr Couldwell said this was a template letter and the consistent wording suggests that this was in fact the case. However, we conclude that this reflects a dogmatic attitude in the respondent generally about the nature of their rules and a breach of them. We conclude that by the time the matter was referred to Mr Mason, the decision that the claimant was guilty of gross misconduct had effectively been made.

79. The claimant agrees he received that information. The letter explains that the claimant is at risk of dismissal and that he has the right to be accompanied which the claimant did not exercise. Again, the disciplinary policy is included as well as a reference to the intranet which, by this time, it was clear that the claimant could not access.

80. The letter does not give the claimant the option to bring or produce any further evidence and, as discussed, neither does the discipline policy.

81. The claimant attended the disciplinary meeting by telephone. Again the claimant said that he would have preferred this to have been face to face but he did not raise this at any time and for the same reasons as explained

in respect of the investigation meeting, we find that it was reasonable for the meeting to be conducted by telephone, the claimant not having access to a computer for a video meeting.

82. The meeting appears from the notes to have been reasonably brief. Mr Mason reflected the outcome of the investigation to the claimant and asked a limited number of questions. Particularly, he asked why the claimant did not come straight out of the accounts on 15 May and the claimant said he didn't know, he had nothing to gain. The claimant explained again about his mental health problems briefly – he said " I have never done anything like this before, my mind last year hasn't been what it should. I have changed considerably to what I used to be, whether or not my colleagues have noticed. I would never have dreamed of doing this if I hadn't been such a mess. I have previously been off with depression prior to these incidents . I have now had help from EAP [Employee Assistance Program], and occupational health". He then describes his ongoing treatment and refers to some problems at home.

83. Mr Mason then follows up by asking the claimant if he maintains that there was no financial gain. Mr Mason asks if there is anything else, and the claimant responds that he just wants it sorting.

84. The meeting concludes by Mr Mason saying that he will consult with HR and obtain the additional Occupational Health report which he did not have (being the most recent from 28 October). He did have the two earlier reports.

85. Mr Mason had before him two occupational health reports identifying ongoing mental health problems, the claimant's interview with Mr Couldwell in which the claimant referred to his mental health problems, the subsequent information the claimant had provided about the impact of his mental health on him and the claimant saying, again, in front of him that he would not have done what he did were it not for his mental health.

86. In our view, it was incumbent on Mr Mason to take some further steps to consider the impact of the claimant's mental health on his actions. This could have been a further referral to Occupational Health asking specific questions about the time of the incidents or even adjourning to allow the claimant to produce further evidence. He did not do so.

87. We find that the reason for this is that Mr Masson's clear view, based on his clear and consistent oral evidence, was that it would have made no difference. He was clear that the claimant was guilty of gross misconduct from the point he received the referral and in his view the only relevant factor was the number of offences. Mr Mason said, on a number of occasions, that mental health is 'not an excuse'.

88. Mr Mason was taken through his decision making process in the context of the respondent's guidance on dealing with security incidents and breaches of security and particularly the matrix at page 355. It was agreed that the allegations against the claimant fell in paragraph 1.2 of that guidance. This would be gross misconduct and carries two potential outcomes – dismissal or final written warning. Mr Mason was extremely clear in his oral evidence

that these circumstances could only ever result in dismissal because of the number of incidents. The policy provides that it may be downgraded to a final written warning if the employee can provide some relevant mitigation. In the respondent's guidance on assessing the level of misconduct and deciding a penalty there is guidance as to what is a mitigating factor. This includes "Issues relating to disability, for example where the condition can influence behaviour". Mr Mason was asked what consideration he gave to that,. His answer was unclear, but initially he said mental health was not an excuse. He then seemed to say that the number of offences over a significant period was the overriding factor.

89. We conclude that, in fact, Mr Mason did not give any consideration to the claimant's mental health problems as mitigation capable of reducing the sanction. It was clear from his oral evidence that there was no possible potential evidence about the claimant's mental health that was capable of reducing the sanction. It is right that Mr Mason records in the decision making template that he considered the claimant's mental health but he says there that the claimant's mental health does not explain his actions. He subsequently records that the claimant knew his actions were wrong but attributed them to his mental health. Mr Mason does not explain further in that document why he has rejected that mitigation and we conclude that it was because he considered that mental health was not an excuse for the claimant's wrongdoing.

90. In his witness statement, Mr Mason says that it is not the DWP policy to seek information from employees' doctors but to refer to Occupational Health. He said that the Occupational Health report he had said that the claimant knew right from wrong. We find that Mr Mason disregarded or rejected the claimant's mitigation about his mental health because he thought that it could not make any difference, because the claimant had not provided any evidence himself and because occupational health said the claimant knew right from wrong. We have already found that the claimant was not informed at any point in the disciplinary process up to then that he could or should obtain his own evidence. We also find that the occupational health report was solely addressing how the claimant was at 22 September and that the respondent's policy required the decision maker to consider the impact of mental health as mitigation in specific circumstances where it <u>can</u> influence behaviour.

91. The decision was to dismiss the claimant without notice for gross misconduct and Mr Mason wrote to the claimant to that effect on 19 November 2020. The claimant takes issue with the fact that the decision was made so quickly after the meeting, particularly given that it took a further day or so after the hearing to agree the meeting notes. We do not place any weight on this. Although we have concluded that organisationally, it was a foregone conclusion that the claimant's breaches amounted to gross misconduct, we think that the time taken for Mr Mason to reach a decision was, of itself, reasonable. There was limited information to consider and he had had the papers for some time before the hearing. The claimant said that Mr Mason was not qualified to reach a decision because he was not qualified in mental health. We reject that submission. It would be wholly unreasonable for managers to be unable to make a decision about their employees' employment in the way the claimant suggests. They are

entitled to come to disciplinary decisions provided they have access to all relevant information and such advice as is appropriate. We find that Mr Mason was sufficiently senior and experienced to be taking the decision that he took about the claimant's employment.

92. The claimant was given the right of appeal which he exercised on 25 November 2020.

The appeal

93. In the claimant's appeal, he said that his mental health had not been properly taken into account, he agreed that he had breached the rules but it was at a time when his mental health was in turmoil. He said that he had not gained financially and none of the people whose accounts were viewed were impacted by his actions. He said that no one within a few months of completing 40 years' service in their right mind would jeopardize this by breaching security.

94. The appeal was allocated to Mr Mews, who was a manager based in a different area. Mr Mews received and reviewed the evidence seen by Mr Mason including the second 2 occupational health reports, but he was unsure if he saw the first occupational health report.

95. Mr Mews wrote to the claimant on 30 November inviting him to an appeal meeting. That is a different letter from the previous standard letters the claimant received but does not say that the claimant can or should bring any additional evidence on which he wishes to rely for his appeal. We note that the discipline guide sent to the claimant previously does say the employee should bring any evidence about any new issues on which an appeal is based, but it is difficult to conclude that the claimant's mental health was a new issue as he had riased it in both the investigation and the disciplinary hearing. It was again agreed that the meeting would be by telephone and, although that was not the claimant's preference, he did not raise any issue about it at the time. We find that Mr Mews did not therefore know and could not have known that the claimant had any objection to the meeting being held by telephone.

96. Mr Mews describes the appeal as a consideration of whether disciplinary policies and procedures had been followed by Mr Mason. It would be characterised as a review, although it is clear that Mr Mews did in fact hear evidence from the claimant about what had happened. He says that he formed the view that the claimant felt that because of his state of mind at the time of the breaches he was not responsible for his actions.

97. Mr Mews did tell the claimant at the start of the meeting that he could produce any new evidence. The claimant said that the respondent did not take into account his mental health and no approach had been made to his GP. Mr Mews did not at that point suggest the claimant could obtain medical evidence himself or ask why he had not done so.

98. The claimant explained again the impact his mental health had had on his decision making and that he had not realised he was unwell at the time.

99. Mr Mews said he would look at the case again with a fresh pair of eyes and take everything into account.

100. Mr Mews did not uphold the claimant's appeal. He said that after 40 years, he should have known better and that although he took the claimant's health conditions into account, he concluded that the claimant knew right from wrong at the time. However, this assessment was based on the occupational health reports dealing with the claimant's state of mind in September 2020 and his presentation to Mr Mews in November 2020. There was no evidence on which he could reliably assess the claimant's state of mind from January to May 2020 except for what the claimant was telling him.

101. Mr Mews said that compelling medical evidence might have caused him to downgrade the sanction from dismissal to a final written warning, although he also said that no sanction short of dismissal could have provided the requisite protection to the people whose information the respondent held. We conclude, that a final written warning *was* capable, in the respondent's view, of providing the requisite protection in an appropriate case. This is based on the possibility of a final written warning for a data breach in the respondent's policies and Mr Mews' evidence that he would consider a final written warning. Mr Mews also said, and we accept, that if he had seen the GP letter now before the tribunal, it would not have changed either the outcome or how he approached the appeal.

102. Similarly to Mr Mason, Mr Mews' clear view was that the number of breaches was the overwhelming factor and it was, we infer, very unlikely although not impossible, that any additional information would have changed Mr Mews' decision.

103. Finally, despite Mr Mews saying he would look at the decision with fresh eyes, it is clear from his witness statement at paragraph 18 that he in fact conducted a review of Mr Mason's decision and concluded that he had come to a procedurally sound and reasonable decision and, ultimately, the claimant knew the difference between right and wrong and his actions were clearly wrong.

The law

104. Discrimination arising from disability

105. Section 15 Equality Act 2010 says:

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

106. Paragraph (1)(a) includes the following elements.

107. The respondent must have treated the claimant unfavourably. Unfavourable treatment is usually straightforward to identify and in this case it is not controversial that dismissal can be unfavourable treatment. There is no need for any comparison with another person – it is simply a question of whether the claimant was treated unfavourably

108. The unfavourable treatment must be because of something arising in consequence of the claimant's disability. This part comprises of two elements – there must be 'something arising', and that something must be 'in consequence of' the claimant's disability. Mr McHugh set out the test from *York City Council v Grossett* [2018] IRLR 746 to the effect that the approach to be taken is that the tribunal must ask 2 questions:

    a. Did the respondent treat the claimant because of an identified "something"?

    b. Did that something arise in consequence of the claimant's disability?

109. In this case, the claimant relies on the unauthorised searches as the "something" on the basis that that was the thing that caused Mr Mason to dismiss him.

110. The first contentious and substantially disputed question in this is case is did the something – namely the unauthorised access to computer records – arise in consequence of the claimant's disability?

111. Mr McHugh says that this question is an objective one – did the something *actually* arise in consequence of the claimant's disability (namely his anxiety and depression in this case)?

112. Mr McHugh referred to the case of *iForce Ltd v Wood* UKEAT/0167/18/DA which he relies on to show that there must be some objective evidence demonstrating the link. That case concerned a claimant's perception of the impact of her employer's decision to propose to move her on her arthritis. Her perception, the EAT said, was unrelated to her disability. It is clear from that case that there must actually be an objective link, even if not a direct link (*York City Council v Grossett* [2018] IRLR 746), between the disability and the something arising. The question for us is what is the *nature* of the required link? The test we are required to apply is whether the claimant's disability was an *effective cause of* the "something" – namely the unauthorised searches. We refer to *Risby v LB Waltham Forest U*KEAT/0318/15/DM which considered the case of *Hall v Chief Constable of West Yorkshire* [2015] IRLR 893. Even if there was an additional cause, the actions will be in consequence of the claimant's disability if his disability had a significant influence on the unfavourable treatment.

113. Even if all these elements are present, the actions of the respondent will not amount to discrimination under this section if they can show that the treatment of the claimant was for a legitimate aim and that treatment was a proportionate means of achieving that aim.

114. The legitimate aim on which the respondent relies is protecting data security. For an aim to be legitimate it must be real, lawful and not discriminatory but, in any event, the pleaded aim was not challenged.

115. In DWP v Boyers UKEAT/0282/19/AT, the EAT said:

> *"When considering whether a discriminatory measure is objectively justified, the ET must balance the needs of the employer, as represented by the legitimate aims being pursued, against the discriminatory effect of the measure on the individual concerned. This involves consideration of the way in which the legitimate aims being pursued represent the needs of the business, and a balancing of those needs against the discriminatory effect of the measure concerned".*

116. This necessarily involves considering whether there was alternative, less discriminatory step that could have been taken

117. Finally, the actions of the respondent will not amount to discrimination if it did not know and could not reasonably have been expected to know that the claimant had the disability on which the claim is based. The respondent does not dispute that they knew the claimant was disabled at the relevant time.

Unfair dismissal

118. A person has the right not to be unfairly dismissed. Section 98 Employment Rights Act 1996 provides (as far as is relevant) that

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a)
>
> (b) relates to the conduct of the employee,
>
> (c)
>
> (d)
>
> …
>
> (4) [Where] the employer has fulfilled the requirements of subsection (1), 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.

119. "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'.' *Abernethy v Mott Hay and Anderson* [1974] IRLR 213, [1974] ICR 323:

120. In terms of reasonableness, *British Home Stores Ltd v Burchell* [1978] IRLR 379, [1980] ICR 303, provides valuable and regularly used guidelines:

"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further". (Our emphasis).

121. It is trite law that the tribunal must not substitute its own decision as to whether the decision of the employer to dismiss the employee was fair, but must decide whether the actions of the employer in dismissing the employee were within the range of reasonable responses of a reasonable employer. In this case, the key issue is whether in light of the evidence before Mr Mason, his decision to dismiss the claimant at that point was within the range of reasonable responses of a reasonable employer. Particularly, considering *Burchell*, whether there had been as much investigation as was reasonable in all the circumstances of the case. There is no burden of proof on the claimant or the respondent to show whether the decision was within the range of reasonable responses, it is a matter for our judgment.

122. For reasons that will become clear, we do not address any legal issues relating to reductions in any compensation arising from *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 or any contributory conduct of the claimant in this judgment.

Conclusions

Disability discrimination

123. Firstly, we have no hesitation in finding that the claimant was treated unfavourably by being dismissed. This is uncontroversial.

124. Secondly, it was agreed that the claimant was at the relevant time disabled by reason of depression and anxiety and the respondent was aware of that.

125. Thirdly, we find that the claimant was dismissed because he had accessed individuals' records without authorisation. This was in breach of the respondent's polices and this was not ultimately challenged by the claimant.

126. The first substantial question we answer is whether the claimant accessing the records is something that arose in consequence of his disability. We have set out at some length our reasoning to the effect that the claimant's anxiety and depression did have an effect on his decisions to access records in incidents 2 – 7. In respect of incident 2, there was an additional reason for him accessing his son's records – namely his concerns about his son's well-being. However, in our judgment and having regard to *Hall v Chief Constable of West Yorkshire*, we find that the claimant's disability was an effective cause of him accessing those records.

127. In respect of incidents 3 – 7, no other explanation has been suggested by anyone as to why the claimant accessed those records. We find, therefore and for the reasons set out previously, that the claimant's disability was an effective cause of him accessing those records.

128. We find that the claimant's decision to access the first record was not affected by his disability at all. He was solely accessing the information for the purposes of assisting his colleague in her duties. We accept the respondent's case that he did so without following procedure and that this is a potential disciplinary offence. However, the evidence of the respondent's witnesses was that while incident 2 might of itself have been enough for dismissal, incident 1 may well have resulted in a final written warning. We also note that the incidents were not raised with the claimant until security were triggered by incidents 3 – 7. We find, therefore, on the balance of probabilities that if the claimant had <u>only</u> accessed records in the circumstances of incident 1, he was unlikely to have been dismissed. However, we note that this is potentially culpable conduct of the claimant that *might* go towards contributory conduct.

129. In respect of the legitimate aim, we find that data security and its protection is a legitimate aim for a large government department like the DWP. We do not think the claimant challenged this but in our experience this is almost obvious.

130. The question is whether the respondent acted proportionately in dismissing the claimant in protection of that aim. We find that they did not. It might at some point have been proportionate to dismiss the claimant but the clear information before Mr Mason and Mr Mews was that the claimant believed himself to have been adversely affected by his mental health at the relevant time and he gave numerous clear explanations as to why. That was borne out by the subsequent medical evidence. We conclude that had the DWP sought more evidence at the time, there is a chance that there would have been a different outcome. It was certainly not proportionate to dismiss the

claimant without considering obtaining further evidence or information about the claimant's mental health or state of mind at the relevant time in the face of the continued representations form the claimant. .

131. Although Mr Mews said that nothing short of dismissal would protect individuals, this is inconsistent with the availability of a final written warning for data breaches and his evidence that in the right circumstances the claimant might have got a final written warning instead. In balancing the legitimate aim of the DWP with the right of the claimant not to be discriminated against, we find that the DWP acted disproportionately in dismissing the claimant without giving proper consideration to the impact of his disability on his actions and/or undertaking further investigations – or even inviting the claimant to provide further evidence.

132. For these reasons, we find that the claimant was dismissed for something arising in consequence of his disability and that that was not a proportionate means of achieving a legitimate aim. Consequently, the claimant's claim of disability discrimination is successful.

Unfair dismissal

133. We find that the reason for the claimant's dismissal was a reason relating to conduct – namely that he accessed personal records without authorisation. This is a potentially fair reason.

134. We find that the decision to dismiss the claimant in the circumstances that the respondent did was outside the band of reasonable responses of a reasonable employer. This is for very similar reasons as set out in respect of the disability discrimination claim. Specifically, there was clear information from the claimant that his decision had been affected by his mental health and the respondent failed to undertake any further investigations into that. Although it was the respondent's case that the claimant was aware he needed to bring his own evidence, there was no evidence that the claimant had in fact ever been made aware of that and he consistently said he trusted the Respondent to make their own enquiries.

135. In our judgement, no reasonable employer faced with the clear, repeated assertions from the claimant about the impact of his mental health would have dismissed their employee without making further enquiries or explicitly inviting the claimant to produce further evidence. And particularly an employer the size of and with the resources of the DWP. We refer also to the fact that the respondent purports to champion wellbeing and take account of its employees' mental health. In such circumstances, the employer can expect to be held to account for failing to apply those aspirations in a meaningful way in respect of an employee who is disabled by reason of their mental health. We add that the actions of Mr Mews in the appeal did not remedy the problem, it was merely repeated.

136. For these reasons, the claimant's claim of unfair dismissal is successful.

137. Finally, in respect of remedy. Although we invited submissions on *Polkey* and contributory conduct, we consider that we are not in a position to deal with that at this hearing. Had the Respondent not discriminated against the

claimant, there were a number of potential outcomes. The medical evidence could have pointed any number of ways resulting in outcomes ranging from the claimant's return to work to dismissal in any event.

138. We therefore reserve the decision about what would have happened or might have happened had the claimant not been discriminated against and unfairly dismissed to the remedy hearing. We have made directions about that and they are the subject of a separate case management order.

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Employment Judge **Miller**

13 October 2021