Case Nos. 2303633/2017, 2302419/2018, 2304537/2019, 2302199/2019 2304117/2019, 2304537/2019, 2300078/2020, 2300079/20

EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

MEMBERS **MR M REUBY**
MR D SCHOFIELD

BETWEEN: **MR M SHAH** **CLAIMANT**

AND

HOME OFFICE **RESPONDENT**

ON: **23 – 26 November, 29 November - 2nd December and (in chambers) 3rd and 6 December 2021**

Appearances

For the Claimant: **Mr McCabe, trade union representative until 26 November, in-person after that**
For the Respondent: **Mr. D Mold, counsel**

This has been a remote hearing by video (CVP). The parties did not object to the case being heard remotely. A face-to-face hearing was not held because of limited hearing space at the London Central Employment Tribunal. The members of the Tribunal had documents and witness statements in electronic bundles.

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

(i) The Claimant was unfairly dismissed.

(ii) The Claimant's claim that the Respondent discriminated against him on because of race and/or religion is not well founded and is dismissed.

(iii) The Claimant's claim that the Respondent victimised him contrary to section 27 of the Equality Act 2010 is not well founded and is dismissed.

(iv) The Claimant's claim that the Respondent discriminated against him because of something arising from disability contrary to section 15 of the Equality Act 2010 is not well founded and is dismissed.

(v) The Respondent failed to provide Claimant with an itemised pay statement on or before the date of payment in respect of the months of on 30th August and 30 September 2019. It is not contended that the particulars subsequently given to him in the pay statements that were provided were incorrect. No unnotified deductions during the period of 13 weeks immediately preceding the date of the Claimant's claim.

(vi) A remedy hearing has been listed on 21 April 2022 in respect of the Claimant's successful claim for unfair dismissal. Further directions in relation to that hearing are set out in the reasons below.

REASONS

1. The Tribunal had before it 8 claims brought by the Claimant against the Respondent which had been combined for hearing together. All the claims arise out of the Claimant's employment as an Executive Officer with the Respondent. Broadly, the Claimant brings claims of race/religious discrimination, disability discrimination contrary to section 15 of the Equality Act 2010, claims of victimisation, a claim of unfair dismissal and a claim under section 8 of the Employment Rights Act 1996 for unauthorised deductions resulting from failure to provide itemised pay slips.

2. The first 2 days of the hearing were spent dealing with a number of preliminary issues arising out of applications for strike out made by the Respondent (time limit points and various applications to strike out on the basis of judicial proceedings immunity and or abuse of process). Having heard submissions on all of those issues, and read the Claimant's additional statement, none of the claims were struck out for reasons which we gave orally at the time.

3. The remaining issues before the tribunal are set out in the schedule to this Judgment.

Evidence

4. The Tribunal heard evidence from the Claimant and, on his behalf, from Mr D Bailey and Mr J McCabe, both trade union representatives who had

assisted the Claimant during his employment with the Respondent. On behalf of the Respondent we heard evidence from 8 witnesses,

a. Ms A Creech, the recruiting manager for the RALON post
b. Mr G Ledbetter, who took the decision to dismiss the claimant
c. Ms G Balmforth, who considered the Claimant's complaint about his 2019 grievance
d. Ms H Earner, who heard the Claimant's appeal
e. Ms I Hall the Claimant's line manager for part of the period.
f. Ms K Thompson, who investigated the Claimant's 2017 grievance
g. Mr M Sayles, a security officer with the appeals and litigation team and
h. Ms M Wright, the Claimant's line manager until August 2017

We also had witness statements from Ms Welch, Ms Chuni and Mr R Bell, none of whom attended to give evidence.

5. We also had a bundle of documents extending to nearly 3000 pages. All references in this judgment to page numbers in the bundle are to the electronic page numbers.

Findings of relevant fact

6. The Claimant was employed by the Home Office from 18 March 2002 until 26 August 2019. He describes himself of British of Bengali/Persian ethnicity and a Muslim by way of religion. (The following findings of fact have been organised by issue and do not always follow chronologically.)

7. The Claimant was off sick from 26 June 2015 to 18 January 2016 with depression. The Respondent now accepts for the purposes of these proceedings that at the material time the Claimant was a disabled person. An Occupational Health report issued in October 2015 (2377) during his sickness absence concluded that the Claimant probably did not meet the test for disability as the depression was reactive to a bereavement. It is however now conceded that by mid-June 2016 the depression had lasted, or was likely to last, longer than 12 months and that the Claimant qualified as a disabled person at the relevant time.

8. In January 2016 the Claimant returned on a phased return to work in London. His line manager at that time was Ms M Peronius, and Ms Wright was his 2nd line manager. His family had however moved to Manchester and the Claimant was anxious to move to work closer to his family. An OH report recommended that consideration be given to seeing if it was possible to redeploy him back to Manchester "to assist reduce his stressors". The Claimant was successful in obtaining a secondment to the Professional Standards Unit in Manchester which began on 5 December 2016.

9. The Respondent has a policy in which disabled applicants for jobs are entitled to a guaranteed interview if they meet the minimum criteria for the

job. The application form provides as follows "*if you have a disability defined by the Equality Act, you're eligible to apply via the Guaranteed Interview Scheme. This means you must have a physical or mental impairment which has a substantial and long-term negative effect on your ability to carry out normal day-to-day activities. If you think you meet the criteria for the GIS, would you like to be considered for the GIS scheme?"*

10. In December 2016 the Claimant applied for a job in London on promotion at Higher Executive Officer grade. In that application the Claimant did not tick the box asking for a guaranteed interview. He told the Tribunal that he did not feel the need to apply for the job under the Guaranteed Interview Scheme as he was completely familiar with the work. He obtained an interview but was unsuccessful. In February 2017 the Claimant successfully applied for a post to work overseas in Abu Dhabi starting in August/October 2017. In March 2017 he was also offered a job as a Senior Executive Officer in the Aviation Security Team of the Department for Transport (the DfT) which he accepted with an agreed start date of 24 July 2017.

11. On 22 May 2017 the Claimant applied for a post as an immigration liaison officer with RALON in a role based overseas (the RALON post). In his application the Claimant asked to be considered under the Guaranteed Interview Scheme (GIS).

12. The application form also required the Claimant to provide his line manager's email address. As part of the application process the line manager's email address will prompt an automatic email to be sent to the line manager for the application to be "validated". The Claimant had inserted his own Home Office email account in the section of the form that required the line manager's validation and so the automatic email went to his own account, rather than to his manager's account.

13. All jobs in the Home Office require employees to hold counter terrorist check clearance (CTC). Most jobs also require Security Check (SC) clearance. Some senior jobs also require a further clearance referred to as developed vetting clearance (DV). The Claimant obtained CTC clearance when he joined the Home Office and, in 2006, he obtained SC clearance for a 10-year period. The Claimant applied for a renewal of his SC clearance in February 2016.

14. On 14 February 2017 the Claimant had been informed that the Respondent was minded to refuse his SC application. Following a meeting, the renewal of his SC was refused, and his CTC was withdrawn on 8 June 2017. As all jobs within the Home Office require, as a minimum, employees to hold CTC clearance the Claimant was then suspended on full pay. He retained something called a base line personnel security standard (BPSS). This would entitle him to work in some jobs in other departments within the civil service, but he could not work at the Home Office. The Claimant does not know why his clearance has been revoked and the revocation of his clearance is subject to a challenge elsewhere. However, for the purposes of these proceedings the Claimant accepts that none of the individuals

involved in the decisions about which he complains were involved in or, aware of, the reasons for the revocation of his security clearance. The Claimant was informed of avenues for appeal against this decision.

15. The suspension letter given to the Claimant informed him that he did not have the necessary clearance to work in the Home Office and should not attend any Home Office premises without permission of his line managers (444). The letter recorded that the Claimant retained baseline security standard clearance. Ms Wright, who at that stage was acting as the Claimant's line manager, informed the DfT and the relevant department in relation to the Abu Dhabi job that the Claimant had been suspended following the withdrawal of his security clearance.

Investigation into application for the RALON post

16. On 22 August 2017 the Claimant received a letter from Ms Welch informing him that he was to be investigated for alleged misconduct in relation to his application for the RALON post. Ms Welch had been appointed as the Commissioning Officer for the purposes of that investigation. The Claimant made representations in response to that letter, and on 13 September 2017, he was informed that no further action would be taken (617). The letter instigating an investigation was subsequently the subject of an internal grievance, the subject of the first claim made by the Claimant to the Employment Tribunal and (later in October 2018) the subject of a complaint to the office of the Data Protection Officer.

17. The background to these complaints was that on 8 August 2017 Ms Creech was considering applications for the RALON job which the Claimant had applied for in May. It was her evidence that she had identified from the Claimant's application that he had provided his own email address in place of his line manager's email for line manager's validation. She told the tribunal that she had therefore contacted the manager named on the application form (Michelle Wright) to confirm the Claimant's eligibility and that as part of the conversation (when asked) she informed Ms Wright that he had applied under the Guaranteed Interview Scheme. Ms Creech told the Tribunal that Ms Wright had informed her during the course of that conversation that the Claimant had been suspended and would need to withdraw.

18. Ms Wright however contends that Ms Creech had contacted Ms Wright for verification that he was entitled to apply under the GIS, and to confirm whether he had ticked the box for the GIS on other applications saying that the contact came about only because of the self validation. This was also the account given by Ms Wright to the Data Protection Officer (889) at a later date.

19. Ms Creech denied that account saying that she had only informed Ms Wright about the Claimant's GIS status when asked. She accepted that it would be inappropriate to contact the line manager about eligibility for the GIS, said that she did not recognise the account given by the data

protection officer and said that she did not know where the data protection officer obtained her information.

20. Ms Creech's account in her witness statement differs from an account she gave internally on 10 January 2019 (982) when she said she was contacted by the Claimant's manager who said that the Claimant would not be able to attend an interview as he was currently suspended and that, on checking his application form, established that he had self authorised his application and that she was asked for copy of the application. Arrangements had been put in place for the Claimant to attend the interview on 14th August - but the Claimant had subsequently withdrawn.

21. On the balance of probabilities, the Tribunal prefers the evidence of Ms Creech whose evidence was clear and consistent. We note that, at the time of the discussion with Ms Creech, Ms Wright was seeking advice from HR and others because the Claimant had sought her permission to enter a Home Office building in order to attend the interview on 14th August, and she was not sure what her obligations were in this regard. (The email trail relating to this correspondence is at 494 onwards.) Ms Wright had received conflicting advice as to whether the Claimant should be permitted to attend for interview and her email of 8th August (466) records that she had done some research into the Claimant's application. We consider it more likely that it was Ms Wright who had initiated the conversation about why the Claimant had been given interview when she was contacted by Ms Creech in relation to the line managers validation.

22. Following a conversation between Ms Creech and Ms Wright, Ms Wright asked for a copy of the Claimant's application form. It is apparent from that application form that the Claimant had put his own (Home Office) email address in the space for the line managers validation and had answered the question relating to the GIS in the affirmative.

23. Ms Wright was of the opinion that the Claimant may be falsely claiming to be disabled in order to obtain an interview under the GIS and that this and other information which the Claimant had included in the application form (none of which are relevant for the purposes of these proceedings) would potentially indicate dishonesty. It was her evidence that she did not consider that the Claimant was disabled and that as part of the enquiry she had made she had reviewed the Claimant's recent application for another post in February 2017 in which he had not asked for an interview under the GIS. On 8th August Ms Wright emailed her concerns to Mr Tucker, head of investigations (466) who decided to commission an investigation. Ms Cates, deputy director, commissioned Ms Welsh to take it forward and she did so,

24. As we have said, the Claimant provided a full explanation about his entries on the application form to the investigating officer. Having read his responses Ms Welch and Ms Cates accepted his explanation for the points raised and concluded there was nothing to suggest a deliberate intention to mislead or misrepresent. Ms Welch wrote to the Claimant on 13th September stating that he had provided a full response to all of the points,

that she decided not to proceed with the investigation and the case was closed.

First grievance

25. The matter did not end there however because the Claimant had, in any event, and before the outcome was sent to him, lodged a grievance (590) that he was being subjected to a disciplinary investigation *"because of my disability and facing harassment in relation to this disability by the sharing of this data by allegations that I intentionally lied about having a disability".* Ms Thompson was appointed as the decision-maker for that grievance. The Claimant confirmed that he wished to proceed with the grievance even after the investigation had been dropped as he considered that the investigation was malicious and discriminatory.

26. An investigation grievance report was sent to the Claimant on 6 April 2018 and a written outcome sent him on 4 May 2018. The Claimant unsuccessfully appealed the grievance outcome, and the appeal decision was sent to him on 13 July 2018 (709). In brief the outcome was that there was no evidence that the Claimant had been subject to discrimination, victimisation or harassment on grounds of disability in relation to the initiation of the investigation, but that the sharing of personal data on the application forms without his consent was potentially a breach of data protection. No complaint is made in these proceedings about the grievance or grievance appeal, but the grievance is relied on as a protected act for the purposes of the Claimant's victimisation claim.

27. In October the Claimant made a complaint to the Office of the Data Protection Officer regarding the handling of his personal medical data by a member of his line management chain and other colleagues. The Data Protection Officer at the Home Office provided her conclusions to the Claimant on 6 November 2018 (888).

Access to civil service jobs website

28. In the meantime, the Claimant was anxious to obtain another job. All civil servants have access to a Civil Service jobs website in which jobs are advertised in advance of any advertisements made available to the general public. In order to access the system employees need to register. That registration lapses after a period of time and cannot be reactivated unless the line manager validates it by clicking a link to confirm individual is employed by the Home Office.

29. Ms Wright had previously received conflicting advice on the Claimant's ability to apply for jobs when enquiring about allowing the Claimant access to attend the RALON interview. At that time she had obtained advice from Mr Jackson of the Security Team that without security clearance the Claimant would not be able to *"take up any post*" and that it would not be useful to interview him. On the other hand, HR had advised that "at the interview stage an applicant may not have the required level of security clearance for the role" so there was no problem with him attending an

interview. Ms Hall, the Claimant's 2nd line manager, had intervened with HR asking for more clarity. Ms Wright also asked the security team and Mr Tucker responded that in his view was not possible for Mr Shah to "apply for any post that requires security clearance until his appeal is heard and a positive outcome achieved" and that all Home Office posts required CTC clearance. At this point the parties were focusing on jobs within the Home Office.

30. In October 2017 Ms Hall (who we understand had taken over as the Claimant's line manager after Ms Wright had moved to a different job) received an alert via the civil service job site asking her to verify the Claimant's employment with the Home Office. An example of such an alert appears at page 683. On receipt Ms Hall sought advice from Mr Jackson of the security vetting team and Mr Powell HR because she was aware that the Claimant was unable to enter any Home Office charging building without consent.

31. It is apparent from that exchange that Ms Wright was seeking "a clear steer" on what to do. HR responded tat it might be best to let the process take its course" but that if there were specific concerns they should be brought to the attention of corporate security; while Mr Jackson responded that without security clearance the Claimant was ineligible for "any post which requires internal security clearance, which is all of them". (2293) This was not strictly true. While the Claimant was ineligible for any post within the Home Office, he was not ineligible for civil service posts in other departments. Ms Hall therefore declined to click the link to validate the Claimant's access to the internal database.

32. What is less understandable than the confusion over the Claimant's position was that when the Claimant emailed her on 1st November enquiring if she had received a reactivation request Ms Hall fails to tell the Claimant that she has declined to reactivate his access to the database (2330), but simply points out that if the Claimant was successful, he would need to tell any potential line manager that he had no security clearance. The Claimant responded saying that he was still able to apply for jobs which only required BPPS. It was not until 7 February 2018 that Ms Hall informed the Claimant that she had decided not to allow him to have access to the civil service job site (680).

33. It was Ms Hall's evidence that in seeking advice as to what the Claimant could do her queries related to jobs with the Home Office. She told the Tribunal that she understood that, while the Claimant was technically still an employee, he was not able to take <u>any</u> jobs. She was concerned that if she clicked the link, he could apply for jobs to the Home Office.

34. Ms Hall also told the Tribunal that she understood that the Claimant had a right of appeal against the decision to revoke his clearance and that they therefore had no obligation to find him another post until he had exhausted his right of appeal. Indeed, the Claimant had emailed Ms Wright on 14th June, just a week after his suspension to say that "*in the event* that my

appeal against the decision to refuse and withdraw my clearance levels is unsuccessful, I will require the Department assistance in transferring me to a job role in another civil service department."

35. We accept Ms Hall's evidence that she had not clearly distinguished between the Claimant's ability to apply for Home Office jobs and jobs in other departments of the civil service and that she had been given confusing advice. Nonetheless the letter of suspension which she herself had given to the Claimant noted that he retained baseline standard and, in his email of 1st November, the Claimant reminded her in terms could still apply for jobs elsewhere within the service.

36. In the end the Claimant eventually obtained access to the civil service web site when Ms Hall forwarded a copy of the activation email that she had refused to click to the Claimant, and the Claimant's representative Mr McCabe inadvertently allowed the Claimant access when he clicked on the link.

37. In early August the Claimant's access lapsed again. On 23 August and again on 3rd September the Claimant emailed his then line manager, Peter Wackenier, (693) asking him to reactivate his access he did not obtain any response. The Claimant's access was reactivated on 18 September 2018 – but the Claimant was not informed that this had been done until 1 October 2018. The first email which was sent to the Claimant from Mr Wackenier (as the Claimant rather ruefully observed) seems to have been on 7th September when the Claimant was sent an invite to a formal meeting to discuss termination – see below. (815)

38. It is now accepted that the Claimant was denied access to the civil service website from 1 October 2017 – 5 February 2018 and again from 1 August 2018 until 1 October 2018, an aggregate of just over 6 months. It is also accepted that the Claimant was entitled to apply for jobs within the wider civil service that required only baseline standard.

39. On 15th May 2018 the Permanent Secretary refused the Claimant's appeal against the loss of his security clearance. The Claimant remained employed (but suspended) by the Respondent until 26th August 2019 while the process took its course.

<u>Sharing the Claimant's first ET1 with Ms Sharland</u>

40. On 21 May 2018 the Claimant became aware that Ms Sharland had received an electronic copy of his first claim on 22 February 2018. He was concerned because, as he understood it, she was the home office employee who at that time was dealing his appeal against the loss of his security clearance, and considered that it would interfere with the impartiality of the appeal process.

41. The email trail reveals that Ms Cates had emailed Ms Sharland on 21st February at the request of the Respondent's then legal advisers, referencing

the litigation (in claim 1) and stating that some of the issues related to his suspension and security clearance and that the Government Legal Department ("the GLD") had requested a contact as they would require evidence/a statement. Mr Sayles, who at that time was a senior security officer dealing with appeals against loss of security clearance, responded (as Ms Sharland was at the time off sick) asked for a copy of the claim to be forwarded. Ms Cates then forwarded that email to Mr Sayles and Ms Sharland on 22nd February.

42. The information about the claim was sent to Ms Sharland at the request of the GLD (the email from Ms Cates clearly says so) and we accept that, as a matter of course, the vetting department would usually request to see any correspondence relating to claims to the Employment Tribunal by employees who had had their security clearances refused or withdrawn. This was because the claim might contain information relating to the refusal/withdrawal of security clearance.

43. On 27 June 2018 the Claimant presented a complaint to this Tribunal alleging that the email to Ms Sharland amounted to an act of victimisation.

Ms Creech declining to respond to the Claimant's discrimination questionnaire

44. On 6 November 2018 the Claimant received the outcome of the data protection officer's investigation (888). He had complained that there had been unlawful accessing and sharing of disability information in relation to his application for the RALON post. The DPO reported that the information that she had been given was that "*Anita Creech had contacted Ms Wright for verification regarding your stated disability, as it was on this basis on upon which you are being invited to interview under the Guaranteed Interview Scheme. Ms Wright was asked whether you had declared a disability in previous act applications, therefore Ms Wright checked an application which you had submitted in very 2017 for a post within your own unit."*

45. The Claimant had not previously been aware of Ms Creech's involvement in relation to the investigation subsequently carried out into his application. The Claimant had never met Ms Creech. He believes that, if she had contacted Ms Wright in this way, it was wholly inappropriate and that the explanation for such action must be that she had discriminated against him on the grounds of his religion or belief by associating his name with his ethnicity and or his Muslim religion.

46. On 8 December 2018 the Claimant sent an email to Ms Creech (1000) asking her whether she had disclosed to Ms Wright that he had applied for the post in May 2017 under the GIS as a person with a disability. This was followed up by a further email of 20th December (999) stating that he was concerned that he had been discriminated against by her on the basis of race and/or religion and asking her to respond to a number of questions.

47. On 15th January 2019 Ms Creech responded to those emails stating that she understood that these requests related to ongoing legal proceedings and that her requests for information/documents relating to those proceedings should be sent to the solicitors dealing with it. Further emails from the Claimant followed and Ms Creech responded again on 18 January 2019 to the effect that the matters he was corresponding with her about related to ongoing legal proceedings and requests should be directed to the lawyer at the GLD (996).

48. On 3 February 2019 the Claimant made a formal grievance against Ms Creech. The Respondent concluded that it raised substantially the same complaints as the Claimant had previously raised in his earlier complaint and it was taken no further. (1010) On 14 March 2019 the Claimant issued a claim of race discrimination and victimisation in relation to the failure of Ms Creech to respond to his queries.

Email from Ms Welch to the Department for Transport dated 8 May 2018

49. On 8 May 2018 Ms Welch had sent an email to the DFT as follows "*Our legal representative has requested that I try to get hold of a copy of the application form that Mohammed Shah completed when applying for the job with yourselves. Mohammed is taking us to tribunal for various reasons, including that he was unable to work in London and required a compassionate transfer back to Manchester. However, we know that he was applying for roles in London, the role with you being one of them and a copy of the application form would confirm this. In addition, having applied for numerous jobs, on some of the application forms he claims disability and therefore qualified for guaranteed interview. We would be interested to see whether he applied under the scheme for the role with you."*

50. The Claimant became aware of this email in April 2019 as a result of a Subject Access request, and this became the subject of claim 7 submitted on 31st May 2019. It is the Claimant's case that this email is an act of victimisation because of his earlier grievance and his first Tribunal claim.

51. Some of the information in the email is incorrect. The Claimant was not taking the Home Office to tribunal because he was unable to work in London and required a compassionate transfer back to Manchester. It is his case that he was subjected to a detriment when the DFT was informed that the Claimant had made a number of complaints to the Employment Tribunal, by providing false information about the basis of the claim, by disclosing sensitive personal data when it was indicated that the Claimant had applied for various jobs under the GIS and attempting to unlawfully obtain personal data contained within his application form.

52. On 13 April 2019 the Claimant lodged a formal grievance about the contents of the 8 May 2018 email. He did not at that time know who had sent the email, (which had been obtained by a subject access request.) His complaint was that the sender had included sensitive personal data (namely that he applied under the guaranteed interview scheme), presented him as

a liar and that the email was sent as an act of victimisation following his complaint to the tribunal in order to negatively impact his chances of gaining employment with the DfT. On 9th May Mr Bell (who was at that time the temporary head of the unit of the Team that the Claimant was employed in) wrote to the Claimant stating that his complaint would not be taken any further as it did not pass the Grievance Consideration test under the Respondent's grievance policy. His decision was countersigned by Mr Ledbetter as Mr Bell's line manager. The reason for rejection was described as follows "*The email in question was sent as part of litigation investigations by the Government Legal Department in relation to your Employment Tribunal Case against the Home Office. The enquiry is considered reasonable and in no way defamatory*."

53. The Claimant was not satisfied. On 1st July he presented a further grievance (1700) about the determination that his grievance had not passed the Grievance Consideration test. He said that it clearly did pass such a test, being a complaint of victimisation under the Equality Act. He considered the failure to consider his grievance to be a further act of victimisation. That grievance was passed to Ms Balmforth, who was Mr Ledbetter's line manager.

54. The Respondent's grievance policy provides that there is no right of appeal against a decision that a grievance does not reach the required threshold to pass the Consideration test. Although Ms Balmforth then contacted HR for advice she did not respond substantively to the Claimant until 10th October (1837) when she advised him that (although there was no right of appeal against the grievance consideration test) she would reopen the 2019 grievance as the Claimant had raised "other issues". On 16th October the Claimant was notified that the decision manager would be Ms Singh and Ms Bourne the Investigation Manager.

55. It is the Claimant's case that Ms Balmforth ignored his grievance of 1 July and that she did so because she was influenced by the fact that the Claimant had brought earlier grievances, had made claims before this tribunal and had done other protected acts.

56. The chain of emails in the bundle evidence that Ms Balmforth did not ignore the Claimant's grievance, but that she sought advice from HR internally and that HR had been extraordinarily slow in responding. While this delay is unsatisfactory, it is apparent that Ms Balmforth did try and chase the advice and, while we might criticise her and/or HR for not making a decision sooner, we do not consider that the delay related to the fact that the Claimant had done protected acts - but rather from an abundance of caution as to the best way to proceed. As Ms Balmforth said in evidence, ultimately her decision was to reopen the grievance and she made a decision which was favourable to the Claimant.

<u>Failure to respond to the Claimant's email of 7 August 2019</u>

57. On 7 August 2019 the Claimant wrote to Mr Ledbetter, (1735) to say that it had come to his attention that on 21st May a Home Office employee who had lost their security clearance was offered to DEFRA as an employee available for transfer into an existing post. He referred to the Civil Service Management Code section 10.2.1. He asked if Mr Ledbetter had sought HR advice before informing the Claimant that the only assistance that would be offered to him in finding another job would be to confirm that he was Home Office employee so that he could access the Civil Service jobs website.

58. Mr Ledbetter responded on 12 August 2019 to the effect that he was awaiting legal advice and would respond after that. The Claimant then left the Respondent employment on 26th August (1741) and there was no further response. Mr Ledbetter said that this was because he had not received the advice before he went on leave on 17th August and that he took no further steps once the Claimant had left. He said that he did not speak to anyone at DEFRA because the Claimant had not provided a name, a date or any context to the transfer and he didn't know what to do with it. He did not feel he should be going the extra mile once the Claimant had left. He had already asked Mr Bell to liaise with HR to see if there was anything more that they could do to help (1722) and did not consider there was much further he could do.

<u>Failure to provide assistance with obtaining an alternative post</u>

59. It is the Claimant's case that the Respondent failed to provide assistance to him in obtaining an alternative post. This is raised both as an act of victimisation and as relevant to the fairness of the Claimant's dismissal. Our findings relating to Ms Hall's decision not to activate the Claimants access to the civil service website from 1 October 2017 are set out above. Although it was open to the Claimant to apply for jobs in the civil service via the public website there is a considerable advantage in applying as an internal candidate, not least that the jobs are released internally before they are released to external candidates. Mr Wackenier was slow to respond to the Claimant's request that he reactivate the link.

60. It was also the case that there was very little contact between the Claimant and his line management chain during the period of his suspension and, such contact as there was, was initiated by the Claimant. There was no active engagement, and the Claimant was left alone.

61. On 13th February 2019, the Claimant emailed Mr Bell with several job roles that he had identified in the DWP and the Department for Education, that the Claimant said were available and that he was capable of taking on. He asked Mr Bell to help to "arrange his transfer" to them under the Civil service Management Code 10.2.1. All were at a higher grade than the Claimant's current grade. On 14th February 2019, Mr Bell replied that he was unable to respond until he had received input from HR on the Management Code.

62. Nonetheless, the Claimant did apply for one of the jobs. Mr Bell validated the Claimant's application confirming that there were no outstanding disciplinary or performance issues. The Claimant was invited for interview, but was not offered the job.

63. On 20th March 2019, Mr Bell told the Claimant that that the only ongoing obligation to the Claimant under the CS Management Code was to enable him to have access to CS jobs (1488). In other words, they did not accept any obligation to arrange a transfer. He referred the Claimant to the Careers Transition Service (CTS) on 21st March 2019, but the CTS did not make contact and, when the Claimant chased on 4th July Mr Ledbetter advised that, having checked, the CTS did not apply to the Claimant as he was not facing redundancy (1722). (As we understand it the CTS in effect offers outplacement assistance rather than assistance to find a job within the civil service.)

The dismissal process

64. On or about 15 May 2018 the Permanent Secretary refused the Claimant's appeal against the loss of his security clearance (761). Mr Jackson of the vetting and appeals department wrote to Ms Cates to inform her that the Permanent Secretary had refused the appeal, and that she should liaise with HR about next steps "which will probably include ending his employment with the Home Office."

65. Ms Cates referred that email on Mr Ledbetter. By then, the Claimant's line management responsibility had transferred to Mr Wackenier; and Mr Ledbetter was the senior manager in that team. Emails in the bundle suggest that both HR and the line management were at a loss about how to manage the dismissal process. The security team said that they could not divulge the reasons why the Claimant had been refused SC clearance or why his CTC had been revoked, but advised that dismissal could be arranged on the grounds that security clearance is required to hold a post in the Home Office- and without it the Claimant would be unable to discharge his duties. (835) Mr Ledbetter sought advice from HR. The CSHR lead unhelpfully advised that they only supported dismissals "that relate to the areas they support, i.e., attendance, poor performance, discipline and conduct" and that the Claimant's issue wasn't supported by CSHR. They suggested that Mr Ledbetter should seek support from HR policy. Mr Wackenier also asked Ms Hall for some background information and she told him that the business had not been provided with any reasons for the refusal of the Claimant clearance (756). She said the next stage would be for "a stage 3 hearing to be scheduled to terminate his employment" and that he remained on full pay and without any clearance and could not undertake any employment or enter any HO building."

66. (Note some of the correspondence in the bundle gives a redacted reason for the Claimant's security clearance. Mr Ledbetter tells us that this was a generic phrase and that he had not been told the specific reason for the loss of clearance. There is correspondence in the bundle showing that the

Claimant complained about this at the time, but the Claimant now accepts that no-one in these proceedings was aware of the reason for the loss of security clearance and no issues turn on this.)

67. As a result of this general confusion about what to do next and how to handle matters the Claimant was not invited to attend a hearing until 7 September 2018 nearly 3 months after the appeal had been turned down. The invitation letter to that meeting is not a model of clarity. It is headed "Proposed termination of Home Office Employment – invite to a formal meeting". The letter then refers to the fact that the Claimant had been suspended, that the permanent secretary had upheld that decision, and that as a result he was now unable to carry out his duties at the Home Office. It continues "*to discuss next steps I would like to meet with you in person*." It is the Claimant's case that when he received the invitation letter (814) he did not realise that this was an invitation to a dismissal hearing, and that during the hearing dismissal was not discussed.

68. We do not accept that the Claimant can reasonably have believed that this meeting was not to discuss the possible termination of his employment, and that it was simply a meeting to discuss the possibility of transferring the Claimant to another civil service department. The Claimant had been suspended on full pay for some 15 months, he had lost his appeal and the letter was clearly headed proposed termination of Home Office Employment. It is correct, as the Claimant says, that the word dismissal is not used, but that is merely semantics.

69. Mr Ledbetter reactivated the Claimant's access to the Civil Service jobs website on 17th August, but the Claimant was unaware of this until he received the letter of 7 September.

70. A meeting with Mr Ledbetter was eventually held on 1 October 2018. The Claimant was accompanied by his Trade Union Representative, David Bailey. Mr Ledbetter was supported by Mr Ikin, HR Case Manager. Mr Ikin took brief handwritten notes. On 3rd October Mr Ledbetter emailed the Claimant and Mr Ikin a summary of "action points" resulting from the first October meeting. The Claimant had been disappointed as to the contact he had received from line management during his suspension, and it was agreed that they would agree a new point of contact to manage the Claimant's situation more closely and to provide ongoing support. Mr Ledbetter would gather evidence as to how his case be handled in the past and why his access to the CS jobs website had been denied. Mr Bailey requested that the lack of access to the job's website be taken into consideration when managing the Claimant's potential dismissal. It was noted also that Mr Ikin would try and assist in identifying alternative government employers in the Northwest.

71. It is apparent that these further enquiries to be undertaken did not get very far. On 8 November 2018 Mr Ledbetter wrote to the Claimant giving him 6 months notice of the termination of his employment because he could no longer carry out his duties at the Home Office. He was told his employment

would conclude on 13 May 2019. In the meantime, he was eligible to apply for alternative jobs within the wider civil service which only required baseline standard and would continue to have full access to the Civil service Jobs website. The Claimant was told he had a right of appeal by sending an email to Mr Ledbetter's email account. (The Claimant alleges that it was unfair that his right of appeal had to be sent to the dismissing manager – and that it would be more usual appeals manager to have been identified in the termination letter. We do not consider that there is anything in this point. The Claimant eventually obtained an appeal which was heard by an independent appeals manager.)

72. On 21 November 2018 the Claimant said that he would be appealing against his dismissal. The Claimant was initially advised that his appeal to the Security Vetting Appeals Panel (SVAP) needed to be completed before he could appeal the dismissal decision, but that decision was eventually revoked, and the Claimant's appeal went ahead and was heard by Ms Earner on 11 March 2019.

73. The Claimant's grounds of appeal were that:

    a. He was not told the meeting of 1 October 2018 was being held to consider his dismissal and the invite letter said it was to discuss "next steps".
    b. it was unreasonable to dismiss him at this point given that he had been deliberately and maliciously prevented from applying for other posts in the civil service for 7 months
    c. until the dismissal meeting his managers had failed to contact him during the 15 months since his suspension
    d. he had understood that Mr Ledbetter would assist him to find alternative posts in other government departments and provide him with a point of contact to manage his situation more closely and provide ongoing support. This had not happened, and his civil service job site account had been deactivated from 1 August to 18th September.

74. At the appeal hearing the Claimant was again assisted by Mr Bailey. The focus of the Claimant's appeal was that (i) he had not been notified that the meeting with Mr Ledbetter could result in his dismissal and (ii) he had been denied access to the civil service jobs website for 7 months and had insufficient assistance from the Respondent in helping him to find another job.

75. The day after the hearing the Claimant referred Ms Earner to the policy relating to appeals against withdrawal of security clearance which provides as follows

    "*4.5 Redeployment or dismissal from service*

    For Home Office employees, where the permanent secretary dismisses an appeal, or the individual does not appeal, the individual should be aware

that line managers will give consideration to identifying an alternative post for the individual or to dismissal as appropriate."

He also referred to an email sent internally from Ms Sharland (when she was dealing with this appeal against the loss of his security clearance) to the effect that as the Claimant retained baseline standard he would be able to look for a post elsewhere within the Civil Service, that the vetting team would provide advice to the business area on receipt of notification of the permanent secretary's decision and that the Claimant line management would be responsible for taking the necessary employment/redeployment action.

76. Ms Earner did not uphold the Claimant's appeal. She found, as we do, that the Claimant had been informed that the formal meeting on 1st October could lead to his dismissal. She found it was reasonable to dismiss the Claimant given that he had only baseline standard and could not undertake any role in the Home Office. She also found that while there were periods during which the Claimant did not have access to the civil service jobs website and was not adequately contacted by management there was no evidence of deliberate or malicious intent on the part of the managers including on grounds of ethnicity. Her view was that the managers did not consistently have access to sufficiently detailed guidance in the circumstances of his case. The tribunal accepts that all those findings were reasonable and open to her.

77. She concluded that as the Claimant had been disadvantaged by actions and inactions from managers that as a result the notice period would be extended until 26 August 2019.

Policy documents

78. The Security Clearance Appeals Policy of the Home Office provides (2059) at 4.5 that:

"For Home Office employees, where the Permanent Secretary dismisses an appeal, or the individual does not appeal, individuals should be aware that line managers will give consideration to identifying an alternative post for the individual or to dismissal, as appropriate. Any decision regarding redeployment or dismissal will not affect an individual's rights to appeal to the SVAP. However, any relevant action should not be delayed whilst the SVAP appeal is being considered. In the event that a recommendation from SVAP to grant or restore security clearance is accepted, then reinstatement of the employee should be considered."

79. The Civil Service Management code provides at 10.2 for the transfer of staff between departments and agencies (2160). It provides as follows:

"Departments and agencies have authority to determine the circumstances in which staff may be transferred between departments and agencies, including the filling of vacancies in one department or agency with staff from another and the movement of staff between departments and agencies to promote career development or on compassionate grounds, subject to the following conditions…

Departments and agencies must

> Take into account the interests of the civil service at large and in particular the needs of small departments, and of staff whose security clearance has been withdrawn:"

80. It also provides at 11.1.4 for the notice period to be given when there is a compulsory termination of employment. This provides that "in accordance with paragraph 11.1.1, staff will be given 6 months notice… When their employment is terminated compulsorily on grounds other than those covered by paragraphs 11.1.2 and 11.1.3." It is accepted that this section applied to the Claimant.

Failure to provide itemised pay statements

81. In his claim submitted on 5 January 2020 the Claimant complains that the Respondent has failed to provide him with an itemised pay slip for the months on or before 30 August 2019 and 30 September 2019 when his wages were paid to him. He seeks a reference under section 11 of Employment Rights Act 1996, and he claims payment of unnotified deductions. The Claimant accepts that he did receive payslips - but submits correctly that the obligation on the employer is to send him those statements on or before the date of payment and that they did not do so.

82. The Respondent accepts that it did not send the August payslip to the Claimant until 21 November 2019. In relation to the September pay slip Mr Ledbetter said that shared services informed him that the September payslip was sent to the Claimant on 23rd September. Further the Claimant knew that he was at liberty to obtain his payslips by telephoning Shared Services.

83. The Claimant accepts that he was told he could contact Shared Services direct in order to obtain information about his payslips. However, when he did so Shared services told him that his line manager was required to contact them. He had told Mr Wackenier that Shared Services would not talk to him direct and that he would need to contact them, but Mr Wackenier had failed to do so.

84. Both payslips relate to payments payable after the Claimant had left the Respondent's employment. We prefer the Claimant's evidence that he was not able to phone shared services direct at this point. We accept that he did not get his September payslip in advance of payment. However, his claim for unnotified deductions does not succeed for reasons set out below.

Relevant law
Direct discrimination on grounds of race and or religion

85. Section 39 of the Equality Act 2010 prohibits an employer discriminating against or victimising its employees by dismissing them or subjecting them to any other detriment. Section 40 prohibits an employer from harassing its employees.

86. Section 13 defines direct discrimination as follows: -

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favorably than A treats or would treat others.
Race and religion are both protected characteristics.

87. Section 13 focuses on "less favourable" treatment. A claimant must compare his or her treatment with that of another actual or hypothetical person who does not share the same protected characteristic. In comparing whether the employee has been treated less favourably than another, section 23 of the Equality Act provides that "on a comparison of cases for the purposes of section 13… there must be no material difference between the circumstances relating to each case." Is not necessary for all the circumstances to be the same provided that the circumstances are materially similar. In other words, for the comparison to be valid, like must be compared with like.

88. As to victimisation section 27 provides that

> "(1) 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.
>
> (3) Giving information or making a false allegation is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."

89. In cases of victimisation there is no need for a comparative approach. The issue is whether the detrimental treatment was because the Claimant had done a protected act.

90. The burden of proof is set out at Section 136. It is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence before it, in the absence of an adequate explanation, that there has been a contravention of the Equality Act. If a Claimant does not prove such facts he will fail – a mere feeling that there has been unlawful discrimination, harassment or victimisation is not enough. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise.

91. At the first stage the Claimant must prove a prima facie case but, as set out in Madarassy v Nomura International plc, (2007 IRR 246) and approved by the Supreme Court in Hewage v Grampian Health Board 2012 ICR 1054, "the bare facts of the difference in status and the difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that the respondent had committed an unlawful act of discrimination."

Discrimination arising from disability

92. Section 15 of the Equality Act 2010 provides that

> (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.

93. Although A must know, or have been expected to know, that the Claimant was disabled, it is not necessary for A to know that the "something" arose in consequence of that disability. As with victimisation there is no issue of comparison. The question is whether there was unfavourable treatment and what caused that treatment. An examination of the conscious or unconscious thought processes of the individual alleged to have treated the claimant unfavourably is likely to be required. The something that causes the unfavourable treatment need not be the main or sole reason but must have a significant (or more then trivial) influence of the unfavourable treatment and so be an effective reason or cause for it.

Unfair dismissal

94. Section 94 of the ERA sets out the well-known right not to be unfairly dismissed. It is for the Respondent to show that the reason for the Claimant's dismissal is a potentially fair reason for dismissal within the terms of section 98(1).

95. Section 98(1) (b) provides that it is potentially fair to dismiss for "some other substantial reason" and this is the reason on which the Respondent relies in this case. The Tribunal has to be satisfied first that there was another substantial reason for the dismissal and secondly that it was reasonable to dismiss for that reason. The answer to this second question "depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and shall be determined in accordance with equity and the substantial merits of the case."

96. In Dobie v Burns International Security (UK) Limited the Court of Appeal said that, in considering reasonableness, tribunals should look at the conduct of the employer and at whether the dismissal is an injustice to the employee.

97. It is settled law that in unfair dismissal claims, the function of a tribunal is to review the fairness of the employer's decision, not to substitute its own view for that of the employer. The issue is whether the decision to dismiss fell

within the band of reasonable responses for an employer to take in all the circumstances. However, it is not the case that nothing short of a perverse decision to dismiss can be unfair within the section, simply that the process of considering the reasonableness of the decision to dismiss must be considered by reference to the objective standards of the hypothetical reasonable employer and not by reference to the tribunal's own subjective views of what we would have done in the circumstances.

Itemised pay statements

98. Section 8 of the Employment Rights Act 1996 provides that

"A worker has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement."

99. Section 11 goes on to provide that where an employer does not give a worker statement as required by section 8, the worker may require a reference to be made to an employment tribunal to determine what particulars ought to have been included. Further, by virtue of section 12 (4)

"Where the tribunal finds that any un-notified deductions have been made from the pay of the worker during the period of 13 weeks immediately preceding the date of the application for the reference (whether or not the deductions were made in breach of the contract of employment bracket the tribunal could order the employer to pay the worker a sum not exceeding the aggregate of the unnotified deductions so made".

Submissions

100. Both parties produced well drafted submissions in writing. As these were largely made on the facts, we do not reproduce them here.

Conclusions

Race discrimination

Did Anita Creech, between 22 May 2017 – 8 August 2017, treat the Claimant's disability declaration with suspicion and initiate an investigation as to whether he was disabled, sharing his disability status in doing so? If so, did the above act(s) constitute less favourable treatment on grounds of race / religion? The Claimant relies upon his Muslim religion and Bengali and Persian ethnicity and an actual comparator, namely David Bailey, who is said to have applied under the Guaranteed Interview Scheme in 2016 but does not share the Claimant's protected characteristics.

101. On the balance of probabilities, the tribunal has preferred the evidence of Ms Creech that she did not initiate an investigation into whether the Claimant was disabled, nor did she treat the Claimant's disability declaration with suspicion. It is accepted that she did tell Ms Wright that the Claimant had ticked the box asking for an interview under the GIS, but we accept that she only did so when asked for that information by Ms Wright. There is no evidence that in giving that information to Ms Wright, Ms Creech was influenced by the fact the Claimant's name was one that was might be indicative of his race and or religion. As the Claimant says he had never met Ms Creech and there is no evidence from which we could infer that she was influenced by the Claimant's name when she contacted Ms Wright. A much more probable explanation is that she contacted Ms Wright because the Claimant had put his own email address in the box for line manager validation.

Disability discrimination.

Was the Claimant treated unfavourably due to something arising in consequence of disability, namely the Claimant making an application under the Guaranteed Interview Scheme, when he was issued with a notification of a disciplinary investigation dated 22 August 2017.

102. The Respondent now accepts that the Claimant was, at the relevant time a disabled person by reference to depression. The issue is whether the Claimant was issued with a notice of investigation "because of something arising from disability". We accept the Claimant ticked the box because he was disabled and that ticking the box (or the ability to do so) was something that arose from disability. However, as Mr Mold submits, the reason that the investigation was initiated was because the Respondent had doubts about the Claimant's honesty. Those doubts arose both because he had ticked the box and for other reasons (which were not related to disability). We accept that, in that respect, the case is very similar to Kelso v Department for Work and Pensions EAT 0009/15.

103. It is true that the investigation would not have been initiated if the Claimant had not ticked the box, but the question is not whether "but for" the ticking of the box there would have been investigation. The issue for the tribunal is whether ticking the box was the reason (or part of the reason) for the treatment. In this case ticking the box was the background to the genuine but erroneous belief, that the Claimant was not being honest in his application form. Ms Wright had clearly jumped to the wrong conclusion (and may not have been justified in doing so), but her reasons related to a genuine belief that by ticking the box the Claimant was seeking to obtain an advantage to which he was not honestly entitled.

Victimisation

Did the Respondent victimise the Claimant when they sent him a letter initiating an investigation into his application form?

104. It is the Claimant's case that he had done a protected act by ticking the box on the application form. He says that the reason for the investigation was initiated was because he had ticked the box. This claim fails on 2 counts

105. First, as we have said, the reason for the investigation was not because he had ticked the box but because the Respondent believed him to have been dishonest - for seeking a guaranteed interview and for other reasons. Secondly, we do not accept that by ticking the box the Claimant had done a protected act as defined in section 27. It self-evidently does not fall within section 27 (2) a b or d. Section 27 (c) is a broader catchall provision which provides that *"doing any other thing for the purposes of or in connection with this act"* is a protected act. Nonetheless we do not accept that making an application under the GIS was something done "for the purposes of or in connection with" the Equality Act. It is not a complaint (either express or by implication) that the Respondent has failed to do something that it was

required to do under the Act. It is simply a broad statement that the Claimant wished to avail himself of the more favourable application process which the Respondent extends to disabled individuals.

106. It follows therefore that at the time that the investigation was initiated by Ms Wright, the Claimant had not done a protected act, and the initiation could not as a matter of logic amount to an act of victimisation contrary to section 27.

Did the Respondent victimise the Claimant when they prevented him from accessing the internal civil service job site from October 2017 to February 2018?

107. By October 2017 when Ms Wright decided not to allow the Claimant access to the civil service job site the Claimant had raised a grievance alleging discrimination. His grievance of 5 September 2017. On 7 December 2017 the Claimant had also filed his first claim for discrimination and victimisation. Both of these are protected acts.

108. The email trail between Ms Hall and others (see above) identifies that Ms Hall sought to get clear advice about the action she should take in relation to the Claimant wish to apply for jobs. Ms Hall took the advice from Mr Jackson as meaning that the Claimant could not apply for any jobs, and she did not focus on whether the Claimant was able to look for jobs within the wider civil service and outside the Home Office. This confusion is apparent in her email of 7 February 2018 (680) when she tells the Claimant that she has not acted to activate his access to the website "because I was advised last year that until your appeal outcome from the removal of your security clearance is known you hold no security clearance. Therefore, if you have no clearance you cannot apply for civil service vacancies using the internal database." While this statement is undoubtedly untrue, we find that it resulted from a misinterpretation of what Mr Jackson had said. In other words, we find that Ms Hall was genuine but wrong when she declined to activate the Claimant's account. By the time the Claimant responded to Ms Hall's email to tell her in terms that he was still able to look for jobs elsewhere within the civil service he had obtained access to the website when Mr McCabe had clicked the link

109. While we have some sympathy for the Claimant, in that Ms Hall ought to have known that he was able to apply for jobs elsewhere, we accept that at the time she was focused on the fact that the Claimant was still waiting for an appeal against the loss of his security clearance. We do not consider the fact that that Claimant had put in a grievance or a Claim to the tribunal influenced Ms Hall in her analysis that the Claimant was not entitled to apply for jobs. Rather once she had obtained the less than clear advice from Mr Jackson her mind was closed to the possibility that the Claimant might be entitled to look elsewhere. As we set out further below, we consider that she did not do enough to support the Claimant during his suspension, but we find that this had nothing to do with his complaints or claims and everything to do with a lack of clarity in the advice that she received and a lack of sympathy or real determination to assist.

Did the Respondent victimise the Claimant by (i) sending the ET1 for his first claim to Ms Sharland and (ii) when Ms Creech declined to respond to the Claimants discrimination questionnaire

110. It is the Claimant's case that these actions were acts of victimisation. The Respondent submits that the actions of the Respondent were done to protect itself in the litigation. Mr Mold has referred the Tribunal to *British Medical Association v Choudhury 2007 IRLR 800* in which the Court of Appeal reaffirmed the essential principle of law that a person does not discriminate "if he takes the impugned decision in order to protect himself in litigation".

111. Ms Cates sent the ET1 to Ms Sharland at the request of the vetting department. The vetting department requested the ET1 because they wanted to understand if it contained information concerning the Claimant's security clearance and which would require high levels of confidentiality. Ms Creech did not respond because she was advised not to by government lawyers. Both Ms Cates and Ms Creech took the actions they did to protect the position of the Respondent in litigation. They did not amount to victimisation.

112. As the Claimant submits, when Ms Creech refused to answer the Claimant's email, he had not yet lodged a claim alleging that she had discriminated against him. However, he had issued proceedings against the Respondent complaining about the investigation into his application form for the RALON job, which was the subject of his queries to Ms Creech.

Did the Respondent victimise the Claimant when Paula Welch sent an email to the DFT on 8 May 2018?

113. The content of that email is set out above. It is the Claimant's case that the author's motivation was to undermine his credibility with the DfT as a potential new employer. We do not accept that. Ms Welch's email was sent to the DFT because she had been advised to obtain the Claimant's 2017 application by their legal representative. The email says so in terms. Some of that information is wrong but Ms Welch was simply trying to give some background to the request. She sent her email on advice and to protect the Respondent in potential litigation.

114. In any event when Ms Welch sent the 8th May email she had no information before her that would suggest that the Claimant had any open or imminent applications to the DFT. The Claimant had successfully applied for a job with the DFT in 2017, but he had been unable to take that up because of the loss of his security clearance and we have had no evidence that he was making applications to the DFT at the time that this email was sent.

Did Mr Bell and Mr Ledbetter victimise the Claimant when they decided not to investigate the Claimant's complaint of 13 April 2019?

115. Mr. Bell decided, as set out above, that the Claimant's 13 April 2019 grievance (which was about the 8th May 20018 email) did not meet the grievance consideration test and his decision was validated by his manager Mr Ledbetter. The Tribunal has not heard from Mr Bell but, in his witness statement, Mr Bell says that he was confused about the grievance. He thought that it might relate to a grievance that had already been investigated and determined by Ms Thompson. Further the Claimant had not named anyone. When the Claimant clarified it was a new complaint Mr Bell took advice from HR. The tribunal does not have a copy of that advice but (even if that decision was incorrect), the evidence strongly suggests that the decision was made because it was an unusual grievance, made in the context of an enquiry about legal advice and that Mr Bell did not really know what to do with it. His rationale - that the 8th May email was sent as part of litigation investigations by the Government Legal Department - was undoubtedly true. Although the earlier claims were background to that decision, we do not find that the decision that it did not pass the Consideration Threshold was an act of victimisation in that it was influenced by the fact that the Claimant had made claims to the Tribunal

Did Ms Balmforth victimise the Claimant when she ignored the Claimant's complaint of 1 July 2019?

116. As we have said above, while the delay in dealing with the Claimant's grievance was unsatisfactory it is apparent that Ms Balmforth did try and chase the advice and, while we might criticise her and/or HR for not making a decision sooner, we do not consider that the issue related to the fact that the Claimant had done protected acts - but rather from an abundance of caution as to the best way to proceed. As Ms Balmforth said in evidence, ultimately her decision was to reopen the grievance and she made a decision which was favourable to the Claimant.

Did Mr Ledbetter victimise the Claimant when he failed to provide a substantive reply to the Claimant email of 7 August 2019?

117. The Claimant sent this email on 7 August 2019. Mr Ledbetter sought legal advice and on his return from holiday decided that, as the Claimant had left employment he would not respond. We accept that.

Did the Respondent victimise the Claimant by failing to provide assistance with obtaining an alternative post?

118. As we set out below, we do consider that the Respondent failed to assist Claimant in his search for an alternative post. This failure extended across the various line managers that the Claimant had while he was on suspension and across HR.

119. We have already found that Ms Hall's failure to validate the Claimant 's access to the civil service jobs website was not an act of victimisation. In relation to the subsequent managers while we accept that there was a failure to assist, we do not consider that this failure by the different individuals involved was influenced by the Claimant's various claims and

grievances. Rather we consider that the individual line managers were all dealing with a situation that they were unfamiliar with and on which HR did not provide proper guidance. The Respondent had no policy in place and the line management were perhaps unduly reliant on being guided by Policy.

120. Further, the various changes of line management during the Claimant suspension and absence from work meant that no one individual was focused on supporting the Claimant.

Failure to provide payslips

121. Section 11 of the Employment Rights Act 1996 provides that where an employer does not give a worker a statement as required by section 8 of that Act, the worker may require reference to be made to the employment tribunal to determine what particulars ought to have been included. We have accepted that the Respondent was late with providing the payslips and that therefore there is a breach of section 8. It was not, however, contended that the particulars included in the delayed payslips were incorrect and we make no finding that they were.

122. Section 12(4) of the ERA provides that, on a reference under section 11, if the employer has not provided the worker a pay statement as required by section 8 the Tribunal may order the employer to pay the worker a sum not exceeding the aggregate of any unnotified deductions made in the Claimant's pay for the period of 13 weeks immediately preceding the date of the application for the reference. However, as the Claimant accepts, there were no deductions made in the 13-week period prior to 5 January 2020, the date that the claim was presented.

Unfair dismissal

123. We accept that the Claimant was dismissed for some other substantial reason, namely that he could no longer work in the Home Office, and that this is a potentially fair reason for dismissal. The issue therefore is whether the decision was reasonable within the terms of section 98 (4).

124. The Home Office have published policies on most aspects of management, and it was evident that the senior management involved in the Claimant's case were used to having clear policy guidelines. All those who dealt with the Claimant seemed somewhat at a loss as to how to deal with him as this was a situation that is rare within the Home Office and which most managers had never had to deal with before. The position was made more difficult because those managers were not aware of the reasons why the Claimant had lost his security clearance.

125. The Respondent's policies provide that where an individual loses their security clearance, they may remain suspended on full pay until the internal appeal has been dealt with. After that, as set out in the Security Clearance Appeals policy, consideration will be given to redeployment or dismissal as

appropriate. The Claimant submits that paragraph 4.5 of that policy (set out above) requires the Respondent to consider his redeployment to another civil service department. We do not agree that that is the correct interpretation of the policy.

126. The policy is a Home Office (rather than a wider civil service) policy. If an individual loses either his DV clearance or his SC clearance, the Respondent would be required to consider redeployment to a job requiring only CTC. However, the Claimant had lost all clearances – and could not work in the Home Office. In such circumstances the policy does indeed require that consideration be given to dismissal.

127. The Claimant seeks to rely on an unnamed comparator who he says was transferred into another role when they lost their security clearance. However, without a name or any other specifics about the circumstances of this claim no conclusions can be drawn.

128. Equally we do not accept that paragraph 10.2 of the Civil Service Management code places an obligation on the Respondent to transfer the Claimant to another job within the civil service, as he contends. Paragraph 10.2 gives the Respondent authority to organise a transfer; but it does not impose an obligation on it to do so. Nor do we accept the Claimant's submission that the Respondent had any obligation, contractual or otherwise, to treat him if he were at risk of redundancy and to place him in any civil service job, without interview, where he met the minimum requirements for the job. (The Respondent's policy for at risk candidates provides that they may only be declined for a job when they are deemed unsuitable for the post either at the time with 6 months training and development and/or they've been refused security clearance to the appropriate level (2140)).

129. As we have already said we do not accept the Claimant's submission that he did not understand that the meeting with Mr Ledbetter might result in his dismissal. The heading of the letter is clear and in circumstances where the Claimant was aware that he could not work in the Home Office he must have understood what that meant. If he genuinely thought that it was to discuss transferring to another civil service department that was not a reasonable interpretation of the notice of hearing.

130. We are, however, critical of the approach that the organisation as a whole took to the Claimant once he was suspended, and we do consider that there was a general failure to support him. None of his line managers made any effort to keep in touch with him during his suspension. While we accept that Ms Hall genuinely believed that the Claimant was not entitled to apply for jobs elsewhere within the civil service, this was an erroneous belief. When Mr Wackenier took over the Claimant's line management the advice he received in September 2018 (804) was that the Claimant retained the BPSS and could search the jobs database vacancies within other government departments, but by then of course the Claimant had been deprived of his access to the civil service jobs website for many months. (There were some

internal emails about the possibility of the Claimant being referred to the Career Transition Service in September 2018, but it was not until July 2019 that the Claimant was informed that, having checked, the Respondent was of the view that the CTS did not apply to the Claimant as he was not at risk of redundancy.)

131. We would not wish to apportion individual fault but, one way or another, the Claimant was failed by the organisation as whole when line managers and/or HR failed to keep in touch with him to discuss his predicament and when his access to the civil service jobs website was denied. Some assistance was initially provided immediately after the meeting with Mr Ledbetter in October - for example Mr Ledbetter suggested in October 18 that Claimant might seek help from ABLE (859) and he was given a point of contact, but nothing seems to have come of that.

132. The email from Ms Welsh (1785) sent to Mr Ledbetter on 9 August 2019 evidences that "*the Central HR workforce planning team have a redeployment list which details available roles and surplus staff looking for roles across the civil service".* Ms Welsh also records in that email that she regularly received summaries of live adverts on CS jobs. If she received such live adverts on CS jobs, then other HR managers must also have received such summaries. The Claimant had repeatedly made it plain that he was seeking jobs elsewhere within the Civil Service but no one within the organisation appears to have offered to assist him in that process – quite the reverse. Although Ms Welsh's email was only sent to Mr Ledbetter some 2 weeks before the Claimant was due to leave the Home Office, those adverts, and lists, existed prior to that and were not ever made available to the Claimant.

133. The Respondent's failure to keep in touch with the Claimant during his suspension is clearly evidenced by the fact that when Ms Hall left to take up another post in April 2018, the Claimant was not informed and did not know who his new line manager was. It was not until August 2018, when his access to the civil service website had lapsed again and the Claimant made enquiries of Ms Thompson of HR, that he became aware that Mr Wackenier had taken over line management responsibility for the Claimant.

134. Mr Ledbetter acknowledged but did not remedy the failure to allow the Claimant access to the civil service jobs website. By the dismissal meeting his access had been restored but the disadvantage caused by his lack of access to the civil service jobs website prior to that period was not remedied by ensuring that his access continued during his notice period, since the Claimant was already entitled to 6 months notice. Ms Earner went some way towards remedying this at the appeal by extending his date of termination by some 3 ½ months (from 13th May to 26 August 2019). This was a shorter period than the period of his exclusion and we consider that a reasonable employer, given the size and administrative resources of the Respondent, would have compensated him for the full period, particularly in the light of the other failings we have identified. Moreover, despite a representation in the dismissal letter that the Respondent would provide him

with “whatever support we can in your job search” they did not in fact do so - in that there was no active engagement with the Claimant by HR or others in sharing the redeployment list or the vacancy list that Ms Welsh has referred to.

135. Both Mr Ledbetter and Ms Earner were faced with failures that had largely occurred in the past, and no doubt they would not have wanted to start from the position that they were in, given that the Claimant was unable to work in the Home Office. To that extent dismissal was inevitable unless he could find another job elsewhere. Nonetheless we consider that the dismissal was unreasonable in that those earlier failures were not sufficiently remedied before dismissal took effect.

136. In determining the appropriate remedy for the unfair dismissal obvious issues of Polkey arise. In assessing compensation a Tribunal has to assess the loss flowing from the dismissal. In a normal case that requires it to assess for how long an employee would have been employed but for the dismissal.

137. In assessing what loss flows from the unfairness of the dismissal, we have to consider what would have happened if the Claimant had been fairly treated. He may, or may not, have been successful in obtaining another job within the wider civil service. What were the chances that the Claimant would have found another job within the wider civil service had there not been the failures which we have identified above? In order to determine that question evidence will be required as to the jobs that the Claimant did apply for when he did have access to the civil service website, and of the vacancies that were available in the 2 and a half months after 26th August 2019.

138. We hope that the parties will engage constructively to agree terms of settlement in respect of our finding of unfair dismissal. However, in the event that this is not possible, a remedy hearing has been listed to take place on 21st April 2022 in the event that the parties are unable to reach terms of settlement in advance.

139. The following directions apply in relation to the remedy hearing.

    a. The parties are to exchange a list and copies of all documents relevant to remedy, to the extent not already disclosed, on or before 3rd March 2022. In the Claimant’s case this will include of any documents which he has which evidence his applications for jobs within the wider civil service following his suspension and his applications for jobs in the wider workforce. In the case of the Respondent this will include evidence of suitable jobs requiring only bassline clearance in the period of 2.5 months from 26th August 2019.

b. The Respondent shall prepare a bundle of documents to be provided for the remedy hearing and shall provide an electronic and hardcopy to the Claimant not later than 24th March 2022.

c. Witness statements should be exchanged on or before 7th April 2022.

_____

Employment Judge Spencer
6th January 2022

JUDGMENT SENT TO THE PARTIES ON

10/01/2022.

FOR THE TRIBUNAL OFFICE

THE SCHEDULE

Substantive Issues

Direct race/religious discrimination (s.13)

1. Did Anita Creech, between 22 May 2017 – 8 August 2017, treat the Claimant's disability declaration with suspicion and initiate an investigation as to whether he was disabled, sharing his disability status in doing so?

2. If so, did the above act(s) constitute less favourable treatment on grounds of race / religion? The Claimant relies upon his Muslim religion and Bengali and Persian ethnicity and an actual comparator, namely David Bailey, who is said to have applied under the Guaranteed Interview Scheme in 2016 but does not share the Claimant's protected characteristics.

Disability

3. It is agreed that the Claimant was a disabled person by reason of anxiety and depression.

Discrimination arising from disability (s.15)

4. The Claimant alleges that he was treated unfavourably by being issued with a notification of disciplinary investigation letter dated 22 August 2017, in which it was alleged that he had falsely stated on an application form that he qualified under the Guaranteed Interview Scheme when he had no declared disability ("the allegation").

5. Was that treatment due to something arising in consequence of disability, namely the Claimant making an application under the Guaranteed Interview Scheme.

6. Can the Respondent show that the Claimant's treatment was a proportionate means of achieving a legitimate aim under section 15(1)(b)? The Respondent relies on the legitimate aims set out at paragraph 16 of its Grounds of Resistance, namely (a) ensuring that all staff comply and abide by professional standards of behaviour and maintain appropriate standards of integrity and/or (b) preserving the integrity of the Defendant's Guaranteed Interview Scheme.

7. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was disabled by reason of anxiety or depression at the material time?

Victimisation (s.27)

<u>Claims 1,2 & 5</u>

8. The Claimant relies on protected acts for the purposes of section 27(2) EA 2010:

   (a) Making an application for a post under the Guaranteed Interview Scheme in around May 2017 (under reference HOM/1139/17). The Respondent does not accept that making such an application would amount to a protected act for the purposes of section 27(2)(a)-(d);

(b) Raising a grievance about discrimination on 5 September 2017. The Respondent accepts this grievance was capable of being a protected act under section 27(2)(d); and

(c) Filing his claims for discrimination, harassment and victimisation at the Employment Tribunal on 7 December 2017 ('the first claim'). The Respondent also accepts this was a protected act.

9. Did the Respondent victimise the Claimant by subjecting him to a detriment because he did protected acts (a) and (b)? The Claimant relies on two acts of detriment, namely:

(a) The Respondent raising the allegation in its letter dated 22 August 2017;

(b) Preventing the Claimant from accessing internal jobsites from October 2017 until February 2018.

10. Did the Respondent victimise the Claimant by subjecting him to a detriment because he did protected act (c) (filing the first claim)? The Claimant relies on two detriments:

(a) that on or before 22 February 2018 the Claimant's ET1 for his first claim was sent to an employee of the Home Office who was going to decide the appeal the Claimant had lodged against the decision to withdraw his security clearance;

(b) that on 15 January 2019 Anita Creech declined to respond to the Claimant's discrimination questionnaire, sent on 19 December 2018.

<u>Claims 7, 8 and 11</u>

11. The Claimant relies on the following protected acts for the purposes of section 27(2) EA 2010:

(a) Raising a grievance alleging discrimination on 5 September 2017.

(b) Contacting ACAS on 19 November 2017 regarding complaints of discrimination arising from disability.

(c) Filing his claims for discrimination, harassment and victimisation at the Tribunal on 7 December 2017 ('Claim 1').

(d) Raising an internal complaint on 5 February 2018 alleging unlawful victimisation and complaining about being denied access to internal job vacancies.

(e) Lodging an Amendment to the Tribunal for Claim 1 against the Respondent on 1 March 2018.

(f) Contacting ACAS in May 2018 regarding complaints of unlawful victimisation in relation to the sharing of his ET1 with the offices of Jacqueline Sharland.

(g) Filing his claims for unlawful victimisation on 27 June 2018 ('Claim 2').

(h) Raising in an email dated 16 January 2019 a complaint about alleged discrimination on grounds of race and religion and unlawful victimisation;

(i) Contacting ACAS on 6 February 2019 regarding his claims for race and religious discrimination and unlawful victimisation.

(j) Filing his claims for race and religious discrimination and unlawful victimisation on 14 March 2019 (Claim 5).

(k) Complaining on 13 April 2019 about the contents of an email from the Home Office to the Department of Transport (DFT) on 8 May 2018; including

alleging that her conduct constituted discrimination arising from disability and unlawful victimisation;

(l) Filing his claims for unlawful victimisation on 31 May 2019 (Claim 7); and

(m) Complaining to Georgina Balforth on 1 July 2019 regarding the decision by Gareth Ledbetter and Richard Bell not to investigate his 13 April 2019 complaint as a formal grievance and alleging that decision constituted an act of unlawful victimisation.

The Respondent accepts that alleged acts (a), (c)-(d) and (g), (h) and (j)-(m) constituted protected acts. However, the Respondent makes no admission in relation to whether alleged acts (b), (e), (f) and (i) are protected acts and the Claimant will be put to proof in relation to whether they constituted protected acts.

12. Under Claim 7, did the Respondent victimise the Claimant by subjecting him to a detriment because he did protected acts (a)-(e)? The Claimant contends Paula Welch subjected him to a detriment(s) in an email sent to DFT (whom the Claimant contends was a potential employer) on 8th May 2018 by;

a) Informing DFT that the Claimant had made multiple complaints in the Employment Tribunal.

b) Falsely informing DFT that the Claimant complained to the Employment Tribunal that he was required to move to Manchester and could not work in London.

c) Falsely inferring to DFT that the Claimant had lied about requiring a move to Manchester by having applied for posts in London including a post at DFT;

d) Unlawfully disclosing sensitive personal data- particularly, that the Claimant was disabled by virtue of disclosing that the Claimant had

applied for posts under the Respondent's Guaranteed Interview Scheme for disabled staff; and

e) Attempting to unlawfully obtain the Claimant's personal data contained within his application form (for employment at the DFT) by falsely claiming; (i) that the Claimant had complained that he could not work in London to an (Employment) Tribunal ("Claim 1"); and (ii) that the application form was needed from the DFT for the Home Office to defend the Claimant's alleged claim.

The Respondent denies the alleged acts at (a)-(e) above constitute detriments and/or if they are, that the Claimant was subjected to any such detriment(s) on grounds of doing/carrying out the protected act (s).

13. Under claim 8, did the Respondent victimise the Claimant by subjecting him to a detriment because he did protected acts 6(c), (g), (k), (l) and (m)? The Claimant relies on two detriments:

a) The decision by Richard Bell and Gareth Ledbetter on 16 May 2019 not to investigate, as a formal grievance, the Claimant's complaint dated 13 April 2019; and

b) That Georgina Balmforth ignored the Claimant's complaint/grievance of 1 July 2019 regarding the decision by Richard Bell and Gareth Ledbetter not to investigate the Claimant's complaint dated 13 April 2019 as a formal grievance.

The Respondent denies that the Claimant was subject to detriments as is alleged-including, it will say that Georgina Balmforth did commission an investigation into the Claimant's grievance/complaint. Further, the Respondent will contend if the Claimant was subject to any detriment as alleged, that this was not on grounds of him doing/carrying out the protected act(s).

14. Under claim 11, did the Respondent victimise the Claimant by subjecting him to a detriment because he did protected acts (a)-(d) and (f)-(k)? The Claimant appears to rely on the following detriments:

    a) That Gareth Ledbetter did not, following his email of 12 August 2019, provide a substantive reply to the Claimant's email dated 7 August 2019; and

    b) That the Respondent failed to assist the Claimant during his period of suspension and up until his dismissal, with finding alternative employment within the Civil Service.

    The Respondent will deny that the Claimant was subject to the detriment(s) alleged and/or that if was, it was not on grounds of him doing/carrying out the protected act(s).

Unfair Dismissal (Claim 9)

15. Was the Claimant dismissed? The Respondent accepts that the Claimant was dismissed with effect from 26 August 2020.

16. Was the Claimant dismissed for a potentially fair reason under section 98(1)(b)? The Respondent contends the Claimant was dismissed for 'some other substantial reason'; particularly, that the Claimant lost the relevant security clearance necessary to remain employed at the Respondent and did not then subsequently obtain alternative employment within the wider Civil Service.

17. Was the Claimant's dismissal fair and reasonable in all of the circumstances- including, taking into account the size and administrative resources of the Respondent? The Claimant is contending that his dismissal was substantively/procedurally unfair on the basis of the following allegations (which are not accepted by the Respondent):

    (i) The Respondent refused to acknowledge that the Clamant was a Home Office employee for a period of 7 months in order to deny him the ability to apply for other positions in the Civil Service for which he was entitled

to apply for that did not require Security Clearance. This action did indeed deny him the opportunity to apply for internal jobs for 7 months.

(ii) The Respondent failed to fulfil its obligation under the Civil Service Management Code to take into account the Claimant's needs and assist him transfer in to another Government Department;

(iii) The Respondent's Vetting Team failed to provide advice to the Claimant's business area on assisting the Claimant's redeployment, given as an undertaking to the then Permanent Secretary Philip Rutnam on 18 April 2018 by Jacqueline Sharland, despite the Claimant writing to the Respondent several times about this in January 2019; and

(iv) The Respondent's failure to place/slot the Claimant into another role was inconsistent with the treatment of an 'unnamed' comparator whom the Claimant contends was 'offered' to another Civil Service Department, the Department for of the Environment, Fishers and Rural Affairs (DEEFRA) after losing his/her security clearance. ***[The Claimant has twice been requested by the Respondent to provide details of his comparator, but as of yet has failed to do so. He is required to particularise the comparator so that the Respondent can respond to this allegation, as it is a key part of his unfair/victimisation claims in relation to his dismissal].***

(v) The Claimant wishes it to be noted that the Respondent agreed to recommence the Claimant's 6 month notice period with effect from 26 March 2019 but dismissed the Claimant a month earlier on 26 August 2019.

The Respondent's case is that there was no legal/contractual obligation to place the Claimant into another role and it complied with the relevant contractual/legal duties on it by affording the Claimant access to external and internal job advertisements on the Civil Service Jobs website, which the Claimant could then apply for.

The Claimant's case is that the Respondent did not afford the Claimant access to external and internal job advertisements on the Civil Service jobsite. The Claimant further will contend that only step that the Respondent took was to confirm that the Claimant was a

Home Office employee and this step wasn't taken until September or October 2018; at least 15 months after the Claimant had his security clearance withdraw. The Claimant considers that the Respondent, if they had a right to dismiss, dismissed the Claimant too soon in light of the above.

18. Was the Claimant dismissed after a fair and proper procedure was followed? The Respondent contends that a fair and proper procedure was followed, including that the Claimant was afforded a right of appeal. The Claimant contends that a proper procedure was not followed in that there was a failure by the Respondent to follow its own procedure and a hearing was not held to consider the dismissal of the Claimant prior to the initial dismissal decision, the meeting held prior to that was not held for that purpose and did not warn the Claimant that the meeting could decide his dismissal, and the Claimant was not granted an appeal right to the decision made on 26th March 2019, made after a meeting had been held.

19. If the Claimant's dismissal was procedurally unfair, would the Claimant have been dismissed in any event and is a *Polkey* deduction appropriate?

20. If the Claimant's dismissal was unfair, in relation to the issue of compensation, did the Claimant comply with the duty to mitigate his financial losses by making reasonable efforts to find alternative employment?

Itemised Pay Slip (Claim 10)

21. Did the Respondent comply with the legal obligation under S8 ERA 1996 to provide the Claimant, at or before payment of the relevant wages was made to the Claimant, with an itemised pay slip in relation to his August/September 2019 pay?

22. If so, did the Claimant suffer unnotified deductions from his pay during the period of 13 weeks prior to filing the relevant claim(s) at the Employment Tribunal and if so, is it appropriate for the Claimant to receive a sum not exceeding the aggregate of the unnotified deductions made under S12(4) ERA 1996? The Respondent will contend, even if it breached the obligation under S8, no unnotified deductions were suffered within the relevant 13-week period and/or any award of compensation would not be appropriate

or just on the basis that the deductions were lawful, proper and would have been known by the Claimant in advance.

23. The Claimant contends that there are unnotified deductions, and those deductions are not correctly set out by the Respondent for September 2019 in his ET3 dated ‘’7 February 2019’’ but most likely of the 7 February 2020. The total deductions detailed in the payslips stated for August 2019 being £783.78 and for September 2019 being, £3832.56.