EMPLOYMENT TRIBUNALS

Claimant: Mr H Umradia

Respondent: Department of Transport

Heard at: Watford Employment Tribunal (in person)

On: **16 to 19 May 2022**

Before: Employment Judge Quill; Mr M Bhatti MBE; Mr T Maclean

Appearances
For the Claimant: Mr P Tomison, counsel
For the respondent: Mr S Crawford, counsel

Judgment and reasons were given orally on 19 May 2022 and the judgment was sent to parties on 4 June 2022. The Respondent has requested written reasons, and these are those reasons.

REASONS

Introduction

1. This is a case which was heard over 4 days. It was held fully in person. The evidence was in an agreed bundle of 698 pages and supplementary pages 177A to 177R.

2. We had written witness statements from 5 witnesses:

   2.1 3 for claimant, being himself, Ms Lal, Mr Moloney.

   2.2 2 for the Respondent, being Mr Williams and Ms Snell.

3. Ms Snell did not attend. We gave her written statement such weight as we saw fit in the circumstances.

4. All of the others attended the hearing, swore to their written statements, and answered questions.

The Claims and Issues

5. There was a list of issues produced and agreed at a hearing before EJ Palmer on 19 June 2020. On the first day of the hearing both parties confirmed that this list was still accurate. We will refer to it, and quote it, in our analysis.

The findings of fact

6. The claimant is a driving examiner who worked for the respondent from around January 2008 until he was dismissed in November 2018.

7. He was suspended in April 2018. An investigation into the alleged misconduct commenced and he remained suspended until his dismissal.

8. The person who carried out the investigation was Paul Day. Mr Day produced his investigation report and appendices dated 18 July 2018. At the same time that Mr Day was investigating the claimant, he was also investigating the claimant's colleague, Neelam Lal ("Ms Lal"). Ms Lal was also a driving examiner and she had also been suspended around April 2018. There is no dispute between the parties that cases of the claimant and Ms Lal are connected. We do not have the investigation report for Ms Lal in the bundle.

9. The person who was appointed to be the decision manager was in due course, Roland Williams, Operations Manager. He was appointed to carry out that task in around August 2018. Originally had been intended that a different person, Mr Chas Perkins, would be the decision maker for both the Claimant's and Ms Lal's cases. However, this was changed at the request of Ms Lal.

10. Having considered the investigation reports in relation to both Ms Lal and the claimant, Mr Williams contacted the investigator and asked for some further enquiries to be made.

11. We do not have the covering email sent by Mr Williams to Mr Day, but at page 691 of the bundle, there is a list of the further questions/issues which he wanted Mr Day to investigate.

12. Mr Williams also wrote to the claimant on 22 August 2018 (page 301 of the bundle) to say that he was appointed as the decision manager and that he had received a report from Mr Day and that he had asked for clarification of some things from Mr Day. He did not send the report to the claimant at that time, and he did not send the list of the further investigation questions to the claimant either.

13. A supplementary investigation report dated 9 October 2018, which dealt with both Ms Lal's case and the claimant's case was produced by Mr Day. While separate reports had been produced for Ms Lal's and the Claimant's cases originally (and we accept that fact, though we have only seen the one relating to the Claimant), this supplementary report was a single document dealing with both cases.

14. By letter dated 16 October 2018, Mr Williams sent to the claimant both the original investigation report and the supplementary investigation report. The same letter informed the claimant that he was required to attend a formal meeting under the discipline procedure and stated - in the second paragraph of the letter:

> The formal meeting will consider the allegation/s that you did not following Agencies policies when dealing with sensitive data, including unauthorised and unsecure copying of Data involving the Agency and it's staff at some time between December 2017 and march 2018.

15. In the fourth paragraph of the letter the claimant was informed that a possible outcome was dismissal. On the second page, it was stated that the allegations potentially amounted to gross misconduct offences.

16. The meeting took place in due course on 5 November 2018.

17. The suspension letter dated 30 April is page 228 of the bundle.

18. As per page 230 of the bundle, the claimant was sent a letter dated 2 May 2018, which informed him that Paul Day had been appointed as an investigator and which informed the claimant that any information that emerged from the investigation might be used in any misconduct proceedings against him.

19. This letter was from Mr Perkins. The first paragraph of the letter was:

> I am writing to advise you that Paul Day has been appointed to investigate a case of allegedly not following Agencies policies when dealing with sensitive data, including unauthorised and unsecure copying of Data involving the Agency and it's staff. This is being treated as a possible case of Gross misconduct.

20. It is our finding that the allegations as notified in the 2 May 2018 letter match those in the 16 October, invitation to disciplinary meeting letter. The suspension letter of 30 April did not specify the allegations.

21. There are some disputes between the parties about the events which led to the claimant's suspension. However, it is common ground that on 21 February 2018, Ms Lal contacted the respondent's Human Resources department and spoke to them about a potential breach of confidentiality by the person who was line manager of both Ms Lal and the claimant, Jan. It was suggested that the line manager had left a notebook open on her desk and that staff had noticed it contained confidential information about employees' sickness absence and other things.

22. The HR officer advised Ms Lal that potentially the individuals who had read the information could be in breach of relevant policies (as well as Jan), but that if Ms Lal wished to pursue it further. She should speak to Jan's line manager. This was Chas Perkins, Operations Delivery Manager.

23. Ms Lal contacted him by phone and arranged a meeting for 27 February.

24. On that day, 27 February, both the claimant and Ms Lal sought to go to the appointment. Mr Perkins declined to have the claimant in attendance. In relation to the suggestion that the Claimant should be present as a companion, Mr Perkins' response was that Ms Lal did not have the right to a companion at this type of meeting. In relation to the suggestion that the Claimant was potentially someone with relevant information about the alleged wrongdoing, Mr Perkins said that, in

that case, it would not be appropriate for the Claimant to be included in the same fact-finding meeting as Ms Lal.

25. Therefore, the claimant did not take part in the meeting. During the meeting with Mr Perkins, Ms Lal told him that some photographs existed which supported the allegations of the line manager breaching confidentiality.

26. We are satisfied that her genuine recollection is that she specifically discussed with Mr Perkins that both she and the claimant had photos available. We accept that her genuine recollection is that Mr Perkins told her that both she and the claimant should print copies of these photos and provide to him. Ms Lal does not suggest that any particular method of doing such printing was specifically discussed.

27. Both the claimant and Ms Lal state that, after the meeting with Mr Perkins, Ms Lal told the claimant that Mr Perkins wanted hard copies printed. The claimant has not alleged at any time that Mr Perkins directly communicated to him that the photos should be printed.

28. Mr Perkins was not a witness. His contemporaneous emails do not expressly confirm everything that Ms Lal says. In his emails on the topic, he notes that he had asked for photos to be sent to him, but he does not expressly say that they should be sent to him by hard copy rather than electronically.

29. At page 499 of the bundle in the second to last paragraph of his email of 27 February 2018, Mr Perkins confirms that he had been told by Ms Lal that other members of staff had photos. However, he does not expressly say in email that he had asked her to tell any other members of staff to provide (whether by hard copy or otherwise) copies of the photos which they had.

30. Mr Perkins' email is fully consistent with Ms Lal's account that she showed the photo to Mr Perkins actually on her phone and not on any separate device or as a hard copy.

31. It is common ground that, in early March, Ms Lal did send three photographs to Mr Perkins. This led him to produce the information security incident report form which appears at 506 of the bundle. The three photographs which Ms Lal provided to him are – we infer - those at pages 510, 511 and 512 of the bundle. Therefore, although we did not have the investigation report for Ms Lal, we are able to make a finding that Mr Williams had these three photos in his possession, prior to the time he sent the request for further information to Mr Day. He sent that request to Mr Day on or before 22 August 2018 (because that is the date on which he told the Claimant he had requested further enquiries).

32. Two of Ms Lal's photographs are just of a page of handwriting in a book. (More specifically, one seems to be of the whole page, and the other is a close up of part of the same page). It is common ground that this book contained the handwritten notes of the line manager, Jan, and the photographs are of the same page of the book. It is also common ground that the close up contains information specifically about Ms Lal, whereas the whole page also includes information about the Claimant and another of their colleagues, Richard.

33. The third photograph taken by Ms Lal is from a further distance away. As well as showing the open book, it also shows other items on Jan's desk, including some satnav boxes.

34. Mr Perkins arranged for the allegations against Jan to be investigated and the investigator was Sharon Collyer. As part of her investigations, Ms Collyer interviewed both Ms Lal and the claimant. Ms Collyer raised concerns about the photographing that each of the claimant and Mr Lal had done. It was the fact that Ms Collyer raised these concerns which led to the suspensions and subsequent investigations of each of the Claimant and Ms Lal respectively.

35. In her investigation meeting with Jan, on 9 April 2018, Ms Collyer made notes of what Jan said about the notebook. Jan denied leaving the book open on her desk. She said that sometimes she left it on her desk closed, but at the end of each day she would either lock it away or else take it home in order to work at home. She said she kept it securely with her laptop while at home. It was also confirmed that bank details of a new member of staff were written in the book. Ms Collyer was able to inspect the book during the meeting.

36. There was a discussion with the investigator, Ms Collyer, that the photos taken by Ms Lal appeared to make it undeniable that the book had been left open on the desk on at least one occasion. When asked questions about the photographs, Jan suggested that the satnav boxes implied that the photo must have been taken around November and no later than early December 2017, because after that date - according to Jan - the satnav boxes were always locked in the safer and were never on anyone's desks.

37. In the interview with Ms Collyer, Jan suggested that there was one occasion when she had come back and found the book open on her desk and she thought this was unusual because she claimed that she always closed it before leaving her desk.

38. In the first investigation report produced by Mr Day (the one dated 18 July 2018), he included notes of interviews with: Sharon Collyer; the claimant; Ms Lal; Mr Perkins; Richard Miller. Mr Day's report did not include copies of the meeting notes between Jan and Ms Collyer.

39. It is common ground that the claimant did take photographs of the same pages as Ms Lal and that his photographs are the one which appear at pages 298 and 299 of the tribunal hearing bundle. These were pages 37 and 38 respectively of the first investigation report. He had made one print of the whole page, and one print of the part of the page that related just to him.

40. It is also common ground that on the whole page (so the page which each of the Claimant and Ms Lal had photographed), there was information about three people the claimant and Ms Lal and their colleague, Richard Miller.

41. It is common ground that the claimant was not accused of staging the scene, or of opening the book despite its having been left closed, or of looking through drawers to obtain the book.

42. It is common ground that the page in the photos is genuinely in the book. Both Ms Collyer and Mr Williams saw the original book itself and compared it to the photographs and were satisfied of the match.

43. Each of Ms Lal and the claimant have said that three of them were present together (the Claimant, Ms Lal and Mr Miller). They each claim that as well as giving permission to each other to take photographs, Mr Miller gave each of them permission take the photographs. Mr Miller has confirmed that fact to the Respondent, and the respondent does not allege otherwise.

44. In the list of supplementary questions sent by Mr Williams to Mr Day after the initial reports, Mr Williams asked Mr Day that each of Mr Miller and the claimant should confirm what they had said in the interview notes about finding the book. This was because, in Mr Williams' opinion, there was a contradiction: namely that each of them claimed to have been the first person to have seen the book and to have drawn other people's attention to it.

45. Additionally, Mr Williams asked Mr Day to obtain the book with a view to seeing what other entries were made to see if that could help establish the dates when the photos were taken.

46. He asked Mr Day to look into the relationships in around the office. He also wrote:

> Does Jan believe a case is being built up by Neelam? Can Jan give some examples.

47. Once the supplementary report was created it included interviews with the 8 people listed on page 318 as well as "supporting emails" from Jan and Mr Perkins and photographs of the office layout.

48. At the examination centre in question, there were two shifts: an early shift and a late shift. The claimant and Ms Lal were on the early shift.

49. In the supplementary report, the interview notes with colleagues referred to some disagreements in the office, including at team meetings. There was some suggestion by colleagues that there was a group - potentially including Mr Miller, the claimant and Ms Lal - which was seeking to undermine the manager.

50. On pages 12, 13 and 14 of the supplementary report, Mr Day suggested that there was evidence which indicated lack of trust and lack of a good working relationship and that Ms Lal was planning to take out a case against the respondent. It was suggested by Jan that Ms Lal would bring a claim against the respondent because she done so in the past.

51. Mr Day also said that there was evidence of unacceptable behaviour by the claimant, Ms Lal and Mr Miller towards Jan, since she took up the post of manager. He quoted from some bullying policies. He summed up by saying that "Considering the above policy guidance, there is therefore a case of bullying to answer".

52. The claimant was accompanied to the hearing on 5 November 2018 by union representative Mr Moloney. At the outset of the meeting, Mr Williams explained

the purpose of the meeting and gave an account (which matched the invitation letter) of the charges that were to be considered.

53. The meeting commenced by discussing the book's having been on the desk and the photographs that were taken of it. The claimant said he had done so for evidence. He said there had been a breach committed (by Jan) and he was obtaining evidence. When asked where he had printed the photos, he said he printed them at home. He reported that he had planned to go with Ms Lal to meet Mr Perkins but Mr Perkins had not allowed him to attend the meeting and after the meeting he been told by Ms Lal that Mr Perkins had said to print the photographs.

54. We observe that Mr Perkins had been asked whether he told the claimant to print photographs and that he said 'no' that he had not done so. Neither before or after 5 November was Mr Perkins asked outright (by Mr Day or Mr Williams) whether he had told Ms Lal to ask the claimant to send photos to him.

55. The claimant was asked about the fact that he and Mr Miller each said they discovered the book first. The claimant said that he was sure that he had in fact discovered the book first.

56. He was asked about his relationship with Jan and said it was a good professional relationship.

57. He was then asked about a comment which appeared in the supplementary report in which a colleague (Mr Hadley) was reported as saying that the Claimant's behaviour towards Jan appeared like a witchhunt. The claimant queried what that had to do with the data breach investigation. He said that he was not proposing to answer questions about that supplementary report. [Mr Hadley's evidence appears only in the supplementary report.]

58. The panel accepts that the claimant genuinely believed that the supplementary report was suggesting that he had a case to answer for bullying. We accept that - based on the advice he received - he was not planning to answer questions about alleged bullying on 5 November, because he did not believe such an allegation had been properly raised with him in accordance with the respondent's appropriate procedures.

59. Mr Williams said that he noted what the claimant said about not answering such questions about the supplementary report, but he was going to ask anyway. Mr Williams said that it appeared that the claimant had taken photos for some reason other than having evidence. He suggested that it appeared that the claimant was seeking to make life intolerable for his colleagues, and in particular for his manager. He asked why that was the case. The claimant's replied that he did not believe that to be the case. Mr Williams then moved on to another topic.

60. The claimant was asked about the date of the photos and that Jan had said that the fact that the satnav boxes were lying around meant that it was much earlier than February 2018.

61. The claimant's answer was that he believed the photos were taken the same day as Ms Lal phoned HR. That was a date that had been independently established as being 21 February 2018.

62. Mr Williams suggested that since the new satnav test had started in early December, then the photographs must have been no later than early December. The claimant answered that that was not the case and that the satnav boxes were often on the desks much later.

63. Mr Williams' evidence to the tribunal was that based on his own knowledge of the 15 to 20 test centres which he had visited between December 2017 and February 2018, it was definitely not true that satnav boxes were left on desks. He believed this to be true of all centres in the UK.

64. A new test had come in from 4 December 2017. Mr Williams said that, therefore, all the examiners in the UK had been given specific bags to use to carry these satnav's around. He said that at every examination centre, the boxes had been tidies away and placed in the safe.

65. After the Claimant's account on 5 November 2018, there were no further enquiries to Jan or any of the other workers at the Claimant's particular site to find out whether other people agreed with Jan's claim that the boxes were not on desks after December or with the claimant's claim that they were on desks much later than that (or whether no-one could remember).

66. Mr Williams suggested in the 5 November meeting that what the claimant should have done was to secure the book in a drawer or somewhere else secure and that the claimant had breached the policy. Mr Williams said that the issue which he had to decide was whether a sanction less than dismissal would be appropriate and that this would be influenced by whether the claimant could be trusted. He asked how he, Mr Williams, could be convinced that the trust and confidence between the claimant and the respondent, and the trust and confidence between the claimant and Jan had not broken down irrecoverably.

67. The claimant's representative said that this was bringing in a new element. There was a discussion between Mr Williams and the claimant's representative about whether it was a new element or not. Mr Williams's position was that it was in the supplementary report.

68. The claimant's representative said on the claimant's behalf that there was not a breakdown of trust and that the claimant wanted to get back to work as possible. Amongst other things, it was alleged that there was a difference in treatment between the white line manager, and Asian staff. It was suggested by the union rep that potentially Mr Williams would need to impose some punishment on the claimant but that it should be no more severe than any which was to be imposed on the line manager. Unbeknownst to the claimant and his union representative, the line manager, Jan, had been given a first written warning. The Claimant and Mr Moloney had not been directly informed of this. All they had to go on was that Jan had not been either suspended or dismissed, from which they concluded that she had not been accused of gross misconduct.

69. During the meeting, the claimant read a prepared statement, which is in the bundle. Mr Williams told the Claimant he would write to him with the decision.

70. Following the meeting, by letter dated 8 November 2018 (a seven-page letter), Mr Williams informed the Claimant that he was dismissed without notice (with last day of employment stated to be 12 November 2018) and gave the reasons for the dismissal.

71. Broadly speaking, we accept that what Mr Williams writes in the letter are his genuine opinions on the matters stated. We note his amplification of some of these reasons in his witness statement and in particular paragraphs 29 through to 38 and we accept that what he says in those paragraphs are his genuine opinions.

72. Although not stated in his witness statements, in cross-examination, Mr Williams accepted that he probably had seen the documents (or some of them at least) in relation to Jan. He does not specifically remember it. He says he does remember speaking to Mr Perkins and Ms Collyer after the disciplinary meeting and before 8 November letter; that is not mentioned in the dismissal letter or the witness statement either.

73. A summary of the dismissal reason is at the top of the second page of the letter:

> The investigation has concluded that you have breached the data protection act, the acceptable use of IT and communications and equipment policy and the Civil Service Code, due to unauthorised copying of personal sensitive data.

74. He said that the remainder of the letter was to explain his rationale. He said he had considered three points.

> 1. Has a proper and due process been followed in this case?
>
> 2. Have you breached DVSA policy, and / or the data protection Act?
>
> 3. What are the reasons for your actions?

75. In relation to whether there had been due process, Mr Williams decided that there had been.

76. For the second point, he addressed contention that had been put forward on the Claimant's behalf that the items on the page had not been data. He rejected that.

77. He dealt with the argument that the claimant had committed the same breaches as the manager. He rejected that argument also, and he said that the claimant's contraventions were more serious. Amongst other things, he said that there was no evidence that Jan had taken the data outside of the respondent's premises or downloaded it to personal electronic devices. The tribunal accepts, of course, that there is no evidence of the second of these. However, clearly, in April 2018, the manager had said to Sharon Collyer that she did frequently take the notebook home with her and, when she did so, she kept it with her laptop. So the Respondent did have that information available to it. It is somewhat unclear from Mr Williams' answers (and we accept that he genuinely does not recollect) whether he had the documents which showed that she had taken the notebook home with her, and just did not read them properly, or whether the documents he received from Perkins and Collyer, and the answers to whatever questions he put to them, did not contain the information.

78. The letter dealt with the fact that the items had been kept an unsecure telephone (the Claimant disputed his mobile phone was not secure, but there was no dispute that that was where the photo was) and printed at the Claimant's home. The letter noted that the claimant's case was that the photographs were taken around 21 February 2018, and it said the items had been kept unsecure for some time even if that date was correct. Mr Williams, however, reached the conclusion that, actually, the claimant had had the data in his possession for significantly longer. At the end of the second last paragraph of the letter, Mr Williams expressed the view that it was probable that the photos were taken in December 2017. He said he accepted that that had not been proven conclusively. He said that it was on the balance of probabilities that he decided they were taken in December.

79. For the third of the 3 points, he rejected the claimant's explanation that the photographs had been taken - and the information processed - for the purposes of complaining about Jan's conduct.

80. The decision was summary dismissal.

81. Mr Williams said it was gross misconduct not serious misconduct. We accept that he had considered the list of examples of "gross misconduct" and "serious misconduct" from the Respondent's guidance document for managers "How to: Assess the level of misconduct" which appears at pages 139 to 142 of the bundle.

82. He said that he did not believe the Claimant on crucial points and that this cast doubt on the Claimant's integrity.

83. He also said that the Claimant had destroyed trust and confidence by his actions, including, according to Mr Williams' findings, by taking the photo as part of a campaign against the manager.

84. The Claimant subsequently appealed. Ms Snell was the appeal manager, and she rejected the appeal.

85. At around same time, that he was dealing with the Claimant's and Ms Lal's cases, Mr Williams was also the decision maker for another disciplinary matter, in relation to an employee called Dave. Dave had been accused of writing other people's signatures on documents, and of doing so over a lengthy period of time. Mr Williams' decision was that Dave should not be dismissed. His reasons were partly that Dave had stepped down from his former role, and was, therefore, no longer in a role which required him to deal with staff, or to deal with the types of document onto which he had put other people's signatures. Mr Williams' reasons were also partly that Dave had put forward mental health as mitigation for his actions, and that Mr Williams had accepted that argument.

The Law

86. Section 98 of ERA 1996 says (in part)

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and

> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> (2) A reason falls within this subsection if it—
> …
> (b) relates to the conduct of the employee,
> …
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

87. So section 98(1) ERA requires the Respondent to show the "reason" (or "principal reason") for the dismissal.

88. So the respondent bears the burden of proving, on a balance of probabilities, that the claimant was dismissed for the factual reason relied on.

89. The Court of Appeal discussed the meaning of the word "reason" in this context in Abernethy v Mott, Hay and Anderson [1974] I.C.R. 323

> *A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee. If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason. He may knowingly give a reason different from the real reason out of kindness or because he might have difficulty in proving the facts that actually led him to dismiss; or he may describe his reasons wrongly through some mistake of language or of law. In particular in these days, when the word "redundancy" has a specific statutory meaning, it is very easy for an employer to think that the facts which have led him to dismiss constitute a redundancy situation whereas in law they do not; and in my opinion the industrial tribunal was entitled to take the view that that was what happened here: the employers honestly thought that the facts constituted redundancy, but in law they did not.*
>
> *So the reason for the dismissal was not redundancy but something else. The tribunal found that the principal reason for the dismissal related to the capability of the applicant for work of the kind which he was employed to do*

90. It is the actual thought processes of the person (or group) taking the decision to dismiss that have to be analysed, and the tribunal must make findings of fact about what set of facts/beliefs caused that person (or those persons) to decide to dismiss the Claimant.

91. As per subsection 98(1), the dismissal will be unfair if the employer fails to show the (principal) reason for the dismissal was the factual reason it relies on. The dismissal will also be unfair if the employer fails to demonstrate that that reason either falls into one of the categories in subsection 98(2) or falls into the category "SOSR", defined by section 98(1)(b).

92. Where an employee is dismissed for conduct, it is sufficient that the employer honestly believed on reasonable grounds that the employee had actually acted in

the manner alleged. It is not necessary for the employer to prove to the tribunal that he did, in fact, conduct himself in that way. On the contrary, the tribunal must not substitute its opinion for that of the employer.

93. At the stage of analysing the employer's reason for the dismissal, we are not concerned either with what investigation was done, or else the alleged harshness of the decision. We only take those into account at this stage if a claimant argues that an alleged failure to do any investigation, etc shows that the employer's purported dismissal reason is false or if a claimant argues that a dismissal decision was so off the scale unusual that it is evidence that the employer's alleged dismissal reason is false.

94. If the respondent fails to persuade the tribunal that it had a genuine belief that the claimant had acted in the manner alleged and that it genuinely dismissed for that reason, then the dismissal will be unfair.

95. Provided the respondent does persuade us that the claimant was dismissed for the reason relied upon (and this it falls into the category "conduct"), then the dismissal is potentially fair. That means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996.

96. In considering this general reasonableness, we will take into account the respondent's size and administrative resources and we will decide whether the respondent acted reasonably or unreasonably in treating the conduct as a sufficient reason for dismissal.

97. We have had regard to the guidance in British Homes Stores Ltd v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Ltd v Jones [1993] ICR 17 EAT; and Foley v Post Office / Midland Bank plc v Madden [2000] IRLR 82 CA.

98. In considering the question of reasonableness, we must analyse whether the respondent had a reasonable basis to believe that the Claimant did actually act in the manner alleged. This does not mean that we decide whether the employer was right or wrong to reach the decision that it did, but we decide whether we are satisfied that, based on the evidence presented to the employer at the time, a reasonable person could potentially have decided that the claimant acted in the manner alleged.

99. We must also consider whether or not the respondent carried out a reasonable process prior to making its decisions. In terms of the sanction of dismissal itself, we must consider whether or not this particular respondent's decision to dismiss this particular claimant fell within the band of reasonable responses in all the circumstances. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure by which that decision was reached. (Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23 CA).

100. It is not the role of this tribunal to assess the evidence and to decide whether the claimant should or should not have been dismissed. In other words, it is not our role to substitute our own decisions for the decisions made by the respondent.

101. In some circumstances unfairness (if any) at the original dismissal stage may be corrected or cured as a result of what happens at the appellate process. That will

depend on all the circumstances of the case. It will depend upon the nature of the unfairness at the first stage; the nature of the hearing of the appeal at the second stage; and the equity and substantial merits of the case. If there is unfairness at the first stage, then that can potentially impact the overall fairness of the employer's decision to dismiss, even if the second stage is carried out to a high standard of fairness. See Taylor v OCS Group [2006] IRLR 614

102. In considering the overall fairness of the sanction of dismissal, we take into account that it can be reasonable for one employer to have much higher standards of conduct than another.

103. It is relevant to think about what information the employer might have given to its employees about the type of thing which can lead to dismissal, for example in policy documents and disciplinary procedures.

104. It might also be relevant to consider the treatment of other employees, and what has led to dismissal (or lesser sanction) in other cases, especially where the claimant was likely to have known about such other cases.

105. Inconsistency of punishment for similar cases misconduct might give rise to a finding of unfair dismissal, as the Court of Appeal discussed in Post Office v Fennell 1981 IRLR 221, CA.

106. Before making a finding of unfairness based on alleged inconsistency, however, the tribunal must bear in mind that the tribunal has less information about the other case. It is necessary for the tribunal to be wary of deciding that there were no distinguishing features. Furthermore, while some basic levels of consistency are desirable (for various reasons, including for setting benchmarks so that employees are aware that particular conduct might lead to dismissal), another requirement of fairness is that employers decide each case on its own merits. In particular, there might be mitigation in one case (ill-health, for example, that contributes to the misconduct) and not the other. A fair employer might dismiss in the case where there is no mitigation, and not in the other, even though the conduct itself was the same. Similarly, the employees' previous disciplinary records might be different. There must therefore be some latitude given to the way in which an employer deals with particular cases that are superficially similar.

107. In Hadjioannou v Coral Casinos Ltd 1981 IRLR 352, the EAT accepted the argument that a complaint of unreasonableness by an employee based on inconsistency of treatment would only be relevant in limited circumstances:

    107.1 where employees have been led by an employer to believe that certain conduct will not lead to dismissal (because others have not been dismissed for it)

    107.2 where evidence of other cases being dealt with more leniently supports a complaint that the purported reason for dismissal was not the real reason

    107.3 where decisions made by an employer in truly parallel circumstances indicate that it might not have been reasonable for the employer to dismiss.

108. Like with other arguments about alleged unfairness, tribunals must be careful not to substitute their own view for that of the employer. The ultimate question remains whether it was outside the band of reasonable responses to dismiss.

109. The fact that another employee had not been dismissed for something similar in the past is only one factor when answering the question about whether a reasonable employer might have dismissed this particular employee for this particular misconduct.

110. As mentioned by the House of Lords in Polkey v AE Dayton Services Ltd 1988 ICR 142, a dismissal might be unfair even if it is probable that the same outcome– termination of employment – would have occurred had the employer acted fairly.

111. S122(2) the Employment Rights Act 1996 states

> *Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*

112. In relation to compensatory award, S123(6) states

> *Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*

113. Section 123(1) provides tribunals with a broad discretion to award such amount as is considered just and equitable in all the circumstances, having regard to the loss sustained by the claimant because of the unfair dismissal.

114. As part of the assessment, the tribunal might decide that it just and equitable to make a reduction following the guidance in Polkey. For example, the tribunal might decide that, if the unfair dismissal had not occurred, the employer could or would have dismissed fairly; if so, the tribunal might decide that it is just and equitable to take that into account when deciding what was the claimant's loss flowing from the unfair dismissal.

115. In making such an assessment the tribunal, there are a broad range of possible approaches to the exercise.

    115.1 In some cases, it might be just and equitable to restrict compensatory loss to a specific period of time, because the tribunal has concluded that that was the period of time after which, following a fair process, a fair dismissal (or some other fair termination) would have inevitably taken place.

    115.2 In other cases, the tribunal might decide to reduce compensation on a percentage basis, to reflect the percentage chance that there would have been a dismissal had a fair process been followed (and acknowledging that a fair process might have led to an outcome other than termination).

    115.3 If a tribunal thinks that it is just and equitable to do so, then it might combine both of these: eg award 100% loss for a certain period of time, followed by a percentage of the losses after the end of that period.

116. There is no one single “one size fits all” method of carrying out the task.

117. In Software 2000 Ltd v Andrews and ors 2007 ICR 825, the EAT, noted that the relevant principles included:

    117.1 in assessing compensation for unfair dismissal, the employment tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal

    117.2 if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee

    117.3 there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal

    117.4 however, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to make a deduction

    117.5 a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored.

118. For conduct to be the basis of a finding of contributory fault under S.123(6) ERA, it must have the characteristic of culpability or blameworthiness. This was established in Nelson v BBC (No.2) 1980 ICR 110. The conduct must also have a causal link to the dismissal.

119. In Hollier v Plysu Ltd 1983 IRLR 260 the EAT said that the contribution should be assessed broadly and should usually fall within the following categories: wholly to blame (100 per cent); largely to blame (75 per cent); employer and employee equally to blame (50 per cent); employee slightly to blame (25 per cent). There would be a zero reduction where the Claimant has not contributed at all by blameworthy conduct.

120. In considering both Polkey and contributory fault, in Granchester Construction Ltd v Attrill UKEAT/0327/12:

    120.1 In paragraph 26, the EAT notes: *we accept that the Tribunal's approach in looking at a reasonable employer rather than at the actual employer was in*

error and was likely to understate the extent of the deduction that fell to be made.

120.2 In paragraph 27, when considering the approach to adjustments for contributory fault and/or Polkey, the EAT suggested a tribunal should: *consider what facts and matters the employer would probably have accepted for itself, reasonably, having carried out the investigation that would have been carried out had a proper procedure been followed*.

121. More generally, Attrill considers the approach to making adjustments when deductions to reflect both contributory fault and Polkey might be appropriate. If a tribunal provisionally decides on a percentage reduction to reflect contributory fault, then it is not necessarily an error for the tribunal to decide that applying that same full percentage reduction to the compensatory award might not be just and equitable if a Polkey reduction (which takes account of the same conduct by the employee) is also being made. In other words, the tribunal might decide to make a smaller reduction for contributory fault than it might otherwise have made. However, in Attrill, the EAT noted that if the logic just described would not mean that the smaller reduction should be applied to both the basic award and the compensatory award if the Polkey reduction was applied only to the latter.

Equality Act

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contraventionoccurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

122. In other words, it is a two-stage approach. At the first stage the tribunal considers whether the tribunal has found facts - having assessed the totality of the evidence from both sides and drawn any appropriate inferences - from which the tribunal could potentially conclude, in the absence of an adequate explanation, that a contravention has occurred. At this stage it is not sufficient for the claimant to simply prove that the alleged treatment did occur. There has to be some evidential basis from which the tribunal could reasonably infer from the facts that there was a contravention of the Act. However, the tribunal can look, and should look, at all the relevant facts and circumstances when considering this part of the burden of proof test and make reasonable inferences where appropriate.

123. If the claimant succeeds at the first stage then that means that the proof has shifted to the respondent and the claim is to be upheld unless the respondent proves that the contravention did not occur.

124. In Efobi v Royal Mail the Supreme Court made clear that the changes to the burden of proof provision in EQA in contrast to the slightly different language of the predecessor section under does not represent a change in the law.

125. In assessing the evidence in the case and considering the burden of proof provisions the tribunal can have regard to the guidance given by the Court of

Appeal in for example, Igen v Wong [2005] EWCA Civ 142 and Madarassy v Nomura International plc [2007] EWCA Civ 33. The burden of proof does not shift simply because the claimant proves a difference in race, and/or that there was a difference in treatment. That only indicates a possibility of discrimination or victimisation or harassment, and it is not sufficient; something more is needed.

126. In Deman v The Commission for Equality and Human Rights [2010] EWCA Civ 1279, the Court of Appeal suggested that something more does not need to be a great deal more. An example - depending on the facts of a particular case - might be the non-response from a respondent or an evasive or untruthful answer from a respondent or an important witness. That could be something more, potentially.

127. That being said, it is important for the tribunal to remind itself that the mere fact alone that a tribunal might reject some or all of the employer's explanation for one or more particular act or omission does not mean that the burden of proof necessarily shifts. See for example, Raj v Capita Business Services UKEAT/0074/19/LA.

Direction discrimination

128. Direct discrimination is defined in s.13 of the Equality Act. A person discriminates against another if, because of the protected characteristic (in this case …) they treat the other less favourably than they treat or would treat others. This definition has two elements. Firstly, whether the respondent has treated the claimant less favourably than it has treated others ("the less favourable treatment question"). Secondly, whether the respondent has done so because of the protected characteristic ("the reason why question").

129. For the "less favourable treatment question", the comparison between the treatment of the claimant and the treatment of others can potentially require decisions to be made about whether another person is an actual comparator and/or the circumstances and attributes of a hypothetical comparator.

130. However, "the less favourable treatment question" and "the reason why question" are intertwined and sometimes an approach can be taken where the tribunal deals with "the reason why question" first. If the tribunal decides that the protected characteristic was not the reason even in part for the treatment complained of then it will necessarily follow that a person whose circumstances are not materially different would have been treated the same. That might mean that in those circumstances there is no need to construct the hypothetical comparator.

131. When considering the reason for the claimant's treatment we must consider whether it was because of the protected characteristic or not and we must analyse both the conscious and the sub-conscious mental processes and motivations leading to the acts, omissions and decisions.

Victimisation

132. The definition of victimisation is contained in s.27 of the Equality Act.

27 Victimisation

(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.

133. There is an infringement if a claimant is subjected to a detriment and the claimant was subjected to that detriment because of a protected act. The alleged victimisers improper motivation could either be a conscious motivation or an unconscious motivation. A person is subjected to a detriment if they are placed at a disadvantage. There is no need to prove that the claimant's treatment was less favourable than a comparator's treatment.

134. To succeed in a claim of victimisation the claimant must show that she was subjected to the detriment because she did the protected act or because the employer believed that she had done or might do a protected act. Where there is a detriment and a protected act then those two things alone are not sufficient for the claim to succeed. The tribunal has to consider the reason for the treatment and decide what (consciously or otherwise) motivated the respondent to subject the claimant to the detriment. That requires identification of which decision makers made the relevant decisions as well as consideration of the mental processes of those decision makers.

135. The claimant does not have to demonstrate that he protected act was the only reason for the detriment. If the employer has more than one reason for the detriment, then the claimant does not have to establish that the protected act was the principal reason. The victimisation complaint can succeed provided the protected act has a significant influence on the decision making. An influence can be significant even if was not of huge importance to the decision maker. A significant influence is one which is more than trivial.

136. A victimisation claim might fail where the reason for the detriment was not the protected act itself but some feature of the communication (or conduct while doing the protected act) which could properly be treated as separable from the protected act itself such as the manner in which the protected act was carried out. .

137. In terms of causation, the essential question in determining the reason for the claimant's treatment is what, consciously or subconsciously, motivated the employer to subject the claimant to the detriment? This requires an inquiry into the mental processes of the persons who decided that the employer would take the action that has been found to be a detriment, taking account of the burden of proof provisions.

138. Section 136 applies and so the initial burden on the claimant is to demonstrate that there are facts from which the tribunal might conclude that the detriment was because of the protected act. If the claimant does that then the burden of proof shifts.

139. In this case, the argument being put forward as been described as victimisation by association. The panel does not have to make a decision about whether such a claim fits within the scope of the Equality Act.

140. It is a matter discussed by the EAT in at least two cases. In Thompson v London Central Bus Company, because of a decision by the employment tribunal that such a claim was valid, by the time it reached the EAT seeking to overturn a strike out decision, it was not necessary for the EAT to deal directly with the legal issue of whether "victimisation by association" is a claim which exists. That was noted in Jamu v Asda Stores, which discussed Thompson, and also did not specifically confirm if "victimisation by association" was covered.

141. However, in this case, the Respondent is content for us to decide the case on the basis that the Claimant is able to rely on protected act by Ms Lal, and that the victimisation complaint can succeed if we decide that the Respondent's treatment of the Claimant was motivated by (or significantly influenced by) such acts.

Analysis and conclusions

142. We will work our way through the list of issues. For unfair dismissal, these are:

> 1. Is there a potentially fair reason for dismissal within s.98(2) of the Employment Rights Act 1996 ("ERA")? The Respondent relies on misconduct.
>
> 2. Did the Respondent, considering their size and administrative resources, act reasonably in treating this as a reason for dismissal under s.98(4) of the ERA 1996? The following questions apply (from BHS v Burchell):
>
> a. Was there a genuine belief in the misconduct?
>
> b. Were there reasonable grounds for that belief? and
>
> c. Was that belief formed after such investigation as was reasonable?
>
> 3. The Claimant alleges that the dismissal was unfair in the following ways:
>
> a. The decision maker did not have an open mind;
>
> b. The Respondent had no reasonable grounds for the belief that the Claimant had breached data protection rules, as (1) no data was involved, or (2) if data was involved, it was the Claimant's own data or that of others who gave him permission to use their data;
>
> c. The Respondent had no reasonable grounds for believing that a breach of trust and confidence had occurred, as the Claimant had been suspected for a significant amount of time;
>
> d. The Claimant was treated inconsistently. In particular, his manager had breached data protection rules and the staff handbook by keeping unofficial notes;

e. A new charge was put to the Claimant at the dismissal hearing which had not formed part of the investigation or been listed in the invitation letter to the dismissal hearing;

f. The Respondent failed to consider the Claimant's clean disciplinary record; and

g. The sanction of dismissal fell outside the range of reasonable responses.

4. Did the Respondent follow a fair procedure?

5. If the dismissal was procedurally unfair, what are the chances that the Claimant would have been dismissed in any event had a fair procedure been followed?

143. For list of issues number 1, we are satisfied that the reason that Mr Williams decided to dismiss the claimant was for the three-pronged reasons set out in the dismissal letter which were (i) that the claimant had (in Mr Williams' opinion) breached data protection requirements and (ii) had given a dishonest explanation of his actions and (iii) that the claimant's reasons for taking the photograph had been part of a campaign to undermine the manager.

144. In terms of item 2a from the list of issues, we accept that it was Mr Williams' genuine belief in each of the three strands of misconduct based on the facts as he found them.

145. In terms of 2b, whether he had reasonable grounds for his belief, he certainly had reasonable grounds for believing that the claimant took the photo and printed it at home; there was no dispute that the Claimant had done that.

146. In terms of the claimant having kept the data on his phone from at least February to April 2018 (so at least two months), there was no dispute about that either.

147. For allegation of dishonest explanation.

147.1 Mr Williams' finding was that the photograph was taken in December, not February. Further, he decided that the Claimant was lying when he said the photo was taken on, or immediately before 21 February 2018. There was some evidence before Mr Williams. He had Ms Jan's own account that she did not keep the boxes on her desk after December. He also was able to look at the actual notebook which seemed to show that the left-hand page had been filled in on some days prior to 15 January 2018. The panel does not have the notebook itself, but Mr Williams says that (part of) what he saw is shown by the photo on page 544 of the bundle. (Page 544 being an email sent by Ms Collyer to herself on 10 April 2018, containing a photo of the notebook; the right hand page matches the one in Ms Lal's and the Claimant's photos, but the left hand page with handwriting on it, is in contrast to the blank left hand page shown in one of Ms Lal's, but none of the Claimant's photos). Mr Williams analysed emails which Jan supplied, and compared the meetings discussed in those emails to the contents of the left hand page. He decided that he could see that the date Jan booked certain meetings and crossed out other potential dates, showed that the left hand page had been written on prior to 15 January 2018. From that he inferred that Ms Lal's photo (with blank left-hand side page as per page 510 of bundle) must have been taken

before 15 January 2018, and from that he inferred that the Claimant's photo (taken on same day as Ms Lal's according to the Claimant, and Ms Lal, and Mr Miller) was taken before 15 January 2018. Mr Williams did have some evidence from which a reasonable person could infer that the photo was taken prior to 15 January 2018. He also had the evidence about the SatNav boxes to suggest it might have been taken in December. The time gap between December (or early January) and the call to HR was long enough that a reasonable person could conclude that – if the photo was actually taken in December or early January – it was a lie to say that it was taken on the same day (established as 21 February) of the call to HR.

147.2 Although we do not regard it as a separate ground of misconduct found by Mr Williams (because it is not stated as such in the dismissal letter), we do not think that there would be reasonable grounds to conclude that the claimant lied about whether it was he, or Mr Miller, who first found the book. The claimant simply said that it was him and he was sure he was right. There is no inconsistency with two people - both being asked several months later about which of them found the book first - saying very slightly different things.

147.3 Although expressly disavowed in his oral testimony, it does seem to us that, to some extent, Mr Williams comments in his dismissal letter implied that he did not actually accept that the book had been found open at all. It seems to us that he thought that the inconsistencies in the evidence about who found the book went to that issue. However, we do not need to find whether or not there would have been reasonable grounds for that because it is expressly said by the Respondent not to be part of the reason for dismissal.

147.4 Our decision is that there was no reasonable basis for suggesting that Mr Miller's recollection was definitely right and, not only that, the claimant remembered that Miller was right, but was lying when he said to have found the open book before Miller.

148. For the allegation of campaign versus Jan:

148.1 We do not think that there were reasonable grounds to form the belief that taking the photograph was part of a campaign against the manager.

148.2 It is true that there was evidence before Mr Williams from witnesses to suggest that relationships on the team were bad and that one colleague thought there was a witchhunt.

148.3 However, Mr Williams has expressly disavowed the notion that there was a separate charge against the Claimant of bullying. Mr Williams said that, as far as he was concerned, if the claimant or Ms Lal had genuinely taken the photographs with the intention of using it as evidence of wrongdoing by the manager, then that would have been okay in his opinion.

148.4 In fact, we think that it ought to be obvious to a reasonable person that that is what they actually did do. The facts are not that the Claimant or Ms Lal were discovered by somebody else to have taken a photo of Jan's notebook, and – in response – they put forward the purported explanation that they had

gathered it for evidence against the manager. The facts are that the matter was brought to HR's attention by Ms Lal and then to Mr Perkins attention, also by Ms Lal. However, the Claimant wanted to be part of the meeting in which the evidence was presented to Mr Perkins, and it was Mr Perkins who would not let the Claimant be there. As Mr Perkins confirms in his email of 27 February, Ms Lal had told him that it was not just her who taken photographs. As Mr Williams knew from the evidence presented to him, the claimant had wanted to join Ms Lal at the meeting with Mr Perkins.

148.5 There was no reasonable basis for a finding that the claimant and Ms Lal had taken the photograph for reasons other than gathering evidence of alleged wrongdoing by Jan and presenting that evidence to the Respondent.

148.6 Mr Williams' position was that that taking the photograph in and of itself was okay provided it was for the purpose of presenting evidence of the alleged wrongdoing to the Respondent. In other words, it was not his decision that it was improper to try to report Jan's conduct to management; he made clear to us that that would have been permissible and not misconduct by the Claimant. His specific decision – as relayed in his evidence at the tribunal hearing – was that the photograph had been taken for some different reason.

149. In terms of 2c from the list of issues, whether the belief was formed after such investigation was reasonable, we do not find that it was reasonable to fail to carry out further enquiries in relation to the satnav boxes.

150. This was an open plan office. It would have been relatively straightforward to ask colleagues whether or not they remembered whether the satnav boxes had been left on desks. We take into account the long time gap from February to November, and that witnesses would not necessarily be expected to pay close attention to what items colleagues had on their desks a long time previously.

151. There was a clear cut off point (according to Mr Williams) of around 4 December 2017 when a new test came. It was on this basis that Mr Williams formed his own opinion that he personally could be sure that satnav boxes would not have been on the desks of any examination centre in the country after that date. It would have been fairly easy to ask some of the other people who worked at the particular centre in question (which was not one which Mr Williams had necessarily visited in the relevant period) about whether or not they were as confident as he was that the boxes had not been seen after December, and/or whether they thought they had seen satnav boxes on Jan's desk after the new test came in.

152. The first time the Claimant was asked about the issue with the boxes, he stated straightaway that he believed Jan had kept a box on her desk later than December. That point was not put to Jan specifically.

153. The issue of whether boxes were on desk in February is, in itself, extremely trivial. There is no suggestion – or at least none made to us – that it would have improper for Jan to have had the box on her desk then. However, given that this was something that Mr Williams was relying on as evidence of dishonesty by the Claimant, it was not reasonable to fail to make some simple and obvious enquires.

154. Mr Williams accepted that both the claimant and Ms Lal had taken the photos on the same dates. There potentially was no further investigation necessary. He could not have done more to check if they each took the photos on the same date as each other given that each of them were saying that they no longer had electronic versions of the photos available to them.

155. There is, of course, one obvious potential explanation for the difference between the left hand side of the notebook (as examined by Mr Williams in late 2018, and as photoed by Ms Collyer in April 2018) and the photo taken by Ms Lal (showing a blank left hand page) that is consistent both with Mr Williams opinion that the left hand side which he saw was written before 15 January and the Claimant's contention that the relevant photos were taken around 21 February 2018. If someone (presumably Jan) had removed one or more pages from the notebook after 21 February but before the book was photographed by Ms Collyer in April, then that would undermine the basis for Mr Williams' inference on this point. This possibility would not require a belief that (say) Jan was deviously trying to create false evidence against the Claimant or Ms Lal; it would require no more than an opinion that Jan might have decided to remove some pages from the book (possibly for entirely innocent purposes, though that does not matter) either before or after she found out that she might have to show the book to the Respondent as part of an investigation. We accept that there are limits to what further investigation that the employer could have done on that point, but it does not seem to have been a question specifically put to Jan, and that should have been done before making a finding that the contents of the left hand page showed dishonesty by the Claimant about the date of his photo.

156. In terms of item 3a from the list of issues, we were not persuaded that Mr Williams had prejudged matters from the outset. His questions on page 691 in our opinion opens up further lines of enquiry, but potentially these lines of enquiry could have helped the claimant. We are not persuaded that he was trying to build a case against the Claimant simply to make sure that he had some pretext for dismissing the Claimant.

157. In terms of item 3b, personal data was involved. It was the personal data of the three individuals who had their information on the page. To a lesser extent, it was personal data related to Jan in that it recorded her version of certain events.

158. We accept - and we find that there was no dispute - that three people had given their permission for this for the data to be used. Jan had not given permission for her data to be photographed. We have already commented on the claimant's assertion that he did it together evidence of wrongdoing.

159. In terms of item 3c from the list of issues, the fact that the claimant had been suspended and investigated from April to November does not make it unreasonable in itself to conclude that there been a breach of trust and confidence.

160. In terms of item 3d from the list of issues, in relation to the alleged inconsistent treatment, our decision is that Jan's offence was not identical to the claimant's. However, there were similarities in that she had taken paper documents home which contained personal data. She had not printed them at home and she had not photographed them on her personal mobile phone. In Jan's case, the data did

not just include the items that the claimant photographed, but also bank details of a different colleague.

161. Jan did not accept in her interview that she had left the book open, and Ms Collyer seemingly thought the evidence contradicted Jan on that point. Subject to that, we accept that there was no suggestion by the decision-maker - who was not Mr Williams - that Jan had been dishonest in her account. That, therefore, is a difference between Jan's case, and the Claimant's case.

162. In comparison to Dave, the suggestion by Mr Williams was that the claimant's integrity in allegedly lying about the dates of the photograph was a matter of the utmost importance given the nature of the job. Dave was charged with very different offence, namely signatures on internal documents. However, as far as integrity is concerned, it is our view that a reasonable employer would find that falsifying signatures was at least as serious a case of dishonesty as being found to have concealed the true date on which a particular photograph was taken in circumstances in which that photograph was voluntarily revealed to the employer at a later date. In Dave's case while he did "come clean", he only admitted the wrongdoing after it had already been discovered by other people that there was evidence that he was falsifying signatures.

163. In summary, we do not find that there was necessarily an inconsistency with between the claimant's treatment and that of Jan or Dave because the circumstances are so different. However, we do take the punishments they were each given into account when deciding whether the outcome of dismissal for the Claimant was within the band of reasonable responses.

164. In relation to item 3e in the list of issues, this arises because of something included in the supplementary report, namely the allegation that there was a case to answer for bullying.

165. However, the invite to the disciplinary meeting and the oral introduction to the meeting itself did not refer to bullying. Mr Williams explanation for asking Mr Day to investigate team relationships is that he was simply looking at the claimant's motivation for his actions as part of considering whether or not the data protection rules had been breached. He says the relationship issue was also to be part of his consideration for whether there could be mitigation and the claimant could remain as an employee going forward on the basis he would not do the same thing again.

166. It was not fair to the claimant that he was allowed to have the impression that he was been accused of bullying. It was reasonable for the Claimant and his rep to form the opinion that bullying was part of the case that he was being expected to answer at the disciplinary hearing.

167. Regardless of whether or not he could have taken a different approach and tried to address the evidence head-on rather than taking a tactical defence is not the point. Given that the respondent is claiming that no new charge was being put before him, it would have been reasonable for the respondent to explain clearly that that was the case, and to explain that he was not being accused of bullying, but that Mr Williams wanted to hear from the Claimant about his motivation for taking the photo, and about what the Claimant might do in the future.

168. In terms of 3f and 3g of the list of issues, we will consider both of these together.

169. It is our judgment that the decision to dismiss was outside the band of reasonable responses in all of the circumstances.

170. The band of reasonable responses is wide but it is not infinite. It is the employer's decision not ours to decide whether particular conduct is serious enough to dismiss, but a level of consistency is required. The claimant had taken a photo of his own data and data, which related to other people who had given their permission to him to do so.

171. To the extent that Jan's data was also captured that was comparatively trivial in the circumstances. It was information which she had apparently received about individuals in a hand over meeting. The fact that some of the personal data might have been Jan's was not something on which the disciplinary outcome letter focused in any event.

172. To the extent that Mr Williams says he found that the misconduct was failure to secure protectively marked documents with high impact, there are several observations to make.

    172.1 Firstly, this was not a protectively marked document. In Mr Perkins original report about the incident, he had taken the view that it did not need to be. (It was Jan, of course, who would have been responsible for marking it as such, it needed such a categorisation or marking).

    172.2 We accept, of course, that Mr Perkins and Mr Williams could legitimately reach a different view. However, we have not been shown any particular evidence to explain that the document should have been put protectively marked.

    172.3 Mr Williams stated that it did not have to be protectively marked if only in the office, but if taken out of office it should have been. Firstly, it was taken out of the office by Jan. Secondly, whether it should have been protectively marked or not, that does not change the fact that it was not. Even if Mr Williams is correct that it was the type of document that ought to have been protectively marked (if taken out of the office) it does not follow that the Claimant ought to have been aware of that, given that neither Jan nor Mr Perkins had concluded that it should have been so marked.

    172.4 In any event, the words "(with high impact)" after "failure to secure protectively marked documents" are particularly significant when they are written in the list of gross misconduct (page 141). This is because the item "failure to secure protectively marked documents (with low to medium impact)" appears higher up the guidance document, in the list of serious misconduct.

    172.5 The guidance says that serious misconduct "will require formal management action, but is not of itself serious enough to amount to gross misconduct in the case of a first offence".

    172.6 We do not think that any reasonable employer could have decided that something was "high impact" just because that there could have been some

impact on the individual data subjects had the information been leaked more widely. On the facts, there were 3 data subject who had each given consent to the photograph being taken and who all knew the use to which the photo was to be put. There is no rational basis for saying that this could be high impact.

172.7 There must be some distinction between “low and medium impact” and “high impact”, or else why have the distinction at all in the respondent's disciplinary policies. If this incident were to be “high” impact, it is hard to conceive of what would be “medium” or “low”.

172.8 So we are not persuaded that this notebook (an item which Jan took home from time to time) should have been protectively marked, but, even if it was, the Respondent could not reasonably have treated the printing of one page from it at home as a significant breach of security, or a high impact incident, in all the circumstances, including that Jan’s actions (both in leaving it open at work, and in taking it home) were not deemed serious.

173. Mr Williams was very much aware of the distinctions between serious misconduct and gross misconduct. He implemented the distinction when dealing with Dave’s case. He downgraded the allegations charges of serious misconduct from gross misconduct, and, as a result, Dave had the threat of dismissal lifted prior to the hearing and the suspension was also lifted.

174. Ultimately, in taking a photograph of his own data (and other people's data) and having kept it on his phone and having printed a copy, the claimant was performing actions which Mr Williams said were legitimate (if done for evidence gathering purposes, which Mr Williams decided they were not). That leaves the length of time between the photograph having been taken and its being brought to the respondent's attention. That was a significant issue in Mr Williams eyes. So was the fact (as he found it) that it was part of a campaign to undermine the manager.

175. However, the fact is that the manager - on the respondent's own findings - did actually act as alleged by the complainants (the Claimant and Ms Lal); she had left the book open. They were not making false charges against her.

176. If it was legitimate to make the complaint about her without the photograph (as Mr Williams maintains it was) and if it was also legitimate to make the complaint against her with the photograph provided done promptly (as Mr Williams also maintains it was) then it was not within the band of reasonable responses to dismiss the employees on the basis of an alleged delay of (according to Mr Williams’s findings) two or three months from early December to middle of February.

177. There was no reasonable basis for the findings that relationships had irrecoverably broken down given that Jan herself did not say that this was the case and that the claimant in his disciplinary meeting (through his union adviser) stated that he thought he could come back to work and that (on his own account) he had a good working relationship with Jan. The actions against Jan arising out of the data breach with the notebook had been resolved several months prior to Mr Williams’ meeting with the Claimant. Through his representative, the Claimant said that he

would accept some sort of sanction being imposed on him (which should not be greater than that for Jan was the Claimant's position, but it was not suggested that he would refuse to work on the team if the sanction was greater than Jan's).

178. In terms of item 4 from the list of issues, we have identified some defects in the procedure. Not every defect in a procedure makes a dismissal as a whole unfair. However, in this case the finding of dishonesty in relation to the satnav boxes was such a serious matter that it required further investigation after the claimant had given his explanation that Jan had the boxes on her desk after December. Furthermore, if it was correct that the claimant was not facing the new charge of bullying, then the respondent ought to have done more to make that clear to the claimant.

179. Thus, in this case, it is our decision that the procedure taken as a whole was so unfair that no reasonable employer should have dismissed without curing those procedural defects.

180. In terms of question 5 in the list of issues, we have found the dismissal was procedurally unfair and we have also found it was substantively unfair; the decision to dismiss was outside the band of reasonable responses.

181. Therefore our view is that even had the procedural defects been cured, and a fair procedure followed prior to dismissal (so hypothetically investigating the SatNav box issue further, but still deciding that any new evidence, or absence of new evidence, supported the decision that the photo was taken no later than December; hypothetically making clear to the employee that he was not being accused of bullying, and that the questions were for a different reason) then that would not have led to a dismissal which was fair, based on Mr Williams findings about the Claimant's conduct.

182. The unfair dismissal claim succeeds.

183. We turn now to the direct discrimination allegations. The list of issues reads:

> 6. The Claimant relies on the protected characteristic of race. He is an Asian of Indian origin.
>
> 7. The Claimant relies on his dismissal for the discrimination claim pursuant to s.39(2)(c) of the Equality Act 2010 ("EqA").
>
> 8. Did the Respondent treat the Claimant less favourably than it treats or would treat another employee who is not of the same race as the Claimant and whose circumstances are not otherwise materially different to the Claimant's? The Claimant relies on the comparators of his manager, Ms Jan … who is white, who breached data protection rules and the staff handbook, and was not dismissed and his former manager, David …, who allegedly fraudulently completed appraisals. In the alternative, the Claimant relies on the hypothetical comparator of a white colleague accused of the same misconduct.
>
> 9. If so, was that less favourable treatment because of the Claimant's race?

184. In terms of item 8, while it is true that Jan and Dave were not dismissed and the claimant was dismissed, and there is a difference in race, we do not find that they

are valid actual comparators as the circumstances of their conduct are not sufficiently similar to those of the claimant.

185. We have to ask ourselves whether the burden of proof has shifted. In other words, whether there are facts from which we could infer that a reason why the claimant was dismissed was his race. It does not have to be the only reason (or the principal reason) and it does not have to be part of his conscious thought processes.

186. Based on the facts as we have found them, we do not find that there are facts from which we could infer that a reason that the claimant was dismissed was his race.

187. The punishment was a harsh one, and in our judgment outside band of reasonable responses. However, the mere fact alone that the decision was harsh does not imply that it was because of race, or partly because of race.

188. Similarly, the fact that the claimant and Ms Lal are of a similar race to each other, and that she, like him, was dismissed, does not necessarily lead to the conclusion that the Claimant's dismissal was influenced by his race.

189. One argument put forward by the claimant was that because of industrial action in which he had participated in the past, there might have been some animosity towards him. Rather than support his case on race discrimination that tends to undermine it.

190. Furthermore, in connection with the alleged disagreements and cliques in the office, we have not been provided with evidence that these alleged cliques were on racial grounds. Mr Williams was motivated (in part) by the opinions he formed from reading the colleagues' accounts of the Claimant's interactions with Jan.

191. We have accepted that Mr Williams genuinely dismissed the claimant for the reasons stated in the dismissal letter. We have commented already on what we think about the evidence which led into those conclusions. We do not think Mr Williams has been dishonest in his explanation of what his conscious reasons were for dismissing the Claimant, and they did not include the Claimant's race. On the facts as found by us, we have not been provided with reasons from which we could conclude that he was unconsciously motivated by race either.

192. Therefore, the direct discrimination claim fails.

193. In terms of the victimisation by association, the list of issues states as follows.

> 10. The Claimant's case is that he was subjected to associative victimisation contrary to s.27 of the Equality Act 2010. The Claimant's case is that s.27 EqA 2010 covers associative victimisation and relies on the decision in the Employment Tribunal case of Thompson v London Central Bus Company Limited ET Case No.2300125/14 and of the Employment Appeal Tribunal decision in Thompson v London Central Bus Company Limited [2016] IRLR 9, EAT.
>
> 11. The Claimant's case is that he was dismissed because his colleague, Neelam Lal, had lodged Employment Tribunal proceedings for race discrimination on 25 September 2018. They were investigated for the same misconduct and dismissed for the same offence. The Claimant's case is that he was dismissed because of his association with her protected act.

12. Did Neelam Lal do a protected act within the meaning of s.27(2)(a) Equality Act 2010, namely she brought proceedings for race discrimination in the Employment Tribunal on 25 September 2018?

13. If so, was that Claimant subjected to a detriment, namely dismissal?

14. If so, was the Claimant dismissed because Ms Lal had done a protected act? The association relied upon by the Claimant is that he and Ms Lal were accused of misconduct in relation to the same act, were investigated for the same misconduct, and were dismissed for the same misconduct. His case is that the Respondent dismissed him because Ms Lal had brought race discrimination proceedings against the Respondent.

194. We have not been persuaded, on the balance of probabilities, that Mr Williams was aware of the employment tribunal complaint brought by Ms Lal in around 25 September 2018. We have not been provided with evidence of when that claim was sent to the Respondent. We have not been provided with evidence about what (if anything) that claim said about Mr Williams, and (therefore) cannot use the contents of that claim form as any basis for us to assess the likelihood of its been shown to him (promptly) after the Respondent received it.

195. He said that he did not know about the claim. The Claimant has not provided evidence to contradict or undermine that assertion. We believe Mr Williams' assertion under oath. Since he did not know about the protected act at the relevant time, it follows that he was not motivated by it.

196. Questions 10 to 14 of the list of issues do not suggest victimisation on the basis that it was believed that Ms Lal might do a protected act.

197. The victimisation claim therefore fails on the facts.

198. In terms of 15, in the list of issues, that is all about remedy.

15. If the Claimant is successful in his claim, what remedy is he entitled to?

a. Should the Claimant be reinstated?

b. What is the appropriate amount of compensation which he should be awarded?

c. Is an award for a basic award appropriate?

d. What compensatory award is just and equitable in the circumstances?

e. Is an award for injury to feelings appropriate?

f. Has the Claimant mitigated his loss and should there be a deduction of sums earned for such mitigation, or to reflect a failure by the Claimant to take reasonable steps in mitigation?

g. Should any compensatory award be reduced on the basis of Polkey, namely that a fair procedure would have resulted in dismissal anyway?

h. Has there been any contributory fault on the part of the Claimant entitling a reduction in any award?

199. For 15g, it is our decision that there should be no Polkey deduction. We do not think that a fair procedure could have resulted in a fair dismissal of the claimant given that the decision was outside the band of reasonable responses.

200. For 15h, there has been contributory fault on the part of the claimant. We do not think that this is 50-50. We do not think that both parties are equally to blame. We believe that the respondent is more to blame than the claimant. The contributory factors include

    200.1 The fact that the claimant did take the photo in the first place and he did print it at his home. Even though he believed the Claimant believed that he was asked by the respondent to make a print copy, he should still have explored ways of making that copy were more secure.

    200.2 The Claimant did not himself promptly send the item to Mr Perkins, but rather waited until Ms Collyer's meeting with him.

    200.3 In the disciplinary meeting with Mr Williams, the Claimant was slightly obstructive in suggesting that he would only read a prepared statement rather than answer questions on the supplementary report. We do not hold him wholly to blame for that, and we have found that the respondent handled that particular matter badly. Furthermore, we acknowledge that he answered almost every question that was put in any event, either directly or through his union representative. However, taking account of the fact that he had had the supplementary report for three weeks, we do not accept that it was such a surprise to the employee that it was legitimate for him to say that no questions about those matters should be put to him in the disciplinary meeting for procedural reasons.

201. On balance, we do not think that 25% is high enough. The Claimant was more than “slightly” to blame, though less than 50% responsible. We compromise at a 33% reduction for contributory fault. That applies to both the basic award and the compensatory award.

202. The other remedy issues will be determined at the remedy hearing.

Employment Judge Quill

Date: 27 August 2022

REASONS SENT TO THE PARTIES ON

16 September 2022

N Gotecha

FOR EMPLOYMENT TRIBUNALS