EMPLOYMENT TRIBUNALS

Claimant: Mr Arthur Mark Robinson

Respondent: The Home Office

Heard at: Leeds On: 23, 24, 25, 26, 27 and 31 January 2023 Before: Employment Judge D N Jones

REPRESENTATION:

Claimant: In person
Respondent: Mr A Tinnion, counsel

JUDGMENT

1. The claimant was wrongfully dismissed.

2. The claimant was unfairly dismissed.

3. It is not just and equitable to reduce any compensatory award on the ground the claimant might have been dismissed had there been a fair procedure.

4. It is not just and equitable to reduce any basic or compensatory award on the grounds of any conduct before or which caused or contributed to the dismissal.

5. The claim for holiday pay is dismissed upon withdrawal.

REASONS

Introduction

1. The claimant brings claims for unfair and wrongful dismissal.

2. The issues were identified by Employment Judge Buckley at a preliminary hearing on 20 June 2022 and agreed by the parties at the commencement of the final hearing.

The Evidence

3. The claimant gave evidence and called Mr Colin McAllister, formerly Deputy Director of Border Force North, Mr Paul Webster, senior officer of the same division and I read a witness statement of Mr Kevin Parsons, a former senior officer who reported to the claimant. I ruled that the evidence in a witness statement of Mr John McTaggart, Deputy Director at the same division, was of peripheral relevance and it was not proportionate to consider it, given the issues which required my determination. Although I have not made reference to the witnesses the claimant called in these reasons other than obliquely, it was because it was not necessary to explain my conclusions in what is quite a lengthy decision. It does not follow from this that their evidence was not considered.

4. The respondent called Ms Tahira Shah, formerly Chief of Staff to the Chief Operating Officer, Ms Sue Bentley, Deputy Director, Immigration Enforcement, Mrs Jane Sutton, formerly Director for Immigration Compliance and Enforcement and Ms Phillipa Rouse, Director of Migration and Citizenship.

5. The parties produced a bundle of documents running to at least 938 pages. I say at least because there were several insertions, some of which ran to double lettering. For future reference insertion with numerals rather than letters, such as 10.1, 10.2, 10.3 etc, is much easier for navigation of an electronic or hard copy bundle.

Background/facts

6. The respondent is a State Department. One of its executive agencies is the Border Force. It has the responsibility for border control at airports and other points of entry to the United Kingdom.

7. The claimant commenced working for the respondent on 3rd November 2014 as Assistant Director of the North Region. The Northern Region comprises 7 divisions, Northern Ireland, Scotland, Humber, the North East, Manchester Airport, North West and North Wales. The claimant was posted to the Humber Command. That covers five Primary Control Points namely Hull, airport and seaport, Immingham, Leeds/Bradford and Doncaster. The claimant reported to a Deputy Director who had responsibility for a cluster of 3 divisions. The Deputy Director reported to the Director who was based at Manchester Airport.

8. On 8 December 2017 Ms Versi was appointed to the post of Director of the Northern Region.

9. On 5 March 2018 the Claimant submitted a grievance in which he complained that Ms Versi had singled him out for unfair criticism and created an environment in which he had been subject to bullying and intimidation.

10. On 16 October 2018 the Decision Manager, Mr Wren, dismissed the three allegations which had been distilled as permissible complaints under the procedure. On appeal, by a decision of 8 January 2019, the substantive grounds of complaint were not upheld, but it was found the process had been unfair insofar as the case should not initially have been allocated to Emma Moore, the line manager of Ms Versi. She had stood down in May 2018 from that role upon the claimant's expression of concern. In addition the procedure should have been resolved much quicker; it took 225 days

11. By email of 12 November 2018 Ms Versi submitted complaints about the claimant. She stated he had pursued a complaint of hate and harassment with the intention of removing her from her post, including by making allegations in his grievance against her. She included a formal request for removal of the claimant from her command at the first opportunity. Mr Ramudo was appointed as the Decision Manager and Mr O'Donaghue the Investigator. That appears to have been formalised into a grievance on the 11 December 2018 and the claimant notified of it on 12 December 2018.

12. On 6 March 2019 Mr Ramudo wrote to the claimant to inform him that the allegation Ms Versi had made warranted an investigation under the disciplinary procedure. The grievance was put on hold.

13. On 8 March 2019 Ms Hall, the claimant's new line manager wrote to say he was to be moved from his position at the Humber Command given the circumstances and she proposed two possible secondments, each for a period of three months. On 14 March 2018 Ms Hall wrote to the claimant to state that if he refused to take one of the alternative roles it would be a failure to follow a management instruction and could lead to formal disciplinary action.

14. On 16 March 2019 the claimant was informed, by letter from Ms Moore, that he was suspended pending the investigation into the disciplinary allegations of Ms Versi. She stated that, in addition, he had refused to follow a management instruction in accepting the temporary posting outside the Northern Region.

15. On 26th March 2019 the claimant reported sick with work related stress.

16. On 11 June 2019 the claimant submitted a grievance in which he complained that Ms Moore had been complicit with Ms Versi and other senior managers in engineering a situation to secure his removal from the Northern Region. The grievance manager, Ms Jones, reduced the complaints to three, two of which related to Ms Versi and one to other managers' decisions. The complaints were not upheld on 2 December 2019. The claimant did not appeal that decision.

17. On 27 August 2019 the claimant reported that he was no longer sick and was fit for duty.

18. On 4 September 2019 the claimant was interviewed by Mr O'Donoghue in respect of the disciplinary allegations.

19. On 2nd October 2019 Mr Ramudo wrote to the claimant to inform he was to stand down as Decision Manager. This followed a letter of complaint he had received from the claimant who said that, following a subject access request, he had seen a step plan to remove him from his post in Humber which Mr Rumado had been instrumental in putting into effect; by converting the grievance to a disciplinary investigation, suspending him and not reviewing the suspension under the policies of the respondent which had been ongoing for 6 months. Mr Rumado stated he had been independent and had not made the decision to suspend but that to ensure the process was not only fair but perceived so, he would hand the matter over. On 20 November 2019 Ms West informed the claimant she had taken over the role of Disciplinary Manager.

20. On 30 December 2019 the investigation report was completed by Mr O'Donoghue and submitted to Ms West.

21. The claimant attended a hearing on 3 August 2020. The investigation had identified 7 allegations as appropriate to proceed in the disciplinary part of the process. The claimant said there had been 25, but others were still open for consideration in the grievance.

22. On 28 August 2020 Ms West wrote to the claimant to inform him that she had upheld 4 of the 7 allegations: his accusing Ms Versi of breaching confidentiality in March 2018, alleging she had disadvantaged him in an expression of interest competition, accusing her of interfering with his performance rating and accusing her of inappropriate working relationships with two members of staff. She explained why she had rejected the other 3 allegations. She held this 'could be reasonably seen as amounting to bullying in terms of specific instances and its cumulative effect' but she did not find it amounted to harassment. She expressed the view that their working relationship had broken down and recommended that he and Ms Versi took steps to address that, specifically by mediation, but that was a voluntary process. She issued a final written warning for 18 months.

23. The claimant appealed the disciplinary finding. Following a hearing on 2 October 2020, the appeal was dismissed by Ms Lloyd, by letter of 16 October 2020.

24. On 28 August 2020 Ms Shah had written to the claimant to confirm a conversation they had just had with respect to the claimant taking up a post outside the Humber at Clandestine Threat Command (CTT). She wrote, "the move to CTC is temporary while we put in place mediation which we hope, will go some way, to repair what is a broken relationship. As a result if we see an improvement in working relationships through this process, we will then be able to return you to your former role which will remain temporarily covered in the meantime". She awaited his response after speaking to his solicitor. Ms Shah had taken over line management responsibility for the claimant at this time, but he was unaware of that.

25. On the same date Ms West wrote to the claimant and informed him his suspension had been lifted and, after his two weeks of annual leave, that he had been asked to report to Ms Sari at the CTC. The claimant wrote to Ms West to say he thought her role had ended after the disciplinary hearing and he asked who had made the decision to transfer him to CTC. He received no reply from Ms West.

26. On 1 September 2020 Ms Shah wrote to the claimant to say that she had not said that reporting to CTC had been presented as an option and, on his return on 14 September 2020, he would be undertaking that role. The claimant replied to Ms Shah to say that she had not said, in their discussions, that the move to CTC was non-negotiable. I prefer the claimant's interpretation of the discussions. I consider that the request of Ms Shah for the claimant to revert to her after he had spoken to his solicitor, in her earlier email of 28 August 2020, suggested the matter had yet been finalised. In his email of 1 September 2020 the claimant expressed the opinion that she and Mr Bean, the HR partner to whom Ms Shah had alluded in their discussion, were making it impossible for him to return to Humber command.

27. On 13 September 2020 the claimant reported sick with work related stress. The claimant was informed by Ms Shah that she was his line manager after he had expressed his confusion and that he believed it was still Ms Hill. Ms Shah managed the referral to OHU and the sickness absence reviews.

28. On 20 January 2021 Ms Versi withdrew her outstanding grievance against claimant.

29. On 7 May 2021 Ms Shah wrote to the claimant to inform him that Ms Versi had decided not to engage in the mediation process. She proposed a meeting to discuss the prospects and options of a return to work. By this stage, shortly after the second formal attendance review meeting on 22 April 2022, the claimant had eventually expressed his agreement to mediation. Up until that point he had expressed reservations and mistrust as to whether it would be used as an excuse to remove him from the Humber Command.

30. The claimant wrote on 7 May 2021 to Ms Shah to say that as Ms Versi no longer wished to have mediation there would be no obstacle to him returning immediately to the Humber Command. Ms Shah replied on 10 May 2021. She stated that Ms Versi had the right not to engage in the mediation process and that the option of his return there was no longer on the table.

31. The claimant responded on 13 May 2021 to state that the issue of mediation had been weaponised, Ms Versi had told lies about him, withdrawn her grievance and then her agreement to mediation leading to him being barred from returning to the role he was employed to undertake.

32. On 25 May 2021 an attendance review meeting was held. Plans were to be made for the claimant's return, he having informed Ms Shah he would be fit for duty from 30 May 2021. Ms Shah informed the claimant that as Ms Versi had declined mediation a return to Humber was no an option. The claimant asked who had made that decision and when. Ms Shah said she had not been part of that decision process and she understood it had been based on the disciplinary hearing. When the claimant specifically asked her again who had made the decision, Ms Shah said she did not know, but it had been relayed by her to HR, was in line with the disciplinary hearing and that the claimant had been made aware of this at the time. She explained her role was to facilitate the claimant's return.

33. By an email sent at 8 am on 14 June 2021 the claimant was asked by Ms Marsden to report to Mr Hewitt, the Deputy Director at the National Operation, Command and Control Centre (NCC). At 8.30 that morning the claimant sent an email to Ms Shah to ask, for the sake of clarity, why he could not return to his role on the Humber and that no justifiable reason had been provided why he should not. He said that was the only role to which he would agree to return. Ms Shah sent an email to Mr Bean to say she required definitive advice as she was stuck in the middle.

34. Ms Griffith of HR replied to suggest Ms Versi write to the claimant to say that following the issuing of the final written warning the business made the decision it would not be appropriate for the claimant to return to Immingham[1] unless voluntary mediation was undertaken with Ms Versi, and as she was not willing to undertake mediation it could

[1] The reference to Immingham was an error which was made several times by HR and managers. They meant the Humber Command, or Hull, where the offices were.

not be taken forward and so there was no option for him to return to that role. This was the same message Ms Shah had already conveyed to the claimant.

35. Following a series of further emails in which the above message was repeated and two options elsewhere suggested, Ms Shah wrote on 18 June 2021. She stated they had reached an impasse, her position had not changed and her role was to find a suitable alternative place of work. She said she expected the claimant to take up the role at NCC unless he could specify a reason why it was not suitable for his grade and skill set. She said she would like him to contact Mr Hewitt at 9 am on 21 June 2021. She stated that failure to do so could result in disciplinary action. The claimant responded. His stance was the same.

36. On 22 June 2022 Ms Shah wrote to the claimant and stated he had been absent from work without authorisation from 21 June 2021, it was a serious matter and could lead to disciplinary action. She stated it was imperative he reported for duty with Mr Hewitt at the NCC.

37. The claimant responded, repeated the background as he saw it and stated Ms Shah and the Border Force were taking an unlawful stance.

38. On 29 June 2021 Ms Shah wrote to the claimant to say that his absence was unauthorised and his pay would be withheld from 21 June 2021. She informed him that his absence was a serious matter and could lead to disciplinary action.

39. On 2 July 2021 disciplinary proceedings were initiated in respect of the claimant's refusal of the duty. Mrs Sutton was appointed as Decision Manager (DM). Ms Shah settled terms of reference, the scope of which was that the claimant had failed to accept an alternative role upon his return from sickness absence and failed to report for duty. As the claimant had not provided a satisfactory explanation for not reporting, his absence would be considered unauthorised and a disciplinary investigation instigated. An investigator would be appointed to gather evidence, establish the facts, present an objective analysis to assist the DM to reach a decision. She listed potential witnesses; herself, Nick Bean and Jane Griffiths, HR Business Partners.

40. Mrs Sutton endorsed the terms of reference. Ms Bentley was appointed as investigation manager. Mrs Sutton decided that a specialist investigation was not required. Mrs Sutton wrote to the claimant on 9 July 2021 to inform him of the investigation into a potential disciplinary act of gross misconduct arising from unauthorised absence in not reporting for duty at the National Operations HQ, where the NCC was situated.

41. Ms Bentley commenced her investigation 12 July 2021. She had the correspondence for the attendance review meeting of 11 May 2021, the minutes of that meeting on 25 May 2021, email correspondence between 2 June and 29 June 2021 concerning the instructions to attend at the NCC and the claimant's refusal.

She had considered the respondent's Unauthorised Absence Policy, the Terms and Conditions – changes 2013 2014 Policy, the guidance entitled A Manager's Guide to Assess Reasonableness of Moves Advice [the mobility policy] and the Grievance Policy.

42. The claimant attended an investigation interview with Ms Bentley on the 23 July 2021. He expressed his opinion that the attempt to move him into another role was not a reasonable or lawful management request. He stated he had been recruited to work as Assistant Director in the Humber Command and nowhere else. He said the Border Force had been attempting to move him into another role since he put in a grievance against the Team Director, Ms Versi, some years previously. Ms Bentley stated that she had considered email exchanges between the claimant and Ms Shah from which the rationale behind the decision to move the claimant was that it would be difficult for the claimant and Ms Versi to work together without mediation because of the finding of bullying against the claimant.

43. The claimant stated that might be her interpretation of the email of Ms Shah but he disagreed that it was not suitable for Ms Versi and him to continue to work together. He stated that he had worked with Ms Versi for three years. He briefly recounted the history of the grievance and counter grievance, that he had a very effective Deputy Director who had acted as a filter and that the Humber command were top performers. He stated that he should not be removed from the Humber because Ms Versi had declined mediation. He suspected she had engaged with Mr Bean to concoct a plan to remove him from his role. He said he believed people from management and HR, including Mr Bean and Emma Moore, had colluded to remove him from his post. He said this was supported by documents disclosed under the subject access regime. He stated he would not be willing to accept any other role if not allowed to return to the Humber command.

44. Ms Bentley spoke to Ms Shah on the telephone on 17 August 2021. She recorded her comments. She sent her an email of 20 August 2021 to confirm the accuracy of the note. Ms Shah was due to work overseas and Ms Bentley decided she would progress and conclude her investigative report with her written note of the discussion. She did not wish to delay because she was about to take annual leave and did not know when Ms Shah might reply. In the note of the discussion Ms Shah was reported to have said the decision to move the claimant to a different post was a joint one of Emma Moore and Nick Bean and the rationale was to protect Ms Versi who had been bullied by the claimant. Mediation had been declined and although Ms Versi was the claimant's counter signing rather than direct line manager, it was considered a high-profile post and it was important relationships between senior managers at the port were good.

45. Ms Bentley concluded her report on 23 August 2021. Her understanding was the decision to move post had been a joint one, of Ms Moore and Mr Bean, and the rationale to protect Ms Versi who had been bullied. Under the section 'Facts established' Ms Bentley referred to the mobility policy, the Managers Guide to Assess Reasonableness Of Moves. She identified that a manager should consider the suitability of the alternative post with respect of an equivalent grade and salary. She noted that the claimant said he had the skill set to undertake the NCC role and that he was fit and well. She did not think it was unreasonable for the business to require the claimant to move to that particular role as it would not adversely affect him financially, professionally or by way of an increase in travel time, it being understood the role would be undertaken remotely. In respect of the claimant's argument that it was unreasonable management request, she wrote, "My remit in this investigation is not to reopen discipline or grievance matters that have previously concluded but I must consider whether the business decision to require [the claimant] to transfer was a reasonable one as this

impacts upon my consideration of whether [the claimant's] reason for not attending work as required to be a reasonable one". She expressed the opinion that the business had a duty of care to protect staff from bullying behaviour and that given the inability to use mediation to repair the working relationship in order to protect Ms Versi, the decision to transfer the claimant had been reasonable one. She recommended there was a case to answer.

46. The claimant was invited to attend a disciplinary hearing by letter of 27 August 2021. It informed him that the allegation might constitute gross misconduct and lead to dismissal without notice.

47. The claimant attended on 14 September 2021. He chose not to be accompanied. Ms Griffith attended as HR case manager. The claimant raised his concern that there had been a conspiracy to remove him from his command since he first raised his grievance. He queried Ms Griffith's involvement with Mr Bean because he considered him to be one of the conspirators. In questioning Ms Griffith, he established that she had been at the claimant's previous disciplinary hearing with Ms West. Ms Griffin confirmed she had advised also Ms West prior to the disciplinary hearing on 24 July 2020 and she confirmed that the decision to remove the claimant from the Humber command had not been a recommendation of Ms West. She confirmed that Ms West's reference to mediation was only a consideration. She said she had advised Ms Shah on the claimant's sickness absence, advised Ms Bentley in respect of the investigation and Ms Sutton in her role as DM.

48. The claimant stated that the decision to remove him from his substantive post was not a reasonable or lawful request. He cited the history of grievance and counter grievance, the instruction by Ms Hall to remove him from his post on 14 March 2019, the conversion of the grievance to a disciplinary matter and his subsequent suspension. He criticised the investigation into the current matter as containing nothing of evidential value, written 'on the back of a fag packet'. He noted Mrs Sutton's decision not to call Mr Bean and Ms Moore to hear their account, but rather rely on a telephone conversation of Ms Bentley with Ms Shah. He said senior managers would have to hold themselves accountable to an employment tribunal. With respect to the telephone discussion between Ms Bentley and Ms Shah, Mrs Sutton said she awaited confirmation of its accuracy and would share it with the claimant. She asked the claimant if there was any other evidence she thought she should have and the claimant stated she should obtain formal statements from Mr Bean and Ms Moore about the decisions made.

49. Mrs Sutton said it had been some time since the claimant had worked alongside Ms Versi. She asked how he would describe the current state of their relationship. The claimant stated that there was no relationship, he had not seen her for her contact for approximate three years. He said when there had been issues on the Humber command he had performed perfectly well over the 12 months and his line manager Mr McAllister managed any issues. He said he was professional and would not disrupt work or show disrespect to peers or superiors.

50. On 15 September 2021 Mrs Sutton received alterations to the telephone conversation Ms Shah had with Ms Bentley. The passage which had stated that the decision to move the claimant to a different post was that of Ms Moore and Mr Bean had been removed, but not replaced with any comment about who had make that decision. Rather, she

stated Ms Moore and Mr Bean had provided advice on the option of seeking mediation prior to allowing the claimant to return to his previous role as Assistant Director at Immingham, regardless of the outcome of the disciplinary.

51. The notes of the hearing and Ms Shah's clarification were sent to the claimant. He claimant sent a reply with additions to the record of the hearing.

52. On 27 September 2021 Mrs Sutton wrote to the claimant to inform him that she upheld the allegation and had concluded that he was culpable of gross misconduct. She stated that the decision permanently to move him had been made by Ms Moore, supported by Mr Bean, following a disciplinary investigation that found he had bullied his countersigning manager Ms Versi. She stated the claimant had confirmed in the hearing they no longer had a working relationship, attempts to repair it by voluntary mediation had not proven successful, that the Department had a duty of care to ensure they were not placed in a situation which would enable a further deterioration and must consider the wider business impacts of allowing them to continue to work closely together. She stated that the decision to invoke the mobility clause and require the claimant to move to a post as Assistant Director at NCC was reasonable. The claimant was dismissed summarily.

53. The claimant appealed the decision by completion of the standard form dated 27 September 2021. He complained that Mrs Sutton had relied upon hearsay evidence and not considered taking statements from, or call to the hearing, Ms Moore and Mr Bean. Rather, he said, she had relied upon an informal telephone conversation between Ms Bentley and Ms Shah in which Ms Shah relayed another conversation she had had with Mr Bean and Ms Moore. He complained that Mrs Sutton had relied upon the earlier finding without taking account of his concern, or investigated his contention that Mr Bean had been directing and controlling the actions since early 2019. He stated his own crime had been standing up to the bullying of Ms Versi.

54. The appeal was dismissed by Ms Rouse, following a hearing on 8 October 2021. She concluded the claimant had not offered any new evidence or highlighted procedural issues which warranted overturning the decision of Mrs Sutton.

55. The claimant was appointed by letter 4 November 2014 to the post based at custom House, King George, Hull. The copy of the letter in the bundle attached the principal terms and conditions but it was not returned signed and dated and the claimant said he had not seen these until they were provided to him by Mrs Sutton in the disciplinary process. He does not dispute they were applicable. I am satisfied that up until sight of them he was not aware of the specific terms, including the mobility and location flexibility clauses.

56. The mobility clause stated that the claimant could be transferred to anywhere in the United Kingdom or abroad and he would be given notice of any changes at least one month in advance of implementation. It also provided he may be liable to serve a period away from home on detached duty.

57. The location flexibility clause stated that, in addition to the mobility obligations, the claimant may be required to work at short notice at any location within the respondent according to business need. It stated that normally that would be a short term contingency measure within his region but there may be occasions when it would be

outside region. He stated that, in accordance with the mobility obligations, he could be required to transfer on a permanent basis.

58. The mobility policy, How to: A Managers Guide to Assess Reasonableness of Moves – Mobility obligations when moving post was issued in August 2013 as HR Policy and Guidance.

59. Paragraph 1 stated it was to help the manager decide whether a move was reasonable for an employee when considering invoking the mobility clause in the contract. Paragraph 3 stated a mobile member of staff could be compulsorily transferred to any civil service post in the UK or abroad as long as the post and move was deemed reasonable. Paragraph 5 provided that an employee may be asked to move to meet a particular business or development need. Paragraph 6 provided that when asking an employee to move post or location they should try to reach a mutually agreeable outcome and affect a voluntary move. The mobility clause should only be invoked where that was not possible and only if there were strong business reasons for doing so. It was then a question of balancing the needs of the business against those of the employee.

60. Paragraphs 10 and 11 caution a case by case approach, with discussions about the business drivers and employee's circumstances. By paragraph 13, the line manager is responsible for discussing the proposed move with the employee, gathering information needed to consider whether the move is reasonable for them and deciding whether or not the employer should move using the mobility clause,

61. Paragraph 14 states that the manager should have a clear picture of the business reasons which support the need for a move before approaching the employee. That includes details of any options that may have been considered for meeting the business need without invoking the mobility clause and why they were discounted. Paragraph 18 provides that the manager should follow up with relevant contacts any questions the employee has raised during the first meeting and that it may be necessary to hold a second meeting to discuss any additional information that has been obtained. By paragraph 24, the employee should be informed of the grievance procedure if they disagree with the decision.

The Law

Unfair dismissal

62. By Section 98(1) of the Employment Rights Act (ERA 1996) it is for the employer to show the reason for the dismissal and that it falls within a category recognised in Section 98(1) or (2), one of which relates to conduct, see Section 98(2)(b).

63. Under Section 98(4) of ERA "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.

64. There is no burden of proof in respect of the analysis to be undertaken under Section 98(4) of the ERA. Material considerations in a case where the reason for the dismissal was conduct, will include whether the employer undertook a reasonable investigation and formed a reasonable and honest belief in the misconduct for which the employee was dismissed[2]. It is not for the Tribunal to substitute its own view, but rather to review the decision-making process against the statutory criteria and, if it fell within a reasonable band of responses, the decision will be regarded as fair[3]. The 'reasonable band of responses' consideration includes not only the determination of whether there was misconduct and the choice of sanction, but will include the investigation[4]. A fair investigation will involve an employer exploring avenues of enquiry which may establish the employee's innocence of the allegations as well as those which may establish his guilt. That is of particular significance in the event the dismissal will impact upon the employee's future career[5]. With regard to any procedural deficiencies the Tribunal must have regard to the fairness of the process overall. Early deficiencies may be corrected by a fair appeal[6].

65. In Davies v Sandwell Metropolitan Borough Council [2013] EWCA 135 the Court of Appeal considered the extent to which it is legitimate of an employer to rely upon a final warning, within the considerations which are relevant for section 98 of the ERA. It held it was not the function of the tribunal to re-open the final warning and rule on an issue as to whether the final warning should, or should not, have been issued and whether it was a legally valid warning or "nullity". "The function of the ET is to apply the statutory test of reasonableness to determine whether the final warning was a circumstance, which a reasonable employer could reasonably take into account in the decision to dismiss the claimant for subsequent misconduct". "… it is relevant for the ET to consider whether the final warning was issued in good faith, whether there were prima facie grounds for following the final warning procedure and whether it was manifestly inappropriate to issue the warning. They are material factors in assessing the reasonableness of the decision to dismiss by reference to, into alia, the circumstances of the final warning".

66. By Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal, a Code of Practice issued by ACAS is admissible and any provision in the Code which appears to be relevant to any question arising in the proceedings should be taken into account in determining that question. The ACAS Code of Practice on Discipline and Grievance Procedures 2015 is one such Code.

67. If a claim of unfair dismissal is established, the Tribunal shall make a basic and compensatory award, if no order for re-instatement or re-engagement is sought, see section 118 of the ERA. Formula for calculating awards is contained in Section 119 and Section 123 of the ERA.

[2] BHS v Burchell [1980] ICR 303.
[3] Iceland Frozen Foods v Jones [1983] ICR 17.
[4] J Sainsbury PLC v Hitt [2003] ICR 111.
[5] Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457. [6]
Taylor v OCS Group Ltd [2006] ICR 1602

68. Under section 122(2) of the ERA, 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, it shall reduce or further reduce that amount accordingly.

69. By Section 123(1) of the ERA, the amount of the compensatory award should be such amount as the Tribunal considers just and reasonable in all the circumstances having regard to the losses sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. If the dismissal is unfair for procedural reasons, the Tribunal may reduce or extinguish any compensatory award, if the Tribunal concludes that the complainant would or might have been dismissed had the procedures been fair[6].

70. Under Section 123(6) of the ERA, 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 the finding.

Wrongful Dismissal

71. An employee will be wrongfully dismissed if his employment is terminated without notice unless such summary dismissal is otherwise permitted under the terms of the contract. If the employee has committed an act of gross misconduct, it will be regarded as a repudiatory breach which discharges the employer from its obligation to give notice of the termination of the employment.

72. It is for the employer to establish, on a balance of probabilities, that the claimant committed an act justifying summary termination of the employment.

Analysis

Wrongful dismissal

73. The claimant did not attend work as instructed on 21 June 2021. He was fit to work. He was willing to work. It was all a question of where. He considered his contract of employment cited his place of work as Hull. He wanted to report to work there. Ms Shah informed him a decision had been made that he could not work at Hull. Having explored with him alternatives in September 2020, on the basis of a temporary move, and May 2021 on the basis of a move he and the subsequent investigators and disciplinary manager considered as permanent, Ms Shah instructed him to report for work at NCC, at the National HQ in Dover which she considered was a reasonable alternative. Unlike Hull, this was far from his home in Lincolnshire, but the understanding was that he could work remotely and the post was of an equivalent grade and salary.

74. Did the claimant's refusal to do that work constitute gross misconduct?

75. The absence was not authorised. On the other hand, the claimant was prohibited from reporting to his former place of work. As Ms Bentley rightly identified in her

[6] Polkey v A E Dayton Services Ltd [1988] ICR 142.

investigation report, in the context of gross misconduct, this necessitated determining whether or not the instruction to report to a different location was a reasonable one.

76. Mr Tinnion submits that the mobility clause is cast in broad terms without qualification or restriction, save for a requirement to give one month's notice which he says was not material in the circumstances of this case. The claimant had been provided with alternative suitable options in March 2019, September 2020 and June 2021 but steadfastly refused to move, or even acknowledge the case for him being moved.

77. The claimant suggests that there had been a conspiracy between four senior members of staff, Mr Bean, Ms Moore, Mr Ramuno and Ms Clifton to remove him from post in February 2019. He says his dismissal was the final, inevitable consequence of that project. In addition he says that the decision to relocate him, in respect of which the instruction was given in June 2021, had not been made in accordance with the respondent's own guidance. No such decision, he say, could be reasonable.

78. I heard from none of the witnesses who were said to have been part of that conspiracy. In many proceedings before employment tribunals conspiracies of one kind or another are alleged but usually with little are no foundation. This does not fall into that category. The disclosed documentation and absence of explanations raise grounds for concern.

79. The conversion of Ms Versi's grievance to a disciplinary case 12 weeks, or 84 days, after it was formally issued is of itself unsatisfactory. The policy envisages conclusion of the grievance within 40 days, without which a procedure is automated for review to ensure correct processes are being followed and there are no unavoidable delays. If this was a complaint which warranted disciplinary action, why did it take so long for that decision to be made?

80. The first evidence of this is an email from Mr Bean to Ms Moore, copying in Ms Clifton, HR Director and Mr Ramudo of 26 February 2019. Mr Bean posed two questions to which he had been asked to respond. Firstly, what was the justification to avoid immediate suspension and with that a charge commensurate with gross misconduct? Secondly, if they moved straight to suspension/gross misconduct charges, what are the consequences? There is no evidence about why they had arrived at that point. The claimant says there is only one reasonable inference: the demand of Ms Versi in her grievance to move the claimant from her command. The question posed starts with the proposition of suspension, followed with justification for that.

81. In his email, Mr Bean explained that there was not sufficient evidence to support "potential gross misconduct" and that the grievance investigation had produced some witnesses who contradicted Ms Versi and others who were allied. He said some delay had arisen because of the absence of the investigation officer on leave. He stated that further investigation may reach a tipping point into gross misconduct. He advised that usually suspensions accompanied a charge of gross misconduct; a precautionary suspension would have to be justified by reason of an immediate threat, danger or high risk to the organisation or individuals; the respondent should look to avoid suspension through reasonably moving somewhere elsewhere so there was no contact with vulnerable parties. He recommended not suspending at that stage but to proceed with disciplinary charges for serious misconduct.

82. In a further email to Ms Moore of 27 February 2019 Mr Bean provided further advice. It is what the claimant describes as the step plan to remove him, in stages. The first was the issuance of the disciplinary letter that or the following day. The second was to establish operating rules to avoid communication between the claimant and Ms Versi. The third was, if that did not work, to propose three projects for the claimant to move to temporarily and, if refused the second, for suspension to take place the following week. The fourth was the disciplinary investigation, lasting 2 to 3 weeks with a hearing at the end of March or early April. The fifth was any appeal which would be in mid-April 2019.

83. The claimant refused a request from his new line manager Ms Hill, of 8 March 2019, to take up one of two secondments which would last a period of three months.

84. The suspension was communicated in a letter of 15 March 2019 from Ms Moore. She stated that it was pending allegations of behaviour over a protracted period which could be seen as bullying or harassment as well as refusing a management instruction to take up another project in the Northern region. Ms Moore did not explain or state why suspension was considered necessary.

85. An email to the Director of HR Ms Clifton, 8 March 2019 of Ms Luckin, a senior HR policy adviser, is noteworthy. She provided independent commentary on the matter. She recommended that Mr Ramudo respond to concerns raised by the claimant about delays and a 90 minute exchange between his letter and formal notification to him that the grievance had been converted to a disciplinary investigation. She advised the case should be set out clearly, so the claimant could understand the allegations and that it be concluded in a timely way. As to the concern the claimant had expressed about his position at the Border Force, she advised that decisions about working relationships should be considered by the line management chain to ensure that Mr Ramudo's impartiality would be maintained. She said it should be borne in mind the case against the claimant may not proven. I saw no evidence of a letter to the claimant or explanation along the lines suggested by Ms Luckin. The subsequent disciplinary investigation was anything but timely.

86. The claimant's suspension lasted 17 months. The policy required it to be for as brief a period as possible. It had to be kept under regular fortnightly review. It was neither brief nor reviewed fortnightly. It was reviewed once, in November 2019, at the time Ms West was appointed as the new decision manager.

87. For the disciplinary case to have taken nearly 18 months (21 months from the date the complaint was first made) was inordinate. The claimant was removed from his workplace for a year and a half. It is no mitigation for the respondent to say that the claimant had been off sick for four of those months. Mr Bean's advice of 27 February 2019 had envisaged the entire process concluding by mid-April 2019.

Against that timeline and the independent comments of Ms Luckin, progress of the disciplinary proceedings, to 28 August 2020, was glacial.

88. After the conclusion of the disciplinary hearing, a decision was taken that the claimant should be moved from the Humber command whilst mediation took place. It was said that if relationships improved in that process, a return to Humber would follow. This

decision was conveyed by Ms Shah, who was the Chief of Staff to Ms Moore. It appears likely that Ms Moore made that decision.

89. The process was arrested by the claimant's absence through sick leave. When he signed off sick in late April 2021 and it became apparent that Ms Versi had recently declined the option of mediation, a decision was taken that the claimant would not be able to return to the Humber command at all.

90. How and who made that decision is shrouded in uncertainty. In her evidence Ms Shah said she had. She said the move was temporary. She acknowledged she had not applied the mobility policy. She was unaware of it. In any event, she said, it did not apply to a temporary move and was only guidance.

91. Generally, I regarded Ms Shah as a frank and straightforward witness who had been placed in a very difficult position as a consequence of decisions taken by others. In respect of this issue, however, I did not regard her evidence as reliable or credible.

92. Firstly, the suggestion that this was to be a temporary move, in June 2021, was first made in her evidence; that proposition is not advanced in her witness statement. Whilst a temporary move had been proposed in August 2020, after mediation had been eliminated as an option in April 2021 there was no reason for anyone to infer that the instruction to move in June 2021 was anything other than a permanent one. That was the conclusion Ms Bentley and Mrs Sutton reached on the material placed before them. That was the claimant's belief. I find that was the intention. By the time the instruction was issued it was not envisaged that the claimant would return to the Humber command in the near or foreseeable future. If Ms Shah had intended for the move to be temporary, it was incumbent upon her to make that clear to the claimant in her instruction. It was not mentioned at all. The significance of a temporary move rather than a permanent one, first alluded to in her evidence, may be that the contractual requirement of location flexibility recognises a distinction between temporary and permanent moves, the latter being subject to "mobility obligations". For reasons I shall set out, I regard those mobility obligations as including consideration of the policy and guidance.

93. Secondly, the claimant repeatedly asked who had made the decision that if mediation was no longer available he could not return to the Humber command. At the attendance review meeting on 25 May 2021, in response to that specific question, Ms Shah said she could not say; it had been relayed to her by HR and she had understood it was in line with the disciplinary hearing. The claimant asked the name of the individual from HR who had relayed that message and was informed it was Ms Griffith.

94. At the disciplinary hearing, Ms Griffith said she had not made the decision. On 3 July 2021, the claimant sent an email to Ms Griffith stating that nobody from the respondent had been able or willing to identify the individuals who had made the decision and asked her to identify who it was, so he could understand the rationale behind it. Ms Griffith replied on 3 August 2020 to say she did not know and was forwarding his query to Ms Shah for response. He did not receive one. As no time did Ms Shah say the decision had been hers. Indeed, in June 2021, she had described herself in an email to Mr Bean as being 'stuck in the middle' needing definitive advice about the rationale. If she had been the decision maker, she would not have needed to be informed of the rationale, she would have known what it was.

95. Ms Griffith rather than Mr Bean responded with the proposed reply: "I'd suggest a reply saying that following the issuing of the final written discipline warning the business made the decision that it would not be appropriate for Mark to return to Immingham unless voluntary mediation was undertaken with Liz. As Liz is not prepared to undertake mediation it cannot be taken forward therefore there is no option for him to return to that role".

96. In her discussion with Ms Bentley on 17 August 2020, Ms Shah had said that the decision to move the claimant had been that of Ms Moore and Mr Bean. I am satisfied Ms Bentley had accurately recorded that comment in her email of 24 August 2021. In her comments of clarification to Ms Bentley on 15 September 2021, that specific remark had been removed by Ms Shah but not replaced with an alternative. She had not said the decision had been hers. She said that on the claimant's return from suspension "the decision was relayed by me to [the claimant] and he was offered a different role the declined". She was the messenger. There was no suggestion that anyone other than Ms Moore and Mr Bean had been responsible for the decision. That had been the finding of Mrs Sutton, on reliance on the first record of the conversation, but there had been no reason to correct it upon receipt of the later clarification.

97. I found one email particularly informative on this question. Mr Bean sent an email to Ms Shah and copied in Mr Griffith on 22 April 2021. He informed them that Ms Versi did not want to enter into mediation. He continued "this therefore closes off a return to the post at Immingham and hopefully now a focus on his return to the CTC or similar for him. Tahira [Ms Shah] this needs to be communicated to him. It is not for you or HR to presuppose of course Liz's reasons not to want to do this and neither have we the right to press for them. It is as it is".

98. By this time, Ms Moore had left the respondent. There is no indication from this email that any other manager had taken part in the decision, namely that the return to the post at Humber had been closed off. I find that the decision the claimant could not return to Humber but had to be redeployed permanently was that of Mr Bean. Why the HR partner felt able to make that decision rather than those in line management of the claimant is unexplained. Ms Shah was placed in the difficult position of having to implement it.

99. Having regard to the history, I can understand why the claimant believes there was a conspiracy to remove him from his post from the time Ms Versi said she no longer wanted him to be under her command. The disclosed material does suggest that procedures had been put in place to achieve that end. I can understand why he thinks those procedures were simply a means to an end.

100. I must consider that proposition on the basis of all the evidence, which I recognise raises more questions than I have answers. I have not heard from the four alleged conspirators.

101. In the end, I do not accept there was a conspiracy of the sophistication the claimant suggests. The documentary material demonstrates that the alleged conspirators were not at one. For example, Mr Bean had suggested that measures be taken to keep the claimant and Ms Versi apart, the first part of the so-called step plan. Secondly, he proposed alternative temporary redeployments, pending a timely disciplinary investigation.

102. Ms Moore did not follow step one of that plan at all. The conspirators were not then acting to effect a common plan. The matter moved rapidly to a suspension, but because the claimant had rejected a temporary redeployment. I do not accept his argument that such a temporary move was inappropriate and contrary to the policies. It is clear from them that this would be considered an appropriate measure in cases in which bullying and harassment allegations are made if it is necessary to protect individuals. I found there was nothing wrong with the suggestion made by Ms Hill to redeploy the claimant pending the conclusion of the disciplinary investigation.

103. In addition, if the conspiracy was as alleged, the decision to move the claimant at the conclusion of the disciplinary process in August 2020 was a huge, missed opportunity. Ms Versi could immediately have rejected mediation and a decision justified by the conspirators to compulsorily transfer the claimant. That would have required application of the mobility policy, but if they were acting in bad faith, as alleged, there was the core material to engineer a justification on business need.

104. That is not to say that my finding, which is on a balance of probability, has been reached without some doubt. The circumstances in which the grievance and disciplinary process were handled as described above and the tone of the emails, which are tendentious rather than suggestive of impartial enquiry, have given me cause for reflection. I have not lost sight in making that observation of a primary motivation of the Chief Operating Officer; to ensure the service is delivered without interruption such as from disputes between senior staff, the benefits of decisive action and that one of the roles of human resources advisors is to advise on how that can permissibly be achieved within policy parameters.

105. Having rejected the central proposition that the claimant's ultimate dismissal was the implementation of a conspiracy to remove him from post, I address the alternative argument that he was not culpable of gross misconduct because the instruction was not a lawful and reasonable one.

106. It is suggested by the respondent I should construe the contract solely on its wording in the written terms and particulars (albeit sidestepping the overlooked requirement for one month's notice). It is said the guidance is, in effect, wellintentioned but not determinative, or even helpful, in construing the parties' rights and obligations. I reject that. I am satisfied that it was the common intention of the parties that the written terms and particulars of employment were to be informed and construed in accordance with such policies and guidance as were issued by the respondent from time to time.

107. It would seem to me to be extraordinary were that not the case. The written particulars describe themselves as a summary. They are not exclusive and all encompassing. The introduction states, "You will be told about any significant changes in Home Office Notices. Details of Home Office civil servants' conditions of service are in Home Office manuals and in the Staff Handbook and in accessible Human Resources policy leaflets posted on the Home Office Intranet". That is not to say that I am finding that every policy document is a term and condition. Rather, in respect of contractual terms relating to mobility I am satisfied the policy document gave a reasonable expectation the guidance would be taken into account, not followed to the letter. The mobility policy uses in its title the language, "mobility <u>obligations</u> when moving post" [emphasis added]. The respondent's submission would be an invitation for me to interpret this as

the obligations of the employee, not the employer. If the mobility policy is of no legal consequence, the choice of the term obligation is seriously misleading. Both employer and employee are entitled to rely upon such documents in understanding acceptable decision making in the working relationship.

108. On my findings, Ms Shah did not make the decision to redeploy the claimant and nor did Ms Griffith. Neither could explain the rationale for a decision they had not been party to. They could only speculate as to it.

109. In response to a query to Ms Griffith on 14 June 2021, she suggested to Ms Shah the claimant be told it was inappropriate to return in the absence of mediation. She did not explain why, which would be the rationale behind that conclusion. That brief message was conveyed in the instruction for which the claimant was disciplined for non-compliance.

110. When advising Ms Bentley in the disciplinary investigation, Ms Griffith suggested she speak with Ms Shah to evidence the rationale behind the decision. Other than the bald assertion in the letter of instruction which is really a conclusion and not a rationale, the first was from the discussion Ms Shah had with Ms Bentley on 17 August 2021. Ms Shah had by then to provide a sound business case for not returning the claimant to the Humber command. A retrospective and speculative justification was given. It was assumed that working relationships would not be productive because both parties had said there had been a breakdown, or that would not be in the interests of the business which required harmonious relations between senior managers, or that Ms Versi required protection from the claimant. Whilst any of this may have been sound upon proper enquiry and discussion, it was assumed.

111. Reliance on the disciplinary outcome letter takes the respondent so far; but not far enough. Ms West had recommended that the claimant and Ms Versi took steps to address a broken relationship. She specifically suggested mediation. The recommendation was directed at both. Ms West did not suggest the claimant be redeployed, although she wrote to inform his suspension had been lifted and informed the claimant that he had been asked to report to Ms Sari. I am satisfied she was relaying Ms Moore's request. Whilst redeployment was not a disciplinary sanction available to Ms West but a decision for the managers of the claimant, nor was mediation.

112. There was nothing inappropriate with the decision Ms Moore then made, temporarily to redeploy the claimant to allow mediation to take its course. I reject the claimant's objections about that. This would have been in accordance with the location and flexibility aspects to his contract. Although the claimant has drawn my attention to the mobility guidance, which refers to discussion about whether any move may be temporary, I am satisfied that it principally focusses on more permanent arrangements. Following his objection, matters were overtaken by his ill health.

113. It is unfortunate an assumption was made that Ms Versi would have been agreeable to mediation from the outset, but there is no evidence she was asked about that in 2020. That built in further delay. By the time she declined, in April 2021, Ms Moore had left. Although Ms Shah had taken over first line managerial responsibility for the claimant before then, it is clear she was heavily reliant upon HR and did not challenge what Mr Bean instructed about a move from the Humber command.

114. The problem arose when Ms Versi declined mediation. It was treated as a veto over the claimant's return to the Humber. Nothing in the decision-making process in late August and early September 2020 justified that.

115. In the absence of any other evidence, I am satisfied the person who made that decision was Mr Bean. It was communicated in his email of 22 April 2021. Ms Shah was informed she was not to question why Ms Versi did not want to agree to mediation. Nor he said was HR, which suggests he had not had any other discussion about the matter. Ms Shah then attempted to implement that decision.

116. I cannot understand why Mr Bean regarded there to have been only a binary choice of mediation or redeployment of the claimant. That was not what emerged from the disciplinary outcome letter, or the managerial decision of Ms Moore which followed it. Mediation had been the preferred course, but it had never been said it would be determinative. Following an attendance review meeting after the claimant had become unwell, on 16 November 2020, Ms Shah had written to provide further explanation for the mediation and to reassure him about it. She stated, "As our discussion progressed, I was clear that without a successful mediation outcome, the return to your previous role may not be possible. This is because [of] the breakdown in your relationship with Liz Versi, particularly in the time leading to your disciplinary. A return to your previous role could also further exacerbate your stress levels but also be counterproductive for the business given that Liz would be your countersigning manager. This was also the reason why I considered a role in a different part of the HO to be more suited at this point in time" [emphasis added].

117. Of course, Ms Versi had the right not to engage in mediation; but it did not inexorably follow that the consequence of that choice was that the claimant would not return to the Humber. She did not have a veto. It would not have been reasonable for her to assume that. It was she who had elected not to attempt to repair the address the relationship through mediation. Three of her seven allegations had not been upheld and she had chosen not to pursue several others in her grievance.

118. The findings were of bullying. Without a working definition in the policies of the respondent which I was shown, the term has a number of connotations. The decision maker, Ms West, had not found the conduct amounted to harassment[7]. Bullying usually implies some element of abuse of authority or power. Ms Versi was senior to the claimant. That is not to condone the behaviour. Nor is it to say that a manager could never find themselves in a situation of being bullied by someone who reports to them. One of the allegations was that the claimant had stared at Ms Versi and clenched his fists at monthly meetings, an action which could be intimidating and undermining both physically and mentally. However, this allegation was found unsubstantiated. In any assessment of the business case for redeployment, the findings themselves would have been the starting point to evaluate risks.

[7] Ms West's finding appears to have been adopted and adapted from the executive summary of Ms O'Donoghue, in a document which had been redacted until the Tribunal ordered it to be produced in its original form. He had suggested the cumulative effect of the behaviours could be seen as harassment, which he defined as creating an intimidating, hostile degrading, humiliating or offensive environment and could also be seen as bullying, a term he did not define.

119. The mobility policy required at least one meeting with the claimant to discuss the proposed redeployment, to explain the business case, hear his objections and consider any relevant personal circumstances. The first of such meetings necessitated an understanding by the manager of the business case for the move. It required consideration of what options had been addressed to avoid a compulsory transfer and why they had been discounted. That was so they could be explained to the employee at the meeting. There was no such meeting.

120. Assessing the business need would mean asking Ms Versi, in April 2021, whether she objected to a return of the claimant to the Humber. It would mean understanding any concerns and considering in what ways they might be addressed. Ms Shah said she did not know if anyone had asked that question. It could not be taken as a given that Ms Versi's view would have been the same as in November 2018. Since that time there had been significant staff movements such that a number of her direct reports with whom there had troublesome disagreements had moved on. She had been in post by then for 3 years. She would have gained confidence in the role. She would have become accustomed to the different legislation and working practices, in contrast to her earlier period in post, having moved from the Immigration Department. In summary she had new direct line reports and a period of settling in such that any anxieties about the claimant may have been very different. Moreover, the claimant remained on a final written warning. She and the claimant would have known that any future misconduct would likely lead to his dismissal. She was in a position of authority over him. All these matters were material to reaching a decision on business need and evaluating how the respondent could and should discharge its duty of care to protect its employees.

121. The working practices would need to be considered. I was told the claimant and Ms Versi met about once per month. I was told although the Director countersigned decisions they did not prevail if she disagreed with the operational judgment. She was not the claimant's direct line manager, but the manager of his. A consideration of alternative arrangements, such as had been considered in the first stage of the step plan would need to be addressed before being discounted if unsuitable or unworkable. In his years at the Humber command, it had become the highest performing area. I am not satisfied any of the above factors were considered.

122. If, having considered all of the above, a strong business need was established, it required balancing against the claimant's circumstances. I recognise he was fit and able to return and I reject the submission that there had been a failure to consider adjustments or factor in his health issues upon his return, first raised in his written submissions. But he did have family commitments and considerations and, even if his work could be undertaken remotely, permanent move away from his workplace near home was significant. However, all of this is secondary to the establishment of a strong business need in the first place.

123. In the light of the failure of anyone to address the material factors in the policy at the time of the instruction, I find the respondent had not established there was a business need for the move, let alone a strong one. The consideration of the mobility policy by Ms Bentley in her investigation report was based upon Ms Shah's understanding of

what others had decided and observations the claimant had made about the working relationship. She had completed her report before the clarification of the rationale in her telephone discussion. It had the hallmark of what could have justified a business need rather than what did. The decision maker who was required to apply the mobility guidance in the Spring of 2021 had never been asked.

124. For these reasons I do not regard the instruction as lawful and reasonable. Even if I were wrong about my construction of the contract with respect to the relevance of the policy on mobility such that the instruction was lawful, I would nevertheless have regarded the instruction as unreasonable. It was not reasonable to give that instruction without addressing the relevant considerations within the respondent's mobility policy. It is no answer to say, as the respondent contended, that it was only guidance. If one applies the policy retrospectively there remain far too many unanswered questions to form a view that a move was required.

125. It follows that I do not regard the claimant's absence which was unauthorised by his manager as amounting to gross misconduct. He was willing to attend the place of work stipulated in his contract and the instruction for him to report elsewhere was not a reasonable one. His dismissal without notice, in the absence of gross misconduct, was in breach of contract. The respondent shall pay damages for the contractual breach, being his notice entitlement.

Unfair dismissal

126. I am satisfied that both Mrs Sutton and Ms Rouse held a genuine belief that the claimant was culpable of an act of gross misconduct in the form of his unauthorised absence from work for having refused to comply with Ms Shah's written instructions. I agree with Mr Tinnion that in his written submission the claimant conflated the decision makers' genuine belief with reasonable belief.

127. On the face of it, this was a straightforward case. An employee had been found to have bullied another for which he had been given a final written warning, redeployed to protect the other to a suitable alternative role, but the employee had refused the instructions to attend his new workplace. The contract included a mobility clause. In his interviews the claimant accepted that there had been significant difficulties with their relationship and accused the complainant of lying and being part of a wider conspiracy to remove him. Having heard from both decision-makers, I was satisfied those circumstances led them to the belief that the claimant was guilty of gross misconduct.

128. In respect of the investigation into the alleged misconduct, I have regard to the process from beginning to end. The claimant complains of the terms of reference and the fact the fact they were initially drafted by Ms Shah, contrary to the written disciplinary policy. This did not affect the reasonableness of the dismissal. The terms of reference were approved by Mrs Sutton. There were sufficiently focused on the alleged act of misconduct and would not have restricted Ms Bentley, Mrs Sutton or Ms Rouse from considering any lead or trail of enquiry which was pertinent.

129. The difficulty, as I see it, is that Mrs Sutton accepted a rationale for the business need to transfer the claimant which had been communicated from the note of a telephone conversation between Ms Bentley and Ms Shah. She felt able to rely on the reason for the move from that record and the adjustments Ms Shah made to it after the disciplinary hearing.

The claimant complained to her that Mrs Bentley had relied upon a hearsay account. Although he had not asked Ms Bentley to speak to any other witnesses, having seen her investigation report he asked to Mrs Sutton do so. She did not regard that as necessary. The lawfulness and reasonableness of the decision had been placed squarely in issue by the claimant but neither Ms Bentley nor Mrs Sutton ever spoke to the person who made the decision.

130. Ms Griffith had advised Ms Bentley to seek further details of the rationale for the move from Ms Shah, which had led to the telephone discussion. This was an important aspect to the inquiry. Ms Bentley rightly stated in her report that it would require the instruction to have been a reasonable one for its refusal to amount to gross misconduct.

131. The explanations Ms Shah gave, which were principally about the protection of Ms Versi and otherwise for the benefit of senior managers to act harmoniously, were logical. It is perhaps not surprising that they were accepted as sound. But they were a rationalisation for a decision she had not made. Nor had she been told by the decision maker, Mr Bean, what the reason for the decision was. He had bluntly instructed her that no mediation meant no return to the Humber.

132. Had the claimant not repeatedly challenged the decision to move him as being unreasonable and unlawful at the investigative interview and disciplinary meetings and asked who had made it, I would have regarded acceptance of Ms Shah's reported remarks as sufficient to fall within a reasonable scope; that is what could reasonably be expected of a reasonable employer in this type of disciplinary enquiry. But the claimant repeatedly challenged the decision and asked Mrs Sutton to speak to the decision makers, or who it had been believed were the decision makers, Ms Moore and Mr Bean. The claimant had established in questions of Ms Griffith that the disciplinary letter of Ms West had not required, or even recommended, his redeployment. Ms Griffith had confirmed that mediation was only a consideration.

133. By then Ms Moore had moved to another part of the civil service, but I was not told she had become unavailable. Mr Bean was still with the respondent. His name had been included as a potential witness in the initial terms of reference.

134. Mrs Sutton chose not to speak to Mr Bean or Ms Moore, or require Ms Bentley to reopen her investigation to do so. Instead, Mrs Sutton drew upon information from the hearing which supported the logic of the redeployment. It was a rationalisation of the decision. She placed reliance on what the claimant had said about the working relationship. In the outcome letter Mrs Sutton wrote, "the decision to move you permanently to an alternative Grade 7, Asst Dir role was made by the Chief Operating supported by advice from HR Business Partner Nick Bean following a disciplinary investigation [which] concluded that you had subject counter signing manager, Liz Versi, to bullying which has had a detrimental impact on Ms Versi. You confirmed during our meeting that because of this you and Ms Versi no longer have a working relationship. Attempts to repair the relationship by voluntary mediation had proved unsuccessful with both you and Ms Versi opting at various stages not to engage in this process. Considering this the Department has a duty of care to ensure that neither you or Ms Versi are placed in a situation that would enable a further deterioration of your working relationship and must consider the wider business impacts of allowing you to consider to work together in such close proximity".

135. In fact, the claimant's observations about the working relationship, when asked to describe its current state, were that there was no relationship as they had had no contact for approximate three years. He added that when there were issues he had performed perfectly well

over 12 months and that his direct line manager had managed the issues between them. He had said he was professional and would not disrupt work or show disrespect for peers or superiors. I agree with the submission of the claimant, that his observations cannot fairly be reduced to stating there was no working relationship. His comments stated more than that and he sought to reassure Mrs Sutton that he would act professionally. It was not reasonable of Mrs Sutton to construe the claimant's remarks in the limited way she had. Moreover that deflected from the need to ascertain the decision maker's reasons for the move; that is, on my finding, Mr Bean.

136. Mrs Sutton alluded to the mobility policy in her outcome letter. In order to be satisfied that the mobility policy had been properly addressed, or at least the principles within it applied, a reasonable investigation would have explored that with the decision maker. Mrs Sutton should have spoken to Mr Bean and, if still available, Ms Moore. It seems likely the mobility policy had not been considered at all, as there had been no meetings with the claimant to discuss it. Mrs Sutton would have discovered that. She would have learnt that the views of Ms Versi about a return of the claimant had not been sought in the Spring of 2021 and quite possibly not at all since the final written warning had been issued. The extent to which Ms Versi needed protection, or felt she did, in the light of the findings should not have been assumed. Questions posed to Mr Bean would have addressed how, when and why the decision became a binary one, namely mediation or redeployment. This was not the decision which had been made and conveyed to the claimant in September 2020.

137. A reasonable investigation would have included consideration of the disciplinary letter of Ms West. That is because it was said the decision to move the claimant followed that disciplinary process. Mrs Sutton did not look at it. It would have informed Mrs Sutton about the nature of the findings. She would have recognised that none of them suggested the claimant's professionalism in discharging his primary responsibilities and duties had been compromised; that was a factor to be weighed alongside his assurances about the working relationship. In the hearing, the evidence and arguments developed to suggest sensitive national security decisions mandated levels of trust which might be jeopardised by the relationship. There is no evidence that was in the minds of anyone, Ms Moore, Mr Bean, Ms Shah nor Mrs Sutton in her evaluation of how the Department had to discharge the duty of care.

138. For these reasons I regard the investigation as falling below that I would have expected of a reasonable employer. The respondent's disciplinary policy defines the role of the investigating officer as one of establishing facts and gathering evidence which is fair to all parties, including evidence that supports as well as contradicts a the allegation raised. Although that relates to the investigative officer's role, it does not follow that the same principles of fairness do not carry forward to the decision and appeal managers. That is the principle established in the authorities such as Salford Royal Infirmary NHS Foundation Trust v Roldan [2010] ICR 1457 and referred to at paragraph 64 above. Those avenues of enquiry were not explored. The investigation fell outside that which a reasonable employer would have undertaken.

139. In the absence of important material that such enquiry would have revealed, the decision that the claimant was culpable of gross misconduct was not a reasonable one. The appeal did not cure these errors.

140. Having regard to all the circumstances of the case, including the size and administrative resources of the respondent, dismissal for the alleged misconduct due to unauthorised absence,

was not reasonable. Nor was it in accordance with equity and the substantial merits of the case. I find the dismissal was unfair.

141. I have not found it necessary to rule on all of the arguments the claimant has raised as to why the dismissal was unfair. I found a number were very technical, such as departures from the letter of the disciplinary policy which were of no real consequence.

142. It was unadvisable for Ms Griffith to have had continuing involvement in supporting many of the managers in the sequential decisions which were made such as Ms West, Ms Shah, Ms Bentley and Ms Sutton. Like lawyers, human resources advisors advise and do not make the decisions, so the imperative of independence is not as strictly applicable to advisors. Nevertheless, if the same advisor is used, it necessitates additional scrutiny by the decision maker to safeguard the integrity of the process. They do not have the benefit of an advisor with a fresh pair of eyes and the advisor may feel defensive and need to justify earlier decisions founded on their advice.

Polkey

143. I am asked to find that the claimant would or might have been dismissed in any event, regardless of any deficiencies in the investigation, such that compensation should be adjusted proportionately.

144. Mr Tinnion draws upon statements made by the claimant in his grievance and the subsequent disciplinary proceedings that he regarded Ms Versi as a bully and their relationship had irretrievably broken down. He also drew attention to the manner in which the claimant gave evidence, frequently not answering a question directly, even when it was repeated.

145. In respect of his evidence, the claimant had attempted to argue his case when giving evidence rather than directly answer the question. That was regrettable but is an approach witnesses sometimes take. He has been deeply affected by how he has been treated. At points in his evidence he became upset and had to pause.

146. The claimant has deep-rooted beliefs about how matters were handled and he has expressed them many times to various managers who have handled the case since the first grievance was made. He feels supported by colleagues such as Mr McAllister and others who shared and expressed their own concerns about Ms Versi. His choice of language manifests intensity of feelings, such as his grounds of appeal in which he says he called out Ms Versi for the nasty, divisive bully she is. The respondent says that whatever errors had been made, a return to Humber would have been inconceivable as the trust between the claimant and Ms Versi had been shattered.

147. For me to reach a decision about what might have happened had the mobility policy been properly applied, informed by the up to date views of Ms Versi and discussed with the claimant, is highly speculative. I have no idea what material the additional enquiries would have identified in respect of a serious business need, to which I refer above.

148. Moreover, that would have had to be a new disciplinary hearing for a new instruction which the claimant refused some weeks or months down the line. That is because the claimant would not have been dismissed on 27 September 2021 by Mrs Sutton. A reasonable enquiry would have revealed to her that the instruction was not a reasonable one because the principles within the mobility policy had never been considered. She would have been obliged to

conclude he had not been guilty of gross misconduct. I am not satisfied that a reasonable employer might have dismissed the claimant had the investigation been reasonable.

149. I have not explored in any detail the issue of the final written warning which the claimant said had been issued in bad faith. Mrs Sutton did refer to it in her outcome letter, but only as an additional reason which would have supported the decision summarily to dismiss the claimant. In the absence of misconduct, there would have been no dismissal. I recognise the difficulty for managers of the respondent who are invited to reopen disciplinary proceedings of this type which have been conducted by independent decision-makers and appeal officers and the written policies exhausted.

150. It remains open to the parties to address how long the claimant would or might have remained in his employment under general principles relating to compensation and evaluation of loss.

Conduct

151. I am not satisfied that it is just and equitable to take into account conduct of the claimant before the dismissal, for the purpose of adjustment of the basic award, or conduct of the claimant which caused or contributed to the dismissal, in respect of the compensatory award.

152. I accept that the claimant expressed himself in forthright terms about his treatment and the motivation of others unfairly to treat him. Nevertheless, I do not consider that should be reflected in a reduction in any compensation which may be awarded. The claimant's questions about who had made the decision to move him, why and when were never answered and this was not his fault. This contributed to his sense of stress and frustration.

153. It is true that his objections to the earlier redeployments which were to be temporary, in March 2019 and September 2020, were not justifiable, in the sense that I have found they were managerial actions the respondent could have taken under their policies. That was not why the claimant was dismissed nor directly connected to it. It is too remote to justify a reduction in either award.

Remedy

154. In his claim form the claimant seeks compensation and not reinstatement or re-engagement. He must write to the Tribunal to confirm that remains the case.

155. I assume all relevant evidence has been disclosed and the case can be listed for a remedy hearing for 1 day. If not, an application would be required for further evidence to be admitted in respect of remedy with proposed directions.

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Employment Judge D N Jones

Date: 7 February 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

7 February 2023

FOR THE TRIBUNAL OFFICE