EMPLOYMENT TRIBUNALS
(England and Wales)
Watford

Claimant: Ms R Pasha

Respondent: Home Office

Heard by CVP on 29 and 30 June 2023

Before: Employment Judge J S Burns

Representation
Claimant: Mr Imitiaz Aziz (Friend)
Respondent: Mr T Kirk (Counsel)

JUDGMENT

The claim of unfair dismissal fails and is dismissed.

REASONS

1. On 5 June 2022 the Claimant presented her claim for unfair dismissal.

2. I heard evidence from the Respondent's witnesses Mr S Miah, (Investigation Manager) Mr M Wilkinson (Disciplinary Decision Manager) and Ms J Shoker (Appeal Decision Maker) and then from the Claimant and her witness Mr J Mangrola (a Chief Immigration Officer).

3. During the tribunal hearing the Claimant was distressed and vague when giving her evidence and made comments about both the primary facts and the disciplinary proceedings such as "*I cant recall…it is like I am trying to remember a dream…my memory is cloudy".*

4. It is clear from a psychiatrist's letter dated 11/3/22 that the Claimant was suffering similar memory problems when she went through the disciplinary process in March and April 2022, a matter which it is relevant to bear in mind when reading the records of those proceedings. In her witness statement for the final Tribunal hearing she wrote "*Since my suspension on 1 March 2021, my mental health has suffered and my ability to think clearly and recall events*

has been impaired… I have therefore relied on (Mr Aziz's) understanding and knowledge when writing my statement."

5. During her oral evidence I thought the Claimant was trying to give accurate answers but that she was not a reliable witness about disputed past events, as a consequence of her significant memory problems.

6. The documents were in a bundle of 734 pages and in additional small bundle served late by the Respondent from which I admitted into evidence by consent pages 735, 737 and 744 to the end but not otherwise. I refused the Respondent's application to admit the other pages because there was no good reason for the lateness of their disclosure and admitting them would have unfairly prejudiced the Claimant and disrupted the trial. I also considered an agreed cast list and chronology.

Findings of Fact

7. The Claimant was employed by the Respondent from 15 July 1991 and had been working as an Immigration Enforcement Officer for many years until 17 February 2022 when she was dismissed on the grounds of misconduct. Until the misconduct for which she was dismissed she had a clean disciplinary record, and appears to have been a hard-working and successful employee who had won awards and appreciations for her work, was regarded as honest and held in high-regard by her colleagues.

8. Part of the Claimant's role as an Immigration Enforcement Officer included carrying out checks using the UK Visa Central Reference System (CRS).

9. At all material times when accessing CRS the Claimant would have had to acknowledge that she had read and understood the CRS standard Operating Procedure (SOP) the relevant part of which is as follows: "*The use of CRS data must not breach the requirements of the Data Protection Act 1998 and confidentiality must be maintained at all times. The Computer Misuse Act 1990 makes unauthorised access to a computer system and information unlawful. This includes accessing CRS information for any purpose which: is outside the scope of employment; would breach the employer's duty of confidentiality; would involve accessing CRS outside agreed working hours. The data will be used strictly for genuine internal business purposes and will not be used for any personal convenience."*

10. The Civil Service Code requires all public servants to act with honesty and integrity but does not contain any specific guidance about use of CRS.

11. It has always been regarded as contrary to the Respondent's policies and to the Civil Service Code for the Respondent's employees to abuse CRS by looking up information about friends, family or others known by the employee personally or for other non-work reasons.

12. Mr Mangrola, a Chief Immigration Officer and an employee of the Respondent for 26 years, who was called by the Claimant as a witness, confirmed under cross-examination that *"if his job was to use CRS to look up offenders he would not ask a member of the offender's family to do the looking up, and he wouldn't ask another officer to look up his own family or relatives for him"*

13. However, prior to June 2013, this type of activity was not specifically and separately identified as computer abuse or as misconduct in a separate policy.

14. Between 2006 and 2012 the Claimant undertook numerous look-ups on CRS of her relatives including her brother, her nephew and her brother-in-law and an old school friend who was a custom official in Pakistan ("Aktar"). Several of these look-ups were for persons sponsored by her for purposes of immigration into the UK or personal contacts of hers who had made immigration or visa applications. Relevant dates of the look-ups included 25 June 2006, 5 June 2008, 20 October 2008, between 22 March 2010 and 15 September 2010, 30 October 2011, and 15 June 2012. These were all an abuse of CRS but were not detected at the time.

15. In 2010 the Claimant exchanged emails with Aktar sending him the Respondent's business information at his Yahoo email account, which was a breach of the requirement at that time that Respondent emails should not be sent to insecure email addresses.

16. On 6/6/2013, the Respondent introduced a new strict prohibition against computer use for personal look-ups. The Director Generals of UKVI, IE and OST issued a statement to colleagues stating the following: "*The information we access on a daily basis is often highly sensitive personal data and every one of us has a legal obligation to protect this data. It is potentially a criminal offence under the Data Protection Act 1998 and the Computer Misuse Act 1990 to access a record without a genuine business need. We expect everyone in the Home Office to act with the highest integrity and only access a record where there is a legitimate business need to do so. A zero tolerance policy on misuse of Home Office IT systems comes into effect from 10 June 2013. For instance, looking up the case records of high-profile figures in the media - for instance professional footballers or entertainers - is not acceptable unless you have specifically been asked to administer that case. Nor is it acceptable to look up other information on our IT systems purely out of personal interest such as looking up your own surname or postcode. Inappropriately looking up information is considered gross misconduct. Robust action, including dismissal and in more serious cases prosecution will be taken against those who are found to have accessed records without a*

legitimate business need. We urge you to familiarise yourselves with the 10 golden rules for handling personal data on Horizon. Remember, it is need to know, not nice to know."

17. This message was posted on an intranet notice board called Horizon at the time of issuing. It was also sent out the same day (6/6/2013) to group email addresses. Mr D Wood, then Interim Director General of Immigration Enforcement, sent such an email to all immigration enforcement staff, of which the Claimant was one. The Claimant in her oral evidence to the Tribunal accepted that it was likely that she had received the email but said she did not remember having done so or having read it if she did.

18. In March 2014 the Respondent published amended HR Policy and Guidance called "Discipline: How to Guidance" which includes the following:

> *"Gross misconduct: Zero tolerance*
>
> *A policy of zero tolerance is operated in respect of intentional/deliberate breaches of the operating instructions governing access to the department's IT systems or data bases e.g. PASS/AMS, CID or CRS. Accessing records without a legitimate business need is a breach of the Data Protection Act and is not tolerated. Misuse includes seeking information the employee is not entitled to, misusing information or entering or changing official data not for official purposes. Unauthorised access is a gross misconduct offence and may also result in criminal prosecution. The sanction for proven breaches is summary dismissal, i.e. immediate dismissal without notice.*
>
> *What is meant by mitigating factors*
>
> *The DM should decide whether the case has been proven or not before taking mitigation into account.*
>
> *Consideration of mitigating factors is of vital importance, particularly in cases where dismissal is a potential outcome. Mitigating factors may be put forward by the employee, with supporting evidence, if available, at any stage. Such factors should always be considered before deciding the penalty. Examples may include (this list is not exhaustive): capability; cases of ill-health or conduct due to medication and there is likely to be a relationship between the nature of the illness and the conduct that was inappropriate; issues related to disability, for example where the condition can influence behaviour; provocation; exceptional pressures upon the employee; serious personal trauma; the employee appears to have been acting out of character, particularly where they have a previously unblemished record; the employee may have volunteered information about the misconduct and gives an explanation prior to any discipline action being started; actions taken by the employee to mitigate the impact of the allegations against them, for example, removing offending postings from social media sites;*
>
> *Mitigation is not simply about one of the above existing but for it to have had a material impact on the behaviour. For example, if someone has suffered bereavement, there may be a relationship between that and, for example, aggressive behaviour which may indicate the pressure they were under."*

19. On 25 June, 20 July and 11 August 2013 the Claimant used CRS to undertake numerous lookups of the Claimant's in-laws, related to her second husband.

20. At the time the Claimant carried out these 2013 look-ups she was suffering from a difficult home life and was estranged from her second husband (whom she says was physically assaulting her) and his relatives (whom she says were deriding and belittling her). This caused her considerable domestic stress, low mood, loneliness and a need for counselling. Objective evidence of this unfortunate situation is provided in a GP letter dated 27/1/22 from Dr Daly who has known the Claimant since 2002 onwards. However according to a letter from a consultant psychiatrist dated 11/3/22) during this time (ie 2013) she was "*otherwise functioning well both at home and at work - there have so far been no concerns around that time regarding her mental health"* .

21. On 11/9/2015 the Claimant carried out a CRS sponsor search on the relatives of Kuljit Jeetla who was a more junior work colleague (Administrative Officer) of the Claimant's at West London ICE. The relatives had been sponsored by Jeetla or her household for purposes of immigration into the UK and Jeetla had approached the Claimant with a list of names asking for the searches to be carried out.

22. In 2017 the Claimant looked up or attempted to look up at least two of the same relatives (Gurmeet Singh and also Balbir Kaur) "*using a wildcard name search but was unable to access the records intended, reverting to another sponsor search*".

23. On 2/8/2017 the Claimant sent an email to IEI.Sheffield (an enforcement department) copied to one of her managers Mr Paul Smith (an Immigration Inspector). The email reported Gurmeet Singh (the father of the daughter-in-law of law of Jeetla) as being on his way to the UK on a visitor's visa with the intention of possibly working in a Sikh temple.

24. On 3/8/2017 the Claimant entered notes of an allegation of illegal working onto the CRS records of Gurmeet Singh and Balbir Kaur (another relative of Jeetla).

25. In late 2020 all these lookups were detected. An audit was carried out by a criminal investigator Mr M Newbould between 9/3/20 until "around 28/7/20". Mr Newbould signed off and delivered his audit report on 15/12/20. It dealt with all the look-ups but not in a chronological order and in a confusing and jumbled manner. While the report in its conclusion stated "*Of those instances highlighted in this report, PASHA has made 6 searches and viewed 20 records after the message from the Director Generals of UKVI, IE and OSCT on Zero Tolerance of Home Office IT systems misuse from 10 June 2013.*" , the audit did not set these out in a separate section or highlight clearly which ones they were.

26. On 1/3/21 the Claimant was suspended from work and Mr Wilkinson was appointed as decision manager on the Claimant's case.

27. On 2/3/21 Mr Wilkinson notified the Claimant of a disciplinary investigation as follows: *"I have received details of an allegation concerning misconduct relating to a breach of the policy relating to the access of personal data through Home Office IT systems without a legitimate business reason. These breaches are alleged to have taken place between 25 June 2006 and 3rd August 2017. It should be noted that the message from the Director General of UKVI, IE and OST advising of zero tolerance of misuse of Home Office IT systems was issued in June 2013, of these alleged breaches 6 searches and a total of 20 records were viewed that will fall to that zero tolerance period."*

28. The Respondent's Discipline Policy and Procedure 13/10/2020 contains the following concerning Formal investigations: "*The Decision Manager (DM) should …draft Terms of Reference (ToR). The ToR should be clear about what the investigation is required to examine but may be reviewed and amended, as appropriate, through the investigation process. The ToR may need to be updated. The roles of DM and Investigation Manager (IM) must be undertaken by different managers. …. The role of the IM is to establish facts and gather relevant evidence including witness statements. The investigation needs to be conducted in a timely fashion and the DM should ensure that the IM has capacity to complete the investigation and avoiding key work deadlines and annual leave. …The DM will decide whether to instigate the disciplinary procedure and will inform the employee of the investigation, including details of the allegations, the likely penalty if misconduct is proven, ..*

29. A section of the same policy entitled *Investigation Reports* reads as follows: … "*It is important to remember that the investigation report is a formal document and may be used at an Employment Tribunal as evidence. The report should be comprehensive, accurate and be an objective and fair assessment. The report should include all evidence that is relevant to the allegations. The IM should not reach conclusions on whether it is proven or whether a penalty should be imposed - this is the role of the DM. The DM should check the report is reasonable and be satisfied that it meets the required scope of the investigation. If further information is required, the DM should commission the IM in writing to gather the further information as specified, for example, additional statements.*'

30. On 8/3/21 Mr Wilkinson as DM appointed Mr S Miah as IM to investigate the Claimant's conduct as revealed by the Newbould audit. His instructions were as follows (page 412) *"Following a review of CRS activity the named officer has been identified as having a number of CRS checks which appear to breach our policy around inappropriate look up of personal information. I would like you to look at incidents that occur between June 2013 and the present date. …Is there a case to answer*…." (emphasis added)

31. Mr Miah sent the Claimant a letter dated 29/3/21 inviting her to an investigatory interview on 8/4/21. He told the Claimant the following about the subject matter of the investigation: "*In the interview I will consider the allegations that you have inappropriately misused Home Office IT systems and breached Home Office IT Policy when you had several CRS checks around inappropriate look up of personal information between June 2013 until present." (*emphasis added).

32. From March 21 onwards and until the dismissal of her internal appeal the Claimant was represented and assisted by a TU rep Mr S Taylor.

33. The Claimant's mental health deteriorated and she was signed off sick with stress on 1 April 2021 and this and periods of annual leave and diary clashes prevented the investigatory interview going ahead.

34. Eventually, having taken HR advice, Mr Miah on 23/7/21 sent Mr Taylor written questions for the Claimant to answer. Instead of being restricted to the period 2013 onwards, many of these questions related to the period 2006-2012.

35. On 30 July 2021 the Claimant provided her reply to Mr Miah's questions.

36. The first two questions and answers were as follows: 1) Have you read and understood the CRS SOPs? *I have to admit, that at times, I continued to accept it without reading it, because of time constraints, as I had to conduct checks for my team whilst on visits*. 2) Have you accepted the SOPs when logging on to CRS? *Yes.*

37. Her answers, about the breaches which subsequently were given as the reasons for her dismissal, were as follows:

38. In relation to the email communications with Aktar in 2010 she stated: "*To inform his counterparts with NCA and authorities at Felixstowe and Pakistan… It is unthinkable for me to do such a thing without telling my seniors. Also, with such a long passage of time, I am unable to recall the name of manager. However, I have had mentioned him to a couple of my managers and colleagues."*

39. In relation to the 2013 look-ups of her second husband's in-laws she stated *" I wanted to make an allegation against them because they were coming in on holiday and in fact were selling goods; almost certainly houses and flats too. Also, Shoaib came once for a job interview. So, I wrote anonymously to the Home Office telling them what they were doing.*'
40. In relation to the 2015 and 2017 look-ups of the relatives of Kuljit Jeetla, the following exchange took place (C's answers given in italics) : "Were you doing searches on CRS on behalf of Kuljit Jeetla? *No. She gave me a piece of paper with names written on it and asked me to search for them.* Do you know/remember the reason as to why Kuljit Jeetla asked you to conduct searches on Gurmit and Balbir? *To make a complaint I believe*. Was there a business need for the checks, and if so why? *Yes, to take enforcement action because lots of them were illegal entrants and overstayers.* What was the intention to look up these records? *To get the required information and update the systems accordingly. It was authorised verbally by HMI Paul Smith, to proceed with the searches and to take action."*

41. In August 21 the Claimant was hospitalised because she had caught Covid-19 but she was discharged from hospital by the end of that month.

42. During the period of several months thereafter Mr Wilkinson sent regular extension-of-suspension-communications to the Claimant, but nothing was done by Mr Miah to progress the investigation until he was prompted to do so by Mr Wilkinson on 7/12/21. Mr Miah then contacted Mr Taylor asking if Mr Miah could send the Claimant more questions.

43. Mr Taylor complained to Mr Wilkinson on 13/12/21 about the delay in the investigation. Mr Wilkinson apologised the same day and on 14/12/21 Mr Miah then sent his second batch of questions for the Claimant to answer, giving her one week to answer them.

44. Her answers were slightly delayed until 31/12/21. One of the questions and answers was as follows: "Are you aware of the Director General of UKVI, IE and OST message of a 'zero tolerance policy of inappropriate look ups'?" "*I am aware not to look but not the 'zero tolerance policy'. But I am told by my union rep that the zero tolerance policy has not existed since 2019, so the idea is apparently obsolete."*

45. Mr Miah concluded his investigation and produced his report on 13/1/22.

46. The report opens by stating that the allegations are as follows: *"(1) Misused the Home Office Central Reference System (CRS) database by accessing records without any business reason, and in doing so breached the Data Protection Act 1998 and the Home Office Zero Tolerance Policy of 10th June 2013. (2) If in doing so, were Rukhsana Pasha's actions in*

breach of the Civil Service Code values of integrity and honesty. (3) Misused the Home Office CRS database after 10th June 2013 when a zero-tolerance policy on the misuse of Home Office IT systems came into effect. "

47. It is unclear from this whether the allegations do or do not include alleged breaches before 10/6/13. This uncertainty then continues in the body of the report which discusses all the instances of personal look-ups from 2006 onwards, presenting them in a jumbled and unchronological order, very much following the pattern of presentation in the audit, and not focussing on the post 10/6/2013 look-ups, to which the investigation was supposed to be restricted.

48. In the conclusion of his report Mr Miah found there was a case to answer in relation to all the allegations, and in justifying his conclusions in relation to allegations (1) and (2) made detailed reference to numerous pre-10 June 2013 look-ups, thus showing that he had mis-understood his instructions so as to include investigating and making findings about these earlier alleged breaches.

49. Insofar as the post-10/6/2013 matters were concerned, Mr Miah decided that there was a case to answer in relation to the 2013 look-ups. He did not refer to the 2015 look-ups at all, and insofar as the 2017 look ups were concerned he wrote the following "*she (Jeetla) had given Rukhsana Pasha a piece of paper with names written on it to conduct checks, and the reason for this was to write a complaint. Rukhsana Pasha also claimed to have received verbal authorisation from HM Inspector Paul Smith to update the systems accordingly. Upon further examination of the CRS Record VAF4379290 and VAF2694481, it appears there was a legitimate business reason to do the check. A note placed on CRS describes the reason for the check, therefore this check on the 03 August 2017 has not been considered as part of my conclusion."*

50. In other words, Mr Miah did not think there was a case to answer in relation to the 2017 look-ups. As the 2017 look-ups had the same subject matter as the 2015 look-ups and Mr Miah did not comment on the 2015 look-ups separately, it is a reasonable inference that Mr Miah did not think that the 2015 look-ups gave rise to a case to answer either. He appears to have accepted the Claimant's explanation that she had carried out these look-ups for a business purpose and with the authorisation of her manager HM Inspector Mr Paul Smith. However Mr Miah had not spoken to Mr Smith about this.

51. On a fair reading of Mr Miah's report, the only matters within the ambit of Mr Wilkinson's instructions to Mr Miah ("*I would like you to look at incidents that occur between June 2013 and the present date"*) which Mr Miah, following his investigation, concluded gave rise a "case to answer", were the 2013 look-ups.

52. The report was sent in a redacted form to the Claimant and by arrangement Mr Taylor had access to an unredacted version.
53. On 13/1/22 Mr Wilkinson sent a letter to the Claimant inviting her to a disciplinary hearing.." *in respect of your conduct, as set out in the letter dated 2/3/21".*

54. Mr Wilkinson contacted Mr Smith on 24/1/22 asking him a series of questions which Mr Smith answered (shown in italics) as follows: Did you authorise KuljIt JEETLA to Instruct Rukhsana PASHA , or did you authorise RP to undertake checks on behalf of KJ, on CRS on 11.09.15 for any purpose in relation to an allegation, investigation or complaint pertaining to any member of Jeetlas family? *No. I do not recall authorising these checks or instructing RP to conduct these checks.* Did you authorise KJ or RP to undertake any search on CRS on 03.08.17 to conduct checks on family members of KJ in response to any complaint, investigation or Visa issue? *No. I do not recall authorising this* Have you authorised any staff member to undertake checks on Gurmeet Singh or Balbir Kaur in 2017? *No. I do not recall ever authorising this* Were you approached by either staff member with a list for you to authorise verbally or any other way to agree to any of these actions as described above. *No. I do not recall being approached by either member of staff to agree the actions listed above.*

55. Mr Smith sent these answers to Mr Wilkinson in a covering email of 24/1/22 which states. "*I do not recall authorising or requesting CRS checks in relation to this matter from either party. However, I have reviewed my emails from the periods you have listed and attach the 1 relevant email I could find. As you will see, Rukhsana was in touch with IEI Sheffield re Gurmeet Singh. I was copied into the email which would suggest we discussed the case but I'm unable to recall any conversation that we might have had. What I am clear about is the fact there must be a business justification for any use of CRS and that I would not have authorised a member of staff to conduct searches on someone who they, or a colleague, had sponsored. Instead I would have advised them to contact a team which deals with the issuing of visas and raise their concerns through the appropriate channels. I suspect that this is why Rukhsana contacted the IEI Sheffield team but cannot be certain of that."*

56. Mr Wilkinson copied this material from Mr Smith to the Claimant and her representative on 26/1/22.

57. The disciplinary hearing took place on 4 February 2022 by Teams (video) and was chaired by Mr Wilkinson. The Claimant was accompanied by Mr Taylor.

58. Shortly after the questioning started there was a confused exchange about the "zero tolerance policy" but then Mr Wilkinson asked the Claimant *"you confirmed that you had read and understood the policy on IT security and were aware of the message relating to zero tolerance or no tolerance to inappropriate look-ups?*" To which the Claimant replied *"yes".*

59. Especially in the light of the confused answer which the Claimant had given about this on 31/12/21, Mr Wilkinson's questions about this should have been more clearly and carefully phrased as "*did you receive the zero-tolerance message dated 6/6/13 on that day and did you read it before 25/6/13 (the date of the first post 6/6/13 look up)?"*

60. However, the Claimant and Mr Taylor during the remainder of the disciplinary hearing and subsequent appeal did not contend that the Claimant had not or may not have received or known about the 6/6/13 message before she made the improper post- 6/6/13 look-ups, and the first time this was suggested was in the Claimant's witness statement dated 20/6/23.[1]

61. Mr Wilkinson questioned the Claimant in detail about all the matters for which she was subsequently dismissed, and he also discussed with her in detail Mr Smith's evidence about the 2015/2017 look-ups.

62. There was also a reference to the Claimant's mitigation as recorded in the following from the hearing notes: *MW acknowledges all the mitigation put forward and invites if there is anything else that she would like to add. MW states that she called him and outlined some additional mitigation which appear to have been covered in what has been submitted but was there anything else? ST: All this from a print out from security giving details searches – pages are linked to each search, so you don't have a proper understanding of the record, she's been completely co-operative and thought she was assisting in stopping corruption – there is extensive mitigation, everything was done with intent to ensure our borders were safe. There is a cultural issue – the shame of her family and issues with her mental health.*

63. After the disciplinary meeting, but before issuing his decision, Mr Wilkinson made further enquiries which he subsequently described as follows in a message to Ms Shoker: "*I also spoke with Chris Edwards the AD for West London on the 04/02/22 to clarify if he had ever authorised any operational activity or research relating to those named in the checks, to double check if there could have been any authorities given. He confirmed that no such activity had been authorised by him and he had not commissioned anyone to undertake such research. Chris has been the AD on that team since November 2015 but prior to that was the*

[1] in which it was written: "*During the disciplinary process I made was aware of the contents of the note that was posted on Horizon on 6 June 2013… I do not believe that at the time of 2013 lookups I was aware of the 6 June 2013 Horizon posting.'* Under cross-examination at the tribunal hearing when taken to the global email dated 6/6/13 containing the zero-tolerance message (page 735) the Claimant's answer was*.."I probably did receive it. I did receive it. Obviously I would have received it but I don't know whether I read it."*

HMI in that team so was well sighted on what had been authorised to research or investigate particularly if it related to existing staff. I also went back to IO Matt Newbould in PSU to again check if there had been any legitimate or business-related reasons that could have been missed or overlooked. He replied by email confirming the following: "As discussed earlier. At the time of the investigation there was no indication of any enforcement action against any the persons below and no lawful business person(sic) for a staff member in enforcement to be accessing those records. I have been through them again today and it still remains the same."

64. These post-meeting discussions were not revealed to the Claimant or her representative at the time.

65. Early on 4/2/22 (ie on the morning of the disciplinary hearing) Mr Taylor had sent an email to Mr Wilkinson raising the issue of consistency of treatment , and contending that *"(other) "CRS comparators, ….were not dismissed despite being found to have a case to answer for IT abuse"*. Mr Taylor provided in his email a list of seven names. Two of these were described as having been dealt with "during the zero tolerance policy".

66. No further details were provided about them and the issue of comparators was not pursued or discussed during the subsequent disciplinary hearing later that day.

67. Mr Wilkinson stated in his witness statement that before making his decision he had "*sought advice from the HR department to make sure (his) decision was consistent with policy and in line with other decisions being made in similar situations throughout the entire Home Office across the country".*

68. Under cross-examination when it was put to him that he had ignored the comparator evidence he answered "*I didn't - I was accompanied by an HR case-worker - it was discussed but we had limited information - we were not privileged with the information (ie the details about the comparators*)."

69. Mr Wilkinson explained that prior to dismissing the Claimant, he had been the decision-maker in only one previous CRS-breach disciplinary case, and in that case he had not dismissed but given the offender a final written warning, one point of distinction between the two cases being that the Claimant's number of improper look-ups was greater.

70. Other evidence in the bundle[2] indicates as follows: *Request: Of the total number of Border Force officers who faced disciplinary action between 2018- 2019 due to IT abuse or computer*

[2] Page 377, - (the Respondent's reply to a Freedom of Information request from a third party in a different case)

misuse, I would like to know the number of officers whose case were proven as gross misconduct and dismissed. Reply: 6 proven as Gross Misconduct with 2 dismissals.

71. On 9 February 2022, the Respondent wrote to the Claimant confirming that she was summarily dismissed for gross misconduct. The letter advised the Claimant of her right to appeal. The letter includes the following:

"You accessed CRS records on a number of occasions prior to the change in departmental policy which came into effect on 10th June 2013. I have considered the access of CRS prior to this period and it has not been included within the consideration as the departmental setup and process around its use were inconsistent. Although where relevant I have made reference.

We discussed access to CRS in respect of the following dates 25/06/13 and 11/08/13. Three family members of your ex-husband were looked up in this period. You stated that the record had been looked up as a result of you wishing to make an allegation and you were trying to identify full details. You made a similar statement when accounting for checks that you had conducted on these same family members between 2006-2011.

We then discussed the checks that were undertaken on 20/07/13 these were conducted on a relative of your ex-husband. You stated that this look up was done in support of an intelligence allegation you were wishing to make against the person. You had previously looked these family members up on a number of occasions between 20/10/08 and 15/11/2012. Where you stated that this was done to make an allegation against the family members.

We then discussed the email which had been sent from your Home office account in 2010 to a contact you had within the Pakistan Customs team. You advised me that it was an old school friend. You were contacting him via a Yahoo email address which is stated to have been the official Pakistani customs email address. You passed operational information to that person relating to identifiable individuals. This was not done in accordance with any policy or process and does not appear to have followed any of the National intelligence model guidelines. You stated this was done with the best intentions and in the spirit of information sharing due to shared objectives. You stated this was done with managerial consent although were unable to identify the managers who were aware or authorised it. I am concerned that unauthorised intelligence disclosure can have unintended consequences and is why National intelligence model and departmental processes must be followed.

We discussed the access of CRS records pertaining to an existing staff member where records of 7 individuals of records were looked at on the 11th September 2015. These were all connected to or related to the staff member at Eaton House. You stated that you would never look up records on behalf of other staff members. You stated that there must have been a business reason for these look ups. At the time of the investigation there was no record of any legitimate business reason for these checks. I have since rechecked with PSU and they confirm there is no legitimate explanation for access to these records. I have also spoken with the Assistant Director of West London and he confirms no such investigations were authorised in respect of these individuals. I have considered whether there is a coincidence in your look

ups, but I find it highly unlikely in view of the search parameters entered and the time frame in which these checks were conducted.

We discussed the CRS checks which had been undertaken on 03/08/17 in respect of two individuals who were known to a staff member who you state had given you a list with names on it. You explained that you undertook the checks in order that the staff member could make a complaint. You explained you had discussed it with a manager, Paul Smith, and we confirmed an email that supports the fact you referenced the case to Paul. It doesn't not however give authority to conduct the checks on those individuals. You did note CRS with the nature of the concern. I do however still consider this to be out of the scope of the terms of use of CRS. ….

I have carefully considered all the facts and have read and reviewed the mitigation you put forward to me and also the additional information your provided during the hearing. I acknowledge your long service with the organisation, and I recognize the commendations and note of appreciation from colleagues that you have put forward. I am mindful of the circumstances you were in at the times of these checks and cogniscant of the impact that this investigation has had on you and your health.

I understand from your explanation that in every incident you believed you were acting in good faith. You confirmed to me that at no point in any of this were you under duress, financial incentive or pressure to conduct these checks and that no information from the CRS records was passed to a third party. In considering the appropriate sanctions I must also consider the precedents. However, in your case I must consider the number of unauthorised look ups, the fact that they are former family members of yours or relatives of a colleague and the fact that this continued over a period of time. In each case on its own I would consider as Gross misconduct. "

72. The Claimant submitted her provisional grounds for appealing on 25 February 2022 followed by final grounds on 01 March 2022.

73. She submitted a detailed appeal mitigation document referring to her health and domestic issues. She also provided evidence about her mental health (letter from a Consultant Psychiatrist dated 11/3/22) which confirmed that the Claimant did not have a "past psychiatric history" but was suffering a reactive depression in response to her suspension and the disciplinary process.

74. Ms J Shoker was appointed appeal manager and she sent a list of questions (page 664) arising from the grounds of appeal to Mr Wilkinson and he replied providing short answers about background points. For example Ms Shoker asked *"Are you aware if Rukhsana's LM (current or previous) has raised any concerns regarding conduct and ability to perform her role due to any of the mitigations she has presented for the misconduct actions?"* and Mr Wilkinson replied "*I am not aware of any concerns raised by her previous line mangers around her performance or issues during these times. The question was asked if she had told anyone, and she said that she hadn't.*"

75. Other questions concerned subjects such as the Claimant's request about access to emails, the agreement with Mr Turner that the Claimant would answer investigatory questions put to her in writing, and the delay in the investigation,

76. These questions and answers were not revealed to the Claimant.

77. On 14/4/22 the Claimant attended an appeal hearing chaired by Ms Shoker. This was held on Teams video.

78. The primary facts were discussed and also the Claimant's psychiatric report. At one point the following appears in the appeal record: *"ST : Going back to the time of the searches, RP's mental health was not in a good place. This is not an excuse but is a part of the explanation as it is important to have an insight to the medical situation. JS: so you are wanting to use the medical report to support your position that during the time that the initial checks were conducted, there may have been other issues such as emotional distress due to other live circumstances? ST: It was more to do with the process* – " ie Mr Turner touched on the fact that the Claimant's mental health (which in turn arose from her domestic problems) was a relevant factor to consider in relation to explaining the 2013 look-ups, but when Ms Shoker tried to steer the conversation onto that topic, Mr Turner did not take her up on it but said "*it is more about the process*" - ie he wished rather to focus on the effect of the investigation and disciplinary proceedings in 2021/2022 on the Claimant's mental health.

79. Although this had not been referred to in the grounds of appeal, during the appeal hearing Mr Turner raised the issue of comparators and told Ms Shoker about his comparator email of 4/2/22. He explained further : "*They were CRS breach of IT guidance cases – previous cases that were not dismissed. Some of them had done 200-300 individual searches, far more than Rukhsana, but they were not dismissed – however this was not mentioned in the investigation and the dismissal letter specifically refers to precedent being important, and the number of searches, but yet it doesn't consider the multiple cases of other searches with more that I provided."* After the appeal hearing Mr Turner sent Ms Shoker his comparator email.

80. After the appeal hearing Ms Shoker sent more questions (676) to Mr Wilkinson about points arising which Mr Wilkinson replied to.

81. The first question was about the comparators. Ms Shoker asked : *"On the precedence (sic) point can you please advise what consideration was given to the email chain attached where*

the Union Rep seeks to set out a comparator of Home Office handling of similar cases? " Mr Wilkinson gave a lengthy reply the material part of which was as follows: *"I did consider these matters in my decision, but it is important to highlight that in these cases I was not in possession of all the facts and circumstances. (The number of look ups, the mitigating circumstances, and the general context around each case). I also have my own personal experiences of dealing with similar cases and being aware of the sanctions and circumstances applied by me in a previous case where I was fully aware of the circumstances.*"

82. Another question was about Mr Smith's claimed involvement in the 2015/2017 look-ups. In answering that question, Mr Wilkinson provided details as well as referring to the discussions which he (Mr Wilkinson) had had with Edwards and Newbould in the period between the decision meeting and the dismissal.

83. A further question was about the specific period of delay in the investigation between mid-August 2021 and the hearing on 4/2/22. Mr Wilkinson provided a fair reply to this conceding that *"this delay was longer than I would have liked although it came about through trying to do the right thing by enabling recovery and following what we believed was the correct process. I accept that the delay was in hindsight too long and I have apologised to her in the email and suspension review letter which was sent on 13.12.21".*

84. These questions and answers were not revealed to the Claimant.

85. On 29/4/22 Ms Shoker wrote to the Claimant confirming that her appeal was not upheld and that the decision was final.

86. The letter included the following about the Claimant's mental ill health: *"Prior to the appeal hearing I received a GP letter and a report from a Consultant Psychiatrist at the Cardinal Clinic. Having read these documents it is clear that the distressing life events that you were experiencing at the time the offences took place did not fortunately impact your mental health. Your psychiatrist says "The alleged information security breach is said to have happened on several occasions between the years 2006 till 2017, but during those years she seemed to have been otherwise functioning well both at home and at work – there have so far been no concerns around that time regarding her mental health". Notwithstanding this, the decision maker has placed weight on your mitigating circumstances and life events that caused you distress when reaching his final decision.*"

87. The letter dealt with the comparator issue as follows : *"I will also take this opportunity to respond to the specific point raised at the hearing by Stephen stating that Matt Wilkinson,*

when making his original decision, did not consider precedent and the list of comparators (list of cases whereby a person had been found to have committed gross misconduct on the same grounds but were not dismissed), contradicting his decision letter which states "in considering the appropriate sanctions I must also consider the precedents". Having had an opportunity to consider the list myself and a follow up discussion with Matt I am satisfied that due consideration has been applied and that in the absence of the mitigation circumstances pertaining to each case it would be wholly inappropriate to attach weight to the document. I am also satisfied that the decision maker consulted appropriate experts during his assessment and that he balanced the need to consider precedent, with the individual merits of the case"

Relevant law

88. Where the conduct of the employee is established by the employer as a potentially fair reason for dismissal under section Section 98(1) and (2) of the Employment Rights Act 1996, then section 98(4) must be considered which provides as follows: *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) –depends upon 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 shall be determined in accordance with equity and the substantial merits of the case.'*

89. A dismissal for misconduct will not be unfair if it is based on a genuine belief on the part of the employer that the Applicant had perpetrated the misconduct, which belief is based on reasonable grounds following a reasonable investigation BHS v Burchell [1978] IRLR 379.

90. An Employment Tribunal should not substitute itself for an employer or act as if it were conducting a rehearing of or an appeal against the merits of an employer's decision to dismiss. The employer not the Tribunal is the proper person to conduct the investigation into the alleged misconduct. The function of the Tribunal is to decide whether that investigation is reasonable in the circumstances and whether the decision to dismiss, in the light of the result of that investigation, is a reasonable response. HSBC v Madden [2000] ICR 1283.

91. The range of reasonable responses test (or to put another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances, as it does to the reasonableness of the decision to dismiss for the conduct reason. Sainsbury v Hitt 2002 EWCA CIV 1588

92. On the subject of length of service as a mitigation, Mr Kirk referred me to the following extract from Harvey: "*Length of service will almost always be a relevant factor. In misconduct cases it may influence the question whether dismissal is a fair sanction to impose (Johnson Matthey Metals v Harding [1978] IRLR 248), and it may lead a tribunal to take the view that a reasonable employer ought to give the benefit of the doubt to long serving employees where evidence is in conflict (O'Brien v Boots Pure Drug Co [1973] IRLR 261). Obviously, however, it will not be a factor of any, or any significant, weight where gross misconduct is concerned: see the decision of the Inner House of the Court of Session in AEI Cables Ltd v McKay [1980] IRLR 84. As the EAT put it in Harrow London Borough v Cunningham [1996] IRLR 256, this means that in gross misconduct cases, length of service will not save the employee from dismissal.*"

93. On the subject of consistency of treatment of misconduct cases, the EAT in Hadjioannou v Coral Casinos Ltd [1981] IRLR 352 confirmed that an employer's previous decision not to dismiss an employee in the same circumstances will only render a dismissal unfair in two types of cases:

    1. Where the employer has previously treated similar cases less seriously, such that: a) employees have been led to believe that certain categories of conduct will be overlooked, or will not lead to dismissal; b) or it can be inferred that the purported reason for dismissal is not, in fact, the real reason.

    2. Where employees in "truly parallel circumstances" have been treated differently so as to support an argument that it was not reasonable to dismiss the employee and that a lesser sanction would have been appropriate in the circumstances.

94. Mr Kirk referred to the following extract from the judgment of Beldam LJ in Paul v East Surrey District Health Authority [1995] IRLR 305; *"I consider that all industrial tribunals would be wise to heed the warning of Waterhouse J, giving the judgment of the Employment Appeal Tribunal in Hadjioannou v Coral Casinos Ltd [1981] IRLR 352 where, in paragraph 25, he said: ""We accept that analysis by counsel for the respondents of the potential relevance of arguments based on disparity. We should add, however, as counsel has urged upon us, that industrial tribunals would be wise to scrutinise arguments based upon disparity with particular care. It is only in the limited circumstances that we have indicated that the argument is likely to be relevant, and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that a tribunal may be led away from a proper consideration of the issues raised by [s 98(4) of the ERA]. The emphasis in that section is upon the particular circumstances of the individual employee's case. It would be most regrettable if tribunals or employers were to be encouraged to adopt rules of thumb, or codes, for dealing with industrial relations problems and, in particular, is-sues arising when dismissal is being considered. It is of the highest importance that flexibility should be retained, and we hope that nothing that we say in the course of our judgment will encourage employers or tribunals to think that a tariff approach to industrial misconduct is appropriate. One has only to consider for a moment the dangers of the tariff approach in other spheres of the law to realise how inappropriate it would be to import it into this particular legislation". I would endorse the guidance that ultimately the question for the employer is whether in the particular case dismissal is a reasonable response to the misconduct proved. If the employer has an established policy applied for similar misconduct, it would not be fair to change the policy without warning. If the employer has no established policy but has on other occasions dealt differently with misconduct properly regarded as similar, fairness demands that he should consider whether in all the circumstances, including the degree of misconduct proved, more serious disciplinary action is justified…."*

95. On the significance of procedural fairness Mr Kirk reminded me that defects must be examined in context and referred to the following from the judgment of Lady Wise in NHS 24 v Pilar UKEAT/0005/16/JW: *'It seems to me that the danger of treating procedural unfairness separately as the Tribunal sought to do in this case is that it can result in a failure to assess the gravity of the procedural defect. If there is no real relationship between an unfair step in*

the procedure and the ultimate outcome, the impact of that procedural defect may well be far less than where an absence of any proper procedure led to substantive unfairness. As Langstaff P put it in Sharkey v Lloyds Bank plc UKEATS/0005/15 "..procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together."

96. Mr Aziz referred me to the case of Martin v Home Office UKEAT/0046/19/AT in which, on the facts of that case, the ET had found that the only direct communication of the 6/6/2013 zero-tolerance policy to claimant in that case was by message on its intranet Horizon, and where the ET was found to have misinterpreted the Respondent's zero tolerance policy as requiring any mitigating factors to be a direct cause of, rather than having a material impact on, the misconduct.

Discussion and conclusions

97. The Claimant was dismissed for the Aktar emails in 2010, her 2013 look-ups of her own husband's relatives, and her 2015/2017 look-ups of Jeetla's relatives.

98. It is not in dispute that the decision makers had a genuine belief that the Claimant was guilty of gross misconduct.

99. The Aktar emails were not in dispute and nor did the Claimant dispute that it had been wrong of her to send these emails to Aktar's Yahoo address. The Respondent reasonably concluded that the Claimant had sent these emails aware that she was doing wrong at the time.

100. It was not in dispute that the Claimant in 2013 had made numerous look-ups, after the 6/6/2013 message had been sent, of her own husband's relatives. She had not disclosed the 2013 look-ups to her managers and it was not part of her proper work at the time.

101. The Claimant contended that she was "*under an obligation because of her job to report the illegal activities of her in- laws. Reporting her in-laws could not realistically be classified as an act of 'personal convenience.' The anonymous complaint she made was an act that was in the public interest. She acted with honesty and integrity in reporting her in-laws' illegal activities*" .

102. However, her husband's in-laws were not persons whose existence and activities had come to the Claimants attention in the course of her work. She looked them up for personal reasons to do with her problems with her husband. It was reasonable for the Respondent to conclude that these lookups were not for a legitimate business reason and constituted an abuse of the system. Even if she subsequently submitted anonymous reports about the relatives, the whole subject was closely connected with her own personal interest and family situation and it was not something which she should have used the CRS system for.

103. In her oral evidence and in final submissions it was conceded by the Claimant and by Mr Aziz on her behalf that she had done wrong in looking up her husband's relatives in 2013.

104. There was evidence that in 2017 the Claimant had informed Mr Smith that she was reporting one of Jeetla's relatives for a possible intention to breach his visa conditions. The Claimant contends that she obtained authorisation from Mr Smith before carrying out the lookups of these relatives in 2015 and 2017. As discussed above, Mr Wilkinson asked Mr Smith about this and he denied giving any such authorisation. He stated that he would never have authorised someone to look up persons in these circumstances. The same was confirmed by another officer Chris Edwards. The Respondent was entitled to prefer Mr Smith's and Mr Edward's evidence to that of the Claimant. This preference was the more likely given the Claimant's admitted propensity over previous years to abuse CRS by looking-up people for personal reasons or for idle curiosity. Hence the Respondent had reasonable grounds for its conclusion that the 2015/2017 look-ups were unauthorised CRS breaches.

105. Even before the introduction of the new policy on 10/6/2013, the SOP which the Claimant had to accept every time she used CRS, stated that she understood the following: "*accessing CRS information for any purpose which: is outside the scope of employment; would breach the employer's duty of confidentiality; The data will be used strictly for genuine internal business purposes and will not be used for any personal convenience."*

106. Looking-up one's own or a colleague's relatives for purposes of advancing or facilitating some personal family dispute, concern or other domestic issue, is outside the scope of employment, breaches the Respondent's duty of confidentiality and is not strictly a genuine internal business purpose.

107. CRS abuse cannot be allowed by the Respondent for obvious and important reasons which go to the heart of its operations. Applicants will not feel safe giving proper details to the Respondent unless that information is kept secure and used for official purposes only. If an applicant, who had given personal data to the Respondent for immigration purposes, found that some relative of the applicant with a special personal interest in the applicant or colleague of that relative, was allowed by the Respondent to access the applicant's private data through CRS, then the applicant would have a legitimate complaint against the Respondent of a serious breach of trust and data abuse, and the Respondent would be in breach of its statutory duties.

108. This was recognised by Mr Mangrola in his oral evidence and is a matter of common sense.

109. On the evidence before it, and given the stance of the Claimant and her TU rep during the disciplinary proceedings, the Respondent was entitled to conclude that the Claimant had received the 6/6/2013 email the same day, and therefore it was likely that she was aware of the zero-tolerance policy from then on. As stated in the message itself, the policy was introduced with effect from 10/6/2013. The Claimant's argument that it came into effect only in December 2013 was reasonably dismissed.

110. The Claimant, through Mr Aziz's very able representation, made a number of complaints about the procedure: I have dealt with the main ones below; but I have considered them all, even if not specifically mentioned, and they have not caused me to reach a different decision.

Redactions

111. Mr Newbould's audit and Mr Miah's report were not released in unredacted form as copies to the Claimant because they contained sensitive data which had to be protected having regard to the Respondent's data protection obligations. However, arrangements were made, with which Mr Turner and the Claimant appeared happy at the time, for Mr Turner to have controlled access to unredacted copies. This was reasonable.

The inclusion of the pre-10/6/2013 matters

112. Mr Wilkinson's letter of 2/3/21 notifying the Claimant of the forthcoming investigation and his invite letter of 13/1/22 (which incorporated the contents of the earlier letter by reference), both referred to all the breaches from 25/6/2006 onwards. However, Mr Miah in his investigation letter of 29/3/21 then told the Claimant that he would be investigating look-ups from June 2013 onwards (only).

113. Mr Miah then applied an approach to his investigation which conflicted with his 29/3/21 letter (and his instructions from Mr Wilkinson dated 8/3/21) by investigating in some detail all the pre-2013 matters and relying on them heavily in concluding that the Claimant had a case to answer in relation to 2 out of the 3 allegations.

114. Mr Wilkinson discussed all the matters from 2006 onwards with the Claimant and Mr Turner and then found the Claimant guilty (inter alia) of one pre-2013 matter - namely the 2010 Aktar emails, which had in fact been outside the terms of reference (ie instructions) he had given to Mr Miah. Apart from that, Mr Wilkinson gave the Claimant the "benefit of the doubt" about the pre-2013 look-ups.

115. While this was incompetent, I do not find that as a matter of substance it prejudiced the Claimant. The Aktar emails were flagged up in Mr Newbould's audit, in the investigatory questions, in Mr Miah's report, and in the disciplinary interview. The Claimant admitted her wrongdoing in relation to the 2010 emails. They were in any event a comparatively minor matter which appear to have been included in the dismissal reasons as a make-weight and I accept Mr Wilkinson's evidence that their omission from the disciplinary proceedings would have made no difference to the outcome.

Change of mind over the 2015/2017 look-ups

116. Mr Miah found there was no case to answer in relation to the 2015/2017 look-ups but Mr Wilkinson, having taken it upon himself to go directly to Mr Smith to ask him about whether they had been authorised, (which Mr Miah should have done in the first place) and having questioned the Claimant about this at the disciplinary hearing, decided to bring home findings of gross misconduct in relation to them.

117. This was a breach of the Respondent's disciplinary procedure at least insofar as it conflated the roles of Investigation Manager and Decision Manager. The IM is supposed to do the investigating and if, as here, the original investigation is found to be deficient, the DM is supposed to send it back to the IM for further investigation, rather than do it himself.

118. While this was a technical breach of the Respondent's own policy, it was also a short-cut to save time, and I do not think it caused any real prejudice to the Claimant. If Mr Miah had been told by Mr Wilkinson to question Mr Smith, then the latter would have given the same answers/information which he did in his email of 24/1/22, in which case Mr Miah probably would have changed his mind and found that there was a case to answer in relation to the 2015/2017 look-ups and they would still have been found by Mr Wilkinson to be gross misconduct.

Consideration of mitigation.

119. Encouraged by the Martin v HO case, Mr Aziz submitted that the Respondent had failed to adopt a "two stage test" to the mitigation question, and that no proper consideration had been given by the Respondent to the material impact of the Claimant's mitigating factors on her behaviour (as required by section 21 of the Respondent's "*Discipline: How to Guidance*"). Mr Aziz submitted that Respondent had failed to consider how the Claimant's troubles with her second husband and his relatives had had a material impact on her carrying out the 2013 look-ups.

120. I reject this submission. The disciplinary hearing and appeal records show that both Mr Wilkinson and Ms Shoker engaged with this issue. In his decision letter Mr Wilkinson wrote *"I am mindful of the circumstances you were in at the times of these checks".* In her appeal letter Ms Shoker considered the consultant psychiatrist letter and made specific observations based on that letter about the impact of the Claimant's unfortunate life events (as set out earlier in these Reasons).

Delay

121. The audit was completed on about 28/7/20 at which point Mr Newbold would have known that the Claimant was implicated in possible misconduct but it took Mr Newbould another 5 months until December 2020 until he signed off and delivered his report. It is unclear what was going on during that period but it was during the Covid-19 pandemic lockdowns when many activities were slowed down

122. The Claimant was suspended on 1/3/21 and Mr Miah appointed investigator on 8/3/21 but then another ten months elapsed before he completed his report on 13/1/22.

123. This leisurely pace was particularly unsatisfactory given the fact that the alleged misconduct events were already old by the time they were discovered. In such a case it is especially important to ensure that an investigation is dealt with expeditiously.

124. Given the fact that years had already gone by since 2013/2015/2017 until July 2020, delays from July 2020 to 1/3/21 would have probably had an insignificant or marginal impact on the quality of the evidence and the Claimant's ability to recall events.

125. After the Claimant became aware of the matter on 1/3/21, delays would have had the effect of prolonging the Claimant's stress, uncertainty and reactive depression, which was acute. This in turn affected her memory and made it more difficult for her to cope with the disciplinary proceedings when they eventually occurred in 2022.

126. Part of the delay in 2021 was caused by factors such as the Claimant's sickness, Mr Taylor's holidays, the Claimant's hospitalisation etc, for which the Respondent cannot be held

responsible, but part at least of the delay of about three months up to December 21 could have been avoided if Mr Miah had been more pro-active. However, in fairness to Mr Miah, the Claimant's stress and illness him cautious about pressing on regardless, until it was clear that the Claimant was fit to continue, and it would also have been possible for Mr Turner to be more pro-active during that time.

127. The Claimant's mental health deteriorated quickly after she was suspended and during the first half of 2021, during which time the Respondent was not responsible for the delay in the investigation. Any additional deterioration during the period of delay in late 2021 is likely to have been marginal.

The non-disclosure to the Claimant of (i) Mr Wilkinson's post-disciplinary hearing discussions with Mr Newbould and Mr Edwards and (ii) Mr Wilkinson's answers to Ms Shokers questions

128. Mr Wilkinson discussed matters with Mr Edwards and Mr Newbould after the disciplinary hearing but before his decision. The Claimant was not given a chance to see or comment on this discussion before her dismissal.

129. Mr Wilkinson sent Ms Shoker answers to her questions about the appeal grounds and about issues arising during the appeal hearing. The Claimant was not given an opportunity to comment on these exchanges before the appeal decision.

130. Managers should not make a decision without allowing the employee an opportunity to see and respond to all material which is to be relied on in the decision. The failure of Mr Wilkinson and Ms Shoker to provide such opportunities to the Claimant was a shortcoming in the procedure.

131. However what Mr Edwards and Mr Newbould had to say to Mr Wilkinson after the disciplinary hearing did not help the Claimant and was essentially just a nil-return saying that nothing could be found to exonerate her for the 2015/2017 look-ups.

132. Mr Wilkinson's answers to Ms Shoker's questions consisted in clarification of what had gone before and covered old ground and did not raise any new point or issue.

133. While quite properly criticizing the shortcoming, Mr Aziz did not identify anything specific which the Claimant or Mr Turner would have wanted to say or do if they had seen this material before the decisions were made, and I find that if they had, it would not have changed the outcome.

The potential comparators

134. The available evidence suggests that summary dismissal is not always the inevitable result of breach of the CRS zero-tolerance policy.

135. It is clear that insofar as his own personal decision was concerned, Mr Wilkinson had only one previous case of CRS breach to compare the Claimant's case to, and in that other case he had not dismissed.

136. Whether or not Mr Wilkinson discussed the matter in general terms with his HR case worker, it is plain from his own evidence that he was not given any details and nor did he appear to

have asked for any details about any of the comparators which Mr Taylor had provided. The same applied to Ms Shoker.

137. Mr Turner had waited until the morning of the disciplinary hearing until he sent in his list of comparators. He did not provide any information about the comparators apart from their names. He did not refer to the issue during the disciplinary hearing. He did not include the comparator point in the grounds of appeal and he then raised the issue again during the appeal hearing but only in general terms but not by reference to specific cases.

138. The issue raised was not that the Claimant had been lead (by previous lenient treatment of other offenders) to believe that her own breaches would be overlooked, or would not lead to dismissal. Rather he suggested that as other offenders had been treated more leniently it would not be reasonable to dismiss the Claimant and that a lesser sanction would be appropriate for her.

139. The question is whether in these circumstances it was necessary for Mr Wilkinson and/or Ms Shoker, and/or HR on their behalf, to stay or further delay the Claimants disciplinary proceedings and then go off and search across the Respondent's large organisation to try to identify the claimed cases of the persons named in Mr Turner's list, and then investigate or possibly re-investigate all the relevant facts of those cases, to see if useful comparisons could be made, before returning to deal with the Claimant's case. I find that this would have placed an unreasonable burden on the Respondent.

140. While an employer should consider a comparator if it is reasonable to do so, I find, on the facts of this case, that in order to engage that obligation, the initial onus was on the Claimant to adduce the necessary specific facts so that the Respondent could make the comparison.

141. If Mr Turner knew enough about his claimed comparators to be able to advance a reasonable argument that they had been treated differently in truly parallel circumstances, then he should have provided the facts about them to Mr Wilkinson and Ms Shoker and made his argument accordingly. If he did not know enough about his claimed comparators to do this then it was reasonable to conclude that his putting forward of their names was mere speculation not supported by any such knowledge.

142. Most unconnected cases are distinguishable from each other on their own facts, or on their own mitigating circumstances. This was not a case in which it was suggested that the Claimant had had a co-offender in her CRS breaches who had been treated more leniently.

143. The Claimant did not provide at the tribunal hearing any specific information or evidence about any comparator nor were any specific facts about any claimed comparator put to Mr Wilkinson or Mr Shoker in cross-examination.

144. The comparator argument was a mere assertion and the Respondent's decision makers acting reasonably were entitled to make their decisions in ignorance of the facts about the claimed comparators which facts the Claimant and Mr Turner had not provided.

Summary re procedural fairness

145. The investigatory, dismissal and appeal process was not perfect and there were some shortcomings as identified above. I have considered these shortcomings in context and find that individually and in combination they did not had any material negative impact on the substantive fairness of the disciplinary procedure as a whole, or its outcome from the Claimant's point of view. The procedure fell within the range of reasonable responses.

Was dismissal within a range of reasonable responses?

146. What the Claimant was found to have done, particularly the many unauthorised personal look-ups in 2013, 2015 and 2017 was, in the light of the Respondents policies, reasonably treated as gross misconduct.

147. Given the number of look-ups it was a serious matter and a flagrant breach of the zero-tolerance policy.

148. The Claimant had some mitigation arguments including her long (and it would seem good) service; her clean formal disciplinary record prior to the instant offences (albeit she had been abusing the CRS system for years) and the fact that since August 2017 until 1/3/21 (when she was suspended) she was not shown to have carried out any more CRS breaches. The Respondent considered all these matters in addition to the Claimant's domestic problems and mental health issues.

149. A clean record before or after serious gross misconduct is not necessarily a decisive factor. A single instance of serious gross misconduct can justify summary dismissal, even if the employee is otherwise blameless.

150. The passage of time between the last offence and its discovery is not in itself a reason not to prosecute or dismiss, although late discovery can of course lead to practical evidential problems affecting both sides.

151. The Respondent was entitled to characterise this type of breach as very serious and it had in effect given a clear warning about this in its 6/6/2013 message and subsequent policy documents.

152. Summary dismissal was within a range of reasonable responses to the gross misconduct found.

153. Hence the unfair dismissal claim fails.

Contributory fault.

154. For the sake of completeness, and in case I am wrong to have found that the dismissal was fair, I record that if I found that the Claimant was unfairly dismissed, I would have found that (i) the Claimant's numerous and repeated CRS breaches in the face of a zero-tolerance policy struck at the heart of the employment relationship and was significant contributory fault, before dismissal, which would have made it just and equitable to reduce the basic award to nil under Section 122(2) ERA 1998; (ii) the same misconduct caused or contributed to the dismissal

such that it would have been just and equitable to reduce the compensatory award to nil also under Section 123(6) ERA 1998, and (iii) it would also in the circumstances have been inappropriate to order re-instatement or re-engagement of the Claimant.

J S Burns Employment Judge
3/7/23
For Secretary of the Tribunals
J Moossavi
Date sent to parties
14/08/23