EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105318/2023

Held in Glasgow on 2, 3, 4 & 5 September 2024

Employment Judge: J D Young

Mr M Scaresbrook	**Claimant** **In Person**
Commissioners for HM Revenue and Customs	**Respondent** **Represented by:** **Mr C McCracken - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that;-

1. The claimant was not a disabled person at the relevant time within the meaning of s6 of the Equality Acy 2010 and so the claim of discrimination arising from disability does not succeed;

2. The claimant was not unfairly dismissed in terms of s98 of the Employment Rights Act 1996;

3. The claim of wrongful dismissal does not succeed.

REASONS

Introduction

1. In this case, the claimant presented a claim to the Employment Tribunal which at the date of this final hearing, consisted of a claim of unfair dismissal; wrongful dismissal (notice pay); and discrimination arising from disability. The respondent did not concede that the claimant was a disabled person at the relevant time and in any event denied there had been any discrimination

arising from disability. It was maintained that there was a fair dismissal on the grounds of the conduct of the claimant and that no notice pay was due.

2. The parties agreed under section 4(9) of the Employment Tribunals Act 1996 that the Tribunal could proceed before an Employment Judge alone which agreement was recorded.

Issues for the Tribunal

3. The issues for the Tribunal were:

1 Was the claimant a disabled person at the relevant time as defined in section 6 of the Equality Act 2010 (EqA) giving rise to the following issues:

1.1 Did the claimant have a physical or mental impairment?

1.2 Did the impairment have an adverse effect on his ability to carry out normal day to day to day activities?

1.3 If so, was that effect substantial (as in more than minor or trivial)?

1.4 If so, was the effect long term?

1.5 What was the relevant time?

2 If the claimant was a disabled person as defined at the relevant time, was there discrimination arising from disability under section 15 of EqA. In that respect:

2.1 Did the claimant suffer from unfavourable treatment?

2.2 If so, was that treatment because of something arising in consequence of his disability namely his mental health bringing about a state of mind which led to the policy breach for which he was dismissed?.

2.3 If the claimant establishes the above, was the unfavourable treatment a proportionate means of achieving a legitimate aim?;

..2.4 Did the respondent know or could it reasonably have been expected to know that the claimant had a disability?

3 Was the claimant unfairly dismissed by the respondent which requires assessment of:

3.1 What was the reason for the dismissal?

3.2 Was that a potentially fair reason for dismissal?

3.3 If misconduct, did the respondent believe the claimant guilty of misconduct, had in mind reasonable grounds to sustain that belief, and carry as much investigation into the matter as was reasonable?

3.4 If so, was dismissal for that reason within the band of reasonable responses bearing in mind the mitigating circumstances advanced by the claimant of difficulties with mental health and alleged inconsistency of treatment.

4.5 Was there procedural unfairness with particular respect to:

(a) Experience of the investigator and decision makers and whether they were biased?

(b) Was the hearing conducted fairly and without undue delay?

(c) Did the respondent deal with the case in accord with the ACAS Code of Practice on discipline and grievance procedures.

4.6 If the claimant succeeds, was there contributory conduct?

4.7 If the claimant succeeds on either substantive or procedural unfairness, what compensation should be awarded in respect of the unfair dismissal?

5 Was the claimant wrongfully dismissed?

5.1 If so, what sums should be awarded by way of damages?

Documentation

4. The parties had helpfully liaised in providing a joint file of documents numbered 1-80 (paginated 1-260). A further document being a prescription for Sertraline was provided during the hearing numbered 81 (paginated 261). Reference to documents in this judgment are to the paginated numbers.

The hearing

5. At the hearing, I heard evidence from:

   a. Gavin Colclough, a frontline manager within the respondent Individuals and Small Business Compliance section concerning the implementation of the National Minimum Wage (NMW). He was based in east Kilbride and the line manager for a team of NMW compliance officers including the claimant. He had been in that position for 3.5 years

   b. Jessica Burrow, who had been employed by the respondent since June 2003; appointed an Operational Team Leader in Bristol within NMW in October 2016; and from 1 January 2024 Operational Advisory Team Leader.

   c. Sarah Riley, employed by the respondent since 2020 and from September 2023 in the position of Head of Compliance for Trades Statistics and Customer Analysis as a senior grade officer based in Stratford.

   d. Wayne Ruecroft, employed by the respondent since 2005 and from 2020 a Senior People Manager based in Newcastle leading a team of ten people.

   e. The claimant, who had commenced employment with the respondent on 7 April 2015 initially within the Management Collection team for PAYE, and from 2020 officer grade within the NNW Compliance section based at East Kilbride.

f. Julie Haigh who had been employed by the respondent for 20 years and since January 2021 an officer in NMW Compliance at East Kilbride.

6. From the documents produced, admissions made and relevant evidence led, I was able to make findings in fact on the issues.

Findings in fact

7. The respondent is the tax, payments and customs authority for the United Kingdom and is a non-ministerial department. It has responsibility for various matters including compliance and the enforcement of NMW.

8. The claimant had continuous employment with the respondent in the period between 7 April 2015 and 2 February 2023. He was initially employed as a Debt Management and Banking Officer at the respondent's offices in East Kilbride and at that time received terms of employment (J61–70). The claimant was then promoted to the position of National Minimum Wage Band 0 case worker at East Kilbride effective from 11 January 2021 (J71-72). The core of that role was to ensure NMW compliance by approaching customers; examining records; speaking with workers and challenging information where necessary. That would include visiting companies and businesses.

Employment terms and policies.

9. The employment terms (J61-70) advised that no notice of termination would be given in cases of gross misconduct (9.2.4). The claimant required to comply with "*Civil Service Code and HMRC's Code of Conduct*" and that the "*HMRC's Conduct and Discipline Policy specifies HMRC's conduct rules and disciplinary procedure*". Failure to comply may result in disciplinary action which could include downgrading or dismissal (para10.1).

10. The Civil Service Code (J113-118) set out values and standards of behaviour expected of employees in line with the core values of integrity, honesty, objectivity and impartiality. Within integrity, it was advised that employees were expected to fulfil their duties and obligations responsibly and as regards

honesty should set out facts and relevant issues truthfully and *"correct any errors as soon as possible."* (J114)

11. It was accepted that the claimant was subject to certain Codes of Conduct. The document entitled *"Upholding our Standards of Conduct"* (J119-134) set out the respondent approach to conduct and the steps to be taken in the event action was required to ensure the respective standards were met. That included a formal approach applying in cases where the *"potential misconduct is more serious such that the outcome could potentially be dismissal…"* (J123). The steps to be taken were in essence the appointment of a decision manager appointed from the *"HMRC decision manager pool"* who would work alongside the "*Expert Advice Service"* (EAS) and arrange an independent investigator to gather information; ensure the investigation progresses quickly; is reasonable and proportionate and keeps those involved informed of progress (J123).

12. EAS was to provide advice on the appropriate procedure and support the decision manager and investigator. After investigation there would be arranged a decision meeting (if required) giving five days working notice of the intended meeting and setting out details of the potential breach and the relevant information gathered (J124). At that meeting, the employee would be given the opportunity to explain their views and answer questions about the alleged breach of standards and identify any witnesses who may have further relevant information and put forward any mitigating factors (J124-125). The potential penalties ranged from a first written warning to dismissal without notice in cases of gross misconduct and there was provision for an appeal (J125-127).

13. Breaches of standards which were so serious that they destroy the relationship of trust and confidence between the respondent and employee were considered "*gross misconduct"* (J133) and that may result in dismissal without notice even for a single breach. A non exhaustive list of acts which could be considered gross misconduct were:

- *"Serious breaches of any HMRC policies and procedures, including but not limited to:*
    - *Data security and data protection, confidentiality and privacy;*
    - *Health and safety rules and procedures;*
    - *Acceptable use policy."* (J133)

14. The respondent "*Acceptable Use Policy*" set out procedures necessary to manage data appropriately and ensure that the respondent was a "*trusted tax and customs department*" (J135-144). That policy advised of necessary measures to protect the confidentiality of customer data and in relation to the use of email employees should:

    - *"Never send OFFICIAL-SENSITIVE information to your personal email address"* (J141);

15. It was also stated under *"Important points to remember"* that any suspected breaches of the security policy should be immediately reported by letting the employee's line manager know and complete a security incident report particularly if the breach related to the possible disclosure of personal data. It was also stated that the respondent monitored use of equipment, systems and access to data and that all breaches of the policy would be investigated (J144).

16. There was no dispute that the claimant had received training on these policies and procedures.

The reported incident

17. On 10 March 2023, the claimant's manager received a report from "*Systems Audit Data Analysis*" (SADA) that on 20 February 2023, the claimant had forwarded to his personal email address a section of a *"Real Time Information"* report (RTI) containing over 100 workers' full names and which included national insurance numbers and dates of birth and pay details. The claimant's manager completed an incident report (J83-85) which advised that he had spoken with the claimant on 10 March 2023 and notified him of the

breach of security which had been disclosed. An RTI is a document prepared by an employer and provided to the respondent for information and review. It precedes any enquiry into compliance with NNW. The claimant along with a colleague was to make a visit to the employer located in Norwich. He had arranged a rental car which when delivered was found to be problematic and delayed departure. In terms of the incident report the claimant advised that he had "*emailed the RTI report to his own email in order to print off a copy for the visit".* The claimant was advised that this was *"a serious breach of security*" and he had "*apologised and explained that he had deleted the email as soon as he had printed it off"*. The claimant was advised that this was a matter which would require to be considered under conduct and discipline (J83-85).

18. On 17 March 2023, the claimant's manager emailed the claimant to confirm dates he had completed mandatory training and also that an investigation manager had been appointed to the matter who would be in touch to arrange an interview and obtain background. (J86)

19. The claimant's line manager had also sent an email to all staff in the operational team reminding them that they had "*access to a lot of personal information when carrying out NMW reviews, NINOs, addresses, dates of birth etc. We must* ***never*** *send these outwith HMRC systems even to print off at home. There have been more incidents of this recently as we are working from home a lot more since COVID but never send anything to your own private email address to print off that contains any personal or business data."* (J87)

20. The investigation manager was appointed on 15 March 2023. She had no knowledge of the claimant prior to that time. EAS was to assist and a meeting arranged for 20 March 2023 to discuss future procedure. The investigation manager received the SADA report. At this time, the investigation manager also received some training for "*unconscious bias"*.

21. By letter emailed to the claimant on 23 March 2023 he was advised that Ms Riley had been appointed as decision manager with Ms Burrow as

investigation manager. He was to expect an invite to an investigation meeting. He was advised the "*potential breach"* could be classed as gross misconduct which if established may lead to a final written warning or dismissal. (J102-104)

22. The claimant was absent from work on 27-28 March 2023 as he was suffering from anxiety. He spoke with his line manager at that time who advised of resources for assistance in these circumstances (J89).

23. By emailed letter of 3 April 2023 from his line manager the claimant was advised of these arrangements under the conduct policy and whilst this is a "*potentially serious matter*" the claimant would not be suspended but could continue his duties. (J91/92)

The investigation

24. The investigation meeting was arranged for 24 April 2023. In an email of 14 April 2023 and attached letter the claimant was invited to that investigation meeting via Teams (J93-96). The invitation advised that the alleged breach of policy was:

"On 20 February 2023, you emailed OFFICIAL SENSITIVE customer information from your HMRC.GOV email account to a personal external email address. This is potentially contrary to the HMRC Acceptable Use Policy and the Electronic Communications Security Policy."

25. It was noted that this may be classed as gross misconduct and that it was the claimant's opportunity to *"provide and comment upon relevant evidence and discuss avenues of investigation"* for example with any particular witnesses. The claimant had the opportunity to bring a colleague or trade union representative to that meeting.

26. The terms of reference for the investigator noted that the prospective time scale was four weeks for the investigation (J97 – 98).

27. The claimant had intended to be accompanied by a Trade Union representative but on the day, he was not able to contact her. He agreed in

the course of the meeting that he was happy to continue without that representative and he was fit enough to participate. A note of the meeting (J163-167) was stated by the claimant to be a fair representation of the discussion on the day.

28. The claimant confirmed that he was aware of the Acceptable Use Policy and Code of Conduct. It was agreed that the RTI contained a list of 100 employees names and dates of birth with 98 of the employees' national insurance numbers also listed.

29. The claimant explained that he had a visit planned to Norwich being an eight hour drive which would keep him away from home for three days. He was to pick up a colleague to accompany him on the visit. He had intended to print documents from the office and then collect his colleague from East Kilbride. The hire car booked was dropped off to his home address the day before the intended meeting. He was not told it was an electric car which he had looked over later in the day and saw no issues with the vehicle. He planned to leave around 11am on 20 February 2023. However when he got in the car, he found the battery had 79 miles remaining which was clearly insufficient for the drive. He let his manager and colleague know of that issue as well as contacting the hire car company. He was advised that the car could be swapped but not a time as to when that might happen. He had difficulties with electric cars before. He explained that he suffered from depression and anxiety and this scenario worsened his anxiety which was already high due to the upcoming visit and waiting for another car. That put his "*anxiety through the roof".*

30. A replacement car was dropped off around 12.45pm. If he had gone to the office to print off any document, he would have arrived in Norwich very late. He tried to print the RTI document from his work phone and home printer but that did not work. He then sent the document to his personal email and printed it from there. He stated he had firewall protection on his computer and regularly updated his passwords. After printing the file, he deleted the document. He stated that he understood the lack of judgment and GDPR responsibilities and that he had refreshed all learning packages available. He stated he had no malicious intent when printing the document and wished to

get the meeting carried out and assist the respondent.. He understood that the data was at risk of being intercepted and that he would be "*vigilant at all times including when stressed and under pressure".* He understood breaches should be reported. He advised that if it happened again, he would go into the office and either reschedule the meeting or arrive late. He advised that he was on "*Sertraline*" being a depression medication and that made him "*forgetful"* and he was going through a bad spell at the time of the breach. He had an appointment with his doctor to discuss this. He indicated that he had been taking medication for approximately one year.

31. He understood that there was a need to keep data protected; that the respondent could face fines and reputational damage were there to be a leak of data or intercepted by those with the wrong intentions.

32. Subsequent to the meeting, the claimant forwarded to the investigation manager a statement of the events in question. This coincided with the notes within the investigation meeting including that he suffered from depression and anxiety and that the events meant that he was "*not thinking straight due to the stress of the situation and my anxiety being extremely high and I forwarded the document to my personal email to print from home. I did not suspect it to be an issue as I have firewall and anti virus security on all my devices and only I have access to my email. I also regularly update my passwords. I do now realise this was a major lapse of judgment.*" He also stated that he realised the potential severity of the situation and understood data protection and GDPR responsibility. He hoped this could be viewed "*as a learning curve"*.

33. He also advised that he had time to dwell on the situation and was caught "*off guard*" in relation to questions asked regarding codes of conduct. He advised that links in the email to take him to documents were broken but he had searched the policies and now realised that the investigation manager was looking for information on his responsibilities in terms of the Codes (J169-179).

34. The claimant also forwarded to the investigation manager an email from the car hire company of 24 February 2023 apologising that the rental had not gone *"as smoothly as hoped but we glad we rectified it as soon as possible".* There was also forwarded an exchange of messages between the claimant and his colleague between 11am and 11.36am on the day of the intended visit concerning the problems with the car. (J180-181)

35. The investigation manager completed her report on 28 April 2023 (J105-J111) with appropriate appendices and considered that there was a breach of the Acceptable Use Policy on electronic communication and that there was a case to answer in that respect. She indicated that the level of any penalty was for the decision manager taking into account any mitigation . That report was submitted to Ms Riley as the decision manager.

Decision manager consideration

36. The decision manager received the investigation report and all appendices and met with the advisor from EAS. The claimant was invited to a decision meeting on 19 May 2023 by letter of 11 May 2023 (J182-183). A mixture of leave taken by the claimant and Ms Riley accounted for delay between the receipt of the investigation report which was dated 28 April 2023 and invite to decision meeting.

37. The claimant was advised that the allegation was that he had *"breached the HMRC Acceptable Use policy for electronic communications and data"* and outlined the possible consequences in the event the alleged breach was upheld. He was advised that he could be accompanied by a colleague or trade union representative.

38. The meeting took place at the appointed time and date and the claimant was accompanied by his trade union representative.

39. Notes of the meeting (J184-187) were sent to the claimant on 19 May 2023 asking if he would advise if anything has been *"missed and you are happy with them."* The claimant responded on 22 May 2023 (J188) saying that he was *"okay with the notes"* but adding that in relation to his stated response

which read *"I knew that you should not sent emails to home yet still did it",* he had meant "*more that I had the information somewhere but forgot at this moment due to the situation."*

40. Within the meeting, the claimant advised that interpretation of the Acceptable Use Policy with reference to forwarding documents classified as *"OFFICIAL-SENSITIVE"* to personal or home email accounts was *"basically that I shouldn't do it. I did have some information on the policy but I had a lack of clarity. I am sorry."* He indicated that he was *"100% more switched on than I was".* He also indicated that he was aware of the need for the policy to protect HMRC and their workers and customers' data and was aware of the wider consequences but realised that he "*slipped up at this point and I was on medication".* He emphasised that he had refreshed his training and that the data breach had been of no personal gain to him but understood how it could lead to serious consequences. He was asked if he wished to add anything to the reasons given for the incident to the investigating manager and indicated that in future, he would be more vigilant in checking if any hire car was electric and that *"I had depression and anxiety at the time and maybe the medication wasn't working at the time. I was also tired too. So I think this had a bigger contribution to what happened. For two weeks, I was getting up later in the morning and feeling down. I have since learned to speak to the information and security partner in case there was any special dispensation. I am more aware of compromised data security in work as well as day to day life. The doctor did say that the medication could have these side effects. They said you will still get good and bad weeks. I just need to recognise in myself and that information is safe. I have got all the HMRC data policy now saved in a handy place for reference."*

41. He was further asked what the link was between his health issues and mitigation and indicated:

"I felt down and anxious going on this visit. It increased the feelings I had and maybe I acted out of character. It was a three day visit so this didn't help. So I had to print off but now realise I am paying for my choices."

42. The decision manager considered that this matter was a major incident and did not consider that there was sufficient evidence to indicate that the claimant's mental health affected the decision made during the process to the extent that he would forget the prohibition on sending personal taxpayer information to personal email accounts. She was aware that the claimant had no previous disciplinary incidents. She agreed that she had no training in disability issues but in any event, even if disability issues arose, the *"breach was too severe"* given the importance of maintaining confidentiality for taxpayers' information and the fines and reputational damage which might accrue to the respondent. She was not aware of any discussions with the claimant's manager prior to the incident around his mental condition.

43. The decision manager had dealt with five cases in which three had resulted in dismissal including the present case and in light of the evidence available to her considered that the claimant should have known it was a breach of policy.

44. There was some dispute as to whether the meeting had ended with the decision manager indicating to the claimant that he should *"have a good weekend and see you on Monday"* inferring that all would be well and there would be no dismissal. The decision manager indicated that she had no recollection of making that statement. It was not included in the notes of the meeting and not pointed out as missing by the claimant in his email of 22 May 2023 (J187-188).

45. A further issue was whether or not there had been delay in issuing the decision given that it should have been intimated within five days of the decision meeting. The notes indicated that the decision manager advised that "*in the interests of transparency, I will aim to get back to you before 5 June, as I will be going on leave."* Again no issue was taken with that matter when the claimant approved the notes of the meeting.

46. By letter of 2 June 2023 (J191-193) the claimant was advised that there had been a breach of the following policies:

"

- *Upholding our standards of conduct.*
- *Acceptable Use Policy for electronic communication and data.*
- *Conduct: Confidentiality and Customer Privacy."*

47. In those circumstances, the penalty was dismissal with effect from 2 June 2023. The reasons for that conclusion were identified in the attached decision notice (J191-200).

48. This decision was intimated by email to the claimant without notice or any communication from his line manager at the time. The "*conclusions*" narrated the available evidence and noted the points made by the claimant in mitigation. The difficulties around the hired car were stated along with the claimant's position that he suffered from *"depression and anxiety and the situation worsened due to your anxiety. You explained in your statement you weren't thinking straight as you had tried to print the document from your workphone and due to the high anxiety, you just forwarded it onto your personal email. You didn't suspect it would be an issue as you have firewall and anti virus security on your devices. You advised that you printed it off and deleted the email."* It was also narrated that in the meeting, the claimant was asked if there was a link between health issues and the incident and the answer that the claimant *"felt down and anxious going on this visit. It increased the feelings I had and maybe I acted out of character. It was a three day visit so this didn't help. I tried to print off from a work phone but now realise I am paying for my choices.*"

49. The decision letter advised that these matters had been considered in the sanctions available but that this was a serious breach of the acceptable use policy. The letter concluded in stating that the decision had not been taken lightly and that dismissal without notice was considered appropriate rather than other available sanctions because:

"

- *The material is particularly sensitive in nature and disclosure is liable to cause or could have caused significant consequence to a taxpayer or to HMRC's functions/reputation.*
- *The contents relate to a large number of identifiable customers with NINO's and date of birth.*
- *The email was sent to an address not under the sole control of the intended recipient(s).*
- *The communication could have resulted in an unauthorised disclosure of HMRC information, a criminal offence, or a breach of legal obligation.*
- *There was no responsibility to disclosure/highlight this breach to your manager as soon as it happened. I would have expected with your length of service, you were fully aware of what was required from you"* (J198-199).

Appeal

50. The claimant consulted with his union adviser (J204) and intimated a lengthy appeal on 12 June 2023 (J206-213).

51. The claimant also provided an extract from his medical record showing a consultation of 1 November 2022 with his GP (J215) and a personal reference from his line manager (J217).

52. He summarised his appeal as:

"

- *The disciplinary sanction imposed was too severe. In all of the circumstances a final written warning would suffice. Summary dismissal is not within the band of reasonable responses.*

- *Appropriate consideration has not been given to my mental health conditions (depression and anxiety) and I am being treated less favourably as a result of this.*

- *Due consideration has not been given to the wider circumstances in which the breach happened.*

- *The process was unduly protracted and drawn out which compromised the recollections of those involved and worsened my mental state.*

- *The steps that I have taken since to rectify the breach and ensure it does not happen again have not been given full consideration."*

53. Within the grounds of appeal, it was also stated that he was aware of a case *"in England where the accused only received a written warning for a data breach within national minimum wage. Am I being treated different due to the size of the case I was given? Should I have been given that case in the first place? Would the outcome have been different if it was a tiny case i.e. two workers instead of a hundred? It is the same mishap I have made as the person who got a written warning. I am not aware of whether this individual suffers from mental health problems but I am concerned that this is the reason for the way in which I have been treated rather than the nature of the breach."*

54. By letter of 21 June 2023, the claimant was invited to an appeal decision meeting on 29 June 2023. He was advised that he could be accompanied and that the aim would be to intimate a decision within five working days of the appeal meeting. This was the first internal appeal dealt with by the appeal manager having been appointed to the pool of decision makers created by the respondent for such matters in early 2003. He had dealt with appeals from members of the public.

55. By way of preparation for the meeting, the appeal manager sought information from the claimant's line manager indicating that he was looking for additional evidence namely "*OH reports and notes of any conversations with Matthew around his mental health in the run up to late February."*

56. In response, the appeal manager received an Occupational Health Report (OH report) dated 12 September 2022 (J76-77) which was instigated around the issues with the claimant attending the office subsequent to the COVID lockdown. This indicated that the claimant had been experiencing symptoms of *"increased anxiety for about a year or possibly longer"* and that his family had noticed that he had not *"been himself"*. He had seen his GP who had *"advised a diagnosis of depression"* and that medication had been prescribed to manage the symptoms. He had also been offered some self help online support "*via his GP*". The claimant at that time noted an improvement in his mood since commencement of the medication. The claimant reported managing at work with his workload but finding that he was "*struggling to go into the office environment due to his increased anxiety".* The advice from OH at that point was that the claimant may benefit from some "*additional flexibility with home and office based work if operationally feasible*" and that additional support networks had been discussed. Based on the information presented at that time it was stated that *"in my clinical opinion"*, the claimant remained *"fit for work in his substantive role*" and *"it is my opinion that he is unlikely to meet the criteria of the Equality Act; however this is a legal decision and not a medical one."*

57. There was also produced notes of conversations between the claimant and his line manager dated 21 September 2022; 26 October 2022 and 27 October 2022 (J78-81).

58. Those notes concerned the issue of the claimant making a return to the office rather than continuing to work at home. Occupational Health assessment was offered to the claimant at that point bringing about the foregoing report. A note of a meeting with the claimant on 27 October 2022 advised that the claimant had not logged on from the office since before 5 September 2022 and he was being encouraged to return to the office working as *"three days a week is a requirement of his job"*. Discussion related to the claimant commencing two days in the office and then increasing to three days and that visits to a customer's own business were to count as days "*in the office"* Discussion also related to the claimant's holiday and a suggestion that the

claimant might simply come in to see his manager *"for a coffee"* and then drive home to try and break any barriers about returning to the office. At that time, the claimant thought that he could work two days per week and would be in touch after his appointment with his GP. Thereafter, the claimant was sent a link to *"wellness and stress plans and guidance"*. While the claimant was not sure what *"triggered"* any feelings of anxiety, it was possible that the wellness and stress plans and guidance might assist.

59. There was also included within the information provided to the appeal manager a note of a call between the claimant and his line manager on 28 March 2023 when again the issue of the claimant's mental health was discussed as the claimant was unable to attend work because he was "*suffering from anxiety*". At that point, the claimant had not approached his GP regarding the issue but would if his anxiety continued. The claimant was reminded of help available from the respondent to assist his mental health issues but that had not been followed through by the claimant.

60. The claimant prepared an appeal document for the hearing on 29 June 2023 which he produced (J223-227). He elaborated on the particular grounds of appeal in the hearing.

61. The appeal meeting notes (J228-235) disclose a full discussion on the issues. In respect of the claim that insufficient consideration had been given to his mental health by way of mitigation, the claimant advised that he had been going through a difficult time at that point and for *"two weeks he was not wanting to get out of bed, waking up anxious and depressed. After two weeks, he started to get better and wasn't feeling too bad throughout the investigation."* He also stated that he felt that the incident wouldn't have happened "*if there wasn't an issue with the hire car".* Going to the office to print documents would have added time and he already had concerns about driving late on the roads. He also indicated that this was his *"big first case face to face"* and he wished to get this one done but that he *"knows what he did was wrong and a big risk and would like an opportunity to make this better."*

62. He was asked if he could explain the link with the evidence provided from his doctor and he explained that he had consulted with his GP in November 2021 and that his workplace was providing the main source of anxiety. He explained that came in spells and he could "*have good and bad weeks".* Following the breach, he felt bad and considered changing his medication but after consultation with his doctor, decided to remain on the same medication. He stated that he could *"suffer side effects such as feeling tired, forgetful and lethargic"* and that he "*forgot this was a major issue and had probably seen it somewhere at some point but that this time he couldn't recall. Stress and anxiety were caused when the wrong car was delivered and he didn't want to cancel the meeting and didn't know what to do. Matthew advised that he kept his colleague and manager up to date and informed them of the issue. He felt the only option was to get the meeting done but in hindsight, he should have cancelled and rearranged. This was a snap decision.*"

63. The claimant confirmed that he had not followed through on the completion of the stress management plan and wellness plan as he could not explain the triggers other than to say going into the office and his manager *"wasn't willing to negotiate on this".* He also indicated that there had been some flexibility where he would attend the office for half days or for coffee but his *"depression and anxiety didn't just go away"*. The claimant thought that at one point, he had contacted "*PAM Assist"* but he felt disillusioned after the OH referral and that his approach was that any help would be provided from the doctor. He felt there was further information which could be achieved from his GP and the appeal manager advised he would be happy to extend time for that information to be provided. The claimant also advised that he did not think he had any conversations with his manager in the run up to the intended visit in February 2023 and permission was provided for the appeal manager to request any evidence which might be held within the *"teams chat".*

64. In relation to the responsibility to highlight any breach of policy as soon as it occurred, the claimant advised that he had not done so due to *"not knowing it was a breach at that point"* and he would have straightaway had he known (J235).

65. Subsequent to the meeting, the appeal manager sought information from the claimant's line manager on the visit to be made on February 2023 and if there were any "*teams chats with yourself in and around the date of the breach around his mental wellbeing (early February to 20 February 2023)"* (J237).

66. The claimant's line manager responded to say that his section did not handle the *"big*" cases as they would go to a specialist enforcement team; it was not unusual for his section to deal with cases of around 100 workers; and this case was allocated as a "*run of the mill compliance review"*. He also advised that officers went out in pairs so there was always support; that the claimant had completed a full training programme in January 2021 and during the 2022/2023 financial year "*was a fully trained compliance officer working and closing 19 cases over that year (the expectation was 20 for all officers so as good as met that expectation) that included a variety of businesses including cases that had around 80 workers".* He also advised there were no mental wellbeing "*chats"* from beginning 2022 and the only *"teams messages related to casework".* The only mention was on 27 March 2023 after the breach to say the claimant was "*calling in sick due to anxiety".* He advised that he had no performance issues with the claimant.(J236)

67. The appeal manager extended the decision by a week to allow the claimant to provide any further evidence or information and by email of 5 July 2023, the claimant acknowledged that extension and advised that he would wish to add to his appeal that he had been *"made aware that at a recent disciplinary hearing within the last six months regarding an almost identical scenario the accused was sending national insurance numbers to their home email so they remembered what cases to work when working from home each day (more than one occasion). The person was told there was no intent other than business purpose, no ill intent and there was no past history of issues from the decision maker. The person received a written warning for this. I do not believe there is much difference to my case than this. I did not know it was an issue, had no intent other than business purpose, had no ill intent by doing what I done and have no past issues with disciplinary. Potentially, the case I have mentioned is worse than mine as it was more than once. I understand*

it will be on a case by case basis but there seems to be no consistency and I have been treated very harshly. Either this or the decision maker was incompetent. I have now given two examples of previous cases where I have been treated differently." (J238)

68. There was also produced a letter from Pollokshaws Medical Centre (J241) indicating that the claimant had been attending the practice for "*work related stress and anxiety exacerbated by a recent dismissal investigation".* It was stated "*I fully support Matthew in relation to his mental health and can see he contacted us in this regard in February this year prior to the consultation he had this month."*

69. There was also produced the records from the claimant's GP in the period 10 April 2015 – 24 April 2023. This showed a consultation on 9 October 2015 noting that the claimant complained of low mood and anxiety *"for the past year"*. And *"unsure if low mood has tipped into depression. He will come back in a few weeks to let us know how he is getting on. I explained the meds that we could use if he wants. He will consider them…".*

70. Another consultation took place on 11 August 2022 where the problem was described as *"low mood"* for the past year or so and *"bored with his job"* . Reference was made to his sister attempting suicide on three occasions *"which plays a factor"* and *"still working/going to the gym...."* At this point a prescription of Sertraline 50mg is given.

71. There was a further entry on 7 September 2022 with a brief note stating the problem is "*low mood"* and that *"improved initially and then tailed off"* and the Sertraline dosage is increased to 100mg.

72. A further consultation is noted on 1 November 2022, again dealing with "*low mood"*. It was stated that there had started to be an improvement in his mood "*in the last week or so"* but still feeling tired and wished "*bloods checked"*. He felt that his job was the main cause of a lot of his stress in that his boss was not very sympathetic, *"wanting back in office when he would rather work from home".* He chose to continue the current treatment and had "*supportive partner family and friends.* He asked to be referred to "*cbt"* which he attended.

73. A further entry was made on 24 April 2023 and related to a repeat prescription for his medication as it required to be reauthorised (J255-258).

74. The appeal manager considered the whole circumstances and concluded that the appeal should not be upheld. He intimated that decision by letter of 13 July 2023 (J246-254). He dealt in detail with areas raised in the appeal being:

"Mental health mitigations and additional evidence".

75. In essence the appeal manager considered there was insufficient evidence to show that the claimant was not accountable for his actions on 20 February 2023. He considered there was "*no evidence provided to show that during the weeks running up to the breach on 20 February 2023 that you were unwell."* It was noted that the letter from the Pollokshaws Medical Centre did not indicate the date that the claimant had approached the surgery. The only reference to visit in February 2023 related to a request for a repeat prescription and not for any consultation.

"First large face to face case"

76. In this respect, evidence from the claimant's line manager was that there was nothing abnormal regarding this piece of work; the claimant had had the required training; and had the relevant experience to deal with the matter.

"Return to office flexibilities"

77. In this respect, it appeared that the claimant's manager had been sympathetic to phasing a return to work in the office with a view of doing a few hours of work; then starting two days in the office; with a view to building up to three days. He did not agree that there was no flexibility.

"Working during the investigation and the breach of reasoning " (sic)

78. It was stated that all formal investigations take some time to be concluded. Unless there were extreme circumstances, a "*business as usual approach is adopted"* and it was only on rare occasions that a decision might be made to remove someone from day to day work. It was acknowledged that the

claimant had no malicious intent but sending information to a personal non encrypted email address put the data at risk.

"*Additional acknowledgements"*.

79. In this respect, it was noted that there were difficulties with the hire car but that the claimant had indicated *"in hindsight, he should have cancelled and rearranged*". It was not considered the disciplinary process was unduly delayed. The length of time taken was a fair representation of the investigation and formal meetings that were required to take place.

"Additional contact after appeal meeting".

80. It was noted that the claimant had brought to the appeal manager's attention the circumstances of what was regarded as an *"almost identical scenario"* which had resulted in a lesser penalty. No enquiry was made by the appeal manager in this respect. He indicated that this did not bear weight in his decision and "*all cases are dealt with on a case by case basis and I am not able to pass comment. I will however advise that in all formal gross misconduct cases, an independent case worker and decision manager are appointed to ensure fairness and consistency in decisions."*

81. The screenshot of the invitation to sign up for online CBT in November 2022 was noted but however that was more than three months prior to the breach and the appeal manager did not add to the mitigation for the actions on 20 February 2023.

82. In all the circumstances, the appeal upheld the decision of the dismissing manager.

Disability status

83. On the claim of discrimination arising from disability the claimant had provided a disability impact statement at an earlier stage in the proceedings (J56-57) and was able to make further comment in evidence.

84. The claimant had initially been part of the Debt Management collection team with the respondent and in 2020, was promoted to the post within NMW. The

section to which he belonged dealt with compliance issues for small businesses up to 180 employees. It would be necessary to prepare for a visit or a telephone discussion, question directors and interview workers and check employee records. It could take up to a year for a case to be completed. He had a lengthy training programme of about six months and then commenced with cases which were "*light"* before taking on heavier cases. His training included instruction on the Acceptable Use Policy which he read.

85. Initially, given lockdown, his contact with employers was all by telephone. Prior to September 2022, he commenced visits with employees/employers. He always had a companion in those visits. He stated that he had never been off work for any length of time and with the respondent and his *"attendance was brilliant".*

86. As described previously, he had a consultation with his GP in October 2015 with the problem described as *"low mood"* and no medication or other treatment was identified at that time.

87. There were no further consultations until 2022 when his family indicated he was *"not himself"* anymore. He considered that he had been in denial as to his mental health condition at this time. His sister had attempted suicide on three occasions. Also, there were difficulties in that a previous husband of his partner (now ex-partner) was messaging his then partner in controlling and abusive terms. The ex husband also sent the claimant messages on fake accounts. The claimant was unable to resolve matters. For some time he had suffered from anxiety. He found leaving the house and talking to people difficult.

88. As a result of the conversations with his family, he attended his doctor on 11 August 2022. He stated at that time that he was diagnosed with depression and anxiety albeit the entry of 11 August 2022 (J267) describes the problem as "*low mood"* as do subsequent entries on 7 September 2022 and 1 November 2022.

89. At that time, he was prescribed Sertraline 50mg and as a consequence of the further consultation on 7 September 2022, that dosage was increased to 100mg.

90. He described in August 2022 that he would lie in bed for *"three hours – maybe not get changed, shower – maybe have to build up going to the shops*" and "*maybe not see friends for months"*. Around this time, work was flexible as he was working at home and so could make up hours and he "*never really let work slip"* albeit he found himself "*stressed about the cases beyond what I thought was normal".*

91. In September/October 2022 he had discussion with his line manager regarding anxiety about office working. The notes of those discussions (J75,78,79,80/81) disclose that he advised his line manager of medication prescribed and advised that he felt unable to attend office as he got used to the medication. He advised that the medication seemed to affect his sleep and he awoke feeling tired and anxious about attending the office. At this time he agreed a referral to OH who produced their report on 12 September 2022 (J76/77). The discussion also disclosed that in late September 2022 the claimant had conducted a 2 day visit to Aberdeen but on return *"had felt down"* and was considering going back to his GP. Subsequent discussions concerned phased return to office working and seeking to understand why office work made the claimant anxious with him advising that he had felt "*ok on the plane"* for his holiday and "*on (employer) visits"* and *"didn't know why the thought of working in the office was making him anxious".*

92. He described the cancellation of social events in that he recalled saying that he would go out with friends but when it came time to leave, he "*had the wee boy and no money"* (a son born by his partner February 2024) and so did not go and cancelled with half an hour spare. He described this as his brain *"not quite computing that he needed to have done that sometime before".*

93. Also, he advised that "*a few weeks ago thought about going out with friends and cancelled at the last minute"*. He described not attending a friend's birthday party in September 2022 not because he disliked the individual but

because he was feeling anxious and not wanting to go out that night. At the same time he indicated he had never attended the event before then.

94. He had been a reasonably regular attender at football matches until lockdown in 2020. He had attended a fixture in July 2022 but felt anxious about crowds and had not returned for about 18 months or so.

95. He had found his motivation lacking and that had caused some arguments with his ex partner. He described "*finances"* and being viewed as lazy were the main factors in the breakup of that relationship which had *"gone south after the disciplinary".* He had continued to meet with family but found that he wanted to avoid people or awkward situations. That would limit his desire to go to the shops.

96. The statements of fitness for work of December/January 2024 and January/March 2024 advised that because of "*low mood",* that he was unable to work. He advised that generally he suffered from low confidence.

97. He advised at the time of the breach in February 2022, he had not been sleeping well and had a "*really bad two weeks"*.

Events since termination

98. The claimant had found employment from 2 April 2024 at a salary of £1600 net per month. This was a "*permanent contract"* albeit still on a probationary period. The employment was with a private healthcare provider. He was enrolled in a pension scheme and obtained private healthcare as a benefit with a value of approximately £30 per month.

99. At the date of termination, the claimant was paid by the respondent gross annual salary of £28,130 and his net monthly pay ran at a rate of £1,841.05.

Submissions

100. Each party made lengthy submissions for which I was grateful. No discourtesy is intended in making a summary.

For the respondent

Unfair Dismissal

101. It was submitted for the respondent that the reason for dismissal was conduct being one of the potentially fair reasons for dismissal. The particular breach of conduct was well canvassed in the hearing namely that the claimant on 20 February 2023 sent an email from his HMRC.GOV email account to his personal email address to print off at home. The RTI document contained was marked as "*official"* which contained a list of 100 employees names and dates of birth – 98 of which referred to national insurance numbers. In addition, gross pay and net pay was identified for the individuals. In doing that, he committed a serious breach of the respondent's Acceptable Use Policy for electronic communications and data. That was listed as an example of gross misconduct in the respondent Upholding our Standards of Conduct Policy.

102. It was submitted that the well known tests within **British Home Stores Limited v Burchell [1978] IRLR 379** had been met.

103. Thereafter, it was for the Tribunal to determine whether the decision to dismiss fell within the range of reasonable responses available to a reasonable employer. That test applied to both the decision to dismiss and to the investigation. The Tribunal was minded that it should not substitute its view for that of the employer.

104. It was submitted that the policy breached by the claimant was well known to him. That was accepted within the investigation and disciplinary process. The claimant understood the importance of protecting the respondent and the information.

105. It was submitted that the claimant had not produced any medical evidence to support that he was suffering from depression and/or anxiety at the time of his conduct or suffering from side effects such as forgetfulness as a result of taking medication. Neither was their evidence that there was any connection between his mental health/side effects with the medication and the

misconduct committed. It was not considered that there was a link between the claimant's mental health and the conduct that resulted in dismissal.

106. Neither did the claimant report the matter once he realised there was a breach.

107. The decision manager considered the claimant had disregarded the respondent's policies. It was not considered credible for the claimant not to realise that what he was doing was a breach of policy.

108. The material emailed was particularly sensitive in nature and the disclosure would have caused significant consequence to the respondent's functions/reputation as an organisation and/or to the taxpayers whose details were contained within the RTI report.

109. The decision manager's position was not that she ignored the claimant's mental health but that she did consider that aspect of matters but did not believe that the consequence of his mental health and/or the medication resulted in the email to his personal email address.

110. The decision manager considered that the main focus of the mitigation put forward by the claimant was around the issues relating to his hire car. The claimant had not produced any medical evidence during the disciplinary hearing and in the notes of that meeting, he does not say that his mental health caused him to send the email. It was for the claimant in that hearing to produce the necessary evidence.

111. In any event, if there were any errors in the decision making process resulting in dismissal, that was cured at appeal. The claimant was given time to produce any additional evidence. That evidence was considered. The claimant's line manager was contacted to glean any further information. It was considered that there was insufficient evidence to support that there was a link between the claimant's mental health and his conduct. It was submitted that the language used by the claimant throughout the disciplinary and appeal showed that even he did not appear to be convinced that his mental health had caused him to act in the way that he did.

112. It was considered by the appeal manager also that the breach occurred was and serious as it could be in terms of the Acceptable Use Policy. He saw no reason to overturn the decision made.

113. The claimant had raised an issue of inconsistency in dealing with breaches of the Policy. In the course of the disciplinary proceedings he asserted he was aware of two cases in which the employees had breached that policy and received a written warning.

114. Such arguments need to be scrutinised with care. In **Hadjioannou v Coral Casinos Limited [1981] IRLR 352**, it was necessary to show that there was evidence that an employee had been misled by an employer to believe certain categories of conduct would be overlooked or not dealt with by sanction of dismissal; or it could be inferred that the employer's asserted reason was not the real reason for dismissal; or there were "*truly parallel circumstances*".

115. The only argument for the claimant here was that other events were parallel It was clear from the claimant's evidence that he was not aware of the facts or circumstances of either of the two mentioned cases and unable to answer any questions which would put the situation as "*truly parallel*". The decision makers had a dedicated independent caseworker from the respondent's HR function to ensure that cases involving gross misconduct were dealt with fairly and consistently.

116. It was also submitted that a fair investigation and process had been taken in this case.

117. The claimant took issue with the lengthy investigation and disciplinary process but the respondent submitted that it was not a drawn out or unduly protracted process. The claimant was kept informed of the timescales in the process and in any event, that would not have made any difference to the outcome.

118. The claimant appeared to suggest that the decision was pre-determined but there was no evidence to support that assertion. In all the circumstances, it was submitted that the complaint of unfair dismissal should be dismissed.

Wrongful dismissal

119. Insofar as the claim of wrongful dismissal was concerned, the claimant's contract of employment indicated that if his employment was terminated following disciplinary proceedings, then the respondent would give no notice in cases of gross misconduct. The contract also advised that the claimant should comply with Policies issued by the respondent.

120. It was the respondent's position that the claimant's actions did undermine the relationship of trust and confidence and that it was an action of gross misconduct and so there was no separate contractual claim of wrongful dismissal available to the claimant.

Discrimination arising from disability - disability status

121. The time for determining disability status would be 20 February 2023 which was when the conduct complained of took place.

122. The claimant sought to rely on depression and anxiety. It was disputed that at the relevant time, the claimant was disabled.

123. In August 2022, the claimant was diagnosed with low mood and there was no reference to depression and anxiety. The further medical record entries refer to low mood and not depression.

124. It was submitted that the low mood was caused by life events rather than clinical depression. The claimant was assessed by OH provider in September 2022 and that assessment indicated that it was unlikely that the claimant was a disabled person as defined.

125. There was no further record of any depression within the GP notes or the statement of fitness to work produced later.

126. Reference was made to the case of **J v DLA Piper (UK) LLP [2010} ICR 1052** and the distinction between life events causing low mood and clinical depression. The respondents in this case would say that the claimant had low mood and not depressive episodes.

127. So far as day to day activities were concerned, it did not appear that the anxiety over social occasions would be a substantial effect at the relevant date. It was accepted that the role that the claimant held was a demanding one but he did attend meetings, prepared for meetings, travelled and visited customers and was assessed as fit for work.

128. Neither was there evidence of a recurring effect. He experienced symptoms in 2015 and then the next consultation was in August 2022. The discussion in 2015 appeared to centre around the claimant being anxious in speaking at team meetings which was not likely to recur.

129. It was submitted there was no evidence of long-term effect. The claimant was first seen on 9 October 2015 with low mood but the symptoms appear to have resolved and there was no follow up consultation.

130. Between 7 August 2022 and 1 November 2022, his symptoms appeared to have improved so it was not a condition which had either lasted for 12 months or was likely to last for 12 months from 20 February 2023.

Knowledge of disability

131. In the event that it was determined that the claimant was a disabled person, it was contended that the respondent would not know or could not reasonably have been expected to know that the claimant had a disability. It was not reasonable to infer a long-term condition from what the respondent was told. Depression and anxiety can be situational and those affected can be prescribed medication for short periods of time.

Discrimination arising from disability

132. In any event, it was not accepted that the dismissal of the claimant was because of something arising in consequence of his disability. The EHRC Code acknowledged that there must be a connection between whatever led to the unfavourable treatment and the disability. **Basildon and Thurrock NHS Foundation Trust v Weeransinghe EAT/0397/14** made clear that section 15 of the EqA is a two stage test namely:

- What was the cause of the treatment complained of; and
- Did that cause arise in consequence of the disability.

133. It was submitted the cause of the treatment in this case was the claimant's conduct on 20 February 2023. However, there was no medical or other information which would allow the Tribunal to make the conclusion that the treatment was *"something arising in consequence of his disability".* There was no medical evidence or other wider evidence to support that proposition in that:

- The claimant's line manager confirmed that the claimant's concern regarding his mental health related to office attendance and no deterioration in his standard of work;
- He continued to work without any complaint;
- There was no mention within the medical notes of the claimant being forgetful or suffering from lapses in judgment as a result of his mental health;
- In September 2022, the OH report assessed the claimant as fit for work and there was no mention by him of suffering from lapses in judgment and/or feeling forgetful;
- There was a great deal of thought given by the claimant about the visit to be made regarding the hire car; delay to travel; difficulties on roads. He also tried several alternatives before sending the email to his home address. That would not suggest he was in some way out of control of his actions;
- The claimant made no mention of his mental health when first told of the breach by his line manager; and
- The claimant has still not produced medical evidence to show how his mental health and/or the side effects of medication affected him.

134. Even if the Tribunal did consider that the treatment arose because of the claimant's disability, the respondent would consider that dismissal was a proportionate means of achieve a legitimate aim.

135. The Tribunal required to undertake a fair and detailed assessment of the employer's business needs. For the reasons set out in the ET3 paper apart, dismissal was in pursuit of a legitimate aim and was proportionate. Dismissal was the only way of dealing with a position where an employee could not be trusted and in discouraging such behaviour. All the respondent's witnesses emphasised the importance the respondent places on Data Protection.

136. The decision maker was clear that this was a severe breach given the amount of data involved and there was no less discriminatory or alternative way of achieving the legitimate aims of the business.

For the claimant

137. The claimant submitted that the decision made to dismiss him was made by those who were inexperienced in disciplinary issues. There was no evidence of disability or mental health training within the disciplinary panel.

138. Additionally, it was submitted that the decision was biased because those involved were taken from the respondent disciplinary panel; worked for the respondent and it could not be confirmed that they would go against the respondent.

139. It was also submitted that he was disbelieved by the panel particularly in relation to his deletion of the email subsequent to printing off the information.

140. Additionally, the investigation manager was from the NMW section and that was a conflict of interest. He did not consider that the process was carried out in an independent and fair manner.

141. He advised that medication for his mental health had improved him "*a bit"* but that did not mean he was cured of the ailment. He continued to have lethargic and tired days albeit less frequent given the medication.

142. He stood by his impact statement and considered that he went above and beyond for the respondent with seven years exemplary service and it was harsh to be dismissed for his first breach of policy. There was a business need for the breach and it was not at all malicious.

143. He also questioned if there was consistency in treatment. He referred to the email from his line manager to the team subsequent to the breach (J87). He had also raised other examples and given as much detail as he could but there had been no effort made to track down these cases.

144. He maintained that there had been a lack of investigation into matters. The investigation manager had not seen the RTI form herself and while he had indicated in the investigation that he took medication for his mental health, there was no investigation made on that matter by the investigating officer or contact with his manager.

145. He also took issue with the length of time that the dismissal decision took to be made in that it should have been intimated within 5 working days of a hearing whereas the decision in this case was much later.

146. As far as the claimant was concerned, the investigation and decision maker was one sided and there was little effort to consider the mitigating circumstances. He believed that the respondent had no regard for his mental health since he was diagnosed.

147. He maintained that the decision maker had remarked that it would be "*business as usual*" for him on the Monday following the decision meeting. The notes were inaccurate in not recording this issue.

148. While the decision manager indicated that the mental health condition did not overcome the seriousness of the breach, there was no explanation of what constitutes "*severity*" or the threshold and difference between misconduct and gross misconduct.

149. Also, the way in which the decision was communicated was cold and harsh.

150. Neither was it fair to indicate that the respondent could not be sure the incident would not occur again. That would be to go against his own position which was that he had refreshed himself on all these policies and was now well aware of the sanctions. He did not consider that summary dismissal was within the band of reasonable responses in that appropriate consideration had not been given to his mental health conditions (depression and anxiety) or to the wider circumstances.

151. He had attached evidence being a summary from his doctor showing that work was giving him anxiety in November 2022 and that condition simply does not "*just go away*". While he understood that there needed to be a full investigation, why, if he was a risk to the respondent, was he allowed to continue working with sensitive data for nine weeks subsequent to the breach and being involved in training of new colleagues.

152. He considered that during the appeal, he had provided evidence such as the letter from his doctor which indicated that he had made contact in February 2022 regarding his mental health and that this information was disregarded on the basis that there was no specific date of contact mentioned. Also, while the appeal manager had been provided with detail of other incidents where there had been no dismissal he had made no enquiry. It seemed that the evidence he was providing was simply disregarded.

Discussion and conclusions

Disability status

153. Section 6 (1) of the Equality Act 2010 (EqA) states that a person has a disability if that person has a *"physical or mental impairment which has a substantial and long term adverse effect on [the persons] ability to carry out normal day to day activities".* The burden of proof is on the claimant to show that he or she satisfies this definition.

154. Supplementary provisions for determining whether a person has a disability are contained in Part 1 of Schedule 1 to EqA. Also, "*Guidance on matters to be taken into account in determining questions relating to the definition of*

disability" (2011) ("the Guidance") has been issued under Section 6 (5) of EqA. There has also been published a *"Code of Practice by the Equality and Human Rights Commission (EHRC)"* ("The EHRC Code") which has a bearing on the meaning of disability. Neither the guidance nor the code impose legal obligations but their provisions must be taken into account by Tribunals where relevant.

155. Tribunals are encouraged to consider this issue by reference to four different questions being:

- Did the claimant have a mental and/or physical impairment?
- Did the impairment affect the claimant's ability to carry out normal day to day activities?
- Was the adverse condition substantial?
- Was the adverse condition long term?

156. The material time at which to assess the disability is the date of the alleged discriminatory act. This is also the material time for determining whether the impairment has a long term effect.

157. The note of the Preliminary Hearing in this case issued on 28 December 2023 allowed a complaint of disability discrimination to be added by way of amendment and states that following discussion, it became clear that the claimant's claim was of discrimination arising from disability under section 15 of the EqA. The argument by the claimant is that there was *"something arising in consequence of his disability namely his mental health and state of mind leading to the decisions he took which brought about the policy breach for which he was dismissed"* and that the dismissal was the unfavourable treatment. The dismissal arose out of the claimant's actings on 20 February 2023 . As stated in the EHRC Code (5.8), *"the unfavourable treatment must be because of something that arises in consequence of the disability."* This means that there must be a connection between whatever led to the unfavourable treatment and the disability.

158. In this case, the respondent's assessment of the effect of the claimant's disability and whether dismissal took place as a consequence of that disability must relate to the claimant being a disabled person as at 20 February 2023 which is taken to be the material time to make the assessment of disability status.

The impairment

159. There is no statutory definition of either *"physical impairment"* or *"mental impairment"* and neither is there any definition in the Guidance or the EHRC Code. Almost any impairment (apart from alcohol or drug addiction) can be classed as an impairment. Appendix 1 to the EHRC Code states that there is "*no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is to consider the effect of the impairment, not the cause."*

160. So far as mental health is concerned, the guidance indicates that a disability can arise from mental health conditions with symptoms such as *"anxiety, low mood…".* Neither is it necessary to consider how an impairment is caused (Guidance section A5-A7).

161. In this case, the claimant consulted with his GP in 2015 with the problem stated as being *"low mood"* but it would not appear that any further consultation, medication or measures needed put in place to deal with that problem. Given there was no further consultation for approximately 7 years I would consider any impairment apparent in October 2015 had been resolved.

162. The claimant consulted with his GP on 11 August 2022 with the problem being stated as "*low mood*" and medication of Sertraline tablets 50mg prescribed. A further entry of 7 September 2022 increased the dosage to 100mg with again the problem being stated as "*low mood*". That continued to the consultation on 1 November 2022 and medication continued through to 20 February 2023.

163. The notes of the conversations with the claimant's line manager over September/October 2022 referred to his anxiety and him *"suffering from*

depression". While there was no diagnosis of depression that was inconsequential for the purposes of identifying whether the claimant had "*an impairment"*. I accepted that he had an impairment of *"low mood and anxiety"* which had caused him to be prescribed medication. I accepted that impairment continued through to 20 February 2023.

164. The severity of symptoms for anxiety disorders can vary greatly and with most other mental health conditions, the issue of whether a person will be regarded as being disabled needs to be judged by a Tribunal on a case by case basis.

165. The impairment requires to have a *"substantial adverse effect"* on a person's ability to carry out normal day to day activities. "*Substantial*" means "more than minor or trivial" – s212 (1) of EqA.

166. The guidance explains that the requirement for any adverse effects of an impairment to be "*substantial"* reflects the *"general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people"*.

167. In this determination, the guidance emphasises that it is important to focus on what an individual cannot do, or can only do with difficulty rather than on the things that he or she can do (paragraph B9).

Effect on normal day to day activities

168. Protection is only accorded to those ability to carry out "*normal day to day activities*" is impaired and so the issue of whether or not there is a *"substantial adverse effect"* is clearly tied in with those issues.

169. Appendix 1 to the EHRC Code states that "*normal day to day activities*" are those activities that are carried out by most men or women on a fairly regular and frequent basis giving examples such as walking, driving, typing and forming social relationships. Other activities would include shopping, reading and writing, having conversation or using the telephone, watching TV, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities. Normal day to day activities would also include general work

related activities such as interacting with colleagues, following instructions, using a computer and preparing written documents.

170. So far as the effect on day to day activities is concerned, there was nothing in the notes of consultation with his GP which would assist in identifying adverse effect on day to day activities. The entry of 11 August 2022 advises that the claimant is "*bored with his job"* but *"still working – going to the gym although anhedonia evident".* The further entry of September 2022 gives no information on this aspect of matters. The entry of 1 November 2022 advises he had been on holiday and that there had been some improvement in his mood. While he was "*sleeping less than before he started Sertraline but waking up feeling better"*. The note also indicates *"feeling very tired all the time – wanting bloods checked"* (J255,258).

171. The OH report (J76/77) does not identify what day to day activities the claimant cannot do or has difficulty doing. It is reported that he is managing at work with his workload but finding that he is "*struggling to go into the office environment due to his increased anxiety" and* the claimant is "*unlikely to meet the criteria of the Equality Act"* albeit acknowledging that is a legal decision and not a medical one.

172. The notes of conversation between the claimant and his line manager essentially concerned attendance at work in the office rather than at home and the claimant's position that he was anxious about office attendance and did not consider attendance conducive in the initial stages of medication.

173. In this period (September/October 2022) It did appear that he was still conducting visits to employers as part of his case work and that his line manager was happy with his case work. In the conversation of 27 October 2022, it was noted that the claimant *"didn't know why the thought of working in the office was making him anxious".* He also advised in a conversation of 1 September 2022 that the medication seemed to affect "*his sleep and leaving him very tired"* and that when he woke, he felt tired and anxious about attending the office (J75 – 81).

174. The claimant's impact statement (J56 – 57) states that the claimant considered he had the conditions of "*depression and anxiety"* for many years but never considered action until around 2022 after his family noticed that he was not himself and unhappy. He states symptoms include feeling "*lethargic, tired, unmotivated, sickness, unhappiness, forgetfulness, low self esteem and finding no joy in things I used to love."* He states that his symptoms of anxiety are *"feeling restless, getting tired easily, difficulty concentrating, difficulty sleeping, difficult to have social conversations some days, nervous about feeling about tasks and sometimes feeling overwhelmed"* and that those symptoms made it hard to *"maintain relationships mostly from being unable to leave the house on occasion and meeting friends and family becoming harder to do".*

175. In his evidence, he advised avoiding social interaction for example having to *"build up going to the shops"* or avoiding any social events and contact with friends or family. He also lacked motivation and attending to chores around the house which caused arguments with his former partner.

176. However of these various matters it was difficult to find evidence of what it was that the claimant could not do or only do with difficulty and any particular time line. He still saw his family over August 2022 to date. He was still in touch with friends. There was no evidence he could not or had difficulty shopping or cooking or performing household chores, or dressing or washing. He described separation from his partner came after disciplinary proceedings (concluding in July 2023) over problems with *"lethargy and finance"* which would be related to different circumstances and time period than the material time of February 2023 when he did live with his partner. In this assessment the type of day to day activity in his work such as planning, using the telephone, managing a case load, using a computer, following instructions, making decisions, analysing written material, travelling away from home, driving, conducting meetings were all performed satisfactorily. The occasions described of avoiding social interaction seemed to relate to cancellation of a visit with friends shortly before it was likely to happen after the birth of his son

in February 2024 and avoiding the birthday party of a friend in September 2022.

177. From the evidence I would consider that as at February 2023 the effect on day to day activities was not that the claimant was unable to perform any particular day to day activity but that lethargy made it difficult to be motivated to do so; in particular being anxious in social situations; and wishing to avoid crowds. That would be the situation in February 2023 with the aid of the Sertraline medication. While that would be an adverse effect I do not consider that to be substantial .

Substantial adverse effect

178. In determining whether a person's impairment has a substantial adverse effect on his or her ability to carry out normal day to day activities, the effects of medical treatment on the impairment should be ignored. If an impairment would be likely to have a substantial adverse effect but for the fact that measures are being taken to treat or correct it, it is to be treated as having that effect (paragraph 5(1) schedule 1 EqA). That would be the case even where the measures taken result in the effects of the impairment being removed. Consequently, the impairment in this case requires to be judged by reference to the claimant's abilities without the Sertraline medication.

179. In determining the effects of an impairment without medication, it would be necessary to examine how the claimant's abilities had actually been affected at the material time whilst on medication and then address its mind to the difficult question as to the effects which they think there would have been but for the medication being the "*deduced effects"* and the question is then whether the actual and deduced effects on the claimant's ability to carry out normal day to day activities are clearly more than minor or trivial – **Goodwin v Patent Office [1999] ICR 302.**

180. The claimant commenced medication from August 2022. Again there is no medical evidence of the effect on day to day activity prior to that date or any medical evidence since then of the likely effect on day to day activities were the claimant to cease medication.

181. So far as assessment of day to day activity can be judged in relation to work related matters there seems to be no difference in the position pre 11 August 2022 and thereafter.

182. On specific matters the claimant advised that he had regularly attended football matches pre Covid lockdown, which would be around 27 March 2020, and then on return to a match in July 2022 had found anxiety in attending a particular game and had not returned to a football match for 18 months thereafter.

183. His family appeared to have advised him in August 2022 that he was "*not himself*" but there was no evidence of what it was he could not do by way of normal day to day activities at that time to make an assessment of deduced effects. The medical record entry of 1 November 2022 advises that the claimant felt an "*improvement in his mood, feeling better"* and it might be assumed that without the medication his mood would be lower and he would not be feeling as good. However that would not enable a finding to be made that there were day to day activities that he could not do or only do with difficulty without medication compared with the position with medication or to articulate what those activities might be.

184. The position would then be that the only difference from the evidence is that the claimant without medication would find it difficult to attend football matches. That addition to the matters put at paragraph 177 above would not in my view mean that there were substantial adverse effects (meaning more than minor or trivial) on day to day activities.

185. That conclusion would mean that the claimant is not a disabled person as that is defined in s6 of EqA.

Discrimination arising from disability

186. Albeit the finding on disability status means the claim of discrimination arising from disability under s15 of EqA cannot succeed I would not have found that claim to be successful even if the claimant was a disabled person as that is defined.

187. Section 15 (1) of EqA provides that a person (A) discriminates against a disabled person (B) if:

- A treats B unfavourably because of something arising in consequence on B's disability;
- A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

188. Section 15 (2) states that the foregoing does not apply if A shows that A did not know, and could not have reasonably have been expected to know, that B had a disability.

189. In this case, it was submitted that the respondent did not know and could not reasonably have been expected to know that the claimant had a disability.

Knowledge of disability

190. An employer cannot simply ignore evidence of disability in defence to a claim under section 15 of EqA. The act does not impose any duty to enquire about a person's possible or suspected disability but the EHRC Code states that an employer must do all it can reasonably be expected to do to find out whether a person has a disability.

191. In this case, there was evidence of the claimant discussing his mental impairment with his line manager. That discussion took place around the claimant's attendance in the office subsequent to a period of home-working during COVID. There was clearly a drive for the respondent to encourage office working as a target of three days a week and the claimant explained his anxiety in this respect. The respondent knew that the claimant had been prescribed medication for his impairment. At the time of the alleged unfavourable treatment, the claimant had explained in the investigation process, a disciplinary hearing and appeal process, that he suffered from *"depression and anxiety"* and the scenario which presented itself worsened that state of anxiety namely the difficulties with the hire car and travel.

192. The respondent in this case had the OH report of 12 September 2022 (J76-77) which indicated that, in the opinion of the advisor of the claimant, was not covered by the Equality Act. **Gallop v Newport City Council [2014] IRLR 211** demonstrates that an employer should proceed with caution when told by an OH advisor that an employee is not disabled. At any subsequent hearing, a Tribunal could so find that an employer had constructive knowledge. The respondent should make its own factual judgment.

193. I consider that once informed of some of the details regarding a mental condition, an employer might reasonably be held to come under a duty to enquire further in order to establish how severe the condition is and whether in particular the effects have a substantial adverse effect on the employee's ability to carry out normal day to day activities. I consider the failure to do so leads to the conclusion that had there been a finding of disability then the employer would have had constructive knowledge of the disability on the basis that even if it did not actually know that the impairment in question was severe enough to satisfy the section 6 definition, it could reasonably have been expected to know within the terms of section 15 (2).

Something arising in consequence of disability

194. For a claim under section 15 (1) of EqA to succeed, the unfavourable treatment must be shown by the claimant to be *"because of something arising in consequence of (his or her disability)".* The discriminatory treatment must be as a result of something arising in consequence of the claimant's disability and not the disability itself. There must be *"something"* that led to the unfavourable treatment and this *"something"* must have a connection to the claimant's disability.

195. The EHRC Code states that the consequence of a disability *"includes anything which is the result, effect or outcome of a disabled person's disability".*

196. Essentially, the section 15 claim in this case is that the claimant's misconduct resulted from his mental health and state of mind leading to the decisions he took which brought about the policy breach.

197. In this case, I accepted that the reason for dismissal was that the claimant had incurred a policy breach in sending the RTI report by email to his personal email account. The policy was well known.

198. The "*something arising in consequence of the disability"* would require to be a mental failing on the part of the claimant. I did not find there to be objective evidence to support that position.

199. The claimant did not dispute that he was aware of the policy. He had been advised of it at induction training and it was a principal policy for the respondent. He had intended to go into the office to print off the information that day in order to comply. The security of taxpayer information was fundamental to its operation.

200. There was no medical evidence to indicate that the claimant's condition made him forgetful or he could be so overwhelmed by anxiety that his condition could cause him to forget that he should not be sending email to his personal account.

201. The claimant's own evidence was confusing in his explanation of events and somewhat contradictory. He stated that he *"did not think this was an issue at the time. Felt was a business need for it. Not know was an issue to email home especially if a business need for the information. Cancelling would have been frowned upon. I had always gone to the office (for printing off RTI) – felt only option at the time."* That evidence was to the effect that because he felt he was emailing the information due to a *"business need"* then that was in order. That was a very different explanation from stating that a consequence of his state of mind due to his disability or medication caused him to send the email.

202. He also indicated that the prohibition on sending personal information to his home email address was "*in his mind somewhere*" but he forgot it on the day which was a very different explanation from thinking it appropriate to send an email because it was for a business reason.

203. There was no evidence in the performance of the claimant's duties that he was *"forgetful"*. His line manager was complimentary about the standard of work and there was no suggestion of any cognitive failure.

204. In the notes of his investigation meeting (J164), he did not indicate that it was his increased anxiety or impairment that had caused him to send the email. He indicated that he had "*tried to print the document from his work phone and home printer"* but that did not work. He then sent the document to his personal email and it printed from there. If it was the case that he had *"forgotten"* about the policy, then there was no reason to try and print off the document from his work phone rather than simply email the document to his personal computer in the first instance. He also indicated that he understood that security *"should never be compromised no matter what"* and he put the data at risk of being intercepted and that there was a *"lapse of judgment"* (J164 – 165).

205. In the decision meeting, he was asked of his interpretation of the policy regarding sending information to a personal or home email account and stated that *"basically that I shouldn't do it. I did have some information on the policy but had a lack of clarity. I am sorry for that"* (J185) That appeared to be an acknowledgment of his awareness at the time.

206. He did indicate in his amendment to the notes (J188) that where the notes of the decision hearing stated, ""*I knew that you should not send emails to home yet still did it"", I meant more that I had the information somewhere but forgot at this moment due to the situation*." The situation was the lack of charge on the hire car to get him to the proposed destination and the need to call for a replacement. There is no evidence there that the sending of the email was a consequence of his disability distinct from the situation which he found himself.

207. In **Basildon and Thurrock NHS Foundation Trust v Weeransinghe [2016] ICR 305**, it was explained that there is a need in section 15 cases to identify two separate causative steps for a claim under section 15 to be made out being:

- The disability had the consequence of "*something",* and

- The claimant was treated unfavourably because of that "something".

208. According to that case, it does not matter in which order a Tribunal approaches those steps.

209. The consequence, result or outcome of a disability according to the evidence was that the claimant shied away from social interaction; became anxious and lethargic; was reluctant to be in crowds or socialise.That would be the *"something"* and the question would be whether *"because of that",* the respondent dismissed the claimant.

210. The "*consequence"* of the disability was not related to the reason why the claimant sent a document containing personal taxpayer information to his personal email. The "*something"* could not be said to have had any bearing on that issue. It did not disclose a state of mind that would have resulted in that action being taken.

211. That set against the other confusing nature of the claimant's own evidence on the situation leads to a finding that there was no causal link between the disability and the claimant's state of mind which would cause him to send the taxpayer information to his personal email. The "*something"* in consequence of a disability was not a state of mind which would mean that the claimant would forget about the policy.

212. Accordingly, it is not accepted that it was because of the *"something"* that the claimant was treated unfavourably and the section 15 claim of discrimination arising from disability would not have succeeded.

Unfair dismissal

Relevant law

213. Section 98 of the Employment Rights Act 1996 (ERA) sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages, namely (1) the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in Section 98 (1) and (2) of ERA; and (2) if the employer is successful at the first stage the Tribunal must

then determine whether the dismissal was unfair or fair under Section 98 (4). As is well known, the determination of that question:

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 treated 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.*

214. Of the six potentially fair reasons for dismissal set out at Section 98 of ERA one is a reason related to the conduct of the employee and it is this reason which is relied upon by the respondent in this case.

215. The employer does not have to prove that it actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness. A *"reason for dismissal"* has been described as a *"set of facts known to the employer or it may be of beliefs held by him which cause him to dismiss the employee"* – **Abernethy v Mott Hay and Anderson [1974] ICR 323.**

216. Once a potentially fair reason for dismissal is shown then the Tribunal must be satisfied that in all the circumstances the employer was actually justified in dismissing for that reason. In this regard, there is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one for the Tribunal to decide.

217. In a case where misconduct is relied upon as a reason for dismissal then it is necessary to bear in mind the test set out by the EAT in **British Home Stores v Burchell [1978] IRLR 379** with regard to the approach to be taken in considering the terms of Section 98 (4) of ERA.

218. The guidance in that case has stood the test of time and was endorsed and helpfully summarised by Mummery LJ in **London Ambulance Service NHS Trust v Small [2009] IRLR 536** where he said that the essential terms of enquiry for Employment Tribunals in such cases are whether in all the

circumstances the employer carried out a reasonable investigation and at the time of dismissal genuinely believed on reasonable grounds that the employee was guilty of misconduct. In that respect the Tribunal should be mindful that it should not put themselves in the position of the employer and consider what it would have done but determine the matter in the way in which a reasonable employer in those circumstances in that line of business would have behaved.

219. If satisfied on the employer's fair conduct of a dismissal in those respects, the Tribunal then has to decide whether the dismissal of the employee was a reasonable response to the misconduct. The Tribunal requires to be mindful of the fact that it must not substitute its own decision for that of the employer in this respect. Rather it must decide whether the employer's response fell within the range or band of reasonable responses open to a reasonable employer in the circumstances of the case **(Iceland Frozen Foods Limited v Jones [1982] IRLR 439).** In practice, this means that in a given set of circumstances one employer may decide that dismissal is the appropriate response, while another employer may decide in the same circumstances that a lesser penalty is appropriate. Both of these decisions may be responses which fell within the band of reasonable responses in the circumstances of a case.

220. Additionally, a Tribunal must not substitute their decision as to what was a right course to adopt for that of the employer not only in respect of the decision to dismiss but also in relation to the investigative process. The Tribunal are not conducting a re-hearing of the merits or an appeal against the decision to dismiss. The focus must therefore be on what the employers did and whether what they decided following an adequate investigation fell within the band of reasonable responses which a reasonable employer might have adopted. The Tribunal should not *"descend into the arena"* – **Rhonda Cyon Taff County Borough Council v Close [2008] ICR 1283**.

221. Also in determining the reasonableness of an employer's decision to dismiss the Tribunal may only take account of those facts that were known to the

employer at the time of the dismissal – **W Devis and Sons Limited v Atkins [1977] ICR 662.**

222. Both the ACAS Code of Practice on disciplinary and grievance issues as well as an employer's own internal policies and procedures would be considered by a Tribunal in considering the fairness of a dismissal. Again however when assessing whether a reasonable procedure had been adopted Tribunals should use the range of reasonable responses test – **J Sainsbury's Plc v Hit [2003] ICR 111.**

223. Single breaches of a company rules may found a fair dismissal. This was the case in **The Post Office t/a Royal Mail v Gallagher EAT/21/99** where an employee was dismissed for a first offence after 12 years of blameless conduct and the dismissal held to be fair. Also in **AH Pharmaceuticals v Carmichael EAT/0325/03**, the employee was found to have been fairly dismissed for breaching company rules and leaving drugs in his delivery van overnight. The EAT commented:

"In any particular case exceptions can be imagined where for example the penalty for dismissal might not be imposed, but equally in our judgment, where a breach of a necessary strict rule has been properly proved, exceptional service, previous long service and/or previous good conduct, may properly not be considered sufficient to reduce the penalty of dismissal."

224. This means that an employer need not have conclusive direct proof of an employee's misconduct. Only a genuine and reasonable belief reasonably tested.

Conclusions

Reason for dismissal

225. The reason for dismissal in this case was given as conduct being one of the potentially fair reasons. The reason for dismissal was that on 20 February 2023, the claimant sent an email from his HMRC.GOV email account to his personal email address. The email contained a PDF document being a Real Time Information (RTI) report marked as *"official"*. That document was a *"list*

of over 100 employees names and dates of birth with gross wage and net wage and the national insurance numbers for 98 of those employees."

226. The respondent's *"Acceptable Use Policy"* (J135-144) advises under paragraph 9 in relation to use of email that an employee should *"never send OFFICIAL-SENSITIVE information to your personal email address."*

227. In addition, the policy advises that an employee must "*report suspected breaches of security policy immediately. Let your manager know straightaway and complete a security incident report. The sooner you report a potential breach, especially if this relates to the possible disclosure of personal data… the quicker HMRC can start to resolve it."*

228. The policy advises that the respondent monitors equipment and that all potential breaches of the policy are investigated.

229. The respondent policy entitled *"Upholding our Standards of Conduct"* advises (under the heading gross misconduct (J133)) that *"serious breaches of any HRMC policies and procedures including but not limited to… Acceptable Use Policy"* would be considered gross misconduct.

230. There was no dispute that this event had taken place.

231. In relation to the Burchell test, it is necessary for the respondent to have a belief in the guilt of the employee of the misconduct which would include that there were reasonable grounds upon which to sustain that belief and had carried out as much investigation into the matter as was reasonable in all the circumstances.

232. The potential breach of the policy was intimated to the claimant's line manager on 10 March 2023 (J84) and the claimant was advised that afternoon of the notification. The claimant at that time confirmed that he had emailed the RTI report to his own email address in order to print off a copy for a visit he was making to Norwich.

233. An investigation followed and the report of that investigation provided the claimant with an opportunity to comment on the issue. The claimant was

supplied with the appropriate documentation prior to the investigation meeting and at that time, the claimant confirmed that he had sent the email including the RTI report. He intimated he was "*very stressed*" with the difficulty in the hire car which meant he couldn't travel as planned to the office to print out the document. There was a long drive ahead and the last minute situation caused a lapse in judgment in sending the email to his private address to print the required document. He also advised during the investigation meeting that he took medication for anxiety and depression and at the time of the incident was going through a bad spell further adding to his lapse of judgment.

234. The investigation manager decided that there was a "*case to answer"* and so the matter proceeded to a disciplinary hearing. At that hearing, the claimant confirmed that he should not have sent the RTI document to his personal email address and that he understood the need of the respondent to "*keep everyone safe and the data safe"* and that he was aware of the "*wider consequences".* Essentially, his position was that he had slipped up but at the time, he had "*depression and anxiety"* and *"maybe the medication wasn't working at the time".*

235. The subsequent decision and appeal hearings indicated that the claimant felt the sanction was too severe and he did not think consideration had been given to the wider circumstances around the issue with the hire car and his mental health (J229).

236. In those circumstances, there was ample grounds upon which to sustain a belief that there had been misconduct by the claimant. There had been investigation within the investigative meeting and decision and appeal meetings which established the misconduct.

237. The essential position being put by the claimant was that in the circumstances, the offence should not be treated as gross misconduct and that to do so was outwith the range or band of reasonable responses.

238. The principal issue put forward by the claimant was that the circumstances surrounding the hire car and his mental health at the time meant he was not

thinking clearly. He did not consider that the decision manager had placed proper emphasis on those matters.

239. The decision manager did however outline the mitigating circumstances put forward by the claimant in her decision notice (J198). In that notice the circumstances surrounding the inadequate charge in the hire car were outlined and additionally stated the claimant's position that he suffered from *"depression and anxiety and this situation worsened"* that anxiety. She recorded the claimant's statement was he was not "*thinking straight as you had tried to print the document from your work phone and due to the high anxiety, you just forwarded it onto your personal email, you didn't suspect it would be an issue as you have firewall and anti virus security on your devices. You advised that you printed off and deleted the email. You accept this was a major lapse of judgment and realised the potential severity of it".*

240. The decision manager advised that she had weighed the mitigation provided but considered that the dismissal was appropriate given:

"

- *The material is particularly sensitive in nature and disclosure is liable to cause or could have caused significant consequences to a taxpayer or to HMRC's functions/reputation.*
- *The contents relate to a large number of identifiable customers with NINO's and date of birth.*
- *The email was sent to an address not under the sole control of the intended recipient(s).*
- *The communication could have resulted in an unauthorised disclosure of HRMC information, a criminal offence, or a breach of legal obligation.*
- *There was no responsibility to disclose/highlight this breach to your manager as soon as it happened, I would have expected with your length of service, you were fully aware of what was required from you."*

241. In evidence, the decision manager advised that this was a "*severe breach"* and indeed even if the claimant had been regarded as a disabled person, dismissal unfortunately would have been the only means of achieving a legitimate aim given the high importance attached to ensuring taxpayer information was kept confidential.

242. Clearly, the decision manager had a view that not to dismiss in circumstances where there was an admitted breach would require mitigating circumstances beyond those advanced by the claimant.

243. Criticism of the decision manager was that there was no investigation of the claimant's mental health, and it is the case that she relied on the claimant's evidence without making any further enquiry by way of seeking medical evidence or other information. However, the notes of the decision hearing relating to the claimant's depression and anxiety was not to say that this breach was caused by that condition but that he would be more *"switched on"* in the future and that he had taken steps to refresh himself on the policies.

244. In any event, if there was a failure at this stage of investigating fully the consequences of the claimant's impairment, then the appeal manager sought to address that issue and that would cure any failure in this respect. The appeal notes indicate that the claimant was specifically asked to expand on his mental health condition. At this stage, he had produced a copy of the consultation of 1 November 2022 with his GP (J215). That note indicated that there had been an improvement in his mood albeit feeling *"tired all the time".* He indicated he had the support of his partner, family and friends and the job was the main cause of stress in that his line manager wished him back in the office when he would rather work from home. It was advised that he would continue with the current treatment and could increase the dose or switch medication if he felt that was not working. He chose to continue the treatment. He was also referred for cognitive behavioural therapy.

245. Also, the claimant produced a reference from his line manager which indicated that he had no doubts about the claimant's commitment to his work

and that albeit times had been difficult for him, he had retained a good quality of work.

246. Subsequent to the appeal, the appeal manager sought further information from the claimant's line manager (J220) seeking additional evidence namely OH report and any notes of conversations with the claimant around his mental health in the run up to 20 February 2023. He received the notes of conversations in September/October 2022 with the claimant around his anxiety about returning to the office three days a week. The OH report was also disclosed.

247. The claimant also produced a letter from his GP of 6 July 2023 which advised that the claimant had been attending the practice for "*work related stress and anxiety exacerbated by a recent dismissal investigation"* and that he had engaged well in terms of his medication titration and CBT arrangements. It was stated that he had contacted the practice in February prior to a consultation of July 2023. The medical records disclosed that there was no consultation as such in February 2023 but repeat prescription.

248. Accordingly the recent evidence of mental health condition was contained in the note of consultation of 1 November 2022. There was no detail given of any contact with the practice in February 2023 and if this had been either before or after the incident and there was nothing in the notes to suggest there had been any particular discussion with the claimant's GP in that month.

249. The appeal manager outlined the evidence available in his decision letter (J247-249) and considered that there was insufficient evidence to show that the claimant was unwell in the weeks running up to 20 February 2023. He considered there was insufficient mitigation in what was disclosed to alter the penalty of dismissal.

250. As indicated, a Tribunal should not substitute its decision as to what was a right course to adopt in respect of an investigative process. The focus is on what the employer did and whether what they decided following an adequate investigation fell within the band of reasonable responses which a reasonable employer might have adopted. Applying that test, I would consider that an

adequate investigation had been undertaken in relation to the claimant's mental health and the surrounding circumstances of the day in question relating to the car hire (which was not in dispute). I could not say that the decision by the appeal manager to rely on the information received went beyond or was outwith the band of reasonable responses.

251. Further, as regards the claimant's mental health condition in the view of the appeal manager there was insufficient evidence to show that this affected the claimant in his decision to send the email to his home address in February 2023. I did not consider that this was an unreasonable belief.

Inconsistency of treatment

252. An additional matter put forward by the claimant related to an alleged inconsistency of treatment. He advised in his appeal document (J223) of a *"case in England where the accused only received a written warning for doing the same thing – data breach".* He could not remember who had told him about this "*but it was the same lapse of judgment".*

253. Additionally, he advised subsequent to the appeal hearing and before receiving the appeal outcome of an issue involving a *"disciplinary hearing within the last six months"* where the *"accused was sending national insurance numbers to their home email so that they remembered what cases to work when working from home each day (more than one occasion)."* A written warning was received in that respect. He considered this was "*two examples of previous cases where I have been treated differently".*

254. It has been recognised that inconsistency of punishment for misconduct may give rise to a finding of unfair dismissal (**Post Office v Fennell [1981] IRLR 221).** However, that case recognised that while a degree of consistency was necessary, there must also be considerable latitude in the way in which an individual employer deals with particular cases.

255. Also, as was submitted, the case of **Hadjioannou v Coral Casinos Ltd** indicated that a complaint of unreasonableness by an employee based on inconsistency of treatment would only be relevant in limited circumstances:

- Where employees have been led by an employer to believe that certain conduct will not lead to dismissal. This was not apparent in this case. The claimant made no suggestion that he sent the email in breach of the Acceptable Use Policy as it would not lead to dismissal because of previous cases.

- Where evidence of other cases being dealt with more leniently supports a complaint that the reason stated for dismissal by the employer was not the real reason. There was no suggestion in this case that the real reason for dismissal was anything other than a breach of the Acceptable Use Policy.

- Where decisions made by an employer in truly parallel circumstances indicate that it was not reasonable for the employer to dismiss. This was the ground relied on.

256. That case stressed the danger inherent in attaching too much weight to consistency of treatment when the proper emphasis is on the *"particular circumstances of the individual employee's case"* and deprecated the idea of a "*tariff approach to misconduct cases".*

257. The further case of **Securicor Ltd v Smith [1989] IRLR 356** advised that where two employees were dismissed for the same incident and one was successful on appeal but the other not, the question to be asked was whether the appeal panel's decision was so irrational that no employer could have reasonably accepted it. The Securicor case also made it clear that the question of consistency is subject to the *"range of reasonable responses"* test and as was observed in **Wilko Retail Limited v Gaskell and another EAT 0191/18**, employers are permitted some flexibility in deciding whether a supposedly comparable situation is sufficiently similar.

258. Furthermore, as was pointed out in **Harrison v Royal Mail Group Limited, ET case number 2401652/2016,** perfect consistency simply may not be achievable for large employers who have numerous dismissing officers in different locations. In that case, the employee was dismissed for failing to apply a handbrake sufficiently to prevent his vehicle rolling away having failed

to follow a safety briefing that he had been given. There was evidence of inconsistency in that another employee (D) had not been dismissed in similar circumstances. The Tribunal noted that had the same person been responsible for a disciplinary decision in both cases, there could have been an argument for saying that he or she acted unreasonably in imposing a sanction short of dismissal on one employee and dismissing the other. However, the Tribunal went onto note that in a large organisation, it is not surprising that there is some variation in treatment between similar cases in different parts of the country. It could not expect RMG Limited to apply a tariff based approach nor to achieve equality of outcomes in similar cases. All that can be expected of an employer acting reasonably even one as large as RMG Limited is that *"managers will consider allegations of misconduct on a case by case basis, apply the standards of behaviour and attempt to achieve a broad level of consistency".*

259. There was some limited questioning of the claimant in relation to his knowledge of the cases on which he relied and it was clear he had no real understanding of the particular circumstances in question. It could not be said that this case and the two to which he referred were truly similar or they were *"truly parallel circumstances"*. It is clear that the tribunals have given latitude to employers and in particular large employers in relation to this aspect of reasonableness. The appeal manager in this case advised that he was assisted by a member of the "Expert Advice Service" as were all other appeal managers and this sought to achieve a level of consistency.

260. Given the relevant law in this area and the information provided, I could not state that the decision to dismiss was taken outwith the range of reasonable responses due to inconsistency of treatment. This was a case involving a large employer and the appeal manager had indicated that matters should be dealt with on a *"case to case basis"* which is an approach in line with the authorities.

261. The ACAS Guide also points out that fairness does not mean that similar offences will always call for the same disciplinary sanction and that each case must be looked at in the context of its particular circumstances which may

include health or domestic problems, provocation or justifiable ignorance of the rule or standard involved.

Delay in the investigation

262. The claimant criticised the length of time it took for the disciplinary process which only added to his anxiety.

263. The timescale was that the incident occurred on 20 February 2023 and on 10 March 2023, the claimant's line manager was advised by the internal security department of a potential breach of security. He advised the claimant that day of its coming to his attention and that he would require to raise a "*security incident*".

264. By letter of 23 March 2023 from the decision manager appointed the claimant was advised of the next steps and indicated that the process would be as set out in the *"Upholding our Standards of Conduct Policy – approach B"* and that a decision manager would arrange for an investigator to speak with the claimant.

265. By letter of 14 April 2023 the claimant was contacted by the investigation manager who advised the claimant that the investigation meeting was intended to take place on 24 April 2023 giving the required notice. The investigation meeting took place on 24 April 2023. The investigation manager explained that after appointment she met with HR on 27 March 2023 to review process and became aware that the claimant was absent and that on his expected return she was to be on leave and so decided to issue the invite letter on her return.

266. The report by the investigating officer was complete and submitted on 28 April 2023 with its appendices and that recommended that the matter go to a decision manager.

267. A decision meeting in terms of the policy (J124) was to be held "*as soon as reasonably possible giving the employee five working days notice"*. By email of 11 May 2023, the claimant was advised that the decision meeting would take place on 19 May 2023 and the decision was issued on 2 June 2023. The

claimant was particularly concerned with the timescale of issuing that decision as the policy indicated that it would be within five days of the decision meeting. However, the notes of the meeting (J187) included the statement that "*in the interests of transparency, I will aim to get back to you before 5 June as I will be going on leave."* Commenting on the notes of the meeting, the claimant made no comment that this statement had not been made or that it was incorrect. The decision manager indicated that she was on leave, that she had produced the outcome letter on 2 June 2023 which was within the timescales she had indicated.

268. The claimant then appealed that decision on 12 June 2023 and a hearing on the appeal took place on 29 June 2023. Thereafter, a decision was intimated on 13 July 2023 (the appeal manager having agreed to delay a decision for a week to allow the claimant to produce some further information).

269. At each stage of the procedure, the respondent advised the claimant of the issues involved, the right to be accompanied, any support that might be utilised and required to find suitable dates. I did not consider that there was undue delay in the proceedings which would have rendered the procedure unfair on account of delay. I did not consider that there was any prejudice caused in any recollection of events or lack of available evidence in the timescale involved.

No suspension

270. The claimant maintained that if he was not to be trusted that he would not breach the policy again then that was at odds with him being allowed to remain in office over the period of the disciplinary proceedings. It was explained by the decision manager that suspension/non suspension was a decision for the line manager. The letter from the line manager of 3 April 2023 (J91) advises that albeit potentially serious the claimant could continue in his present role. It is the case that an employer often feels it necessary to suspend an employee while an investigation is being carried out particularly in gross misconduct cases. However, the ACAS code recommends that if a suspension with pay is considered necessary, it should be brief as possible

and kept under review. Also, the Court of Appeal has commented **(Crawford v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402)** that even where there is evidence supporting the employer's investigation, suspension *"should not be a kneejerk reaction and it will be a breach of the duty of trust and confidence towards the employee if it is".* Accordingly suspension pending the outcome of disciplinary proceedings should not be automatic. That the claimant was allowed to continue in post during the disciplinary proceedings did not render the dismissal unfair.

Creating false sense of security

271. The concept of equity comes into play where an employer has led an employee to believe that he or she would not be dismissed for certain conduct. The claimant maintained that he had been advised at the conclusion of the disciplinary hearing that the claimant should *"have a good weekend and see you on Monday"*. He stated that he "*focused on that"* and that this led him into thinking that he would not be dismissed. This was a disputed matter and the decision manager did not recall making that comment. Certainly the notes of the meeting contain no reference to that remark and when the claimant was asked to comment on the notes of the meeting, he made no mention of the remark being made.

272. I took the view that the remark may well have been made by the decision manager but it fell short of creating a false sense of security such that the dismissal would be unreasonable. The circumstances where a false sense of security is created would require stronger circumstances than such a comment. The claimant was advised that a decision letter would be issued on the matter and the comen was not necessarily an indication of the decision being made in his favour. The claimant may well have taken the best interpretation but it would not be enough to find he was being misled into thinking that the misconduct could not lead to a dismissal.

Inexperience of decision makers/impartiality/pre-judgment

273. The claimant submitted that there was unfairness in the appointment of an investigation manager, a decision manager and appeal manager who were inexperienced in dealing with misconduct cases.

274. He considered the position was exacerbated by the investigation manager coming "*from National Minimum Wage"* which was a *"conflict of interest*".

275. The thrust of the argument was that there was likely to be a lack of impartiality in the lack of experience and in the case of investigation conflict of interest and the disciplinary panel would not *"go against*" the respondent. It was also maintained that there was pre-judgment of the matter in that there was a very quick judgment made that there had been misconduct in breach of the policy by the investigation manager.

276. The investigation manager in this case had experienced as a decision maker in two previous cases but this was the first time she had acted as an investigation manager. From October 2016, she had operated as a team leader in Bristol at senior officer grade. She was line manager to approximately 12 employees. The decision manager had been with the respondent since 2020 and since September 2023 was in the position of Head of Compliance for Trade, Statistics and Customer Analysis with senior officer grade. She was based in Stratford. She had been a decision maker in four or five previous cases which had resulted in dismissal (excluding the present case). The appeals manager had been employed by the respondent since 2005 and had acted as a Senior People Manager for four years which involved management of the project lead team, HR and compliance on casework. He was based in Newcastle and had line manager responsibility for approximately 10 employees. This was the first time he had acted as an appeal manager in a misconduct case. He had dealt with appeals from the public on matters of concern but not as part of a disciplinary procedure.

277. In this case, the respondent advised the claimant that the process under the conduct policy would be dealt with under "*approach B"* (J123-134) That was an approach which would apply in all cases where the potential misconduct could potentially be dismissal. In cases of gross misconduct, a decision

manager would be appointed "*from the HMRC decision manager pool"* and would be responsible for ensuring the appropriate procedure was followed. That involved arranging for an "*independent investigator to gather the information and to ensure that investigation process proceeds quickly and is reasonably proportionate"*. It was also outlined that there would be advice available from an "Expert Advice Service" (EAS) colleague (usually from HR) who would support the decision manager.

278. The policy advised under "*who is an appropriate decision manager"* that EAS would appoint a decision manager "*from the HMRC decision manager pool which will normally be someone from your business group but outside your line management chain. That will ensure they have sufficient knowledge of the work and arrangements in your business area but will be independent and unable to consider the matter on the facts*" (J128).

279. In cases of gross misconduct, EAS would appoint an appeal manager also from the HMRC decision manager pool and appeals should be considered by someone (where possible) *"at least one grade higher than the person who made the decision being appealed"* although it was appreciated that for "*colleagues at very senior grades this may not always be possible"* but that the appeal manager should be independent of the original decision and should receive suitable training in any *"core practices or skills HMRC requires of those undertaking this role".* The appeals manager had been appointed to the pool in early 2023 and had online learning and training from EAS advice on case examples and appropriate policies.

280. Each of these individuals had assistance from expert advice service in the course of the disciplinary. The decision manager and appeals manager came from the appropriate "*pool"* .

281. The ACAS Guide stresses that employers should keep an open mind when carrying out an investigation. The task is to look for evidence that supports as well as weakens an employee's case.

282. Also, the ACAS Code states that *"where practicable, different people should carry out the investigation and disciplinary hearing. Such a division of functions is recognised as an important indicator of impartiality by the courts."*

283. In this case, the appointments made of investigating manager, decision manager and appeals manager were made in accordance with the conduct policy. They followed the steps laid out within that policy. I could not detect any procedural mishap.

284. They were also independent of each other and of the claimant. They came from different geographical locations and had no knowledge of the claimant prior to their appointments.

285. While there would be justification in stating that the investigation manager and appeals manager were inexperienced in the particular roles, that would not infer that there was a defect in procedure. The issue for the Tribunal is whether or not there was adopted a fair procedure and that the case was investigated fully and fairly with particular reference to hearing what the employee wishes to say in explanation or mitigation.

286. It could not be said that simply because an individual was involved in his first hearing, that makes the process unfair. The question is whether or not that individual conducted a fair hearing and gave consideration to the claimant's explanations.

287. In this case, I find that the hearing process adopted by the respondent was in line with their conduct policy and that the individuals did carry out a fair hearing of the employee's position. I have indicated that if it could be said that the decision manager did not consider fully the mitigation given by the claimant around his mental health, that aspect was effectively investigated and dealt with by the appeal manager, who saw no reason to disturb the conclusion reached by the decision manager on that aspect of matters.

288. So far as conflict of interest is concerned, I take that to occur when an individual's personal interests (be it family, friendship, financial or social) could compromise his or her judgment, decisions or actions in the workplace.

289. In this case, while the investigation manager may have been located within NMW, she worked in Bristol and had no knowledge of the claimant. Simply because she was working in the same area as the claimant could not mean that she had a conflict of interest. The policy that was in play was generic and not one which applied simply to NMW operation and even if it did, that would not indicate there was a conflict of interest in her being appointed investigations manager. Again, the essence is whether or not that investigation was fair. In that respect, the investigation manager followed the procedure in having a meeting with the claimant and listening to his explanations and recording those matters and recommending that there be a disciplinary hearing. Again, the ACAS Code advises that if it becomes clear during the course of an investigatory meeting that disciplinary action is needed, then that meeting should be adjourned and the employee given notice of separate disciplinary hearing and told of his or right to be accompanied. That was the procedure followed in this case. The investigating manager recorded that the decision manager would require to consider the mitigating factors put forward by the claimant namely the circumstances that prevailed on 20 February 2023 with the hire car and that he had put in issue his mental health.

290. Section 98 (4) of ERA poses the one question namely whether the dismissal was fair or unfair in regard to the reasons shown by the employer. A Tribunal must not treat the reasonableness of the decision to dismiss and the reasonableness of the procedure as if there are two separate questions, each of which must be answered in the employer's favour before the dismissal can be considered fair. The importance of a proper procedure is to assist in ensuring that the employer's decision to dismiss is reasonable for the reason given and in that assessment, the Tribunal should use the range of reasonable responses test.

291. In this case, I did not find evidence of the employer's investigation and procedure adopted being outwith the range of reasonable responses. I do not consider that there was evidence of pre-judgment or bias in the decision making process.

Manner of dismissal

292. The claimant indicated that the way in which the dismissal was conducted was inappropriate. He pointed to the fact that the outcome of the disciplinary hearing had been emailed to him without prior warning or any intervention at his place of work from line manager or other colleagues. He considered this to be heartless and also inappropriate so far as security was concerned. That may be but it would not render the dismissal unfair. The statutory provision is to assess whether the dismissal of an employee is fair or unfair and depends on whether in the circumstances, the employer acted reasonably or unreasonably as treating the reason as a sufficient reason for dismissing. The method of communication in this case would not impact on that assessment.

Dismissal being too harsh a penalty

293. In the course of the disciplinary proceedings, the claimant's position was that dismissal was "*too harsh"* and that a written warning would suffice particularly where this was a first offence.

294. The difficulty for the claimant in that proposition is that a Tribunal must decide whether the employer's response fell within the range or band of reasonable responses open to a reasonable employer in the circumstances of the case. As indicated, in practice, that means that any given set of circumstances, one employer may decide that dismissal was the appropriate response while another employer may decide in the same circumstances that a lesser penalty is appropriate. Both of those decisions may be responses which fall within the band of reasonable responses in the circumstances of a case.

295. This is a case where that situation prevails. The respondent has very good reason to require compliance with their policy on email use. The policy is not ambiguous. It indicates that so far as "OFFICAL-SENSITIVE" information is concerned, it should *"never be sent to a personal email address".* The reason is not hard to find namely the protection of confidential taxpayer information. The reputation of HMRC depends on that confidentiality being maintained. This was not a breach of a single individual's information being released but the danger of approximately 100 taxpayers information being compromised.

Data security is a highly important aspect of this employer's undertaking and it could not be said that dismissal for a breach was outwith the band of reasonable responses. The claimant's colleague and his line manager were both unequivocal that the circumstances here were a breach of data security. There were ways in which matters could have been organised to avoid sending the email to the claimant's home address. His line manager indicated that the information on the printout was not essential for the visit as the employer itself would have the information which could be examined during the course of the visit. Also, the visit could have been cancelled and rearranged.

296. Also, as indicated previously, single breaches of company rules may find a fair dismissal.

297. In all the circumstances therefore, the complaint of unfair dismissal is dismissed.

Wrongful dismissal

298. Wrongful dismissal is a contractual issue as distinct from the concept of unfair dismissal which is a creature of statute. The claimant's contract of employment (J61-70) advises within clause 9.2.4 that if "*your employment is terminated following disciplinary proceedings, HMRC will give you no notice in cases of gross misconduct."* The contractual term still ruled despite promotion since receipt. In light of that contractual position the claim of damages for wrongful dismissal does not succeed as the contract has been terminated in its terms.

Employment Judge: **J Young**
Date of Judgment: **22 October 2024**
Entered in register: **23 October 2024**
and copied to parties

5