EMPLOYMENT TRIBUNALS

Claimant: Mr S B Whitehead

Respondent: The Commissioners for HM Revenue and Customs

HELD AT: Liverpool **ON:** 19, 20 and 21 April 2017

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: In person
Respondent: Mr S Lewis, Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant's claim for unfair dismissal is not well founded and is dismissed.

REASONS

Preamble

1. In a claim form received on 4th November 2016 following the issue of an early conciliation certificate by ACAS on 6th October 2016 the claimant claimed unfair dismissal alleging that as a result of "malicious and vexatious grievance" raised against him by a female colleague (referred to as “ML” during these proceedings) in October 2015 the respondent had a pre-conceived notion of the claimant's guilt and a bias following the grievance investigation that adversely affected the subsequent investigation into the three allegations resulting to his dismissal. In short, the claimant alleged bias continued throughout the disciplinary process and this gave rise to an unfair dismissal.

2. In the claimant's claim form he also alleged with reference to the documentation found his home following a search by the respondent "further

evidence has now been received which supports my claim that the documents were accidentally included in training manuals etc taken home when I moved team without notification. Sufficient notification of a move would have given me the time to sift my papers". It is notable, the claimant's pleading is in direct conflict with the oral evidence given by the claimant at the liability hearing, and in oral submissions, when he maintained form ENF 274 left at his home on 22nd April 2016, following the seizure and removal of property found on his premises on that date, did not set out the documents allegedly taken. The claimant maintains now having "researched" the position, the documents were not at his home as they were not listed therefore he had not taken the documents home, the respondent failing to prove their case. The claimant's evidence in this regard (and in a number of other key matters) was not credible, believable, and was undermined by the contemporary documentation, specifically the claimant's admissions made during the disciplinary process that he had accidently taken the confidential documents home.

3. The respondent denied the claimant's claim, maintaining the claimant was dismissed on grounds of his conduct under Section 98 of the Employment Rights Act 1996, and the respondent had acted reasonably in so doing for the protection of confidential tax payers/customer data that was of very high importance to it, and the claimant had breached key policies and procedures in so doing.

Evidence

4. The Tribunal heard oral evidence on behalf of the claimant; it also considered the claimant's witness evidence and read the entirety of the claimant's witness statement together with documents referred to prior to the claimant giving evidence. Under oath, the claimant retracted pages 7 to 16 and pages 30 to 40 on the basis that they were not relevant. There was no suggestion by the claimant that he was not telling the truth and this was the reason for the retraction. The Tribunal having read these paragraphs beforehand, were struck by the fact that they undermined much of the claimant's case, as set out below.

5. On behalf of the respondent the Tribunal heard oral evidence from Graham Macaulay, Dismissing Officer, employed as Governance and Assurance Team Manager at Higher Officer Grade, and Julie Hurst, Appeals Officer. There were no real issues concerning the credibility of Graham Macauley and Julie Hurst, the claimant having indicated during closing submissions they acted within the guidance based on the information they had been provided. The claimant's criticism was aimed at the investigating officer who he would have liked to have cross-examined to establish if the information setting out the relevant criteria presented as evidence had been checked, including the validity of the reconstruction. The claimant was informed by the Tribunal from the outset when issues were agreed, the Tribunal would consider the information before the dismissing and appeals officers, including the investigation and whether they held a genuine belief based on reasonable grounds, and whether the respondent carried out as much investigation was reasonable in all the circumstances of the case. In short, it was not detrimental for the claimant's case for the investigating officer not to be called and in any event, at no stage during the litigation had the claimant requested a witness summons ordering the attendance of Clint Gibson, the investigating officer.

6. The claimant alleged an alleged bias by Graham Macauley on cross examination of Mr Macauley, which the Tribunal has dealt with below in its findings below. The Tribunal found, on balance, there was no satisfactory evidence of any bias against the claimant. When it came to conflicts in the evidence, the Tribunal preferred that of Graham Macauley and Julie Hurst to the claimant having found the claimant was not a credible witness who gave irrational and confusing explanations in response to allegations, both during the disciplinary process and at this liability hearing.

7. A chronology was agreed between the parties, used as a basis for the Tribunal's finding of facts.

8. The parties also agreed a list of issues, which are as follows:-

8.1 Did the respondent dismiss for one of the potentially fair reasons set out at Section 98(2) of the Employment Rights Act 1996 ("the ERA") i.e. misconduct?

8.2 Did the respondent hold a genuine belief that the claimant had committed the alleged misconduct? The alleged misconduct was as follows –

7.2.1 An attempted to search/trace the name/address of a colleague who had previously made a complaint of harassment, via PAYE and tax payer business service system ("TPBS") without a legitimate business reason and in breach of policy.

7.2.2 The claimant emailed confidential customer/tax payer information to his private email account, without authorisation or a legitimate business reason against policy.

7.2.3 The claimant took home documents containing confidential customer/tax payer information and failed to keep them secure or return them to the office, without authority or legitimate business reasons and thereby breached the policies.

8.3 Was the genuine belief held by respondent based on reasonable grounds?

8.4 Did the respondent carry out as much investigation as was reasonable?

7.5 Did the respondent act fairly and reasonably in all the circumstances in dismissing the claimant, having regard to the equity and substantial merits of the case?

7.6 Did the respondent follow a fair procedure in dismissing the claimant?

7.7 Under the no Polkey "difference rule", if a fair procedure was not followed, such that dismissal was rendered unfair, would it be just and equitable for any compensatory award to be reduced? If so, by how much?

Contributory Fault

7.8 Did the claimant cause or contribute to his dismissal by culpable or blameworthy conduct? If so, would it be just and equitable to reduce any compensatory award under Section 123(6) ERA 1996? If so, by how much?

Conduct

7.9 Was there any conduct by the claimant before the dismissal such as to make it just and equitable to reduce any basic award under Section 122(2) ERA 1996? If so, by how much?

9. The Tribunal was referred to an agreed bundle of documents consisting of three lever arch files together with witness statements, and additional documents marked "C1" together with "C2" the investigation report handed to the claimant produced by the claimant during cross-examination. It considered oral submissions, which it does not intend to repeat in their totality, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons, and has made the following findings of the relevant facts.

Facts

10. The respondent is a substantial employer in the North West.

11. On 2nd April 2001 the claimant commenced his employment with the respondent as an Administrative Assistant in St John's House, Bootle. The claimant was issued with a contract of employment which he signed on 2nd April 2001 ("the Contract"). No additional contracts were provided.

The contract of employment

12. At page 42 of the Contract under the heading "Use of Official Information" the claimant agreed to the following: "as a Civil Servant you owe duties of confidentiality to the Crown. These require you to exercise care in using information which you acquire in the course of your official duties and protect information which is held in confidence, especially information about tax payer's affairs, which must not be misused or discussed outside the department without authorisation. When you join the Inland Revenue you must make a declaration of non-disclosure covering Section 6, Taxes Management Act 1970 and to confirm that your attention has been drawn to the provisions of Section 182 Finance Act 1989. Any breach of either of these provisions may result in disciplinary action and, in respect of the latter, criminal proceedings may be appropriate in certain circumstances…Rules on confidentiality and the use of official information is set out in the Guide". On the same date the claimant signed a declaration of secrecy, he was aware from the outset of employment the seriousness of protecting confidential information relating to the respondent's clients and so the Tribunal finds.

13. Throughout his employment the claimant was made aware of a number of policies relating to the duty of confidentiality he owed to the respondent and the need to exercise care when dealing with confidential information. The relevant policies in this case were attached to Appendix A of an investigation report prepared by Clint Gibson, the Investigating Officer, provided to the claimant prior to the disciplinary hearing. The Tribunal has noted them below in the same order as they appear within the investigation report; the Civil Service Code, HR 22005 Confidentiality and Customer privacy, HMRC Acceptable Use Policy, an email guidance and HR23007 Discipline - how to assess level of misconduct. The Tribunal does not intend to set out the entirety of the policies or procedures, suffice to say, the policies relied upon by the respondent underlined with sufficient clarity the need for confidentiality and the severe consequences for misuse. It is inconceivable the claimant was unaware of the seriousness of his actions alleged by the respondent.

The Civil Service Code updated 16th March 2015 ("the Code")

14. The Code sets out standards of behaviour expected of a Civil Servant as follows: "you must…always act in a way that is professional and that deserves and retains the confidence of those with whom you have dealings…you must not misuse your official position, for example by using information acquired in the course of your official duties to further your private interests or those of others [or]… disclose official information without authority. In addition, a Civil Servant "must use resources only for the authorised public purposes for which they are provided".

Guidance HR 2205 confidentiality and customer privacy

15. This guidance sets out the legal obligations of employees of the respondent who are bound by the provisions of the Official Secrets Act 1989 and the Commissioners for Revenue and Customs Act 2005 ("CRC") as follows:

15.1 Section 18 of the CRC "places you under a strict duty not to disclose information held by HMRC in connection with its functions except in limited circumstances. Breach of this duty could leave you being personally liable to disciplinary action, or prosecution for a criminal offence…" Under the heading disclosure rules it is provide that an employee "must not disclose official information without lawful authority to anyone…you may only disclose information about customers when either the customer has given written consent, you are specifically allowed to by law. The Commissioners for Revenue and Customs Act 2005 clarifies and places clear limits on the circumstances in which public interest disclosure may be made lawfully…Other disclosures outside HMRC…remain strictly subject to existing statutory gateways".

15.2 Under the heading "accessing customers records" it is provided that when personal and confidential information about individual customers is handled, the employee must remember "you have the authority to look at, or ask others, for information about our customers only if you need it for your particular job and are legally entitled to the information, confidential information about the affairs of individual customers is

given to us on the basis that it will not be … used for any purpose other than a proper business need. It is your duty to ensure that there is no breach of this trust and you are not to disclose anything about HMRC's business without lawful authority. You must…only access a customer record where you have a clear and unambiguous reason for doing so. **You must not use the computer tracing facilities to trace information for…personal or casual interests [or] access or attempt to access a customer record…held on HMRC database … for any personal, non-business related reason** [my emphasis]."

15.3 Under the heading "general confidentiality rules…you must not access any information unless you have proper authority to do so, seek to access, view or ask others for any information about our customers unless you need it for your particular job and are legally entitled to the information".

15.4 Under the heading "official papers…you must safeguard any official papers in your care. You must not part with them other than when you need to do so in the course of your duties, keep them when you no longer need them. You must comply with any official instructions for the return and disposal and report the loss of any official papers immediately to your manager and to Security and Information Directorate where security classified documents are involved".

<u>The Acceptable Use Policy dated 11th February 2016</u>

16. The acceptable use policy dated 11th February 2016 clearly sets out it "must be followed by all users of HMRC IT systems and networks," it supersedes all previous policies on this topic and is in place to "protect" HMRC, its staff and other users as HMRC officials or those working on behalf of HMRC. "It confirms "we are bound by the provisions of the Commissioners for Revenue and Customs Act 2005, the Data Protection Act 1998, the Official Secrets Act 1989 and the Civil Service Code. Unauthorised use of information systems increases HMRC's risk of reputational damage and may compromise the confidentiality, integrity and availability of the information and the data we hold. It is essential that customers and the wider public have confidence that records kept by HMRC are secure, confidential and not at risk of misuse". Reference was made to the respondent's Guidance on "securing our information." The following is relevant:

16.1 Under the heading conduct, an employee "must not do anything illegal … or negatively impact the reputation of HMRC."

16.2 Under the heading "system access…working for HMRC does not automatically give you the right to access information held by the department, unless there is a clear and direct business reason for doing so."

16.3 Under the heading "disciplinary action" breach of the acceptable use policy could lead to disciplinary action, and employees were referred to

conduct, confidentiality and customer privacy and discipline for further guidance.

16.4 With reference to the secure use of email it provided "you can send official emails to any email domain. **You may send official sensitive information…to secure domains/email addresses that appear on our wipe list ..[and] to other domain/email addresses…with your data guardian's prior approval but only if there is evidence that both parties accept the risk and that locally agreed business protocols had been met** [my emphasis]. You can email your own personal data…to a person or account … you must ensure that examples and evidence contained in the document does not contain any colleague or customer specific information."

16.5 Under the "security and information policy" a mandatory requirement exists for sending emails securely and these mandatory requirements referred to the employee reading and understanding the acceptable use policy, lawful business monitoring policy and guidance. Employees were advised; "you must not use HMRC's email system in any way that could be considered a criminal offence, or would bring the department into disrepute. You must consider the security implications and any information you send especially Official Sensitive and seek to protect customer information at all times…if you must misuse our email system or fail to comply with the mandatory requirements you may make yourselves liable to disciplinary proceedings. This could lead to a penalty up to and including dismissal."

16.6 The risks of sending emails are set out, including; "the risk of unauthorised access is much greater when emailing to addresses that are not within the secure domains that appear on our wipe list…particular care must therefore be taken when emailing information to addresses/domains which are not on the list".

16.7 Under the heading "dos and don't'" the following is set out "[don't]…use your personal email address when corresponding on behalf of HMRC, send customer information to a non-government email address unless you have clear, written understanding that both parties understand and appreciates the risks involved and your data guardian has approved this…[don't]…send any material with a classification of Official Sensitive by email unless you are sure you have followed the guidance in the paragraph above headed "sending emails - security considerations…[don't]…forward information classified as Official Sensitive to your personal or home email accounts."

<u>Policy HR23006 Discipline how to appoint a Decision Manager and an Appeal Manager,</u>

17. In Policy HR23006 Discipline how to appoint a Decision Manager and an Appeal Manager, reference was made to the minimum levels of authority and that "you must not have been involved as a witness to the potential breach of conduct, be

independent and impartial so should not, for example, have prior involvement in the potential disciplinary incident prior to being appointed, interact socially with the employee outside of the working environment" and "in these roles you must…ensure that your decision is not being influenced by pre-conceived assumptions or unconscious bias".

Policy HR23007 Discipline how to assess the level of misconduct

18. Policy HR23007 Discipline how to assess the level of misconduct under the heading "gross misconduct" the following is relevant;

18.1 Paragraph 21 gross misconduct is defined as "serious enough to destroy the working relationship between the employee and the employer and the potential penalty may be dismissed, with or without notice, for a first offence."

18.2 Paragraph 22 provides that "unauthorised access, or attempted access to…customer information (including any tracing functions)…without a proper common legitimate and specific business reason will **always** be treated as gross misconduct. It is not for individual managers to take a view of the employee's action - all unauthorised and/or inappropriate accessing of customer records is considered serious and must be investigated as such. This includes attempts to access or to obtain access to an employee's own, or family members, friends, persons known to them…without a proper, legitimate and specific reason, attempting to access or obtain access to any customer record…using information obtained from any customer records."

18.3 Paragraph 24 set out classification of other breaches of conduct including breaches of confidentiality and/or privacy, serious breaches of security, failure to follow data security rules and procedures including non-compliance with a rule set out in the security basics for all staff guidance leading to a breach of customer confidentiality…loss or a failure to secure official documents, serious misuse of internet, intranet or email which includes failing to comply with HMRC's acceptable use policy, serious misuse of computer facilities including attempting or obtaining access to the departmental computer system without proper authority or legitimate business reasons.

19. It is not disputed the claimant had read and was aware of a document titled “Security – Golden Rules” that set out in clear language a summary of the respondent’s policies in respect of protecting confidential information.

20. Finally, it is not disputed by the claimant that when logging on to his work computer a blue HMRC acceptable use policy warning flashes up and this would need to be ticked by the claimant before proceeding. The warning provided; "you must read HMRC's acceptable use policy. You must not access, or attempt to access, customer information (including use of tracing tools) unless you have a legitimate business reason to do so. You must not access inappropriate websites or misuse HMRC's email system. You must follow data security rules and comply with

instructions contained in your security handbook. Use of HMRC computers is monitored routinely. If you breach HMRC's rule you may be disciplined for gross misconduct. In certain circumstances you may have committed a criminal offence and could be prosecuted. You must speak to your line manager if you have any questions." It is irrefutable on the evidence before the Tribunal that the claimant, had he followed the respondent's processes and procedures, taken cognisance of them and of reminders via managers, training and flash warnings on the computer, would have known without doubt, any breaches in data security were serious and could result in disciplinary action being taken, dismissal or ultimately, criminal proceedings depending on the breach in question.

21. The Tribunal accepted the evidence put forward on behalf of the respondent in preference to that given by the claimant to the effect the acceptable use policy warning flashed up each and every time the claimant logged on to his computer and it was not an occasional warning as maintained by the claimant. Nothing hangs on whether or not the highlights in the warning referred to by the respondent existed, the claimant denying that they did and produced the documents marked "C1" during cross examination to prove his case. The relevance of the HMRC acceptable use policy warning is self-explanatory, each and every time the claimant logged on to his computer he was made aware of the importance of that policy, the existence of a security handbook and if he were to breach the respondent's rules, he may be disciplined for gross misconduct.

The claimant's employment

22. It was fundamentally important to the respondent that customer information remained confidential when communications (including emails) were marked as Official Sensitive with a view to protecting the financial information of customers including PAYE details and national insurance numbers. The claimant's continuity of employment with the respondent was almost 15 years, he had been dealing with confidential customer information for a long period of time and it was not credible the claimant was unaware of the security implications in his role and the need for him to comply with the respondent's policies and procedures in respect of searches carried out on the respondent's computer, documents taken out of the office and emails sent and received from the claimant's office email address to his personal address; the position maintained by the claimant during this liability hearing.

23. In 2010 the claimant was promoted to Administrative Officer in the personal tax operations team. The claimant's role was to answer Pay As You Earn tax enquiries, and he had access to the PAYE and Tax Payer Business Service ("TBS") computer programmes. Throughout, he was aware protection of customer information was key for the respondent, and breaches of their policies concerning confidential customer information was a serious matter that could lead to disciplinary and dismissal. The Tribunal finds even if the claimant was unaware of the specific details and wording set out within the policies (as he maintains now), he was under no illusion concerning the need to safeguard personal information of the public which included cell communications and retaining copies of documents relating to potential sensitive financial information, such as national insurance numbers.

24. As part of the claimant's role customers would call and provide their national insurance numbers when making tax enquiries. If a national insurance number was not provided, the Tax Payer Business Service and PAYE tracing systems could be used to establish their national insurance numbers, the latter system being used to trace self-assessment records. All customer records held by the respondent are accessed by keying into the computer system the national insurance numbers of individual customers or the individuals date of birth and their postcode. If an individual's date of birth and postcode were provided, the tax payer business service accessed full details of the national insurance number, the customer's full personal address and date of birth.

25. The Tribunal accepted Graham Macauley's evidence as credible that if a customer were to call and was unable to provide the exact date of birth, postcode and surname, for security reasons the call would end immediately as the respondent's guidance to employees facing such a situation was the lack of information points to the caller being a potential fraudster. The Tribunal finds the claimant was aware of this procedure and he would have known not to disclose confidential information over the telephone if a prospective client was unable to provide their full surname, date of birth and postcode or full personal address.

The events leading up to the allegations

26. Between 16th December 2014 to 30th December 2014 the claimant on different occasions transferred data from his work HMRC email account to a personal account copying it to a second personal account. By 30th December 2014 the attachments to the emails sent to both personal accounts from HMRC included 226 national insurance numbers of individual clients, names and addresses and other confidential information relating to "R38's and 106 UTRS". The claimant's transfer of confidential information to his private email accounts came to light during a criminal investigation carried out on behalf of the respondent into potential security breaches in April 2016. Prior to that date, there was no indication the respondent had knowledge of the emails, and there was no document within the bundle to the effect that the claimant's line manager in either 2014 or 2016, was aware and had given authority as maintained by the claimant, a statement the Tribunal did not find credible given the lack of supporting documentation, the respondent's stringent policies and procedures on such matters and the claimant's evidence given during the disciplinary process.

27. In or around August 2015 the claimant had problems with a female colleague referred to as "ML" during these proceedings. ML alleged sexual harassment allegations against the claimant, which he took offence to on the basis that he had done nothing wrong, and ML was not telling the truth.

28. It is not disputed the claimant was aware of problems with ML as early as August 2015. In oral evidence given in cross examination the claimant denied being aware of ML's complaint concerning the alleged telephone calls he had allegedly made that gave rise to harassment allegations until after the alleged search had been made for ML's details. The claimant's argument before this Tribunal was that he had no motive due to a lack of awareness.

29. It is notable in the chronology of events set out in the claimant's witness statement and retracted as referenced above; he referred to handing across to ML his telephone and asking she remove her details from it. The claimant also referred to Saturday 19th September 2015 as the start of alleged telephone calls he had made, despite ML having, according to the claimant, already deleted her telephone details from his phone. There was also a dispute as to whether the claimant had been informed by the Police that ML complained she had been "harassed with telephone calls" from an anonymous caller, the claimant denying that he had. It is notable in the claimant's witness statement the Tribunal were referred to page 764 of the bundle, paragraph 38 to 39 related to a fact finding interview with Ian Valentine on 26th January 2016 concerning the Police complaints, and the transfer of the claimant to another floor in the respondent's premises.

30. The claimant, also in cross examination, disputed that he had been transferred to another floor as a result of ML's complaints against him. It is apparent from the claimant's retracted statement at paragraphs 16 and 17 and the reference to the fact finding interview with Ian Valentine the claimant was "asked" to move teams and go to the first floor in September 2015. The claimant had then offered to go before changing hid mind. Ian Valentine recorded the claimant "started getting aggressive saying why should he have to move". The version of events set out in the contemporaneous documentation is reinforced by paragraph 17 on page 10 of the claimant's retracted statement with the exception of the reference to the claimant allegedly getting aggressive, which is not relevant to these proceedings and to which the Tribunal makes no finding. It is apparent that by 25th September 2015 the claimant had transferred to the first floor from the tenth floor directly as a result of ML's allegations and so the Tribunal finds. The claimant's evidence under cross-examination was in direct contrast to the documents at pages 765 of the bundle to which the Tribunal was referred, and the claimant's retracted witness statement, which make it clear the claimant was aware of ML's allegations during he relevant period.

31. Whilst at work on 5th October 2015 the claimant was informed by the Police they were issuing a Harassment Order, (a non-caution order) that he was to have no contact with ML. In direct contrast to oral evidence given on cross-examination, the claimant at paragraph 21 on page 12 of his witness statement referred to the following: "The non caution order was issued based on the malicious, unfounded and unsubstantiated claims of harassment of telephone calls…" This evidence is supported by notes of the fact finding interview held by Steve Billington and ML on 10th November 2015, that referred to by the claimant at paragraphs 16.32 to 16.33 which read as follows; "05/10/15, the Police called into work and wanted to speak to SW and issue harassment warrant…Police told SW to remove himself from ML…They mentioned the anonymous calls…"

32. On the balance of probabilities the Tribunal finds as at 5th October 2015, the claimant was aware ML provided the Police with sufficient information concerning anonymous calls resulted in the issuing of a harassment order that the claimant would not have any contact with ML. This is an important matter; the claimant's case at this liability hearing concerning his subsequent attempts to access ML's records was that he was unaware of the telephone calls or grievance, and therefore had no motivation to carry out such a search. The facts do not bear out this contention. The

Tribunal is in no doubt that, at the very latest, by 5th October 2015 the claimant was aware ML's complaints against him were ongoing, albeit he considered them to have been fabricated, and it was not unreasonable for the respondent to take the view a causal link existed between ML's continuing complaints and the claimant's actions that gave rise to his dismissal. The claimant's submission to the Tribunal there was no causal connection as ML's complaints had been dealt with was not at all believable, especially bearing in mind the claimant's evidence given at the investigation meeting when he linked the two events without prompting, and admitted he had tried to access ML's personal details as alleged.

ML's grievance 9th October 2015

33. ML raised a grievance on 9th October 2015, alleging harassment against the claimant. The claimant was informed during the liability hearing it is not for the Tribunal to indicate one way or another whether ML's grievance was well founded against him or not; this is not relevant to the Tribunal's considerations. ML's grievance is but part of the factual matrix and it is a matter of fact ML informed the respondent within her grievance; "I have also had to contact the Police due to receiving anonymous phone calls, and threatening Facebook posts. Furthermore I try to address this matter by requesting Sam [the claimant] be moved while this matter was ongoing…I believe the department systems have been used as part of this harassment - specifically the phone system - and would request as part of any investigation that a search is done to show which department numbers have been calling my phone …"

34. ML's grievance complaint was passed to Chris Powell who completed the grievance check list managers review, before referring for investigation by a Specialist Fact Finder. It was concluded; "the case alleges harassment but not with alleged discrimination…I do feel the case is likely to result in disciplinary action…I expect we may need an Independent Investigation Manager given the attempts of managers at a series of levels within the office to try and resolve this and also the complexity of the issue in relation to phone records and the involvement of the Police".

35. The completed investigation was referred to a Grievance Decision Maker, Steven Cosgrove.

The claimant's searches on the Tax Payer business Service 28 &29 October 2015

36. On 28th and 29th October 2015 eight searches on the Tax Payer Business Service and seven on the PAYE system were allegedly carried out by the claimant.

ML's grievance outcome

37. On 10th December 2015 the claimant attended an investigation meeting into ML's grievance. The Tribunal has not had sight of the minutes of that meeting.

38. In a Decision Managers deliberation document Steve Cosgrove on 23rd March 2016 upheld ML's grievance, in part, against the claimant. He found a

number of the allegations were not founded which had disputed facts for lack of evidence.

39. In a letter dated 24th March 2016 to ML Steve Cosgrove's decision to uphold her grievance was confirmed and in a letter of the same date to the claimant he was informed there was a case to answer and "the matter will now be referred to your manager to decide if there is any action to be taken under the disciplinary procedures". The claimant had been found to have breached the Civil Service Code as a result of the harassment complaint. Due to the lack of experience of the claimant's line manager Joanne White, Graham Macauley, the Governance and Assurance Team Manager, considered the matter having been sent the papers on 31st March 2016. Graham Macauley was to "complete the checklist, review the paperwork, hold a decision meeting with the job holder…reach a decision and if necessary decide on penalty". Chris Powell of HR advised Graham Macauley, "I can't see any reason why we would have another fact find as this was thoroughly done…and I can't imagine any new information is required other than anything the job holder may wish to raise at the decision meeting with yourself".

40. Following the advice of HR Graham Macaulay was provided with a “discipline checklist manager’s review to complete” which he did setting out the events surrounding ML’s grievance, commencing 12th August 2015 to 23rd March 2016, the date the grievance was upheld. There was no reference to potential accessing ML’s in the HMRC corporate system. Graham Macauley concluded; "this has not been a straightforward case to review and the number of witness statements and the lack of substantiated evidence available to prove beyond any reasonable doubt that the person who is the subject of some of the allegations around anonymous phone calls and bogus social media actually perpetrated these acts. Having said that I do not feel I can completely discount these as the pattern and timings of these events cannot in my opinion be purely attributed to coincidence….I have reviewed the factual evidence….I feel that a clear pattern developed over a number of months whereby Sam Whitehead developed a fixation… the fact that Merseyside Police felt there was a necessity to issue a harassment officer to SW is an obvious concern and would clearly indicate they felt there was sufficient evidence to corroborate the allegations made by ML. I am of the opinion that on the balance of probability Samuel Whitehead has breached the Civil Service Code of Conduct…making unwanted physical or verbal contact or advances. I do not feel at this stage that the breaches of conduct meet the criteria set out for gross misconduct but serious misconduct is applicable."

41. Graham Macauley, a Higher Officer and two grades higher than the claimant took the view the claimant's behaviour amounted to misconduct but not gross misconduct and in his capacity as the Decision Maker for ML’s harassment complaint, reviewed the evidence and completed a discipline checklist. No disciplinary action was taken against the claimant for the serious misconduct found by Steve Cosgrove given intervening events following an investigation that resulted in the internal governance (criminal) team arresting the claimant on 22nd April 2016, the claimant having allegedly breached the Acceptable Use Policy.

The anti-fraud investigation

42. On 21st April 2016 an internal Mail Marshall employed by the respondent flagged to anti-fraud assurance team two emails dated 5th April and 20th April 2016 as being sent by the claimant from a HMRC email address to a personal email containing tax payer information. These emails did not form part of the investigation; from thereon in the internal governance criminal team commenced an investigation into potential security breaches.

43. On 22nd April 2016 the claimant was arrested, handcuffed whilst at work and suspended. In closing submissions Mr Lewis on behalf of the respondent, referred to the "high-handed" behaviour of the internal governance criminal team in how it handled the claimant's arrest and subsequent search of his property in the presence of his ill mother. The Tribunal has a considerable amount of sympathy for the claimant in this regard and acknowledges that he would have felt distress given way he had been treated, and under pressure as a result of the serious allegations. In contrast to the claimant's belief, the actions of an internal governance criminal team are not matters which can be addressed by the Employment Tribunal whose statutory powers are limited to considering the unfairness or otherwise of the claimant's dismissal. In respect of this, the Tribunal does not accept, having considered in detail the transcript of the investigation interview between Clint Gibson and the claimant held on 20th May 2016 approximately one month after, the actions of the internal governance criminal team caused the claimant to make the admissions which he did; admissions which the respondent were entitled to take into account during the disciplinary process. The Tribunal has dealt with this point further below.

44. In a letter dated 22nd April 2016 the claimant's suspension on full pay was confirmed. He was informed his suspension did not impinge any decision about the eventual outcome of the case and HR guidance relating to suspension was enclosed.

45. Following the search of the claimant's home the responsibility for which lay with Mark Bithell, the claimant was provided with a form EMF274, "Notice of exercise of additional powers of seizure under Sections 50 or 51 of the Criminal Justice and Police Act 2001." Mark Bithell had completed the form and set out a description of the property seized which did not include a reference to a number of appendixes to the investigation report. The claimant has at the liability hearing made much of this omission, maintaining it was evidence that no documents were located in his home as alleged, the inference being that Mark Bithell was not telling the truth and trumping up non-existent of documents to get the claimant into trouble. The Tribunal did not accept this was the case on the evidence before it.

46. Jumping forward in the chronology, it is noteable the claimant emailed Mark Bithell on 4th and 8th October 2016 seeking information concerning how long the documents had been at his premises and the "log sheet" evidence shown to the claimant at interview. In an email sent 5th October 2016 Mark Bithell confirmed; "I have no idea how long the documentation had been in the claimant's premises, in his bedroom". With reference to the log sheet shown to the claimant at interview he write; "this was a photocopy of the front of a tamper evident bag which is used to

seal evidence. Each tamper evident bag is marked with a location that the item was found along with other details regarding this item. All the information on these TEB's for every item uplifted as evidence is reproduced on a form EMF980/C and E 980 which was left by officers at your premises following the conclusion of the search". In an email sent 19th October 2016 Mark Bithell confirmed the location of each item uplifted not shown on the claimant's copy of the EMF980C and E 980, and he attached a schedule detailing the items lifted during the search and the location the item was lifted from. The document exhibited a number of items including handwritten notes of national insurance numbers, various documents from several different tax payers submitted to HMRC, PAYE coding notice for 2014/15, self assessment calculations, in short, highly confidential information relating to the respondent's clients. The claimant was aware of this information in October 2016 and his evidence now before the Tribunal to the effect that no documents were taken as described by Mark Bithell, is not believable.

47. As a result of the investigation three allegations were made against the claimant as follows:

<u>He made an unauthorised access to a colleagues (ML) TBS and PAYE records</u>

47.1 An attempted to search/trace the name/address of a colleague who had previously made a complaint of harassment, via PAYE and tax payer business service system ("TPBS") without a legitimate business reason and in breach of policy.

<u>He had emailed confidential tax payer information from HMRC email to personal email addresses.</u>

47.2 The claimant emailed confidential customer/tax payer information to his private email account, without authorisation or a legitimate business reason against policy.

<u>He had taken home documents containing taxpayer information without authorisation, storing them insecurely and failing to return them to the office.</u>

47.3 The claimant took home documents containing confidential customer/tax payer information and failed to keep them secure or return them to the office, without authority or legitimate business reasons and thereby breached the policies.

48. On the 27 April 2016 Graham Macauley received an email from Clint Gibson, internal governance civil investigations, informing him of 2 of the 3 allegations against the claimant who "appears to have committed serious security breaches…I discussed with Julie Hurst the possibility of you acting as DM for all the above issues and we agreed that it would make sense for you to hold one disciplinary meeting to cover all aspects…" by which Graham Macauley understood he was to deal with the harassment and security breaches as one case.

49. In a letter dated 29 April 2016 from Graham Macauley and received by the claimant 9 May 2016 the claimant was informed Clint Gibson was to investigate "potentially serious security breaches and breaches of the HMRC Acceptable Use Policy" and the claimant was invited to name witnesses. The letter complied with the ACAS Code of Practice.

50. Mark Bithell provided Clint Gibson with the relevant documents on 28 April 2016 including PAYE and TBS extract reports, email reviews in a spreadsheet and a spreadsheet detailing 9 exhibits uplifted by the search team from the claimant's address. These documents were considered by the Tribunal at the liability hearing in detail. The claimant disputed the validity of the reconstructed documents on the basis that they were not original later during the disciplinary process and at this liability hearing despite having admitted to attempting to make an authorised access to ML's records at the investigation meeting.

20 May 2016 Investigation meeting held by Clint Gibson

51. The claimant was interviewed on 20 May 2016 by Clint Gibson. The interview was digitally recorded and a transcript produced from the recording. The claimant's admissions made during this interview were key to the finding that he had committed the acts alleged. The Tribunal considered the transcript in detail, finding there was no evidence the claimant was suffering form stress over and above that which any employee would have felt at being faced with an investigation, and there was no hint of any answers being given under duress. The claimant has suggested at this liability interview that the amount of stress he felt could not be ascertained from the words on the page, and one would have to listen to the transcript. The Tribunal were not invited to do so by the claimant, and it is clear the questions asked by Clint Gibson were open questions, the claimant offering the information he freely gave, although there was a marked reluctance by the claimant to accept he was aware of the respondent's policies. It is notable the claimant was represented by the branch secretary of his trade union, and had the claimant been forced to give the answers and admissions as alleged, the position would have been made clear and no doubt objections would have been raised. No objections have been raised by the claimant's union concerning the manner in which the investigation meeting took place.

52. The admissions are paraphrased as follows:

52.1 The claimant accepted he had seen the Civil Service Code back in 2001, had not looked at it since but had received reminders from managers with links as part of the quarterly checks.

52.2 The claimant had a "general" awareness/idea of the respondent's rules concerning disclosure of official information and knew the "scope" of the Acceptable Use Policy.

52.3 When it was put to the claimant the security handbook said "Do not email HMRC information to a non email address unless you are sure you have the authority to do so," the claimant admitted he had done so.

52.4 The claimant admitted the blue warning box showed up on his computer and he clicked “okay.”

52.5 The claimant was asked the following open question; “the 28 of October and the 29 October, can you explain what you were doing?” In response, the claimant brought up of his own volition the following “…Taking it on its own looks worse, worse than it was…She’s a colleague I work with and she raised a grievance against me and actually made false allegations to the police…that I was hassling by phoning her all of the time.” It was the claimant who introduced ML as an explanation for his actions, and when asked what he was doing looking up ML’s PAYE the claimant responded, “Because I wanted at the time…I felt I needed to do something because at the time I was under a lot of stress.” He confirmed that he was looking up ML’s contact details to “give her these phone records [to which the claimant had made an earlier reference to] and say look it wasn’t me.” He admitted on numerous occasions ML was a colleague and he had tried to look her up on the PAYE, his explanation being “She’s been moved out and I had no other way of getting in touch with her. I just wanted to let her know, it wasn’t me.”

52.6 The claimant was shown the reconstructions of his attempts to obtain the information on ML. At no stage did he question their validity, in direct contrast to the position he adopted at this liability hearing. Having considered the reconstructions the claimant conceded; “I know I did it but…at the time I didn’t know what I was going to do…I knew I needed to do something to try and put the record straight…I just felt I needed to let her know that I, I hadn’t done what she’s accusing me of with the police” in relation to his attempt to access ML’s details on the 28 and 29 October. The claimant explained he did not try again because he received ML’s grievance and “I thought no it’s not worth it.”

52.7 The claimant confirmed the police had “said I was phoning her and I’d use this phone record here...” in direct contradiction with the evidence given at this liability hearing that the police had not referred the claimant to ML’s complaint about him phoning her, a statement the Tribunal found to be less than honest for reasons already stated.

52.8 With reference to the 2014 documents sent by the claimant from the respondent to 2 private email accounts incorporating 173 national insurance numbers and 91 SA unique tax records, having been shown the evidence gathered by Mark Bithell the claimant admitted he had and gave the following explanation; “…I was trying to create spreadsheets to simplify my work…I wasn’t really aware of the NINO’s on there, I wasn’t interested in them at all…that was my error I never, never, well I wasn’t, I wasn’t concerned about that information, all I was interested in was what was on the blank template…I can see how it looks.”

52.9 At the liability hearing the claimant went into detail how his creation of a template over time would assist the respondent, and yet it has never been used. He maintained he had consent of the manager, and yet when asked that question during the interview the claimant's response to the question "did you tell anyone what you were doing" was "No because I wanted to get it working first." The claimant has criticised the respondent during this liability hearing for failing to interview his managers with a view to establishing whether consent had been given. It is the Tribunal's view, given the claimant's clear admission; it was not outside the band of reasonable responses for the respondent not to interview the claimant's previous and present manager on this point.

52.10 When asked "did you not think the first time you did this and you saw the customer details that you should report it as maybe a security incident" the claimant responded "Well, yeah, all I could think of, obviously, because I sent them it looked like they were one week apart." He admitted he had sent them to his home address and that it had not occurred to him he had customer details in his private email account because they were not relevant to the spreadsheet at which point the claimant alleged senior manager's were involved in a "witch hunt" because of NL's grievance. In the transcript the claimant contradicted his evidence before this Tribunal, as set out above, when he denied sending the confidential information to himself; a denial the Tribunal found to be less than honest given the contemporaneous documentation evidencing the claimant's admissions given once he had seen documents produced by Mark Bithell, which he now questions but did not at the time. The claimant conceded he had been emailing information backwards and forwards from home "for a couple of years."

52.11 The claimant was asked about the documents uplifted by the search time comprising of 9 exhibits, 64 items of "customer sensitive information." The claimant was shown a list of the items uplifted and not the items themselves, as the latter were being retained pending possible criminal proceedings. The claimant admitted they had been found at his house, none meant anything to him and "…they were gathered up in notes…I, I printed off well in relation to the spreadsheets I was working at the time…I print off all this paperwork here, all I can assume is…when I gather them up at the end of the day, they must have just got caught up in them." The claimant agreed there was a "lot of confidential information."

52.12 When it was pointed out that there were bank details of customers and the public's perception was that it would not be taken home, the claimant's responded "…Yeah I understand from your point of view but the point of view is I wasn't taking information home…it was gathered up with other paperwork I was working on at the time…I know and I can see in hindsight when I spotted them I should have…put them back."

52.13 When asked whether the claimant had covered everything the claimant's union representative confirmed that he had including "his sort of circumstances and why they've appeared in his home and why the email were sent…more of a case of carelessness not thinking about security policy." There was no suggestion at any stage of the process the claimant was under duress or pressure to give the answers he had, and so the Tribunal found.

52.14 Towards the end of the interview the claimant again admitted to attempting to make an unauthorised access to confidential staff information on PAYE and TBS by trying to get into a colleague's record repeating "I don't know why I did it at the time." He accepted he had breached security guidelines by taking home confidential tax payer documents "in hindsight…because I didn't deliberately take anything home…I'd say that was carelessness…I would be aware that it, it wasn't right" and conceded he should not have done it. The claimant also conceded, in hindsight, he had breached security guidelines by emailing confidential tax payer information to his home email account without authorisation "because I wasn't aware at the time the information was included…and appreciate…it was wrong but it wasn't with any attempt to use that information...an oversight."

53. Following further investigations the claimant was informed of an email sent on 9 June 201s from Joan White, the claimant's line manger since February who confirmed; "Every time we log into the computer an acceptable use notice comes up. It is a reminder to read HMRC acceptable use policy. We have to click on the OK button before we can access the computer" and referred to an email sent on 10 December 2015 concerning the rules around confidentiality and protecting customer information with links to the respondent's procedures". On 9 June 2016 Mark Bithell provided confidential customer details found in the claimant's house.

54. By email sent by HR on 27 June 2015 Graham Macaulay was instructed not to proceed with the findings against the claimant following ML's grievance referred to as the "original serious misconduct matter, you need to refer it back as a possible gross misconduct. This should then be an additional allegation of misconduct to be laid along with the unauthorised access one" following an inquiry he made. In accordance with the respondent's procedures he completed a manager's review providing a summary of the potential misconduct incident, leaving out any reference to the alleged harassment and concentrated on the breaches including the first allegations that "appeared to have attempted to trace the home address of a colleague [ML] who made a harassment claim against him."

55. On 16 June 2016 Clint Gibson sent Graham Macaulay 2 copies of his report, which included one for the claimant that was duly passed to him in person. The report included a number of appendices to which the various policies and procedures were attached, details of the claimant's attempts to access PAYE and TBS records, the claimant's emails, a spreadsheet detailing the documents found at the claimant's home and a transcript of the claimant's interview. It was conceded by the claimant a copy had been provided to him on 7 June 2016 by Graham Macaulay, despite him questioning this at first. Clint Gibson determined there was a case to answer.

56. On the 6 July 2016 Graham Macaulay was advised by HR to set aside the harassment charge and focus on the unauthorised access as "this may prejudice any ongoing investigations being undertaken by IG (Criminal)", which he did.

57. In a letter dated 7 July 2016 the claimant was invited to a disciplinary hearing. The invite complied with the ACAS Code of Practice. Graham Macaulay, who had experience of conducting previous disciplinary hearings, took it that his role was to decide whether on the balance of probabilities the misconduct was proven or not which meant he had to consider the claimant's admissions set out within the transcript and any mitigation.

Disciplinary hearing 14 July 2016

58. Graham Macaulay met with the claimant who was supported by the same TU representative Mr Miller who had accompanied him at the investigation meeting. The claimant disputed he had accessed ML's record maintaining he had been confused by the dates. He also stated he had received "a copy of the interview notes on Friday and IG information on Monday (11/07/16), so I've only had since Tuesday to review," which was not true as the claimant had the report, documents and appendices in his possession since 7 July 2016 when they were handed to him by Graham Macaulay.

59. Graham Macaulay considered the evidence before him, and taking into account the claimant's admission at the disciplinary hearing in respect of accessing ML's record that "I'm not saying I didn't intent the keys but not specifically to find a colleagues details," before concluding he did not accept:

(1) The claimant's allegation that Clint Gibson had conducted the investigation with a pre-conceived notion of his guilt.

(2) The line of questioning was an attempt to coerce him into making statements to implicate himself. As did the Tribunal after it had considered the transcript in detail, Graham Macaulay took a reasonable view which fell well within the band of reasonable responses that all lines of questioning were a genuine attempt to establish the full facts.

60. Graham Macaulay concluded the claimant's change of story and his explanation that he had been confused by the dates completely implausible, and he disagreed with the claimant's evidence that he did not want to trace ML's details at a time when there had been no ongoing issues until the grievance was logged. As did the Tribunal, Graham Macaulay found the claimant's explanation for changing his story to be implausible having previously admitted he had attempted to trace ML's details, concluding the allegation was proven and constituted gross misconduct. Give the seriousness of the claimant's actions and the breach of policies and procedures known to the claimant (which he denied having detailed knowledge of, which in itself was found not to be believable) Graham Macaulay concluded the claimant's action in attempting to access a work colleagues records in itself amounted to gross misconduct for which he should be dismissed.

61. The matter did not stop there. With reference to the claimant admitting he had emailed confidential customer information from a secure HMRC email addresses to his personal email addresses, Graham Macaulay did not accept the claimant's statement that he was unaware of the respondent's guidance in this regard. It was reasonable for Graham Macaulay to conclude as the claimant had been employed since 2001 he was an experienced employee well aware of the rules surrounding confidential customer information. From his own experience in the role of governance and assurance team leader, Graham Macaulay was aware there were many occasions, not least every time an employee logged into their computer, when employees were reminded of the relevant rules. As the claimant had admitted taking the documents home (a position he resiled from during this liability hearing) Graham Macaulay found the allegations proven in respect of both the emails and confidential information kept at home.

62. Graham Macaulay took the view the claimant showed little or no remorse for his actions, this was also evidenced throughout the liability hearing when the claimant attempted to change his evidence on a number of occasions. Graham Macaulay held a genuine belief based upon a reasonable investigation the claimant was guilty of gross misconduct, he had concerns that the claimant had changed his position and took the view this brought into question the veracity of all his evidence.

63. When considering penalty Graham Macaulay took into account mitigation, including the claimant's clean employment record and length of service) and the respondent's Guidance aware that in the past similar disciplinary cases were regarded as gross misconduct, even for a first offence, and without exception resulted in dismissal. Having considered the dismissal letter sent 21 July 2016 and the document "Decision Managers deliberations," and having taken into account Graham Macaulay's credible evidence, the Tribunal was satisfied the claimant's mitigation was taken into account, his explanations were found to be "implausible" in relation to the alleged unauthorised access into a colleague's records, the claimant having changed his story. The allegations concerning emailing confidential customer information to his private email account and taking home official documents and storing them insecurely were admitted. Graham Macaulay held a genuine belief based upon a reasonable investigation the claimant had committed acts that amounted to gross misconduct "having taken into account all of the available evidence, and on the balance of probabilities and admissions that the jobholder has made serious breaches of security and the HMRC Acceptable Use Policy contrary to Departmental policy."

64. The Tribunal is satisfied, on the balance of probabilities; Graham Macaulay was not influenced directly or subconsciously by a bias resulting from his knowledge of ML's grievance against the claimant and the outstanding disciplinary matter that was left unresolved. His decision to dismiss fell within the band of reasonable responses given the claimant's continuity of employment, his unreliable evidence and the need for the respondent to trust employees in the claimant's position given the requirement for it to protect customer information and the public it serves. It was apparent from all the evidence, including that of the claimant, breaches of policy concerning the safeguarding of customer information, was key to the respondent, breaches were taken seriously and could have percussions for respondent's reputation.

65. The claimant was dismissed without notice with immediate effect, the effective date of termination being 21 July 2016,

The appeal

66. The claimant appealed in a lengthy document dated 29 July 2016. The appeal hearing was heard on 19 August 2016 and the appeal process, including the invite letter, complied with the ACAS Code. The claimant raised a number of points, including that his conduct did not fall under the definition of gross misconduct, he had not attempted to access ML's records, he had not seen the documents at his home and had been pressurised into admitting that he had and he had not seen the emails he had allegedly sent, and if he had sent them, they were an oversight.

67. The appeal, whose purpose was to consider whether the procedures had been followed correctly on, was heard by Julie Hurst, a senior officer one grade above Graham Macaulay. It took place on 19 August 2016. Julie Hurst was independent with no previous dealings in the matter. The claimant was accompanied by his trade union representative, Mr Miller. Notes were taken and it was recorded the claimant, with reference to a pack of documents he had provided for the appeal, stated, changing his story again, he had been set up "to unknowingly access complainants records" by and "this had happened before" by ML and her friends and "that as implausible as it sounds that is what happened." The claimant said someone had rang him acting as a customer and gave him ML's details to set him up. With reference to emailing confidential information his personal email address the claimant was unable to recall reporting it to a manager.

68. Questions were put to Julie Hurst on cross-examination by the claimant concerning whether she had read and taken his pack of information into account. The Tribunal concluded that she had, and in addition, considered the points raised by the claimant in his grounds of appeal providing they came within her brief, which was to review procedural matters. She did not deal with the claimant's complaint over ML's grievance outcome, the IG criminal search and Subject Access Requests, matters outside her remit and it was not unfairness in the process for Julie Hurst to concentrate on those matters that had culminated in the claimant's dismissal only.

69. When considering the claimant's grounds for review Julie Hurst was independent, objective and thorough. She took into account the respondent's procedures and the evidence before her. She concluded Graham Macaulay had not considered any findings relating to ML's harassment grievance before he made the decision without bias, to find the claimant guilty of the charges alleged and dismiss. With reference to the dates of the alleged attempted access by the claimant to ML's account Julie Hurst did not find this relevant, relying on the claimant's earlier admissions. She did not accept his argument that a "No Access" message would have been triggered on the screen (this had also been put forward at the disciplinary hearing) as the attempt at access had been via a variations of ML's name and different birth dates, not ML's national insurance number. Had ML's national insurance been used this would have resulted in access being denied.

70. Julie Hurst did not accept the reconstructions were flawed, concluding that it was not possible to take "live" screenshots in such cases, and it is usual to see reconstructions. She did not accept there was a fault with the computer system, as maintained by the claimant; had there been a fault she would have known about it and there was none. Julie Hurst took into account the fact the claimant had provided three different explanations for the unauthorised access attempts at the investigation meeting, the disciplinary hearing and then at appeal concluding the explanations were implausible, particularly given the fact that had a member of the public made telephone contact with the claimant as alleged, this would have resulted in a security incident on the basis that the caller was fraudulent and the call ended immediately. In short, Julie Hurst did not believe the claimant and her conclusion in this regard, taken after she had considered all of the evidence and heard what the claimant had to say, fell well within the band of reasonable responses.

71. With reference to the allegation that the claimant had emailed confidential customer information to his private email accounts, unlike Graham Macaulay, Julie Hurst gave the claimant the benefit of the doubt that he may have asked a manager if he could email spreadsheets home to work on them. She concluded sensitive taxpayer details should not have been disclosed and when it was, the claimant should have reported to a manger. The claimant was unable to recall reporting it when he realised his mistake.

72. Julie Hurst took into account the claimant's argument with reference to the documents found at his home given the fact he had not had sight of them, having only been provided with a list, he was disadvantaged. Julie Hurst did not agree. The Tribunal were referred to the actual documents, in addition to the list, at this liability hearing when the claimant's argument changed again from admitting he had transferred them by mistake to denying this was the case, on the basis that they were not listed in the record of documents taken from his house. The Tribunal has dealt with this above, and found the claimant's arguments to lack any credibility. The claimant appears not to understand the effect of his admissions given at the outset of the investigation when he was asked questions in a fair and open manner. Despite an attempt to provide a smokescreen and undermine the answers given, the claimant having made it clear at that early stage of the process he had taken documents that contained customer confidential and sensitive information. Julie Hurst was entitled to take the claimant's earlier admissions into account when she formed a view as to the honesty of his responses.

73. Julie Hurst considered the claimant's arguments concerning Graham Macaulay's lack of bias arising from him dealing with ML's grievance against him, concluding the claimant's criticisms had no basis. The identical argument was raised before the Tribunal, who concluded the view taken by Julie Hurst fell well within the band of reasonable responses. The fact that Graham Macaulay believed the claimant had committed an act of serious and not gross misconduct as a result of the alleged sexual harassment claims brought by ML did not undermine his objectivity and there was no evidence of bias. It is not unknown for misconduct allegations to change during the disciplinary process; sometimes allegations are expanded or increased to include fresh allegations depending on the particular circumstance in an individual case. It is not unfairness in the process for the disciplinary officer to deal with all allegations at the final disciplinary nearing, providing the requirements of the

ACAS Code have been met. Graham Macaulay's role was to establish whether what had been found amounted to serious or gross misconduct given the earlier findings. No action continued against the claimant for the alleged sexual harassment, and it fell within the band of reasonable responses for Graham Macaulay to continue hearing the security breaches allegation.

74. The claimant has criticised the respondent's disciplinary process by making numerous allegations and assertions concerning process and alleging a substantive unfairness. In short, none of these matters get the claimant past an insurmountable hurdle, his lack of reliability as a witness and the numerous inconsistencies in his evidence with illogical and implausible explanations as to how these came about.

The law

75. Section 94(1) of the Employment Rights Act 1996 ("the 1996 Act") provides that an employee has the right not to be unfairly dismissed by her employer. Section 98(1) of the 1996 Act provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reasons for the dismissal, and that it is a reason falling within section 98 (2) of the 1996 Act. Section 98(2) includes conduct of the employee as being a potentially fair reason for dismissal.

76. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

77. Where the reason for dismissal is based upon the employee's conduct, the employer must show that this conduct was the reason for dismissal. For a dismissal to be procedurally fair in a case where the alleged reason for dismissal is misconduct, Lord Bridge in Polkey –v- A E Dayton Services Limited [1981] ICR (142) HL said that the procedural steps necessary in the great majority of cases of misconduct is a full investigation of the conduct and a fair hearing to hear what the employee has to say in explanation or mitigation. It is the employer who must show that misconduct was the reason for the dismissal, and must establish a genuine belief based upon reasonable grounds after a reasonable investigation that the employee was guilty of misconduct – British Home Stores Ltd v Birchell [1980] CA affirmed in Post Office v Foley [2000] ICR 1283 and J Sainsbury v Hitt [2003] C111. In short, the Tribunal is required to conduct an objective assessment of the entire dismissal process, including the investigation, without substituting itself for the employer.

78. The Court of Appeal in British Leyland (UK) Ltd v Swift [1981] IRLR 91 set out the correct approach: "If no reasonable employer would have dismissed him then the dismissal was fair. But is a reasonable employer might reasonably have dismissed him, then the dismissal was fair…in all these cases there is a band of reasonableness, within which one employer might reasonably take one view and another reasonably take a different view.

79. In between extreme cases of misconduct there will be cases where there is room for reasonable disagreement amongst reasonable employers as to whether dismissal for the particular misconduct is a reasonable or unreasonable response: LJ Mummery in HSBC Bank Plc v Madden [2000] ICT 1283.

80. The question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case, having regard to equity and the substantial merits of the case. The Tribunal will not substitute its own view for that of the respondent. In order for the dismissal to be fair, all that is required is that it falls within the band of reasonable responses open to employer. It is necessary to apply the objective standards of the reasonable employer – the "band of reasonable responses" test – to all aspects of the question of whether the employee had been fairly dismissed, including whether the dismissal of an employee was reasonable in all the circumstances of the case.

81. The test remains whether the dismissal was within the range of reasonable responses and whether a fair procedure was followed. Section 98 (4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

Conclusion – applying the law to the facts

82. With reference to the fist issue, namely, did the respondent dismiss for one of the potentially fair reasons set out at Section 98(2) of the Employment Rights Act 1996 ("the ERA") i.e. misconduct, it is not disputed the reason for dismissal was misconduct.

83. With reference to the second issue, namely, did the respondent hold a genuine belief that the claimant had committed the alleged misconduct; the Tribunal found that it did for the reasons set out above. The dismissing officer and appeal officer genuinely held a belief that the claimant had made an attempt to search/trace the name/address of ML via PAYE and tax payer business service system ("TPBS") without a legitimate business reason and in breach of policy. The claimant emailed confidential customer/tax payer information to his private email account, without authorisation or a legitimate business reason against policy, and he had taken home documents containing confidential customer/tax payer information and failed to keep them secure or return them to the office, without authority or legitimate business reasons breached the policies.

84. With reference to the third issue, namely, was the genuine belief held by respondent based on reasonable grounds, the Tribunal found that it was for the reasons set out above. There was a full and fair investigation of the claimant's conduct taking into account cumulatively the evidence gathered by Mark Bithell, Clint Gibson and the questions raised at both the disciplinary and appeal hearings.

85. With reference to the fourth issue, the Tribunal found the respondent carried out as much investigation as was reasonable. The claimant denied he was aware of the detail in the respondent's policies, following further investigation by Graham Macaulay of the claimant's line manager he was satisfied the claimant was aware of them, if not the exact words used. It is not for the Tribunal to substitute its own view for that of the respondent, and it found Graham Macaulay's conclusions concerning the claimant's culpability and knowledge was reasonable. He was entitled to rely on the IT generated data and re-constructions, evidence accepted by the claimant at the first investigation hearing. He was entitled to take into account the clear multiple admissions made by the claimant at that first investigation and conclude the claimant's changes in his story lacked plausibility and credibility.

86. With reference to the fifth issue, namely, did the respondent act fairly and reasonably in all the circumstances in dismissing the claimant, having regard to the equity and substantial merits of the case, the Tribunal found that it had. Graham Macaulay's decision fell well within the bands of reasonable responses open to a reasonable employer. He took into account the claimant's mitigation and accepted he was stressed as a result of ML's grievance and the search of his premises, but given the gravity of the offences, dismissal was a fair and proportionate decision bearing in mind the key importance to the respondent of client security and the confidentiality surrounding information relating to employees such as ML. The claimant had breached the respondent's trust in him by his actions; a fundamental requirement in employees caring out the role the claimant did with access to a myriad of confidential official and sensitive client information.

87. On behalf of the respondent the Tribunal was referred to the EAT decision in Denco Ltd v Joinson [1991) IRLR 63 in which it was held unauthorised use or tampering with computers is an extremely serious industrial office…The employee's motive is immaterial. It is a question of 'absolutes' and should be compared with dishonesty….It is desirable…that management should make it abundantly clear to the workforce that interfering with computers carries sever penalties. Rules concerning access and use of computers should be reduced to writing and left near computers for reference." Despite the claimant's denials, it was the respondent's view, one in which the Tribunal was in complete accord, that the claimant was well aware of the rules, the policies were written and to ensure there was no doubt as to their importance, each time the claimant logged on a blue box came up with a tick box as a reminder to him. There was discussion by the claimant concerning whether the words in the blue box were in bold or not; this was irrelevant to the Tribunal's deliberations. The words themselves were clear in their meaning.

88. In closing submissions the claimant maintained he was under extreme pressure during the investigation interview and this made him make admissions he later retracted. The harassment allegation made him feel distressed, confused, vulnerable and impressionable; the inference being words had been put in his mouth. As indicated earlier the Tribunal, having considered the transcript did not find this to be the case. It was the claimant who first brought up the link with ML in response to an open question, and he continued to rely on this admission throughout the interview without any prompting or pressure. The claimant submitted it is difficult for the Tribunal to access his ability to deal with pressure by merely reading the

words of the transcript. The claimant misses the point. The dismissing and appeal office were well placed to access the claimant's evidence and his reactions. It was reasonable for both to conclude the claimant was not telling the truth, a view also taken by the Employment Tribunal after hearing the claimant's attempts to build a different version of events. The Tribunal does not accept the claimant was bullied into making the admission as alleged by him during the hearing and when making closing submissions, preferring the evidence given on behalf of the respondent that had the claimant being bullied, his experienced union representative would not have remained quite.

89. Throughout the disciplinary process there was no evidence the claimant, due to suffering from emotional stress was hindered in his comprehension and decision making at the time. All of the contemporaneous evidence points to the claimant having a full comprehension of the allegations made and evidence put to him. In closing submissions he stated that the admissions looked damming but they were given "to bring a quicker conclusion to the interrogation...to break people down…I'd admitted anything to bring it to an end." The Tribunal does not recognise the investigation meeting to be an interrogation as alleged; a fair process was carried out whereby the claimant was asked proper questions put to him to which he answered in full. It was an objective investigation that covered all necessary issues to be dealt with at the disciplinary and appeal hearing. At no point during the process did the claimant inform the respondent he had made admissions to bring an "interrogation" to an end; this was yet another new explanation raised during this hearing.

90. With reference to the sixth issue, it found the respondent followed a fair procedure in dismissing the claimant and the ACAS Code was complied with in all respects for the reasons set out above.

91. There is no requirement for the Tribunal to consider the last two issues, having found against the claimant. Had it found the claimant had been unfairly dismissed (which it did not) it would have found the claimant culpable for the allegations resulting in his dismissal. He had caused his dismissal by culpable blameworthy conduct it would have been just and equitable to reduce any compensatory award under Section 123(6) ERA 1996 by 100 percent.

92. In conclusion, the claimant's claim for unfair dismissal is not well founded and is dismissed.

24.05.2017
Employment Judge

JUDGMENT AND REASONS SENT TO THE PARTIES ON

1 June 2017

FOR THE TRIBUNAL OFFICE