EMPLOYMENT TRIBUNALS

Claimant: **Mr S Idrees**

Respondent: **Home Office**

Heard at: **East London Hearing Centre**

On: **4 – 5 February and 3 - 4 November and (in chambers) 11 December 2020**

Before: **Employment Judge A Ross**
Members: **Mr R Blanco**
Mr D Ross

Representation

Claimant: Mr. D. Searle, Counsel

Respondent: Ms. G. Hirsch, Counsel

JUDGMENT

The judgment of the Tribunal is that:-

1. **The Respondent discriminated against the Claimant because of his race by dismissing him on 16 August 2018.**

2. **The complaint of unfair dismissal is upheld.**

REASONS

1. The Claimant was continuously employed by the Respondent between 6 December 2006 and 16 August 2018. The Claimant worked as a Border Force Higher Officer until his summary dismissal on 16 August 2018.

2. After a period of Early Conciliation, on 21 December 2018, the Claimant presented a Claim containing complaints of unfair dismissal and direct race discrimination. The Claimant relies on the protected characteristic of race and identifies his relevant race or ethnicity as British of Pakistani origin

3. The complaints were further particularised at a Preliminary Hearing, at which a List of Issues was agreed.

4. After the Preliminary Hearing, the Respondent filed Amended Grounds of Resistance particularising denials to each complaint.

5. On 3 November 2020, the parties agreed at the outset of the hearing that, if the dismissal was found to be unfair, the issues for the Tribunal should include at this stage whether there was a breach or breaches of the ACAS Code, and, if so, whether each proven breach was unreasonable; but not the percentage uplift to be made to any award.

The Evidence

6. There was an agreed bundle of documents (pp 1-365). Page references in this set of Reasons refer to pages in that bundle.

7. The Tribunal read witness statements for, and heard oral evidence from, the following witnesses:

7.1. The Claimant
7.2. Aysha Idrees
7.3. Sandra Parnell
7.4. Clive Perry
7.5. Mark Kennedy
7.6. Taylor Wilson

8. Counsel for the Respondent produced an agreed chronology and a cast list, which were helpful tools.

The Facts

9. The Claimant worked at Stansted Airport as a Higher Officer ("HO").

10. On 5 March 2018, a female officer, G, who did not work in the same office as the Claimant, made an oral complaint to her line manager, Ms. Crouchman, alleging that certain actions and statements by the Claimant towards her were unwanted. In an email later that day, G explained that they were to an extent that had made her feel "so uncomfortable" (p123). The allegations in the email included that the Claimant had given her unsolicited contact, hugging, and grabbing her arm or fleece, on many occasions (estimated to be nearly every time she saw him). G alleged that the Claimant had "bear hugged" her on a number of occasions in open view in the Casework office, but which, although more subtle, made her feel uncomfortable.

11. In addition, on the same date, G submitted a grievance. The Grievance Notification Form (p.167-170) was completed by G. Under "Nature of Grievance", the form (p169) stated that the grievance was of harassment on the ground of G's gender.

12. In the notes submitted by G as part of her grievance (p224ff), she stated that the Claimant had touched her on several occasions, such as by grabbing her hand randomly when walking past or by putting his arms round her shoulder, that she had always pulled away, and verbally made clear that he should not touch her, but had expressed this in a "*jokey manner*" because she did not want to offend by being rude. She felt that she was being singled out because comments were made about her or to her when she entered a room. The notes referred to various incidents, of which three were particularised: an invitation for coffee on 4 January 2018; an incident on 5 January 2018 in the Customs Office, when the Claimant had taken her hands, spun her round and came close to her face which G found uncomfortable and the coffee invitation was repeated; an incident on 22 February 2018 when she was placing something in the HO safe.

13. At a meeting on 5 March 2018, the Claimant was told that G had made a complaint of bullying and harassment against him. He was told to return to work but at a different building within the airport.

14. The Grievance Decision Manager appointed was Mr. Wilson, an Assistant Director for Border Security at Stansted (see p131). He worked in the same area of the airport as G, who worked in the support team, albeit he had his own office. He knew the Claimant better than he knew G, because she had not been at the airport very long, and he had regular contact with the Claimant, as a HO and someone who acted up as Senior Officer ("SO").

15. Mr. Wilson commissioned a grievance investigation by Sandra Parnell. She received the form at p131-132. Mr. Wilson stated that G had made an allegation of sexual harassment against the Claimant, alleging that she had been touched by him on a number of occasions despite making clear she did not want him to.

16. On 8.3.18 (p128) Mr. Wilson wrote to the Claimant to inform him of the grievance investigation. The Claimant was not suspended pending the grievance, but he was re-located to another building, a decision taken by another manager prior to the appointment of Mr. Wilson.

Grievance investigation

17. Ms. Parnell investigated G's grievance. She was independent; she was based at Gatwick Airport and did not know either G or the Claimant prior to the investigation.

18. On 27 March 2018, Ms. Parnell interviewed G. Notes of the interview are at pp 135-138; a fair summary of the evidence provided is set out in the evidence of Ms. Parnell. G stated that she had told him to stop, that she had pulled away or pushed him away at times, and in relation to an incident in the kitchen (when it flooded and the fridge required moving), G had told the Claimant not to come near her four times, because she was ill, but he had touched her and said "*you're hot*".

19. At the end of the interview, G stated:

> "*I've always said to him, "Can you not". I don't want to be precious but I want him to respect boundaries. I can have a laugh, but I don't appreciate the grabbing and bear hugs. He would pull me by the fleece or the arm, it's the physical contact I don't like. I don't think anyone would. I didn't know how things worked as I was new*."

20. The Tribunal noted that G was an Administration Officer on probation, having joined the Respondent in August 2017, in her first role in the Civil Service. The Claimant was two grades above G; and Higher Officers are in effect team managers. G's evidence in the grievance explained the significance of this explaining that it was her first job in the Civil Service, and that she did not want to be rude, and the Claimant was 2-3 grades above her as HO and acting SO, so she just did as she was told: see p.137

21. As part of the grievance, G submitted emails sent by the Claimant (pp 106-122) in order to demonstrate the type of thing that he said to her. One email stated "*You love me really*". G also submitted a written statement (pp139-141).

22. Also on 27 March 2018, Ms. Parnell interviewed the Claimant. The notes of the interview are at p.142-145. We found these notes to be accurate although not verbatim.

23. In the interview, Ms. Parnell put allegations to him, without dates or precise details attached. For example, she did not put to him the allegations about the VP2/route incident (that the Claimant had taken G's arm, nor that he had said "are you scared?") In cross-examination, she admitted that it would have been better if she had put details to him.

24. In the course of that interview, the Claimant denied singling out G for comment, or touching her to make her feel uncomfortable. He admitted giving "side to side" hugs to people. He did not deny giving G a hug, but could not recall doing so. He stated that G had never made him aware through line management that she feels uncomfortable, so he may have touched her as a gesture of thanks (p.142). Contrary to G's evidence, he denied that she had ever asked him not to touch her.

25. The Claimant did admit throwing orange peel in the general office, although he stated that he could not recall G coming in. He denied that it was thrown at G. He stated that this was "*just camaraderie, banter in the office*". His responses included:

> "*But [G] doesn't work in the office so she must have chosen to stay in the office rather than just put her things down and go*."

26. In interview, the Claimant also admitted that he may have suggested that G go with him for a coffee, because he would have done this to a lot of people. He stated that "*there is nothing untoward on my part in asking her to go for a coffee*" (p.144)

27. At the interview, the Claimant also admitted that he had said to G in jest "*you love me really*", and that he had said that to lots of people.

28. In the interview, the Claimant did not deny that G felt uncomfortable by his actions, but that he had not known that and had just done what he had always done. He apologised if he had upset G unintentionally.

29. Although the Claimant was not questioned before us about this, the Tribunal inferred from the facts that the Claimant knew that G was new in post and therefore on probation over the period when the acts relied upon by the Respondent occurred.

30. Ms Parnell prepared a report on completing her investigation (p150-152). She did not produce a set of findings of fact, setting out which particular events occurred, nor when, nor in what circumstances. In her conclusion (headed "Consideration"), the summary findings were as follows:

30.1. There was little dispute over most basic facts, with the Claimant admitting that he may have made remarks and touched G.

30.2. There was no finding about the allegation that the Claimant had spun G around.

30.3. It was unfortunate but understandable that G did not raise her concerns about the Claimant earlier;

30.4. In adopting a jokey approach in order to avoid being rude, G "*has perhaps led him to think she is comfortable with his behaviour, which she clearly is not*".

30.5. The language used by the Claimant in emails exchanged was not professional.

30.6. The fact that no person felt that they had seen or heard anything unusual (except for one officer who raised it in an email to her manager after the kitchen incident) and that the Claimant seemed to have felt comfortable with flicking orange peel in the office (some of which had struck G) led Ms. Parnell to think the culture at Stansted was "*quite relaxed*". This relaxed culture combined with the lack of a clear indication from G that she felt uncomfortable may have led the Claimant to continue his behaviour.

30.7. It was impossible to say with certainty what had occurred. There was sufficient evidence to conclude that Claimant may not have acted as professionally as he should have done in his dealings with G and: "*Further I consider that it is not unreasonable that she should feel that this amounted to harassment*".

31. On the face of the report, Ms. Parnell did not conclude that any of the Claimant's actions were done with the intention of creating a hostile environment. She concluded that the Claimant did not realise that his conduct was unwanted. She made no finding of fact on one important issue in dispute: whether G had told the Claimant not to touch her at various times, nor in what circumstances such a request was made. She made no recommendation for disciplinary action.

32. In cross-examination, Ms. Parnell confirmed that she did not find that the Claimant had any intention to harass G, although she did not expressly consider the question of his intent, focussing on the effect that the incidents had on G. She considered that the Claimant's behaviour had not been as professional as she would expect.

33. In response to questions from the Employment Judge, Ms. Parnell explained that she had asked herself whether it was reasonable for the Claimant to feel as she did, and that she concluded that it was reasonable; she saw the use of the words "not unreasonable" in the conclusions of her report as meaning the same as "reasonable" in the Policy.

34. Ms. Parnell agreed that there was a "jokey" tone to the emails at pp116-120 (with, for example, the Claimant responding "*ha ha*" and "*LOL*" to emails), and a reasonable view of these might be that G and the Claimant were getting along. Ms. Parnell agreed that the Claimant may not have realised that the G felt uncomfortable with this jokey approach. She decided that the emails were consistent with the relaxed culture at Stansted. The existence of this culture was in her view demonstrated by the orange peel throwing in the presence of other officers.

35. Having received a copy of the report, the Claimant submitted a personal statement, in which he stated that what happened was a case of miscommunication.

36. G's trade union representative filed a detailed set of submissions on her behalf: p240-249. This noted that Ms. Parnell's report was not lengthy and failed to reach a conclusion on certain allegations. The submissions set out the Policy and Legal Framework, including that the Civil Service has a zero tolerance approach to bullying. The submissions stated that the Respondent is vicariously liable for sexual harassment (pp248-249), the Claimant had breached the Civil Service Code, and that action must be taken against the Claimant.

37. The trade union representative also made detailed oral submissions in the grievance interview.

38. Mr. Wilson interviewed G on 11 May 2018 (p231ff). He found her to be a credible witness. In the interview, G stated that she had tried to laugh off comments made by the Claimant every time. Mr. Wilson asked about some specific incidents where the Claimant had denied or did not recall matters at the grievance interview. For example, at p.234, G alleged that, on one occasion, the Claimant had grabbed her and spun her round, and she felt that he was being aggressive. G was asked about a further incident. She explained that the Claimant had taken her on an unfamiliar route through the airport from security; the Claimant had touched her hands and said "*feel how cold I am*"; and G had pulled her hands away, after which the Claimant had pulled her sleeve and taken her on a route unknown to her, which had scared her because she was on her own and did not know where she was.

39. In the interview, G said that no other HO had had physical contact with her, and they would have stopped if told to; she had told the Claimant to stop, but he had not done so.

40. Mr. Wilson asked what resolution she sought; G stated that she wanted it to stop, that she did not want to work with the Claimant again, did not want to see him, and did not want him to be anywhere near her in the department.

41. The submissions of G's representative were that the Claimant was guilty of gross misconduct, that disciplinary proceedings should follow and that the Claimant should already have been suspended. The representative recognised, however, that the issue of

whether his actions were done with the purpose of violating G's dignity had never been put to or explored with the Claimant; but she countered that the actions had this effect and that the effect was reasonable.

42. After a 15 minute break (see p.236), Mr. Wilson decided to uphold the grievance, having considered "*the report and your submissions and hearing today*". At the grievance hearing he gave his conclusion as follows:

> *"You have been a credible witness and I have no doubt about your account of events. You should not have been subjected to this behaviour. This behaviour breaches the CS Code, Home Office code of ethics and BF values. I see this as gross misconduct and sexual harassment of you. I note via* [G's representative] *that you want this dealt with as gross misconduct and I will do that…*"

43. After delivering his conclusion, Mr. Wilson stated that he would review the decision to suspend, and that he did not need to reinvestigate everything, but that he just wanted clarification of points arising from the water flood in the kitchen and the witnesses present. He stated that his priority was to protect the victim.

44. In the Claimant's personal statement (p238-239), prepared following the report from Ms. Parnell and forming part of the grievance hearing pack, he stated that: he had worked at Stansted since 2006, and this was the first time any such allegation had been made; his family unit was very important to him; if his actions had been misconstrued, he wanted to apologise; and that he would not do anything with any intent to cause upset to any one person and that this was a clear case of miscommunication.

45. There was no mention of this statement when Mr. Wilson reached his conclusion that the Claimant was guilty of gross misconduct and sexual harassment. The Tribunal found that Mr. Wilson did not take into account the Claimant's statement in reaching those conclusions.

46. The Tribunal found that Mr. Wilson was influenced in what to do by the trade union representative of the Claimant, due to the detailed set of submissions dated 11 May 2018 (p155), which included: an extract from the Civil Service Code (defining Integrity); relevant policy statements by the Home Office and Border Force in respect of harassment and sexual harassment; an extract from the ECHR Code of Practice on Employment (paragraphs 7.6 – 7.8, 7.12 – 7.13, 7.16 – 7.18, explaining harassment and sexual harassment).

47. Mr. Wilson completed the Grievance Notification Form to record his decision, set out at p.173. At p.174, it is recorded that he believed the allegations are about sexual harassment and "*as such this is Gross Misconduct*". Although inconsistent with these conclusions, the form also states that a disciplinary investigation would take place to establish if there was misconduct and if so, what level of misconduct.

48. In the grievance outcome letter of 11 May 2018 (p165), Mr. Wilson did not set out a list of allegations, with particulars of what each act was and when and/or where it occurred. Furthermore, the outcome letter does not make clear what allegations were found proved, nor whether any particular allegation proved amounted to harassment related to the sex of G, nor whether it was reasonable for G to consider that any such allegation violated her dignity.

49. It did record that the Claimant admitted touching G's hands, side hugged her and had thrown orange peel at her, and that such acts as these and pulling staff clothing, grabbing hands, and saying "you love me really", was harassment, citing the Home Office Policy on harassment. Mr. Wilson stated:

> "*It is clear from G statements, interview and hearing that this was unwanted attention that caused her distress and it is clear of the impact it has had*."

50. The Tribunal found that Mr. Wilson based his decision about whether harassment had been committed entirely on the effect that it had had on G. He did not appreciate the Home Office Grievance policy and the guidance contained within paragraphs 7.16 – 7.18 of the ECHR Code required him to decide whether the unwanted conduct had the purpose of causing the proscribed environment described in paragraph 7.6 of the Code or whether, if not, it was reasonable for each incident to have that effect.

51. The letter stated that the Claimant was guilty of harassment and that he had breached the Civil Service Code standard of Integrity. It does not state that the harassment was related to G's sex, but stated that a Discipline Investigation would take place.

52. In addition, at about the same time, Mr. Wilson decided to commence disciplinary proceedings against the Claimant.

53. The Claimant was invited by email to a meeting with Mr. Wilson on 14 May 2018. He was told that he did not need to bring a representative.

Events on 14 May 2018

54. On 14 May 2018, Mr. Wilson met the Claimant and suspended him. The Claimant contended that he was confronted with allegations, and that the meeting was akin to an ambush. The Tribunal found that this meeting was a normal suspension meeting under the Respondent's procedure, and that there was no entitlement for the Claimant to have a representative present at a suspension meeting.

55. At paragraph 12 of his witness statement, Mr. Wilson gave two reasons for suspension, both of which the Tribunal rejected.

56. In his statement, Mr. Wilson claimed that one reason for suspension was that the Claimant did not grasp the severity of the allegations. However, this is in conflict with Mr. Wilson's own note at p.182, which states that the Claimant was shocked.

57. Secondly, Mr. Wilson alleged that the suspension was because the Claimant had seen him twice in the car park; but there was no mention of this in the Claimant's interview on 11 May 2018, which is inconsistent with this alleged reason for suspension; and in the submissions of G's representative (p248), the request for suspension is based in part on them sharing the same car-park.

58. We found Mr. Wilson's evidence about events on 14 May 2018 in general to be unreliable. As we shall explain, his evidence conflicted with that of Mrs. Idrees, whose evidence we preferred for a number of reasons.

59. Mr. Wilson made a note at the time of suspension, which is at p.182. This includes:

> "*In my view, SI has not grasped the severity of his actions the [wording unclear] zero tolerance approach of the HO and the me-too media campaign. This has reinforced my need to suspend as he is a risk if he cannot understand these key aspects particularly as he is a HO*."

60. The note also shows that after suspending the Claimant, Mr. Wilson met with the Claimant's wife. There were some disputes of fact about this meeting between the evidence of Mrs. Idrees and Mr. Wilson. However, we found that Mrs. Idree's evidence was clear and unshaken by cross-examination. In addition, Mrs. Idrees had written up her own note immediately after this meeting. It was put to Mrs. Idrees in cross-examination that she had made the note in late August 2018 (that is, before the appeal hearing). Mrs. Idrees denied this and she was able to give a clear and detailed account of how and when she made that note. The Tribunal accepted the contents of that note, and the evidence of Mrs. Idrees, as true and accurate.

61. The allegation made for the first time in the Respondent's submissions that Mrs. Idree's note was created – albeit unconsciously - to benefit her husband's case was never put to Mrs. Idrees in cross-examination. The Tribunal considered that this allegation should not have been made without being properly set out in evidence and put to the witness.

62. In contrast, the Tribunal found Mr. Wilson to be a less reliable witness about this meeting than Mrs Idrees. His note was not as full as the note of Mrs Idrees; and his recollection of the detail of the meeting was less clear than that of Mrs. Idrees. He accepted in cross-examination that other things could have been said that were not recorded in his note and that he may have said that the Claimant had "*massively underestimated*" the gross misconduct.

63. We found that Mr. Wilson did approach Mrs. Idrees for an "off the record" meeting. He did this because he felt that the Claimant had (as recorded by Mrs Idrees) "massively underestimated" the seriousness of the grievance and the gross misconduct. He told Mrs. Idrees that she needed a "*bleak conversation*" with the Claimant about the "*worst case scenario*".

64. In cross-examination, Mr. Wilson admitted that at the time of the meeting, he considered the conduct of the Claimant, complained of by G, was gross misconduct. He could not recall the exact words used at the meeting, but accepted he would have said "*it is gross misconduct*" or "*it is likely to be gross misconduct*".

65. Furthermore, in cross-examination, Mr. Wilson admitted that, under the Respondent's policy, the worst case scenario for the Claimant was dismissal; and that he potentially did say as noted by Mrs Idrees that "*if she was my daughter, a 20 something year old, I'd be livid*".

66. The Tribunal decided that this conversation with Mrs. Idrees took place because, as Mr. Wilson put it in his note of 14 May 2018, he was exercising care for Mr. and Mrs. Idrees. The inference from the facts we found was that the reason that he exercised this care was not merely because the Claimant was shell-shocked at the suspension meeting, but because Mr. Wilson had already decided that the Claimant was guilty of gross misconduct and that this would inevitably mean that he would be dismissed.

67. Mr. Wilson's oral evidence in cross-examination was different in material respects to the matters stated in the note made by Mrs. Idrees and the notes of the grievance conclusions. He claimed that, prior to the disciplinary hearing, he had not made his mind up about whether misconduct had happened and that there was merely potential for a finding of gross misconduct. The Tribunal found that this was inaccurate; Mr. Wilson had already reached a fixed conclusion that the Claimant was guilty of gross misconduct which would lead to dismissal. Moreover, we noted that in the grievance hearing notes (p.236), there is no reference to the mere "potential" for a finding of gross misconduct.

68. The Tribunal found that Mr. Wilson's evidence was unreliable on the issue of when he had reached the decision that the Claimant was guilty of gross misconduct and would be dismissed. We found that, retrospectively, after the passage of time and in the preparation for this case, he had persuaded himself, so as to create the perception, that he had not made up his mind in advance of the disciplinary hearing that the Claimant was guilty of gross misconduct and would be dismissed.

Relevant disciplinary procedure

69. The Tribunal found that the relevant discipline policy in force until September 2018 was that set out from pp 56A – 56JJ (dated March 2014).

70. Under "How to decide a discipline penalty", the policy stated that where conduct was proved, the discipline manager must decide on a penalty consistent with the seriousness of the offence; consistency did not mean that the same penalty must be applied in every instance of the same act of misconduct. The purpose of the discipline procedure was to encourage better behaviour and each case had to be looked at on its merits; the sanction or penalties must be proportionate: see p.56R.

71. The policy provided that it was for the manager to conduct the initial fact-finding and decide on the likely level of the alleged misconduct, to decide whether suspension or temporary removal are appropriate: p.56D.

72. This policy sets out three tiers of misconduct: minor misconduct, serious misconduct and gross misconduct (sections 5 -7). Section 6 defines serious misconduct as misconduct requiring management action but which is not serious enough to amount to gross misconduct in the case of a first offence. The section includes examples of serious misconduct.

73. Section 7 states that gross misconduct is misconduct serious enough to destroy the working relationship with the employer, and the likely sanction was dismissal for a first offence. One example was as follows:

"*physical violence or threatening behaviour, including proven cases of serious bullying, harassment and/or discrimination including online*;" (see p56H)

74. Under "Assessing the Level of Seriousness" (p.56F), the policy set out factors to be considered by the discipline manager. These included: the degree of the misconduct; culpability; intent; and precedents set by how similar cases have been handled in the wider Home Office.

Disciplinary investigation

75. Mr. Wilson appointed Mr. Perry as the disciplinary investigating officer.

76. In addition, the nature of the investigation requested by Mr. Wilson demonstrated that he had reached his conclusions ahead of the disciplinary hearing including on most factual matters and the degree of culpability. This is evidenced by the form completed by Mr. Wilson and received by Mr. Perry, which he thought contained the matter he was investigating, stated (p.195):

"…I believe this to be sexual harassment and now falls to be dealt with under misconduct policy and as gross misconduct."

77. Mr. Wilson directed Mr. Perry (by email at p.200) to focus on two incidents: the flood in the kitchen, and the incident where orange peel had been thrown by the Claimant in the office, and which had hit G.

78. Mr. Perry interviewed four witnesses. He found that there was no further evidence about these two matters beyond that generated in the grievance. His investigation report (pp202ff) was short and concluded that a case to answer had been established through the grievance process and that there was no further relevant evidence.

79. The Tribunal found that the Respondent's investigation into the misconduct complained of (taking all the investigation steps as a whole, not merely the very limited investigation by Mr. Perry) was not reasonable in the circumstances of the case for at least the following reasons:

79.1. The purpose of the investigation should have been to establish whether there were reasonable grounds for the belief that the Respondent had formed that there had been misconduct on the part of the Claimant. However, a key fault, running throughout the entire disciplinary process, was that there was no list of allegations drawn up that Mr. Wilson believed to amount to gross misconduct (whether individually or if taken together).

79.2. The discipline investigation by Mr. Perry was limited to interviewing further potential witnesses about two factual incidents, even though Mr. Wilson intended to rely on other matters upon which he had already made up his mind.

79.3. The original grievance investigation was not adequate to assess the seriousness of the alleged misconduct because it made no specific findings about particular allegations. The Respondent needed to understand, at least, what acts were likely to have occurred, whether done with the purpose of causing violation of dignity or a hostile environment or, if the acts had that effect, whether it was reasonable for them to have done so. The question of reasonableness required the employer to make a determination about the context in which each of those acts occurred.

79.4. Further, although at the grievance investigation interview certain actions had been admitted by the Claimant or that they may have happened, he had denied spinning the Claimant around (which was alleged by G to have been on 5 January 2018) and stated that he was on leave on that date. This allegation was not investigated further, whether by seeking documentary evidence about his leave or seeking witnesses or CCTV. There was no evidence that either investigation looked for any exculpatory evidence at all.

79.5. In respect of an allegation that he had asked G to go for coffee, the Claimant had stated in his grievance interview that he did not recall asking G to go for coffee, but he did not deny saying it, because he would do the same to a lot of people. This explanation was not investigated, nor did Mr. Perry investigate whether there were any witnesses to an invitation, to consider the circumstances in which the invitation was made and whether, if it was made, it was made to G alone, nor if it was made on one or more occasions.

79.6. The Claimant was not interviewed at all as part of the disciplinary investigation by Mr. Perry. Particular allegations were not put to him to give him an opportunity to respond to the allegation or the context in which acts occurred. In particular, it was not investigated whether G verbally requested him to stop or acted so as to demonstrate to him that it was reasonable for the conduct complained of to have the effect of violating her dignity or creating a hostile environment, in the circumstances in which those matters occurred. Given that his career in the Civil Service was at stake, these matters should have been investigated.

79.7. The investigation of Mr. Perry did not investigate any factors relevant to mitigation, despite the fact that he was investigating alleged gross misconduct.

79.8. Ms. Abid was interviewed about the flood incident. She said that the body language between G and the Claimant was normal, which tended to support the Claimant's account. The conclusion of the discipline investigation report that there was no further relevant evidence was irrational in this respect.

80. The Tribunal found that the investigation conducted by the Respondent fell outside the band of reasonableness bearing in mind that the Respondent was a large government department with sufficient resources to conduct a reasonable investigation in the circumstances. We found that the limited nature of the disciplinary investigation was consistent with the fact that Mr. Wilson had predetermined the outcome of the disciplinary process. In particular, there was no attempt to link evidence gathered (whether by Ms. Parnell or Mr. Perry) with particularised allegations.

81. In reaching these findings, the Tribunal is well aware that the nature of harassment cases may well mean that the complainant cannot give precise dates and times of specific incidents for different reasons, including that they are numerous or spread out in time or because of the circumstances in which they occur. However, the experience of the Tribunal is that a reasonable investigation into a set of allegations is required, which can lead to a more precise set of charges being drawn up. Indeed, the Tribunal noted that the Respondent's own discipline policy (at p.56L) provided for a Formal Investigation in a case of alleged gross misconduct or where the facts of the allegation are not clear.

Disciplinary Hearing

82. Following receipt of the report of Mr. Perry, a Discipline Hearing Invite (p.260) was sent to the Claimant.

83. Section 16 of the disciplinary procedure (p56F) is entitled "How to hold a formal discipline hearing". This explains that the invitation should "*set out the allegations and the level of misconduct if proven, serious or gross*". The Discipline Hearing Invite did not comply with this part of the procedure, because the letter stated only:

> "*The allegations to be discussed at the hearing are you on several occasions acted inappropriately with BFAO. If proven this may constitute Gross Misconduct* …

84. In any event, the Tribunal found that the Claimant could not know the case against him from that description of the alleged misconduct. The grievance investigation report had been unclear about what factual allegations had been found proved, which amounted to harassment, and which (if proved) related to the sex of G. After all, the conclusion in the report of Ms. Parnell states that it is impossible to say with certainty what had occurred; and she did not reproduce the test of harassment in the Respondent's policy (which is at p.156), in her finding that it was "*not unreasonable*" for the Claimant to believe that she had been subject to harassment.

85. From the invitation letter, the Claimant could not know what incidents were in issue, what evidence to adduce or what witnesses to call. There was no list of the documents included; but it referred to additional documents created since the grievance hearing being included such as the investigation report. The difficulty for the Claimant was that the original grievance investigation report and grievance outcome decision (p.165) did not contain any list of findings of fact amounting to proven acts of harassment.

86. The Claimant's statement at pp266ff was before the disciplinary hearing. However, in this statement, the Claimant was responding to allegations within the submissions of the representative of G. He was not able to respond in any detail in his defence, because there were few particulars in the allegations made by the representative.

87. In addition, the Claimant added comments to the grievance interview note of G. The grievance interview note of G is not an adequate or reasonable charge letter, because the Claimant could not know which allegations were upheld. For example, he questioned why one named witness to the safe incident was not interviewed purely on G's claim that the witness would not remember anything.

88. The disciplinary hearing took place on 15 August 2018. It was conducted by Mr. Wilson who put a series of allegations to the Claimant. The notes of the hearing are at

p.276-285 and their accuracy was not disputed; we find that they are accurate but not verbatim.

89. The Claimant had learned of the comments of Mr. Wilson in his conversation on 14 May 2018 with Mrs. Idrees. The Tribunal inferred from this and the surrounding circumstances that these comments made him substantially more defensive in his statement filed for the disciplinary hearing and in his responses at the disciplinary hearing than he had been during the grievance interview.

90. As a result, the Claimant's written statement prepared for the disciplinary hearing denied almost all matters, pointing out that there was no evidence to corroborate the complainant's allegations despite the incidents occurring in an office environment.

91. The date of the alleged incident where G was spun round by the Claimant was 5 January 2018, but the Claimant's case was that he was on leave on that date. No investigation had been conducted into that incident such as by checking whether he was on leave. In cross-examination, Mr. Wilson accepted that there was no good reason for failing to investigate this defence.

92. Moreover, the Claimant's oral answers at the disciplinary hearing denied several matters. For example, he pointed out that he had said in the grievance interview that his character and personality was to hug people; but he maintained in the disciplinary hearing that he did not hug G, and he had never said that he had hugged her. In addition, the Claimant denied touching G's hands on any occasion.

93. In respect of one matter, the allegation that he took G from security at VP2 along a different route, the Claimant stated that he could not recall it at all, and that he had never taken G that way, but that he went that way because it was quicker. He denied touching her hands and referring to them being cold. It was never put to the Claimant in the disciplinary hearing that this was an occasion on which G had protested about his attention and that she did not want to go that route; and G's evidence was not that she protested to going along the route with the Claimant (see p.135). Moreover, Mr. Wilson did not make any finding in his decision that the comment alleged (asking if G was "*scared*") was stated in a threatening or hostile way, nor that the Claimant had pulled G's arm to take her via VP2.

94. Irrespective of any factual incident, the Claimant did not dispute that G felt the upset alleged, but that it was due to miscommunication for which he apologised.

95. The Claimant did admit throwing orange peel in the office towards the bin, as part of a group throwing it, which he described as "*camaraderie*" and part of the culture. He admitted G came into the office and some peel landed in her hair. The Claimant denied that he had started throwing the peel and that it was an accident that some had gone in G's hair, for which he apologised.

96. In respect of an allegation that the Claimant had invited G for coffee, he stated that he always offered people coffee when he was going to get one, but that he had not intentionally asked G. He was not challenged or asked about this in the disciplinary hearing; and he was not "*adamant*" (as Mr. Wilson alleged in evidence) that he had not invited G for coffee; the notes stated his response to the allegation as "*I don't think I have*". In re-examination before the Tribunal, the Claimant explained that at the

disciplinary hearing he meant that he had not asked G directly. It was never put to the Claimant at the disciplinary hearing that he had repeatedly asked G to coffee. The evidence at the disciplinary hearing from his representative was that there was a coffee culture with little groups going together.

97. The Claimant accepted that he should not have sent the email stating "*you love me really*" but explained that the emoji smiling faces showed that it was banter, and that he wanted the original chain – which was not present.

98. Mr. Wilson adjourned. On the re-start of the disciplinary hearing, he stated that his role was to decide whether the case was proven, whether partially or wholly or not at all. He stated that he looked at "*key aspects and as a collective*". He found certain matters proved, summarised in the notes of the disciplinary hearing at p.283 and the dismissal letter at p.289-290, with each incident summarised in a separate paragraph. In the following summary, the Tribunal has used its own sub-headings:

98.1. Half hugging, touching hands and pulling fleece. Mr. Wilson's note reads: "*some of the stuff she describes you admit doing to others and her account has such detail and clarity that I believe it happened*". Mr. Wilson decided that G's account of a number of instances of hugging and touching hands were credible. There is no breakdown of precisely what he found had happened, nor when, nor in what circumstances or context.

98.2. VP2/new route incident. Mr. Wilson found this had happened, but the dismissal letter was inconsistent with the written note. We preferred the contemporaneous note as likely to be more accurate. Therefore, we found Mr. Wilson decided that the Claimant had said to G that this was a quicker way and asked if she was scared; and he found that the Claimant had tried to be helpful, but did not pick up on how it made G feel, when he should have realised how it made her feel.

98.3. Invitation for coffee. Without finding how many invitations had been made, nor the circumstances in which they were made, Mr. Wilson found that invitations for coffee had been made due to the inconsistency of the Claimant's evidence. He concluded that: G had felt singled out for coffee with a supervisor she hardly knew; she had said no, and felt harassed; G was a relatively new member of staff and junior in rank to the Claimant, which made it difficult for her to say no. Mr. Wilson considered that the Claimant's evidence was inconsistent because he had said that he had only met her 20 times.

98.4. Orange peel incident. This had happened, but it was not intentional, but it had caused distress and made G feel degraded. (In cross-examination, Mr. Wilson stated that this was not gross misconduct if viewed separately).

98.5. 5 January 2018 allegation. The allegation of G being spun around was not mentioned in the notes at the end of the disciplinary hearing, but was mentioned in the dismissal letter. Mr. Wilson accepted G's evidence about this incident because he found she had a vivid recollection of it. It was unwanted and involved the Claimant touching her clothing.

98.6. Email chain. Mr. Wilson found that the Claimant admitted that the content was inappropriate particularly given that he was a HO and G had only joined in August 2017 and whom he stated he had met only 20 times.

99. There was no reference by Mr. Wilson in the dismissal letter about the hand touching when moving the fridge (in the kitchen flood incident). He did refer to it at the end of the disciplinary hearing, referring to it as "*accidental hand touching*", which he found occurred. In cross-examination before us, Mr. Wilson stated that he had found that it had happened, but he had not investigated whether it was accidental or not; he had just "*badged it*" as accidental.

100. From the hearing notes, Mr. Wilson concluded that the Claimant was guilty of harassment; but he did not refer to the harassment being related to the Claimant's sex nor that it was sexually motivated. However, he concluded that: the harassment was gross misconduct; the hugging and touching was not consensual, and that G did not need to say that she was not consenting; the coffee invitation was unwanted; and the orange peel incident made G feel demeaned.

101. After providing his findings, Mr. Wilson adjourned the hearing for 5 minutes to allow the Claimant to discuss his mitigation with his representative. When the meeting reconvened, Mr. Idrees stated: he was mortified that G felt as she did; there was no intention to harass; he had no previous disciplinary record; operational delivery was "*spot on*"; and he had learned from the situation, in that he realised he had to show responsibility and values, that he had misjudged a situation and caused G distress. Mr. Wilson considered that the Claimant had changed his position from the start of the meeting, when he considered that he had denied causing G upset.

102. After a further adjournment (25 minutes), the meeting was reconvened. Mr. Wilson informed the Claimant that: he did not trust him when it came to interacting with staff and junior staff; he had made a junior member of staff feel uncomfortable and under threat; he did not accept how he had acted but accepted the outcomes; in his mitigation, the Claimant had said he was changed, but Mr. Wilson did not accept this, and did not trust that the Claimant would not repeat the actions; the Claimant had used his authority as power.

103. Mr. Wilson dismissed the Claimant, stating that he had no other option. The Claimant asked if he had preferred G's evidence due to bias, because Mr. Wilson worked in close proximity to G. Mr. Wilson denied this. The Tribunal found that the fact that Mr. Wilson worked in close proximity to G had nothing to do with his decision to dismiss, not least because over time he had seen as much or more of the Claimant at work.

104. By a letter of dismissal dated 16 August 2018, Mr. Wilson purported to explain his reasoning for the decision to dismiss. However, the letter fails to explain precisely what allegations he was considering, and precisely what findings of fact were found proved; at p.289, the dismissal letter states that the allegations are as set out in the letter of 26 July 2018 (p260) but that letter does not particularise the allegations, and refers to the allegations set out in the 8 March 2018 letter and 14 May 2018 letter (pp185,191); but neither of those letters particularise the allegations either.

105. In the dismissal letter, at p290-291, Mr. Wilson rejected the mitigation put forward as not credible and why he could no longer trust the Claimant; the letter stated that Mr.

Wilson held the belief that the Claimant had not been honest in the disciplinary process. The letter stated that in the first submission to the grievance investigator, the Claimant had offered sincere apologies and said that it was a case of miscommunication and nothing more; but in the statement to the disciplinary hearing, the Claimant had denied miscommunication on the grounds that the events did not occur, save for accepting that the emails were sent.

106. The Tribunal found that insofar as the dismissal letter stated that Mr. Wilson could no longer trust the Claimant, it was an attempt to retrospectively justify the decision to dismiss the Claimant that Mr. Wilson had reached in May 2018, before the disciplinary process had commenced. Indeed, there were relevant matters unreasonably and unfairly left out of account by Mr. Wilson in his statement in the dismissal letter that the Claimant could no longer be trusted by the Respondent:

106.1. In the grievance investigation, the Claimant had not been given any specific dates with particulars of incidents. He had had general allegations put to him, such as in relation to hugging, and admitted that he may have done the act complained of. He did not admit that he had done a specific alleged act, nor that the act had amounted to harassment. He admitted that G had been "*made to feel in a way which is not right*", but that it was not intentional and a case of miscommunication.

106.2. More significantly, before the disciplinary hearing, Mr. Wilson indicated to Mrs. Idrees that the Claimant was guilty of gross misconduct and likely to be dismissed, as we have explained above. The Claimant was informed of this by his wife before the disciplinary hearing. In those circumstances, we found that it was almost inevitable that the Claimant would adopt a more defensive stance at the disciplinary hearing stage, when it appeared to him that his whole career in Border Force was going to end if the facts alleged were admitted or found proved, irrespective of whether the acts were not done with the purpose of harassment, irrespective of any relevant context, and irrespective of any mitigation. In those circumstances, the Tribunal found that any employee would be likely to put the employer to proof of the factual basis for the unparticularised allegations.

106.3. In his submission to the disciplinary hearing, the Claimant stated that all the allegations, except for the email, were false: see p.266. However, at the disciplinary hearing itself, the difference between his oral evidence and that given in the grievance was substantially more limited. For example, in oral evidence to Mr. Wilson, the Claimant stated that he had not said that he had hugged G, but that he may have done; and that his personality was such that he may have hugged other people in the office; he maintained he did not hug G. His position on the issue of whether any contact amounted to harassment had not changed. In respect of the alleged invitation for coffee, he said that he may have done so in the grievance interview; and in the disciplinary hearing, he stated that he always offers people to go for coffee and that "*I haven't intentionally asked her, I don't think I have*".

106.4. Mr. Wilson had formed a concluded view that G was a credible witness and that the Claimant was guilty of gross misconduct at the grievance hearing, by which time he had not heard evidence from the Claimant at all, including

evidence about matters relevant to whether it was reasonable for the unwanted conduct to have the effect complained of.

107. Furthermore, Mr. Wilson did not assess the level of seriousness of the misconduct at the disciplinary hearing, contrary to the discipline policy at p.56F. We found that the main reason for this was that Mr. Wilson had made his mind up in advance that the acts of the Claimant found at grievance amounted to gross misconduct and the Claimant would be dismissed, irrespective of any mitigation or further investigation results. In addition, Mr. Wilson was influenced by G's representative and her record of senior management statements in respect of sexual harassment and the zero tolerance approach required, and her reference to the vicarious liability of the Respondent.

108. In cross-examination, Mr. Wilson stated that: the coffee invitation incident would not amount to gross misconduct or warrant dismissal as an isolated incident; the orange peel incident would not be gross misconduct, or even serious misconduct, if an isolated incident; and the VP2/route incident would not be gross misconduct or warrant dismissal as an isolated incident. His evidence was that there were multiple findings of serious harassment and they amounted to gross misconduct in total. The Tribunal found that, if this was the case, it was all the more important to list and particularise those allegations of serious harassment, and to investigate each of them in a reasonable way.

109. The Tribunal found that Mr. Wilson did not consider any of the sanctions referred to in the discipline policy other than dismissal. We inferred this partly from the fact that neither the notes of the hearing nor the letter of dismissal contained any reference to any alternative sanction, and because Mr. Wilson had made his mind up that the Claimant would be dismissed prior to the hearing, evidenced by his discussion with Mrs. Idrees on 14 May 2018 set out above.

110. Mr. Wilson alleged in cross-examination that, in order to ensure consistency, he had referred to the outcome in similar cases, referring to an email that he had sent to a Human Resources officer on 23 July 2018 (p259) in which he asked for examples from similar cases of appropriate sanctions. Although he said that he had received a response, when asked where it was, he stated that he could not remember; and there was no copy of a response in the bundle. The Tribunal found that Mr. Wilson was mistaken about receiving a response; in a case of this nature, in which consistency of treatment was a key feature, if such an email response existed, it would have been found and disclosed and if a telephone response was made, Mr. Wilson would have recalled it or noted it; after all, he had made a note of his conversation with Mrs. Idrees.

111. The Tribunal found that Mr. Wilson did not consider sanctions applied in any similar cases before reaching his decision to dismiss. He had reached the decision to dismiss by the time he met Mrs. Idrees on 14 May 2018, which explains why he did not chase a response to his email of 23 July 2018.

112. In response to a question from the Tribunal, Mr. Wilson accepted that the misconduct of the Claimant would have been more serious if he had been the line manager of G, because that was a position of trust.

Role of Gail Crouchman

113. The Claimant relied on the fact that Gail Crouchman, Chief of Staff, was a senior line manager of G, had decided both that there was a case of answer by the Claimant but proceeded to act as note-taker during the suspension meeting, at the grievance interview, and the disciplinary hearing. He alleged that this was a procedural irregularity. We heard no evidence to suggest that Ms. Crouchman participated in, or interfered with, the decisions taken in the suspension hearing or the disciplinary hearing; and no complaint was made by the Claimant about the accuracy of the notes made at those meetings.

114. We found that Ms. Crouchman's presence at these different meetings was likely to be the result of the Respondent's intention to ensure consistency in the process, with someone who understood the issues, and for reasons related to confidentiality.

Appeal Hearing

115. The Claimant appealed the decision of Mr. Wilson. In order to activate the appeal, he completed an "Appeal Notification Form" (p294ff) which included the following:

"*The sanction imposed upon me was too severe and was disproportionate to the misconduct, which was in any event not proven or admitted to. The decision made by the DM was based purely on his opinion and not fact.*

The sanction was inconsistent with one imposed for similar misconduct committed by another employee. I believe that similar cases have not led to dismissal with far less severe sanctions imposed, furthermore this case involved a white manager whereas I am of the BAME community; I feel I have been treated differently because of this."

116. The Tribunal found that the second of these paragraphs clearly indicated that one ground of appeal was that the decision to dismiss was direct race discrimination.

117. In addition to this Form, the Claimant's representative, Mr. Chew (PCS union) submitted four bullet pointed grounds of appeal, including that the sanction was too severe and disproportionate, that the sanction was inconsistent with one imposed for similar misconduct committed by another employee, and that the employer had not taken into account a previously exemplary disciplinary record. We found the Claimant had no previous disciplinary sanction on his record (A recommendation made in 2015 was not a penalty under the disciplinary policy).

118. Mr. Kennedy was appointed as the appeal manager. The discipline policy provided that the appeal manager "*should examine the decision-making process, but not reconsider the discipline case in detail unless there is new information/evidence to evaluate*." If new evidence was made available, the appeal manager was required to "*consider the impact that this may have on the final decision; the AM should decide whether or not the outcome and any sanction imposed were reasonable*."

119. The appeal was heard on 10 October 2018. The notes of the appeal hearing are at p.303ff; there was no dispute about the accuracy of them.

120. In the course of the appeal, the notes record that Mr. Kennedy clarified with the Claimant that he believed race discrimination had taken place. The notes record the response as follows:

> "*SI explained that 1 case was a HO who kept their job in a similar case, yet he was dismissed. They are white yet he was treated differently. SI stated that he was uncomfortable and did not wish to come to that conclusion and has never used the race card to get something. But in this case, it is the only thing he could draw upon."*

121. During the hearing, the Claimant produced a signed statement from Mrs. Idrees recording her conversation with Mr. Wilson of 14 May 2018. A copy was taken by Mr. Kennedy. Mr. Idrees explained that he did not raise it before because he had wanted to protect his wife. Mr. Kennedy explained that he may need to speak to Mrs. Idrees and also Mr. Wilson.

122. After the hearing, Mr. Kennedy spoke to Mr. Wilson about the meeting that had taken place with Mrs. Idrees on 14 May 2018. There were no notes of that meeting between Mr. Kennedy and Mr. Wilson. Mr. Kennedy did not speak to Mrs. Idrees, despite the two different accounts of the meeting on 14 May. He asked Mr. Wilson to send over his notes of the meeting of 14 May. He accepted Mr. Wilson's account of his meeting with Mrs. Idrees, without speaking to Mrs. Idrees and without sending her a copy of Mr. Wilson's notes for her comments.

123. By a decision letter of 6 November 2018 (p317-318), Mr. Kennedy dismissed the appeal. The letter contains three substantive paragraphs, none of which address, the grounds of appeal nor do they explain why the grounds were not upheld. There is no mention of whether he found that the sanction was proportionate, nor whether he had investigated whether the decision to dismiss was because of race, nor whether the sanction of dismissal was consistent with other similar cases.

124. The decision letter stated that the meeting between Mrs. Idrees and Mr. Wilson was in relation to her well-being, and it was a gesture of support rather than anything more.

125. In oral evidence in response to the Tribunal's questions, Mr. Kennedy, when asked why the appeal decision letter did not refer to the ground of race discrimination, stated that this was because "*it was a throw away comment, not with any evidence for me to look at*." He was asked what he would understand such evidence to be. He felt this ground was just something introduced at the last minute to deal with at the appeal. He contrasted the ground of race discrimination with the statement made by Mrs. Idrees about the 14 May 2018, which was something "*physical for me to look at, to see if I could confirm*."

126. Further, Mr. Kennedy stated in oral evidence that, at the appeal, he did not accept that the Claimant was saying that his dismissal was because of "*some racial issue*" (to quote his words). The Tribunal found that it was clear from the grounds of appeal that the Claimant was indeed alleging that his dismissal was due to race discrimination; and the Claimant confirmed that at the appeal.

127. In re-examination, Mr. Kennedy stated that if there was something for him to follow up on, he could have potentially launched a follow-up investigation. When asked about

what misconduct sanctions were broken down by race, he stated that this would be down to the HR Business Partner on Shared Services, and he did not know if such information was available.

128. In respect of the ground based on race discrimination, the Tribunal were surprised that Mr. Kennedy had not even carried out the steps of consulting the HR Business Partner nor investigating what (if any) relevant data existed concerning the relationship of sanction to the race of the employee found guilty of misconduct.

129. Furthermore, the discipline policy itself provides that one factor in assessing the level of seriousness may be consideration of precedents set by how similar cases have been handled in the wider Home Office (p56F). Given that consistency and proportionality of sanction were put in issue, a reasonable appeal manager would have sought such precedents. The Tribunal found that this was particularly so where the employee was also complaining that dismissal was an act of race discrimination, because inconsistent or disproportionate treatment might cause the manager to ask why such treatment occurred. Mr. Kennedy made no attempt to seek any such precedents or guidance about them; in evidence, he stated that he did not investigate this because each case had to be treated on its own merits. However, we found that this answer demonstrated a further way in which Mr. Kennedy had acted unreasonably in the conduct of the appeal, because consistency of sanction (and whether the decision on sanction was tainted by race) could only be raised at the appeal stage. In summary, we found that he failed to address whether the Claimant had been treated inconsistently compared to others.

130. In addition, in cross-examination, Mr. Kennedy agreed that Mrs. Idrees' account of the meeting on 14 May 2018 indicated that Mr. Wilson had come to the conclusion that the Claimant was guilty of gross misconduct before the disciplinary hearing. He was asked whether, in the light of her statement, he had considered the grievance documentation for evidence that Mr. Wilson had pre-determined the decision. Mr. Kennedy stated that he read the statements of Mr Wilson (such as at p236) to mean that gross misconduct was a potential outcome of the disciplinary hearing.

131. The Tribunal found that this evidence was, at best, unreliable and we rejected it, because:

131.1. The notes of the grievance hearing conclusions demonstrate that Mr. Wilson had unambiguously determined that the Claimant was guilty of gross misconduct, in the form of sexual harassment, well before the disciplinary process commenced: see paragraphs 42-47 above. Reading those notes and the Grievance Notification Form (pp173-174) would not leave that open to question.
131.2. Mr. Kennedy admitted in cross-examination that he had not referred Mr. Wilson to the disciplinary investigation form (pp193-200) and that his conversation with Mr. Wilson was limited to the statement of Mrs. Idrees and Mr. Wilson's response to it.

132. From the above facts, the Tribunal found that, in reaching his appeal decision, Mr. Kennedy did not address the ground of appeal based on race discrimination at all, nor did he address the grounds of consistency or proportionality of sanction. In essence, Mr. Kennedy failed to carry out the fundamental requirements of any appeal by failing to engage with the main grounds presented.

133. Given the content of the appeal decision letter, and the facts found above in this section of our Reasons, Mr. Kennedy's witness statement evidence that he had given careful consideration to the representations of the Claimant and his representative was unreliable evidence, which the Tribunal rejected.

134. Although the appeal required under the Respondent's policy was a review, rather than a re-hearing, the discipline policy expressly required (p56HH) that the appeal officer must consider whether the procedure had been properly followed and must consider the reasonableness of the decision. In this case, the Claimant was appealing on grounds including that the procedure had not been properly followed (new evidence from Mrs. Idrees indicating that the gross misconduct finding was pre-determined) and that the decision was unreasonable, whether because of race discrimination, inconsistency of treatment (whether or not because of race), or lack of proportionality. Moreover, the policy (at p56V) indicates that the discipline case may be considered in detail if there is new evidence to evaluate; and in this case, there was new evidence from Mrs. Idrees which should have been properly and fairly evaluated.

135. The Tribunal concluded that had Mr. Kennedy reasonably evaluated the note of evidence from Mrs. Idrees by considering it alongside the documentary evidence produced by the grievance hearing (specifically the hearing notes at p.236 and the Grievance Notification Form at p173-174) and by interviewing her as well as Mr. Wilson, the only reasonable conclusion that he could have reached was that Mr. Wilson had pre-determined the decision to dismiss and that the appeal should be allowed.

Treatment of alleged comparator

136. In his evidence to the Tribunal, the Claimant referred to the case of a white British HO, W. In that case, findings of fact were made that W had exchanged inappropriate WhatsApp messages with a female officer. The numerous messages were unwanted and had caused distress to the female officer. The inference is that when the messaging began, she was new to his team, because she started in April 2017 and the messages began from about September 2017. W was her line manager (see p.335-336).

137. The Tribunal did not take into account the Claimant's evidence in his witness statement that W had sent photos of his genitalia to the complainant. The Claimant admitted in cross-examination that he had no evidence of this and that it could have been all gossip, and that he only knew for a fact what was included in the investigation report at p.330-360.

138. The investigation report showed that WhatsApp messages and calls were sent by W, the line manager of the complainant, to the female officer's mobile phone between September/October 2017 and April 2018. The messages included inviting the officer to W's home, stated on one occasion "*I really want you*", stated that she smelt good, asked if she was engaged, signed off with a kiss "x" on one occasion, asked for a picture of her with her hair done, and made other personal and inappropriate comments, and sent persistent messages until she responded.

139. In addition, the evidence against W was that the female officer had messaged him that the inappropriate messaging should stop but it continued.

140. As shown by the decision letter (p.361-362), W was found guilty of conduct which resulted in a colleague being bullied and harassed. It was found that he had mitigation due to personal stress and because he considered the victim a friend (although her evidence was she never socialised with him outside work and gave no evidence that she was a friend). The allegations found proved were determined to be serious misconduct. W was given a final written warning for 18 months.

141. In contrast to the Claimant's case, the investigation report in the case of W is detailed. It contains a formal front page with a summary of the allegations, and then it lists the terms of reference. A chronology of the investigation is provided. A summary of the evidence of each witness is included and each message is set out in full. The terms of reference were considered by addressing the two allegations and findings were made with a recommendation that one allegation, set out with particulars, should proceed to a disciplinary hearing. The report also referred the discipline manager to mitigating circumstances arising from the investigation.

142. In his witness statement, Mr. Wilson alleges that he knew about this case before he reached his decision to dismiss the Claimant, but that he believed that the cases were very different. Mr. Wilson's evidence (paragraph 30 of his witness statement) was that the complainant had been engaging in sending inappropriate texts to W, but after a while she thought that it had gone too far and made an allegation of harassment against W.

143. However, the Tribunal found that, at the time of reaching his conclusion that the Claimant was guilty of gross misconduct, Mr. Wilson did not have that understanding about the case of W. The evidence of Mr. Wilson was unreliable in this respect; we did not find that he had a genuine but mistaken belief about W's case. To begin with, we have found that Mr. Wilson had reached his decision that the Claimant was guilty of gross misconduct long before the sanction of a final written warning was imposed on W (which was on 18 July 2018, evidenced by the letter at p361). Secondly, Mr. Wilson's description of the complainant's role in the exchange of texts was wrong, given the contents of the outcome letter and the investigation report, demonstrated by the evidence of the complainant at p.335 (including at 6.2.2, 6.2.3, and 6.2.4 and 7.3.7), none of which suggested that she had been engaging in sending inappropriate texts to W.

144. In oral evidence, Mr. Wilson stated that the complainant in W's case did not feel threatened by the WhatsApp messages, in contrast to G's case. However, the complainant stated to the investigator that she felt uncomfortable every time she saw a message from W (see 6.2.26 of the report) and on one occasion refers to feeling anxious. Moreover, it was never put to the Claimant in the disciplinary hearing that G had felt threatened by him, nor is this finding apparent from the dismissal letter or the notes of the hearing. In fact, the relevant note from the disciplinary hearing in respect of the VP2 incident is as follows:

> *"SI: …Why would I say are you scared, I would remember if I said are you scared. It's a route I always take to work.*
> *TW: I don't know if she meant it like that you were being threatening. …"*

145. In addition, in her statement provided to Ms. Parnell, G stated that it could be argued that she did not express herself enough, maybe because she laughed things off, because she thought it was friendly banter and that it would stop. This led to part of the conclusions of Ms. Parnell.

146. Also, Mr. Wilson accepted in oral evidence that W had no choice but to accept the content of the WhatsApp messages at the disciplinary hearing.

147. At paragraph 31 of his witness statement, Mr. Wilson referred to the case of a white officer, X, whom he had dismissed for gross misconduct. This officer had been found to have made inappropriate comments and inappropriately touched colleagues on various occasions, including two much younger female officers on a training course. X claimed that he knew the two female officers socially and that he was just being friendly. Mr. Wilson found that this was untrue, and that he lost trust in X and dismissed him in December 2018.

148. In cross-examination, Mr. Wilson accepted that the misconduct proved against X was more severe than that misconduct he considered proved or admitted in the Claimant's case.

Failure to comply with the ACAS Code of Practice

149. The Respondent failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures in several ways. We consider that adequate reasons have been given already to explain this conclusion. The Respondent breached, at least, paragraphs 2, 4, 5, 9, 18, and 27, of the Code when read together. For the avoidance of doubt:

149.1. The Respondent failed to inform the Claimant of the case against him with sufficient information to enable him to prepare to answer the case at the disciplinary hearing, contrary to paragraph 9 of the Code.

149.2. The decision to dismiss had been pre-determined by Mr. Wilson before he had heard from the Claimant in answer to a set of allegations or charges, contrary to paragraph 18.

149.3. The appeal hearing was grossly unfair. It is implicit from paragraphs 2 and 4 that the appeal referred to in paragraph 27 must be a fair one.

149.4. In breach of paragraph 5 of the Code, the Respondent did not carry out all necessary investigations before reaching the conclusion that the Claimant was guilty of gross misconduct, which was in part the product of sub-paragraph 2 above. Mr. Wilson's evidence was that there was a totting up of various serious misconduct amounting to gross misconduct, but, for example, in respect of one such matter, 5 January 2018, no investigation was carried out at all to determine whether the Claimant had been at work on that day; and he did not investigate what level of sanction had been imposed in comparable cases.

150. The Tribunal found that the Respondent had unreasonably failed to comply with the ACAS Code. The Respondent did not lead evidence that might suggest that any of the failures were not unreasonable or which might excuse or mitigate them. The Tribunal found that the Respondent was a government department and that Border Force management had HR or other resources available to it which could have been used to ensure that the Code was consulted and applied.

The Law

Direct Discrimination

151. Section 13 Equality Act 2010 ("EQA") provides:

> "A person (A) treats another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

152. The required comparison must be by reference to circumstances. Section 23(1) EQA provides:
"On a comparison of cases for the purposes of section 13,14 or 19 there must be no material difference between the circumstances relating to each case."

153. In terms of how a comparator should be constructed, the Tribunal directed itself in accordance with Shamoon v Chief Constable of the RUC [2003] UKHL 11, ICR 337 and Balamoody v UK Central Council for Nursing [2002] IRLR 288 CA, at 53-54, from which the following principles can be distilled:

(1) Where there is no evidence as to the treatment of an actual comparator whose position is wholly akin to the Claimant's, a Tribunal has to construct a picture of how a hypothetical comparator would have been treated in comparable surrounding circumstances. Inferences will frequently need to be drawn.

(2) One permissible way of judging a question such as that is to see how un-identical but not wholly dissimilar cases were treated in relation to other individual cases. It is not required that a minutely exact actual comparator has to be found for this use as an "evidential comparator".

154. Whether the comparison is sufficiently similar will be a question of fact and degree for the tribunal, see Hewage v Grampian Heath Board [2012] ICR 1054.

155. In recent years the higher courts have emphasised that in cases where there is no actual comparator, or where there is a dispute about whether a comparator is an appropriate comparator, tribunals should focus on why the claimant was treated in the way that he or she was treated. Was it because of a protected characteristic?

156. In Shamoon v Chief Constable of RUC [2003] ICR 337, Lord Nicholls explained that "the less favourable treatment question" and "the reason why question" are "intertwined" and "essentially a single question": see para 8. At paragraphs 9-11, Lord Nicholls gave guidance as to how an employment tribunal may approach a complaint of direct discrimination and explained that it was sometimes unnecessary to identify a comparator:

> "…*employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding*

> *whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others*."

157. Elias J (President) in Islington London Borough Council v Ladele (Liberty intervening) [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential - see at paragraphs 35–37.

158. Mummery LJ in Aylott v Stockton on Tees BC [2010] IRLR 94 (at paragraph 41) held: " *There is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others?"*.

Causation in direct discrimination cases

159. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason: see the observations of Lord Nicholls in Nagarajan v London Regional Transport [1999] ICR 877 as explained by Peter Gibson LJ in Igen v Wong [2005] ICR 931*,* paragraph 37.

Burden of proof in discrimination cases

160. The Tribunal reminded itself of the reversal of the burden of proof provisions within section 136(2) EA 2010, as explained in Igen v Wong [2005] EWCA Civ 142, Madarassy v Nomura [2007] ICR 867, and Efobi v Royal Mail Group [2019] ICR 750.

161. In Efobi, at paragraph 10, Elias LJ explained the correct approach to the burden of proof for a discrimination complaint:

> "The authorities demonstrate that there is a two-stage process. First, the burden is on the employee to establish facts from which a tribunal could conclude on the balance of probabilities, absent any explanation, that the alleged discrimination had occurred. At that stage the tribunal must leave out of account the employer's explanation for the treatment. If that burden is discharged, the onus shifts to the employer to give an explanation for the alleged discriminatory treatment and to satisfy the tribunal that it was not tainted by a relevant proscribed characteristic. If he does not discharge that burden, the tribunal must find the case proved."

162. The burden of proof is not shifted simply by showing that the claimant has suffered a difference in treatment or detrimental treatment and that he has a protected characteristic or has done a protected act: Madarassy at paras 56-58 (followed in Efobi). There must be something more from which a tribunal "could conclude" that on the balance of probabilities the respondent had committed an unlawful act of discrimination.

163. The "something more" referred to in Madarassy need not be a great deal. In some instances, it will be provided by an evasive or untruthful answer to a statutory questionnaire: see Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279 at paragraph 19, per Sedley LJ.

164. In Igen v Wong, at paragraph (11) of the Appendix, it is pointed out that, if the burden of proof shifts, it is necessary for an employer to prove that the treatment was in no sense whatsoever on the grounds of the protected characteristic, because "no discrimination whatsoever" is compatible with the Burden of Proof Directive. The guidance in Igen v Wong was approved by the Supreme Court in Hewage v Grampian Health Board.

165. Conduct on the part of the employer that is merely bad or unreasonable is not, in itself, sufficient to support an inference of discrimination. The tribunal will in all cases have to be satisfied that the unequal or unfair treatment was caused by race discrimination, and not by some other factor—such as the incompetence or (non-discriminatory) policies of the employer.

166. The crucial decision as to whether the adverse treatment was a sign of race discrimination or general unreasonableness will have to be made against the primary facts established. In Sinclair Roche & Temperley v Heard [2004] IRLR 763 in which Burton P observed as follows:

> "The tribunal must set out the relevant facts, draw its inferences if appropriate and then conclude that there is a prima facie case of unfavourable treatment by reference to those facts (identifying it), and then look to the respondent for an explanation to rebut the prima facie case. The employment tribunal must plainly make quite clear what the unfavourable treatment is which is prima facie discriminatory, so that the respondent can understand what it is that it has to explain. It then explains, if it can. Such explanations, if any, must be fully considered and:
>
> (i) It may be, either obviously or after analysis, that there is no explanation.
>
> (ii) There may be an explanation which only confirms the existence of discrimination.
>
> (iii) There may be a non-discriminatory explanation which redounds to its discredit—eg it always behaves this badly to everyone.
>
> (iv) There may be a non-discriminatory explanation which is wholly admirable.
>
> But the employment tribunal must address the respondent's response."

167. It is important not to make too much of the role of the burden of proof provisions at section 136. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other: Hewage v Grampian Health Board [2013] UKSC 37.

Unfair Dismissal

168. In determining whether a dismissal was unfair, it is for the employer to show that the reason for the dismissal is a potentially fair reason within s.98 Employment Rights Act 1996. A potentially fair reason is one which relates to conduct: s.98(2)(b) ERA.

169. Where there are multiple reasons for dismissal, the question is whether the employer has proved that the fair reason was the principal reason for dismissal. Whenever there is misconduct that could justify dismissal, a Tribunal is not bound to find that this was the real reason for dismissal: ASLEF v Brady [2006] IRLR 576.

Reasonableness: s.98(4) Employment Rights Act 1996

170. The Tribunal directed itself to section 98(4) ERA which provides:

> "*4. Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer)*
>
> *(a) depends on whether in the circumstances including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

171. The burden of proof on the issue of fairness is neutral.

172. In conduct cases, in considering the fairness of a dismissal, the classic questions for a Tribunal to consider are:

172.1. Did the employer have an honest belief that the employee was guilty of misconduct?

172.2. Was that belief based on reasonable grounds?

172.3. Was that belief formed on those grounds after such investigation as was reasonable in the circumstances?

(See *BHS v Burchell* [1980] ICR 303)

173. The principles which the Tribunal must apply when considering section 98(4) are as follows:

173.1. The Employment Tribunal must not substitute its own view for that of the employer as to what was the right course to adopt for that employer.

173.2. On the issue of liability of the unfair dismissal the Tribunal must confine itself to the facts found by the employer at the time of the dismissal.

173.3. The employer should ask: did the employer's action fall within the band of reasonable responses open to an employer in those circumstances?

(See *Foley v Post Office and HSBC Bank plc v Madden* [2000] IRLR 3.)

174. The range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision is reached including the investigation: see

Sainsbury plc v Hitt [2003] ICR 111. The Tribunal directed itself to the following passage in Hitt, with emphasis added:

> "*The investigation carried out by Sainsburys was not for the purposes of determining, as one would in a court of law, whether Mr Hitt was guilty or not guilty of the theft of the razor blades. The purpose of the investigation was to establish whether there were reasonable grounds for the belief that they had formed, from the circumstances in which the razor blades were found in his locker, that there had been misconduct on his part, to which a reasonable response was a decision to dismiss him*…."

175. Reading Hitt and Foley together, it is clear that the Tribunal must not substitute its own standards of what was an adequate investigation for the standard that could be objectively expected of a reasonable employer, in this case, the Home Office.

176. The Tribunal directed itself that whether a procedural defect is sufficient to undermine the fairness of the dismissal as a whole is a question for the Tribunal. Not every procedural error will do so; the fairness of the whole process should be looked at. In South Maudsley NHS Foundation Trust v Balogan UKEAT 0212/14*,* the EAT held at paragraph 9:

> *"As this Tribunal has said countless times, the crucial thing is the statutory test in section 98(4) namely whether in all the circumstances the employer acted reasonably in treating its reasons for dismissing the employer sufficient. A procedural defect is a factor to be taken into account but the weight to be given to it depends on the circumstances and the mere fact that there has been a procedural defect should not lead to a decision that the dismissal was unfair. The fairness of the whole process needs to be looked at and any procedural issues considered together with the reason for the dismissal, as the two will impact on each other".*

177. It is particularly important that employers take seriously their responsibility to conduct a fair investigation where the employee's reputation or ability to work in his chosen field is likely to be affected by a finding of misconduct: see Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457. This case highlights that, where the purpose of the investigation is to establish whether there are reasonable grounds for the suspicion of gross misconduct in the form of a charge grave enough to effect a career or reputation in a chosen field, a more careful investigation is required which produces more cogent or weighty evidence.

Appeals

178. In Taylor v OCS Group Ltd [2006] IRLR 613, it was stated that ultimately a tribunal must look at the overall fairness of the procedure, and not just consider whether the appeal had taken the form of a rehearing rather than a review. The same principle is stated in many of the relevant authorities.

Submissions

179. Counsel had prepared written submissions, presented on the final morning of the hearing. The start was put back so that these could be read and considered. Each

Counsel then made oral submissions to expand upon their written submissions. Deliberations commenced on 4 November 2020.

180. The Tribunal subsequently met in chambers on 11 December 2020 to conclude its deliberations. We took into account each and every submission, even if each submission is not referred to below.

Conclusions

181. Applying the law set out above to the findings of fact made, the Tribunal reached the following conclusions on the issues for determination.

Issue 5: Direct race discrimination

182. The Tribunal reminded itself that the question posed by section 13 EQA is essentially a single question, as explained in the cases cited at paragraphs 157 – 159.

183. Therefore, the relevant question in this case is: was the Claimant treated less favourably than a comparator because of his race? Put another way, was the Claimant's race one reason for his dismissal?

184. The treatment complained of is dismissal. The relevant treatment is not suspension, nor being subject to disciplinary action.

Less favourable treatment

185. Counsel for the Respondent argued, in essence, that W was not a statutory comparator. Counsel argued that the Claimant's case included misconduct more serious than that committed by W.

186. We have explained in our findings of fact that there was no evidence that photographs of genitalia were sent by W.

187. However, the Tribunal also explained why we have rejected several of the submissions at paragraph 59 of the Respondent's Skeleton Argument. In particular, it was incorrect to suggest that W had been friends with the complainant or engaged in mutual "flirtation"; and it was inaccurate to suggest that the communication between W and the complainant was any more consensual than that between the Claimant and G. The submissions refer to a "finding" at 7.2.5; and this selective attention to a sentence taken out of context is unhelpful. It is apparent from the rest of the report that the complainant's evidence was that she had only given W her number out of politeness to discuss work-related matters, and they had exchanged text messages outside of work but there was no problem between April and September 2017; and both confirmed that they did not socialise out of work. There is no evidence that the complainant had been part of, or encouraged, any "flirtation" (which is a word not found in the report at all, and which was not used by W): see, for example, 7.2.1 (p.356) More significantly, the report states that W's last message ("*Just makes it harder that I clearly want you*") could be viewed as being sent in pursuit of a sexual relationship.

188. The Respondent argued that the Claimant denied that he was friends with G, and that he was not open and co-operative with the investigation, was evasive and gave

answers which lacked credibility, when compared to W. However, the investigation report indicates that W was not credible, as a witness. For example, W alleged that if the complainant had produced more message threads, their relationship would be seen in a different light (ie. the complainant had tried to make it look worse than it was); but the investigation report explained that there was no evidence to support W's actions or version of events (see 7.3.6), it stated that the last message tended to contradict W's evidence, and the author could not explain what W perceived as "humour" or "jovial" conversations.

189. The Claimant's submissions included that there was a lot of evidence to suggest that W was guilty of unwanted conduct of a sexual nature, which was more serious harassment that the Claimant had been found to have committed.

190. The Tribunal decided that, on the facts, W was not a statutory comparator. The two cases involved different facts. In the case of the Claimant, the harassment alleged consisted of unwanted attention, of being singled out, including physical contact, in the workplace. In the case of W, the harassment consisted of unwanted attention by WhatsApp messages, some with sexual innuendo and the last message at least leading to an inference that it was sent in pursuit of a sexual relationship.

191. The Tribunal directed itself that a hypothetical comparator would be a white British HO in the same circumstances as the Claimant in all material respects. A hypothetical comparator would have been found to have committed the same unwanted conduct, to the same complainant and with the finding that all the unwanted conduct was committed as that found by Mr. Wilson to have been committed by the Claimant, and would have the same mitigation including the same disciplinary record as the Claimant, with no live warnings.

192. However, the Tribunal found that W was an evidential comparator because:

192.1. The cases both involved several allegations of inappropriate behaviour to a female member of staff which were found to be substantiated. The complainants felt bullied and harassed.

192.2. Both the Claimant and W were more senior than the complainants. In W's case, W was her line manager and the complainant had only joined Border Force in April 2017. In the Claimant's case, G was on probation, but in a different team.

192.3. There was no relationship as friends between W and the complainant, nor between the Claimant and G.

192.4. The accounts of both the Claimant and W were rejected in key areas.

193. The Tribunal decided that, in all the circumstances, the evidence provided by the evidential comparator provided some evidence as to how a hypothetical comparator would have been treated.

194. The Tribunal concluded that a hypothetical comparator would have been likely to have received, at most, a final written warning as W had done. In particular:

194.1. The misconduct of W had been found to be serious misconduct, not gross misconduct. Although the unwanted conduct by W did not include any physical contact, there were two matters of fact that tended to show that W's conduct was more serious than that of the Claimant. First, W was her line manager which Mr. Wilson accepted was an aggravating factor. The negative effect of this line management relationship is apparent in the investigation report at 6.2.8 and 6.2.6: the complainant did not think that she could tell him directly to stop sending messages and she wanted to maintain a normal working relationship with him. Second, W's conduct contained innuendo and suggestion that he was pursuing a sexual relationship, which, coming from a line manager, indicated that it was more serious than the Claimant's case.

194.2. The unwanted acts by the Claimant were, viewed objectively alongside the decision in the case of W and the Respondent's own policy and pleading, not so serious as to amount to gross misconduct. The discipline policy showed that serious harassment or bullying amounted to gross misconduct, leading to an inference that less serious harassment did not amount to gross misconduct. Moreover, at paragraph 8 of the Grounds of Resistance (p.25), it states that sexual harassment could amount to serious misconduct or gross misconduct, leading to the inference that lesser harassment would amount to misconduct which was less serious.

194.3. Furthermore, Mr. Wilson's conclusion that he could no longer trust the Claimant, based on the Claimant's submissions at the disciplinary hearing, was not reached with an open mind, because he had decided that the Claimant should be dismissed for gross misconduct at or about the conclusion of the grievance hearing. We repeat the relevant paragraphs above. Had Mr. Wilson viewed the facts objectively, and reasonably, we found that he would not have concluded that there had been the breach of trust referred to in the decision letter.

194.4. The mitigation of a hypothetical comparator, such as his lack of previous disciplinary sanctions, would have been considered before reaching a decision on sanction. This is the inference from the disciplinary policy at section 21 (p56T).

195. The Tribunal concluded that the Claimant had been subject to less favourable treatment by being dismissed.

The "reason why" question

196. In any event, the Tribunal decided that it should focus on why the Claimant was treated in the way that he was treated. The Respondent's case was that he was dismissed because of his conduct: see paragraph 33 Respondent's submissions.

197. It is unusual to find direct factual evidence of race discrimination. In this case, the Tribunal were unable to make direct findings of primary fact that a reason for the dismissal of the Claimant was because of his race.

198. Usually, whether a claimant can satisfy stage 1 of the exercise required by section 136(1) EQA will depend wholly or in part on the drawing of inferences from the primary facts.

199. In this case, the Tribunal found that it could properly conclude from all the evidence before it that, on the balance of probabilities, Mr. Wilson had dismissed the Claimant because of his race. Applying section 136 EQA, we concluded that the burden of proof shifted to the Respondent. Our reasons are as follows.

200. The Claimant was subjected to the detriment of dismissal.

201. On balance, there was some evidence from W's case that the Claimant was treated less favourably than a hypothetical white British comparator would have been. W received a final written warning for 18 months.

202. However, a difference in treatment and a difference of race is insufficient to shift the burden of proof. There is something more required to shift the burden of proof.

203. In this case, the Tribunal concluded that, when considering the decision of Mr. Wilson, there were several factual matters which amounted to "something more" and led to a shift in the burden of proof. In particular:

203.1. Mr. Wilson failed to follow the disciplinary procedure in various respects as set out in the facts above. In particular, Mr. Wilson pre-determined that the Claimant was guilty of sexual harassment, which was gross misconduct, and that he would be dismissed, having heard only from G at the grievance hearing. This is evidenced by the conversation with Mrs. Idrees on 14 May 2018 and the notes of the grievance hearing and the Grievance Notification Form referred to above. This was despite that, by the date of the grievance hearing: Mr. Wilson had not established the facts about the precise nature or frequency of the unwanted conduct nor the context in which it occurred (because he had not heard from the Claimant); he had not received advice on the issue of consistency of sanction from HR (which he failed to receive at any point); and that he had not carried out adequate investigation into the matters that the Claimant had stated to the grievance investigator. There was no evidence that he had treated X or any other employee in this way by failing to follow the Discipline Policy.

203.2. Mr. Wilson did not direct that an adequate discipline investigation should take place. The instruction to Mr. Perry, and the discipline investigation report compiled, was in stark contrast to the investigation and report conducted in the case of W, which also considered the mitigation of W.

203.3. Mr. Wilson did not approach the disciplinary procedure and hearing in an objective way by complying with the disciplinary procedure, nor by assessing all the evidence, nor by finding the facts and grading the severity of any misconduct proved or admitted. His approach was subjective and emotive, evidenced by his comment to Mrs. Idrees that he would have been livid if it was his daughter involved. Such an approach

was likely to permit unconscious bias to play a part in the decision-making process.

203.4. Key parts of Mr. Wilson's oral evidence were unreliable. His evidence was unreliable on the issue of when he had reached the decision that the Claimant was guilty of gross misconduct and would be dismissed: see findings of fact above, including paragraph 68.

204. Furthermore, the Tribunal decided that, looking at the whole decision-making or dismissal process, there were additional factual matters in the appeal process which amounted to "something more". The appeal officer all but ignored the ground of appeal that the Claimant had been subject to inconsistent treatment because of race. The Tribunal found that this dismissive approach to such an argument was surprising for several reasons:

204.1. Data about consistency of sanction and about the race or ethnicity of employees who were disciplined was available to the appeal manager from HR Business Partners. Monitoring statistics of this nature, although far from conclusive, might indicate that the decision could have been tainted by unconscious discrimination.

205. Mr. Kennedy had not addressed the ground of appeal about the issue of consistency of sanction at all, in order to see if the sanction in the Claimant's case was disproportionate, when compared to other sanctions awarded in comparable cases. It was irrational to dismiss the ground of appeal based on race discrimination as of no significance, as Mr. Kennedy had done (as explained at paragraph 125 above), without even considering whether, on the face of the evidence from similar cases, the Claimant was treated less favourably than others. The ground of inconsistency of sanction could only be raised at the appeal stage.

206. At the second stage of the exercise of applying section 136 EQA, it is for the Respondent to prove that Mr. Wilson did not dismiss the Claimant because of race discrimination.

207. The Tribunal directed itself that it must assess not merely whether the Respondent has proved an explanation for the facts from which such inferences can be drawn, but also that the explanation is adequate to discharge the burden of proof on the balance of probabilities that race was not a ground for the treatment in question. The facts necessary to prove an explanation would normally be in the possession of the Respondent, so a tribunal would normally expect cogent evidence to discharge that burden of proof.

208. The Tribunal concluded that the Respondent had failed to provide an adequate or cogent explanation for the less favourable treatment (by dismissal) of the Claimant. Our reasons are as follows.

209. In the Respondent's Skeleton Argument, two arguments were advanced in support of an explanation for the treatment, based on the cases of W and X.

210. In respect of X, a white HO, the Respondent argued that Mr. Wilson had dismissed in the only other case where he had been decision-maker, and this showed that the explanation for any difference in treatment compared to the case of W was:

(a) his personal view of and sensitivity to harassment; and

(b) the trust and confidence aspect, arising from W's admission, apology and contrition.

211. The Tribunal did not accept this argument. The Respondent had not led any evidence (let alone cogent evidence) that the explanation for the treatment of the Claimant and X was Mr. Wilson's "*personal view and sensitivity to harassment*" (to quote from the Respondent's submissions). As we have noted in our reasoning above, there was evidence that he reacted to the allegations made by G in an emotive way, and did not objectively consider the totality of the relevant evidence in the Claimant's case; but this evidence is not evidence that Mr. Wilson held a general personal view or sensitivity applicable in any case of harassment.

212. In addition, the investigation report prepared in the case of W, and the decision letter in that case, did not place any weight on any admission by W. The Tribunal decided that this was because W could not deny the messages were sent by him, because they were numerous and came from his phone.

213. Furthermore, the investigation report demonstrates that W claimed that the messages were jovial and friendly banter, and that he claimed the complainant had not disclosed all messages, so as to cast him in a bad light. The investigator rejected his evidence: see, for example, 7.3.6 (p357).

214. Moreover, X was not a comparator who was the same in all material respects as the Claimant. The misconduct proved against X was more severe than the misconduct that Mr. Wilson considered proved or admitted in the Claimant's case.

215. The Respondent also relied on the case of W. In essence, the explanation for the dismissal of the Claimant was that the Claimant had committed more serious harassment than W.

216. For the reasons we have set out above at paragraph 194.1, the Tribunal concluded that W was found to have committed more serious misconduct than the Claimant.

<u>Unfair dismissal</u>

<u>Issue 1: Reason for dismissal</u>

217. The Tribunal concluded that the Respondent had failed to prove that the reason or principal reason for dismissal was the potentially fair reason of conduct. (The Respondent did not rely in submissions on some other substantial reason to justify dismissal and did not attempt to define such a reason).

218. There were mixed reasons for the decision to dismiss. One reason related to the conduct of the Claimant.

219. However, the Tribunal concluded that the principal reason for the dismissal – rather than a different sanction such as a final written warning - was the unconscious race discrimination of Mr. Wilson. Mr. Wilson would not have decided to dismiss the Claimant but for this reason. At paragraph 194 above, we explain why the decision to dismiss was less favourable treatment and that a hypothetical comparator would not have been dismissed.

220. In any event, if we are found to be wrong about this, and the Respondent is held to have shown that the principal reason for dismissal was conduct, the Tribunal has found that the dismissal was unfair for the following reasons.

Issue 2: Fairness

221. Applying the test of fairness within section 98(4) ERA to the circumstances of this case, the decision to dismiss was both procedurally and substantively unfair.

Procedural unfairness

222. In summary, the procedure adopted by this Respondent, a government department, was outside the band of reasonableness in the circumstances of this case for the following reasons:

222.1. Although Mr. Wilson had a belief that the Claimant was guilty of gross misconduct at the point of dismissal, he had formed this belief on or about 11 May 2018, before the start of the disciplinary process. As at 11 May 2018, he also formed the view that the Claimant should be dismissed. Accordingly, he had pre-determined the outcome of the disciplinary hearing and decided upon sanction.

222.2. Mr. Wilson approached the whole of the disciplinary process with a closed mind.

222.3. The investigation was outside the band of reasonableness. The Respondent failed to carry out as much investigation as was reasonable in the circumstances, where gross misconduct was suspected and the Claimant's career with Border Force was at stake. The Tribunal repeats the findings of fact at paragraphs 79-81.

222.4. The investigation carried out by the Respondent, such as it was, did not search for any exculpatory evidence despite the fact that Mr. Wilson believed that the Claimant was guilty of gross misconduct. This was particularly unfair because, as stated in paragraph 8 of the Grounds of Resistance (p25), there would be a difference in sanction if the finding was that the Respondent was guilty of harassment, rather than sexual harassment, because the latter would constitute serious or gross misconduct.

222.5. As a result of his closed mind, and the inadequate investigation, Mr. Wilson did not have reasonable grounds for the belief that the Claimant was guilty of gross misconduct.

222.6. The Claimant was not given fair notice of the actual disciplinary charges against him. The Respondent never set out a list of charges which he could respond to by challenging or admitting defined factual allegations.

222.7. Mr. Wilson failed to consider any sanction other than dismissal.

222.8. Mr. Wilson failed to consider sanctions applied in similar, albeit non-identical, cases.

222.9. The appeal was not a reasonable (or proper) appeal. We repeat paragraphs 115-135 above. Given our findings of fact at paragraph 135 above, the appeal would have succeeded had it been conducted in a reasonable way.

222.10. The Respondent failed to comply with the ACAS Code: see paragraphs 149-150 above.

Whether dismissal was within the range of reasonable responses

223. The decision to dismiss the Claimant was outside the band of reasonable responses open to this employer in the circumstances of this case. In summary, our reasons are as follows:

223.1. The Tribunal concluded that Mr. Wilson's belief was tainted by unconscious race discrimination. In those circumstances, the dismissal was substantively unfair, because race discrimination is unlawful.

223.2. The decision letter states that the Claimant was guilty of harassment, not sexual harassment. From paragraph 8 of the Grounds of Resistance, the inference is that such misconduct would not justify dismissal. This inference also arises from the definition of gross misconduct in the discipline policy (p56h) which indicated that only proven cases of serious bullying or harassment would amount to gross misconduct.

223.3. The Tribunal has directed itself that it must not fall into error by substituting its own decision for that of the employer. In this case, the conclusion that the Claimant could no longer be trusted by management was one that was outside the range of reasonable responses open to this employer in the particular circumstances in this case. This conclusion was reached after a hearing that Mr. Wilson had approached with a closed mind. Had he taken into account the relevant factual matters at paragraph 106, no reasonable employer would have found the Claimant guilty of such breach of trust.

223.4. The Respondent failed to carry out a fair or reasonable appeal process. Given the size and resources of this employer, the Respondent should have properly considered the grounds of appeal.

223.5. In all the circumstances, the sanction of dismissal was too severe, even if Mr. Wilson had reasonable grounds, after a reasonable investigation, that the Claimant was guilty of all the unwanted conduct complained of.

Issue 3: Whether there should be any Polkey deduction

224. The Polkey question is in one aspect of the issues raised by section 123(1) ERA, which requires the Tribunal to consider what amount of compensatory award is just and equitable in all the circumstances.

225. However, given our conclusion that the dismissal was an act of direct race discrimination, the Tribunal considered that it was fairer to the parties to leave this issue to be determined at the remedies hearing, if required. In the leading authority on pecuniary loss in discrimination cases, Chagger v Abbey National and Hopkins [2010] IRLR 47, the Court confirmed that the general rule in assessing compensation for the statutory tort of discrimination is that damages are to place the claimant into the position he or she would have been in if the wrong had not been sustained, ie the discrimination had not occurred: see paragraphs 56-60.

Issue 4: Whether any deduction should be made for contributory fault

226. Given our conclusion that the dismissal was an act of direct race discrimination, and that this was the principal reason for dismissal, the Tribunal concluded that there should be no deduction to the compensatory award under section 123(6) ERA for contributory fault.

Whether there was unreasonable failure to comply with the ACAS Code

227. The Respondent unreasonably failed to comply with the ACAS Code. We have set out our reasons at paragraphs 149-150. The question of what uplift should be applied to the award shall be determined at the remedies hearing.

Summary

228. The complaints of direct race discrimination and unfair dismissal are upheld. The remedies hearing provisionally listed for 22 February 2021 is confirmed.

Employment Judge A Ross
Date: 11 January 2021