EMPLOYMENT TRIBUNALS

Claimant: Mr P Rothwell

Respondent: Commissioners for HM Revenue and Customs

HELD AT: Manchester **ON:** 6-10 January 2020 and 21 January 2020 (in chambers)

BEFORE: Employment Judge Slater
Mr A G Barker
Mr P Stowe

REPRESENTATION:

Claimant: In person
Respondent: Mr S Lewis, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaints of disability discrimination and victimisation under the Equality Act 2010 are not well founded.

2. The complaint of unfair dismissal is not well founded.

3. The complaint of breach of contract in respect of failure to give notice is not well founded.

4. The remedy hearing provisionally arranged for 22 June 2020 is cancelled.

REASONS

Claims and issues

1. The claims and issues had been discussed at a preliminary hearing on 22 May 2019. The issues in relation to the complaints of disability discrimination, as they then stood, had been recorded in the notes from that hearing. Although the claimant had indicated on his claim form that he was bringing a complaint of breach of contract in relation to notice pay, this did not appear to have been discussed at the preliminary hearing and no issues in relation to that complaint had been recorded. Mr Lewis, having checked his notes from that hearing, did not object on behalf of the respondent to that complaint being added to the list of claims and issues. We also discussed, at the start of this hearing, some amendments to the issues which arose from the amended response, and Mr Lewis clarified the legitimate aim relied upon for the complaint of discrimination arising from disability. The hearing had been listed to deal with liability only, but the parties agreed that the tribunal should, at the same time as liability, consider the issues of principle relating to remedy for unfair dismissal which are recorded in the list below, if they became relevant.

2. Following the discussion, the judge typed an amended list of claims and issues which she gave to the parties on the second day of the hearing. The parties confirmed, after having had time to consider this, that the list correctly recorded the claims and issues to be considered by the tribunal.

3. The claims and issues which were agreed were to be considered were as follows:

Disability Discrimination

Disability

3.1. Was the claimant a disabled person at the relevant time by reason of a physical impairment of neck/back/shoulder/hip problems and/or a mental impairment of depression?

3.1.1. Did the claimant have such a physical and/or mental impairment?

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

3.1.3. Was the adverse effect substantial, in the sense of more than minor or trivial?

3.1.4. Was the adverse effect long term in that it had, at the relevant time, lasted at least 12 months or was likely to last at least 12 months or the rest of the claimant's life.

Discrimination arising from disability – section 15 Equality Act 2010

It is agreed the claimant was treated unfavourably by the respondent by being dismissed.

3.2. Was the dismissal because of something arising in consequence of disability?

3.2.1. The claimant asserts that the "something arising" in consequence of disability was that the claimant made it known to manager Gregor Alexander in or around June 2018 that he intended to raise a grievance arising out of his receipt of a written warning for his attendance connected to his disability.

3.2.2. Did the claimant make this known to Gregor Alexander in or around June 2018?

3.2.3. Did this arise in consequence of disability?

3.2.4. Was the dismissal because of this "something arising"?

3.3. Did the respondent have knowledge (actual or constructive) of the claimant's disability at the relevant time?

3.4. If yes to all the above, does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The legitimate aim relied upon is for the respondent to only employ staff in whom it has trust and confidence in general and/or specifically in managing their private tax/financial affairs properly.

Victimisation

3.5. Did the claimant do a protected act or did the respondent believe that the claimant had done or may do a protected act?

3.5.1. The claimant asserts that he did a protected act by making it known by speaking to Gregor Alexander in or around June 2018 that he intended to raise a grievance following a written warning about his attendance. The claimant asserts that he showed Mr Alexander a draft of his grievance and went though it with him and that the grievance identified the claimant considered there had been a breach of the disability discrimination legislation.

3.5.2. Did this happen as a matter of fact?

3.6. Did the claimant suffer detrimental treatment in respect of the following:

3.6.1. He was referred into the disciplinary process;

3.6.2. He was dismissed; and

3.6.3. His appeal was rejected?

3.7. Is there a causal connection between the protected act or belief that the claimant had done or may do a protected act and the detrimental treatment?

3.8. In relation to the complaint of victimisation about being referred into the disciplinary process, was this act part of a continuing course of discrimination such that the complaint was presented in time and, if not, is it just and equitable to consider the complaint out of time?

Failure to make reasonable adjustments – sections 20-21 Equality Act 2010

3.9. It is agreed that the respondent applied the following two provisions, criteria or practices ("PCPs").

3.9.1. That the respondent required the claimant to notify it of an increase of income which impacted on receipt of tax credits. (PCP1)

3.9.2. A requirement to work at the respondent's Manchester office. (PCP2)

3.10. Did the application of any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

3.10.1. The claimant says PCP 1 put him at a substantial disadvantage in relation to a relevant matter because his mental health meant that he could not focus on the issue due to problems with his concentration and memory and due to medication side effects of the drugs he was taking for his impairment.

3.10.2. The claimant says PCP2 put him at a substantial disadvantage in relation to a relevant matter because the development of his back/neck/shoulder condition meant a lengthy commute from his home in Liverpool was painful.

3.11. Did the respondent know or could reasonably be expected to know

3.11.1. that the claimant had a disability

3.11.2. and was likely to be placed at the disadvantage set out above?

3.12. If the duty to make reasonable adjustments arose, did the respondent take such steps as was reasonable to avoid the disadvantage?

3.12.1. The claimant says that the reasonable adjustment in relation to PCP1 was a longer period of time to make arrangements to repay the debt to the respondent. The respondent disagrees, saying that the claimant had plenty of time to make arrangements to repay the debt.

3.12.2. The claimant says that the reasonable adjustment in relation to PCP2 was a transfer to Liverpool office and/or home working. The

claimant says he made requests for these adjustments to Chris Boyes at Performance Management meetings between March 2016 and October 2018.

3.13. In relation to the complaint relating to PCP2, was the complaint presented in time and, if not, is it just and equitable to consider it out of time?

"Ordinary" unfair dismissal pursuant to the Employment Rights Act 1996

3.14. Can the respondent show the reason for dismissal? The respondent relies on conduct.

3.15. In considering whether dismissal was fair or unfair within the meaning of section 98(4),

3.15.1. Did the respondent have a genuine belief based on reasonable grounds following a reasonable investigation?

3.15.2. Was the dismissal procedurally fair?

3.15.3. Was dismissal within the band of reasonable responses of a reasonable employer?

3.16. If the dismissal was unfair, in a case where such an assessment may be made, what are the chances the claimant would have been fairly dismissed, had a fair procedure been followed? ("Polkey" type reduction of compensatory award).

3.17. If the dismissal was unfair, should the basic and/or compensatory award be reduced because of any culpable and blameworthy conduct on the part of the claimant?

Breach of contract (notice pay)

3.18. Was the claimant guilty of gross misconduct, permitting the respondent to terminate his employment without notice? If not, the respondent was in breach of contract by dismissing the claimant without notice.

The Evidence

4. The claimant had not prepared a witness statement; he said he had not understood the case management order. By agreement with the parties, the tribunal decided to consider the contents of the claimant's claim form and the witness statement he had prepared in relation to the issue of disability ("the impact statement") as his witness statement.

5. The tribunal heard evidence from the claimant and, for the respondent, from the following:

Christine Boyes, Employer Duties Team Leader of the Manchester Business Unit for Wealthy and Mid-Sized Business Compliance, and the claimant's manager at the relevant time;

Gregor Alexander, Grade 7 Manchester Business Unit Head for Mid-sized Business, and the claimant's second line manager;

Nicholas Doyle, site lead in Public Departments Collection;

Louise Hadfield, the dismissing officer and, at the start of her involvement, a grade 7 Corporate Tax Inspector in Mid-Sized Business based in Liverpool and, from September 2018, the Business Unit Head for Mid-sized Business in Liverpool; and

Michael Hughes, the appeal manager and a Grade 6 in Risk and Corporate Services.

Facts

6. We start by making findings of fact relevant to all claims. We then deal with findings of fact specifically relevant to disability. We go on to make further findings of fact relevant only to the breach of contract claim after reaching our conclusions on the other claims, to ensure that we adopt the correct approach, in particular, to the unfair dismissal claim before we address the breach of contract claim.

7. The claimant began employment with the respondent as an Assistant Officer on 25 March 2013. He had previously worked part-time in a supermarket.

8. In July 2013, he made an application for working tax credits (WTC) which was approved within a few days. It is common ground that the claimant filled in the application form correctly, using the previous year's income, as the form required. His previous year's income was around £3000. His salary at the time he made the application was £19,320 per annum. However, the application form did not ask for his current salary or for an estimate of his income for the tax year 2013/2014. The respondent does not contend that the claimant did anything wrong in his initial application.

9. As an employee of HMRC, the claimant could not make an online application in the same way as members of the public. He was required to telephone a special unit which dealt with HMRC employees and get a paper form which he completed. The claimant was consistent, through the internal proceedings and this tribunal hearing, in saying that he thought, since he had to make the application to a special unit, that they would have the information about his current salary. It is not necessary, for the claims of disability discrimination and unfair dismissal, to make any finding as to whether this was the claimant's genuine belief at the time.

10. The claimant does not dispute that he received notice of the award, although he says he does not remember this. We find that a letter was sent with the notice of award. Unfortunately, we do not have a copy of the letter so do not know the wording of the letter. However, the respondent has produced a screenshot showing the data inserted into the letter. It appears from this that the letter said something to the claimant about letting the tax credits office (TCO) know if his income went above £11,420.

11. Information which accompanied the tax credits award notice included the instruction:

> "Tell us straight away if your current income changes so that we can make sure you are paid the right amount of tax credits-see page 2."

12. Page 2 included lists under the headings "changes you must tell us about" and "other changes to tell us about". An increase in income was not included in the changes an applicant was required to tell the TCO about. Under the heading "other changes to tell us about" the notes stated: "It is in your interest to tell us about any of the following changes within one month because they may increase the amount of tax credits you are due or you may be paid too much." One of the changes the applicant was informed they should tell the TCO about was: "Income goes up. This may not affect your current tax credits, but it will affect how much we should pay you for next year. If we pay too much because you delay telling us about any changes, you will be asked to pay back any tax credit overpaid."

13. The guidance available online at the time about WTC included a table setting out the money a person could get by way of WTC. This showed that, if they were a single person aged 25 or over working 30 hours or more a week, they would not receive any WTC if their income was £13,000 per annum or above.

14. The claimant has been consistent in the internal proceedings and in these tribunal proceedings in asserting that he was not aware, when he made the application, that he would not be eligible for WTC. He referred to adverts at the time which indicated that a couple earning up to £50,000 between them could be eligible for WTC. Since the claimant was earning less than half that, he says he thought he would be eligible for something. It is not necessary, for the claims of disability discrimination and unfair dismissal, to make any finding as to whether this was the claimant's genuine belief at the time.

15. The claimant signed contracts with the respondent on 26 March 2013 and 27 May 2014. Each contract contained at clause 10.1 the following:

> "You must comply with the Civil Service Code and HMRC's Code of Conduct. HMRC's conduct and discipline policy specifies HMRC's conduct rules and disciplinary procedures. Failure to comply may result in disciplinary action which can include suspension without pay, downgrading or dismissal."

16. HMRC's conduct rules include the following, in HR22009, under the heading "managing your private financial affairs":

> "You must:
> - manage your private financial activities properly
> - manage your private dealings with HMRC properly and on time, including:
>
> …..
>
> - Notifying the Department of any change in circumstances which affects your entitlement to claim any benefits or credits."

17. "HMRC conduct update 2 personal responsibility in HMRC" includes the following:

> "You are personally responsible for your own actions and for managing your own circumstances and affairs. It is therefore important to:
>
> ….
>
> - ensure that any benefit claims you make are a true reflection of your own personal circumstances and that you are receiving the **actual** amount you are **entitled** to."

18. In 2014, the claimant was promoted to Higher Officer. His income went up as a result to around £28,000. The claimant's tax credits stopped in May 2014, around the same time. The claimant says he thought there was a connection between the two events. The respondent suggests this was a coincidence. We have no evidence which would allow us to determine whether the claimant was right or wrong in his belief, if this was his belief at the time.

19. The claimant did not make a further application for tax credits as he was aware his income was too high. He understood that, if no further application was made, tax credits would stop. The evidence has been inconsistent as to whether the claimant completed some sort of finalisation form for the tax year 2013/2014. The claimant does not recall doing so. However, an email from someone in the internal governance liaison special management unit dated 25 June 2018 recorded that the claimant had declared an income of £19,320 in the summer of 2014. In the investigation interview on 13 July 2018, the claimant could not remember doing an end of year form but accepted that it apparently looked like he had done it correctly. In an email to Louise Hadfield on 12 September 2018, claimant referred to the email of 25 June 2018, noting that it confirmed he had notified his increased earnings in the summer of 2014. Notes of a telephone call between the claimant and a person dealing with the tax credit debt made by the claimant records the person as saying that the system uses the PAYE figure to recalculate at the year end.

20. Whether the information was supplied by the claimant or the claimant's pay information was obtained through the PAYE system, the TCO recalculated the claimant's award on the correct income, reducing WTC to nil so that everything he had been paid for the tax years 13/14 and 14/15 was an overpayment.

21. The claimant, when making the application for WTC, gave his address as being his parents' address. The claimant never notified the TCO of a change of address although he was not living with his parents throughout relevant times. The TCO sent correspondence to the claimant at his parents' address over a period of years. However, the claimant says he did not receive most of the correspondence about overpayments. His parents did not open the mail because, in the past, they had had an argument about his mother opening his mail. We will return to whether or not, as a matter of fact, we consider the claimant received more of the mail than he has admitted to receiving, when we deal with additional findings of fact necessary for the complaint of breach of contract.

22. It appears from the respondent records that a "TC610" was issued on 21 October 2014 for an amount of £1897.20 for the tax year ended 5 April 2014. We understand this to be a notice to the claimant that he had been overpaid tax credits in the tax year ending 5 April 2014 in the sum of £1897.20.

23. In around April 2015, Chris Boyes became the claimant's manager.

24. On 30 July 2015, the claimant was sent a letter about the overpayment of 1897.20. The claimant has never accepted that he received this letter. He does not accept receiving any letters relating to overpayments of WTC before one dated 30th of March 2017.

25. A TC610 was issued on 12 October 2015 for an amount of £417.81 for the tax year ended 5 April 2015.

26. In March 2017, a member of the Public Departments Collection team (PDC) tried to make contact with the claimant by telephone on his work number on several occasions about the overpayments of WTC. The PDC is a specialist unit that manages debt collection for HMRC employees and a limited number of other types of customer. The claimant accepts that he was aware of one attempt to call him, although he did not know who the person was, and says he tried to call back on a couple of occasions, but could not get through and attempted to email but the email bounced back and he then put the matter to the back of his mind. Notes taken by him and what he has said in internal proceedings and these tribunal proceedings have not been consistent in whether he picked up an answerphone message or simply saw a missed call from an internal number. We will return to this when we make our additional findings of fact relating to the breach of contract claim.

27. The PDC did not try to contact the claimant on the home or mobile phone numbers he had given on his application for WTC.

28. The claimant admits that he did very little and not enough to sort out the overpayment between receiving the letter of 30 March 2017 and February 2018.

29. The claimant never informed the debt collection side of HMRC about any health problems causing him difficulty in dealing with the tax credit matter.

30. On 16 May 2017, a referral was made by PDC to internal governance (IG) concerning the debt due. From screenshots of the respondent's debt recovery information, it is apparent that IG did not take any action in relation to the debt owed by the claimant for a considerable time due to working on cases involving higher amounts as a priority.

31. On 5 February 2018, IG contacted the claimant's manager, Chris Boyes by letter about the debt owed by the claimant. The letter identified potential misconduct on the part of the claimant and notified Chris Boyes of the overpayment of tax credits made to the claimant. The letter stated that failure to pay debts owed to HMRC was a breach of the Civil Service Code of Conduct and referred to HR 22009 which states staff must make personal tax payments to HMRC on time. Chris Boyes was informed that she should hold an informal discussion with the claimant and advise him that IG had made her aware of the issue due to the claimant's lack of action to resolve the debt. She was told to ask the claimant why he was in that position, instruct him to, as soon as possible, contact debt management to resolve it, give him time during work to do this and offer any support that she would be allowed to give as a manager. She was to advise the claimant that he would need to keep her updated on the progress up until resolution. The letter stated: "Failing to pay debts to HMRC is a misconduct matter and their behaviour in dealing with the issue will be taken into account when

you consider if formal disciplinary action should be taken." Under the heading "disciplinary action", the letter advised that, once the debt had been resolved, Chris Boyes would need to consider the actions/behaviours of the jobholder in dealing with the situation. Where the jobholder had failed to take appropriate action and owed money then formal action was to be considered. The letter advised that the level of misconduct this type of behaviour could be deemed as was as high as potential gross misconduct.

32. There was no suggestion that the claimant should be suspended and he was not. The claimant continued to work on his normal duties. The letter from IG did not suggest any potential misconduct in relation to the application which had been made for tax credits or that there was potential misconduct in relation to failing to meet any obligation to notify the tax credit office of changes in income. The suggested potential misconduct was in not paying the debt due to HMRC. Had the claimant made arrangements to pay the debt when he had been notified of this, we find that no disciplinary action would ever have been taken against the claimant in relation to anything he did, or failed to do, in relation to WTC prior to notification of the overpayments.

33. Chris Boyes held a meeting with the claimant on 13 February 2018. The claimant said he recalled receiving one of the letters referred to in the note from IG but could not remember which letter that was. He said he could not recall whether he took any direct action following receipt of the letter. He said he did not really take a lot of notice of mail received. He said he did pick up a message on his answerphone and, over a two-week period, tried to return the call but without success as a number just rang out. He tried to email the caseworker concerned but didn't seem able to. Chris Boyes told the claimant that he was to contact the caseworker today and, if he could not speak to her, he was to email her again and keep on trying to contact her until contact was established. If he struggled to make contact with her, then he was to contact her manager and establish contact with them. Chris Boyes reminded the claimant of the serious consequences of the matter and said that owing his employer money was in breach of the Civil Service Code. She said the priority was to get the issue of the debt resolved and they would revisit the disciplinary aspect at the end of the process. However, it was important that the claimant demonstrate how proactive he was about resolving the issue. He was to keep her updated on progress.

34. Over the next few months, Chris Boyes sent the claimant a number of reminders to take action. She also kept IG updated. On 26 February 2018, the claimant sent Chris Boyes an email in response to a request from her for a copy of an up-to-date note about his attempts to make contact with the tax credit people. The claimant wrote that he had telephoned the caseworker on 13 February 2018 and was advised that he could ring tax credits to see how the amount had been calculated. He was given another telephone number for an office in Preston. The note did not indicate that he had tried to call the office in Preston as at the time the note was written. The claimant recorded that he was advised to be proactive as he had not responded to previous messages and that he had said he had only received one voicemail and tried to ring back.

35. The claimant was on sick leave from 28th February to 4th of March 2018 with a problem with his arm and painkillers for this causing stomach upset.

36. According to the claimant's notes, he intended to try to see someone in person in Preston when he went to that office to work, but did not have time to do so. He spoke to someone at that office by telephone on 8 March 2018. He was informed that the overpayment had occurred because the previous year's figures were used. He asked why it did not use current-year estimate and was told that the system used the PAYE figure to recalculate at the year-end. He asked why the form does not ask for an estimate and was told that the onus was on him to update. He said that he worked in HMRC and rang a special team to apply and asked why it did not flag that you earned more and was told that his application was processed as any other. He was asked how he was meant to know to update in the year and told that the letter of award advised him to update if there was a change of situation.

37. The claimant was again absent on sick leave from 12 March to 2 April 2018 with an upset stomach connected with his upper arm problem. This period of sickness absence caused the claimant to hit the trigger point for action under the attendance management procedure.

38. During the claimant sickness absence, on 27 March 2018, Chris Boyes went to meet the claimant in Liverpool. The claimant said that he did not require an occupational health referral but might need reasonable adjustments to help him on his return to work. Chris Boyes informed the claimant that he had now exceeded departmental trigger points for absence.

39. The claimant returned to work on 3 April 2018. He said in the later investigation into the tax credit matters that, when he came back from sick leave, he was still quite groggy from the tablets.

40. Chris Boyes held a return to work meeting the claimant on 5 April 2018 which included a review of a DSE assessment completed by the claimant. The claimant said he was feeling much better now he was no longer taking the medication. Chris Boyes informed the claimant that he had reached the trigger points for absence and that she would set up a formal meeting. She also reminded the claimant that he needed to speak to the tax credit helpline to resolve that issue as soon as possible. The claimant said he did not need any reasonable adjustments.

41. By letter of 5 April 2018, the claimant was invited to an attendance management meeting since he had hit the trigger. That meeting took place on 24 April 2018. Chris Boyes had referred the claimant, in the invitation letter, to the attendance guidance. The claimant said in the meeting that he had not read this. The claimant said he was currently having one day a week working at home as he felt he was suffering from low concentration levels caused by the strong medication he was taking. Chris Boyes said she was happy to agree this as a reasonable adjustment in order to help him recover.

42. On 1 May 2018, Chris Boyes issued the claimant with a warning because of absence. The claimant appealed against that warning on the same day. He argued that the periods of sickness absence in the previous 12 months were all due to musculoskeletal causes and should be linked together. He wrote that his manager had a duty to consider whether his absence could be disability-related and that she should have considered adjusting the attendance management procedures by discounting potential disability related absences. The claimant referred, as a

detriment, to the fact that he was now barred from applying for any internal job role anywhere in the civil service and throughout the United Kingdom because of the warning.

43. On 3 May 2018, Chris Boyes sent the claimant a further chasing email about the tax credits. On 4 May 2018, the claimant arranged a time to pay plan (TPP) and informed Chris Boyes that this had been set up. Chris Boyes asked the claimant to give her a copy when he received it. Chris Boyes issued the claimant with a number of reminders before the claimant brought in a copy of the letter confirming he had set up the TPP on 4 June 2018.

44. In the meantime, on 14 May 2018, the claimant applied for a job without declaring the warning. His application was not allowed to proceed because of the warning.

45. The appeal hearing took place on 18 May 2018 and he was informed on 1 June 2018 that the appeal was dismissed. The outcome letter informed the claimant that the 2nd and 3rd absences were linked as one due to there being one intervening week when he had returned to work. Both of these absences were treated as an upper limb disorder rather than a musculoskeletal condition as his description at the time was pain in the upper arm. The appeal officer noted that much of the absence also appeared to have been due to the claimant's reaction to medication.

46. Once the claimant had provided Chris Boyes with a copy of the letter confirming the TPP had been set up, Chris Boyes emailed internal governance on 4 June 2018 seeking their guidance as to the appropriate level of misconduct. She wrote that her reading of HR 23007 paragraph 25 indicated gross misconduct but she wanted to be sure their understanding of the seriousness mirrored hers before going down that route. She wrote that she was not sure of the jobholder's intent in this regard but that was something the fact-finding process should cover but she described his willingness to deal with the issue as "somewhat disappointing". HR 23007 gives guidance on how to assess the level of misconduct. Paragraph 25 gives examples of offences which may be considered gross misconduct. IG replied, agreeing with Chris Boyes' view on the seriousness, as this was the level other cases had been investigated at, but advising that Chris Boyes contact HR for a definitive answer to the level of misconduct.

47. On 8 June 2018, Chris Boyes got advice from HR. Chris Boyes informed HR of the tax credit overpayment and that IG had had difficulty in contacting the claimant. She said the claimant could give no explanation why he had not responded. A repayment plan was now in place. HR agreed that gross misconduct was the most appropriate level and advised Chris Boyes to complete a discipline checklist.

48. We find that Chris Boyes was not aware, when she decided to initiate disciplinary proceedings, that the claimant intended to issue a grievance alleging disability discrimination. Her decision was taken before the meeting between the claimant and Greg Alexander on 22 June 2018 on which the claimant relies as the protected act. There is no evidence to suggest Chris Boyes was aware of the claimant's intention. The evidence is consistent in pointing towards Chris Boyes's decision being made because this was in accordance with the guidance she had received from internal governance and then from HR.

49. Chris Boyes spoke to Greg Alexander. He said they must find a decision maker and factfinder from out of the location. Subsequently, IG said they would carry out the investigation so Greg Alexander only needed to find a decision maker. The HR guidance on appointing a decision manager and an appeal manager would have allowed Greg Alexander to be the decision manager. However, he went further than the guidance required, in deciding that it would be best to have a decision maker from out of the area. Louise Hadfield, who was based in Liverpool, was appointed, having been asked by her line manager if she would be willing to be the decision maker. She did not know the claimant. The claimant has not satisfied us that there was any connection between Louise Hadfield and Greg Alexander and/or Chris Boyes which made her unsuitable to be the decision maker. The fact that she supplied her mobile telephone number to Greg Alexander so he could speak to her about the case does not suggest that there was any improper influence by Greg Alexander over the decision making by Louise Hadfield.

50. On 18 June 2018, Chris Boyes completed the discipline check list. The claimant has suggested that there was something improper in Chris Boyes being the person to complete this checklist. However, there is nothing in the instructions in the form which indicate to us that she was not a proper person to do this. We have not been referred to any other guidance which suggests that she was not the correct person to do this. In summary, she wrote:

> "I can confirm that after seeking specialist advice I am satisfied that the fact that Peter owes a debt to HMRC and didn't deal with this quickly which means that he is in breach of the Civil Service Code. Throughout he has not appreciated the seriousness of his position."

51. This indicates that, at this time, Chris Boyes was putting the case forward for disciplinary proceedings on the basis of the claimant's alleged failures in dealing with the debt quickly only and not also for any alleged failings in relation to notification of income to the tax credit office.

52. On 22 June 2018, there was a meeting between Greg Alexander and the claimant. The claimant relies on this as being the protected act and the reason for the referral for disciplinary action and the dismissal and appeal decisions. The claimant says that he told Greg Alexander he intended to raise a disability-related grievance and that he showed the draft grievance to Greg Alexander on his tablet. Greg Alexander denies this and says this was not discussed and he was not shown a draft grievance. The claimant has not satisfied us that he did raise this matter with Gregor Alexander. We consider that, had he done so, the claimant would have referred to this in his email following the meeting, sent on the same day. He did not do so. Also, the claimant has not disclosed the draft grievance which he says he showed to Greg Alexander. We prefer the evidence of Greg Alexander in finding that Greg Alexander was not told that the claimant intended to raise a grievance that he had been discriminated against because of disability.

53. The claimant has asserted that the investigator appointed, JC, was the wrong grade and that this affected the fairness of the process and outcome. We have not seen any documentary evidence of any guidance or instructions as to the proper grade for an investigator or as to the grade of JC.

54. On 25 June 2018, an employee in the B & C/IG liaison, special management unit, sent to JC a copy of the "household notes" relating to the claimant. A covering email included the statement that, when the claimant did his renewal for 13/14 in the summer of 2014, he declared an income of £19,320 so his award was recalculated on the correct income and reduced to nil and everything he had been paid was an overpayment. She wrote "this could have been avoided if he had given us an "in year estimate" for his 13/14 income, because he would have known he was going to earn a lot more than the previous year, but he chose not to do that." However, she did not state that there was any requirement on the claimant to notify them, within the tax year, that his income was going to be higher than his previous year's income.

55. By letter dated 5 July 2018, the claimant was invited to an investigation meeting. The allegation was set out as being that the claimant had failed to pay an outstanding tax credit liability. There was no mention of an allegation of a breach of any obligation relating to notification of income to the tax credit office.

56. The claimant attended an investigation meeting with JC, accompanied by his trade union representative, on 13 July 2018. The meeting was recorded and we have been provided with a transcript. The claimant suggested in evidence that he had supplied corrections to the transcript. However, we had no documentary evidence to support this and the claimant could not tell us in what respects, if any, the transcript in the bundle was incorrect. We find that the transcript is a correct reflection of the conversation.

57. This was a lengthy meeting, with the transcript going over 53 pages. We refer only to parts of the conversation which we consider may have particular significance. The claimant said he applied for tax credits because this was his first job over 30 hours. Previously, he had worked in a supermarket where he had worked less than 30 hours but everyone who worked 30 hours got tax credits. The claimant said he was aware of the Civil Service Code. He said he had filled out the form properly but the box does not have a box to say how much your earnings are going to be for the next year.

58. JC referred the claimant to various parts of the conduct rules, including that he must manage his financial activities properly, manage his private dealings with HMRC properly and on time and notify the Department of any changes in circumstances which affects his entitlement to claim any benefits or credits. The claimant said he thought his application went to a special team because he worked for HMRC. He said it was his first claim for tax credits and he did not claim the following year because he knew he earned too much; he had got promotion so was on around £28,000. The claimant said he thought, when he received the award, it was generous, compared with what colleagues at the supermarket had got, but he had been on the dole so he thought it might have related to entitlement that he did not get during that period.

59. The claimant said that, when he was filling out the claim, the criteria said salary of £50,000 for a couple, so he was going off the basis of half of that. He thought he would be entitled to something.

60. JC referred to the claimant giving his income on a finalisation notice. The claimant could not recall doing this. The claimant said the award stopped when he got his promotion so he thought that, since he was on more than £25,000, he was doing everything as he should.

61. The claimant agreed that it was his responsibility to inform TCO of any changes in his circumstances which could affect his claim but said he thought it should be on the form. He was asked if he ever considered that, because he had put an income of £3310 on his original claim but was going to earn a lot more than that, by the end of the year he might owe them some money. He said he did not.

62. JC said that the main reason they were there was the recovery of the outstanding liability. The claimant agreed that he had received a notice to pay. He said the mail had gone to his parents' address and explained that he had not been living there all the relevant time. He was asked if they gave him the letters. He said not really. The claimant said he had received one letter.

63. The claimant said he had a missed call on his work phone so he tried ringing. He said he probably wasn't proactive enough in ringing. He rang a few times and then, after a couple of weeks, forgot about it. He said it went to the back of his mind. He said he had had a bit of a bad breakup around the same period and then had been busy with work. He was commuting from Liverpool to Manchester, setting off at 7 and getting home at 7.

64. The claimant said he rarely opened letters. He said he was not aware that he should inform the tax credit office if his income changed. He said he naïvely assumed that, since his application was dealt by a special team, they would know his salary.

65. The claimant said that, after the meeting with Chris Boyes, he had spoken to someone and been given a number in Preston. He was to be in Preston the following day so he tried to arrange to talk to someone but it did not happen. Then he went off sick and was a bit of a mess. He said he was having psychosis due to the medication. He said he was off work for a month and after he came back he was still quite groggy. He was asked why it took him so long to give Chris Boyes the letter about the payment plan. He said he had forgotten the letter. He said that Chris Boyes had told him in February that it was potentially gross misconduct.

66. JC sent the investigation report to Louise Hadfield on 24 August 2018. Louise Hadfield sent the report to the claimant on 6 September 2018.

67. The report referred to guidance on conduct, including the obligations to manage private financial activities properly and make personal tax payments on time and to ensure that any benefits claims are a true reflection of their personal circumstances and that they are receiving the actual amount they are entitled to.

68. In the recommendation, JC wrote that she considered, on the balance of probabilities, that the claimant may not have received all of the letters or notices to pay because the mail went to his parents' house. However, during the interview, he recalled receiving the letter dated 30 March 2017 and, at least at that point, he became fully aware that the debt was due and payable. The report stated that the

claimant entered the correct figures on his application but JC wrote "however there was a lot of guidance for claimants advising that they must inform TCO if the income increased." We note that this does not accord with the guidance we have seen which is put in terms that claimants "should" inform the TCO of increases to avoid building up overpayments and that it was in their interests to do so rather than being a requirement. The recommendation referred to HMRC conduct guidance HR 22009 stating "you must manage your private financial activities properly" and "notify the Department of any change in circumstances which affect your entitlement to claim any benefits or credits." It also referred to the HMRC conduct update to**:** personal responsibility in HMRC, stating "ensure that any benefit claims you make are a true reflection of your own personal circumstances and that you are receiving the actual amount you are entitled to."

69. JC wrote:

> "Mr Rothwell knew when he made his application for tax credits that his income for the period end 2014 would exceed the income he had received in the previous period. He had just joined the department and knew that he was in receipt of a full-time salary when the income submitted on the claim was based on his previous year's part-time salary.
>
> "He completed the form correctly by putting his P60 details on the application however as an HMRC officer it was his responsibility to inform TCO of his actual income at the earliest opportunity for the period of his claim.
>
> "On the balance of probabilities Mr Rothwell failed to inform TCO of the increase in his income and therefore he had been receiving tax credits to which he had no entitlement."

70. JC recommended that the following allegations be considered:

> "On the balance of probabilities you failed to pay an outstanding tax credits debt for the period ending 5 April 2014 and 5 April 2015 in the sum of £2315.01 and you failed to inform the tax credits office (TCO) that your income for the period end 5 April 2015 was far greater than the income you have provided on your application for tax credits and therefore you continue to receive tax credits to which you had no entitlement.
>
> "I consider that you have seriously breached the HMRC's guidance and civil service code, which reflect poorly on you as an officer of HMRC".

71. By letter dated 11 September 2018, Louise Hadfield invited the claimant to a disciplinary hearing. The specific allegations were as proposed by the investigating officer, although it omitted the sentence about considering that the claimant had "seriously breached the HMRC's guidance and civil service code, which reflect poorly on you as an officer of HMRC". The letter stated:

> "The formal meeting will consider the allegation that you failed to pay an outstanding tax credits debt for the period ending 5 April 2014 and 5 April 2015 in the sum of £2315.01. You failed to inform the tax credit office (TCO) that your income for the period end 5 April 2015 was far greater than the

> income you have provided on your application for tax credits and therefore you continue to receive tax credits to which you had no entitlement."

The letter also stated:

> "I must make you aware that the allegations concerning failure to pay outstanding tax credits liabilities totalling £23151 represents gross misconduct offences."

72. The claimant was advised of his right to be accompanied by a trade union representative or work colleague. He was informed that the meeting could result in his dismissal without notice. The letter also contained the following:

> "The misconduct alleged against you appears to fall within the Cabinet office definition of internal fraud. The full definition is as follows:
>
> 1. Dishonest or fraudulent conduct, in the course of employment in the civil service, with a view to gain for the employee or another person;
>
> 2. For employees of HMRC, this includes dishonest or fraudulent conduct relating to tax, duties, contributions or payments administered by HMRC, even if not connected with employment.
>
> If as a result of the disciplinary process, I conclude that you are guilty of internal fraud and that dismissal is the appropriate sanction, your details will be sent to the Cabinet office for inclusion on their IFH database."

73. Louise Hadfield went on to explain that inclusion on the IFH databased would mean that the claimant would be banned from employment in the Civil Service during a five-year period from the date of dismissal.

74. Louise Hadfield informed us that the section related to internal fraud was inserted in the letter on advice from HR.

75. By an email dated 12 September 2018, the claimant asked Louise Hadfield for clarification about the allegations he was facing. In particular, he asked for clarification about the alleged misconduct which Louise Hadfield considered fell within the Cabinet Office definition of internal fraud. After taking advice from HR, Louise Hadfield replied on 2 October 2018, but did not address the substantive issues raised by the claimant; she encouraged him to attend the meeting scheduled for 4 October 2018 and to provide full details including mitigating factors at that time.

76. The claimant's trade union representative wrote to Louise Hadfield on 3 October 2018, asking again for clarification of the allegations. Louise Hadfield replied, without addressing the substance of the points, stating that the meeting would be the opportunity to provide further information.

77. The disciplinary hearing took place on 4 October 2018. Early on in the meeting, the claimant and his union representative again asked for clarification of the allegations. In particular, the claimant's trade union representative asked Louise Hadfield why the claimant was accused of fraud. He asserted that there was no

evidence to suggest fraud was being committed. Louise Hadfield then called a break in the proceedings. The meeting resumed without Louise Hadfield providing an explanation as to why the claimant was facing a charge of fraud. Louise Hadfield, in her evidence, suggested that she called a break in the meeting because the claimant's union representative was speaking in general terms about how tax credits were a wider issue in HMRC, rather than about specific issues related to the claimant. We were not persuaded by this explanation, which did not appear to us to accord with the notes of the meeting. Given that no explanation had been provided in correspondence prior to the meeting for the allegation of fraud being made, it appeared to us more likely that Louise Hadfield called a break in proceedings because she did not know how to respond to the questions about why the claimant was accused of fraud.

78. From the notes of the meeting, it was not clear to us whether Louise Hadfield was considering whether the claimant was in breach of obligations under the relevant legislation relating to tax credits as well as obligations under the Civil Service Code and HMRC conduct rules.

79. The claimant was asked questions and given an opportunity to explain how the overpayment had arisen and how and when he became aware of the overpayment and the steps he took to address this. The claimant suggested, at one stage, that his post had been going to his parents' house in Liverpool and that he believed they would have destroyed the letters addressed to him. By the end of March 2017, the claimant said he had split up with his girlfriend and was again living in Liverpool with his parents. The claimant said he had made attempts to contact the TCO but could not recall how many times he had tried to contact them to resolve the matter. Louise Hadfield referred to the Code of Conduct guidance which said that every civil servant should be seen to be honest and above board in their personal tax affairs. She said that with each change of circumstance, the claimant was expected to notify the TCO as soon as possible. The claimant said that, from his initial claim for tax credits he had had no contact with the TCO. Louise Hadfield referred the claimant to a KMA (Key Management Actions) delivered in January 2018 which asked staff to look at their personal tax circumstances and said that one of the claimant's roles in Manchester was to deliver KMAs to his colleagues.

80. Louise Hadfield set out her thought process leading to her conclusions in a decision manager's deliberations document. The deliberations document does not set out clearly what obligations she was considering and where they derive from. Had it done so, it would have been easier for the reader to understand what conclusion Louise Hadfield had reached and why. However, it is clear from the document that Louise Hadfield did not reach any conclusion as to whether the claimant breached legislation relevant to tax credits. This is consistent with her oral evidence to us that she was considering only whether the claimant breached the Civil Service Code and the HMRC conduct rules. Louise Hadfield clarified that her reference to an "offence" was, in fact, a reference to a breach of HMRC conduct guidance.

81. Louise Hadfield found that both allegations were proven.

82. In relation to the allegation about not notifying the tax credits office of a change in his circumstances, the section on her conclusions refers to the award notice having

appendices stating that changes of circumstances "must be reported". This must be a reference to guidance to claimants generally, rather than to HMRC conduct rules. As we have seen, the guidance does not, in fact, state that increases in pay "must" be reported when they occur, although claimants are advised to notify the TCO to avoid overpayments building up. Louise Hadfield found that the claimant made no attempts to contact the tax credit office and, in the following year, simply did not file a return as opposed to notifying TCO of his new income. She reached a different conclusion on this point to the investigator, who had found that the claimant had included his correct income in a "finalisation" document, based on the information given by the B & C/IG liaison employee. Louise Hadfield said she had reached this finding by accepting what the claimant told her; that he had not provided any further information to the TCO. Louise Hadfield stated that failure to notify the TCO of his new income breached the claimant's obligation "as per code of conduct". The document, at this point, does not identify which parts of the Code of Conduct she concluded were breached. However, later in the document, she returns to the issue of whether both allegations breached the Civil Service Code of Conduct and there wrote: "Peter has failed to manage his private affairs correctly. He did not notify the Department of a change of circumstances that affected a benefit he was entitled to." Although Louise Hadfield does not, in her deliberations document, specifically identify the source of this obligation, it appears to reflect the obligations set out in HR 22009 conduct: private conduct in which it is stated that employees must manage their private dealings with HMRC properly and on time, including "notify the Department of any change in circumstances which affect your entitlement to claim any benefits or credits."

83. In relation to the second allegation, that the claimant failed to pay an outstanding tax credits debt for the period ending 5 April 2014 and 5 April 2015, Louise Hadfield rephrased this as failing to engage with the debt management unit to bring his overpaid tax credits to account. She noted, in the conclusions section, that there were numerous letters issued and the claimant did not ensure his contact details were up-to-date or make arrangements for letters to be forwarded to his current address. She wrote:

> "I believe that Peter at the very least received the letters issued in March 2017 stating that the monies were owed and encouraging him to contact Debt Management Unit to resolve the matter or the matter would be referred to Internal Governance. Additionally Peter's contact number on his form was his work contact number and answer phone messages by [VC] (DMU) were not followed up.
> Peter stated he recalls receiving letters in March 2017 that he made some attempts to call but was unsuccessful.
> There is an expectation as an HMRC employee you will maintain a high standard of behaviour and manage your private dealings with HMRC properly and on time.
> Peter has not behaved with the high levels of integrity expected of him or managed his private affairs accordingly."

84. Louise Hadfield concluded that the matter was gross misconduct because it had damaged the working relationship between the individual and HMRC. She wrote "Peter has committed an offence relating to a benefit administered by HMRC."

85. Louise Hadfield did not consider that the claimant's stated lack of awareness of the Civil Service Code was an acceptable excuse or mitigating factor. She noted that this contradicted the claimant's role as Key Management Actions coordinator and referred to an email he sent on 2 January 2018 to his team providing details of and links to HMRC's conduct guidance. She referred to the claimant's health and that, for the majority of the period under question, the claimant had no sickness absence and that it did not appear to have affected his ability to pass a challenging development course. She noted that the turbulent relationship he described did not appear to have any impact on the claimant passing his exams and that he met all his performance objectives during the period. She noted that the claimant had stated that he should not be expected to have knowledge of the tax credit system. She stated that as an employee of HMRC, she would expect the onus to be on the employee to ensure that they were aware of their eligibility and responsibilities to ensure they were receiving the actual amount they were entitled to. She did not consider that the claimant's lack of knowledge could be viewed as a mitigating factor.

86. Louise Hadfield wrote: "my main concern is that Peter cannot understand how his behaviour constitutes gross misconduct or has he taken the matter seriously. Due to this I cannot be confident that he would not do a similar action in future."

87. Louise Hadfield wrote that, through his conduct, the claimant's honesty, trust and integrity had been brought into question. Due to the seriousness of the offence and his lack of accountability, she did not think he could be rehabilitated into the workforce. She considered that the trust relationship had been broken beyond repair. She concluded that the gross misconduct charge was proven and the penalty was dismissal without warning.

88. Although Louise Hadfield wrote that the claimant's conduct had brought his honesty, trust and integrity into question, there is no conclusion in her deliberations document to the effect that she found the claimant to have acted dishonestly or fraudulently. A conclusion that he had acted dishonestly would have required making findings as to the claimant's thought process e.g. did he know that he was receiving the wrong amount and that he was obliged to notify TCO about this. On the basis of Louise Hadfield's oral evidence to us, we find that she considered that the claimant was grossly negligent but not dishonest or fraudulent. After giving this evidence, the judge referred her to the outcome letter in which a conclusion of internal fraud, being dishonest or fraudulent conduct, was stated. Louise Hadfield then sought to provide an explanation that she found the claimant to be dishonest as an employee but not as a citizen. We were not persuaded by this explanation. Dishonesty, whether as an employee or a citizen, requires examination of the thought process and a conclusion that there was dishonest intent, which is different to negligence. The documentary evidence of Louise Hadfield's thought process in reaching her conclusions and her initial oral evidence to us do not persuade us that she reached the conclusion that there was dishonest intent.

89. Louise Hadfield did not look into the relevant legislation relating to tax credits. She did not consider this was necessary since she was considering whether the claimant had broken the Civil Service Code.

90. On 15 October 2018, Louise Hadfield wrote to the claimant advising him of the outcome of the disciplinary proceedings. She informed him that she had considered

the allegations to be proven and that the claimant should be dismissed without notice and without pay in lieu of notice. She referred to the deliberations document for the explanation of her conclusions. Also included in the letter was statement that:

> "Because you are being dismissed as a result of conduct which is covered by the Cabinet Office's definition of internal fraud, details of your dismissal will be sent to the Cabinet Office for inclusion on the database of civil servants dismissed for internal fraud (the Internal Fraud Hub or IFH)."

She went on to set out the definition of internal fraud, which required there to have been "dishonest or fraudulent conduct". She explained that inclusion on the database of civil servants dismissed for internal fraud meant that the claimant would be banned from employment in a participating department during a five-year period from dismissal.

91. We understand, from the evidence of Louise Hadfield, that the section on internal fraud was included in the letter on the basis of advice from HR that gross negligence equalled dishonesty. If Louise Hadfield has correctly understood the advice she was given, this advice was incorrect. As noted above, gross negligence involves a different mindset from dishonest intent.

92. Louise Hadfield advised the claimant of his right to appeal against the dismissal.

93. The claimant has alleged that the decision of Louise Hadfield to dismiss him was influenced by Greg Alexander, being due to the claimant's intention to bring a grievance about disability discrimination. There is no evidence, as opposed to speculation by the claimant, that this was the case. We find that Louise Hadfield reached her conclusions herself, having taken advice from HR. There is no evidence that Louise Hadfield knew the claimant intended to bring a grievance that he had been subjected to disability discrimination.

94. The claimant appealed against the decision to dismiss him. He was invited to an appeal hearing with Michael Hughes. Michael Hughes has stated that this was not a re-hearing. There was an appeal hearing on 14 November 2018 at which the claimant was accompanied again by his trade union representative.

95. Mr Hughes issued his outcome and deliberations document on 7 December 2018 in which he concluded that the appeal was not upheld.

96. The deliberations document makes it clear that Michael Hughes was approaching the appeal on the basis that he was considering:

- Whether the decision manager made a reasonable decision based on the information available;
- Whether the correct process had been adhered to; and
- To review and consider any additional information and/or mitigation put forward by the claimant.

He arrived at the decision that the decision manager's decision was upheld and the appeal was not allowed. There is no evidence that Michael Hughes was influenced in

his decision making by Greg Alexander or that he knew that the claimant intended to bring a grievance about disability discrimination.

Further facts relevant to disability

97. The claimant relies on two alleged impairments as relevant disabilities: a mental impairment of depression and a physical impairment of neck/back/shoulder/hip problems.

98. We deal first with evidence relating to the mental impairment. The evidence relating to this is very scant. There is no medical evidence of a mental impairment at relevant times. There is a reference in medical notes to antidepressants but this relates to periods after the claimant's dismissal. Although the case management orders explained in some detail the claimant what was to include in his impact statement, there are no more than passing references to mental health in this statement. The Employment Judge asked the claimant questions about the duration and impact of the mental impairment. The claimant said this started with his relationship breakup and cancer scare. He said this was in March 2016. However, from other evidence, including medical letters relating to the cancer scare, and other evidence given by the claimant, we find this was in March 2017 rather than 2016 and that the claimant simply made a mistake about the year when giving this evidence. The claimant said he had recovered by January or February the following year.

99. When asked about the adverse effect of depression on him, the claimant said it was harder to concentrate, it was taking more effort to do work, he was tired and struggling to sleep and was not enjoying anything socially as much.

100. In the investigation meeting, the claimant said that the tablets he took for pain in his arm in early 2018 caused him to have "psychosis". In the appeal hearing, the claimant informed Michael Hughes that he was being messed around by his former partner up to December 2017 and he was "bordering on depression".

101. We have heard of no sickness absence which was attributed to depression. The claimant was continuing to perform well at work during this period. The claimant spoke of his relationship breakup and cancer scare and we accept that people at work saw that he was unhappy. However, the claimant himself acknowledged in evidence that Chris Boyes may not have realised that he was depressed.

102. We turn now to the alleged physical impairment. When the claim was clarified at the preliminary hearing, the claimant identified this as being neck/back/shoulder/hip problems. There was nothing in the GP notes to suggest such a problem. There was reference to foot osteoarthritis. Although the claimant said this was all connected with the neck/back/shoulder/hip issue, there is no medical evidence to this effect. The only other relevant medical evidence was about shoulder pain. The hospital letter dictated on 9 July 2019 recorded that the claimant had been suffering with some left sided shoulder pain for approximately 18 months. The letter stated that x-rays did not show any significant pathology with regards to arthritic changes and that the claimant had a full range of movement in the shoulder and rotator cuff muscle power was well maintained although there was some pain on resisted lateral rotation. It was noted that there did not appear to be any significant impingement problems. A further letter dictated on 31 October 2019 noted that the claimant

continued to suffer with pain in the left shoulder. There was no medical evidence about a neck, back or hip problem.

103. In May 2015, the claimant completed a display screen equipment (DSE) user self-assessment. He raised two issues, only one of which is relevant to this case. That was that his chair was uncomfortable and he was unable to adjust it to his preferred position. Chris Boyes noted in the manager comments that he was to be referred to an assessor for their advice/input re-the chair. A local DSE assessor reported that they found the chair to be very old and impractical due to its functionality not working properly. They wrote that this was causing discomfort as the claimant was unable to adjust the chair accordingly. The assessor wrote that it would be advisable for the claimant to receive a new chair to address his needs. A specialist chair was ordered and provided to the claimant.

104. On 29 June 2016, the claimant completed a further DSE user self-assessment. This included a question whether he experienced any musculoskeletal discomfort was working at his PC or at home afterwards. The claimant answered no to this question. He answered a question saying that his chair was comfortable, stable and of adequate size and in good condition.

105. From 4 to 10 October 2017, the claimant had a period of sickness absence. He told Chris Boyes he had pulled a muscle in the shower and that he had initially taken two days' annual leave because of this problem. By the time of a discussion on 12 October 2017, he was telling Chris Boyes that he was back to virtually full movement.

106. From 28 February to 4 March 2018 and from 12 March to 2 April 2018, the claimant was on sick leave due to a problem with his arm and side effects from medication for this. The claimant informed Chris Boyes that he may have pulled a muscle or trapped a nerve.

107. At the meeting on 27 March 2018, the claimant told Chris Boyes that he did not want an occupational health referral. This suggests to us that the claimant did not consider there was an ongoing musculoskeletal problem at the time.

108. There is no evidence, beyond the assertion of the claimant, that the reason for his absence in early 2018 formed part of an ongoing problem with his neck/back/shoulder/hip.

109. In a DSE user self assessment done on 3 April 2018, the claimant wrote that he did experience musculoskeletal discomfort whilst working at his PC or at home afterwards, but this was infrequent and was not linked to an existing disability and/or ill health/injury. He wrote that his chair was comfortable. In a discussion with Chris Boyes on 5 April 2018, the claimant said he considered the upper arm discomfort to be quite minor and, because it was so infrequent, he did not want Chris Boyes to refer it to a DSE assessor.

110. We do not accept the claimant's evidence that he was persuaded by Chris Boyes to give untruthful answers in the assessment and not seek the purchase of another chair, after he said his specialist chair had gone missing, because of the cost of this. In the attendance appeal meeting, the claimant was asked, when he said

his DSE chair had gone missing, whether he had requested a replacement chair. The claimant said he knew they were expensive and did not want to be a burden on the department. He did not say that he had asked Chris Boyes for a replacement and she had refused and persuaded him to put incorrect answers. At a time when the claimant was appealing against Chris Boyes' decision to issue him with an attendance warning, he would have no reason not to say this about Chris Boyes had it been the case. When referred to the April 2018 assessment in the attendance appeal hearing, he said that the chair he had did not help much and he believed that back pain was down to the commute from Liverpool to Manchester. The claimant said he had been commuting for one to two years at that point. We consider that the answers given in the contemporaneous assessment and attendance appeal hearing are more likely to be reliable than the claimant's account given at a later date and for the purpose of these legal proceedings.

111. We find that the claimant did express a wish to Chris Boyes on various occasions to move to work in Liverpool because of the long commute. However, the claimant has not satisfied us that he linked this with a back problem. A move was facilitated for another employee as a reasonable adjustment for health problems. We consider it more likely than not that Chris Boyes would have taken action, including an occupational health referral, to consider whether a move might be required as a reasonable adjustment had the claimant raised this issue with her.

112. Although the case management orders explained in some detail what the claimant was to include in his impact statement, the claimant included little evidence about the adverse effect the alleged physical impairment had on his ability to carry out normal day-to-day activities. He wrote that he used annual and flexi leave to accommodate the days when his back was sore and periods when his tiredness had accumulated. He referred to being diagnosed with arthritis in his foot which was causing pain in his hip and giving him difficulty walking and making commuting to Manchester harder. He referred to being unable to play in a 5 a side football tournament due to his back. In answer to questions from the Employment Judge, he said he suffered from back problem from 2013. He said he had problems with his hip from around March 2016 and with his neck from October 2017 and his shoulder from February 2018. He asserted they were all connected. He said that he spent one day in bed at the weekend when doing the commute, resting his body and letting his back recover. When asked if there was anything else the impairment stopped him doing, he referred to playing in the football tournament and it making things more difficult rather than stopping him doing anything. He did not add anything else when invited to say anything else about the adverse effect on his ability to carry out normal day-to-day activities.

113. As noted previously, we will make further findings of fact relevant to the breach of contract claim after reaching our conclusions on the other complaints.

Submissions

114. The parties made oral submissions.

115. In summary, Mr Lewis submitted on behalf of the respondent that the evidence did not support a conclusion that the claimant was disabled by reason of either impairment relied upon. He further submitted, in relation to the discrimination arising

from disability claim, that the claim failed at the causation stage and because there was insufficient evidence that the respondent knew or ought reasonably to have known that the claimant was disabled. He also submitted that dismissal was a proportionate means of achieving a legitimate aim.

116. In relation to the victimisation claim, Mr Lewis submitted that the claimant had failed to prove he had done the protected act relied upon. He also submitted that there was no causal link between the alleged protected act and the detriments. He submitted that the complaint in relation to referral into the disciplinary procedure was out of time and that no case had been made out as to why it would be just and equitable to extend time.

117. In relation to the complaints of failure to make reasonable adjustments, the respondent accepted that both PCPs applied. Mr Lewis submitted that the claimant had failed to demonstrate, in relation to PCP1, how he was put at a disadvantage compared to people without the disability. Mr Lewis accepted there may have been some disadvantage from PCP2 but not more than a minor disadvantage. Mr Lewis submitted, in relation to both complaints, that the respondent did not have actual or constructive knowledge of disability or disadvantage. Mr Lewis submitted, in relation to PCP1, that it would not have been reasonable to allow even longer to pay the debt. In relation to PCP2, a move might have been possible if the claimant had raised it properly, but, he did not link his wish to relocate to an underlying condition or disability. In relation to PCP2, Mr Lewis argued that the complaint was out of time if the tribunal considered that an adjustment should have been made by a certain date.

118. In relation to unfair dismissal, Mr Lewis submitted that the reason for dismissal was plainly related to conduct. The decision maker and appeal manager had a genuine belief in both allegations. The failure to pay an outstanding debt, adopting a sensible construction, should be considered as failure to pay in a reasonable period of time or failure to properly engage. The respondent had reasonable grounds, after a reasonable investigation to sustain their belief. Dismissal was in the range of reasonable responses. There were no procedural failures outside the range of reasonable responses. The allegation of failure to pay in a reasonable period of time was sufficient to justify dismissal on its own. If the dismissal was found to be unfair, Mr Lewis submitted that there should be 100% reduction in compensation under **Polkey** principles and for blameworthy conduct.

119. In relation to the complaint of breach of contract, Mr Lewis submitted that there was gross misconduct. The essence was that someone knows something is wrong and did it anyway. As a result, the respondent lost trust and confidence necessary to continue to employ the claimant. In relation to the allegation about failing to pay the debt in a reasonable period, the claimant must have known about the debt and had been told to sort it out. Mr Lewis said there was a bit more of a question about the second allegation but the tribunal might not need to rely on this. In any event, there was gross negligence and both matters would justify summary dismissal.

120. The claimant submitted that the allegation of fraud was not justified and none of the allegations were justified. Particular points he relied on were that Louise Hadfield did not seek specialist advice and that, had the correct grade of fact finder been used, the outcome might have been that there was no case to answer.

121. The claimant suspected Greg Alexander was involved in the decision to dismiss.

122. The claimant said that no one had ever been dismissed for this before and this would put anyone who received an overpayment in danger. The claimant said the tax credit system in its design naturally gives rise to overpayments. The claimant accepted that he was possibly negligent in not engaging more in trying to arrange repayment of the debt; this was serious but not gross misconduct. No time limit was given in the conduct rules. If there had been a deadline, this might have helped him to meet it. The claimant said he had completed the eligibility checker and looked at guidance before he put in the claim. The guidance has now been updated to include thresholds. The claimant said he had no reason to think his entitlement to WTC was not genuine.

123. The claimant submitted that, when he was capable of doing so, he sorted out the repayment as quickly as he could.

124. The claimant submitted that the timing of the gross misconduct was highly suspicious; a day or two after the notice that the appeal had been upheld.

125. The claimant questioned why he would risk his career for £2000.

126. The claimant submitted that his manager should have notice a change in his mental well being.

127. The claimant submitted that the respondent had not considered mitigating factors enough.

Law

128. Section 6 of the Equality Act 2010 (EqA) and Schedule 1 to that Act contain the relevant provisions relating to the determination of disability. Section 6(1) provides:

> "(1) A person (P) has a disability if –
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities.

129. Paragraph 1 of Schedule 1 provides that the effect of an impairment is long term if (a) it has lasted for at least 12 months, (b) it is likely to last at least 12 months, or (c) it is likely to last for the rest of the life of the person affected. It also provides: "If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

130. "Substantial" is defined in section 212(1) EqA as meaning "more than minor or trivial."

131. Section 15 EQA provides:

> "(1) A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

132. The provisions relating to the duty to make adjustments are included in section 20 EQA and Schedule 8 to that Act. Schedule 8 imposes the duty on employers in relation to employees.

133. Section 20(3) imposes a duty comprising:

> "A requirement where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage".

134. Paragraph 20 of Schedule 8 provides that an employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the relevant disadvantage.

135. Section 136 EQA provides:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

136. Section 27 defines victimisation as follows:

> "(1) A person (A) victimises another person (B) if A subjects B to a detriment because –
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act –
>
> (a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act."

137. Section 39(4) makes it unlawful for an employer to victimise an employee by dismissing them.

138. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 94(1) of this Act provides that an employee has the right not to be unfairly dismissed by his employer. The fairness or unfairness of the dismissal is determined by application of Section 98 of the 1996 Act. Section 98(1) of this Act provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Conduct is one of these potentially fair reasons for dismissal.

139. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, depends on whether, in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and this is to be determined in accordance with equity and the substantial merits of the case. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed and the penalty of dismissal were within the band of reasonable responses. The burden of proof is neutral in deciding on reasonableness.

140. In relation to a conduct dismissal, the Tribunal is guided by the authority of ***British Home Stores v Burchell*** *[1979] IRLR 379*. When considering whether the respondent has shown a potentially fair reason for dismissal, the Tribunal must decide whether the respondent had a genuine belief in the claimant's guilt. In considering the fairness or otherwise of the dismissal, the tribunal must consider the other parts of the ***Burchell*** test: was this belief was based on reasonable grounds and formed after a reasonable investigation?

Conclusions

Complaints under the Equality Act 2010

Disability

141. We consider first whether the claimant was disabled, within the meaning in the Equality Act 2010, by reason of either or both impairments relied upon. If he was not, then the discrimination arising from disability claim and the complaints of failure to make reasonable adjustments must fail.

142. In relation to the alleged mental impairment of depression, on the claimant's own evidence, this lasted from around March 2017 until January or February 2018. The alleged mental impairment is the relevant disability for the failure to make reasonable adjustments claim relying on PCP1. That PCP is requiring the claimant to notify the respondent of an increase in income which impacted on receipt of tax credits. The relevant time for that would be the time from the application for tax credits, which was July 2013, until, at the very latest, the end of the second tax year in respect of which the claimant received WTC, albeit for only part of the year, i.e. April 2015. This was before the claimant says he was suffering from depression. The claimant cannot, therefore, have been disabled by reason of depression at the relevant time.

143. We also conclude that the claimant was not disabled by reason of a mental impairment at any time prior to his dismissal. The mental impairment, on the claimant's own evidence, lasted less than 12 months and there is no evidence on the basis of which we could conclude that, at any point when he was suffering from the condition, it was likely to last at least 12 months. The mental impairment was not sufficiently long term in its effects to meet the definition of disability.

144. We also conclude that the adverse effects of the condition were not sufficient to meet the definition of disability. On the basis of the claimant's evidence, the adverse effect of depression on him was that it was harder to concentrate, it was taking more effort to do work, he was tired and struggling to sleep and was not enjoying anything socially as much. During the period he says he was suffering from depression, he managed to continue with a demanding job, without taking any medication. We conclude that any adverse effects were not substantial, in the sense of not being more than minor or trivial.

145. The claimant had an understandable adverse reaction to difficult life events, but it did not amount to a condition with sufficiently adverse and long term effects on his ability to carry out normal day to day activities to satisfy the definition of disability.

146. Turning to the alleged physical impairment, this was identified by the claimant at the preliminary hearing as being an impairment of the neck/back/shoulder/hip. The medical evidence we have been shown refers to a problem with the foot, without medical evidence of a link with other physical problems. There is medical evidence of a problem with the shoulder dating back to early 2018 (18 months back from the hospital letter of July 2019). The start of this issue would coincide with the two periods of sick leave in the period February to early April 2018 due to a problem with the claimant's arm and adverse reaction to the medication for this problem. The only other evidence of absence from work because of a physical problem is of absence in October 2017 when the claimant told his manager he had pulled a muscle in the shower. There is no medical evidence to suggest a link between the absences and a longstanding physical problem with his neck/back/shoulder/hip. We accept that the claimant may have had a low level problem with his back, perhaps attributed, as he did at times attribute it, to his commutes. The claimant says he spent a day in bed at weekends to rest his back and because of tiredness. We accept that the claimant was tired at weekends, but are not satisfied that the need to rest is largely attributable to a back problem, rather than to general fatigue caused by his working pattern and commute. If the claimant had a significant issue with his back, we would

expect to see this reflected in some way in the medical records, but it is not. The duration of any physical impairment during the period he was working in Manchester is not clear, but, even if it lasted more than 12 months, we are not satisfied that the impairment had a more than minor or trivial adverse effect on his ability to carry out normal day to day activities. The fact that the claimant was unable to play in one five a side football match is not sufficient to persuade us that the physical impairment had a more than minor or trivial adverse effect on his ability to carry out normal day to day activities. Despite having been given an opportunity in his impact statement and a further opportunity in oral evidence, to outline the adverse effects of the physical impairment on his ability to carry out normal day to day activities, the claimant did not provide us with any evidence on the basis of which we could conclude that the physical impairment had a more than minor or trivial impact on his ability to carry out normal day to day activities. We conclude that the claimant was not disabled by reason of a physical impairment at relevant times.

147. Our conclusions on the issue of disability mean that the complaints of discrimination arising from disability and failure to make reasonable adjustments cannot succeed. However, we go on to consider what our conclusions would have been in relation to other elements of the complaints of disability discrimination, had we concluded that the claimant was disabled.

Discrimination arising from disability

148. This complaint relates to dismissal only. It is agreed that the claimant was treated unfavourably by the respondent by being dismissed.

149. The claimant argues that the dismissal was because he made it known to Greg Alexander in or around June 2018 that he intended to raise a grievance arising out of his receipt of a written warning for his attendance connected to his disability. The claimant relies on a conversation on 22 June 2018. We found (at paragraph 52) that the claimant did not raise this with Greg Alexander at that meeting. The claim must also fail for this reason. Even if the claimant had spoken of such a grievance to Greg Alexander, we found that Greg Alexander did not influence Louise Hadfield's decision to dismiss the claimant (see paragraph 93). The claim fails for this further reason.

150. The claim would also have failed because we conclude that the respondent did not have the requisite actual or constructive knowledge of disability. The relevant alleged disability for this complaint is the physical impairment. The claimant mentioned discomfort with his chair in one DSE assessment and a specialist chair was provided (see paragraph 103). In an assessment in 2016, he identified no problems (see paragraph 104). The claimant's sick leave pattern did not suggest an ongoing physical problem (see paragraphs 105 and 106). In an assessment in April 2018, he referred to some discomfort but described it as infrequent and not linked to any existing disability or ill health and did not feel the need for an assessment by a DSE assessor (see paragraph 109). We found that the claimant did not link the wish for a move and dissatisfaction with his commute with a back problem in discussion with Chris Boyes (see paragraph 111).

151. For all these reasons, we conclude that the complaint of discrimination arising from disability is not well founded.

Failure to make reasonable adjustments

152. The respondent accepted that both PCPs were applied.

153. PCP1 was identified at the preliminary hearing and confirmed at the start of this hearing to be that the respondent required the claimant to notify it of an increase of income which impacted on receipt of tax credits.

154. The relevant disability for the complaint relying on PCP1 is the mental impairment. As noted above (see paragraph 142), on the claimant's own evidence, the period during which he says he was disabled started after the time in respect of which the respondent required him to notify them of an increase in income which impacted on receipt of tax credits. His disability (if there was one) could not, therefore, put him at a substantial disadvantage at the relevant time.

155. It appears that the disadvantage described by the claimant and recorded at the preliminary hearing relates not to the period during which he was claiming and receiving WTC, but to the period where he was being required to pay back the overpayment made to him. However, PCP1 was not framed as relating to something done during that later period and we do not consider that we can rewrite the PCP at this stage of the proceedings. However, whatever the PCP had been, the complaint of failure to make reasonable adjustments would have failed because the claimant was not disabled at any possible relevant time and also because, as set out below, the respondent did not have the requisite actual or constructive knowledge of disability.

156. The duty to make reasonable adjustments does not arise if the respondent did not know and could not reasonably have been expected to know that the claimant was disabled and was likely to be put at the disadvantage.

157. The claimant may have appeared unhappy, in reaction to the break up of his relationship and the cancer scare, but we conclude there was nothing which should have caused the respondent to consider that he was suffering from a mental impairment likely to last at least 12 months and with more than minor or trivial adverse effects on his ability to carry out normal day to day activities. The claimant himself acknowledged in evidence that Chris Boyes may not have realised that he was depressed. In the appeal hearing, the claimant informed Michael Hughes that he was being messed around by his former partner up to December 2017 and he was "bordering on depression". We conclude that the respondent did not know, and could not reasonably be expected to know, that the claimant was disabled by reason of this mental impairment.

158. There was also nothing to alert the respondent that the claimant was likely to be placed at a disadvantage in relation to the application of PCP1 because of his mental health.

159. For all these reasons, the complaint of failure to make reasonable adjustments in relation to PCP1 fails.

160. Although the respondent did not identify a time limit issue in relation to PCP1, it appears to us that, given the relevant time period in which the PCP was applied, which can only relate to when the claimant was applying for, or receiving, WTC, the claim was presented out of time. The last tax year in which the claimant received WTC was the year which ended in April 2015. The claim was presented in February 2019. The claimant was aware by, at the latest, the investigation meeting in July 2018, that he was being accused of a disciplinary offence of not notifying the TCO of changes in his income.

161. PCP2 is a requirement to work at the respondent's Manchester office.

162. The relevant disability for the complaint relying on PCP2 is the physical impairment.

163. The claimant has not satisfied us that the requirement to work in the Manchester office put him at a substantial disadvantage, in the sense of being more than minor or trivial, in comparison with persons without the alleged disability. For the reasons set out in paragraph 146, we are not satisfied that there were any ongoing physical problems with more than minor or trivial adverse effects. The claimant was unhappy with his commute, but has not satisfied us that this caused him more than minor or trivial problems connected with his back/neck/shoulder/hip.

164. For the reasons we gave in relation to the knowledge defence for the complaint of discrimination arising from disability (see paragraph 150), we conclude that the respondent did not know, or could not reasonably be expected to know, that the claimant had the relevant disability. We also conclude that the respondent did not know, and could not reasonably be expected to know, that the claimant was likely to be placed at a disadvantage by PCP2 compared to people without the disability.

165. For all these reasons, we conclude that the complaint of failure to make reasonable adjustments in relation to PCP2 is not well founded.

166. The respondent raised a time limit issue in relation to PCP2. We would have concluded that this was a PCP which was applied until the claimant's dismissal, so the complaint was presented in time. It was a continuing state of affairs.

Victimisation

167. The claimant relies as a protected act on having told Greg Alexander in a meeting on 22 June 2018 that he intended to put in a grievance about disability discrimination. We have found that he did not raise this with Greg Alexander (see paragraph 52). The complaint of victimisation fails because of this finding.

168. In addition, the complaint fails because we conclude there was not the necessary causal link between the alleged protected act, which relied on a conversation with Greg Alexander, and the detrimental treatment relied upon.

169. The first detrimental act was referring the claimant into the disciplinary process. This was done by Chris Boyes. The decision was taken prior to the date when the claimant alleges that he told Greg Alexander of his intention. The decision by Chris Boyes was in line with advice she had received from IG when the matter of the

overpayments was first raised with her by IG in February 2018 and in line with further advice she sought from IG and HR in early June 2018, before the date of the alleged protected act.

170. The second detrimental act was the claimant's dismissal. For the reasons given in dealing with the complaint of discrimination arising from disability, (see paragraph 149), we have concluded that the decision to dismiss was that of Louise Hadfield and was not influenced by Greg Alexander.

171. The third detrimental act was the rejection of the appeal. We found no evidence that Michael Hughes, the appeal officer, knew that the claimant intended to bring a grievance about disability discrimination or that he was influenced in his decision making by Greg Alexander (see paragraph 96).

172. In relation to the referral into the disciplinary process, this complaint was presented out of time and the claimant has not provided evidence on the basis of which we can conclude that it is just and equitable to consider it out of time.

"Ordinary" unfair dismissal pursuant to the Employment Rights Act 1996

173. We conclude that the respondent has shown a potentially fair reason for dismissal, being conduct. Louise Hadfield dismissed the claimant because she found the two allegations of misconduct set out in the letter inviting the claimant to the disciplinary hearing to be proven. Michael Hughes upheld the decision, being satisfied that Louise Hadfield had reached that conclusion, making a reasonable decision on the information before her and taking into account other information provided by the claimant on appeal.

174. We conclude that Louise Hadfield had a genuine belief that the claimant was guilty of misconduct in (1) not notifying the TCO that his income was higher than the income for the tax year 12/13 which the claimant had, correctly, put on the application form and (2) in not engaging with the Debt Management Unit to bring his overpaid tax credits to account. In relation to the second matter, Louise Hadfield rephrased the allegation which had been put. In the invitation to the disciplinary hearing, this had been described as failing to pay the outstanding tax credits debt, which was not, by then, an entirely accurate description of the alleged conduct, since the claimant had, on 4 May 2018, agreed a time to pay plan and had begun repaying the debt. Louise Hadfield did not consider whether, or conclude that the claimant had, failed to comply with relevant legislation relating to WTC, but concluded that he was guilty of misconduct in breaching the conduct codes applying to HMRC employees, which applied higher standards to employees in relation to their personal tax affairs than legal obligations which applied to the general public. (See paragraphs 80 and 89).

175. We now consider whether the respondent's belief in the claimant's guilt was based on reasonable grounds following a reasonable investigation.

176. We consider first the allegation about the claimant's failure to pay the debt. We adopt the rephrasing used by Mr Lewis in his closing submissions, agreeing this to be a sensible construction: that the claimant failed to pay the debt in a reasonable period of time or failed to properly engage in arranging to repay the debt. We

consider that, despite the somewhat unfortunate phrasing of this allegation in the invitation to the disciplinary hearing, the claimant was aware before the disciplinary hearing, by the nature of the investigatory interview and the investigation report, that this was the essence of this allegation. He was not, therefore, disadvantaged by the way this was phrased.

177. We conclude that Louise Hadfield had reasonable grounds for her belief in the claimant's guilt in relation to this allegation. The claimant had, on her findings, been aware of the debt by, at the latest, 30 March 2017. He did not arrange the time to pay plan until 4 May 2018. At the very most, prior to the involvement of Chris Boyes, the claimant had tried to phone a couple of times and to send an email, following an attempted call by VK of PDC. The claimant then put this to the back of his mind and took no further action until prompted by Chris Boyes in February 2018. Even then, it took the claimant until May 2018 to arrange the time to pay plan. It took nearly a further month for the claimant to provide his manager with evidence of the time to pay plan. We conclude that Louise Hadfield had reasonable grounds for concluding that the claimant had failed to pay the debt in a reasonable period of time.

178. There is potentially an overlap between deciding whether the misconduct was committed and consideration of mitigation in relation to this allegation, since what is a reasonable period of time could be affected by what would be mitigating circumstances. Louise Hadfield took into account the mitigating circumstances of the break up of the claimant's relationship and periods of ill health but concluded that this did not provide a satisfactory explanation for the claimant's failure to engage over the relevant period. She noted that, for the majority of the period under question, the claimant had no sickness absence and that it did not appear to have affected his ability to pass a challenging development course. She noted that the turbulent relationship he described did not appear to have any impact on the claimant passing his exams and that he met all his performance objectives during the period. We conclude that Louise Hadfield had reasonable grounds for reaching the conclusion that the claimant had failed to pay the debt in a reasonable period of time, taking account of the claimant's relationship break up and periods of ill health.

179. We conclude that Louise Hadfield reached a conclusion on reasonable grounds that this conduct was in breach of HMRC's rules of conduct. The deliberations document indicates that she was considering these rules, although it would have been better had she set out more clearly the obligations under the rules of conduct which she was considering in relation to each allegation. We conclude that the reference in the deliberations document to the claimant not behaving with the high levels of integrity expected of him or managing his private affairs accordingly when setting out her conclusion on this allegation, can be understood as referring to the guidance on conduct specifically referred to in the investigation report about managing private financial activities properly and making personal tax payments on time.

180. We conclude that the respondent had conducted a reasonable investigation into the allegation. The claimant was aware of the essence of this allegation he was facing from the investigation meeting, even if the phrasing of the allegation in the invitation to the investigatory meeting, that the claimant had failed to pay an outstanding tax credit liability, may have caused some confusion since, by then, he had started to repay the debt. The claimant had an opportunity at the investigation

meeting and then at the disciplinary hearing to explain how and when he had become aware of the debt and what steps he had taken to address this, and to give his explanation for the delay in doing so. Since Louise Hadfield was only considering breaches of the respondent's rules of conduct, the fact that she did not look into the legislation relating to WTC does not take the investigation outside the band of a reasonable investigation.

181. We turn then to the allegation about the claimant not notifying the TCO that his income for the relevant tax years was greater than the income he provided on his application for tax credits and therefore he continued to receive tax credits to which he had no entitlement.

182. The respondent accepted that the claimant had done nothing wrong in his original application. However, after he had received the notice of the award and accompanying guidance, Louise Hadfield took the view that he had an obligation to notify the TCO that his income was higher than the previous year's income which he had, correctly, given on the WTC application form. It was common ground that the claimant had not notified the TCO of his higher income prior to the end of the first year of his WTC claim. The evidence was not consistent as to whether the claimant had put his actual income on a "finalisation" document at the end of the year, but Louise Hadfield proceeded on the basis of what she understood from the claimant, that he had not done anything because he was not making a new application since, by then, his income had increased and he knew he would not be entitled to WTC. The claimant disputed any obligation to update the TCO and said he was not aware of any obligation under the HMRC rules of conduct.

183. Louise Hadfield concluded "Peter has failed to manage his private affairs correctly. He did not notify the Department of a change of circumstances that affected a benefit he was entitled to." Although Louise Hadfield does not, in her deliberations document, specifically identify the source of this obligation, we found that it appears to reflect the obligations set out in HR 22009 conduct: private conduct in which it is stated that employees must manage their private dealings with HMRC properly and on time, including "notify the Department of any change in circumstances which affect your entitlement to claim any benefits or credits." (See paragraph 82).

184. We conclude that Louise Hadfield concluded, on reasonable grounds, having regard to the higher standards applicable to HMRC employees, as expressed in the rules of conduct, that the claimant had breached these higher standards.

185. We conclude that she acted within the band of reasonable responses in concluding that the claimant's expressed ignorance of the HMRC rules of conduct was not sufficient mitigation; he should have been aware of these rules if he was not, particularly given the task that was allocated to him of disseminating to the team KMAs.

186. We consider next whether there was a reasonable investigation in relation to this allegation. This was not an allegation on the invitation to the investigatory meeting. However, the claimant would have become aware, from the lengthy questioning at the investigatory meeting, that there was a potential concern about whether he had done all he was required to do, as an HMRC employee, following his

successful application for WTC. He was referred, in that meeting, to specific parts of the rules of conduct. The invitation to the disciplinary hearing set out the allegation, although, unfortunately, it appears in error, only referring to one of the relevant tax years. The investigation report also set out the concern the claimant had to address in relation to this allegation. The claimant had an opportunity to clarify what he had done in relation to the application for WTC and subsequently and to address the allegation that he had failed in his obligations as an employee of HMRC by not notifying the TCO that his pay was higher than given for the previous year. It would have been better had Louise Hadfield clearly explained prior to the meeting, in response to questions from the claimant and his trade union representative, and at the start of the meeting itself what the obligations were that the claimant was accused of breaching. As noted previously, we were unclear, on reading the notes of the meeting, whether Louise Hadfield was considering whether the claimant had breached relevant WTC legislation or only considering whether the claimant had breached the codes of conduct applicable to HMRC employees. If we were unclear on this point from the notes of the meeting, it is unlikely that the claimant had any better understanding. However, even if the claimant (wrongly, as it turns out) thought Louise Hadfield was considering whether he had breached WTC legal obligations, it should have been clear to him from the investigation report and the questions that Louise Hadfield was considering also, or only, whether he had breached HMRC codes of conduct. We conclude that the investigation remained within the band of reasonable responses, despite the concerns we have expressed.

187. For the same reasons as in relation to the other allegation, we do not consider that not looking into the relevant legislation took the investigation outside the band of a reasonable investigation.

188. We conclude that the respondent conducted a reasonable investigation in the circumstances into both allegations.

189. We conclude, overall, that the respondent followed a fair procedure, within the band of a reasonable procedure. The claimant did not satisfy us that there was any reason which made Louise Hadfield an inappropriate person to be the decision maker. Even if JC was the wrong grade to conduct the investigation (and we were shown no documents with a policy breached by her being the investigator), we conclude that this would not take the investigation outside the band of a reasonable investigation.

190. We conclude that the penalty of dismissal was within the band of reasonable responses, having regard to the conclusion on the allegation of failing to engage with payment of the debt. This was a serious matter. It was reasonable for the respondent to conclude, on the basis of this misconduct alone, that the necessary trust and confidence in the claimant had been lost. We conclude that the dismissal was fair in all the circumstances.

191. Whilst we have concluded that Louise Hadfield concluded on reasonable grounds that the allegation of not notifying the TCO of his pay levels, following the application for WTC, was a breach of HMRC rules of conduct and, therefore, misconduct, we consider that this matter could not, in the circumstances, reasonably be considered to be gross misconduct. It is common ground that the claimant did nothing wrong in relation to the initial application. There is no evidence that the

claimant acted in breach of any legal obligation applying to WTC recipients in not notifying the TCO that his actual income was higher than his previous year's income although this was inadvisable, since it caused a debt to build up. The HMRC rules of conduct relevant to this allegation are in general terms and might not be clearly understood to impose the type of requirement which Louise Hadfield concluded fell on the claimant. The fact that IG did not propose disciplinary action in relation to the claimant not notifying the TCO of higher pay, suggests that, had the claimant made arrangements to pay the debt when first notified of it, the claimant would not have faced disciplinary proceedings for misconduct, let alone gross misconduct.

192. The dismissal letter included a statement that the claimant was being dismissed because of conduct which is covered by the Cabinet Office's definition of internal fraud. The definition included that there had been "dishonest or fraudulent conduct" (see paragraph 90). As we noted in our findings of fact, we were not persuaded that Louise Hadfield reached the conclusion that there was dishonest intent (see paragraph 88). Her evidence that she had concluded the claimant was grossly negligent is inconsistent with a conclusion that he was guilty of dishonest or fraudulent conduct and, therefore, internal fraud. We conclude that the statement that the claimant had been dismissed because of conduct covered by the Cabinet Office's definition of internal fraud was incorrect and included on the basis of an incorrect understanding of the mental element required for a person to be found to have been guilty of dishonest or fraudulent conduct. Although this does not affect our conclusion that the dismissal was fair, we would hope that the respondent would correct the dismissal letter by removing the reference to internal fraud and remove the claimant from the database of civil servants dismissed for internal fraud.

Breach of contract

Further findings of fact relevant to the breach of contract claim

193. We find that it is more likely than not that the claimant was aware of the debt owed to HMRC because of overpayments of WTC from a much earlier stage than receipt of the letter of 30 March 2017. Earlier letters, the earliest being October 2014, were sent to the claimant. The letters were all sent to the claimant's parents' address. At various times the claimant was living there. Even when he was not living there, we consider it more likely than not that he would have been given the mail at some time. We did not find the suggested explanation that his parents would have destroyed the mail to be credible. There was no suggestion of a poor relationship between the claimant and his parents. We accept that the claimant may not have opened all the mail in a timely fashion, but we find it more likely than not that the claimant was aware of the debt several years before the first letter he has admitting receiving, which was the letter of 30 March 2017. If he received but did not open official mail from HMRC, he was acting in a reckless manner and should have known about the debt. The claimant took no action in relation to letters earlier than 30 March 2017.

194. The action the claimant took after receiving the letter of 30 March 2017 and before Chris Boyes spoke to him in February 2018 was very limited. He made, at most, a couple of attempts to telephone someone in PDC and what he knew at the time to be an unsuccessful attempt to email them. Although he was experiencing difficult times with a relationship breakup and cancer scare, he was still able to do his

job, so we do not consider that these circumstances prevented him taking the simple step of phoning PDC again to arrange payment. After Chris Boyes spoke to him in February 2018, he was slow in taking action to arrange the time to pay plan, this not being put in place until 4 May 2018, despite having been advised of the seriousness of the situation.

195. Clause 10 of the claimant's contract provided that the claimant must comply with the Civil Service Code and HMRC's Code of Conduct. HMRC's conduct rules include, in HR22009, under the heading "managing your private financial affairs" that employees must manage their private financial activities properly, including managing their private dealings with HMRC properly and on time.

Law relating to breach of contract

196. An employer is entitled to dismiss an employee without notice or pay in lieu of notice if the claimant commits a very serious, or fundamental, breach of contract.

Conclusions on breach of contract claim

197. The respondent's conduct rules were incorporated into the contract of employment by clause 10 of that contract. These included that employees must manage their private financial activities properly, including managing their private dealings with HMRC properly and on time.

198. We have found that the claimant was aware of the debt from several years before 30 March 2017 but did not make arrangements to pay the debt until 4 May 2018. This was only after his manager met with him about this in February 2018 and issued reminders to take action to address the debt. We conclude that the claimant did not manage his private financial affairs properly, in particular not managing his private dealings with HMRC properly and on time, because he took so long to make arrangements to pay the debt. The claimant was in breach of the conduct rules by this failure.

199. We conclude that the claimant's conduct in not making arrangements to pay the debt promptly when notified of it was a serious breach of the conduct rules. We do not make any finding of dishonesty but consider the claimant acted recklessly in failing to deal with his personal tax affairs within a reasonable time frame. Higher standards are expected of HMRC employees in relation to dealing with their personal tax affairs than are expected of the general public. This is set out in the respondent's conduct rules but, even if the claimant had failed to make himself familiar with the detail of these rules, as a matter of common sense, the claimant should have been aware that his conduct in relation to his tax affairs should be exemplary as an employee of HMRC. We conclude that this was sufficiently serious misconduct to justify dismissal without notice. We conclude that the respondent was not in breach of contract by dismissing the claimant without notice.

200. We do not need to consider whether the claimant was guilty of misconduct in relation to not informing the TCO that his income was higher than the previous year's income correctly given on the application for WTC. For the reasons given above, even if the claimant was guilty of misconduct in this respect, we do not consider this

sufficiently serious misconduct to have justified dismissal without notice. (See paragraph 191).

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Employment Judge Slater

Date: 24 January 2020

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON
30 January 2020

FOR THE TRIBUNAL OFFICE