EMPLOYMENT TRIBUNALS

Claimant: **Mr K O'Shaugnessy**

Respondent: **Department for Work and Pensions**

Held at: **London South** **On: 15 & 16 December 2016**
In chambers 24 & 25 January 2017

Before: **Employment Judge Freer**
Members: **Mrs A J Sadler**
Mr O Husbands

Representatives
Claimant: **Miss L Mankau, Counsel**
Respondent: **Ms C Hayward, Counsel**

JUDGMENT

It is the unanimous judgment of the Tribunal that the Claimant's claims are not well founded.

REASONS

1. By a claim presented to the employment Tribunals on 24 March 2016 the Claimant claimed unfair dismissal and disability discrimination.

2. The Respondent resists the claims.

3. The Claimant gave evidence on his own behalf and the Respondent gave evidence through Mr Richard Hind, Manager; Ms Theresa Wooten, District Operations Manager; and Mr Brian Menzies, Senior Customer Service Manager.

4. The Tribunal was presented with a bundle of documents comprising 517 pages and additional documents during the course of the hearing as agreed by the Tribunal.

5. Employment Judge Freer apologises for the delay in providing this judgment and reasons to the parties, which has been due to lack of judicial resources and available writing time.

The Issues

6. The list of issues is set out in a Preliminary Hearing Order dated 01 June 2016 and is in the bundle at pages 61 - 62.

7. It was agreed that the Tribunal in the first instance will address liability and general unfair dismissal remedy issues where appropriate.

A brief statement of the relevant law

Unfair dismissal

8. The legal provisions relating to unfair dismissal are contained in Part X of the Employment Rights Act 1996.

9. Section 98 provides that, where dismissal is not controversial, the Respondent must show that the reason for dismissal is one of a number of permissible reasons. The Respondent in this case relies upon a reason relating to the Claimant's conduct.

10. If there is a permissible reason for dismissal, the Employment Tribunal will consider whether or not the dismissal was fair in all the circumstances in accordance with the provisions in section 98(4):

> "the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted

reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case"

11. The standard of fairness is achieved by applying the range of reasonable responses test. This test applies to procedural as well substantive aspects of the decision to dismiss. A Tribunal must adopt an objective standard and must not substitute its own view for that of a reasonable employer. (**Iceland Frozen Foods –v- Jones** [1982] IRLR 439, EAT as confirmed in **Post Office –v- Foley** [2000] IRLR 234, CA; and **Sainsbury's Supermarkets Ltd –v- Hitt** [2003] IRLR 23, CA).

12. It is established law that the guidelines contained in **British Home Stores Ltd –v- Burchell** [1980] ICR 303 apply to conduct dismissals, such as in the instant case. An employer must (i) establish the fact of its belief in the employee's misconduct, that the employer did believe it. There must also (ii) be reasonable grounds to sustain that belief, (iii) after a reasonable investigation. A conclusion reached by the employer on a balance of probabilities is enough. Point (i) goes to the employer's reason for dismissal (where the burden of proof is on the Respondent) and points (ii) and (iii) go to the general test of fairness at section 98(4) (where there is a neutral burden of proof).

13. It is also established law that the **Burchell** guidelines are not necessarily determinative of the issues posed by section 98(4) and also that the guidelines can be supplemented by the additional criteria that dismissal as a sanction must also be within the range of reasonable responses (also a neutral burden of proof) (see **Boys and Girls Welfare Society –v- McDonald** [1997] ICR 693, EAT).

14. The Court of Appeal in **Taylor –v- OCS Group Ltd** [2006] IRLR 613 emphasised that tribunals should consider procedural issues together with the reason for the dismissal. The two impact upon each other. The tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason as a sufficient reason to dismiss.

15. This decision was echoed in **A –v- B** [2003] IRLR 405, EAT and the Court of Appeal in **Salford Royal NHS Foundation Trust –v- Roldan** [2010] ICR 1457 with regard to assessing reasonableness of the process and the decision to dismiss with the seriousness of the alleged conduct.

Discrimination arising from disability

16. Section 15 of 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."

17. When considering a proportionate means of achieving a legitimate aim, the Tribunal will assess whether the aim of the provision, criterion or practice is legal and non-discriminatory, and one that represents a real, objective consideration and if the aim is legitimate, whether the means of achieving it is proportionate including whether it is appropriate and necessary in all the circumstances.

18. As confirmed in the Supreme Court in **Homer –v- Chief Constable of West Yorkshire Police** [2012] UKSC 15:

"As Mummery LJ explained in *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:

". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group. . . . First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"

As the Court of Appeal held in *Hardy & Hansons plc v Lax* [2005] EWCA Civ 846, [2005] ICR 1565 [31, 32], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.

. . . To be proportionate, a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so".

The duty to make reasonable adjustments

19. Sections 20 to 21 of the Equality Act 2010 set out provisions relating to the duty to make adjustments

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is 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.

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

. . . (13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	*Applicable Schedule*
Part 5 (work)	Schedule 8

21 **Failure to comply with duty**

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

20. Schedule 8 provides:

SCHEDULE 8
Work: reasonable adjustments
Part 1
Introductory

1 Preliminary

This Schedule applies where a duty to make reasonable adjustments is imposed on A by this Part of this Act.

2 The duty

(1) A must comply with the first, second and third requirements.

(2) For the purposes of this paragraph—
(a) the reference in section 20(3) to a provision, criterion or practice is a reference to a provision, criterion or practice applied by or on behalf of A;
(b) the reference in section 20(4) to a physical feature is a reference to a physical feature of premises occupied by A;
(c) the reference in section 20(3), (4) or (5) to a disabled person is to an interested disabled person.

(3) In relation to the first and third requirements, a relevant matter is any matter specified in the first column of the applicable table in Part 2 of this Schedule.

Part 2
Interested disabled person

4 Preliminary

An interested disabled person is a disabled person who, in relation to a relevant matter, is of a description specified in the second column of the applicable table in this Part of this Schedule.

5 Employers (see section 39)

(1) This paragraph applies where A is an employer.

Relevant matter	*Description of disabled person*
Deciding to whom to offer employment.	A person who is, or has notified A that the person may be, an applicant for the employment.
Employment by A.	An applicant for employment by A. An employee of A's.

21. The Equality and Human Rights Commission has produced a Code of Practice on Employment (2011) ("the Equality Code"). The Code of Practice does not impose legal obligations, but provides instructive guidance. The Tribunal has referred itself to the Code as appropriate. This has been taken into account by the Tribunal. For example, the Equality Act 2010 no longer lists factors to be considered when determining reasonableness, but these factors appear in the Code of Practice (paragraph 6.28). However, it will not be an error of law to fail

to consider any of those factors. All the relevant circumstances should be considered.

22. The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination (**Archibald v Fife Council** [2004] IRLR 651, HL).

23. The test of reasonableness is an objective one.

24. A failure to consult is not of itself a failure to make a reasonable adjustment (see **H M Prison Service & Johnson** [2007] IRLR 951, EAT).

25. It is not a reasonable adjustment to discount *entirely* disability related absences when considering levels of absence. Otherwise an employee could be absent for a wholly disproportionate and unmanageable length of time with an employer being in no position to take any management action in relation to that absence. An employer would have no control over its own standards with regard to any disabled individual (see for example **Bray –v- Camden London Borough** EAT 1162/01 and **Robertson –v- Quarriers** EAT 104674/10).

26. The correct approach to assessing reasonable adjustments is addressed in **Smith –v- Churchills Stairlifts plc** [2006] IRLR 41; **Environment Agency –v- Rowan** [2008] IRLR 20; and **Project Management Institute –v- Latif** [2007] IRLR 579.

27. In **Smith**, the comparative exercise required by s.6(1) of the DDA was considered by the Court of Appeal having regard to the speeches contained in the judgment of the House of Lords in **Archibald**. Maurice Kay LJ stated:

> ". . . Notwithstanding the differences of language, it would be inappropriate to discern a significant difference of approach in these speeches. . . it is apparent from each of the speeches in **Archibald** that the proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements".

28. The Court of Appeal in **Matuszowicz –V- Kingston Upon Hull City Council** [2009] IRLR 288 held that there may breaches of the duty to make reasonable adjustments "due to lack of diligence, or competence, or any reason other than conscious refusal".

29. With regard to knowledge the EAT in **Secretary of State for the Department of Work and Pensions v Alam** [2009] UKEAT 0242/09 held that the correct statutory construction of s 4A(3)(b) involved asking two questions: (1) Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is: 'no' then (2) Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is also 'no', there is no duty to make reasonable adjustments.

Facts and associated conclusions

30. The Claimant was first employed by the Respondent on 22 May 1997. After holding various roles he became Social Justice Coach in 2013. That role comprised helping customers find employment who were themselves victims of domestic violence and/or had drug and alcohol dependencies.

31. Up to 08 December 2014 the Claimant held a clean disciplinary record.

32. It is accepted by the Respondent that at the material times the Claimant was a disabled person pursuant to section 6 of the Equality Act 2010 with the condition of Ulcerative Colitis. It was also not in dispute the Respondent had knowledge of that condition.

33. The Claimant was referred to the Respondent's Occupational Health which provided a summary report dated 03 July 2003 (pages 70 to 71 of the bundle). It states: "The main adverse effects on day-to-day activities would be on mobility, and continence".

34. A second report was provided dated 19 January 2005 (pages 73 to 74 of the bundle) which states: "He has a long-term condition, which without medication would have a significant impact on continence. There is no indication of any significant mobility problem. He should have good access to toilet facilities at all times. No other adjustments are required".

35. On 08 December 2014 an incident occurred when the Claimant was assisting a long-standing customer to complete a job application using the Respondent's computer system.

36. It has not been disputed by the Respondent that the Claimant had a flare up of Ulcerative Colitis symptoms which caused the Claimant to soil himself.

37. The Claimant's manager, Ms Shelly Cryan, told the Claimant at the time that he should not have left his workstation with the smartcard left in his laptop. The Claimant did not explain to his manager what had occurred.

38. Ms Cryan made a file note that day which states: "During Kieron last interview today I noticed that he had left his customer alone at the desk. When I looked the customer was typing using the keyboard and computer. I asked the customer where Kieron was and he said that he had gone to the toilet. I stayed with the customer until Kieron returned. On his return I told Kieron that that should not happen. Kieron acknowledged this".

39. Ms Cryan discussed the matter with the Respondent's HR the following day, 09 December 2014, and a note of the conversation and advice given is at pages 135 to 136 of the bundle. The advice was to conduct a full investigation, that it may be appropriate to consider the matter as serious misconduct and/or gross misconduct and that it may be appropriate for another manager to investigate. A hyper-link to the Respondent's written guidance on 'How To: Investigate Disciplinary and Grievance Cases' was provided.

40. That day the Claimant was suspended from his normal duties as confirmed in a letter from Ms Cryan (page 89 of the bundle) and which invited the Claimant to an investigation interview into the incident where "a claimant was using your computer with your smartcard". The Claimant was informed that it was being investigated as gross misconduct.

41. Ms Cryan made a file note of her conversation with the Claimant on 09 December 2014, which records: "I told him that I saw Kieron's customer using Kieron's computer with Kieron's smartcard. Kieron said that he was just doing it as a favour to the customer. That he had worked here for 17 years and that he would get the sack because of this. Kieron said that he was being stitched up here".

42. The Claimant went to his GP on 12 December 2014, which is confirmed in a letter of the same date (page 102 of the bundle).

43. The investigation meeting took place on 15 December 2014 conducted by Ms Cryan at which the Claimant was accompanied by his trade union representative Mr Colin Pritchard. The notes are pages 81 to 86 of the bundle.

44. In her opening address Ms Cryan stated: "I witnessed that Kieron's Claimant was alone at the desk with the monitor and keyboard towards him, away from his usual position on the desk. I noticed that the Claimant was using the computer and was typing on the keyboard. I asked the Claimant where Kieron was and he said that Kieron had gone to the toilet. I waited for Kieron to return to his desk and made him aware this shouldn't happen. Kieron acknowledged this".

45. The notes record the following exchange:

    "SC [Ms Cryan]: Before I ask this question I want to make you aware that I have requested the CCTV footage of the date in question.
    CP [Mr Pritchard]: Who requested it?
    SC: I have.
    CP: Are you aware the rules regarding CCTV?
    SC: Yes, I have gone through the correct procedure for requesting it.
    CP: This is a disciplinary matter not Health and Safety, I am alarmed that this has been requested for a purpose it is not meant for.

46. The Claimant gave his account of the event: "Whilst I was with the customer I soiled my underwear as I have Ulcerative Colitis. I was distressed and embarrassed and I went to the toilet to clean myself up with my bathbag. I came back to my desk as if nothing had happened as I don't want it to affect my work. My desk is far away from the toilet".

47. The following exchanges were also recorded.

    "SC: Why didn't you take your smartcard with you?
    KO: I panicked.

SC: Did you give the customer permission to use your computer?
KO: No.
SC: When I called you into a private room to discuss the incident why didn't you explain what happened?
KO: I could hardly talk.
SC: You did talk initially.
KO: It was the pressure of being given 3 letters and I did not want to discuss it until I had spoken to my TU rep.
SC: At first you admitted you had allowed the customer to use your computer stating "I hold my hands up", you did not mention a health condition.
KO: No one asked.
SC: Why didn't you volunteer the information?
KO: You should have asked, isn't that the managers role? To look after their team?
SC: But why weren't you honest?
KO: The last thing I wanted to talk about is soiling myself. 3 meetings had been cancelled which caused more distress.
SC: The first meeting was scheduled for 9am on 15/12/14 which you cancelled so that you could talk to your union rep".

48. Also:
KO . . .I was distressed and embarrassed and I went to the toilet to clean myself up with my bathbag . . .
[later]
"KO: I take medication for colitis and depression and carry a bathroom kit with me.
SC: Did you take it with you on the day?
KO: No I rushed".

49. In the meeting the Claimant also gave the following answers:
"SC: How long were you away from your desk?
KO: 90 seconds.
SC: To get to the toilet and do what you needed to do?
KO: I was aware the Claimant was there so I got rid of my pants and carried on.
SC: Only 90 seconds?
KO: 90 seconds or a couple of minutes".

50. The Claimant's oral evidence gave a detailed description of how messy the situation was for him (see paragraph 5 of the Claimant's witness statement). It is a description that the Tribunal considers appears at odds with the timings and the content of this exchange.

51. The Claimant's answers regarding the bathbag appear inconsistent. The Claimant's oral evidence to the Tribunal was that his bathbag was in a cupboard close to the toilet and he used and returned it at the time of the incident.

52. Ms Cryan produced investigation report on the timeline of events (pages 112 to 114 of the bundle). These notes provide an additional description of events by Ms Cryan: "I noticed that the Claimant was using the computer and was typing

on the keyboard. I asked the Claimant where Kieron was and he said that he had gone to the toilet. I waited for Kieron to return and said to him that this shouldn't happen. Kieron acknowledged this by waving his hand and saying yeah. He did not appear to be concerned about the customer using a computer. Kieron was away for from his desk for 3 minutes (The timings were noted from the CCTV footage)"

53. Those notes also record the position relating to the CCTV recording of the office area: "CCTV footage was requested following advice from the Security Business Adviser who stated that we are obligated under the Data Protection Policy to ascertain if any further breach of data took place i.e. did the customer access any other system(s). However having viewed the footage I observed the following: Kieron's customer arrived at his desk at 10:06 am; at 10:15 am Kieron turned both the monitor and the keyboard around to the customer and allowed him to start typing. At 10:16 am Kieron took a drink from his cup he then left his desk briefly, the customer was still on the computer, he then returned to the desk with an LMU in his hand. He placed the LMU on the desk and left again. At no time did he appear distressed or in a hurry. Kieron returned to his desk at 10:19 am, the customer was still using the computer. Kieron appeared unconcerned about this when I spoke to him. On the day Kieron was behaving in his normal manner. He hadn't displayed any cause for concern. I do not feel that the CCTV supports Kieron's version of events as there appears to be no urgency in his movements, which actually appear to be casual, he did not take or bring back his 'bath bag' and he showed no distress".

54. By a letter dated 9 January 2015, the Claimant was informed by Mr Dipak Sharma, that he was investigating a number of incidents relating to the Claimant's role of Social Justice Work Coach whereby it is alleged that he had "supplied adviser flexibilities inappropriately i.e. Treat as Signed". It was confirmed that this was being investigated as minor misconduct.

55. By a letter dated 20 January 2015 from Ms Jyotika Patel, the Claimant was informed that he was required to attend a formal meeting under the Respondent's Disciplinary Procedure. It confirms: "The formal meeting will consider the allegation that on 8 December 2014 you left your computer with your smartcard still in it and the customer was seen using the computer in your absence and on a number of occasions you have also input "signing evidence" for customers who did not actually attend Bexleyheath JCP on the day in question and there is no supporting evidence to suggest there was any reason that the customers could not attend the office for their appointments"

56. The Claimant was informed that the process could result in his dismissal and he was given the right to be accompanied.

57. The disciplinary hearing took place on 2 February 2015 conducted by Ms Patel and the Claimant was represented by Mr Pritchard. The notes of that meeting are at pages 121 to 131 of the bundle.

58. The meeting notes record the following exchange:

"K: [the Claimant] there are 7 bullet points for mitigation and I hit 5 of them
J: [Ms Patel] I will take that into account but bearing in mind the CCTV does apparently show you letting the Claimant use a computer before you were ill.
C: [trade union representative] But he was monitoring it whilst he was there.
J: Yes been you're not allowed to let Claimant's use the computers.
K: Yes but the WADs don't always work and I didn't want to take ½ hour logging in.
J: What stopped you inputting it for him?
K: I did most of it.
J: Yes but while you were still there he was using it
K I'd like to see it myself. I can't believe I would do that. I wouldn't be that foolish".

59. In an e-mail by Ms Cryan dated 03 February 2015 to Ms Patel, the circumstances surrounding the CCTV evidence was set out: "There is no written communication from the Security Adviser about the viewing of the CCTV however Dipak Sharma (Deputy SEO) requested this by telephone from Chris Bonke. This request was made to establish the exact timings of when the customer was left alone with the computer and the smartcard so that we could then request an audit trail on the benefit system to ensure that the Health and Safety of both staff and the department were not compromised. Once the timings were viewed from the CCTV footage I telephoned the Security Advice and Support Centre to see if I could get the information needed. I dealt with Graham Richards. After the initial telephone conversation we then conversed via email. I do not have the electric versions of the emails but I do have the hard copies. Having completed the audit trail on all their major systems - CIS, LMS, JSA etc they show no access between the times given (10:06 am to 10:19 am) on 8th December 2014. Would you like me to copy these to you? Was it is established that no access been made to the benefit system no further checks were made on access".

60. By an email dated 04 February 2015, Ms Christine Watson, HR consultant for the Respondent, sent an email to Ms Patel regarding advice on penalty. That states: "Based on the information you gave me we discussed the line manager had noticed that the member of staff had left the customer unattended. The line manager conducted the investigation despite being the witness. They did not supply a witness statement as a member of staff admitted to leaving the smartcard unattended. You have reviewed the CCTV footage however we agreed this could not be used as evidence in a disciplinary case. We also discussed the mitigation that the member of staff has a medical condition which caused them to rush out of the office to use the facilities and their view that as a social justice advisor they were expected to be more supportive to the customer. You are content that the customer did not access any other screens than the application they completed. We discussed the potential risks with the dismissal outcome. The line manager's action or lack of action to address the security breach and then carry out an investigation team to add unnecessary risk to the process. We discussed the potential outcome is likely to be a final written warning however the final decision will be yours".

61. Ms Patel created a 'Decision Summary' document dated 16 February 2015, which is at pages 142 to 143 of the bundle. It sets out the background, findings, conclusions and confirms that the decision was for the Claimant to be given a "two-year final written warning".

62. That decision was confirmed in a letter to the Claimant dated 17 February 2015 which states: "In view of your acceptance you did leave your smartcard in the machine and allowed the customer to carry on using your machine to fill in an application form whilst you were absent from your desk I find the misconduct case substantiated and therefore issue with a two-year final written warning". The Claimant was given the right to appeal.

63. In the decision summary Ms Patel accepts the Claimant soiled himself and that "he was extremely embarrassed and in his haste to get to the toilet left his smartcard in the machine".

64. However, she also found: "Kieron has confirmed that he did allow the customer to use the official computer to complete the G4S application form. He was aware of the Standards of Behaviour, Electronic Media and Security Policy and had completed Responsible for Information e-learning training. Kieron's mitigation is that as a Social Justice Advisor they have the flexibility to support the customers in the best way. Kieron did not use the customer computers as due to them being installed a little while ago he had issues with the computers and some customers have lost data from a fully completed application. Kieron had been working with this customer for a while and had a great rapport with him generally and wanted to help him get the job. Due to the excitement of this he agreed to complete the application form on his computer and passed the keyboard for customer to complete the address however he had to urgently go to the toilet as he had soiled his pants and left the customer to complete the form. When he returned to his desk the customer was still completing the application form and Kieron took over the process."

65. In conclusion Ms Patel records: "Kieron accepted his mistake. He confirmed that there was no malicious intent in his actions. Security specialists confirmed that there was no access made to any of the major systems such as LMS, CAIS, Opstrat. The situation of the customer using Kieron's machine could have been stopped earlier before he got up to go to the toilet. It was agreed that as SJ adviser there was a bigger degree of flexibility that he could apply in helping his customers back to work. He has a known health condition. I feel the case is prejudiced due to the line manager being the only witness. Customer not interviewed and the investigation was done by line manager, who is the only witness, against the advice from CCAS. I have taken advice from CCAS and security."

66. With regard to the outcome Ms Patel states: "I have taken into account all the evidence, notes from the meeting with Kieron CCAS and security advice".

67. The Claimant appealed the decision, an appeal meeting was held, conducted by Ms Theresa Wooten and Mr Pritchard again represented the Claimant. The notes of the meeting are at pages 168 to 169 of the bundle. The Claimant

confirmed at the meeting that he considered the 2 year penalty to be too harsh and wanted it reduced to a year.

68. The following is recorded in the notes;

69. “T confirmed that K had admitted the offence in that he had left his card in his machine and allowed a customer to use his computer while he rushed to the toilet. That was dismissal under gross misconduct. K agreed but then Colin said that it was usual for offences to be reduced to one year with mitigating evidence which they felt had not fully been taken into account”.

70. The appeal outcome was provided to the Claimant in a letter dated 22 April 2015 and the appeal was not upheld. The letter records: “You accept that the breach of the Standards of Behaviour did happen but that the penalty was too harsh and did not take into account your mitigation. You suggest a 12 month Final Written Warning is more appropriate. In considering your appeal I took into account the mitigation you presented relating to your previous unblemished work record of 18 years and your underlying medical condition of Ulcerative Colitis. I also examined the evidence presented where you state that the investigatory process was flawed due to the misuse of CCTV evidence and your Line Managers part of this process. On examination of the decision-maker’s notes there is clear documented evidence that the mitigation you presented at our meeting has been accepted in full when making the original decision. This in turn led to her reducing the normal penalty for Gross Misconduct from dismissal to a 2 year written warning. While I accept final written warnings can be given for 12 months, it is correct in this case to apply the maximum extension which is a 24 Month Final Written Warning. Had you not provided such extensive mitigation a breach of this severity would of ordinarily lead to dismissal. I am of the opinion that this penalty is consistent, proportionate and in line with similar cases".

71. Ms Wotten set out the mitigation that she took into account, including the Claimant's medical condition.

72. The Tribunal has considered whether or not it is appropriate for it to go behind this final written warning when considering the subsequent events that lead to the Claimant’s dismissal. The Tribunal has referred to the cases of **Davies -v- Sandwell Metropolitan Borough Council** [2013] EWCA Civ 135 and **Bandara -v- British Broadcasting Corporation** UKEA/0335/15.

73. The Tribunal concludes that the final written warning was given in good faith by Ms Patel, as upheld by Ms Wooten. There was a genuine attempt to understand the whole circumstances of the event, take into account the Respondent’s Policies which reflect how seriously the Respondent takes computer usage that puts customer data at risk and balanced that with the mitigation provided.

74. The Tribunal also concludes that, on the face of it, there were grounds for imposing the sanction. The Claimant accepted the misconduct, that it was contrary to the Respondent’s policies and was usually considered to be gross

misconduct and dismissal. Hence the Claimant suggesting a lower sanction of a one year final written warning.

75. The Tribunal has carefully considered the circumstances and concludes that it was not manifestly inappropriate to issue the warning. The Claimant accepted allowing the customer to use the computer *before* the incident occurred was of itself was a breach of the Respondent's Polcies and a serious matter. That was the conclusion drawn by Ms Patel. The Claimant's mitigation was taken fully into account. The Tribunal concludes that there may have been a range of responses by employers who equally took computer usage and data security as seriously as the Respondent, but a written warning was certainly available to the Respondent. The Tribunal concludes that was not manifestly inappropriate.

76. The active period of the warning was the maximum available to the Respondent. The Claimant suggested a year was reasonable. In the circumstances the Tribunal also concludes that the period of the warning was not manifestly inappropriate. It is not a sanction where there is something about its imposition that once pointed out shows that it plainly ought not to have been imposed.

77. The Respondents Disciplinary Guidance "How to: Assess the level of misconduct and decide a disciplinary penalty" provides examples of misconduct, which states as one example "Deliberate sharing of smartcards, passwords or other access control devices that provides access to customer, employee or other sensitive information". The possible outcomes are "The normal penalty will be dismissal (with or without notice). If managers accept mitigation put forward by the employee this may mean it can be reduced to a final written warning. Final written warnings are normally given for a minimum of 12 months but exceptionally may be extended to a maximum of 24 months. Extensions may be appropriate where the employee would ordinarily have been dismissed, but there are extensive mitigating circumstances".

78. The Tribunal has also been referred to the Respondent's document "How-to: deal with breaches of information security". The document confirms: "Information security is a key priority for the Department and we have robust policies and procedures in place to ensure all staff know what they can and cannot do. We all have an obligation to protect data in accordance with the data protection act and DWP policy. Failure to comply is a very serious matter. You may have disciplinary action taken against you which can result in penalties up to dismissal."

79. The document states: "Every employee must: take time to read, understand and rigidly stick to the Department's policies and procedures on information security; protect personal or other sensitive information and make sure it is held securely; not use the Department information for any purpose other than that for which it is intended, irrespective of whether it is security marked or not, or of a sensitive nature; not disclose the Departments information to any person who does not have a legitimate business interest without authority; have a legitimate business reason authorisation for looking personal information on DWP systems; not contravene the rules for the official and personal use of the

Department's IT systems and; protect passwords and smartcards and keep them separate".

80. Leaving smartcards unattended is itemised as a specific breach of information security.

81. Under the heading "Level of misconduct" the document states: "The level of misconduct to apply for breaches of information security will depend on the full circumstances of the case. Where information has been put at risk, disciplinary action must still be considered even if the breach was a simple mistake or lack of judgement. This is due to potential consequences for the data owner and the Department's reputation. Minor misconduct action may be appropriate and proportionate where the following principles apply: the incident does not constitute a criminal act (breach of the Data Protection Act alone does not constitute a criminal act); the act is clearly a genuine error and completely accidental; there is no malicious or suspicious intent; there is no known harm or distress caused to any party; there has been no reputational damage; it is not a linking offence - the employee does not already have a live warning in place at the time this offence is identified that would warrant action under a high level of misconduct"

82. The document then provides an Information Security Scenario Matrix where under paragraph 6 "smartcards" it states a scenario of: "An employee continually puts customer or employee data information at risk by leaving their smartcard unattended in their PC whilst still logging on". This falls under the description of "serious misconduct", which is described as "Isolated incidents where an employee leaves their smartcard unattended in their PC are unlikely to attract disciplinary action. However, if this becomes a pattern of behaviour and the employee continues to do it, action should be taken under serious misconduct". With regard to possible outcomes it states "A final written warning would normally be appropriate . . . the manager may consider a first written warning if the employee presents some relevant mitigation".

83. The Respondent's Disciplinary Code was used. It was in relation to the Claimant allowing a customer to use the computer and leaving his smartcard in the machine. The Tribunal concludes that none of the examples in the various policies directly address the issue. It was reasonably a matter for Ms Patel and Ms Wooton to consider with the support of HR.

84. For example, leaving smartcards unattended is itemised as a specific breach of information security under the Information Security Policy; disciplinary action must still be considered even if the breach was a simple mistake or lack of judgement. The Information Security Guide gives a scenario of continually putting customer or employee data information at risk by leaving their smartcard unattended in their PC whilst still logging on, but does not address customer access to it as occurred in the Claimant's case.

85. The initial decision and on appeal was that the Claimant had allowed the customer to use the computer before he left his desk. When the smartcard was left in the computer the customer had unrestricted access to all the

Respondent's systems, which include the Customer Information, Labour Market, and Job Seekers Allowance Payment systems. Therefore, whether or not all the conduct under review can be described as 'deliberate' or not under the disciplinary guide (which formed some discussion in the Tribunal Hearing) it was not unreasonable or manifestly inappropriate to consider the matter under the disciplinary policy and give a sanction of a final written warning.

86. Indeed, the Claimant on appeal did not dispute the sanction being in accordance with the Disciplinary Policy or the nature of the sanction, just the active period.

87. As this was a matter that the Respondent could have applied a sanction of dismissal, a reduction to 24 months was within the scope of the Disciplinary Guide where there are extensive mitigating circumstances. It was reasonable for the Respondent to conclude in the Claimant's circumstances there were sufficient mitigating circumstances to apply a 24 month active period to the warning.

88. As stated by the Claimant's representative at the disciplinary hearing with regard to the final written warning: "Colin Pritchard added that Kieron is on a final warning regarding a smart card and there were mitigating circumstances around the incident. Kieron held his hands up to that and didn't attempt to wriggle out of it".

89. With regard to the CCTV recording, the Tribunal concludes that it was not obtained solely for the purposes of the disciplinary, but was to check whether the systems had been breached during the time the customer had access to the computer used by the Claimant.

90. Ms Cryan and Ms Patel viewed the CCTV, the written account of it by Ms Cryan was put to the Claimant in the disciplinary meeting, but the CCTV recording does not raise any element that was not considered generally as part of the disciplinary process. The Tribunal concludes that the details of the recording did not form any part of Ms Patel's decision, as confirmed in her 'decision summary'.

91. For example, the timing of the event was not questioned, although in the Tribunal's view it would have been legitimate to do so. The Claimant's timing of 90 seconds (at a stage when he had been warned that the Respondent had the CCTV recoding) and the reported CCTV timing of a *maximum* of three minutes that the Claimant was away from his desk to attend to himself in the toilet does not sit comfortably at all with the Claimant's account of the episode and the matter generally. The time for the Claimant to get to the toilet, clean himself and return to his desk, given the location of the toilet and the circumstances described by the Claimant in paragraph 5 of his witness statement, appears to the Tribunal to be an entirely obvious line of enquiry. However, no such assessment or conclusion of those matters were made by Ms Patel, which the Tribunal considers corroborates her note that the details of the recording did not form part of the decision.

92. The Tribunal concludes that the Respondent had taken all the Claimant's mitigation into account. The Claimant accepted in cross-examination that Ms Patel had taken mitigation into account. Indeed, Ms Patel was empathetic to the Claimant and was candid about how she viewed Ms Cryan's dealing with the process. The Claimant's long service was equally considered, as stated in terms in the appeal outcome letter.

93. Accordingly, the Tribunal concludes that the final written warning is to be considered as established background that should not be reopened.

94. With regard to the claim of discrimination arising from disability relating to the imposition of a final written warning, the Tribunal concludes that if the final written warning amounts to discrimination arising from disability it follows that the decision to dismiss must also be discrimination arising from disability save for any new justification arguments. As a consequence, the awarding of the final written warning could be in time such that the Tribunal has jurisdiction to consider it.

95. The Tribunal concludes that the final written warning was clearly unfavourable treatment. No comparator is needed.

96. The Tribunal has some difficulty in deciding whether it arose because of the Claimant's disability.

97. The Tribunal concludes that the Claimant had allowed the service user to use the computer in the first instance when the situation arose. Both the Claimant and his representative accepted as much in the investigation hearing. Without doubt this action was a serious breach of the Respondent's procedures. That part of the decision was not arising because of disability..

98. The Claimant argued the 'but for' principle with regard to the connection between the final warning and the dismissal. 'But for' the warning the Claimant would not have been dismissed. The same 'but for' approach might be applied to the breach of procedure circumstances. 'But for' the Claimant first breaching procedure and allowing the customer to use his computer, the remaining events would not have occurred.

99. However, the Tribunal concludes that a broad interpretation should be afforded to the statutory language and so long as part of the unfavourable treatment arose because of the disability then that is sufficient for the statutory prohibition to be engaged.

100. When considering whether the treatment was a proportionate means of achieving a legitimate aim the Tribunal has referred itself to the case of **Homer**, above.

101. The Tribunal concludes that the objective of protecting and securing a very significant amount of important personal data relating to private individuals who are outside the Respondent organisation, particularly in the Respondent's

capacity as a Government Department, is sufficiently important to justify limiting a fundamental right.

102. The measure of creating a disciplinary offence for material breaches by employees of that aim is rationally connected. That much is accepted by the Claimant.

103. With regard to whether the means chosen were no more than is necessary to accomplish the objective, the Tribunal concludes that the protection of data is of the highest importance to the Respondent.

104. It is also necessary to protect the aim by the implementation of policies creating disciplinary offences for any breaches. The Tribunal concludes that the policies themselves are without question no more than necessary. It follows the implementation of those policies to all employees is similarly necessary.

105. Therefore the Tribunal has to weigh these clear and highly important needs against the discriminatory effect of the requirement in the Claimant's circumstances.

106. In doing so the Tribunal has taken into account that not all the disciplinary matter arose from the Claimant's disability. The Respondent has Occupational Health Reports relating to the Claimant that gave no indication of any adjustment required to address the circumstances relating to the Claimant's condition and leaving his smartcard in the computer and, as found below, the Claimant did not indicate to the Respondent at any time that an adjustment/accommodation might be required relating to his condition and adhering to polices relating to smartcards.

107. The Tribunal has also considered that, after taking into account the Claimant's mitigating factors, the Respondent applied a sanction lower than the one it would typically apply in the circumstances. The Respondent followed the tenor of its disciplinary policy when commuting what would have been a dismissal offence to a final written warning for 24 months.

108. The Tribunal therefore concludes overall when balancing the real needs of the Respondent against the discriminatory effects of the treatment, that it was proportionate for the Respondent to apply the sanction to the Claimant.

109. The Claimant accepts that the reasonable adjustment claim is out of time and no argument is made that the Tribunal should exercise its discretion to extend time. It is sensibly argued that it may have an effect on proportionality considerations relating to discrimination arising from disability.

110. The provisions, criteria and practices relied upon by the Claimant are "(i) a requirement that staff remove their smartcard from their computer monitor when stepping away from the monitor, and/or (ii) the policy of disciplining employees for failure to remove their smartcard from their computer monitor".

111. The substantial disadvantage relied upon by the Claimant as set out in the Claimant's submissions is: "Both pcp's require that staff members remove their smartcards from their computer. In the Claimant's case he was unable to do so as a result of his panic and urgency to get the toilet, caused by his flare up. Non-disabled persons would not share this panic and urgency to get the toilet as non-disabled persons do not generally soil themselves".

112. It is not disputed by the Respondent that the two pcp's were applied in the Claimant's case.

113. The Tribunal accepts submissions by the Respondent that the Claimant accepted in evidence that removing the smartcard took less than a second, it is a momentary reaction that the Claimant had time to do before going to the toilet. In particular given the Claimant gave evidence that in his everyday life he puts himself in situations whereby he may have to make quick decisions about how best to deal with a flare up, such as currently working as a minibus driver and being out on a golf course for four hours.

114. Therefore the Tribunal concludes that the Claimant was not put at a substantial disadvantage compared to non-disabled persons.

115. However, the Tribunal recognises that this is a marginal decision and accepts that in moments of panic it may not be realistic, no matter how quick the task, to remove the smartcard, which would then place the Claimant at a disadvantage compared to non-disabled persons. But having carefully weighed the Claimant's evidence regarding the speed that the smartcard card can be removed and the manner in which he deals with other events and his life, including management through medication and diet, the Tribunal concludes on balance that there was no substantial disadvantage, substantial meaning more than minor or trivial.

116. However, more importantly, the Tribunal comfortably concludes that the Respondent did not have knowledge of the disadvantage argued and the reasonable adjustments argument fails on that point also.

117. The Respondent had sight of the Occupational Health reports referred to above. The last of which states: "There is no indication of any significant mobility problem. He should have good access to toilet facilities at all times. No other adjustments are required". The Claimant has not suggested to the Respondent at any time after the Occupational Health report that his circumstances had changed. The Claimant had not suggested at any time that there may be circumstances where he may have some difficulty in removing his smartcard. Indeed, it was the Claimant's oral evidence that he has not had a similar flare-up during his entire 18 years employment with the Respondent. The Tribunal therefore concludes that the Respondent did not have, nor reasonably ought to have had, knowledge of the substantial disadvantage now argued by the Claimant.

118. The Claimant's submissions suggest four potential reasonable adjustments: (i) removing the requirement that the Claimant remove the smartcard when

experiencing a flare-up; (ii) to disapply the disciplinary policy in relation to incidents occurring as a result of a flare-up; (iii) providing the Claimant with a lanyard to put around his neck with his smartcard attached on elastic to ensure that he could not leave his desk without his smartcard; (iv) requesting that the colleague sitting next to the Claimant remove his smartcard in the event he rushes away from his desk to the toilet.

119. With regard to (i), it is clearly a crucial and integral function for the Respondent to maintain the integrity and security of data under its control and removing smartcards from unoccupied computers is fundamental to that process. The Tribunal concludes that to disapply the requirement to remove a smartcard in any individual case would not be a reasonable adjustment.

120. With regard to (ii), the same principles apply as with (i) above, this being a case in point whereby the Claimant allowed computer access to a customer before the flare-up in breach of policies, the disapplication of the disciplinary policy in times of flare-up in the Tribunal's conclusion is neither workable nor objectively reasonable.

121. With regards to (iii), this suggested adjustment, unlike the others was not pleaded by the Claimant.

122. As detailed above with regard to the substantial disadvantage, it only takes a very short time for the Claimant to remove the smartcard. The Tribunal concludes that having a lanyard around his neck with the smartcard attached to elastic to ensure that the Claimant could not leave his desk without the smartcard would not reduce the sense of urgency experienced by the Claimant.

123. The most that could be achieved by the lanyard would be to remind the Claimant he had not removed his smartcard in those circumstances where the flare-up causes him to forget. That therefore could amount to a reasonable adjustment as it may possibly avoid the detriment. However, the Tribunal confirms its decision with regard to knowledge, the Claimant has not ever requested a lanyard because of any difficult he had experienced or considered he was likely to experience in light of his condition in the simple operation of removing the smart card. The Respondent did not and ought not reasonably to know removing the smartcard was any difficulty.

124. With regard to (iv), it could never be guaranteed that at any particular time the Claimant was sitting next to the same colleague or that the colleague would be around at all times, particularly when the Claimant may have a flare-up. There may also be resulting disciplinary matters arising for a colleague who fails to remove the smartcard in the circumstances of a flare-up. Accordingly the Tribunal concludes that this adjustment a is not practicable or workable and therefore would not be objectively reasonable to implement.

125. Therefore, the Tribunal concludes that the Respondent did not fail in its duty to make a reasonable adjustment and the decision on discrimination arising from disability does not need to be revisited.

126. With regard to the unfair dismissal claim, by way of a summary overview, on 03 July 2015 the Claimant was invited to an investigation meeting regarding alleged standards of behaviour and an alleged security breach whilst he was on secondment as the London Borough of Bexley.

127. An investigation meeting took place on 31 July 2015 with Mr Steve Scott, Work Services Manager, and the Claimant was represented again by Mr Prichard (see pages 259 to 265).

128. After the meeting Mr Scott e-mailed Ms Jacqueline Mead, Client Adviser Team Leader, the London Borough of Bexley to confirm further information (see page 266) and an email was sent in reply dated 5 August 2015 (see page 269).

129. Mr Scott sought advice from HR (see page 275).

130. By a letter dated 14 September 2015 the claimant was invited to a disciplinary hearing to consider two allegations: "(1) That on several occasions you misused work IT and telephony when you conducted private business during work time. Specifically, on the 30.06.2015 you used the Departments IT during work hours to access a number of websites, including National rail and holiday homes, to conduct personal business and 01.07.2015 when you used the departments IT and telephony during working hours to attend to personal financial matters via the co-op banking site, you took several personal calls on your mobile phone, arranged a golf function, accessed National rail, National Coach, train and AA websites. Furthermore this behaviour generated a complaint from the London Borough of Bexley resulting in your secondment with them being terminated, thus bringing reputation of DWP into disrepute. (2) on 03.07.2015 it was discovered that you failed to secure the personal details of over 3000 clients. Furthermore, this behaviour generated a complaint from the London Borough of Bexley resulting in your secondment with them being terminated, thus bringing reputation of DWP into disrepute"

131. The letter states that as the Claimant was presently under a final written warning these matters would be treated as gross misconduct and may result in dismissal. The Claimant was given the right to be accompanied.

132. By an email dated 16 September 2015 the Claimant made a complaint against Ms Mead and this was addressed by letter dated 1 October 2015 from Ms Beckett, Head of Economic Development And Skills for the London Borough of Bexley. The complaints are were not upheld.

133. The disciplinary meeting took place on 6 October 2015 conducted by Mr Richard Hind and the Claimant was accompanied by Mr Prichard. The notes of the meeting are at pages 308 to 316 of the bundle.

134. Mr Hind took advice from the Respondent's HR (see pages 331 to 332) and a letter was provided to the Claimant dated 21 October 2015 confirming that his decision to dismiss the Claimant from employment (see pages 341 to 242).

135. The Claimant appealed against that decision in a letter from solicitors dated 3 November 2015 (pages 357 to 362 of the bundle).

136. An appeal meeting took place on 18 November 2015 conducted by Mr Brian Menzies, again with Mr Prichard accompanying the Claimant.

137. By a letter dated 24 November 2015 the Claimant submitted an additional statement in support of his appeal. An appeal outcome was provided to the Claimant in a letter dated 7 December 2015 (pages 374 to 375 of the bundle) which upheld the decision to dismiss.

138. The Tribunal concludes the Respondent genuinely believed in the Claimant's conduct. There was no suggestion that Mr Hind or Mr Menzies had any ulterior motive.

139. The Tribunal further concludes that the procedure fell within the range of reasonable responses.

140. With regard to the procedure generally, the Claimant was given notice of the allegations; attended an investigation hearing; invited to a disciplinary hearing, provided in advance with all the relevant documentation; given the outcome in writing, given a right of appeal, appealed, attended at an appeal hearing and provided with the outcome in writing. The Claimant was given the right to be accompanied throughout and notes were taken of all meetings. The Claimant had a full opportunity to participate in the process.

141. A number of specific matters were argued by the Claimant.

142. One issue is whether Ms Mead instructed those employees who submitted e-mails reporting the Claimant's internet usage during work times, to monitor the Claimant. The Tribunal concludes that this was not the case. The Tribunal finds that Ms Mead had in fact been approached by the employees who reported the matter to her. She had not witnessed the events and after consultation with Mr Sharma asked those employees to put any complaint they had in writing.

143. Mr Hind did consider the possibility that the Claimant had been set up, but reached a conclusion that the complaints were from disaffected colleagues. That conclusion was within the range of reasonable responses.

144. The Claimant argued that the Respondent should have allowed the Claimant to cross-examine the e-mail senders and/or investigated their reports further. The Tribunal concludes that it was objectively reasonable for the Respondent not to take those issues further as the employees were with a client organisation and the Claimant had no legal or procedural right to cross-examine witnesses.

145. The Claimant argued that the Respondent should have investigated his internet usage. The Tribunal concludes that there had been a request for that information, but it was declined by the Respondent's Internal Investigations Policy and Professional Standards team on the basis that there was insufficient

grounds to grant authorisation for the reasons set out in an e-mail dated 20 August 2015 (page 291 of the bundle). It was reasonable not to pursue the matter further.

146. The Claimant argued that the Respondent used the incorrect Policy. The Outward Secondment Agreement entered into by the Claimant has a section entitled “Conditions of Service” which states at clause 6.1: “The DWP will recognise that the Secondee is governed by the Hosts terms and conditions of service and by the Hosts regulations (except where specifically set out in this Agreement) in the day-to-day execution of their duties. The rules on conduct will be made available to the Secondee by his/her host line manager on taking post".

147. Clause 6.2 provides: "Clause 6.1 will not apply where the DWP's rules contradict the above-mentioned terms and conditions and regulations. In this instance the Host will recognise that the DWP's rules will apply".

148. It was argued by the Respondent that if its rules contradict those of LBB then the Respondent’s prevail and if they are the same the Respondent’s rules apply in any event. This raised the question of the point of clause 6.1. One answer is that this clause and the agreement generally is not just dealing with disciplinary matters but covers all terms and conditions. Therefore, it may have effect where the DWP rules are silent but the matter is addressed in the LBB, terms and conditions, in which case the LBB terms prevail.

149. The Tribunal concludes that the Respondent was not using the incorrect policy. Further, this matter was not raised by the Claimant or his trade union representative at the time, and nor was it a ground of appeal.

150. The Tribunal has carefully considered all the procedural matters raised and concludes when looking at all the circumstances that the disciplinary process as a whole fell within the range of reasonable responses.

151. The Tribunal concludes that on the evidence reasonably before it, the Respondent held a reasonable belief in the Claimant’s conduct.

152. The Claimant disputed the allegations against him. He argued that he had conducted personal business on the internet during his break and not during work time and the banking activity conducted in work time was urgent and took no longer than 20 minutes. The Claimant denied his internet use was for the two and half hours as alleged.

153. The Tribunal concludes that given the clear dispute of fact, Mr Hind was required to weigh the evidence and make his findings on the balance of probability.

154. Mr Hind had the email accounts from the London Borough of Bexley members of staff which substantially contradicted the Claimant's account. Mr Hind considered the Claimant’s account was not credible. The Tribunal notes that in cross-examination the Claimant's evidence with regard to the golf match

internet activity was inconsistent with the internet travel sites he had been researching and the dates for which he was making plans.

155. The Claimant had made no effort to obtain consent from his line manager, either before or after the event, in respect of his banking crisis.

156. The Claimant knew that whatever policy was adopted he could not use the internet for personal use outside breaks and also that spending three hours on the internet would amount to misuse.

157. The Claimant also denied that he failed to secure his pedestal and laptop as alleged and argued that the London Borough of Bexley staff had gained unauthorised access.

158. The Tribunal concludes that it was objectively reasonable for Mr Hind to reject that explanation having regard to the email from Ms Jacqueline Bennett to Mr Sharma dated 2 July 2015 that sets out the nature and extent of the security breach (page 227 of the bundle) and the unlikelihood in the circumstances of a member of London Borough of Bexley staff fabricating a security breach against the Claimant, particularly as the Claimant was on secondment. This conclusion is also particularly available on appeal where that matter was given specific consideration by Mr Menzies: "From reviewing the case file and correspondence from the London Borough of Bexley I am satisfied that periodic sweeps of public areas are completed to ensure staff are compliant with data security standards. I am satisfied that the decision-maker made the right decision when determining you did fail to secure the personal details of 3000+ claimant's. I cannot find any evidence to suggest that timing of the sweep was suspect or that any evidence exists suggested anyone was trying to 'catch you out' during this process".

159. The Tribunal concludes that it was objectively reasonable for Mr Hind to conclude that the allegations had been made out and that the reputation of the DWP had been brought into disrepute due to the London Borough of Bexley terminating the secondment. The Tribunal also concludes that upholding the decision on appeal was reasonably open to Mr Menzies.

160. With regard to sanction, the Tribunal concludes that it clearly was within the range of reasonable responses for the Respondent to dismiss the Claimant. He was on a final written warning. Had been found, reasonably, to have committed the new misconduct issues. Options were considered by the Respondent, particularly given the Claimant's length of service, but it is difficult to argue that dismissal was not an option reasonably available to the Respondent. The Tribunal concludes that it was and that the dismissal overall was fair, having regard to the size and administrative resources of the Respondent, equity and the substantial merits of the case.

161. With regard to the remaining disability discrimination issues relating to the Claimant's dismissal, there is no complaint that derives from the circumstances of the second disciplinary matter of itself. The arguments are predicated on the award of the final written warning being an act of discrimination and it following

that the Claimant's dismissal was similarly tainted. The Claimant's submissions confirm that the argument with regard to dismissal in the list of issues is a claim made under section 15 of the Equal Rights Act 2010.

162. As the claims of discrimination relating to the final written warning are unsuccessful, the remaining claims relating to dismissal fall away and are too unsuccessful.

Employment Judge Freer
Date: 24 May 2017