



EMPLOYMENT TRIBUNALS

Claimant

Mr C Kelly

v

Respondent

Sainsbury's Supermarkets Ltd

Heard at: Norwich (by CVP)

On: 17, 18, 19, 20 and 21 January 2022
14 February 2022 (In chambers – no parties present)

Before: Employment Judge M Warren

Members: Ms AE Brown and Mr S Holford

Appearances

For the Claimant: Mr L Varnam, Counsel.

For the Respondent: Ms G Crew, Counsel.

RESERVED JUDGMENT

1. The Claimant's claim of wrongful dismissal fails and is dismissed.
2. The Claimant's claims of unfair dismissal and disability discrimination succeed.
3. The remedy to which the Claimant is entitled shall be determined at a remedy hearing by CVP on **20 May 2022**. Case management orders in respect of the remedy hearing appear in a separate order of today's date.

REASONS

Background

1. Mr Kelly's employment with the respondent began on 27 March 2000 and ended on 31 July 2020. After early conciliation between 12 October and 26 November 2020, he issued these proceedings claiming unfair dismissal, wrongful dismissal and disability discrimination on 21 December 2020.

2. The matter came before Employment Judge Sharkett for case management at a preliminary hearing on 21 July 2021. At that hearing, the respondent conceded that Mr Kelley was disabled. EJ Sharkett identified the issues (see below), made case management orders and listed the case for a three day hearing by CVP commencing 19 January 2022. As a result of correspondence received from the parties, 17 and 18 January 2022 were added to the listing.
3. We commenced the hearing on the morning of Monday 17 January 2022 and adjourned to do our preliminary reading. I had a medical appointment in the afternoon but no time was lost and we commenced hearing the evidence on the morning of Tuesday 18 January 2022.
4. We concluded hearing oral submissions from the representatives on the morning of day five, 21 January 2022 and convened in chambers to conclude our discussions on Monday 14 February 2022.

The Evidence

5. We had before us a witness statement from Mr Kelly and for the respondent, we had witness statements from the investigating officer Mr Hunter, from the disciplinary officer Mr Speke and from the appeal officer Ms Richardson.
6. We were provided with a properly paginated bundle of documents in pdf format running to page number 410.
7. At the outset of the hearing, we read the witness statements and read or looked at, in our discretion, the documents referred to in the witness statements.
8. We heard oral evidence from each of the witnesses except for Mr Hunter. We were asked to place such weight on the witness statement evidence of Mr Hunter as we considered appropriate, having regard to the fact that he was not here to have his evidence tested under oath, which we did.
9. We had a chronology and a cast list provided by Ms Crew, for which we were grateful.

The Issues

10. The issues in this case were identified by Employment Judge Sharkett at a preliminary hearing on 21 July 2021, set out in a hearing summary sent to the parties on 14 August 2021 as follows:

Unfair dismissal

- 4.1 What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (“ERA”)? The respondent asserts that it was a reason relating to the claimant’s conduct.

- 4.2 If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called ‘band of reasonable responses’?

Remedy for unfair dismissal

- 4.3 If the claimant was unfairly dismissed and the remedy is compensation:
- 4.8.1 if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; [W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604];
 - 4.8.2 would it be just and equitable to reduce the amount of the claimant’s basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?
 - 4.8.3 did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)

EQA, section 15: discrimination arising from disability

- 4.4 Did the following thing(s) arise in consequence of the claimant’s disability:
- 4.20.1 An increased propensity to act in an inappropriate manner and make inappropriate comments to others.
- 4.5 Did the respondent treat the claimant unfavourably as follows:
- 4.21.1 By subjecting him to disciplinary proceedings and dismissing him without having regard to his disability and the impact that may have had on the alleged acts?
- 4.6 Did the respondent treat the claimant unfavourably in any of those ways Did the respondent discipline and dismiss the claimant because of the behaviour/conduct that arose from his disability.
- 4.7 If so, has the respondent shown that the unfavourable treatment, in dismissing the claimant was a proportionate means of achieving a legitimate aim? The respondent relies on the following as its legitimate aim(s):
- 4.23.1 RESPONDENT TO CONFIRM?
- 4.8 Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

Breach of contract

- 4.9 It is not in dispute that the claimant’s contractual entitlement was to 12 weeks’ notice.
- 4.10 Did the claimant fundamentally breach the contract of employment by an act of so-called gross misconduct? N.B. This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the gross misconduct; if so, did the respondent affirm the contract of employment prior to dismissal?

Remedy

- 4.11 If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.
- 4.59.1 if it is possible that the claimant would still have been dismissed at some relevant stage even if there had been no discrimination, what reduction, if any, should be made to any award as a result?
- 4.59.2 did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any [compensatory] award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 (“section 207A”)?
11. At the outset of this hearing I clarified with Ms Crew that the legitimate aim relied upon in respect of the section 15 discrimination arising from disability claim is the health and safety of employees and the duty to provide a safe workplace free from harassment.

The Law

Unfair Dismissal

12. Section 94 of the Employment Rights Act 1996 contains the right not to be unfairly dismissed. Section 98 at subsections (1) and (2) set out five potentially fair reasons for dismissal, one of which at subsection (2)(b) is the conduct of the employee. Section 98(4) then sets out the test of fairness to be applied if the employer is able to show that the reason for dismissal was one of those potentially fair reasons. The test of fairness reads:

“Where the employer has fulfilled the requirement of subsection (1) the determination of the question whether the dismissal was 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.”

13. We have guidance from the appeal courts on how to apply that test where the grounds for dismissal relied upon by the employer is misconduct. The first is the test set out in the case of British Home Stores v Burchell [1980] ICR 303. The Tribunal must be satisfied that the employer holds a genuine belief, based upon reasonable grounds and reached after a reasonable investigation. It is for the employer to show the genuine belief, the burden

of proof in respect of the reasonable grounds and the investigation is neutral.

14. If the employer is able to satisfy that test, the Employment Tribunal must go on to apply the test set out in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439. The function of the Tribunal is to determine whether in the particular circumstances a decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If a dismissal falls within the band the dismissal is fair, if the dismissal falls outside the band it is unfair. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.
15. The band of reasonable responses test also applies to the question of whether or not the employer's investigation into the alleged misconduct was reasonable in all the circumstances. See Sainsbury v Hitt [2003] IRLR 23.
16. The investigation should be into what the employee wishes to say in mitigation as well as in defence or explanation of the alleged misconduct.
17. Mitigation must be actively considered by the decision maker.
18. We should look at the overall fairness of the process together with the reason for dismissal. It might well be that despite some procedural imperfections, the employer acted reasonably in treating the misconduct as sufficient reason for dismissal, see Taylor v OCS [2006] IRLR 613.
19. In this case, the Respondents say that Mr Kelly was guilty of gross misconduct justifying dismissal without prior warning or notice. The test for gross misconduct, or repudiation, is that the conduct must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in its employment, see Neary v Dean of Westminster Special Commissions [1999] IRLR 288.
20. More serious allegations, which might have more serious consequences if upheld, call for a more thorough an investigation. The ACAS 2014 Guide to Discipline and Grievances at Work, (not the code of practice) advises as such and the EAT confirmed as such in A v B [2003] IRLR 405.
21. Section 207(2) of the Trade Union & Labour Relations Act 1992 provides that any Code of Practice produced by ACAS under that Act which appears to an Employment Tribunal to be relevant shall be admissible in evidence and shall be taken into account.
22. One such code of practice is the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015) which includes the following in respect of disciplinary proceedings relating to misconduct:

...

Inform the employee of the problem

9.

*If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. **This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.** [emphasis added]*

...

Decide on appropriate action

...

19.

Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning.

20.

If an employee's first misconduct or unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning. This might occur where the employee's actions have had, or are liable to have, a serious or harmful impact on the organisation.

23.

Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence. But a fair disciplinary process should always be followed, before dismissing for gross misconduct.

23. Usually then, in accordance with the ACAS Code, one would expect, except in a case of gross misconduct, to see an employee receive a warning that their conduct, if it continues, might result in dismissal. Such a warning would normally be expected to last for a set period of time, within which a repeat of such conduct would likely result in dismissal. That is not to say that an employer should ignore a warning in respect of which the set period of time has expired; the earlier conduct the subject of the warning may still be relevant to the ultimate decision to dismiss, see Mummery LJ in Airbus UK Limited v Webb [2008] ICR 561, CA. What would be wrong, is to use an expired warning as a trigger for dismissal.
24. As paragraph 9 of the ACAS Code makes clear, it is important for an employee to understand the charges he or she faces. As Pill LJ said, (obiter) in Strouthos v London Underground Limited [2004] EWCA Civ 402 at paragraph 41:

“...it does appear to me quite basic that care must be taken with the framing of a disciplinary charge, and the circumstances in which it is permissible to go beyond that charge in a decision to take disciplinary action are very limited. There may, of course, be provision, as there is in other Tribunals, both formal and informal, to permit amendment of a charge, provided the principles in the cases are respected. Where care has clearly been taken to frame a charge formally and put it formally to an employee, in my judgment, the normal result must be that it is only matters charged which can form

the basis for a dismissal. That is something which may have come to the notice of the Disciplinary Panel as shown by their declining to make the finding of fact upon which the Tribunal subsequently permitted reliance to be placed by the employers.”

Disability Related Discrimination

25. Disability is a protected characteristic pursuant to s.4 of the Equality Act 2010.
26. Section 39(2)(c) and (d) proscribes discrimination by an employer by dismissing an employee.
27. Disability Related discrimination is defined at s.15 as follows:
 - (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.*
28. There are 2 separate causative steps: firstly, the disability has the consequence of causing something and secondly, the treatment complained of as unfavourable must be because of that particular something, (Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN).
29. There is no requirement that the employer was aware that the disability caused the particular something, City of York Council v Grosset [2018] EWCA Civ 1105 although, as the Court of Appeal observed in that case, if the employer knows of the disability, it would be, “wise to look into the matter more carefully before taking the unfavourable treatment”.
30. Simler P, (as she then was) reviewed the authorities and gave helpful guidance on the correct approach to s15 in Pnaiser v NHS England [2016] IRLR 170 which may be summarised as follows:
 - 30.1 The tribunal should first identify whether the claimant was treated unfavourably and if so, by whom.
 - 30.2 Secondly, the tribunal should determine what caused the treatment, focussing on the reason in the mind of the alleged discriminator, possibly requiring consideration of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive is irrelevant.
 - 30.3 Thirdly, the tribunal must then determine whether the reason for the unfavourable treatment was the, “something arising” in

consequence of the claimant's disability. There could be a range of causal links. The question of causation is an objective test and does not entail consideration of the thought processes of the alleged discriminator.

31. If there has been such treatment, we should then go on to ask, as set out at s.15(1)(b), whether the unfavourable treatment can be justified. This requires us to determine:
 - 31.1 Whether there was a legitimate aim, unrelated to discrimination;
 - 31.2 Whether the treatment was capable of achieving that aim, and
 - 31.3 Whether the treatment was a proportionate means of achieving that aim, having regard to the relevant facts and taking into account the possibility of other means of achieving that aim.
32. The test of whether there is a proportionate means of achieving a legitimate aim, (often referred to as the justification test) mirrors similar provisions in other strands of discrimination, such as in respect of indirect discrimination under s19 of the Equality Act, the origins of which lie in European Law.
33. There is guidance in the Equality and Human Rights Commission's Code of Practice on Employment, which reflects case law on objective justification in other strands of discrimination and which can be relied on in the context of disability related discrimination.
34. Thus, in Hensam v Ministry of Defence UKEAT/10067/14/DM the EAT applied the justification test as described in Hardys & Hansons Plc v Lax [2005] EWCA Civ 846. The test is objective. In assessing proportionality, the tribunal uses its own judgment, which must be based on a fair and detailed analysis of the working practices and business considerations involved, particularly the business needs of the employer. It is not a question of whether the view taken by the employer was one a reasonable employer would have taken. The obligation is on the employer to show that the treatment complained of is a proportionate means of achieving a legitimate aim. The employer must establish that it was pursuing a legitimate aim and that the measures it was taking were appropriate and legitimate. To demonstrate proportionality, the employer is not required to show that there was no alternative course of action, but that the measures taken were reasonably necessary.
35. The tribunal has to objectively balance the discriminatory effect of the treatment on the individual, (in cases of indirect discrimination, that would have been in relation to the disadvantaged group) and the reasonable needs of the employer.
36. The tribunal must weigh out a quantitative and qualitative assessment of the discriminatory effect of the treatment, (University of Manchester v Jones [1993] ICR 474).

37. In respect of the burden of proof, s.136 reads as follows:
- “(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.”*
38. In the context of section 15, this means that the claimant will have to show:
- 38.1 That she was disabled at the relevant time;
- 38.2 That she had been subjected to unfavourable treatment;
- 38.3 A link between the unfavourable treatment and the, “something”, and
- 38.4 Evidence from which the tribunal could properly conclude that the, “something” was an effective cause of the unfavourable treatment.
39. If the claimant proves facts from which the tribunal could conclude that there was section 15 discrimination in this way, the burden of proof shifts to the respondent to prove a non-discriminatory explanation, or justification.

Findings of Fact

40. The page numbering that we use below are references to the electronic numbers taken from the PDF copy of the bundle, *not* the paper numbering.
41. The respondent is a national supermarket chain with many thousands of employees and significant resources at its disposal.
42. The respondent’s Disciplinary and Appeals Policy is in the bundle beginning at page 403:
- 42.1 It identifies discrimination and harassment of colleagues or customers as an example of gross misconduct. The policy contains provision for suspension, investigation, disciplinary hearing and appeal. It states that an employee will receive a letter inviting them to an investigatory meeting, which will give details of the allegations/situation that has led to the investigation. It states that after the investigation, if there is to be further action, the letter informing the employee of this will contain sufficient information about alleged misconduct and its possible consequences to enable the employee to prepare an answer to the case at the disciplinary hearing.

- 42.2 In respect of the required letter inviting an employee to a disciplinary meeting, the policy states that the employee will be provided within that letter, all relevant documentation. The employee is encouraged to read such documentation ahead of the meeting, so as to understand the evidence that is to be looked at.
- 42.3 In respect of warnings, the policy states that:
- “Once a warning level is no longer active, it is disregarded for any future disciplinary purposes, although in exceptional circumstances it can be referred to, to establish prior knowledge of an act being contrary to the rules.”
- 42.4 In respect of appeal hearings, the policy states that the manager hearing the appeal can either uphold or overturn the original decision and either decide that no warning is required or determine that a different level of disciplinary outcome should be given.
43. The respondent has a, “Fair Treatment” Policy which begins at page 412. This policy explains that an individual can decide what behaviour is acceptable to them, but that what one person accepts, may not be acceptable to another and may be regarded as harassment. An unsurprising definition of sexual harassment is provided which includes: written or verbal comments of a sexual nature, such as remarks about appearance; questions about colleagues sex lives or offensive jokes; emails with content of a sexual nature, and unwanted physical contact and touching.
44. Mr Kelly’s employment with the respondent as a trainee manager began on 27 March 2000. He was promoted to duty manager on 17 March 2002 and appeared to have good prospects with the respondent.
45. Unfortunately in May 2004, Mr Kelly was involved in a serious road traffic accident. He was in an induced coma for about a month and remained in hospital for a number of months thereafter.
46. Upon his return to work, Mr Kelly’s career appeared to stall and he did not make the progress that had been expected. He was unable to continue with his training as a manager. We have seen from the minutes of a meeting in November 2008, that there were concerns about his progress and his performance, identified by Mr Kelly as related to issues with regard to his memory after his road traffic accident. At the time he agreed to a referral to Occupational Health. We do not know the outcome of that. If there was a report, we have not been provided with a copy.
47. On 27 November 2010, Mr Kelly was issued with a written warning because he had said to a colleague, “*I have to insult you now you are leaving*” and then called her, “*a Whore*”. The written warning is at page 60. The minutes of the disciplinary hearing that led to the warning are at page 68. From those minutes we can see that there were in fact

three incidents of inappropriate conduct, including using the words “Bitch” and “Whore”, (page 64). Mr Kelly said during the disciplinary hearing that since his road traffic accident, his behaviour had changed. He was apologetic. He recognised that his conduct had been unacceptable and assured the respondent that he would change.

48. On 3 December 2010, Mr Kelly applied for assistance from Jobcentre Plus which enabled a referral to be made for specialist psychiatric advice, (page 69).

49. A report was provided by a chartered occupational psychologist, Mrs Hunting in November 2011, (page 77) This was provided at the request of the respondent, so that they were better able to understand Mr Kelly’s work place difficulties. Her report explains that Mr Kelly had been on the management training programme for over 3 years, whereas most colleagues would complete it in 3 months. About his behaviour and mood, Mrs Hunting noted:

“On occasions Mr Kelly’s employers have been concerned over his behaviour being inappropriate in the work place. Some examples include outbursts, use of swearing and lack of insight to what is acceptable and what is not. These behaviours have only been observed since Mr Kelly’s RTA. Mr Kelly has expressed regret over these behaviours.”

50. The report states that a full neuro-cognitive assessment had been carried out in April 2011. In respect of cognitive ability, the report stated that Mr Kelly had significant limitations in terms of cognitive functioning, including aspects of his working memory. It also said that his visual memory ability was much better than his auditory memory ability, which was described as important information to consider when planning support needs in the work place. He was said to experience significant difficulties in processing new information and that he would require longer than his peers to learn new information, particularly when given too much information at one time.

51. Under a heading, “Cognitive Ability”, subheading “Behaviours” the report stated:

“A brain injury carries hidden difficulties often with some emotional and behavioural consequences. Some of Mr Kelly’s behaviours in his work place (as reported earlier) may be partially accounted for as a consequence of a past head injury and associated hidden difficulties. For Mr Kelly, a hidden and cognitive disability can make it difficult for him, and indeed his colleagues to fully comprehend. Behaviour changes and modifications can be developed with counselling support (talking therapies) and helpful strategies acquired through the provision of cognitive behavioural education.”

52. We make the observation that there is letter from Mrs Hunting copied into the bundle at page 81 which is undated. It appears after the above mentioned report, suggesting it is later in date order. However, that seems unlikely as she recommends a cognitive assessment be carried out by a

clinical neuro psychologist, which as we have seen from the report, had by then been carried out. Similarly, there is a further letter from Mrs Hunting at page 87, which the index suggests is dated 28 September 2012, but we see no date on the letter and it too refers to a need for a report on current cognitive difficulties, which would seem to suggest it pre-dates the above quoted report.

53. In December 2015, Mr Kelly was spoken to in an informal conversation about the way that he had spoken to a female colleague, referring to her as a, “Yummy Mummy” and asking her for her telephone number. He was warned to be more conscious about what he was saying and how comments can be seen as inappropriate. He was told to, “Know your audience”. He was invited to review the respondent’s policies and familiarise himself with the concept of harassment. He was given time to do that there and then. Mr Kelly is recorded as having expressed annoyance with himself and saying that he had not meant anything by the comments (page 89).
54. On 17 April 2020, the respondent received a complaint about Mr Kelly’s conduct from a woman we shall refer to as SB, (page 93). The following are excerpts from that email:

“My first ever encounter with Chris was towards the end of December 2017 ... soon after he was addressing me by misogynistic names such as “Whore” and “Bitch” completely unprovoked.

A couple of days later I was asked to go on fresh ... I was condensing down cardboard from the yoghurts I had replenished and I felt him grope my backside ...

On 9/4/20 at around 15.00 pm I was in the general office printing tickets for the next day ... I said I was relieved how I didn’t book to go away this year given the current circumstances with Covid 19 and Chris interrupted and said I was a Bitch for reminding him that he’s not going on any of the holidays he planned ... and how he was disappointed because he was looking forward to giving his wife “multies” ... in between paper changes he came over twice and rubbed my shoulders.

I have confided in Jade Mariah ... she is also going to make a statement that she has also experienced similar issues with the name calling and touching and furthermore has sent her pornographic content over Facebook messenger ... I have also spoken to another young female called Charlie ... I will attach screenshots of what she had to say.”

55. As a preliminary overview on what happens next, events unfold in two stages. Firstly, the local store manager Mr T Rawlinson, dealt with the issue. He interviewed a number of people. He decided no further action should be taken. SB appealed that outcome. Her appeal was upheld. The complaint was re-investigated by a store manager from elsewhere, Mr Hunter. He conducted a series of interviews and decided that Mr Kelly should face disciplinary action, which led ultimately to his dismissal. All of the interviews were recorded by a note taker with handwritten notes, none

of which have been typed up for us. Mostly the handwriting is clear, sometimes it is not.

56. SB was interviewed by Mr Rawlinson on 20 April 2020, (page 94). She said that Mr Kelly had called her a bitch in front of a Mr Stickle, "a long time ago". She said that he does the same to others, but they don't want to talk about it. She said he had groped her backside, which had made her feel sick and go home early. She said she didn't report it at the time because she didn't think people would believe her. She said on 9 April 2020 he had called her a, "moody bitch". She explained that the use of the word, "multies" was a reference to multiple orgasms. She said he had twice walked over to her whilst she was printing and rubbed her shoulders. She also said that outside the store, he had approached her and asked her if he could drive her home. She expressed frustration that others did not want to come forward because they did not trust the system.
57. Mr Rawlinson interviewed JC on 21 April 2020. She said she did not want to report anything for fear of repercussions.
58. A Kirsty Smart was interviewed by Mr Rawlinson on 28 April 2020. She said that 3 years earlier, Mr Kelly had told her that she had greasy hair. She said he had in the past made inappropriate comments to a woman called Charlie, not saying what those inappropriate comments were. She said he called people names and in particular called her, "Smarty pants", "not anything inappropriate".
59. Mr Rawlinson interviewed Mr Kelly on 1 May 2020, (page 109). He asked him whether he remembered calling SB a whore and a bitch in 2017. Mr Kelly confirmed he did recall that and said, (at page 110) that he had talked to her, said that he was sorry and that she, "*said she would tell him if it got too much*". He denied groping her bottom. He said he should have been spoken to about that at the time. Mr Rawlinson explained that they had only just learned of the allegation and that it was said to have happened at Christmas. Mr Rawlinson put it to Mr Kelly that on 9 April 2020, he had called SB a moody bitch and made reference to multies. He denied that, saying that he was on holiday at the time. He denied rubbing her shoulders. Mr Kelly described the allegations as petty and immature. He said that they had been made because she had woken up in a mood.
60. Mr Rawlinson met with SB again on 13 May 2020 and told her, "*there was not a lot of fact based information to support her complaint*". He told her that he was not going to proceed with disciplinary action against Mr Kelly. He told her Mr Kelly had admitted to the 2017 allegations in relation to what he was alleged to have said, but he denied the later allegations. It was recorded that SB was upset. She said that she felt sick. Mr Rawlinson explained to her that the outcome was due to the lack of witnesses. She declined an offer of mediation and said that she felt that the matter was being swept under the carpet.

61. The respondent had received an undated anonymous letter, (page 124) which the respondent later discovered had been written by JC. The author of the letter complained of Mr Kelly's conduct, including:
 - 61.1 Asking for her bra size;
 - 61.2 Saying to her that if she breaks up with her partner, can he, "*have a go?*",
 - 61.3 Using inappropriate explicit language, referred to her and her colleagues as, "whore" and, "bitch regularly", and
 - 61.4 Standing behind women, including customers, and rubbing their shoulders.
62. On 15 May 2020, Mr Rawlinson informed Mr Kelly that no further action would be taken, (page 126). Mr Rawlinson noted that Mr Kelly's apology in 2017 showed that he understood that such comments were not acceptable. He explained that the investigation would remain on Mr Kelly's record.
63. On 21 June 2020, SB made a call to what the respondent has sometime referred to as their whistleblowing hotline called, "RightLine". The record of this is at pages 133-136. The written record includes a warning in bold type, "*Unauthorised disclosure could be a breach of the Data Protection Act and the Public Interest Disclosure Act. This could also lead to disciplinary action.*". All that is recorded as to what had been raised by SB in the call was, "sexual harassment in supermarket Oxney Road Peterborough ...". It was noted that she had already provided details in her written statement and the person concerned was Mr Kelly.
64. SB also appealed the outcome of her grievance. We do not have the documents relating to that, but we do have the outcome of her appeal at page 137. It had been dealt with by a Mr Bassett, who concluded that the case should be re-investigated. This was after a meeting between Mr Bassett and SB on 2 July 2020. No minutes of that meeting have been provided to the tribunal, nor to Mr Kelly. We know there were such notes, because the letter from Mr Bassett refers to enclosing them.
65. Mr Basset's letter was dated 2 July 2020 and that same day, Mr Kelly was suspended. In the letter informing him of his suspension, (page 139) he is told that this is pending, "*An investigation into the allegation of sexual harassment of a female colleague over a period of 3 years resulting in a complaint being raised against you*".
66. Mr Hunter, a store manager from Stamford, was appointed to investigate. He conducted a series of interviews with SB, Mr Kelly and a number of witnesses, between 11 and 22 July 2020, (beginning at page 141) as follows:

- 66.1 11 July 2020 a woman we shall refer to as JC: She said Mr Kelly had stood behind her and rubbed her shoulders. Mr Kelly had asked her questions about her sex life and had said, "*When you break up, can I have a go?*". She said she did not report this in the previous interview with her because she had no faith in the system. She said that she had provided the anonymous statement referred to above. She suggested as another witness to interview, a Vicky Gramau.
- 66.2 11 July 2020 Ian Heggs: He said that he had supported someone called Charlie, (aged between 18-20) when she was upset over the way that Mr Kelly had spoken to her and he had encouraged her to report the incident to her manager. He said he had seen Mr Kelly go up behind Charlie and put his hand on her back and had heard him make comments to her, "You're really hot", "*I wouldn't turn you away*" and "*If my wife knew what I was thinking about you I would be in trouble*". He said that he had witnessed this on numerous occasions two or three times a week. He said that Mr Kelly would say similar things to somebody called Mary and that she laughed him off. He said he had not witnessed anything with regard to SB.
- 66.3 11 July 2020 Kirsty Smart: She said that Mr Kelly had years ago remarked on her greasy hair. She had gone to a manager who had spoken to Mr Kelly and he had apologised.
- 66.4 11 July 2020 Annette Sutterby: She said Mr Kelly came across as a gentleman. She said that he does call colleagues, "*Bitches*" but, "*that's just him*". She said he had called her a bitch once and she had told him not to. She confirmed that other women had told her that he had asked for their phone numbers and that he had sent them messages. She said that five or six years previously, a young girl had confided in her that he had sent her messages, which she reported to the team leader at the time.
- 66.5 11 July 2020 a woman we shall refer to as Mary: This person is of Pakistani ethnic origins. She said that Mr Kelly had touched her on her hips, her shoulder and her back. She said that he had, "said stuff" to her about her, "butt". She said he had sent her a weird video on Facebook, (see below) and had referred to her as "*Bin Laden's mistress*". She said that this has been going on for 4 years or so.
- 66.6 13 July 2020 SB: She repeated the allegations previously made. She said that she had told her line manager and he had simply said that she should be blunt with Mr Kelly and tell him not to touch her. She felt she had not been taken seriously. She explained that a week later her line manager had encouraged her to put it in writing, which she did. What follows in the notes is difficult to read, but it appears to be an explanation of the earlier process. It looks as if she makes some reference to Mr Kelly having whispered in her ear

after the meeting when she had been told there would be no further action, but we do not learn what he is meant to have said.

- 66.7 17 July 2020 Bev Mattera: She said that Charlie had gone to her crying about dirty remarks from Mr Kelly, which had been going on for a while. She described how Mr Rawlinson had spoken to her about it.
- 66.8 17 July 2020 Deana Heggs: Does not seem to add anything of relevance.
- 66.9 17 July 2020 Vicky Gramau: She said that someone called Sharon Smith had to block Mr Kelly from her Facebook because he was constantly messaging her. She said that Mr Kelly would invade personal space and touch her back.
- 66.10 17 July 2020 Mr Kelly: With regard to the 2017 incident, that is touching SB on the bum and calling her a bitch and a whore, he said that things had been taken out of context. He accepted that what he had done was wrong and said that it had been dealt with at the time. He said he did not recall the detail, but it was all just jokey chat. As to the allegation of touching SB's bottom, that he had, *"grabbed her butt in the chiller"* he said, *"I am not saying I didn't do it, but I cannot recall doing it"*. He said he did not recall referring to his wife and to multies. When told that he was accused of calling SB a moody bitch he said, *"Ok if you say so"*. It was put to him that he had massaged SB's shoulders whilst she was using a printer, he said he did not recall that. He told Mr Hunter that no allegations had ever been made against him before. He said that he had not seen the notes of the investigation. Mr Hunter said that he would give him copies of those notes to read during an adjournment. We can see in the minutes that the subsequent adjournment was for 16 minutes. Mr Hunter ends by explaining that he was going to conduct further investigations.
- 66.11 20 July 2020 Store Manager Nicki Thomas: This interview does not appear to add a great deal to the investigation, the focus appears to be on how she managed the situation once SB had been told there would be no further action.
- 66.12 20 July 2020 Peter Usher (put forward as a character witness by Mr Kelly): He described Mr Kelly as, "a good guy". He acknowledged that Mr Kelly could say things, *"close to the line"* or, *"close to the mark"* or that some people might take the wrong way.
- 66.13 20 July 2020 Richard Stickle, (also interviewed as a character witness at the suggestion of Mr Kelly): He said that Mr Kelly has a laugh and a joke, but sometimes he says silly things although, *"nothing naughty, just banter"*. He denied ever advising anyone to report something.

- 66.14 20 July 2020 Stewart Durham, (also a character witness recommended by Mr Kelly): He described Mr Kelly as liking banter, but never going over the line. He had never seen him touch a colleague.
- 66.15 20 July 2020 Yin Fu Yu, (also a character witness): This person, (we are unsure of the gender) said that Mr Kelly had always been nice and had not crossed the line. The person had seen Mr Kelly touch others on the hips and lower back, said to be just to move them out of the way, colleagues and customers. It was acknowledged he did sometimes cross the line.
67. On 20 July 2020, Mr Hunter sent Mr Kelly a further letter inviting him to attend another fact finding interview, (page 203). The allegation he was said to face was, "*Sexual harassment and inappropriate behaviour towards a colleague over a 3 year period causing upset and distress*". The interview was to take place on 22 July 2020.
68. On 22 July 2020, but before seeing Mr Kelly, Mr Hunter spoke with Mr Adam Fisher. He was Mr Kelly's final character witness. He said that Mr Kelly liked banter and that he had only ever seen him tap people on the shoulder.
69. The minutes for Mr Hunter's final interview with Mr Kelly on 22 July 2020 are at pages 207 through to 224. Mr Hunter made the point that Mr Kelly had said he would find nothing more about him in his file, but that he had found the 2010 warning and a note of the 2015 discussion. Mr Kelly responded that he was not a liar, he simply did not remember. Mr Hunter went through each of the allegations in turn. Mr Kelly denied the allegations of inappropriate touching or of making any remarks to Charlie. We note at page 217 that Mr Hunter said that he would let Mr Kelly read the statements during an adjournment. Mr Kelly said that he did not recall calling Mary "*Bin Laden's mistress*" and he did not recall sending her a video. He was then shown the video recording he was said to have sent Mary, after which he said that he did remember it and that he did not mean anything by it.
70. At this point, we should explain what we were told as to the agreed content of the video, (we declined an invitation to watch it). We were provided with a still, so that we were clear that the woman in it was, at least to begin with, properly dressed. From it we can see that the woman was of middle eastern appearance. In his witness statement, Mr Kelly described her as a Muslim; from the still, it is not immediately obvious why one would say that. The parties agree that the video showed this woman making a shooting gesture with her fingers, lifting her fingers up to her lips to blow across the top, as if blowing smoke away from a gun barrel, and then cutting to a film of a woman's anus breaking wind.

71. Returning to the meeting between Mr Kelly and Mr Hunter on 22 July 2020, Mr Kelly said that he did not recall referring to a colleagues friend as having a fake arse. He denied touching SB's bottom. The discussion was adjourned at 11:56 until 12:17. There was no reference in the minutes to Mr Kelly being given statements to read. After the adjournment, Mr Hunter told Mr Kelly that he would be referred to a disciplinary hearing. Mr Kelly responded that he was not aware of his behaviour.
72. Mr Kelly received an invitation to a disciplinary hearing dated 27 July 2020, (page 226). The allegations were said to be, "*Sexual harassment, and inappropriate behaviour towards a colleague in that you touched her inappropriately causing upset and distress*". The manager of another store, Mr Speke, was appointed to chair the disciplinary hearing, which took place on 31 July 2020. The minutes are at page 228. We note the following:
- 72.1 Mr Kelly said he thought SB had made these allegations because she was attention seeking.
- 72.2 He described the video as just a laugh, that he and Mary had a good relationship.
- 72.3 There appears to be very little discussion about the multiple allegations that appear to have been made and the various statements taken.
- 72.4 There does not appear to be any reference to Mr Kelly being provided with statements to read.
- 72.5 The minutes record a representative being present, a Mr Baviello. In cross examination, Mr Kelly acknowledged that he was a Trade Union representative, but new to the role. Mr Baviello does not appear to have played any part in the interview.
- 72.6 Mr Speke read out a decision statement. He said he had taken into consideration what Mr Kelly had said that day and had reviewed the written statements. He said:
- "I believe that in relation to the allegations of your sexual harassment and inappropriate behaviour, they have occurred. Also I made reasonable belief that prior conversations in regards to similar matters have not rectified your behaviour. It is not acceptable and not in line with our values or company policy. Based on this information I am going to summary dismiss you today."
73. Within the bundle is a document entitled, "Decision making summary" which is a pro-forma completed in handwriting. We are told that this is a document completed by the disciplinary officer but not provided to the dismissed employee. It is retained on file as a record for the respondent. Under, "Findings established during meeting" the following appears:

“Chris is unaware that he has potentially done anything wrong. Character statements back up that Chris is unaware of his audience with “banter”.

Discuss with Chris it’s our job to provide a safe environment for all colleagues – it’s our duty of care.”

74. In respect of outcome options, Mr Speke excluded the possibility of a final written warning as there was a risk of the incidents happening again. In respect of dismissal, he recorded that there was a history of sexual harassment going back to 2010 and that Mr Kelly’s behaviour did not accord with their corporate values.

75. Mr Kelly’s dismissal was confirmed by a letter dated 31 July 2020, (page 241) in which Mr Speke wrote:

“The reason for my decision is I believe that in relation to the allegations against you for sexual harassment inappropriate behaviour towards a colleague that these incidences did occur. I also believe that prior conversations with you in regards to similar matters in the past have not rectified your behaviour.

I believe based on the evidence provided that you sent an inappropriate message to a colleague via telephone that was deemed offensive. I also believe that you touched a colleague in an inappropriate way ...”

76. Mr Kelly appealed against his dismissal in a letter dated 6 August 2020, page 244. Included with his appeal grounds were the age of the some of the allegations relied upon, that evidence was compiled to suit a pre-determined outcome, that he had no evidence or statement from his accuser, that his accuser had attempted to falsify evidence and the respondent had no regard to his health and wellbeing. The letter included a detailed analysis of the interview notes for the various witnesses, but not of SB. In that regard, he said that, “*no statement has been offered with any detail*”. He said she had only been referred to by her first name and that he had been given no dates or times in respect of the alleged incidents. He alleged that Adam Fisher had reported to the manager Nicki Thomas, that SB had asked him to give false evidence.

77. Subsequently, Mr Fisher provided a statement dated 17 August 2020. In this statement, he described SB as having said to him that Mr Kelly was a dirty old man and then describing to him her version of events and asking him if he would be a witness for her. He said that he had replied that he had not seen anything and that her response had been to repeat her version of events and to ask him again for a second time, if he would be a witness for her. He explained that he interpreted her as asking him to lie for her, which, he said, he told her he would not do.

78. In a subsequent text message, Mr Fisher reported that he had been told via the store manager, (to whom he had described what had happened) that the respondent did not want to take anything new into consideration but if they wanted a statement from him, they could get it from him the next day.

79. The appeal hearing took place on 18 August 2020, without anybody approaching Mr Fisher. The appeal was heard by a store manager from another store, Ms Richardson. The notes of this meeting are at page 257, from which we observe:
- 79.1 Mr Kelly was represented by his father.
 - 79.2 He handed over the statement from Mr Fisher.
 - 79.3 Mr Kelly records that he was only provided with notes after he had been dismissed. Mr Kelly senior asked when the complaint was made. Ms Richardson answered on 22 June 2020. Mr Kelly senior asked why they had not been given a copy. Ms Richardson replied that it was a highly sensitive document.
 - 79.4 Mr Kelly senior made the point they need to know the dates when things were alleged to have happened so they could check whether Mr Kelly was working.
 - 79.5 Mr Kelly explained that since his car accident he had struggled to remember anything.
 - 79.6 Mr Kelly senior made the point that the allegations were vague and they did not have specific details.
 - 79.7 Ms Richardson was clearly irritated by Mr Kelly senior's involvement.
 - 79.8 Mr Kelly made the point about the 3 year delay since the original incident complained of.
 - 79.9 At page 275, Ms Richardson summarised the allegations as: pinching SB's bottom; touching and massaging her shoulders; placing a hand on her lower back; asking about sexual relations with her partner; asking if he could have a go if she wasn't in a relationship; inappropriate use of the name bitch over a number of years resulting in SB feeling uncomfortable, upset, stressed and anxious. These were said to have happened over a period of time.
 - 79.10 At page 276, Ms Richardson told Mr Kelly that he can't have a copy of SB's statement because it is covered by Data Protection.
 - 79.11 Mr Kelly described the video as a joke and not sexual.
 - 79.12 Ms Richardson went through the various statements with Mr Kelly.
 - 79.13 Mr Kelly said he was confused during the investigation interviews.

- 79.14 Mr Kelly senior explained if the respondent looked properly at Mr Kelly's file, they would see that he is disabled. Ms Richardson asked how that would affect him and he replied that it would not affect him actually doing something silly, but it was not taken into account in answering questions that he did not really know the answers to, (Pages 299-300).
- 79.15 Mr Kelly explained that he had a "child-like nature".
- 79.16 Ms Richardson suggested that it was unreasonable to expect Mr Hunter to know about a car accident in 2004 while conducting a disciplinary process in 2020.
- 79.17 Mr Kelly suggested Mr Speke should have interviewed SB himself.
- 79.18 Ms Richardson adjourned the meeting so that she could meet with Mr Fisher.
80. Ms Richardson met with Mr Fisher on 20 August, the notes are at page 312. She went through with him what Mr Fisher said had taken place in his exchange with SB. She noted this time that Mr Fisher was suggesting SB had gone through what had happened three times rather than two. She then posed the question, "*But did she ask you to lie even though not seen anything?*" to which Mr Fisher is recorded as responding, "*Not those words, no.*". That is interpreted by Ms Richardson as a statement by Mr Fisher that he was not asked to lie by SB.
81. Ms Richardson also met with Ian Heggs on 20 August 2020. She asked him about what he had seen with regard to Charlie and Mary. He responded that Mr Kelly had made comments about their looks, their bodies, what he would do, how he would be in trouble if his wife knew what he was thinking. He said that Mr Kelly used to touch Charlie around the waist area. He had never seen him touch Mary. He said that Mr Kelly would touch girls by the waist.
82. The interview with Mr Kelly and his father resumed after those two meetings, on 20 August 2020. Ms Richardson gave them copies of the notes of the meetings with Mr Fisher and Mr Heggs earlier that day and allowed them to read them during an adjournment. They discussed the statements. With regard to Mr Heggs' statement, Mr Kelly and his father made the point that with regard to Charlie, the events happened 2 or 3 years previously, she had since left and they assert that the statements are out of context. Mr Kelly denied the allegations.
83. Ms Richardson asked Mr Kelly about his symptoms. He said he was prone to saying what was on his mind, letting it out and was child-like. He confirmed he still had memory problems. He confirmed that he'd had therapy. He confirmed he had been referred to Occupational Health, but could not remember when. He said he still could not remember things he was said to have done. Mr Kelly senior said he had a habit of apologising

for things he had not done. Ms Richardson made the point that in an interview with Mr Hunter, Mr Kelly had apparently said with regard to the grabbing of the bottom allegation, Mr Kelly had replied when it was put to him, that he might have done. Mr Kelly said he did not remember doing it, but he might remember something like that and he said it did not seem like him. He said he could not remember an incident involving rubbing shoulders. He said the time line was ridiculous. She pointed out Mr Kelly had told Mr Hunter that he had not faced any previous allegations and yet he had. Mr Kelly answered that he could not remember and that he does not lie.

84. Ms Richardson discussed the allegations with Mr Kelly and ran through the respondent's policies with him.
85. Ms Richardson decided to uphold the decision to dismiss. This was confirmed in an outcome letter dated 21 August 2020, page 385. She ran through each ground of appeal, explaining her decision but of particular note was the following:

“5. No evidence or statement from the “Accuser”.

You have been made aware of the allegations made against you, and over what period of time these occurred, but I do acknowledge your frustrations relating to the not have specific dates for each allegation.

6. “Accuser” attempts to falsify evidence.

I have taken into my deliberations the statement made by Adam on 20/08/2020 as discussed, however Adam's statement confirms that Sally did not ask him to lie for her.”

86. She summarised her conclusions as follows:

“In summary I believe the investigation was fair and proportionate, and that the disciplinary manager has chosen that the nature of the allegation against you is so serious that he has summarily dismissed you.

I agree with his summary in the very most part, and whilst I accept some of the mitigation you have presented, it does not change the seriousness, or the original outcome which I believe to fair and appropriate.

Your behaviour was not in line with Sainsbury's harassment or fair treatment policies which is available to all colleagues and detailed within your handbook.”

87. Ms Richardson hand wrote a decision summary statement, which she read to Mr Kelly on 20 August, which is at page 381.
88. Ms Richardson also completed a decision making summary, as Mr Speke had done, which was not shared with Mr Kelly but retained on file. In terms of outcome options, she noted that she had considered overturning the decision with a lesser sanction, but considered that previous coaching and discussions had not changed his behaviour. She noted changing his

work location would not alter that position. She excluded any possibility of his returning to work in the same location as the complainant. She therefore concluded that the decision to dismiss should stand.

89. In explaining her decision, she stated she was confident a fair and proportionate investigation had been completed, that policies had been followed, there was no new or compelling mitigation and that it was reasonable to believe that Mr Kelly had been guilty, *“of the full allegations despite his denial due to the copious statements witnessing how he behaves, which he suggests is normal”*.
90. In elaborating on her reasons she recorded that:
 - 90.1 Mr Kelly did not think that some of his touching or language was unacceptable.
 - 90.2 He had relied on his father for answering questions.
 - 90.3 He showed no remorse and consistently questioned his accusers motives.
 - 90.4 He appeared to accept no responsibility for his actions.
 - 90.5 Although Mr Kelly had said he would change his behaviour, he had been spoken to several times previously.
 - 90.6 She would be concerned about providing a safe and harassment free environment based upon Mr Kelly’s normal behaviour.
 - 90.7 Although Mr Kelly kept saying things were taken out of context, he did not explain the context.
91. For the avoidance of doubt, we find that Mr Kelly was shown statements during the investigatory hearing as noted above, but he was not allowed to keep them. He was not shown any statement by SB. Mr Kelly was not provided with copies of the notes of the various meetings until after he was dismissed. Those did not include notes of meetings with SB.
92. We note that Mr Speke told us that HR support consisted of an ability to telephone and ask questions, there was no specific person to speak to, there was no attached HR advisor with specific knowledge of the case. Ms Richardson said that HR advice was available to her throughout and that she did avail herself of it. She said that she had a case manager and that she discussed her conclusions with the case manager.

Conclusions

93. We approach the conclusions using the list of issues but in a different order, starting with the claim under section 15 of the Equality Act, discrimination arising from disability.

Discrimination arising from disability

94. The first question posed at 4.4 of the list of issues is whether Mr Kelly had an increased propensity to act in an inappropriate manner and make inappropriate comments to others arising from his disability?
95. There is perhaps surprisingly, no direct and up to date evidence on this key point, one way or the other. The evidence we do have, is the medical evidence which was in the hands of the respondent, the report of Mrs Hunting from November 2011. That report was prepared following the behaviour for which Mr Kelly was warned in 2010, including his use of the words “bitch” and “whore” to female colleagues; the same type of conduct before the respondent in 2020. As we have quoted above, Mrs Hunting said, *“some of Mr Kelly’s behaviours in his workplace (as reported earlier) may be partially accounted for as a consequence of a past head injury and associated hidden difficulties”*. As Mrs Hunting observed, these behaviours had not been noted before Mr Kelly’s road traffic accident.
96. Together with that, we have the evidence from Mr Kelly. He said that his comments and actions were examples of his childlike behaviour, which he would forget were inappropriate.
97. It is apparent on the evidence that comments and actions like these were a regular feature of interaction with Mr Kelly, which had not been the case prior to his road traffic accident. Such comments are not normal behaviour; one would have thought any person seeing that Mr Kelly behaved in this way would recognise there was something not quite right and that something must be causing him to behave that way.
98. On the balance of probabilities, we therefore find that Mr Kelly had an increased propensity to act in an inappropriate manner and to make inappropriate comments and that the same arose in consequence of his disability.
99. The next question posed at 4.5 of the list of issues is whether the respondent treated Mr Kelly unfavourably by subjecting him to disciplinary proceedings and dismissing him, without having regard to his disability and the impact that may have had on the alleged acts?
100. The first part of that question is all that is really required, for it is the disciplinary process and the act of dismissal which is complained about. The respondent did subject Mr Kelly to disciplinary action and did dismiss him and that is plainly unfavourable treatment.
101. The second part of that question is not strictly necessary at this point, whether the respondent had no regard to his disability and the impact that may have had on his alleged acts? Nonetheless, as the question is posed, we will answer it. The respondent did disregard his disability; it had the 2011 report from Mrs Hunting on file and did not consider it. The issue

was not raised before Mr Speke but he and the Human Resources people advising him ought to have looked at Mr Kelly's file. Clearly they did, for they have made reference to his earlier warnings. They ought also therefore have seen the Hunting report and considered its contents. They did not do so. If they had done so, they would naturally have raised the question that his disability may have had an impact on the acts of misconduct of which he was accused.

102. Mr Kelly's disability, the impact on him of his head injuries, was raised before Ms Richardson. It is therefore all the more surprising that neither she nor the Human Resources people advising her read the Hunting report and considered its implications.
103. The first part of 4.6 in the list of issues repeats the question at 4.5. More aptly, it then goes on to ask whether the respondent disciplined and dismissed Mr Kelly because of behaviour or conduct that arose from his disability? The respondent disciplined Mr Kelly because of the behaviour referred to by SB in her email of 17 April 2020, which included use of the expressions "whore" and "bitch", groping her backside, referring to "multies", rubbing her shoulders and sending pornographic content. That was all conduct arising from his disability.
104. 4.7 of the list of issues then poses the key question to the outcome of this case, whether the respondent has shown that such unfavourable treatment, (disciplinary action and dismissal) was a proportionate means of achieving a legitimate aim? It is very obvious that an employer cannot have an employee behaving in this way. The respondent relies upon as its legitimate aim, its obligation to have regard to the health and safety of its employees and to provide a safe workplace, free from harassment. That is a legitimate aim.
105. Did the respondent achieve that aim by proportionate means? As we have explained in our recital of the law above, the test is objective and the employer must establish that the measures it was taking were appropriate and reasonably necessary. We must weigh in the balance the discriminatory impact on Mr Kelly, including the cause or connection to his disability.
106. We considered the following:
 - 106.1 If the respondent did not act on SB' complaint, it would likely have faced a, likely successful, complaint of sex discrimination and harassment.
 - 106.2 If the respondent did not act on the information it received, it would be highly vulnerable to other complaints of sex discrimination and harassment from other female employees.
 - 106.3 Regardless of whether or not the respondent faced potentially successful claims, allowing Mr Kelly to continue to behave in the

way alleged would likely have caused distress and offence to colleagues, male and female alike.

- 106.4 However, the respondent did not appear to even consider the possible, (in our view obvious) impact of Mr Kelly's injury on his behaviour. A proportionate approach would have entailed seeking an update of the medical evidence it already held on file, either via Occupational Health or going directly to a psychiatrist seeking information on the extent to which Mr Kelly's behaviour would have been explained by his head injuries, what steps might be taken to prevent such behaviour and what chances there would have been of those steps being successful.
- 106.5 The respondent did not look at the 2015 informal conversation and consider how effective that had been in the period immediately afterwards in preventing such behaviour and consider whether further such conversations might have been appropriate in the intervening period, which might have prevented things reaching the stage that they did in 2020.
- 106.6 Some of the allegations related to 2017. The respondent did not consider that had it acted with such informal conversations in 2017, the behaviour would have ceased that time.
- 106.7 The respondent did not take account of the fact that on the evidence of the Hunting report and Mr Kelly's own comments, his head injury affected his memory, which meant he would not be able to respond to charges put to him some considerable time after the events complained of.
- 106.8 Ms Richardson ignored the evidence from Mr Fisher that SB appeared to be encouraging him to give false evidence to the investigation. Ms Richardson's evidence in this regard was quite remarkable. She would not acknowledge in her oral evidence that just because Mr Fisher had acknowledged SB had not expressly asked him to lie, did not mean that she was not in fact asking him to lie, when she was asking him to say that he had seen something which he had not seen. This passage of Ms Richardson's oral evidence, to our mind seriously undermined her credibility. It very clearly indicated that she was blinkered in her view and was quite determined to dismiss Mr Kelly, come what may. It is important because Mr Kelly acknowledged he was responsible for some of the conduct of which he was accused, including use of the words "bitch" and "whore", the sending of the inappropriate video to Mary, but he categorically did not accept that he had grabbed SB' bottom. Ms Richardson's approach was not a proportionate approach.
- 106.9 In terms of proportionality, Mr Varnam refers to the respondent's failure to consider training, warnings, counselling or support. Training and support had been recommended by Mrs Hunting;

referred to in the final sentence of the passage quoted above and under the heading, “suggestions” she included one to one support from a support worker, (page 82) and counselling, (page 83). The respondent did not put itself in the position of considering such steps, either by having regard to the report from Mrs Hunting in its possession, nor by seeking further up to date recommendations and advice. Further Occupational Health or psychiatric advice may have suggested these measures or some other measures that might have ameliorated the situation, or provided means of avoiding repetition in the future. The respondent did not consider taking that step.

107. Having regard to the foregoing, our conclusion is that the respondent did not adopt a proportionate means of achieving its legitimate aim in its failure to have regard to the report it already had and thereafter seeking up to date information and advice.
108. The final question posed is whether the respondent had shown that it did not know and could not reasonably have been expected to know, that the claimant had the disability. The respondent had a psychiatric report from Mrs Hunting, explaining to it that he had this disability. It chose to ignore it. It had knowledge of the disability.
109. For these reasons the claimant’s claim that he was discriminated against by reason of his disability succeeds.

Breach of Contract

110. 4.9 and 4.10 of the list of issues identifies that pursuant to his contract, Mr Kelly was entitled to 12 weeks’ notice which he did not receive. He would not be entitled to that notice if he was in fundamental breach of contract. To decide whether he was in fundamental breach because of gross misconduct, we have to make an actual finding of fact as to whether he was guilty of such conduct.
111. We had no direct evidence from any individual who actually witnessed any of the conduct for which Mr Kelly was dismissed. That is relevant, but not an end to the matter. Mr Kelly admitted using the expression “bitch” and “whore”. He also admitted sending the appalling video to Mary. It is no excuse to say that video was sent outside of work. It was racist, sexist and obscene. He was guilty of gross misconduct and therefore as a matter of pure contract, (issues of fairness and discrimination do not enter into the question) he was guilty of such conduct and the respondent was entitled, as a matter of pure contract law, to dismiss him without notice.
112. For these reasons the claimant’s claim that he was wrongfully dismissed in breach of contract fails.

Unfair Dismissal

113. Having heard direct oral evidence from Mr Speke and Ms Richardson, we are satisfied that the reason Mr Kelly was dismissed was the potentially fair reason of conduct.
114. The list of issues at paragraph 4.2 poses the question whether the dismissal was in accordance with section 98(4) of the ERA and in particular, whether it was within the band of reasonable responses? There are two aspects to this:
 - 114.1 Firstly, applying the Burchell test, whether the respondent genuinely believed that Mr Kelly was guilty of misconduct, whether that belief was reasonably held and after conducting a reasonable investigation?
 - 114.2 The second test is that in Iceland Frozen Foods, whether the decision to dismiss was a decision that was within the range of decisions that could have been taken by a reasonable employer, having regard to all the circumstances, including the respondent's size and resources, (which are considerable)?
115. There cannot be any doubt that the respondent genuinely believed in some of the conduct, not least because of Mr Kelly's admissions. There was a reasonable investigation, in that many people were interviewed and whilst some spoke of Mr Kelly in favourable or endearing terms, many to varying degrees, corroborated the allegations insofar as his use of inappropriate words and touching people on their shoulders, was concerned.
116. Insofar as the allegation of grabbing SB's bottom is concerned, that was denied by Mr Kelly. There was no corroborative evidence about that, or any suggestion from others that he behaved in such a way. Specifically, on appeal Ms Richardson had evidence from Mr Fisher which suggested that SB had been asking him to lie in the investigation, saying that he had seen things which he had not. That opens up the possibility that SB might have been embellishing or exaggerating. Ms Richardson chose not to investigate that any further, revealing as we have said, a blinkered view. To that extent, there was not a reasonable investigation.
117. Was the decision to dismiss within the range of reasonable responses? For all the reasons that we have already explained when considering the proportionality of the respondent's pursuit of its legitimate aim, we conclude that the decision to dismiss was not within that range. A reasonable employer would not have dismissed Mr Kelly at that point. A reasonable employer would have gone on to make further enquiries, at the very least to have looked at Mrs Hunting's report and considered the implications of that, but also through Occupational Health to have sought up to date medical and psychiatric advice, both on Mr Kelly's culpability and the possibility of avoiding repetition of such conduct in the future.

118. There were procedural failings also and the question of procedural fairness is part and parcel of the test in section 98(4). We identified the following procedural failings which rendered this dismissal unfair:
- 118.1 A lack of clarity and specificity in the charges Mr Kelly faced, in breach of the respondent's own procedures, as quoted at the beginning of our findings of fact.
 - 118.2 The respondent's failure to provide Mr Kelly with the statement received from SB. He did not receive the email of April 2020 or the notes taken of the interviews with SB during the investigation and disciplinary process.
 - 118.3 He did not receive the actual statements taken from all the witnesses to keep and analyse in his own good time, until after he was dismissed.
 - 118.4 He was expected to read, analyse and respond to the statements taken from the various witnesses, during the investigation and disciplinary hearings. Something he was not able to do effectively because of the effects of his head injury.
 - 118.5 Ms Richardson failed to follow through on information received from Mr Fisher.
 - 118.6 Comparing the various letters Mr Kelly received inviting him to the investigatory meeting, the disciplinary meeting and the dismissal letter, it is clear that he was not dismissed for that which he was originally charged.
 - 118.7 There was no detailed analysis of the findings either by Mr Speke nor Ms Richardson, point by point, of what was he accused of? What was he found guilty of and why?
119. These failings were not rectified on appeal, (save that by the time of the appeal he had statements taken from everybody, except SB).
120. We do not uphold Mr Kelly's complaint that it was inappropriate for the respondent to have referred to his 2010 warning and his 2015 informal conversation. They were clearly not relied upon as triggers for the dismissal, but they were properly relied upon as evidence of earlier similar behaviour.
121. For these reasons Mr Kelly's complaint that he was unfairly dismissed succeeds.

Remedy

122. Before retired to consider our judgment, we fixed with the parties a remedy hearing on 20 May 2022, in case we found in the claimant's favour.
123. We will make case management orders in a separate document. However, it is clear that very much at issue remains the question of to what extent in the context of unfair dismissal compensation, Mr Kelly might be culpable. In respect of compensation both for unfair dismissal and discrimination, (compensation to place him in the position that he would have been in had he not been discriminated against) we will be required to analyse whether, had the respondent conducted itself as reasonable employer would have done, had it acted proportionately and made further enquiries, what advice would it have received? We need to know this. Would the respondent have been advised that Mr Kelly's brain injury was the cause of his behaviour to a very minor extent or to a major extent? What steps could have been taken to try and prevent that behaviour repeating itself in the future? How effective would such steps have been likely to have been? In light of that information, what would have lain within the range of the reasonable employer's responses and the employer acting in a manner which is not discriminatory?
124. It is perhaps surprising, given the resources of the respondent, that this information is not already to hand.
125. The parties must obtain a joint report. Probably from a psychiatrist. That is a report on joint instructions. We do not have the power to order one party to pay the cost of such a report but if Mr Kelly is impecunious and the respondent does not fund such a report, such conduct might be regarded as unreasonable, raising the possibility of an order for costs at the conclusion of the case.
126. These are tricky issues that we will have to resolve at the remedy hearing. Now that Mr Kelly has his public finding that he was unfairly dismissed and discriminated against, perhaps the parties ought to take a pragmatic approach to the question of compensation and resolve matters between themselves. If they are unable to do so, then they must comply with the case management orders set out in a separate document of today's date.

Employment Judge M Warren

Date: 21 February 2022

Sent to the parties on:

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For the Tribunal Office