RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr Sean Dubarry**

Respondent: **Sainsbury's Supermarkets Limited**

Heard at: **East London Employment Tribunal**

Before: **Employment Judge John Crosfill**

Members: **Mrs G Forrest**
Mr L Bowman

On: **6, 7, 8, 9 & 13 October 2020**

Representation

Claimant: **Alexandra Sidossis of Counsel instructed by Pattinson & Brewer Solicitors**

Respondent: **Tim Welsh of Counsel instructed by TLT LLP**

JUDGMENT

The judgment of the Employment Tribunal is that:-

1. **The Claimant's claim for unfair dismissal made under part X of the Employment Rights Act 1996 is well-founded.**

2. **The Claimant's claims of that the Respondent failed to make reasonable adjustments under sections 20, 21 & 39 of the Equality Act 2010 succeeds to the extent set out below.**

3. **The Claimant's claim that the Respondent unlawfully discriminated against him under sections 15 & 39 of the Equality Act 2010 succeeds.**

4. **The Claimant's claim for notice pay brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 succeeds.**

5. **The Claimant's claim for holiday pay, whether brought as a claim**

under Regulation 30 of the Working Time Regulations 1998, or as a claim brought under Part II of the Employment Rights Act 1996 is dismissed upon withdrawal by the Claimant.

6. The appropriate remedies in respect of the successful claims shall be determined at a remedy hearing.

REASONS

Case summary

1. The Claimant was born on 2 April 1971 and, at the time of the matters that led to his dismissal, was 48 years of age. The Claimant has learning disabilities, a palsy and autistic traits. He started working for the Respondent on 5 March 1994 having been found employment under a scheme operated by the local authority intended to assist persons with a disability find work. Throughout his employment he worked at the Respondents superstore situated at Low Hall in Chingford, London. His principal duties were keeping the car park clean and tidy including gathering up the trolleys and baskets used by the shoppers.

2. The Claimant's employment was broadly uneventful until 2016 at which point a customer complained that he had been overfamiliar with her. At this stage the Claimant was given a warning. In July 2018 the same customer made further complaints. On this occasion the Claimant was dismissed but then re-engaged on appeal when it was recognised that assistance that had been planned in 2016 had not been fully implemented. On 21st of March 2019 there was a further complaint from the same customer. This led to disciplinary action being taken against the Claimant who was summarily dismissed with effect from 13 May 2019.

3. The Claimant has presented claims of unfair dismissal, wrongful dismissal, and claims under the Equality Act 2010 that the Respondent discriminated against him under section 15 treating him unfavourably because of something arising as a consequence of his disability. He has also brought claims that the Respondent failed to make reasonable adjustments to accommodate his disability contrary to sections 20 and 21 of the Equality Act 2010. Finally, the Claimant complained that he had not been paid in respect of holidays.

The issues

4. The parties had drawn up a list of issues which, in the course of the hearing before us, was agreed and finalised between Counsel. We shall address each of the issues raised in that list below but shall not set out the issues in these reasons other than by referring to the issues identified.

The hearing

5. Despite the Covid 19 pandemic this hearing was conducted face-to-face due to concerns about the Claimant's ability to participate in a hearing held by

video hearing. As the capacity of the hearing room was limited to 10 people we utilised an additional tribunal room when there were more observers than capacity in the main hearing room. We were able to set up a video and audio link which worked remarkably well for the duration of the hearing.

6. Shortly before the hearing the Claimant's solicitor had suggested that the Tribunal service should provide a facilitator for the Claimant. That request was refused as it would have necessitated an adjournment. It was proposed that the Claimant's father be permitted to sit with the Claimant in the hearing and in the witness box solely for the purposes of assisting the Claimant to understand any questions and the process being followed. This measure was adopted without any objection from the Respondent. There was no objection taken to anything said or done by the Claimant's father during the hearing. We are satisfied that he understood the boundaries of his role.

7. We were told that one of the Respondent's witnesses, Mr Davies, was shielding and was reluctant to attend the Tribunal in person. Without any opposition from the Claimant we granted Mr Davies permission to give his evidence by video link. He was able to access the CVP room without too much difficulty and was able to view the entire tribunal room during the hearing. He gave evidence from his office in one of the Respondent's supermarkets which provided him with a good Internet connection. Mr Davies had access to all the documentation that had been placed before the tribunal either on paper or electronically.

8. The Tribunal could not accommodate a face-to-face hearing on the final day of the hearing during which the Tribunal deliberated. We had agreed with the parties that we would deliver judgment via CVP if it was possible to do so. All the parties indicated that they believed they had the technology necessary to participate in the hearing. Unfortunately, we ran out of time and, whilst we were able to complete our deliberations, we recognised shortly after lunchtime that there was no realistic possibility of being in a position to deliver an oral judgment to the parties. We apologise for raising the parties' expectations but we did not want to rush our deliberations in a case which is of real importance to all the participants. Unfortunately, having recorded our deliberations in note form in anticipation of giving an oral judgment it has taken the Employment Judge some time to find an opportunity to complete the task of providing this judgment and reasons. This has been a consequence of the large volume of cases in the tribunal. We apologise to the parties for the delay.

9. At the outset of the hearing we discovered that the Tribunal had inadvertently informed the parties to supply a copy of the bundle electronically together with electronic copies of all witness statements. Whilst perhaps the parties could have anticipated that this direction was inappropriate for a face-to-face hearing we apologise for the inconvenience that this caused. The trial bundle ran to some 550 pages and the tribunal's administration did not have the resources to provide the Tribunal with sufficient copies. We are grateful for the steps taken by the Respondent's solicitors and Mr Welsh who laboured throughout the first day of the hearing to instruct commercial copiers to provide us with the required number of bundles. The Tribunal had made

copies of the witness statements and we were able to make some use of the time. However, the hearing started in earnest on the second day.

10. On the second day we heard from the following witnesses:

10.1. Debbie McSweeney, who was the Claimants trade union representative and who attended the disciplinary meeting that took place on 13 May 2019 and part of the appeal meeting that took place on 25 June 2019.

10.2. On behalf of the Respondent, Tasha Cooper. She has been employed by the Respondent since 2012 and, by 2016, had risen to the position of checkout team leader. Following a restructure that took place in 2018 she was promoted once again to become the Customer Experience Manager (a position which she still occupies but undertakes at a different store). At the material time she had shared managerial responsibility for 100 employees of which 50 were specifically allocated to her including the Claimant. Her role in the events giving rise to this claim included her taking notes during the disciplinary process in 2018. Following that process she was given the responsibility of drawing up and putting into place measures to assist the Claimant after his reinstatement on appeal in 2018.

10.3. We then heard from Natalie Coll. She was in effect Tasha Cooper's opposite number. She started working for the Respondent in 2013 and worked her way from being a store assistant until, during a reorganisation, she was promoted to become a Customer Experience Manager. After the events which we have been dealing with she has been promoted once again.

10.4. On the third day we had intended to start the day by hearing from Mr Davies but he was having some difficulties maintaining a video connection. We therefore heard from Jason Roberts. His role in the events giving rise to this claim was that he was the person that heard the Claimant's appeal against his dismissal. He has worked for the Respondent for over 30 years and has worked his way up from the shop floor to rise to the position of a Store Manager. At the material time he was a store manager of the Respondent's branch at Hoddesdon.

10.5. We then heard from Mark Davies who gave evidence via video link. Mr Davies started working with the Respondent in 1997. He too has risen to the position of Store Manager and, at the time he took the decision to dismiss the Claimant, he was the Store Manager at the Respondent's branch in Debden.

10.6. At 3:30 PM the Claimant was sworn in to give evidence. The Employment Judge discussed with Mr Welch whether it would be possible to complete his evidence in the time remaining on that day as he was concerned about the Claimant remaining on oath overnight. Mr Welch was of the view that he would be able to complete his cross

examination within an hour and, on that basis, we decided to start. We shall refer later to the difficulties that arose but after around 15 minutes it became apparent that the cross-examination would not be completed and Mr Welch suggested and we agreed that cross-examination should recommence the following day. We had offered Mr Welch some guidance in formulating questions in order to make himself understood. We suggested at the close of the hearing that Mr Welch might derive some assistance from the Advocate's Gateway where free resources giving guidance about questioning vulnerable witnesses are available online.

10.7. During the disciplinary process Natalie Coll, Mark Davies and finally Jason Roberts all viewed the CCTV footage which was said to show the interaction between the Claimant and the customer. The Claimant, his mother, his father, his trade union representative and his cousin had all had an opportunity to view and comment on the CCTV footage. The parties' impressions on what that footage showed were diametrically opposed. The Claimant's representatives had sought disclosure of the CCTV footage and the Respondent's solicitor had supplied a DVD. However, neither the Claimant's solicitor nor the Respondent's solicitor had access to the software necessary to view the footage. As a consequence, neither advocate had seen it nor had the tribunal. We asked the advocates whether they believed it was necessary for us to see the CCTV footage for ourselves. Both advocates thought that it was. Early in the hearing we had indicated a willingness to travel to one of the Respondent's stores if it was possible to view the CCTV there. Mr Welch and his solicitors made the relevant enquiries and, by Thursday afternoon, it had been established that it would be possible to view the relevant footage if we were to attend the Respondents Low Hall store in Chingford (which is the same store where the Claimant worked). We spent the remainder of Thursday afternoon making the practical arrangements to attend to view the CCTV footage.

10.8. At 9 AM on Friday morning we all attended the Low Hall store in Chingford. We were grateful for the facilities provided by the Respondent. Each advocate and then each member of the tribunal in turn viewed the same CCTV footage as had been shown to the parties during the disciplinary process. We were able to ask the security operative who operated the CCTV to replay such parts as we thought were important. Once we had viewed the CCTV we made our way back to the Employment Tribunal and were in a position to resume hearing evidence shortly after 11 AM.

10.9. Mr Welch cross examined the Claimant for a short period. The Claimant did not answer all the questions he was asked. An example of a question where the Claimant struggled was when Mr Welch sought to compare an answer given by the Claimant to the manner in which his case had been put by Counsel to Natalie Coll. The Claimant indicated that he had not understood. Ms Sidossis volunteered that

the Claimant knew her only as 'Alex'. Even when the Claimant was asked about what 'Alex' had said to the Respondent's witness the Claimant did not give an answer that suggested he understood what he was being asked to comment upon. When he was asked when he had written his statement he responded that he had not written it at all and that it had been done by the family. After asking about some of the incidents with the customer Mr Welch curtailed his cross examination.

10.10. Mr Welch indicated that it was his belief that the Claimant was exaggerating his difficulties. He said that he was contemplating applying to recall witnesses to demonstrate that. In the event he did not make that application and so we did not need to deal with it.

10.11. We then heard from the Claimant's mother from 11:51 until 12:13. We did not curtail the Cross examination in any way.

11. The parties had indicated that they intended to provide written submissions. To assist them the Employment Judge had indicated that the Tribunal had already discussed the broad legal framework and had assembled some standard self-directions on some of the law necessary to decide this case. The Tribunal agreed to share these with the parties to relieve the advocates of the task of setting out non-contentions law. Both Counsel then focussed on authorities that they considered would be of assistance on the facts of this particular case. Both Counsel made oral submissions fleshing out the points that they had made in writing. We will not set those out in this decision but deal with the important points in our discussions and conclusions below. During submissions Ms Sidossis indicated that the Claimant would withdraw his claim for holiday pay. That is reflected in our order above.

12. As stated above we had hoped to complete our deliberations and to give an oral judgment. In the event time got the better of us and we notified the parties that the decision would be reserved.

Our findings of fact

13. We set out our findings of fact below in chronological order. We are acutely aware that a different approach is required under say a claim of unfair dismissal than a claim of wrongful dismissal (and claims under the Equality Act 2010). In the former claim we are not responsible for making primary findings of fact as to whether the Claimant acted as the Respondent has said it concluded. Our role is to review the evidence in order to determine whether the conclusions reached where reasonable. We shall endeavour to state in respect of each contentious matter the approach we are taking. However, these findings of fact must be read with our discussions and conclusions set out below in respect of each of the statutory claims where we take care to distinguish between our role as primary fact finder and that of reviewing the evidence.

14. The Respondent has admitted that at all material times the Claimant was disabled but does not accept that the Claimant's behaviour was a

consequence of his disability. It is therefore necessary for us to make findings as to the nature and degree of the Claimants disabilities

15. There was no formal medical report for the tribunal but we had the following sources of evidence:

15.1. a letter from Mrs Angela Powell a social worker with the Community Learning Disability Team for the North East London NHS Foundation Trust, Mental Health Services written on 30 June 2016 for the purposes of explaining the Claimant's condition when he faced the first complaint from the customer in 2016.

15.2. She wrote as follows*:*

'I am writing to inform you that Mr Dubarry has a learning disability, mild cerebral palsy and autistic traits. He has been known to the learning disability team for over 20 years.

I have been informed by Mr Dubarry's mother that he is due to attend a disciplinary hearing on 4th July 2016 due to inappropriate conduct. I have been asked to write this letter to provide some information about how his disability affects him.

Mr Dubarry has some autistic traits which mean that he has difficulties with communication and interpreting social cues. This ranges from misreading facial expressions; not understanding emotions and feelings of others and engaging in repetitive conversations. He can also appear over friendly.

Unless an individual is aware of Mr Dubarry's diagnosis, members of the public may view some of his behaviours is concerning or inappropriate. He on the other hand will view his behaviour as friendly.

It is therefore important that any concerns should be raised and Mr Dubarry as and when they occur in order to prevent any inappropriate behaviours re-occurring. If a person with autism is not told their behaviour is of concern they will continue to present that behaviour assuming it is acceptable.

15.3. A letter from a Speech and Language Therapist, Jack Gaughan written in support of the Claimant in the context of a later disciplinary allegation made against the Claimant (that he had taken a colleague's hat). Jack Gaughan said:

*'..in my professional opinion, Sean does not have a full understanding of ownership and possession of items in the same manner as a typical individual. This can be explained by his well-known diagnosis of learning disability (**not learning difficulty**, see below distinction). This will naturally have consequences and understanding of borrowing and stealing. Sean stated that he was not aware the owner of the hat until the day of his initial meeting with team.*

He goes on to the Claimant's condition amounted to a 'registered Learning Disability' by which we understand him to be saying that he considers the Claimant disabled within the meaning of the Equality Act.

15.4. The Claimant's mother set out her understanding and experience of the Claimants condition within her witness statement. At one point in her cross examination she was at pains to point out that she was a mother and not a professional or expert. Nevertheless, having cared for the Claimant for over 49 years we find she was well placed to describe to us what the Claimant could and could not do. She said:

'Sean was born with cerebral palsy and autism and is registered as a disabled person with a learning disability. The disability affects his cognitive function, social behaviour and his ability to carry out routine tasks, such as reading, writing and comprehension. He has difficulty reading people's emotions, body language and facial expressions and they come across as overly-friendly and engage in repetitive conversations. Sean can have trouble retaining information, and requires repetition and practical explanations to ensure he fully understands questions or new information

As Sean's parent, I support Sean to live semi-independently and assist him with the everyday tasks, which can range from helping him around the home, buying his clothes, paying his bills, to supporting him with employment related issues. Sean also receives additional support for a few hours per week from his key-worker, provided by the local authority

Sean is a very kind and loving person who likes to make everyone smile and laugh at his jokes. He is also renowned for always checking how people are and offering to make cups of tea. He loves walking, dancing and watching sports, and particularly engaging in friendly banter about football. We are a very close family, so unless Sean was at work or with friends, he would spend time at my home, before returning back to his flat.'

15.5. We have evidence from Sean himself, who in his witness statement says that he had a good relationship with customers and would often greet them by giving them a high five.

15.6. We have also taken regard of the manner in which the Claimant answered questions during the various disciplinary processes followed between 2016 and 2019. We set out below specific findings but as a broad overview, we conclude that the manner in which Sean responded to questions of him was at many times, childlike. He displayed all the traits identified in the letter composed in 2016 by Angela Howell.

16. We find that the evidence detailed above allows us to conclude that the description of the Claimant given by Angela Howell and the Claimant's mother is accurate. We consider that the Claimant's disabilities significantly impact his

ability to read the emotions of others and because of this he has difficulties respecting ordinary social boundaries. He requires any messages about his behaviour to be made promptly and then repeated regularly.

17. The Respondent's Low Hall store in Chingford is a very large out-of-town style supermarket which has a large car park. Customers may either select a trolley or baskets being kept by the front door. The Claimant's job was to keep the car park clean and tidy and to retrieve trolleys and baskets and put them back into the positions whether customers could collect them.

18. The Claimant had worked in the same position since 1994. We accept his evidence that he was well known amongst the customers. We had the entirety of his employment record within the agreed bundle. It was not blemish free in that there had been some previous problems which required informal action but until 2016 it was not suggested before us that any formal disciplinary action was taken against the Claimant for his behaviour.

19. The Claimant had been introduced to the Respondent as part of a scheme to facilitate the employment of disabled people. The Respondent was therefore aware of the Claimants disability from the outset of his employment. As far as we were told there was no point at which the Respondent sought specialist advice as to how best assist the Claimant other than permitting the Claimant's family to adduce evidence from specialists during the disciplinary process.

20. We accept the Claimants evidence that he had been in the habit of high-fiving customers and giving customers hugs when he thought they were being friendly. It does not appear that this practice caused any significant difficulties until 2016. We find that the Claimant's somewhat childlike behaviour would have been obvious to many if not all shoppers and would have alerted them to the fact that the Claimant's behaviour was attributable to a disability even if they were unaware of the specifics of that condition. Given that the Claimant has behaved consistently in this manner it follows in our view that, in the main, the Respondent's customers did not regard the Claimant's behaviour as improper.

<u>The events of 2016</u>

21. On 1 June 2016 a letter was handed to the store manager written by a customer. In this judgment we shall refer to that person as 'the customer' although her identity was later revealed. That first letter was sent anonymously but handed in by the customer's son who had given his telephone number for the purposes of any communication. It does not seem that the customer was unwilling to discuss the matter with the Respondent at that stage or any other time.

22. The material parts of the letter are as follows:

'It began last year when he started saying "hello darling". I would respond by saying "morning". It then progressed to him trying to "high five" with me which I found a bit odd. I am in my 60s and I found this form of greeting overfamiliar.

Subsequently one day he approached me and after saying "hello darling" he went on to hug me which was completely unwelcome. He pushed his face up against mine. I remember his face being wet (either with rain or sweat). I found this completely inappropriate and pulled away from him. I was made to feel so uncomfortable by his approach that I stopped going to the store for several weeks.

I decided to resume shopping at Low Hall and do my best avoid this man. I'm always on edge when I go to the branch and feel the need to keep a lookout for him so that I can avoid him. I deliberately avoid eye contact if I see him. However, on several occasions when I am taking a product from the shelf he has pushed up against me, pretending that it was an accident and saying "oh sorry I didn't see you there". This would be when there were only a few other people in the aisle and there would be no reasonable explanation for him to be so close to me. I found this creepy and totally unacceptable.

He also once asked me if I had a boyfriend. I told him that I was married. I found his questioning very intrusive.

Last week when I arrived he was in the car park so I stayed in my car and made a phone call and busied myself in the hope he would go away. However he approached my car and banged on the window which really startled me. I didn't engage in conversation with him and continued my phone call. When I went into the store he came up behind me and said "hello darling" and touched me on the top of my leg with his hand as he walked past.

I have found his behaviour, which I believe to be escalating, to be totally unacceptable. It makes me feel anxious and uncomfortable. I do not think it is something that should be happening on a shopping trip to the supermarket. I have also witnessed this member of staff hug another shopper, who looked uncomfortable and walked off.

I do not think that it is reasonable that I should have to travel further from my home to go to a different supermarket in order to avoid this gentleman. I hope that you can sort this problem out immediately so I can resume a normal shopping experience at this branch.

23. On 9 June 2016 the Claimant was invited to a meeting by the then deputy manager Andy Hales. The purpose of that meeting was to suspend the Claimant pending an investigation the Claimant was however asked whether anything happened that day that he wished to tell Andy Hales about. The answer given is one which we find is typical of the Claimant and displays the extent of his disability is the response by saying *"no been good*". Andy Hales presses the Claimant who promptly reveals that he had touched someone on the shoulder. He said he had done so only lightly.

24. The matter then progress to a formal investigatory meeting at which the Claimant's mother and trade union representative Miss Taylor were present. The meeting was conducted by a Manager, Kerry Miller. The meeting started with Sean's mother drawing attention to the Claimants disability and asking whether she could be informed promptly if there were any difficulties at work.

During the interview Sean attempted to explain his behaviour as follows *"was only being friendly didn't mean to harm her I know her"* he said he knew her face. He acknowledged that the lady appeared not to like it and he gives the somewhat infantile response *"I shouldn't touch old ladies"*. It seems that the customers son had threatened legal action and this was the reason for escalating the complaint to the Claimant's manager at the time Karen Miller decided that changing the Claimant's behaviour *"was going to be difficult"*. It is notable that during this meeting it is the Claimant's mother, we find in an effort to point out to Sean what he had done wrong, is the person that raises the possibility that this will all end up in the police station.

25. During the meeting the Claimant's mother suggests the possibility of meeting with the customer or writing a letter. The primary purpose being to proffer an apology and the second purpose being to explain about Sean's disability. No action was taken on that suggestion. The matter proceeded to a disciplinary hearing.

26. The disciplinary hearing took place on 4 July 2016. Prior to that disciplinary hearing the Claimant's mother obtained the letter from Mrs Angela Powell that we have referred to above.

27. The meeting was conducted by a Deputy Store Manager, Andy Hales. Andy Hales asked the Claimant about the incident and put it to the Claimant that he had touched the customer's shoulder or elbow. Sean agreed and said that he was being friendly. In a short exchange it seems that Andy Hales acknowledged that the Claimant was tactile at work. The Claimant was asked by his mother whether anyone else reacted the same way and said that they never had. Andy Hales went on to explain to the Claimant that some people do not want to be touched. Andy Hales noted that this was the first official complaint on file in 22 years of service other than matters of lateness or issues with trolleys.

28. Andy Hale's decision was to give the Claimant a written warning which would remain valid for six months. He went on to say that going forward the Respondent needed to come up with a plan. He is recorded as noting the Claimant's disability and, in a section, or the meeting proforma where he gives reasons for his decision he notes that there has been no further discussion or support offered to the Claimant. We infer that his conclusion was influenced by this and that he felt that the Claimant had not been adequately supported.

29. Where the Respondent makes adjustments for an employee's health or disability it records that on a document referred to as a Workplace Adjustment Plan Template colloquially referred to as 'a WRAP'. Andy Hale asked Kelly Miller to prepare a WRAP to support the Claimant which she did with the assistance of the Claimant, in so far as he could, and his mother. The WRAP template records the nature of the Claimants disabilities in the same terms as they were described by the Claimant's social worker. The document records a discussion about Sean's behaviour where it appears it was stated that on the whole people accept Sean's behaviour is friendly whilst others view it as unwelcome or inappropriate. Going forward it was agreed that Sean would have someone as a mentor and a manager with whom he can directly raise

any problems. An agreement was reached that the Respondent will work alongside Sean's mother contacting her when assistance was required. It was proposed that there would be a review with the Claimant's social worker and the matter would be kept under annual review. The first review date was due in July 2017.

30. At this time a communication sheet was drawn up to assist Sean with communicating at work this read as follows:

'1. There are particular times to talk to colleagues. Wait until you have your lunch or break to catch up.

2. Greeting customers is fine, but some people don't have much time. Let the customer start the conversation.

3. You can respond in the same way as they do, a bit like a mirror. For example if they smile and wave, you can smile and wave too. Only ask questions if they ask you first.

4.Try not to hug customers. Hugs are for close friends. Some customers may not want this. (This was illustrated by a photo of two hugging children in a red circle with a line through it)

5. Handshakes are more professional when at work.

6. If you need help to reach something, ask another member of staff. Do not put yourself at risk.'

31. We note from appraisal documents completed in January 2017 that the Claimant's manager is engaging with Sean's therapist. It does not appear that the agreement to consult the social worker was ever implemented and we find that it was not. The Claimant was initially assigned a mentor but that arrangement also broke down. The first mentor assigned to assist the Claimant left after a few months. A replacement was sourced but again soon left the business. Neither mentor, nor any of the Respondent's managers, followed through on the suggestion that the Claimant's mother be kept up-to-date with his progress. In particular, the Claimant's mother complains that she was not invited to an appraisal meeting that took place in January. We find that she was not invited in to any further meetings to monitor progress or compliance with the WRAP.

<u>The events of late 2017 and 2018</u>

32. 19 July 2018 a letter addressed to Elaine Kennett was sent to the Respondent by the customer and co-signed by either her husband or son. That letter set out the following complaints:

- *'My coat was lifted from behind (first incident)* (a handwritten note October/November 2017 is added)
- *I was asked by Sean if I was going to take him home to my house (second incident)* (a handwritten note November 17 is added)

- *holding my arm and asking where his Christmas kiss was (third incident)* (a handwritten note December 17 is added)
- *Sean pushed a line of trolleys in front of me to prevent me getting into my car, Sean tried to grab my hand and I explained I was in a hurry (fourth instant)* (a handwritten note may/June 2018 is added)
- *on Monday second of July on coming out of your store with my husband, Sean was by the trolleys (I held onto my husband's arm as I felt uneasy) Sean shouted "you cannot do that" I replied "he is my husband", Sean approached me saying you are My girlfriend, we both ignored him but he continued to shout and follow us, at this point my husband told him to go away. (Fifth incident)*

  I have reported all these incidents at various times to Jason (Duty store manager) and Kelly Miller who advised me she would deal with the issues I had raised.

  As you can imagine I have been left feeling anxious and worried by recent events and I feel that this is a form of stalking that needs addressing. I do not feel that I should limit my shopping to days when Sean is not work (I was advised do this by Kelly Miller). Sainsbury's has a duty of care to its staff but more importantly to its customers that they can shop in a safe and secure environment, this is not how I feel.'

33. We note the suggestion in the complaint letter that all these incidents had been reported to the duty store manager or Kelly Miller. There is no evidence before us from the Respondent that they had ever been raised formally or otherwise with Sean or Sean's mother at the time that they occurred. This is despite the clear advice contained in the letter from Sean's social worker that matters should be raised promptly and the previous agreement that Sean's mother would be kept informed of any issues. The Respondent substantially failed to have regard to the specialist advice it had been given that behaviour would be internalised as unobjectionable unless promptly corrected.

34. We also note that the customer acknowledges that she had been advised by Kelly Miller that she could shop on days when Sean was not working. She is not prepared to do that. We infer from the fact that the customer has spoken to Kelly Miller on a number of occasions that she would have been informed of the Claimant's disability. We note that in this letter, and the subsequent complaint letter the customer does not acknowledge the Claimant's disability or make any reference to it. In respect of the claims where we are entitled to make primary findings of fact we conclude that the failure of the customer to make any reference to the Claimant's disability in any of her complaint letters coupled with her refusal to modify her shopping habits to avoid any further difficulties would strongly suggest a lack of empathy for the Claimant. For the purposes of the unfair dismissal claim we note that this letter was in front of Mark Davis and Jason Roberts when they took their decisions.

35. The Claimant was invited to attend a disciplinary investigation meeting that took place on 9 August 2018 and was conducted by Alistair Denwette. The Claimant was accompanied by his mother. The Claimant is asked if he knew the purpose of the meeting. He responds that he understands it to be

'harassment of a customer'. That is what was said in the invitation letter. When asked if he understands what that meant is, he responded that he was unsure.

36. During this meeting Sean's mother is asked about Sean's level of understanding. She says that Sean would not understand a customer becoming upset and the next day would talk to them like nothing had happened. She stated that this was why she had asked to speak to the customer in order to explain the position.

37. In the course of the meeting Sean acknowledged that at least one of the incidents had some factual basis in that he agreed he had pushed some trolleys to block the customers way. The further allegation that he had taken her hand was not explored in any depth. Alistair Denwette decided that there was a case to answer and he referred the case for a disciplinary hearing.

38. The disciplinary hearing took place on 4 September 2018 the meeting was conducted by the Operations Manager Andy Fahey. The Claimant was accompanied by both of his parents. Natalie Coll was the note taker. As there had been an agreement for the Claimant to be represented by his trade union representative the meeting was put off until 10 September 2018. At that meeting the Claimant was again accompanied by his parents and trade union representative Kevin Grey.

39. During the course of the meeting, when the first of the Customer's complaint was put to him, Sean accepted that he would have touched the Customer. He did not accept that he lifted the Customer's coat. In respect of the second allegation, the suggestion that the Claimant had asked whether the customer was going to take him home, Sean acknowledged that he had said that but explained his conduct by saying that he was only joking. The third allegation, which was asking for a Christmas kiss, the Claimant was unable to remember. In respect of the fourth complaint the Claimant did acknowledge pushing a line of trolleys near the customer. When it was suggested to him that he had touched the customers hand he explained himself by saying that their hands had rubbed together. He did not accept or acknowledge that he had grabbed the customers hand. In respect of the final incident where the Claimant was said to have shouted *'you cannot do that'* when he saw the customer holding hands with her husband the Claimant admitted that he had said that. We find his explanation telling. He said*; 'because it's illegal for her to do that in the car park'*. The Claimant's mother was able to explain that rather unusual answer by explaining that the Claimant believed that the rules that he was given about physical contact would apply to everybody and not just him. We note also that in the course of this interview he was asked about the events of 2016 and had no recollection of them at all. This is consistent with our findings that Sean finds it difficult to answer questions about past events.

40. Andy Fahey engaged in an exercise when he endeavoured to determine for himself the extent of the Claimants understanding of emotions. He asked*: 'Sean how you know someone's upset'*. The Claimant's initial response was to say that he was unsure. When pressed he said he would know someone's upset if they shouted at him. When pressed again, and you could tell by their

face, but then went on to say that if they were upset they would cry. When asked if he could tell if someone was sad his response was *"because I'd shouted or touched them*". That is plainly not an answer to the question he was asked and shows the lack of understanding. When asked if he would know whether someone is happy he said yes because they laugh. Finally the Claimant's mother explains that, with *Sean 'you have to be blatant'*. We understand her to be saying that Sean understands extreme emotions but is unable to pick up on more subtle reactions. In the light of that we are surprised by the fact that Andy Fahey went on to conclude that Sean understands emotions. That was a conclusion which flew in the face of the expert advice that the Respondent already had and was undermined by much of what Andy Fahey had recorded in the meeting and what he was told by the Claimant's mother.

41. During this meeting Sean referred to the consequences of touching people as being potentially going to court or jail. His parents then explained that, ever since the incident, they had been giving Sean the worst-case scenario and explained that Sean had picked up on their language which did not necessarily reflect his own understanding.

42. In the course of the meeting Sean was asked whether he knew the customer and he said that she was a regular customer. He gave no indication at that stage he did not know who she was.

43. Kevin Grey is recorded as reminding Andy Fahey that the Claimant needed to have any instructions repeated regularly he said; *'someone needs to tell him every day'*. At one stage the Claimant's father raised the possibility that the customer was being vindictive. The Claimant's mother retreated from that position at that stage.

44. Andy Fahey concluded that the Claimant should be dismissed. He recorded his reasons on a pro forma drawn up for that purpose. Some of his conclusions are surprising. In particular, he rejected the possibility of redeployment apparently because this would involve *'treating Sean differently'*; apparently making no allowances at all for the Claimant's disability. In fairness to him we have had no explanation or evidence from him as to why he came to this conclusion. We do not need to deal in depth with his findings as the Claimant was reinstated on appeal.

45. The Claimant appealed the decision to dismiss him. That appeal was conducted by Aydin Gunes at a meeting that took place on 11 October 2018. In the course of the meeting Aydin Gunes discussed the WRAP that had been introduced in 2016. The Claimant's mother stated that she had never actually seen the document that had been discussed. Aydin Gunes asked whether a mentor had been put in place and he was told that a mentor had been put in place and then a replacement. After the replacement left, nothing more was done. He was told that the planned meeting with the social worker had not in fact taken place. The Claimant's mother complained that she had not been contacted. The Claimant's father suggested that because of the reorganisation and what he described as cutbacks, support had not been made available.

46. We find that Aydin Gunes was swiftly persuaded by The Claimant's parents that the arrangements that had been put in place in 2016 had either not been implemented or had broken down. The notes of the meeting show that he moved swiftly on to what could be done to support the Claimant in the future. One suggestion that was made in the course of that meeting was to move Sean to a non-customer facing role in the warehouse. It was suggested that this might be dangerous but less so if he was working with somebody else. Ultimately at a further meeting on 21 November 2018 Aydin Gunes decided that the Claimant should be reinstated. It is quite clear and that his decision was based on the presumption that a proper support package would be put in place in order to regulate the Claimant's behaviour and alleviate any difficulties with the customer.

47. Immediately after the meeting of 10 September 2018 a new 'WRAP' was drafted by Tasha Cooper. We note that in the subsequent meeting of 21 September 2018 Sean's mother is recorded as expressly asking whether a mentor would be allocated. Aydin Gunes says in clear terms that he expects that this would be the case and that it would be discussed*; 'yes, we will talk about that'*. One contentious point that we need to resolve is whether, as Tasha Cooper told us, Sean's mother suggested that there was no need for a mentor. She says this occurred during a consultation meeting about new terms and conditions. The evidence suggests that this occurred at the point Sean was reinstated. We find that it would be very surprising if, having complained about the mentor agreement breaking down and having asked whether a mentor would be provided, Sean's mother would suddenly change her stance. Her evidence, which was not challenged, was that she was told that nobody was prepared to act as a mentor. We note that in 2019 Sean's mother complained about the lack of a mentor. This is inconsistent with the suggestion that she had been the person to reject the suggestion. We do not make any finding that Tasha Cooper was trying to mislead us. Generally, she was an open and frank witness. We find that, in this respect, we prefer the evidence of the Claimant's mother and accept that she expected a mentor to be appointed.

48. The new WRAP was dated 21 November 2018. It included the following instructions:

> *'Sean to use communication sheet to help him and also remind him what to do and not to do.*
>
> *Sean not to go anywhere near the customer who filed complaint previously and to go and do other tasks when he knows the customer is in the car park and do not be overfriendly with any of the customers other than to smile and say hello.'*

49. The decision of Aydin Gunes was recorded in a letter dated 26 November 2018. The Claimant was reinstated but given a final written warning that was expressed as remaining active for a period of 12 months.

<u>Events after the return to work.</u>

50. The Employment Judge asked Natalie Coll whether the outcome of the disciplinary process had been communicated to the Customer and whether she had been told of the Claimant's disability. Natalie Coll told the Tribunal, and we accept, that she knew that the Customer had learned of the Claimant's reinstatement before the final complaint was made as the Customer had been in the store and seen the Claimant at work. She had approached Natalie Coll and asked; *'what is he doing here'*. Natalie Coll told us she had noted her initial reaction and said that she was not happy that he was still there. The Store Manager, Greg Spicer took her upstairs. We had no evidence or documents that resulted from that meeting. We find it more likely than not that Greg Spicer explained the rationale for reinstating the Claimant.

51. Upon Sean's return to work no mentor was appointed and he returned to work as normal. The WRAP that had been prepared did provide for additional meetings between Sean and Tasha Cooper. There were to be one per week for 4 weeks and then one every 2 weeks for the next 8 weeks and occasionally thereafter. We have seen the records of the meetings and find that insofar as they took place there was a good attempt to reinforce the message that the Claimant should maintain professional boundaries. The first 5 meetings took place as planned. In January the Claimant missed a meeting because he was off sick. There was no attempt to rearrange it. There was one meeting on 4 January 2019 and one on 1 February 2019. After that Tasha Cooper was unwell and was off work with personal issues. We wish to stress that we consider that Tasha Cooper is in no sense responsible for the fact that meetings were not conducted in her absence. It is a failing of higher management not to put mechanisms in place to cover the work of employees who were unwell. This is a large company and drafting in some external assistance from HR would have presented no difficulties. The breakdown in the planned meetings meant that there were no regular reminders of the behaviour standards required for a period of 7 weeks ending with the incident of 21 March 2019.

<u>The Third complaint</u>

52. On 22 March 2019 the Customer sent an e-mail to the address 'the Manager – Low Hall' FAO Greg Spicer. We infer that she knew the name of the Manager from her previous dealings with him. The e-mail read as follows:

> *'I was once again at approx. 10-45 am on the 21st March inside the shop confronted by Sean by the security desk and he said (that has the cat got your tongue) and are you not speaking to him anymore and I walked away.*
>
> *This situation must be stopped as this is very unnerving and upsetting.*
>
> *Sainsbury had informed me that this would not happen again and the previous complaints had been dealt with (obviously not)*
>
> *I await your reply to this complaint.'*

53. On 23 March 2019 the Claimant was called to a meeting with Greg Spicer. He was told that he was going to be suspended. Greg Spicer told the Claimant

that whilst he would normally ask some questions about the incident he would not do so unless the Claimant's mother was present. The Claimant volunteered the following information:

'I haven't seen that woman since the last time. I like doing my job in the car park. Everybody knows me. I'm a good person I don't harm nobody. I just do my job. Sometimes things can get in a muddle. Can you tell me the day it happened please?'

54. Greg Spicer did not answer the Claimant's question having apparently decided that the matter should not be discussed at all until the Claimant's mother (who he referred to as a responsible adult) was present. The Claimant was then suspended on full pay. Greg Spicer asked Natalie Coll to conduct an investigation. However, we find that before he did so he asked for and viewed CCTV footage taken on 21 March 2019. The suspension letter includes details of two allegations. The first mirrors the complaint by the Customer and refers only to an *'inappropriate comment'*. The second includes an allegation that the Claimant followed the Customer around the checkout area and that he attempted to block her exit (as later emerged the suggestion was that the Claimant had placed baskets in the Customers way outside the store entrance. We find that the second allegation, which goes beyond the complaint in the Customer's e-mail, was added due to the input of Greg Spicer and his impression of what was shown on the CCTV footage he watched.

The Investigation

55. On 27 March 2019 the Claimant accompanied by his mother attended a disciplinary investigatory meeting conducted by Natalie Coll. We had the notes from that meeting in our bundle. The Claimant's mother is recorded as confirming her understanding that the meeting was a preliminary meeting. Natalie Cole read the disciplinary allegations to the Claimant and simply asked him to give his account of what happened. The Claimant is recorded as asking for the question to be repeated as he did not understand it. Natalie Coll then asked whether the Claimant had made an inappropriate comment. She did not say what that comment was said to be. The Claimant said that he could not remember. The Claimant was then told that the complainant was the same individual who had complained before. The Claimant referred to the previous incident involving a lady and her husband. The Claimant said that he could not remember seeing the lady again and had no memory of blocking her exit.

56. During the meeting the Claimant and his mother were shown the CCTV footage. The Claimant is asked whether he recognised the lady shown on the CCTV and he said that he did not. He is pressed on that and repeated that he did not recognise the woman from the CCTV. The Claimant was asked if he saw the woman that had previously complained about him and agreed that he would. He said that he did not think that this was the same person on the CCTV footage. To set out the nature of the Claimant's responses it is necessary to describe the CCTV.

CCTV

57. We are acutely aware that in respect of the claim of unfair dismissal we are not entitled to substitute our view of the evidence before the decision maker. Where the evidence consists of CCTV footage it may be open to a reasonable decision maker to form a different impression of what the CCTV shows than our own conclusions. We set out the conclusions reached by the Respondent in the disciplinary process below.

58. It is possible to describe what the CCTV images were in neutral terms. There were several separate segments taken from different cameras but the sections taken into account by the decision makers had minimal overlap. The events took place at the front of the store by the doorway. If facing the doorway from the inside of the store main checkouts were to the right. The door way was wide, perhaps 5-6m. On each side of the doorway on the outside there were stacks of hand baskets in holders. Just inside the doorway there was a manned security desk. The guard on duty would have a good view of the area around the door. On the left side of the door (looking outside) were counters including one where customers could buy cigarettes.

59. The CCTV showed the customer making her way from one of the main checkouts to the cigarette counter. She waits there for a shop assistant to become free. The Claimant then makes his way across to the left of the front door and appears to be retrieving baskets. The Claimant exits the store and places baskets in the racks on either side of the door. On the left side he leaves a pile of baskets just away from the wall and re-enters the store. It is at this point that the Respondent has concluded that he spoke to the Customer. The CCTV shows the Claimant enter the store and he is in the vicinity of the Security Desk. The customer then rapidly wheels her trolley past where the Claimant is and exits the door on the left side. Her trolley strikes or passes very close to the stack of baskets that the Claimant has left beside the door.

<u>The investigation meeting- 27 March 2019</u> (resumed)

60. The Claimant was asked by Natalie Coll why, having gone outside, the Claimant had come back into the store. The Claimant is recorded as speculating that he might have gone to the toilet. The Claimant was asked if anybody might have witnessed what had happened and he suggested that a colleague Marc might have overheard what was or was not said.

61. After the investigatory meeting Natalie Coll interviewed Greg Spicer. The notes of that meeting reveal that Greg Spicer had spoken to the Customer twice since the initial events. He volunteered that she had said that she felt very unsafe coming in to the store. We find that there was no reluctance by the Customer to give her account of events. Greg Spicer had an opportunity to ask her questions himself or to ask her if she would give a statement. There is no evidence before us that he did either of those things nor did he make any notes of the conversations he did have. Natalie Coll simply asked Greg Spicer whether the Customer's appearance had changed in any way. He said that it had not and that the Customer looked the same.

62. Natalie Coll interviewed the Security Guard who had been at the security desk on the day in question. He is shown the CCTV. We infer that this included the

section where the Claimant is seen at the door near the security desk when the Customer passes with her trolley. The Security Guard remarks that, in his view, the CCTV shows that at that moment the Claimant is speaking to him. He is immediately challenged on that answer with Natalie Coll asking whether that is something he recalls or just an impression from the CCTV. He responded saying that the Claimant always spoke to him as he went past. Natalie Coll again asks whether the Security Guard remembered the conversation or whether he was just going from the CCTV. The Security Guard accepts that he did not remember the conversation. According to the notes at least, at no stage is the security guard asked to comment upon the allegation against the Claimant that the Claimant had spoken to the Customer despite the fact that he was within a few meters of the Claimant. In particular he is not asked whether he heard the Claimant use the phrase *'has the cat got your tongue'*.

63. Natalie Coll spoke to Marc. She asked him whether he remembered *'the Claimant having a conversation with a customer'*. Marc had no recollection of any of the events of that day and said that he did not really see the Claimant during his shifts.

The resumed investigatory meeting – 11 April 2019.

64. The Claimant was invited to a resumed investigatory meeting on 11 April 2019. This time he attended with his union representative Clare Keogh and his mother. Natalie Coll told the Claimant that Greg Spicer had said that the person who had complained was the same individual who had complained before. A very large proportion of that meeting was taken up with the question of whether the Claimant would have recognised the Customer. The Claimant maintained his position that he did not recognise the Customer from the CCTV. At one stage Natalie Coll is recorded as saying *'we believe he recognised her'*.

65. At the conclusion of the meeting Natalie Coll announced that she believed that the Claimant had recognised the Customer. She had previously accepted that the CCTV evidence did not support the suggestion that the Claimant had attempted to block the Customers exit from the store. She concluded that the matter should proceed to a disciplinary hearing. The letter to the Claimant inviting him to a disciplinary hearing erroneously included the allegation that the Claimant had sought to block the Customer's exit.

The disciplinary hearing - 13 May 2019

66. The disciplinary hearing was conducted by Mark Davis. The Claimant attended together with Debbie McSweeney his Trade Union Representative and his mother. At the outset the misunderstanding about the nature of the disciplinary allegations was resolved after the intervention of Debbie McSweeney. All parties viewed the CCTV as Debbie McSweeney had not had the opportunity to view it before the hearing.

67. The Claimant was asked whether he recognised the Customer from the CCTV and he said that he did not. When he said no, Mark Davis said that he wanted

the Claimant to be honest. Debbie McSweeney warned that the Claimant was likely to give the answer that he felt that the questioner was looking for. Mark Davis summarised the interview with the Security Guard as saying that he did not recall anything. We consider that this is not an entirely fair summary of the interview.

68. Mark Davis read the Customer's complaint to the Claimant and asked him 'if he said those words'. The Claimant responded that he had not. He was asked if he understood the instructions in the more recent WRAP about the Customer and the Claimant said that he knew he should not talk to her.

69. When discussing the CCTV footage, Debbie McSweeney on the Claimant's behalf suggested that at the point when the Claimant was alleged to have spoken to the Customer he was in fact facing and talking to the Security Guard. That was of course what the Security Guard had said when he watched the CCTV. Mark Davis is recorded as saying that this was Debbie McSweeney's opinion. Shortly after that Mark Davis asked if the Claimant realised he had done something wrong. The Claimant denied that. Mark Davis responding to Debbie McSweeney who had suggested that the CCTV footage provided no support for the allegation said that the Claimant was in the vicinity. During the meeting she also suggested that the Claimant's ability to recognise people was impaired. She illustrated that by saying that she had met the Claimant before but that he had not recognised her outside of the meeting. She repeated that when she gave evidence before us and, in respect of any claims where we are entitled to be the primary fact finders, we accept her evidence.

70. The Claimant's mother then addressed Mark Davis. She suggested that the Customer had been unhappy that the Claimant had been reinstated. She went on to say that the customer wanted him to be dismissed. We note that this was the first time that the Claimant's mother had made such an assertion. During the disciplinary process in 2018 the Claimant's father had suggested that there was a malicious element to the complaint and it was the Claimant's mother who moved away from that suggestion. However, at this stage she made no bones about the fact that she wanted the question of the Customer's motives to be considered. Mark Davis's response was informative. He said, *'I have no proof of that'*.

71. Mark Davis went through the dates of the meetings that had taken place between the Claimant and Tasha Cooper. He was told that there had been no meetings since 1 February 2019. The Claimant's mother told him that despite an agreement to the contrary she had not been informed about any issues or Sean's progress.

72. After an adjournment Mark Davis asked questions about the Claimant's disability. He had read the letter from Angela Powell. He was told that there had been no change in the Claimant's situation since that was written. After that discussion Mark Davis announced his decision which was that the Claimant would be summarily dismissed. He gave reasons at the time. He said that Greg Spicer had confirmed that the woman in the CCTV was the Customer. He found that there was a 'clear opportunity' for the Claimant to

have spoken to the Customer as she left the store. He said that there had been regular meetings to discuss the WRAP. He concluded that the Claimant had recognised the Customer and used the words in the complaint letter. In a proforma completed at the time Mark Davis records that he considered redeployment. He ruled that out on the basis that he believed that the actions would be repeated at another store. He ruled out a further final written warning on the basis that he believed that the conduct would be repeated. He makes no mention whatsoever of the possibility that the Customer was unhappy that the Claimant had been reinstated. He took the existing final written warning into account when reaching those decisions.

73. The dismissal was confirmed by a letter dated 15 May 2019. The reasons for the dismissal were said to be a *'gross abuse of customer standards'* by making an inappropriate comment.

The Appeal

74. The Claimant with the help of his family, appealed the decision to dismiss him. The letter of appeal included a description of the Claimant's disability. It was pointed out that in 25 years this was the first customer that had complained about the Claimant's behaviour which was acknowledged to be capable of misinterpretation. The appeal letter did not shirk from suggesting that the Customer may have pursued 'a vendetta' aimed at securing the Claimant's dismissal. It contains the following passage:

'Prior to 2016, Mr Dubarry had not received any complaints from Sainsbury's customers, and has, to date, only received complaints from the same customer who has now complained the third time. Nevertheless, at no time has Sainsbury's investigated whether the customer's allegations have been of malicious intent and/or part of a campaign of direct discrimination or harassment against Mr Dubarry, as a vulnerable adult.

75. The Claimant's appeal expressly makes allegations that there had been a history of failing to make adjustments for the Claimant's disability. In respect of the most recent WRAP the complaint was made that the onus was placed on the Claimant to read his 'communication sheet' every day despite the fact that he struggles with reading. It was suggested that he should have been assisted with this at the start of his shifts. The letter suggested that the instruction not to go anywhere near the Customer was impractical given the nature of the Claimant's job. A series of adjustments are proposed including arranging training or mentoring by an individual with appropriate training. The list reads as follows:

- '*Transferring Mr Dubarry to another role e.g. the warehouse;*
- *Assigning Mr Dubarry to a different place of work e.g. store transfer;*
- *Giving, or arranging for, training or mentoring by somebody appropriately trained to work with people with learning disabilities;*
- *Modifying instructions or reference manuals for Mr Dubarry's comprehension;*
- *provision of extra support or supervision and changes to internal processes;*

- *involving other staff to support Mr Dubarry i.e reading his communication sheet with him prior to starting a shift.'*

76. We shall not set out the entirety of the appeal letter. During the Appeal process Jason Roberts addressed the letter from a summary which distilled the appeal letter into 34 separate points. His outcome letter sets out his conclusions in respect of each point so identified.

77. The Claimant was invited to an appeal meeting on 25 June 2019. His mother had asked Joshua Ashitley who was a support worker employer by Waltham Forest to give evidence on behalf of the Claimant. She had attended together with the Claimant's cousin Karise Robinson and his trade union representative Debbie McSweeney. It was their impression that it had been agreed that all of them could attend the appeal meeting. Jason Roberts was not prepared to permit all four individuals to attend together. After some discussion he agreed that the Claimant could be attended by two individuals at a time. The format of the appeal proceeded by an initial meeting with Karise Robinson and Debbie McSweeney accompanying the Claimant and then a further meeting where the Claimant's mother and Joshua Ashitley were present. We have reviewed all the notes of previous meetings and the notes of the appeal. We find that those notes do reveal that the Claimant's family provided a great deal of assistance in explaining questions to the Claimant. There is no suggestion that they were impolite or attempted to hijack the proceedings in any way. They do advocate on the Claimant's behalf as might be expected.

78. The appeal notes are extensive and we shall not attempt to summarise them. The following points emerged:

    78.1. In respect of the suggestion that the Claimant had recognised and spoken to the Customer on 21 March 2019 the Claimant maintained his account that he had not.

    78.2. The record of the discussion as to allegation that there had been a failure to make reasonable adjustments (that takes place in the first part of the meeting) shows that Jason Roberts asked one single question about this point before moving on.

    78.3. When Jason Roberts got to point 23 – the suggestion that the Customer might be discriminating against the Claimant – there was no discussion of this but Jason Roberts is noted as saying that he needed *'to review and take away'*

    78.4. Joshua Ashitley was asked by Jason Roberts what his opinion was of the WRAP that had been put in place in 2018. He said that the lack of detail that had been included would lead to a lack of understanding. He is recorded as referring to a mentor and saying that no provision had been made for any regular follow up on the instructions that were given. He said there was an absence of 'steps to follow' that would allow self-checking. He says that the WRAP made no reference to the communication sheet.

78.5. On a number of occasions Jason Roberts asks the Claimant's mother whether she had raised any concerns with what had been put in place at the time. In some instances (like her suggestion that she should explain the Claimant's condition to the customer) she said she had. In respect of others she accepted she had not but explained that she was unaware there were any ongoing issues.

79. Jason Roberts decided that he needed to speak to some of the individuals involved with the events before making any decision. He interviewed Jason Bolton, the Operations Manager, Mark Davis, Natasha Cooper and Aydin Gunes.

80. The following matters emerged from those interviews:

80.1. Each was asked whether they had any knowledge about Sean's reading skills. Apart from Natasha Cooper, none of them were able to say whether there were any difficulties or not. Natasha Cooper did express a view (see below).

80.2. Mark Davis described the first WRAP that had been put in place as *'rubbish'*. He acknowledged that the meetings with Tasha Coll had been missed towards the end because of sickness. He thought that the WRAP that had been put in place was reasonable. He repeated in full his reasons for deciding that the Claimant should be dismissed by reference to the notes he included on the pro-forma at the conclusion of the disciplinary hearing.

80.3. Natasha Cooper told Jason Roberts that she had prepared the second WRAP in 2018 with the Claimant and his mother. She said that the Claimant's mother was *'completely happy'* with what had been put in place. She said that she had exchanged telephone numbers with the Claimant's mother. She said the Claimant's mother had called her twice about training and asked how things were going. She was told things were fine. Natasha Coopers response when asked if she knew about difficulties with reading and writing was to say that there were *'no issues'*. She said that she had reviewed the communication sheet at every meeting. She said that there had been no other issues with the Claimant. She is recorded as saying that the Claimant's mother was happy for the Claimant not to have a mentor.

80.4. Aydin Gunes said that he believed that Tasha Cooper would telephone the Claimant's mother to keep her updated. Whilst that was what he agreed should happen, other than Tasha Cooper saying that the Claimant's mother called her on two occasions, that aspiration was not fulfilled. Aydin Gunes was not asked whether he had agreed that a mentor should be provided.

81. On 31 May 2019 Jason Roberts held another meeting attended by the Claimant, his mother and Debbie McSweeney. The purpose of the meeting was to announce his decision. No opportunity was afforded for the Claimant to comment upon the additional interviews undertaken by Jason Roberts. Jason

Roberts simply read through a letter that we infer he had prepared earlier. Having identified 34 points in the grounds of appeal he dismissed all of them. He upheld the decision to dismiss the Claimant.

The law to be applied

82. In advance of the hearing the Employment Judge discussed the general legal principles to be applied with the members by reference to some proposed self-directions. When it became apparent that the advocates intended to provide written submissions the Employment offered to share those directions with the parties in order to reduce the burden of referring to uncontentious legal propositions in their written submissions. The advocates welcomed this suggestion and accepted that these self-directions did set out the basic framework of the law to be applied in this case. In their written submissions the parties referred to additional authorities said to be relevant to the particular issues in this case. We set those out in our discussions and conclusions below.

UNFAIR DISMISSAL

83. The right not to be unfairly dismissed is conferred by Section 94 of the Employment Rights Act 1996. Where, as here, there is no dispute that an employee was dismissed, the question of whether any such dismissal was unfair turns upon the application of the test in Section 98 of the Employment Rights Act 1996. The material parts of that section are as follows:

"98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that

of his employer) of a duty or restriction imposed by or under an enactment.

(3) ...

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the 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.

84. For the purposes of Section 98(2) ERA 1996 'conduct' means actions 'of such a nature whether done in the course of employment or outwith it that reflect in some way upon the employer/employee relationship': ***Thomson v Alloa Motor Co Ltd*** **[1983] IRLR 403**, EAT. It is not necessary that the conduct is culpable ***JP Morgan Securities plc v Ktorza*** **UKEAT/0311/16**.

85. Where the reason, or principal reason, for the dismissal is established as conduct then it will usually, but not invariably, be necessary to have regard for the guidance set out in ***British Home Stores Ltd v Burchell*** **[1978] IRLR 379**, which lays down a three-stage test: (i) the employer must establish that he genuinely did believe that the employee was guilty of the misconduct; (ii) that belief must have been formed on reasonable grounds; and (iii) the employer must have investigated the matter reasonably. Following amendments to the statutory scheme the burden of proof is on the employer on point (i) (which goes to the reason for the dismissal) but it is neutral on the other two points ***Boys and Girls Welfare Society v McDonald*** **[1996] IRLR 129**.

86. The correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision itself. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: ***Iceland Frozen Foods Ltd v Jones*** **[1982] IRLR 439**. That test recognises that two employers faced with the same circumstances may arrive at different decisions but both of those decisions might be reasonable.

87. The range of reasonable responses test applies as much to any investigation and the procedure followed as it does to the substantive decision to impose dismissal as a penalty ***Sainsbury's Supermarkets*** **Ltd *v Hitt*** **[2003] IRLR 23**.

88. In terms of the reasonableness of the investigation and the procedure that was followed, the "relevant circumstances" referred to in Section 98(4) include the gravity of the charge and their potential effect upon the employee ***A v B***

[2003] IRLR 405. ***A v B*** also provides authority for the proposition that a fair investigation requires that the investigator examines not only the evidence that leads to a conclusion that the employee is guilty of misconduct but also that which tends to show that they are not. However, where during any disciplinary process an employee makes admissions a reasonable employer might normally be expected to proceed on the basis of those admissions ***CRO Ports London Ltd v Mr P Wiltshire*** **UKEAT/0344/14/DM**.

89. When considering a complaint of unfair dismissal under s.98(4) of the 1996 Act, where the employee has exercised a right of appeal in disciplinary proceedings the tribunal must consider the overall process ***Taylor v OCS Group Ltd*** **2006 ICR 1602, CA**.

90. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

"any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question."

The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009.

91. Unless the employee seeks reinstatement or re-engagement the Tribunal must consider making both a basic and compensatory award. ***Polkey v A E Dayton Services Ltd*** **[1987] IRLR 503** is authority for the proposition that in assessing what compensation is 'just and equitable' an employment tribunal is entitled to have regard to the possibility that had the employer acted fairly there might or would have been a dismissal in any event. The proper approach to hypothetical as opposed to real events is that set out in ***Software 2000 Ltd v And*rews** **[2007] IRLR 569** although that now needs to be understood in the light of the repeal of the statutory dismissal procedures (see the references to Section 98A(2)). Elias J (P) (as he then was) gave the following guidance:

"(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so

unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) An appellate court must be wary about interfering with the tribunal's assessment that the exercise is too speculative. However, it must interfere if the tribunal has not directed itself properly and has taken too narrow a view of its role.

(6) The s.98A(2) and Polkey exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a tribunal considers some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

(7) Having considered the evidence, the tribunal may determine:

> *(a) That if fair procedures had been complied with, the employer has satisfied it – the onus being firmly on the employer – that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).*
>
> *(b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.*
>
> *(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.*
>
> *(d) Employment would have continued indefinitely."*

92. Following the repeal of the statutory dismissal procedure in ***Ministry of Justice v Parry*** **[2013] ICR 311** it was said (by Langstaff J (P)):

"We should add that some of the way in which this subject is dealt with in Harvey has the capacity to be misleading. At para 2558 (Vol 1, D1) it cites Software 2000 Ltd v Andrews [2007] IRLR 568, [2007] ICR 825, and accurately quotes a lengthy passage from the judgment of the EAT given by

Elias P. Under para 54, at point (7) under in his distillation of the effect of the authorities he says:

"(7) Having considered the evidence, the tribunal may determine: (a) that if fair procedures had been complied with, the employer has satisfied it-the onus being firmly on the employer-that on the balance of probabilities the dismissal would have occurred when it did in any event: the dismissal is then fair by virtue of section 98A(2); (b) that there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly . . . ."

Unfortunately, it is not made clear in the text of Harvey that this part of the decision is no longer appropriate guidance, since s 98A(2) was in force at the time it was delivered, and has been repealed since. When it was in force the range of chance of dismissal met a watershed at 50% above which – by however little or however much – a completely fair hypothetical dismissal was to be assumed for the purposes of compensation to be awarded for an actual one already held unfair. It is not in force any more. Chance of dismissal now runs across the whole spectrum from zero to 100%, as assessed by the tribunal. It would therefore be best if this part of the otherwise very helpful guidance were no longer put forward as if it might be relied upon.

EQUALITY ACT CLAIMS

The burden and standard of proof

93. The standard of proof that we must apply is the civil standard that is the balance of probabilities. In other words, we must decide whether it is more likely than not that any fact is established. As a general rule the party making an assertion of any fact to support their claim or defence bears the burden of establishing that fact.

Burden of proof – claims under the Equality Act 2010

94. The burden of proof in claims brought under the Equality Act 2010 is governed by section 136 of that act the material parts of which are:

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(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.

95. Accordingly, where a claimant establishes facts from which discrimination could be inferred (a prima facie case), then the burden of proving that the

treatment was in no sense whatsoever unlawful passes to the respondent. The proper approach to the shifting burden of proof has been explained in ***Igen v Wong*** **[2005] ICR 9311** which approved, with some modification, the earlier decision of the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd*** **[2003] IRLR 332**. Most recently in ***Base Childrenswear Limited v Otshudi*** **[2019] EWCA Civ 1648** Lord Justice Underhill reviewed the case law and said:

17. Section 136 implements EU Directives 2000/78 (article 10) and 2006/54 (article 19), which themselves derive from the so-called Burden of Proof Directive (1997/80). Its proper application, and that of the equivalent provisions in the pre-2010 discrimination legislation, has given rise to a great deal of difficulty and has generated considerable case-law. That is not perhaps surprising, given the problems of imposing a two-stage structure on what is naturally an undifferentiated process of fact-finding. The continuing problems, including in particular the application of the principles identified in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 93, led to this Court in Madarassy v Nomura International plc [2007] EWCA Civ 33, [2007] ICR 867, attempting to authoritatively re-state the correct approach. The only substantial judgment is that of Mummery LJ: it was subsequently approved by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37, [2012] ICR 1054. In Efobi v Royal Mail Group Ltd [2017] UKEAT 0203/16, [2018] ICR 359, the EAT held that differences in the language of section 136 as compared with its predecessors required a different approach from that set out in Madarassy; but that decision was overturned by this Court in Ayodele v Citylink Ltd [2017] EWCA Civ 1913, [2018] ICR 748, and Madarassy remains authoritative.

18. It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:

(1) At the first stage the claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):

> *"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*
>
> *57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. …"*

(2) If the claimant proves a prima facie case the burden shifts to the respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

> *"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."*

He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.

96. Inferences can only be drawn from established facts and cannot be drawn speculatively or on the basis of a gut reaction or 'mere intuitive hunch' see ***Chapman v Simon*** **[1994] IRLR 124** see per Balcombe LJ at para. 33 or from 'thin air' see ***Chief Constable of the Royal Ulster Constabulary*** **[2003] ICR 337**.

97. Discrimination cannot be inferred only from unfair or unreasonable conduct **Glasgow *City Council v Zafar*** **[1998] ICR 120**. That may not be the case if the conduct is unexplained ***Anya v University of Oxford*** **[2001] IRLR 377, CA.** Whilst inferences of discrimination cannot be drawn merely from the fact that the Claimant establishes a difference in status and a difference treatment see ***Madarassy v Nomura International plc*** **[2007] ICR 867** 'without more', the something more *"need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred"* see ***Deman v Commission for Equality and Human Rights*** **[2010] EWCA Civ 1279** per Sedley LJ at para 19.

98. Where there are a number of allegations each single allegation of discrimination should not be viewed in isolation, but the history of dealings between the parties should be taken into account in order to determine whether it is appropriate to draw an inference of racial motive in respect of each allegation ***Anya v University of Oxford***.

99. The burden of proof provisions need not be applied in a mechanistic manner ***Khan and* another *v Home Office*** **[2008] EWCA Civ 578**. In ***Laing v Manchester City Council*** **2006 ICR 1519** Mr Justice Elias (as he then was) said:

"the focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race""

100. Such an approach must assume that the burden of proof falls squarely on the Respondent to prove the reason for any treatment. It is an approach that should be used with caution and is appropriate only where we are in a position to make clear positive findings of fact as to the reason for any treatment or any other element of the claim. We shall indicate below where we consider that it is open to us to follow this approach.

101. The 'shifting burden' provisions apply to all claims under the Equality Act 2010. Guidance as to their application in reasonable adjustments case has

been given in **Project *Management Institute v Latif* 2007 IRLR 579, EAT**. which was dealing with the position under the Disability Discrimination Act 1995 but has been held to be of equal application under the Equality Act 2010. Elias J (as he was) said:

50 In this connection Ms Clement relies upon para. 4.43 of the Disability Rights Commission's code of practice: Employment and Occupation which provides as follows:

'To prove an allegation that there has been a failure to comply with the duty to make reasonable adjustments, an employee must prove facts from which it could be inferred in the absence of an adequate explanation that such a duty had arisen, and that it had been breached. If the employee does this the claim will succeed unless the employer can show that it did not fail to comply with its duty in this regard.'

This certainly implies that something more than the two conditions of an arrangement resulting in a substantial disadvantage is required before the burden shifts……

53 We agree with Ms Clement. It seems to us that by the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative; that is what would be required if a respondent had to show that there is no adjustment that could reasonably be made. Mr Epstein is right to say that the respondent is in the best position to say whether any apparently reasonable adjustment is in fact reasonable given his own particular circumstances. That is why the burden is reversed once a potentially reasonable adjustment has been identified.

54 In our opinion the paragraph in the code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made.

55 We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.'

Equality Act 2010 - Statutory Code of Practice

102. The power of the Equality and Human Rights Commission to issue a code of practice to ensure or facilitate compliance with the Equality Act 2010 is afforded by Section 14 of the Equality Act 2006. Such a code must be laid

before Parliament and is subject to a negative resolution procedure. The current code ('the code of practice') was laid before parliament and came into force on 6 April 2011. Section 15 of the Equality Act 2006 sets out the effect of breaching the code of practice. Paragraph 1.13 of the code explains that:

The Code does not impose legal obligations. Nor is it an authoritative statement of the law; only the tribunals and the courts can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.

Reasonable adjustments

103. When dealing with a claim that there has been a failure to make reasonable adjustments the Tribunal are obliged to have regard to the relevant code of practice. For claims brought in the employment sphere the relevant code is the Equality and Human Rights Commission Code of Practice on Employment 2011. Paragraph 6.2 of that code describes the duty to make reasonable adjustments as follows:

The duty to make reasonable adjustments is a cornerstone of the Act and requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled.

104. The reference in that paragraph to the right to have 'additional steps' taken reflects the guidance given by Lady Hale in ***Archibald v Fife Council*** **[2004] UKHL 32** which whilst referring to the Disability Discrimination Act 1995 is equally applicable to the Equality Act 2010.

……this legislation is different from the Sex Discrimination Act 1975 and the Race Relations Act 1976. In the latter two, men and women or black and white, as the case may be, are opposite sides of the same coin. Each is to be treated in the same way. Treating men more favourably than women discriminates against women. Treating women more favourably than men discriminates against men. Pregnancy apart, the differences between the genders are generally regarded as irrelevant. The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment.

105. The material parts of Section 20 of the Equality Act read as follows:

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)…..

106. The phrase 'substantial' used in sub-section 20(3) is defined in section 212(1) of the EA 2010 and means only 'more than minor or trivial'.

107. Sub-section 39(5) of the Equality Act 2010 extends the duty to make reasonable adjustments to an employer of employees and job applicants.

108. The proper approach to a reasonable adjustments claim remains that suggested in Environment ***Agency v Rowan*** **[2008] IRLR 20**. A tribunal should have regard to:

a) the provision, criterion or practice applied by or on behalf of the employer; or

(b) the physical feature of premises occupied by the employer;

(c) the identity of non-disabled comparators (where appropriate); and

(d) the nature and extent of the substantial disadvantage suffered by the claimant.

109. The code gives guidance about what is meant by reasonable steps at paragraph 6.23 to paragraph 6.29. Those paragraphs read as follows:

6.23 The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

6.24 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.

6.25 Effective and practicable adjustments for disabled workers often involve little or no cost or disruption and are therefore very likely to be reasonable for an employer to have to make. Even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms – for example,

compared with the costs of recruiting and training a new member of staff – and so may still be a reasonable adjustment to have to make.

6.26 [deals with physical alterations of premises].

6.27 If making a particular adjustment would increase the risk to health and safety of any person (including the disabled worker in question) then this is a relevant factor in deciding whether it is reasonable to make that adjustment. Suitable and sufficient risk assessments should be used to help determine whether such risk is likely to arise. Duty to make reasonable adjustments

6.28 The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- *whether taking any particular steps would be effective in preventing the substantial disadvantage;*
- *the practicability of the step;*
- *the financial and other costs of making the adjustment and the extent of any disruption caused;*
- *the extent of the employer's financial or other resources;*
- *the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and*
- *the type and size of the employer.*

6.29 Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

110. The requirement to demonstrate a 'practice' does not mean that a single instance or event cannot qualify but that to do so there must be an 'element of repetition' see ***Nottingham City Transport v* Harvey UKEAT/0032/12JOJ**. This might be demonstrated by showing that the treatment would be repeated if the same circumstances ever arose again.

111. Whilst the code places emphasis on the desirability of an employer investigating what adjustments might be necessary for a disabled employee, a failure to carry out such investigations will not, in itself, amount to a failure to make reasonable adjustments although that might be the consequence ***Tarbuck v Sainsbury's Supermarkets Ltd* 2006 IRLR 664, EAT**.

112. An employer will not be under a duty to make reasonable adjustments until it has knowledge of the need to do so. This limitation is found in schedule 8 paragraph 20 of the Equality Act 2010 and the material parts read as follows:

Lack of knowledge of disability, etc.

20(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

Discrimination because of something arising in consequence of disability

113. Section 15 of the Equality Act 2010 says:

15 Discrimination arising from disability

(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.

114. ***Secretary of State for Justice and anor v Dunn*** **EAT 0234/16** the EAT confirmed the position in the Statutory Code of Practice para 5.2, that the four elements that must be made out in order for the claimant to succeed in a S.15 claim are:

114.1. there ***must*** be unfavourable treatment

114.2. there must be something that arises in consequence of the claimant's disability

114.3. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability, and

114.4. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

115. The ***Statutory*** Code describes what might amount to a detriment in paragraph 5.7. It says:

For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious.

Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably.

116. In ***Williams v Trustees of Swansea University Pension and Assurance Scheme and anor*** **2019 ICR 230, SC** the Supreme Court approved the guidance in the Statutory Code with Lord Carnwath, giving the Judgment of the Court saying**:**

……little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a "subjective/objective" approach. While the passages in the Code of Practice to which [Counsel] draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section.

117. In asking whether treatment is unfavourable there is no need to seek a comparison with the treatment of others. The Statutory code says, at paragraph 5.6:

'Both direct and indirect discrimination require a comparative exercise. But in considering discrimination arising from disability, there is no need to compare a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.'

118. At paragraphs 5.8 and 5.9 the Statutory Code says this about the requirement to show that there is 'something' that arises as a consequence of disability:

5.8 The unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability.

5.9The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet.

119. The approach to the question of whether unfavourable treatment is 'because of' 'something arising in consequence' of disability is that set out in ***Pnaiser v NHS England and anor*** **2016 IRLR 170, EAT** where Simler P (as she was) said:

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's

explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

120. To demonstrate that unfavourable treatment was 'because of' something arising in consequence of disability it is sufficient to show that the 'something' was an effective cause and, if it was, it is immaterial that there were other effective causes of the treatment see ***Hall v Chief Constable of West Yorkshire Police*** **2015 IRLR 893, EAT** and ***Charlesworth v Dransfields Engineering Services Ltd*** **EAT 0197/16**

121. An employer cannot be liable under this section for any unfavourable treatment unless they knew or ought to have known that the Claimant was disabled – see sub-section 15(2) above. However, once they know of disability it is irrelevant whether they recognised that the 'something' that caused their act or omission was because of disability, see ***City of York Council v Grosset*** **2018 ICR 1492, CA**.

122. The Statutory Code sets out the requirements of the justification defence – that the treatment is a proportionate means of achieving a legitimate aim. The material paragraphs are 4.26 to 4.32 and will not be reproduced here. The test is the same as in justifying treatment that would otherwise be unlawful direct discrimination. A convenient summary the relevant principles is set out in ***Chief Constable of West Yorkshire & another v Homer*** **[2012] ICR 708** in the opinion of Lady Hale where she said:

"19. The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age

discrimination, justify direct discrimination. It is not limited to the social policy or other objectives derived from article 6(1), 4(1) and 2(5) of the Directive, but can encompass a real need on the part of the employer's business: Bilka-Kaufhaus GmbH v Weber von Hartz, Case 170/84, [1987] ICR 110.

20. 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."*

He went on, at [165], to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80:

> *"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."

123. Where the unfavourable treatment arises because the employer has failed to make reasonable adjustments, the employer is unlikely to be able to make out the defence of justification. See paragraphs 5.20 – 5.22 of the Statutory Code and see also ***Griffiths v Secretary of State for Work and Pensions*** **2017 ICR 160, CA**

Discussion and conclusions

124. We shall address each issue under a separate heading. The paragraph numbers we include in those headings are the numbered paragraphs and sub-paragraphs of the agreed list of issues.

125. To deal firstly with a submission made by Mr Welch both during the Claimant's evidence and again in his submissions that the Claimant's performance in the witness box, and in particular his apparent inability to understand the questions put to him, was a *'charade'*. We record that the use of that phrase prompted the three members of the Claimant's family who were present to audibly express their dissent (the only time that they spoke 'out of turn'). We recognise that Mr Welch faced a difficult professional task cross-examining the Claimant. It may be that his instructions were to the effect that the Claimant played up his disabilities to avoid criticism.

126. We remind ourselves of what Lady Justice Hallett said in ***R v Lubemba; R v JP*** **[2014] EWCA Crim 2064**, para 45. *'Advocates must adapt to the witness, not the other way round.'* A sentiment later adopted in the Court of Appeal in ***R v Grant-Murray & Anor*** **[2017] EWCA Crim 1228**. We have concluded that despite encouragement from the Tribunal and assistance from his opponent Mr Welch did not manage to adapt his advocacy style to accommodate the Claimant's disability. We have referred above to a question where the Claimant was asked to comment upon differences in the manner in which his case was put to other witnesses and an answer he had given himself. Even without reference to *'your Counsel'* instead of *'Alex'* understanding the question would necessitate understanding the trial process and the duty of an advocate to put their client's instructions to witnesses.

127. Mr Welch may have held instructions that the Claimant's disability was less pronounced at work. In our view that is of little assistance in demonstrating that his performance in the witness box was *'a charade'*. The Claimant had been in the same workplace for 25 years. It would be a familiar environment. The Tribunal, with its formality (even as relaxed as it was in this case), its processes and its language would be alien to most people and particularly so with a vulnerable witness (which we find the Claimant to be).

128. Mr Welch argued that the Claimant's recorded answers in the minutes of disciplinary interviews showed a far higher level of comprehension than he had done in the witness box. We do not agree. We accept that the Claimant gives answers to many of the questions he was asked during the various disciplinary processes. However, there are numerous occasions where he fails to understand the question. As we have noted above there are numerous occasions where his response is child-like.

129. We entirely reject the suggestion that the Claimant's approach to answering questions in the witness box was a calculated attempt to decisive the tribunal (or a 'charade' if the concepts differ). We find that the manner in which the Claimant conducted himself in the witness box was entirely consistent with the short letters from the professionals who have assisted him in the past and the long and clear explanation of how the Claimant's impairments affect his ability to communicate that was given by the Claimant's mother in her witness statement.

130. When he gave evidence, the Claimant was asked by Mr Welch when he wrote his statement. He said that he had not and volunteered that his family had written it. When she gave evidence the Claimant's mother explained how the statement had been prepared. She said that the Claimant had no concept of dates and so it was correct that he had not written the statement. She explained that when the statement was being written it was discussed with the Claimant who had agreed with what had been inserted on his behalf. We find nothing sinister at all in this. We accept that the Claimant had an understanding that his witness statement was his account of events and that he had approved the contents.

131. We are conscious that we have set out these findings below our findings of fact. For clarity we make it clear that we took these matters into account where we made the findings of fact set out above.

132. Below we set out our conclusions in respect of each claim advanced by the Claimant. Where appropriate we make additional findings of fact necessary to determine those claims.

Failure to make reasonable adjustments

133. We shall start with the claims that the Respondent failed to make reasonable adjustments as our conclusions; whilst not in any sense conclusive, have some bearing on the claims brought under Section 15 of the Equality Act 2010 and may also inform our reasoning in the unfair dismissal claim. We reach the conclusions below before dealing with the question of whether the claims were presented within the time limits imposed by Section 123 of the Equality Act 2010. That was not a matter raised in the list of issues or ET3 but it is a matter we are obliged to deal with.

134. In her submissions Ms Sidossis relied upon ***Leeds Teaching Hospital NHS Trust v Mr P Foster*** **UKEAT/0552/10/JOJ** for the proposition that that there does not necessarily have to be a good or real prospect of an adjustment removing a disadvantage for that adjustment to be a reasonable one. It is sufficient for the tribunal to find that there would have been a prospect of it being alleviated. That approach has been more recently endorsed by the Court of Appeal in ***Griffiths v Secretary of State for Work and Pensions*** **2017 ICR 160, CA.** The extent to which it is likely that any step might alleviate disadvantage is a relevant consideration in determining whether that step is a reasonable one for the employer to take. That is supported by the passages of the Code of Practice we have quoted above.

135. The list of issues set out two alleged provisions, criteria or practices ('PCPs') which were said to place the Claimant at a substantial disadvantage. These were:

135.1. *'the requirement for a Customer Service Assistant to deal with members of the public'*; and

135.2. *'the requirement for Customer Service Assistants not to be over-familiar with members of the public'*

136. There was no dispute that the Claimant's role required him to deal with members of the public. This was inherent in the Claimant's job as indicated by his job title. He was working in the public area of the store. Inevitably his role would bring him into contact with customers. His obligation to carry out these duties was imposed on him by his contract of employment and therefore we are satisfied that he was subject to a 'provision' requiring him to interact with the public. If we are wrong about that there was certainly a *'practice'* of requiring him to do so.

137. The formulation of the second PCP is somewhat unsatisfactory. However, we are satisfied that the Respondent required all its staff to behave in a manner that would not attract justified customer complaints. Certainly, that would include not behaving in a manner which is 'over-familiar' in the sense that it would amount to conduct which could give rise to a reasonable complaint. We are satisfied that this amounted to a practice or policy and that all staff including the Claimant were expected to maintain that standard.

138. We have set out above our findings of fact as to how the Claimants disability affected his ability to judge how his conduct would be perceived by others. We have accepted that the Claimant's disability significantly affected his ability to read and understand the emotions of others. We accept that the Claimant tended to be friendly and engaging in conversations and physical contact. In particular, where he perceived people as being friendly towards him he would greet them with a high five or on occasions a physical hug. We accept that the Claimant's ability to judge whether his conduct was welcome was significantly impaired by his disability. We further accept that the Claimant's disability meant that he needed any instruction that he was given in respect of his behaviour to be reinforced on a regular and repetitive basis if he was to retain that information.

139. Mr Welch did not accept that the PCPs did place the Claimant at a disadvantage. He suggested that the conduct of the Claimant went significantly beyond merely dealing with the members of the public but amounted to harassment. Even if that is right, on the basis that the Respondent would have taken disciplinary action because of any such harassment, the Claimant would be placed at a disadvantage had the PCP been framed as a requirement not to harass customers. Mr Welch's second argument was the existence of the PCP not to be overfamiliar with members of the public actually assisted the Claimant because it made the rule clear. Whilst it was the Claimant's case that reinforcing messages as to how to interact with customers was a benefit to him that was because of his inability to remember and comply with the PCP. People without the Claimants disability would be less likely to require such a message to be repeated and reinforced. There is a distinction between the existence of a PCP giving rise to a disadvantage and the Claimant benefiting from reminders of the PCP. We do not accept Mr Welch's arguments to the contrary.

140. It is necessary to compare the effect of the PCPs we have identified on the Claimant and any other person not sharing the Claimant's disability. It is for him to show that there is a substantial disadvantage. We remind ourselves that substantial in this context means more than minor or trivial. Both PCPs required the Claimant to interact with customers. The question is whether those requirements placed him at a substantial disadvantage in comparison to people not sharing his disability.

141. The PCPs we have identified did not give rise to any difficulties for over 20 years. Nonetheless, when difficulties did arise they had serious consequences including disciplinary action and the Claimant's dismissal. We are satisfied that the events of 2017 and 2018 (the first two complaints) arose because the Claimant was not able to understand the reaction of the Customer to his

conduct and adjust his conduct accordingly. The fact that the difficulties that arose as a consequence of the PCPs were rare does not mean that the Claimant was not placed at a disadvantage.

142. We are satisfied that large majority of people not sharing the Claimant's disability would be able to recognise the ordinary boundaries of social interaction and would be sufficiently emotionally aware of their own conduct to recognise when another person was always likely to be uncomfortable.

143. The focus of many of the complaints about adjustments is on the period after the Claimant was reinstated. Below, in the wrongful dismissal claim, we have concluded that the Claimant did not say anything to the Customer that justified her third complaint. We have considered whether, if as we have found, the Claimant was not behaving in a manner that actually generated complaints he can be said to be placed at a substantial disadvantage. We find that he can. We find that without the repeated guidance that had been recommended to the Respondent there was a risk that the Claimant would revert to behaving in an overfamiliar manner. We consider that he was placed at a substantial disadvantage not only when actual complaints were made but also when there was a heightened risk of that occurring.

144. It follows that we are satisfied that the two PCPs that had been identified placed the Claimant at a substantial disadvantage in comparison to people not sharing his disability as the PCPs made it more likely that he would be the subject of customer complaints because of his behaviour than a person without his disability.

145. We are satisfied that from the outset of his employment the Respondent was aware that the Claimant had a disability. There was little or no argument that from the time of the First Complaint the Respondent was aware of the fact that the Claimant's disability impacted on the manner in which he would interact with customers. We are satisfied that the Respondent knew that the Claimant found the requirement to interact with and refrain from being over familiar with customers harder than a person not sharing his disabilities. It was for that reason that the WRAPs were introduced. We are therefore satisfied that the Respondent had the requisite knowledge to give rise to a duty to make reasonable adjustments.

146. There was some confusion as to the reasonable adjustments the Claimant was contending for. The list of issues set out four matters in the sub paragraphs of paragraph 6.2.1. However, four other matters are set out in the sub paragraphs of 6.4. Those latter matters corresponded to paragraph 20 of the Claimants ET1. In reality there is a substantial overlap between the two sets of proposed adjustments. The list of issues was agreed between the parties at the outset of the hearing. We do not consider that there would be any prejudice to the Respondent in dealing with all the proposed adjustments in the list of issues. The evidence that we heard covered all the proposals and it could not be said that the Respondent did not understand 'the broad nature of the adjustment(s) proposed' – see ***Project Management Institute v Latif*** (paras 55-57). Mr Welch had the opportunity to make submissions in respect

of all the proposed adjustments. References that follow are to the sub-paragraphs of the list of issues.

Paragraph 6.2.1.1

147. The first adjustment contended for was to provide an adequate communication sheet. The Respondent had provided the Claimant with a communications sheet in 2016. The intent of that was plainly to prevent any further complaints. Following the further complaints in 2018 the communication sheet was not revised. Natasha Coll said in her witness statement that she considered that the sheet was vague in places. She explains that she made no changes because the Claimant's mother advised that there was no need to do so. This was not a matter actually explored with the Claimant's mother in the very brief time she was cross examined and, as we have concluded it makes no difference to our decision, we shall not make any finding about that.

148. During the appeal Joshua Ashitley had commented upon the entirety of the 2018 WRAP. His view was that the proposals had been vague and lacking in detail.

149. The issue for us is not whether it would have been reasonable for the respondent to have issued the Claimant with a communications sheet because they did take that step. The questions are whether the sheet that was prepared was adequate and whether it would have been reasonable to have provided any more adequate document.

150. We should say that we believe that it was a good idea to provide the Claimant with a communication sheet. The information that the Respondent had indicated that the Claimant required clear instructions and that any message should be repeated and reinforced. Having a communications sheet is one means of achieving that. We further find that the format of the communication sheet that was provided was a step in the right direction. There are some useful illustrations designed to aid understanding. It was 'a good try'.

151. Despite the good intentions we do find that the communications sheet was, as was recognised by Natasha Coll and later by Joshua Ashitley vague. Indeed, some instructions are inviting difficulties. For example, *'greeting customers is fine'* and *'try not to hug customers. Hugs are for close friends', 'handshakes are more professional'*. There is an assumption that the Claimant can identify who is or is not a 'close friend'. There is no clear prohibition on hugs, high fives or other such greetings.

152. Clarity could have been introduced by stating that no hugs were allowed at work. That handshakes were permitted only when offered. That greetings should be made only when the customer has spoken first.

153. We note that the WRAP prepared by Natasha Cooper and endorsed by Mr Gunes in 2018 includes a specific instruction to not go anywhere near the customer who had complained. There is no reason in our view why that instruction could not have been repeated in the communication sheet. It was

suggested by Ms Sidossis that the Respondent should have provided the Claimant with a photograph of the Customer. We do not think that that would have been possible without the Customer's consent.

154. We note that the Claimant was given a communication sheet but that during the disciplinary process he said that he did not have one to hand. We also accept that Natasha Cooper discussed the communication sheet with the Claimant when she met him. What we were not told was that there was any system put in place to ensure that the Claimant carried his communication sheet with him on a daily basis.

155. The Respondent prepared a communications sheet without any expert assistance or advice. There would have been no practical obstacle to obtaining that advice. Throughout the Claimant's mother had been encouraging the Respondent to engage with the professionals who supported the Claimant.

156. The Respondent clearly recognised that a communication sheet might have assisted the Claimant overcome the difficulties experienced with dealing with customers. We agree. We find that the communication sheet that was provided was inadequate in itself and that furthermore no adequate steps were taken to ensure that the Claimant consulted it on a daily basis (we deal with that below). An adequate communications sheet regularly reinforced was, we find, a measure that was likely to significantly reduce the instances of customer complaints.

157. The failure to take expert advice is not by itself a failure to make a reasonable adjustment - ***Tarbuck v Sainsbury's Supermarkets Ltd*** however the risks of proceeding with inadequate information may well, and in the present case did, result in inadequate adjustments being made.

158. We do not consider that the fact that the Claimant's mother may, or may not, have suggested in 2018 that the Communication sheet did not need to be changed would make any difference to our conclusions. The flaws with the communication sheet were obvious and were recognized by Natasha Cooper. Language like try not to hug, hugs are for close friends is hopelessly vague and appears to sanction hugging on some occasions. We consider that the Claimant's mother's statement that she is a mother not an expert has some real force. We reject any argument that the Respondent was entitled to disregard any apparent flaws in the communication sheet by relying on the Claimant's mother when it had not made any enquiries of the professionals suggested by her.

159. We find that here was a failure to make the reasonable adjustment of providing a clear communication sheet suitable for the Claimant's needs.

Paragraph 6.2.1.2

160. The adjustment contended for by the Claimant was for the regular meetings that were in fact scheduled in the 2018 WRAP. The adjustment contended for in the list of issues goes on to include the suggestion that the Claimant's

mother would be informed of the outcome of each meeting. The meetings did in fact take place weekly for 4 weeks and most fortnights until 13 February 2019 at which point the schedule broke down as no meetings were scheduled until the events that gave rise to the dismissal. Other than some contact about training there was no contact with the Claimant's mother initiated by the Respondent.

161. Consistent with what the Respondent was told as early as 2016, the Claimant's disability means that unless messages are repeated and reinforced then there is a danger that they will not be followed. That was recognized by the Respondent at section 1 of the 2018 WRAP. We would accept that that could have been by way of regular meetings. It would not matter whether the reminders of the practical steps required were delivered by a manager or by a mentor. We find that there is some overlap in these proposed adjustments. We do not however consider that a tapering series of meetings by itself would fulfill the need for the regular reinforcement of messages. Indeed, tailing off the meetings, which was what was planned, carried with it a real risk that the necessary messages would not be reinforced.

162. We have stressed and stress again that Natasha Cooper should not feel responsible for the breakdown in the scheduled meetings. Sticking to what had been agreed was the Respondent's responsibility and not hers. We consider that it would have been straightforward for the Respondent to have found another manager to cover any of the missed meetings.

163. We find that the regular repetition of behavior standards was a step that would have alleviated or reduced the disadvantage suffered by the Claimant (the risk of complaints). We find that it would have been reasonable to have ensured that the meetings scheduled did take place. No evidence was placed before us why that step would have increased the financial or administrative burden on the Respondent to any great degree.

164. We find that the failure to stick to the schedule of meetings agreed in the 2018 WRAP was a failure to make reasonable adjustments for the Claimant's disability.

165. Had the Claimant's mother been informed of the topics discussed and agreements reached during the meetings that did take place she would have been in a position to repeat and reinforce the messages that were delivered. That had been expressly agreed in the 2018 WRAP. We find that taking such a step had a very real chance of alleviating the difficulties faced by the Claimant in complying with the PCPs identified in this claim. The communication did not happen as planned. We consider that this would have been a straightforward step for the Respondent to have taken. We find that the failure to carry through a step identified by the Respondent itself as beneficial amounted to a further failure to make reasonable adjustments.

Paragraph 6.2.1.3

166. In this paragraph the Claimant contends that it would have been a reasonable adjustment to have provided the Claimant with a mentor. There is a

considerable overlap between this suggestion and the suggestion that the Claimant had regular meetings with his manager. In our view the benefit to the Claimant of regular meetings whether with his manager or a mentor was that they would be able to reinforce the messages about the behaviour that the Respondent expected in order to reduce or minimise the risk of complaints. We repeat our findings above in this respect.

167. Mr Welch argued that the Respondent had introduced a mentor after the first complaint and that it had been a failure because there had been further complaints. His point appeared to go to the efficacy of providing a mentor. We do not accept his arguments. The reality was that the Respondent had provided a mentor for a period and then failed to find a replacement and the system lapsed without any further steps being taken. Mr Gunes had plainly understood that the Respondent had not done what it had promised to do for the Claimant. It was on that basis that he allowed the appeal.

168. An effective mentor would need some understanding of the Claimant's condition. That might have meant that the Respondent would have had to pay for some training. The mentor would have needed to be familiar with the problems that had arisen in order to be able to advise the Claimant how to avoid them. They would need to be privy to the communication sheet and any other more specific instructions given to the Claimant (such as avoiding the customer who had complained). In order to provide the repetition and reinforcement of messages daily contact would have been ideal. Some arrangements would need to be in place to cover holidays or absences.

169. We have found that the Claimant's mother did not say that a mentor was unnecessary. That is inconsistent with the note of her asking whether a mentor would be provided. However, even if she had suggested that that would not in our view have made any difference. The Respondent knew because it had been told time and again that the Claimant needed frequent reminders of the standards that were expected. For example, Respondent was told that these should be daily by Claimant's Trade Union representative. The Respondent took no steps of its own to find out what might have assisted the Claimant.

170. We believe that if the Claimant had been provided with a mentor with at least some of the qualities we had discussed above there would be a good prospect that any of the difficulties the Claimant had with the PCPs would be reduced or eliminated. Provision of a mentor would, we accept, come with a cost to the Respondent. It may have been necessary for some training to be given or purchased and there would be time spent on the mentoring relationship that would otherwise be productive working time.

171. The Respondent is a substantial company. It was not suggested to us, nor was evidence led that the provision of a mentor would be unaffordable. We find that the cost would have been relatively modest.

172. Taking these matters into account we find that it would have been a reasonable adjustment to have provided the Claimant with a mentor.

Paragraph 6.1.2.4

173. In this paragraph the Claimant suggests that the Respondent *'work alongside his mother'*. We accept that the Respondent relaxed its usual policies in respect of who could accompany the Claimant to any disciplinary meetings. We find that this was a sensible step. It is also the case that the Claimant's managers did take telephone calls from the Claimant's mother on other occasions. We have above dealt with the failure of the Respondent to contact the Claimant's mother after each meeting with the Claimant following his reinstatement. Whilst we have found that to be a failure to make reasonable adjustments. There is no additional failure covered by this paragraph and we find that it adds nothing to the claims that we have already dealt with.

Paragraph 6.4.1

174. The adjustment contended for is *'a degree of flexibility…. before any disciplinary action was taken'.* We consider that there is a complete overlap between this contention and the Claimant's case that his dismissal was a breach of Section 15 of the Equality Act 2010. The proposed adjustment pre-supposes that there has been a complaint. What is suggested is that some leniency is shown to the Claimant (presumably short of dismissal). In this context we consider that there would be no difference between an assessment of whether any adjustment was 'reasonable' and the question of whether a dismissal was a proportionate means of achieving a legitimate aim. The allegation stands or falls with the Section 15 claim and we shall deal with it below.

Paragraph 6.4.2

175. The adjustment that is proposed is 'considering' steps to support the Claimant. Put in those terms the proposed 'adjustment' falls foul of the decision in ***Tarbuck v Sainsbury's Supermarkets Ltd*** mere consideration is not a step that by itself can alleviate any difficulties arising because of any PCP. The Claimant does go on to refer to two practical steps. The first is giving the Claimant a non-customer facing role. The Second is providing a chaperone. If that latter suggestion was intended to go further than the provision of a mentor and to suggest that the Claimant would always be working with somebody else then we do not find that that would be a reasonable adjustment. The nature of the Claimant's job gathering up baskets and keeping the car park clean would mean that either the Claimant or any chaperone would be duplicating each other's work. We consider that that went beyond what was necessary (we find that a mentor would have been sufficient) and that the extra expense would render the adjustment unreasonable.

176. As we understand the suggestion that the Claimant was moved to a none customer facing role it is suggested that this would have been an alternative to his dismissal. Again, we consider that there is a significant overlap between this aspect of the claim and the section 15 claim. In assessing proportionality, it is necessary to consider whether some less discriminatory measure would

suffice. As the claims stand or fall together we shall deal with them below when addressing the Section 15 claim.

Paragraph 6.4.3

177. This allegation suggests that the Claimant should have been given additional training, development and access to redeployment opportunities. As we understood it the redeployment opportunities were not intended to refer to alternatives to dismissal (which is covered above and below). The difficulty with this claim is that there no clear link between the adjustments proposed and the PCPs relied upon. In evidence the Claimant's mother complained that the Claimant had not been encouraged to apply for more interesting roles. However, the roles she identified were customer facing. Such a change in role would not have alleviated the difficulties faced as a consequence of the PCPs pleaded. The manner in which this is put in Ms Sidossis' skeleton argument refers only to opportunities arising outside the dismissal process. The PCP implicitly referred to is requiring employees to make job applications before support is offered. That is an entirely different PCP to that pleaded or indeed set out in the list of issues. It is not for us to reformulate the Claimant's claim. As these claims are independent from the issues that arose from the complaints there may have been difficulties showing that the claims were presented within the time limit imposed by Section 123 of the Equality Act 2010. However, we simply conclude that the adjustments proposed do not in any way address the difficulties of the particular PCPs relied upon.

Paragraph 6.4.4

178. The adjustment contended for was measures to protect the Claimant from possible bullying and harassment. This allegation was not separately pursued by Ms Sidossis in her submissions. In her skeleton argument the measures referred to are additional training in autism. Again, we find it difficult to see quite how the link between the pleaded PCPs and the adjustment is put. No amount of additional training would have prevented a false complaint from a customer (and we consider only a false complaint could fairly be described as bullying and harassment).

179. We have found below that there was a failure to appreciate the possibility that the third complaint by the customer might have been false. We do not consider that failure arose because of any misunderstanding about the Claimant's autism but that it arose because of a failure to properly investigate the Customers complaint and to even countenance the possibility that what she was saying was untrue. We do not find that further training on autism would have prevented the Respondent's managers from reaching the conclusions that they did during the disciplinary process.

180. We do not accept that the adjustment contended for would have alleviated the difficulties with the PCPs identified. Again, it is not for us to reformulate the claim. Any injustice is in any event addressed in our consideration of the claims arising out of the dismissal.

Were the reasonable adjustments claims presented in time?

181. There was no dispute that the claims that related to the dismissal had been presented within the time limits imposed by the relevant legislation. As we note above the parties had not suggested that an extension of time was necessary in respect of any claim. As the issue goes to jurisdiction it is necessary for us to address the point of our own volition. The only claims affected by are those claims for reasonable adjustments that relate to matters the Claimant says ought to have been put in place prior to the final disciplinary process. It is unnecessary for us to deal with the claims that have failed. The claims that might be affected by jurisdictional issues are those in:

181.1. paragraph 6.2.1.1 (the communication sheet)

181.2. paragraph 6.2.1.2 (completing the agreed meetings with his manager and informing his mother of the discussions)

181.3. paragraph 6.2.1.3 (providing a mentor).

182. The first complaint relates to a communication sheet first drawn up in 2016 and then not later amended in 2018. The two latter complaints are criticisms of the WRAP put in place after the claimant was reinstated in 2018 or complaints that what had been agreed was not successfully implemented. The meeting that ought to have taken place with the Claimant's manager but which was missed was 27 February 2019. A failure to make reasonable adjustments is an omission see ***Matuszowicz v Kingston upon Hull City Council*** **[2009] IRLR 288**. As such the provisions of sub-sections 123 (3)(b) and (4) govern the question of whether the claims are presented in time. We find that;

182.1. there was a decision not to update the communications sheet taken on 21 November 2018 when the WRAP was drawn up,

182.2. The decision whether to provide a mentor was reviewed and decided upon on the same date; and

182.3. There was a failure to conduct a meeting on 27 February 2019 in accordance with what had been decided.

183. The Claimant contacted ACAS on 31 July 2019. Accordingly, unless the Claimant is given an extension of time the earliest act of discrimination that could be in time would be 1 April 2019. The three omissions set out above all fall before that date. We therefore need to consider whether we should extend time.

184. ***Robertson v Bexley Community Centre t/a Leisure Link*** **[2003] IRLR 434, CA** reminds a tribunal that whilst the discretion to extend time is wide the burden is on the Claimant to show why time should be extended and as such an extension is the exception and not the rule. In deciding whether or not to extend time a tribunal might usually have regard to the statutory factors set out in the Section 33 of the Limitation Act 1980 see ***British Coal Corporation v Keeble and ors*** **[1997] IRLR 336, EAT** . Whether there is a good reason for the delay or indeed any reason is not determinative but is a material factor ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** **2018**

ICR 1194, CA. It will be an error of law for the Tribunal not to consider the relative prejudice to each party ***Pathan v South London Islamic Centre*** **EAT 0312/13**.

185. There was no suggestion from the Respondent that the fact that the claims were presented late gave rise to any evidential difficulties. We detected none when determining the case. The only prejudice to the Respondent in granting an extension of time would be the prejudice of losing a limitation defence. We note that this is not a point taken by the Respondent.

186. The Claimant did not provide any reasons for the delay (in fairness the point had not been raised). The failures to make reasonable adjustments were only raised when the Claimant's employment had been terminated. The prejudice to the Claimant in not granting an extension of time is that he will be deprived of a remedy for claims which we have found were well founded. We consider it unlikely that there will be a significant difference in any remedy. Nonetheless the Claimant will be unable to seek a remedy if we decline to extend time. We find that in the circumstances it is just and equitable to extend time to permit the Claimant to bring these claims.

Wrongful Dismissal

187. The Claimant has brought a claim for wrongful dismissal. That is a claim at common law for breach of contract. The jurisdiction to entertain such a complaint is found in the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

188. The Claimant accepted new terms contained in a new contract when he was reinstated in 2018. That contract preserved his continuity of service and provides that he would be entitled to 12 weeks written notice of dismissal were the Respondent to elect to terminate the contract in ordinary circumstances. It was common ground between the parties that the Claimant was dismissed without notice being given. The Respondent's case was that it was entitled to dismiss the Claimant without notice as his conduct amounted to a serious breach of conduct which it was entitled to accept bringing the relationship to an end. The parties agreed that the issue for the Tribunal was whether the Respondent could show that the Claimant had, as a matter of fact committed a serious breach of contract by reason of his conduct towards the Customer.

189. Mr Welch referred the Tribunal to the well-known case of ***Neary v Dean of Westminster*** **[1999] IRLR 288** and Ms Sidossis agreed that the passage below was an accurate statement of the applicable law:

'conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment.'

190. Where, as here, there were a series of acts culminating in a dismissal it is open to the employer to argue that the entirety of the actions should be viewed cumulatively. The law in this respect is identical to the law applied

when determining whether an employee is entitled to treat themselves as constructively dismissed. The most recent summary of the relevant principles in found in ***Kaur v Leeds Teaching Hospitals NHS Trust*** **[2018] EWCA Civ 978, CA**. If an employer has affirmed the contract following earlier acts then it may only rely upon those acts to establish a serious breach of contract if there is some subsequent act capable of 'reviving' the breach of contract.

191. The Respondent's actions in reinstating the Claimant in 2018 clearly affirmed the contract of employment. We did not understand the parties to argue otherwise. The issue for the Tribunal is therefore to ask whether the Respondent has proved that the Claimant did anything on 21 March 2019.

192. In a claim of wrongful dismissal, the Tribunal are not bound by the opinions or conclusions reached by the Respondent's managers. That said the Tribunal may have regard to those opinions and in particular the reasons why they are held. The tribunal must make its own findings of fact as to whether the conduct took place as alleged by the Respondent. We set out our own findings of fact below.

Findings of fact – wrongful dismissal

193. The Claimant broadly accepted that in 2016 he has behaved as alleged by the Customer. Insofar as there was any material difference in his account it was in respect of where he might have touched the Customer. Whilst it seems as if the Customer has perceived the Claimant's attention as sexualised we make no such finding. We accept that the Claimant was tactile and that he would hug, touch and high five people he believed were friends. We also accept that the Claimant would have asked personal questions without realising that he was causing offence. That is consistent with the Claimant's account of events and that of his family. The evidence before us was that the Claimant had behaved in the same way with others without complaint for over 20 years. If his behaviour was sexualised we have no doubt that there would have been other complaints.

194. Ms Sidossis suggested to the Respondent's witnesses that the Claimant had made frank admissions in the face of the Second complaint in 2018. Mr Welch rightly points out that when he was first interviewed the Claimant at some points denied any touching. Later on, he accepted that there had been some contact. We find that there were some slight differences between the Claimant's account and the complaint letter. In particular, the Claimant did not admit lifting the Customer's coat or grabbing her hand. He did broadly accept that the other complaints had a basis in fact. Again, we accept that the Claimant behaved as he has admitted doing. We would accept that the Customer perceived the conduct as sexualised and has given a description based on that perception. For the same reasons as we give above we do not accept that the conduct was sexualised. The Customer's description matches the way others describe the Claimant's conduct complete with hugs high fives, jokes and somewhat tactile behaviour. We are satisfied that the Claimant was intending only to be friendly.

195. In respect of the events of 21 March 2019 we have seen the complaint letter. What is alleged is simply that the Claimant spoke to the Customer using the phrases *'has the cat got your tongue'* and *'are you not speaking to [me] anymore'*. We note that the first phrase is unusual and, in our experience, somewhat dated.

196. We have described above in neutral terms what was shown on the CCTV. The CCTV had no audio. We find that the CCTV shows that having collected some baskets from near where the Customer was waiting to buy some cigarettes (or something from the same counter) he left the store. Busied himself stacking baskets before he returned into the store. The Customer passes him as he is beside the security desk. She clearly accelerates and her trolley either struck or nearly struck the baskets left by the Claimant outside the door. We agree with Natalie Coll that there was no evidence that the baskets had been strategically placed to block the entrance. This was a single pile of hand baskets and there was plenty of space to avoid them. We find that there was no attempt to avoid them by the customer. We accept the conclusion of the Respondent that there was an opportunity for the Claimant to have used the words he was alleged to have used.

197. During the investigatory meeting with Natalie Coll she asked the Claimant why he had come back into the store. He suggested that he might have been going to the toilet. We accept that the CCTV shows that he did not do so. We have considered whether this impacts his credibility. We do not think it does. The Claimant's job means he constantly moves around. He is asked about why he moved in a particular direction some days after the events. We do not think that volunteering a possible explanation damages his credibility.

198. We accept that Greg Spicer was able to identify the Customer from the Video and that the clips we saw showed that customer. The date and time are consistent with the Customer's complaint. Greg Spicer by then had met the Customer and we have no doubt he was able to recognise her. The Claimant has consistently said that he did not recognise the Customer. One problem that we can see from the questioning is that the Respondent's managers do not always carefully distinguish between two separate questions. The first being whether the Claimant recognised the Customer from the CCTV. The second being whether he has seen and recognised the customer on that day. We would not be at all surprised if the Claimant was unable to recognise the customer from the CCTV. There are no clear images of her face and in the main her back was to the camera.

199. The Claimant had said in 2018 that he would recognise the Customer. That said, we find that the events depicted on the CCTV show that the Claimant was facing the Customer only fleetingly as she exited the store.

200. The Claimant has consistently denied either recognising the Customer on 21 March 2019 or using the words she alleges. We note that during the appeal the Claimant's mother says that the expression *'the cat has got your tongue'* is not one used by the Claimant. We recognise that she is loyal to the Claimant but also note that she always gave a frank description of his behaviour.

201. Mr Welch described the suggestion that the Customer might have embellished her account as fanciful. We disagree. We find that it was more likely than not that the Customer would have recognised after the first interaction with the Claimant that he had disabilities. If not then, as she says she raised informal complaints through 2017 to 2018, it is overwhelmingly likely that she would have been told of the Claimant's disabilities by the Respondent's staff and their effect on the Claimant's behaviour. In the light of that we find it very unusual that the Customer does not acknowledge those disabilities in her second and third complaints. The vast majority of people would accept a different standard of behaviour from those with disabilities. Whilst we would accept that there are boundaries to that, we would expect at least some acknowledgement of the disabilities.

202. Our view that the Customer may have a less tolerant approach to disability is reinforced by her second complaint letter where she declines to adopt the very sensible suggestion that she does her shopping when the Claimant was off duty.

203. Natalie Coll told us that the Customer had not been happy that the Claimant had been reinstated using the phrase *'what is he doing here'.* In fact, she was sufficiently unhappy that she had asked to see Greg Spicer, the Manager.

204. Finally, we note that when the Customer passed the Claimant in the foyer she then pushed her trolley rapidly out of the store, we find, pushing against the baskets stacked by the Claimant. Whilst we accept that she has suggested that she was intimidated we do not consider that the events she describes are likely to make her afraid. Her conduct is equally, and we find more, consistent with her being angry.

205. Mr Davis discounted the possibility that the Customer was untruthful because he thought that she was being reasonable by not going to the police. We deal with that in more detail below when considering the unfair dismissal claim. We do not consider that the fact that the Customer did not go to the police provides any assistance in deciding whether her account of the events of 21 March 2019 is true.

206. Mr Welch sought to persuade us that we should take into account the events of 2016 and 2018 and approach the Claimant as being of 'bad character'. Whilst we have had regard to the entire course of events we are unpersuaded that the fact that the Claimant behaved as he did in 2016 and 2018 makes it more likely that he used the words attributed to him in 2019. That said, we accept that the Claimant's disability and his need for messages to be repeated, which they had not been, makes it possible that he acted as described.

207. We must decide what happened on the balance of probabilities. Contrary to the Respondent's case there is a reasonable basis to doubt the veracity of the Customer's complaint. The Claimant has been consistent in his denials of the core of that complaint. We are not satisfied that the Respondent has shown that it is more likely than not that the Claimant used the words attributed to him or that he recognised the Customer and failed to make himself scarce.

208. It follows that there is no act capable of reviving the acts of 2016 and 2018 and so we are relieved of the task of determining whether those actions amounted to a serious breach of contract.

209. We find that the Respondent breached the Claimant's contract by failing to give lawful notice of the dismissal. In other words, his wrongful dismissal claim succeeds.

The claim under Section 15 of the Equality Act 2010

210. The unfavourable treatment relied upon by the Claimant is his dismissal (which is admitted). It is the Claimant's case that his propensity to overfamiliarity (using that phrase to summarise all his behaviour) was *'something that arises as a consequence of his disability'*.

211. Mr Welch referred us to ***Sheikholeslami v University of Edinburgh*** **UKEAT/0014/17/JW** and referred to the following passage:

> *'[Section 15] requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence. (See City of York Council v Grosset [2018] EWCA Civ 1105)'*

212. We accept that ***Sheikholeslami*** accurately sums up the proper approach to a claim under Section 15. It is convenient to deal with the second question first as, if the Claimant's behaviour did not arise as a consequence of his dismissal, then it is unnecessary for us to go any further.

213. Mr Welch did not accept that the conduct that the Claimant had engaged in did arise as a consequence of the Claimant's disability. In his skeleton argument he said *'there is no evidence that the Claimant's disability causes him to harass customers'*. He goes on to support that by saying that the Claimant had not harassed any other customers for 25 years. We do not accept this argument.

214. There was an abundance of evidence from the Claimant, from his mother in her witness statement and from the what the other family members said during the various disciplinary interviews. It is clear from letters from professionals assisting the Claimant that his disability caused him to behave in the manner complained of by the Customer in 2016 and 2018. We accept that the effect of the Claimant's disability is accurately set out in the letter of Angela Powell dated 30 June 2016 where she says (with our emphasis added):

'Mr Dubarry has some autistic traits which mean that he has difficulties with communication and interpreting social cues. This ranges from misreading

facial expressions; not understanding emotions and feelings of others and engaging in repetitive conversations. He can also appear over friendly.

Unless an individual is aware of Mr Dewberry's diagnosis, members of the public may view some of his behaviours is concerning or inappropriate. He on the other hand will view his behaviour as friendly.'

215. Mr Welch repeatedly referred to the conduct of the Claimant as harassment and our understanding was that he was suggesting that the conduct met a criminal standard. Certainly, that appears to be behind the reasoning of Mark Davis who discounted the possibility that the Customer was not being truthful about the events of 21 March 2019 because she chose not to go to the Police. It is not necessary for us to decide whether the conduct met that standard. We deal with the gravity of the conduct when reaching our conclusions in respect of proportionality. At this stage the question is whether the Claimant's manner of dealing with the Customer who complained (and others) arose as a consequence of his disability. The fact that no other customers complained over 25 years is in our view of little assistance in answering that question. We would expect, and find, that anybody who had any significant dealings with the Claimant would notice his behaviour was unusual and rapidly come to the realisation that it was attributable to his disability. The fact that nobody else complained supports that conclusion.

216. We find that the manner in which the Claimant dealt with the Customer from 2016 to 2018 arose as a consequence of his disability and in particular his failure to recognise at the time of the behaviour that the Customer viewed his behaviour as inappropriate. We therefore answer that question in the Claimant's favour.

217. We turn then to the question of whether Mark Davis dismissed the Claimant because of the manner in which the Claimant behaved. As set out above we have found that the Respondent has not proved that the Claimant did anything untoward on 21 March 2019. That does not in our view mean that the Claimant was not dismissed because of something arising in consequence of his disability. The phrase 'because of' does not require the 'something' to be the only reason. It is sufficient if it is a material factor in the decision making.

218. Below when dealing with the unfair dismissal claim we accept that Mark Davis and in turn Jason Roberts believed that that the Claimant had behaved as the Customer had alleged on 21 March 2019. We find that they both concluded that this was a continuation of conduct complained of 2016 and 2018. It is fanciful to think that saying to a customer *'has the cat got your tongue'* would be a *'gross abuse of customer service standards'*, unless seen against the background of the previous events. Mr Welch in his submissions put the Respondent's case on the basis that it was reasonable to take account of the earlier events in ascertaining whether the later conduct was made out. In his witness statement Mark Davis says *'I ultimately decided not to reinstate the final written warning given the apparent ongoing nature of this conduct and the similarities to the previous incident .'*

219. We find that the fact that the Claimant had behaved in an overfamiliar way towards the customer between 2016 and 2018 was a material factor in the decision to dismiss him. Put differently we are satisfied that the Claimant was dismissed because of something arising in consequence of his disability.

220. We must then move on to the Respondent's defence that the dismissal was a proportionate means of achieving a legitimate aim. The legitimate aim relied upon by the Respondent in its ET3 was *'ensuring a safe environment for both the Respondent's employees and its customers'.* We should say that there was no evidence at all that the Claimant's behaviour ever impacted on the safety of his colleagues. We will not take an overliteral approach to the legitimate aim. Perhaps it would have been better to express the legitimate aim *as 'ensuring high standards of customer service'*. Ms Sidossis did not dispute that the Respondents would have a legitimate aim in ensuring that its customers were safe and free of inappropriate behaviour by its staff when shopping at the store. We are satisfied that that would be a legitimate aim.

221. It is necessary for the Respondent to demonstrate that the measure that it has adopted, here the dismissal of the Claimant, was logically connected to the legitimate aim that was pursued. We find that it was, there is a logical connection between adopting customer standards and enforcing them by means of a disciplinary policy. Thus far the Respondent has made good its defence.

222. We have considered whether we should approach the question of proportionality on the basis of our conclusion that the Claimant was not to blame for the events of 21 March 2019. If we did it would be impossible for the Respondent to justify the prima facie discrimination. We do not think that that is the proper approach. We believe that it would be open to the Respondent to seek to justify its decision if it was able to show that it had a genuine belief in the misconduct even if it was later found to be incorrect. In assessing proportionality, the Tribunal might need to consider much the same territory as required in Section 98(4) of the Employment Rights Act 1996. A dismissal because of a belief not formed on reasonable grounds would almost inevitably be disproportionate.

223. The test of proportionality requires the Tribunal to balance the need of the employer to achieve the aim identified as legitimate with the prima facie discriminatory effect on the Claimant.

224. Mr Welch referred to ***Hardys & Hansons plc v Lax*** **[2005] IRLR 726** in support of the proposition that when assessing proportionality the mere existence of an alternative measure does not mean that the measure actually adopted is disproportionate. We agree. The relevant passage is in the judgment of Pill LJ and says (with material parts underlined):

'It must be objectively justifiable … and I accept that the word "necessary" used in Bilka is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of

proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary.'

225. Mr Welch also referred to ***Azmi v Kirklees Borough Council*** **[2007] IRLR 484**. That case provides an illustration to the point made above. The existence of alternatives to the measure adopted will not necessarily lead to the conclusion that the measure adopted was disproportionate. If some alternative measure which is less discriminatory is a reasonable alternative to the measure adopted than that will suggest that the measure adopted is disproportionate.

226. We shall start by analysing the effect of the measure adopted by the Respondent on the Claimant. The Claimant had been employed by the Respondent for just over 25 years at the date of his dismissal. He had been employed under a scheme that assisted people with disabilities find work. The Claimant's mother in her witness statement spoke of the entirely predictable effects of the dismissal. The Claimant had worked not so much for the wages (it is said he would have been better off on benefits) but for the boost to his self-esteem that playing an active role in the workforce gave him. It is clear to us, and he told the Respondent, that he loved his job. Dismissal was likely to and was a severe blow to the Claimant. We take judicial notice of the difficulties faced by people with disabilities finding work in comparison with those without disabilities. Those difficulties would be compounded by the fact that the Claimant was dismissed on the grounds of his conduct. We conclude that the effect on the Claimant was substantial.

227. Below we have found the dismissal to be unfair. We have found that the investigation was inadequate and that the conclusion that there was no basis for doubting the truth of what the customer said was irrational. These are matters which we consider are open to us to take into account when deciding if the Respondent's actions in dismissing the Claimant were proportionate. However, even if we had concluded that the Claimant had acted as the Respondent believed (and that the Respondent had reasonable grounds for the same conclusion) we would not have found that the dismissal was a proportionate means of achieving the legitimate aim identified. We shall set out our reasons for that below.

228. In his witness statement Mark Davis says this:

'I ultimately decided not to reinstate the final written warning given the apparent ongoing nature of this conduct and the similarities to the previous incident in 2018. I also decided against redeployment to either a new store or to a role that was not customer facing, as I thought that there was a significant risk of this conduct being repeated should Mr Dubarry be moved to another store or role. Significant steps had been taken to support Mr Dubarry to

prevent incidents such as the one that occurred taking place but ultimately behaviour continued to occur that risked damage to Sainsbury's brand and reputation'

229. We have already found that the Respondent had failed to make reasonable adjustments for the Claimant. As such whilst we accept Mark Davis's evidence that steps had been taken to assist the claimant we have found that the steps were inadequate. The Respondent has acted unlawfully in that it had failed to:

229.1. Provide a clear communication sheet; and

229.2. Conduct all the meetings with the Claimant's manager that had been agreed and communicate the outcome to the Claimant's mother; and

229.3. Provide a mentor for the Claimant.

230. We do not find that, had the steps we have identified been put in place, there was a substantial risk of Claimant conducting himself in a manner likely to attract legitimate complaints from customers. We have regard for the fact that in 25 years there had been only one customer who had complained about the Claimant. In other words, the chances of the Claimant's conduct causing complaints was very low indeed. That we find is a reflection of the fact that most people were prepared to tolerate the Claimant's behaviour, no doubt making allowances for his disabilities.

231. For these reasons we disagree with the rationale of Mark Davis that led him to rule out the Claimant's continued employment.

232. We explored, particularly with Jason Robert's the question of whether 'the customer was always right'. His initial stance was to say yes; as a store the Respondent would take that stance. On reflection he agreed that the question of whether the Respondent should accommodate discriminatory behaviour from its customers was more nuanced. In 2016 the Claimant's mother had asked whether she could have an opportunity to explain the Claimant's disabilities to the Customer. That suggestion was echoed in the letter from Mrs Powell of 30 June 2016 where she said *'Unless an individual is aware of Mr Dubarry's diagnosis, members of the public may view some of his behaviours as concerning or inappropriate*'.

233. We explored with Natalie Coll the possibility of assisting people with hidden disabilities with something like the blue badge scheme now operated by Transport for London. We were pleased to hear that the Respondent has, since this dismissal, adopted a very similar scheme permitting employees with hidden disabilities to wear a sunflower lanyard. The significance of that lanyard being publicised to customers. We consider that this is a sensible tool in combating discrimination. It lets customers know, without any embarrassment for the employees, that the employee's behaviour might differ from the norm. That should assist the customers understanding of any difficulties that might arise. The Respondent could reasonably expect the customers to amend their behaviour in response. If they failed to act

reasonably in the knowledge that an employee was disabled, appropriate steps could be taken.

234. We have found that the Customer was made aware of the Claimant's disabilities. We consider that the Respondent should be prepared to expect its customers to make reasonable allowances for the behaviour of employees with learning disabilities that it employs. It should be proud of the fact that it offers employment to such employees and be prepared to protect them from those who are less tolerant of disability.

235. As early as 2017 it was suggested to the Customer that if she did not wish to interact with the Claimant she could shop when he was not on duty. Implicitly the manager was offering to inform the Customer when the Claimant was not working. That in our view was an entirely reasonable suggestion and one which would, had it been taken up by the Customer have resolved the problem. The Customer was not prepared to do this. We find that refusal very surprising indeed.

236. We consider that, as an alternative to moving the Claimant from the Low Hall store it was open to the Respondent to insist that if the Customer wished to shop at the store she should do so on days that the Claimant was not working. If she refused to do so then the Respondent would have lost a customer. We had no evidence of the cost of that to the Respondent but find that that would not have been unaffordable. We do not find it is a legitimate aim to appease customers who would not assist the Respondent accommodate the needs of disabled employees if a sensible and reasonable proposal was made to them. We find that such a proposal was made in this case and the Respondent ought reasonably to have refused to yield to the Customer's demands to shop when and where she wished. We do not consider that such a step would damage the reputation of the Respondent. On the contrary we find that taking such a step to assist a disabled employee would be applauded.

237. A further alternative to dismissing the Claimant would have been to move him either to another store, in which case he would be away from the only customer who had complained about him in 25 years, or to a role that was not customer facing. We note that the possibility of a role at the rear of the store was discounted as dangerous. We have had no explanation of why a role at the rear of the store was any more dangerous than a role working in a car park. Mark Davis said in evidence that a further reason for not offering this as an alternative to dismissal was that colleagues who worked at the back of the store were required to be flexible and might need to go onto the shop floor. He said that to single the Claimant out for any special dispensation to this would *'be unfair on his colleagues'*. As we understood his evidence he was suggesting that the disabled should not get any favourable treatment – rather missing the point of the duty to make reasonable adjustments.

238. Putting aside any role at the rear of the store, the Respondent is a substantial employer. It has stores all over the London area within reasonable travelling distance of the Claimant's home. We find it impossible to accept that a roll could not have been found for the Claimant at one of those stores that minimised customer contact. Taking such a step would have caused the

Respondent little difficulty and we find that it would have fulfilled the legitimate aim the Respondent has identified.

239. Leaving aside any findings as to whether the Respondent's conclusions were reasonable and assuming that they were we find that the Respondent's actions in dismissing the Claimant were not a proportionate means of achieving the legitimate aim identified. There were alternative means to achieving that aim that were open to the Respondent and which it would have been reasonable to expect the Respondent to pursue.

240. We add for completeness that our findings in the unfair dismissal claim if taken into account would substantially reinforce our conclusions.

241. For the reasons set out above we are satisfied that the Respondent treated the Claimant unfavourably because of something arising in consequence of his disability and that that treatment cannot be justified.

242. It also follows that for these reasons the claims for reasonable adjustments that we have identified as turning on the same questions as we deal with above must succeed.

Unfair dismissal

243. We remind ourselves that when determining a claim for unfair dismissal we must not substitute our own views for those of the employer. We have made our own findings about what occurred on 21 March 2019 and had disagreed with Mark Davis as to what happened. That is neither here nor there in an unfair dismissal complaint. The test is not what we would have found or what we would have done but whether the Respondent acted reasonably. We have reminded ourselves of that at every stage.

244. The first issue identified as being in dispute was the reason for the dismissal. Ms Sidossis did not concede that the reason for the dismissal was conduct. In her submissions she conflates the issue of whether Mark Davis genuinely believed that the Claimant had engaged in misconduct with the issue of whether he had any basis for that belief. We consider that the two are separate. There was no suggestion that Mark Davis had any other reason for dismissing the Claimant other than the complaints that had been made against him. We have no hesitation in accepting that he did genuinely believe, and still believes that the Claimant had spoken to the Customer in the manner that the Customer had suggested. We find that Jason Roberts shared that belief. As such we are satisfied that the Respondent has established a potentially fair reason for the dismissal.

245. In a case such as this it is a useful discipline to follow the steps set out in ***British Home Stores Ltd v Burchell***. It is clear from that case and cases that have followed that an employer cannot have reasonable grounds for a decision unless there has been a reasonable investigation. If there hasn't then the employer may only be looking at part of the evidence. It is logical therefore to look at the investigation before looking at what evidence was before the employer and assessing whether the conclusions reached were reasonable.

246. We have referred above to ***A v B.*** Applying the principles in that case to the present case we find that a reasonable employer would have kept in mind that reaching a conclusion adverse to the Claimant was very likely to have devastating consequences for the Claimant. This was the only job he had held for 25 years. We have set out above in our assessment of proportionality the difficulties that dismissal was likely to involve for the Claimant. We do not put it any higher than that these were matters that should have been in the minds of those investigating this matter.

247. The further proposition we have extracted from ***A v B*** is that an investigation should include matters which might point away from guilt as well as those matters that point towards it. Mr Welch has quite rightly pointed out that there are boundaries to that. There is authority that the quality of the investigation need not be a CID enquiry. In his skeleton argument, when dealing with the suggestion that the Respondent ought to have investigated the possibility of a 'vendetta', he said *'The Respondent already had considerable evidence that the Claimant was guilty of the relevant misconduct and did not believe the Claimant's explanation[s] which were not credible. In these circumstances it was not duty bound to investigate them'*. Mr Welch referred us to ***Shrestha v Genesis Housing Association Limited*** **[2015] EWCA Civ 94** in support of that proposition. In that case the Court of Appeal said:

'To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole.'

248. We consider that ***Sherestha*** sets out the proper test but does not give rise to any novel principle. Whether it is necessary to investigate any point will depend on the circumstances of the particular case. The test is one of reasonableness. That is the question identified at paragraph 3.2 of the List of Issues.

249. Mr Welch in his skeleton argument describes the investigation of Natalie Coll as 'thorough'. For the reasons set out below we disagree. We would not want it to be thought that we are criticising Natalie Coll personally. She was at the time a very junior manager. This was not a straightforward case for her. We accept that when she held the investigation meetings with the Claimant she asked questions in fairly simple terms and gave the Claimant a full opportunity to answer them. She was prepared to let the Claimant, his Trade Union and mother view the CCTV on a number of occasions. She interviewed a colleague of the Claimant's at his suggestion and spoke to others who might have been able to assist.

250. The key issue for Mark Davis and in turn on the appeal for Jason Roberts was whether the Claimant had behaved as alleged by the Customer on 21 March 2019. The Claimant flatly denied that he had.

251. It appears that Greg Spicer spoke to the Customer on a number of occasions after 21 March 2019. No notes were taken of what was said and, when asking Greg Spicer about whether he had recognised the Customer, Natalie Coll did not ask what had been said.

252. At the time that she undertook the investigation Natalie Coll was aware that the Customer's reaction on learning that the Claimant had been reinstated in 2018 was to demand to know *'what is he doing here'* and asking to see Greg Spicer. When Natalie Coll gave evidence the impression she gave us was that she recognised that, at the least, the Customer was disappointed that the Claimant had retained his job. She would also have known if she had read the second complaint that the Customer had refused to amend her shopping habits.

253. We do not agree with Mr Welch that the Respondent had *'considerable evidence that the Claimant was guilty'* or that the evidence that had been gathered relieved the Respondent of taking what we regard as basic steps to investigate the possibility that the third complaint was a reaction to the Claimant's reinstatement. The test is one of reasonableness and we find that it was not open to a reasonable employer not to conduct at least some investigation into this line of defence. The first step was to ask Greg Spicer a few more questions about what he had learned from the Customer. That was a simple straightforward task.

254. Once Natalie Coll had established that the Claimant denied acting as alleged by the Customer a reasonable step to have taken would have been in the first instance to ask Greg Spicer about what he had said to the Customer when she learned of the Claimant's reinstatement and what she had said to him. It did not seem to occur to Natalie Coll that the Customer might not have been telling the truth or that she might have been motivated to falsify or exaggerate what she said in her complaint because of her dissatisfaction with the response of the store. Given that Greg Spicer had commissioned the investigation he ought to have taken the step of carefully noting what the Customer said to him. The very fact that the Customer asked to see him on a number of occasions was a relevant matter that ought to have been properly investigated. We have assumed that the Customer was told about the Claimant's disabilities. We find that a reasonable investigation would have included investigating this and included in the investigation report the information that was obtained. Even in the absence of any ascertaining what was discussed between the Customer and Greg Spicer Natalie Coll ought to have included in the information she put before Mark Davis the fact that she knew that the Customer had expressed disappointment at the Claimant being reinstated.

255. It was a reasonable step for Natalie Coll to have interviewed the Security Guard who was seen within meters of the spot where the Claimant was said to have spoken to the Customer. He gave his opinion that the CCTV showed the Claimant speaking to him. Natalie Coll was asked whether she had asked him whether he had heard the Claimant use the words 'has the cat got your tongue'. She accepted that she had not. She did acknowledge that if those words had been used he was well placed to have heard them. The approach

she took was that if the Security Guard had no recollection independently of the CCTV then his evidence was not of any help. The same approach was later taken by Mark Davis. We consider that it would have been reasonable to have put the customers complaint to the Security Guard and asked whether he could comment upon whether the rather unusual words used were said in his presence. Doing so was likely to assist him to remember what he might have heard on that day. We find that the failure to explore this was a significant error in the investigation.

256. It was argued on behalf of the Claimant that the Respondent could have asked to interview the Customer. Mr Welch suggested that this placed an intolerable burden on the Respondent. We accept that the Respondent could not insist that the Customer assisted in the investigation. On the other hand, the Customer had previously supplied her husband or son's mobile telephone number and she had attended the store on at least three occasions and talked to Greg Spicer. The Respondent had her e-mail contact details. We consider that it would have been a straight forward matter to have asked the customer for some detail of her complaint. In particular it would have avoided some speculation if the Customer had been asked to confirm where she said that the Claimant had spoken to her. Whilst we find that the Customer could very easily have been asked for some more information the more immediate failure was not asking Greg Spicer what the Customer had said to him and what he had said in return.

257. We find that the failure to ask Greg Spicer and the Security Guard about the matters we have identified above rendered the investigation wholly inadequate. By this we mean that applying the approach in ***Sainsbury's Supermarkets* Ltd *v Hitt*** it fell outside the range of reasonable responses to the matter to be investigated.

258. We turn to the question of whether Mark Davis had reasonable grounds for his decision. Where there has been a failure to investigate the decision maker is making a decision without all the information that ought to have been available. As such, their decision is based on only part of the available information. The fact that that information might support a finding of guilt does not mean that the decision was on reasonable grounds.

259. We would accept that Mark Davis was entitled to find that the CCTV showed the Customer. There was no reason to doubt what Greg Spicer had said about him recognising her. We also find that Mark Davis was entitled to conclude that the CCTV showed that the Claimant had the opportunity to speak to the Customer.

260. Mark Davis found that the Claimant must have recognised the Customer. We do not think a great deal of care was taken when Mark Davis asked the Claimant about this in ensuring that the Claimant understood the difference between being asked whether he was able to recognise the Customer from the CCTV and whether he had as a matter of fact recognised the Customer on 21 March 2019. That said we are acutely aware that we should not substitute our own view for that of Mark Davis. We find that he was entitled to have regard to the fact that the Claimant in 2016 and 2018 appeared to know who

had complained about him. He had said that he thought he would recognise her. Whilst the events of 21 March 2019 were fleeting we cannot say that Mark Davis's conclusion that the Claimant must have recognised the Claimant was not a finding open to him.

261. We are somewhat more critical of the next aspect of Mark Davis's reasoning when he says that the fact that the Customer accelerated away fron the Claimant supports her account of events. We agree with him that the CCTV plainly shows that as the Customer passes the Claimant in the lobby of the store; she speeds up and hits or narrowly avoids baskets stacked outside by the Claimant. Putting aside entirely our own conclusion that the Customer could easily have avoided these baskets we ask whether Mark Davis's conclusion that the Customer's reaction showed that her account was more likely to be true. We consider that rapidly exiting the store was equally consistent with the Customer being angry to come across the Claimant at all. We recognise that Mark Davis was entitled to view this aspect of the case along with his other conclusions. Whilst we would not have drawn the same conclusions we do not say that his analysis was irrational.

262. Ms Sidossis argued that a reasonable decision maker would have taken account of the fact that the Claimant had, as she put it, always made frank admissions. Mr Welch countered that by pointing out that in 2018 the Claimant's answers to questions were not always consistent. We have had regard for those arguments in our conclusions in respect of the wrongful dismissal claim. However, Mark Davis set out at length at the end of the disciplinary meeting his reasons for accepting the Customer's complaint. We find that these were the entirety of the reasons he held at the time. It is those reasons that we are examining not the arguments of counsel before us. However, had Mark Davis or Jason Roberts placed significant weight on what appear to be inconsistent answers given by the Claimant at times it would have been necessary to determine how much weight a reasonable decision maker could have put on those responses. In particular, we note that some of the allegations discussed in 2018 were said to have taken place months before the meetings.

263. Mark Davis records in his reasons and in his witness statement that he discounted the suggestion that the Customer was not being accurate in her description of events because there was no evidence of a vendetta. Avoiding the emotive term 'vendetta' we cannot agree that there was no evidence that the Customer might be motivated to make a false complaint about the Claimant. We accept that Mark Davis had not been told of the Customer's reaction to the Claimant's reinstatement nor of anything she might have said to Greg Spicer. That does not mean that there was no evidence that Mark Davis ought to have considered. As we have said the three complaint letters are striking in that they make no mention of the Claimant's disabilities. No allowances for unusual behaviour were made. What is more Mark Davis had the Second Complaint letter where the Customer refuses to modify her shopping times to avoid the Claimant. Both of these matters ought to have been taken into account in assessing whether the Customer's attitude towards the Claimant was a reasonable one which ought to be accommodated or an

unreasonable and possibly discriminatory one which ought to have been resisted. We find that it was wrong to conclude that there was no evidence which should have been taken into account.

264. An additional point relied upon by Mark Davis in his witness statement was his belief that the Customer's account was more likely to be true because she had not gone to the police. We consider that to be an irrational conclusion. There would be many other reasons why the Customer might not have gone to the police. Assuming that the Customer did so for benign reasons is purely speculative. An alternative explanation would be that the Customer knew her allegation was false or that she suspected the police would not consider the matter sufficiently grave to intervene.

265. Neither Mark Davis nor Natalie Coll gave any weight to the fact that the Security Guard could not remember anything untoward and that he had said that he believed that the CCTV showed the Claimant talking to him. We have criticised the failure to tell the Security Guard the nature of the Customers complaint and invite his comments. Even in the absence of that the fact that the Security Guard could not remember anything untoward was evidence that should have been factored in to the decision.

266. The most significant failure in our view was the failure to recognise that there was at least some evidence that the Customer had a motive to give a false account. A reasonable decision maker would have had regard to that and weighed it in the balance. Neither Mark Davis nor in turn Jason Roberts did that. We find that in so doing they both failed to take a relevant matter into account. We do not find that either of them considered or weighed up the possibility that the Customer had an unreasonably low tolerance of for the Claimant's disability. We consider that that was a significant failure.

267. Whilst we accept that there was evidence which supported Mark Davis's conclusion and which, viewed in isolation, did provide a reasonable basis for his conclusions. The failure to investigate and the failure to have regard to relevant matters identified above mean that the conclusion reached cannot be regarded as being on reasonable grounds.

268. Ultimately the question for the tribunal is the one set out in Section 98(4) of the Employment Rights Act 1996. Any assessment under that sub-section requires the tribunal to review the 'sufficiency' of the reason for the dismissal. That will frequently involve a similar balancing exercise to that undertaken under Section 15 of the Equality Act 2010 (see ***O'Brien v Bolton St Catherine's Academy*** **[2017] EWCA Civ 145**).

269. We have set out an extensive analysis above as to why we have concluded that the dismissal of the Claimant was disproportionate. It is appropriate to repeat that analysis here. The same matters that informed that decision are relevant to the question of whether, even assuming in the Respondent's favour that there was a reasonable basis for the conclusions that they had reached, the decision to dismiss the Claimant was within the band of reasonable responses. We find that it was not.

270. In dealing with this point it is necessary to refer to two points referred to by Counsel. Ms Sidossis referred to ***Brito-Bapapulle v Ealing Hospital NHS Trust*** **2013 UKEAT/0358/12** for the proposition that a tribunal will err in law if it accepts that a finding of gross misconduct renders a finding of unfair dismissal inevitable. Mr Welch did not dissent. The ACAS code of practice suggests that dismissal for a first offence would not normally be fair unless the Respondent believed on reasonable grounds that the conduct complained of amounted to 'gross misconduct'. It does not suggest that a dismissal would always be fair if it did. However, the considerations in this case are not quite the same. The Respondent had treated the instances of 2016 and 2018 as conduct issues and the Claimant was, in 2019, still subject to a final written warning. In such a case the ACAS code does not suggest that a dismissal might be unfair for something less than gross misconduct. Indeed, it tends to suggest that it might be fair to dismiss if there was any further misconduct.

271. Whether a dismissal is fair or unfair will turn on the facts of each case. The employer benefits from the latitude of the 'range or reasonable responses test' but that is not to be equated with the Wednesbury test of unreasonableness. Mr Welch made the bold submission that in determining whether a dismissal was fair or unfair the fact that the employee might suffer an injustice is irrelevant. He cited ***W Devis & Sons Ltd v Atkins*** **[1977] AC 931** as authority for that. We do not accept that he is assisted by that authority which goes no further than to say that a dismissal which was unfair cannot be considered fair because of some after acquired knowledge. That does not mean that the risk of an injustice, on the facts known to the employer, can be disregarded.

272. We have found that steps taken to investigate the allegations against the Claimant fell outside the range of reasonable investigations. We have found that the reasoning of Mark Davis, not corrected by Jason Roberts, was in places irrational and ultimately the conclusions they drew were not on reasonable grounds. Even if we are wrong about both of these points we would still have found the dismissal unfair.

273. The Respondent, contrary to its case, had not taken a number of steps to assist the Claimant overcome the difficulties that arose from his disability. It had rejected alternatives to dismissal for reasons that we find were irrational and wrong. We have analysed the proportionality of the decision and decided that dismissal of a long serving disabled employee was not proportionate. For all of those reasons and the reasons set out above we find that the decision fell outside the range of reasonable responses and the dismissal was unfair.

274. Had the Respondent acted lawfully we find that there was no possibility that the Claimant would have been dismissed. As a consequence, if we are going on to consider making a compensatory award (in lieu of reinstatement which must as a matter of law be considered first), we do not consider that it would be just and equitable to reduce any reward to reflect the possibility that the Claimant could, or would, have been fairly dismissed as a consequence of the conduct relied upon by the Respondent. No other contingencies were identified.

275. It follows from our conclusions in respect of the wrongful dismissal claim that the Respondent has not satisfied us that there was any factual basis for a finding of contributory fault.

276. Whilst the list of issues included the suggestion that there had been a breach of the ACAS code neither party identified on in their submissions and none was apparent from the evidence. We do not make any finding that there was such a breach.

277. The matter will now be listed for a remedy hearing.

Employment Judge Crosfill

8 February 2021