EMPLOYMENT TRIBUNALS

Claimant: **Michael Bradley**

Respondent: **Russell Parker Foods Limited**

Heard at: **Cardiff (Teams (Day1) and CVP (Day 2-4))**

On: **17 January 2022, 18 January 2022, 19 January 2022 and 20 January 2022**

Before: **Employment Judge Brace**
Members Ms R Lewis and Mr S Head

Representation

Claimant: Ms J Bradley (Claimant's step mother)
Respondent: Mr D Piddington (Counsel)

RESERVED JUDGMENT

The claim of unfair dismissal is not well founded and is dismissed.

The Claimant was a disabled person at the relevant time by reason of his Asperger's.

The s.15 Equality Act 2010 claim of discrimination arising from disability is not well founded and is dismissed.

WRITTEN REASONS

Preliminary Matters

1. This was a wholly remote hearing with the first day of the hearing being conducted on Teams and the remainder of the hearing being conducted by Cloud Video Platform.

2. The hearing proceeded without technical difficulty.

3. The Claimant's claim (ET1) had been accepted by the Tribunal on 21 December 2020 [5], early conciliation having been entered into on 21 October 2020 which had ended on 9 November 2020 [4]. The Claimant

relied on his employment as a slaughterman with the Respondent, said to have commenced on 20 August 2009, which terminated on 2 October 2020.

4. The Claimant had ticked, within Box 8 of the ET1 claim form [5], unfair dismissal and disability discrimination and, within the narrative attached to the ET1, set out his challenges to fairness in the disciplinary process. He asserted that he had appealed the dismissal notifying the Respondent of his Asperger's condition [19].

5. At the outset of the final merits hearing, before adjourning to allow further reading time for the Tribunal, there was a case management discussion with the Respondent's counsel and the Claimant's representative (being the Claimant's step-mother, an HR Consultant,) when the following was discussed:

   a. how a case proceeds;
   b. that the Tribunal would split the hearing: liability first and then remedy, but that the parties would be invited to make submissions on Polkey, compliance with ACAS Code of Practice and contributory conduct at the end of the liability evidence;
   c. timetabling, which was agreed with a view to completing evidence by the end of the second day (which overran slightly when evidence was not completed until the end of the morning of the third day);
   d. adjustments for the Claimant, which included breaks every hour and a request for permission to the Claimant to read out an opening statement (which was subsequently given but which did not include additional evidence); and
   e. the list of issues, which was agreed by both parties to be the list of issues for the Tribunal to determine arising out of the complaints of unfair dismissal (s.98 ERA 1996) and discrimination arising from disability (s.15 EqA 2010).

List of Issues

6. At the case management hearing on 28 June 2021, Judge Sharp had spent time resolving the particular disability discrimination complaints and set out a list of issues ("List of Issues") giving the parties an opportunity to say if they thought the list was wrong or incomplete [36].

7. Following receipt of the Claimant's medical records and Disability Impact Statement [202], it had been confirmed by the Respondent on 13 August 2021 [208] that disability was not conceded. This was re-confirmed at the outset of this hearing. The Claimant also confirmed that he was seeking compensation only and was not seeking re-instatement or re-engagement.

8. The List of Issues, set out in Judge Sharp's case management order, in relation to liability were as follows:

1. Unfair dismissal

1.1 Was the Claimant dismissed? The Respondents accepts that he was.

1.2 What was the reason or principal reason for dismissal? The Respondent says the reason was conduct. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.

1.3 If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

1.3.1 there were reasonable grounds for that belief;

1.3.2 at the time the belief was formed the Respondent had carried out a reasonable investigation;
1.3.3 the Respondent otherwise acted in a procedurally fair manner;
1.3.4 dismissal was within the range of reasonable responses.

3 Disability

3.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

3.1.1 Did he have a physical or mental impairment: Aspergers?
3.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?
3.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
3.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?
3.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

3.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
3.1.5.2 if not, were they likely to recur?

4. Discrimination arising from disability (Equality Act 2010 section 15)

4.1 Did the Respondent treat the Claimant unfavourably by:

4.1.1 Viewing his lack of remorse and the timing of his retaliation as negative factors when deciding whether to dismiss him?

4.2 Did the following things arise in consequence of the Claimant's disability:

4.2.1 Lack of remorse?
4.2.2 Timing of retaliation against colleague?

4.3 Did the Respondent dismiss the Claimant because of his lack of remorse and/or timing of retaliation?

4.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

4.5 The Tribunal will decide in particular:

4.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;
4.5.2 could something less discriminatory have been done instead;
4.5.3 how should the needs of the Claimant and the Respondent be balanced?

4.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

9. Issues relating to Polkey, ACAS and contributory conduct were set out in the additional Section 2 'Remedy' of the list of issues.

10. Despite the agreement of the parties prior to commencement of evidence that these were an agreed list of issues, following cross examination of the Respondent's third witness and dismissal appeal manager, Mr Dale Williams, and prior to submissions, the Claimant's representative was asked by the Tribunal, and she confirmed, that she had understood and interpreted the 'unfavourable treatment', set out at §4.1 and/or §4.3 List of Issues of '*viewing the Claimant's lack of remorse and timing of his retaliation as negative factors when deciding whether to dismiss him*', as including the view taken at the appeal hearing, not just the dismissal hearing.

11. This was on the basis that she had interpreted the wording '*when deciding whether to dismiss him*, as including the decision made at the appeal hearing by Mr Williams.

12. Following submissions from Counsel for the Respondent, and Mrs Bradley on behalf of the Claimant, it was determined by the Tribunal that this did not amount to a new claim, for which permission to amend the claim was required (for reasons given in the oral judgment on the afternoon of the third day,) but that it was in the interests of justice to review and amend

the List of Issues under our general case management powers set out in Rule 29 ET Rules 2013.

13. As a result, before adjourning to hear submissions from the parties on the morning of the following and final day of the hearing, the List of Issues was amended to fully reflect the Claimant's case and it was agreed that there should be an additional §4.1.2 to be added to the List of Issues as follows:

    4.1.2 Dale Williams viewing the Claimant's lack of remorse and timing of his retaliation as negative factors when deciding whether to overturn the dismissal at the appeal

14. The parties were also invited to make submissions on whether as a result of this amendment further case management was required including whether any witnesses should be recalled, when:

    a. The Claimant's representative agreed that she had presented the Claimant's case and cross-examined the Respondent's witnesses during this final merits hearing on her assumption that the wording '*when deciding to dismiss him',* did include the decision taken at appeal and that she did not consider it necessary for further fresh evidence from the Claimant or cross examination of the Respondent's witnesses; and

    b. Mr Piddington, Respondent's counsel, confirmed that, taking into account the overriding objective set out in Rule 2, he was satisfied that the Tribunal should proceed to hear submissions and adjourn to deliberate, without the need for further cross-examination of the Claimant or the need to call further evidence from the Respondent by way of re-examination or otherwise.

15. Due to the lateness of the completion of the evidence and submissions, whilst the Tribunal had endeavoured to give an oral extempore judgment this proved not to be possible in the time left remaining and the parties were informed that a reserved decision and written reasons would be sent.

Evidence

16. There was a Tribunal bundle of approximately 230 pages and references to the hearing bundle appear in square brackets [ ] in these written reasons. An issue arose at the end of the second day with the Claimant's representative indicating that she was missing pages [222-230] at the end of their copy of the Bundle. This was resolved overnight between the parties resulting in no delay to the hearing.

17. The parties were informed that unless the Tribunal was taken to a document in the Bundle, they should assume that it would not be read.

18. Prior to taking evidence from the Claimant, the parties were permitted to share through the Teams platform, a video copy of the CCTV recording of the incident relied on by the Respondent as the reason for the dismissal of the Claimant.

19. The Tribunal heard evidence from the Claimant and the following witnesses on behalf of the Respondents:

    a. Huw Owen (Production Manager);
    b. Vicki Jones (HR Manager); and
    c. Dale Williams (General Manager).

20. All witnesses relied on written witness statements. Each party had and took the opportunity to ask questions by way of cross examination and re-examination of the witnesses. The Tribunal also asked questions of each witness.

Facts

21. The Tribunal makes the following findings of fact. Where there was a dispute of fact, the Tribunal has resolved it applying the balance of probabilities on the evidence before it.

22. The Claimant was born on 14 September 1991. In around 2003, when the Claimant was living in Hertfordshire with his mother, he was assessed by a Communication Disorder Assessment clinic and diagnosed with Asperger's Syndrome. In 2009, he relocated to Mid Wales moving schools and at some point, when the Claimant was round 14 years' old, he moved to live with his father and step mother, Jessica Bradley, who has helpfully provided support and representation for the Claimant throughout this hearing.

23. After the initial diagnosis, no support from NHS mental health services was sought for the Claimant [204]. The Claimant and his father and step-mother did not discuss his diagnosis again.

24. However, we accepted the Claimant's evidence that he struggled forming friendships, both during his school days and after his compulsory education, and has had little social interaction with others outside of the work environment. He still lives with his father and step-mother and has no social relationships outside of his family members; he cannot make friends and lives a solitary life.

25. The Claimant's personal time is spent on-line gaming. Again we accepted the Claimant's evidence, that his on-line interaction is limited to issuing and receiving operational instructions for the purposes of the game, and he does not participate in on-line gaming for more on-line social or personal communication with others.

26. The difficulties that the Claimant had with communication, which we accepted, was also reflected in the evidence that the Claimant gave in his Disability Impact Statement, in which he spoke of:

    a. his habit of talking at length on a topic which resulted in people being '*turned off',* resulting in difficulty forming friendships; and
    b. trouble showing empathy and not understanding non verbal cues, which resulted in others misunderstanding him and/or becoming annoyed with him.

27. On re-examination and cross-examination, the Claimant gave evidence, again evidence which we accepted, that he would as a result avoid public transport and when in shops, would seek to use the self-service till to avoid the need to verbally communicate with staff.

28. After a short summer period of living with his grandparents, in August 2008, the Claimant was offered employment with the Respondent through his step-mother who was, at that time, employed as its HR Manager.

29. Whilst the health declaration for his employment with the Respondent in 2009 gave no obvious opportunity for the Claimant to disclose such a diagnosis [209], in 2019 the Claimant gave no indication of any such diagnosis despite having the opportunity within that form to do so [210]. Neither the Claimant, nor his step-mother, disclosed to the Respondent the Claimant's Asperger's diagnosis at any time during his employment.

Employment with the Respondent

30. The Respondent is a limited company that sources livestock and processes meat from two sites; in Andover and in Powys, at Llanidloes, where the Claimant worked, and was employed by the Respondent as a semiskilled slaughter man in the abattoir.

31. The Respondent had in place various policies and procedures applicable to the Claimant's employment which were found contained in a Staff Handbook and contained policies including:

    a. CCTV Policy [57];
    b. Disciplinary Policy [61] which contained:
        i. a five-step disciplinary procedure of investigation, invite to hearing, hearing, notification of outcome and appeal;
        ii. guidance on disciplinary sanctions; and
        iii. a discrete section on summary dismissal (section 5.2) [64];
    c. Equality and Diversity Policy (extract) [69]; and
    d. Health and Safety Policy (extract) [78].

32. A copy of the Staff Handbook was provided to the Claimant and he kept his copy in his personal on-site locker. The Claimant also had, more recently, access to an online version of the handbook through the Company's intranet, an intranet which he could access from home during his suspension.

33. The Claimant worked on one of the five lines within the production process, the 'Gut Line', where his main responsibilities consisted of opening carcasses, evisceration and removal of internal organs from lambs. The line had a number of what could be termed environmental hazards, such as sharp knives and hooks. During production, it was a noisy environment and a messy job.

34. The Claimant had been in this role for approximately 5 years at the point of termination and had been line managed by Huw Owen since November 2018.

35. The Claimant was considered to be a valued employee whose standards of work was always high. He was engaged in the Respondent's Works Council, which required employees to represent their colleagues and feedback to them about matters discussed at meetings, and was also a First Aider. He would regularly give lifts to work colleagues.

36. Breaks would be taken in the staff canteen and break times were staggered between the production lines. Management would not take regular breaks at the same set times as the staff.

37. Huw Owen gave evidence, which we accepted, that during his time working with the Claimant, that they had communicated well with the Claimant with no issues as far as he was concerned, and that he was not aware of the Claimant's friendship circle outside of work. We also accepted Vicki Jones' evidence that nothing in the Claimant's communication, or the way that he presented to her suggested to her any issue that had a substantial effect on him (VJWS§4)

Disciplinary in 2014

38. In 2014, the Claimant had received some verbal warnings for spitting and failing to sterilize and, in August 2014, had been suspended following an allegation that he had threatened a colleague with aggression and had thrown meat at a colleague.

39. That investigation had resulted in the Claimant being invited to a disciplinary hearing [80], the letter inviting him to that disciplinary stating:

    "*You will of course be fully aware of the importance and implications in regard to gross misconduct offence, (copy of disciplinary process enclosed) carrying a summary dismissal penalty*"

40. A copy of the disciplinary procedures of the Respondent was enclosed. Within a written statement that the Claimant had prepared for the purposes of that disciplinary hearing, the Claimant had written the following [90]:

    'I do realise that my behaviour was not to company standards but I would like to say that I had been bullied into this behaviour had relied on a supervisor but didn't completely solve the situation which cause my temper to escalate which is out of the ordinary of me with staff.'

41. On cross-examination the Claimant gave evidence, which we accepted, that he had been able to identify that his behaviour had not been appropriate and that he had communicated that to the Respondent and that he had apologised.

42. Following that disciplinary hearing which the Claimant had attended unaccompanied, the Respondent accepted the Claimant's mitigation that he had been subjected to conduct from work colleagues that could be considered bullying. This had reduced the sanction for the conduct from dismissal to a final written warning which had remained on his file for a period of 12 months.

43. There is no suggestion by the Claimant that the bullying arose out of the disability now relied on by him. The Claimant did not at that disciplinary seek to rely on or refer to his Asperger's.

Incident

44. On 24 September 2020, the Claimant was involved in an incident when working on the Gut Line. He was working alongside a work colleague, referred to as JP within the judgment.

45. The Claimant had filled up a latex glove with water from the hot water tap, located at the handwashing sink next to the Gut Line, and had poured the contents of the glove over JP's back. JP had grabbed the Claimant until other work colleagues intervened. CCTV had captured the incident on video although the audio could not pick up what had been said, and some colleagues had witnessed the incident.

46. Both the Claimant and JP were separated and taken away from the production area by Huw Owen, the Claimant's line manager. Accompanied by Vicki Jones, HR Manager, the Claimant was told by Huw Owen that he was being suspended and Vicki Jones told him that she would contact him by email as to next steps.

47. JP was not suspended. A decision was made by Huw Owen and Vicki Jones that due to JP's mental health at that time and concerns that he may harm himself, that he should not be suspended but that he return to work on a different part of the production line, at a different stage of the process to ensure that there would be limited interaction with work colleagues on the Gut Line that had witnessed the incident.

48. JP also received treatment of burn gel applied by Huw Owen which he noted in the 'Plaster issue and Control Record' [113]. Huw Owen also recalled, evidence which we accepted, that the back area of JP's neck was red.

Suspension

49. The suspension was confirmed by letter of the same date from Vicki Jones [104]. In that letter, the Claimant was informed that he had been suspended from duty with immediate effect on full pay to allow the company to carry out investigation into the allegation that he had thrown hot water on another employee and that should the investigation indicate that there was some substance to the allegation, he would be required to attend a disciplinary hearing.

Investigation

50. Christopher Stanford, a slaughterman, was asked to undertake the investigation.

51. He asked the Claimant and JP write their own statements and asked those who had witnessed the incident to prepare written statements detailing what they had seen.

52. In his statement the Claimant confirmed the following [109]:

    'So I was on the opening & [JP] was pulling bellies, [JP] was chucking the bellies as he had gotten a bit behind & this cause a belly to burst on me. I then told him to watch where he was throwing them to which he replied "yeah what are you going to do about it, that's what I thought nothing" in a aggressive tone which was uncalled for as I hadn't done anything to upset him up to that point. Then the line stopped soon after & while it was stopped I poured water over [JPs] back & then he instantly started attacked me shoving me over into the SRM bin & trying to put my face into the content of the SRM bin. Sylvester then pulled [JP] off of me all the while [JP] was insulting me calling me stuff like a "lonely geek" after that we were both taken off the line.

53. In his statement, JP also confirmed that he was getting behind and that when he threw some animal product at a distance some splattered onto the Claimant and that the Claimant had said

    "What are you doing you fucking idiot" and that he had responded *"What can I do about it? Nothing so just get on with it"* [108].

54. He also confirmed that the line continued for a few moments before stopping, that he turned his back, which was when the Claimant filled a glove with hot water and poured it down his back saying "*This is what I'm going to do about it*". JP admitted that he turned and reacted by grabbing the Claimant forcing him down to the ground / bin, which was when he was pulled away by another member of staff.

55. The additional witnesses, within their statements [110-112], had reported that JP was struggling with the carcasses and, when throwing the waste meat products onto the conveyor, a small amount of product had splashed on the Claimant who had said to JP *"Oy you fucking idiot, watch what you are fucking doing".*

56. It was also their evidence that JP had responded *"What are you going to do about it/that?",* or words to that effect [110 and 111].

57. JP was subsequently asked to clarify if his statement was right and whether he could confirm that he said "*what can I do about it*?" as other statements had stated that he had said "*What are you going to do about it?".* JP provided a further statement [107] reporting that he had said *"What can I do about it".* He also denied calling the Claimant a lonely geek, but accepted that he may have called him a lanky geek.

58. Christopher Stafford viewed the CCTV footage of the incident and contacted the Claimant by email on 28 September 2020 [115] asking him: *"..why did you have no initial reaction straight away? What reaction were you expecting from you reaction?"*

59. The Claimant responded later that day by email saying *"I wasn't trying to pick a fight I just wanted to get back at [JP] for being rude & careless. I thought water would be a safe bet & I didn't expect him to attack me."*

60. There were issues with the hot tap on the Gut Line being too hot and these were well known to the employees working there, with warning signs and multiple reports [103]. As a result, Mr Stafford also checked with the Respondent's Technical manager that the reading of the temperature of the water that he had taken from the tap on the day of the incident was 55.5 degrees. It was confirmed that it was, as that was the temperature required for water safety at that point [114].

Invite to disciplinary hearing

61. On 30 September 2020, the Claimant was invited to a disciplinary meeting [105], the letter headed "Notice of disciplinary meeting – Gross Misconduct".

62. The Claimant was informed that the meeting would be chaired by Huw Owen and Vicky Jones and that a notetaker would be in attendance. The Claimant was informed that the question of disciplinary action against him in accordance with the disciplinary policy would be considered with regard to dangerous behaviour and serious breach of health and safety.

63. He was invited to prepare another statement in relation to the incident if he wished which could be considered in advance of the hearing and informed that at the hearing he would be given the full opportunity to explain his case and answer the allegations and that he could ask questions, dispute the evidence, provide his own evidence and otherwise argue his case.

64. He was also informed that he could put forward any mitigating factors that he considered relevant to his case and that due consideration would be given to any factors or explanations which he raised when considering what if any disciplinary action would be imposed. He was informed have the right to be accompanied.

65. Copies of the written statements, taken as part of the investigation, were included within the invite letter.

66. The letter did not include any reference that the Claimant could be summarily dismissed. We accepted Vicky Jones' evidence that it had been an oversight on her part for which she could not offer any explanation.

Disciplinary Hearing

67. On 2 October 2020, the Claimant attended the disciplinary hearing, conducted by Vicky Jones and Huw Owen. A note taker was also present. Both Huw Owen and Vicky Jones had read the written disciplinary statements in advance of the hearing and had viewed the CCTV.

68. We have been provided with notes of the disciplinary hearing [118], which we found was not a verbatim note, but a summary of the matters discussed, recording the main points and was likely to have followed the same order of matters as the discussion that had taken place that day.

69. The hearing commenced at 10.29 and had ended at 10.46. It is agreed between the parties that the meeting lasted 17 minutes.

70. The Claimant attended unaccompanied and confirmed that he did not wish to have a companion. He was informed that the outcome could warrant summary dismissal and asked if he wished to read the statements again. He declined.

71. The Claimant asked what evidence the Respondent had to show that JP had been injured and was informed that burn cream had been applied. The Claimant did not consider that the water had been hot enough to burn and said that he had not intended to harm JP.

72. The disciplinary notes reflect, and we found it likely as a result, that

    a. Huw Owen told the Claimant that JP's actions in splashing the Claimant was clearly an accident;
    b. The Claimant thought JP careless and he had already asked him to stop;
    c. Huw Owen told the Claimant that he did not consider that it warranted his reaction to JP; and
    d. the Claimant responded that he felt that JP had been rude and inconsiderate when he had asked JP to 'watch it' and that he thought JP aggressive.

73. The Claimant was told by Vicky Jones that if the water had physically scalded JP, it would be classed as assault and a police matter. The Claimant considered this to be a threat that she would report the matter to the police although he did not communicate this concern to her. In cross-examination, Ms Jones gave evidence, which we accepted, that she did not say that she was going to report the matter to her police and found that it was not her intention to make the Claimant feel threatened.

74. The Claimant was told that the reason for the disciplinary was to hear his side of the story and he was asked what he thought JP had said and whether, as it was loud on the line, words could get 'lost'.

75. The Claimant was questioned about the delay in his reaction. The Claimant was told that his reaction to JP had been delayed and a planned reaction, whereas the JP's reaction had been instant.

76. Due to that questioning, we found that Huw Owen and Vicky Jones had likely made conclusions regarding the timing of the events from their review of the CCTV footage, prior to the hearing. That said, those conclusions on timing were unchallenged and accepted by the Claimant and were that the CCTV had indicated:

    a. an exchange of words between the Claimant and JP which had finished within 10 seconds of the splash;
    b. after that initial interaction the line is stopped due to an issue elsewhere on the line some 90 seconds after the initial splash;
    c. that the Claimant washes his gloved hands, inspects his helmet, brushes something from his sleeves and looks over at JP.
    d. that he washed his face before filling up a latex glove with water from the hot water tap and pours the content of the glove over JP's back after which JP immediately grabbed the Claimant.

77. The Claimant was asked if he wanted to see the CCTV footage. He did not.

78. The Claimant repeated that JP's words had upset him and that he felt provoked. He said he could not rely on, and had no confidence in, his supervisor but that in hindsight he would go to his supervisor. The Claimant was asked to consider what reaction he had expected to throwing water. He thought that JP would have shouted at him not assaulted him.

79. The Claimant was informed that the words spoken were not clearly heard by them from viewing the CCTV and that there was a dispute in the written statements as to what had been said. They told the Claimant that they were unsurprised due to the high noise levels on the Gut Line.

80. The meeting concluded with the Claimant confirming he had nothing further to add.

Disciplinary Outcome

81. By way of letter dated 2 October 2020, the Claimant was given written notice of the decision of summary dismissal and that he was dismissed with immediate effect.

82. The Claimant was informed that his explanation for the events was '*unsatisfactory because of the time between the initial splashing of the bellies which was not an intentional action by [JP] and your reaction nearly 2 minutes later, it was a calculated retaliation to words that were not clearly heard in a noisy working environment*.'

83. The Claimant was also informed that the consequences of his actions could have resulted in serious injury and that as they worked in a dangerous environment, that type of calculated retaliation was extremely dangerous behaviour that would not be tolerated. The letter also stated that at no time during the incident and the meeting had the Claimant shown any remorse for his actions.

84. Taking into account the incident, the investigation and disciplinary outcome, we found that the decision to dismiss was reached as a result of the Claimant's conduct on 24 September 2020 and not for any other reason.

85. The Claimant was informed he had a right of appeal to Dale Williams, General Manager within 5 days of receiving the letter by email.

Letter of Appeal

86. Following receipt of that letter, the Claimant engaged in email correspondence with Vicki Jones, when the date for appealing was clarified and the Claimant was sent copies of the staff handbook, including disciplinary policy and health and safety documentation.

87. The Claimant asked for a copy of the CCTV footage. This was declined. The Claimant was informed that he could view this onsite, but he

confirmed that he wanted a copy and that he was not prepared to view the footage and was not prepared to drive to the site to undertake this [125-127].

88. By way of letter dated 9 October 2020, the Claimant appealed the dismissal [128]. The contents of the letter mirrors to a large extent the narrative attached to the ET1.

89. The letter included the following

    'I can advise the organisation that I do have a childhood diagnosis of mild asperger's and you will note that some of the symptoms are;
    Exaggerated emotional responses
    Inability to grasp emotional issues'

90. The Claimant agrees that this is the first time that the Respondent was informed about his diagnosis.

91. He inserted a link to healthline.com and stated

    '*I appreciate that I may not previously have informed the company of this, nevertheless, my emotional state during the incident and following was not explored at the meeting. Now I understand these criteria are being used to make decisions about me, I feel it is important to inform the company of this as it has clearly had an impact upon the perception the panel have of me.'*

Appeal Hearing

92. The appeal hearing took place on 16 October 2020 before Dale Williams. Again, the Claimant declined to be accompanied. Notes of the appeal meeting were included in the bundle [141]. Again, we found that more likely than not that these contained an accurate summary of the discussion and not a verbatim note.

93. The notes reflect that the Claimant raised that he had not been prepared for the disciplinary hearing as he had not understood that he could have been dismissed and that he was unsure why throwing hot water on another member of staff was gross misconduct.

94. Before the appeal continued further, Dale Williams ensured that the watched the CCTV footage and the Claimant was asked to clarify his actions from watching the footage. The Claimant confirmed that he understood why JP had reacted as he had, but could not understand why JP had not been dealt with. Dale Williams informed the Claimant that the meeting was to focus on his actions and his appeal.

95. The Claimant was asked about the 90 second delay between the splash from JP and his own actions in pouring the hot water over JP. The Claimant explained that this was due to a condition he had dealing with emotions. He told Dale Williams that he had been provoked to throw hot water over JP and that he was not disputing that he had done anything wrong. He had not expected JP to react as he did and that he had

expected JP just to shout at him. He did not accept that he had been the original aggressor and considered that he had been provoked by JP as, when he had asked JP to stop, JP had verbally responded '*What are you going to do about it?'*

96. He was asked why it was a particular issue that he had been splashed that day and the Claimant explained that it was a problem as JP had a 'don't care attitude' and had not apologized after splashing him. The Claimant explained that it was not his intention to harm Jordan, that he just wanted to *'get back at him'.* When asked why he had not approached a supervisor, he stated that this was because he had no confidence in the management team at the Respondent. Later in the meeting the Claimant explained that after the splash from JP and before pouring the water, he had spent the time thinking about what to do to get JP back.

97. The Claimant raised a number of times during the appeal that he considered that the procedure had been biased as JP had not been suspended and that he had not been treated equally to JP. That JP had reacted immediately to the Claimant pouring water over him was raised, as was the concern that the Claimant had not immediately reacted to JP. The Claimant again raised that he had been provoked as when he had asked JP to stop, he had said to him '*What are you going to do about it'*

98. The Claimant's Asperger's diagnosis was discussed it was agreed that the appeal letter was the first time that the Claimant was disclosing the condition. The Claimant was informed that the Respondent may have been able to assist if they had known and he was asked why it had been a particular problem that he had been splashed that day.

99. The Claimant responded that it was a problem as Jordan had a *don't care* attitude' and had not apologised. He said that it was not his intention to harm JP but that he just 'wanted to get back at him'.

100. Dale Williams was asked about this on cross-examination. Based on the confirmation he have in live evidence, we found that he did not consider the splash to be the provocation relied on by the Claimant but the exchange of words which he did not consider to have been sufficient to amount to provocation justifying the Claimant's conduct.

101. He also confirmed that he did not consider that even if the Respondent knew that the Claimant had Asperger's, that the dismissal outcome would have changed, confirming that the Claimant had not told him that the delay in his reaction was him processing his emotions, but was time spent trying to work out a way of '*getting [JP] back'*.

102. The Claimant raised that he considered that dismissal was disproportionate and that he should have received a warning and the Claimant raised concerns that there was 'another force at play' and Dale Williams confirmed that his step-mother's business, StepChange, had nothing to do with the dismissal. The Claimant raised concerns regarding JP's social media interaction with Huw Owen.

103. The meeting concluded with the Claimant raising concerns regarding the CCTV footage and the staff handbook.

104. By way of letter dated 16 October 2020 [140], the Claimant was informed that his appeal had been unsuccessful. He was informed that it was considered that there was no new evidence that mitigated the Claimant's actions. It was confirmed that it was concluded that policies and procedures had been followed and that allegations of bias were unfounded.

Submissions

105. The Respondent relied on detailed written submissions compromising some 62 paragraphs and 19 pages. The Tribunal will not attempt to summarise those submissions but incorporates them by reference. Mr Piddington also made some supplementary oral submissions when he took the time to work through the written submissions for the benefit of the Tribunal and the Claimant.

106. The Claimant's representative presented on his behalf, as his step-mother and a person lacking legal knowledge. She reminded the Tribunal that that the Claimant's difficulties with communication was at the heart of this case.

107. She submitted that there had been an unfair procedure, relying on lack of documentation, confusing timetables and intimidation in terms of potential police action and a failure to inform the Claimant properly of the potential consequences and outcome from the disciplinary. She submitted that there was insufficient reason to dismiss an spoke of lack of consistency in the way that JP had been treated.

108. With regard to disability, Ms Bradley conceded that the Respondent presented information at the appeal but relied on constructive knowledge throughout the whole of his employment.

Issues and Law

<u>Unfair Dismissal</u>

109. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that they were dismissed by the Respondent under section 95, but in this case the Respondent admits that it dismissed the Claimant (within section 95(1)(a) of the 1996 Act) on 2 October 2020.

110. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.

111. In this case the Respondent asserts that it dismissed the Claimant because it believed he was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2). In this regard, the Respondent bears the burden of proving on balance of probabilities, that the Claimant was dismissed for a reason that related to one the potentially fair reasons set out in section 98(2) Employment Rights Act 1996 (ERA 1996).

112. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

113. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in **Burchell 1978 IRLR 379 and Post Office v Foley 2000 IRLR 827**.

114. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited** v **Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563**).

115. If the Tribunal concluded that the dismissal was procedurally unfair, it should consider what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in **Polkey** v **AE Dayton Services Ltd** [1987] UKHL 8; **Software 2000 Ltd** v **Andrews** [2007] ICR 825; **W Devis & Sons Ltd** v **Atkins** [1977] 3 All ER 40; and **Crédit Agricole Corporate and Investment Bank** v **Wardle** [2011] IRLR.

116. The Tribunal also agreed with the parties that if the Claimant had been unfairly dismissed, it would address the issue of contributory fault, which inevitably arises on the facts of this case. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996. Section 122(2) provides as follows:

Where the Tribunal considers that any conduct of the complainant

before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.

117. Section 123(6) then provides that: Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

Disability

118. The Equality Act 201 ("EqA") provides that a person has a disability if he or she has a 'physical or mental impairment' which has a 'substantial and long term adverse effect' on his or her 'ability to carry out normal day to day activities'. Supplementary provisions for determining whether a person has a disability is contained in Part 1 Sch 1 EqA which essentially raises four questions:

a. Does the person have a physical or mental impairment?

b. Does that impairment have an adverse effect on their ability to carry out normal day to day activities?

c. Is that effect substantial?

d. Is that effect long term?

119. Although these questions overlap to a certain degree, when considering the question of disability, a Tribunal should ensure that each step is considered separately and sequentially (**Goodwin** *v* **Patent Office** *[1999] IRLR (EAT))* and Morison P, giving the decision of this Court, also set out very helpful guidance as to the Tribunal's approach with regard to the determination of the issue of disability. At paragraph 22 he said "*The tribunal should bear in mind that with social legislation of this kind, a purposive approach to construction should be adopted. The language should be construed in a way which gives effect to the stated or presumed intention of Parliament, but with due regard to the ordinary and natural meaning of the words in question."*

120. The EqA 2010 Guidance states '*In general, day to day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household takes, walking and travelling by various forms of transport, and taking part in social activities'* (D3).

121. Furthermore, a non-exhaustive list of how the effects of an impairment might manifest themselves in relation to these capacities, is contained in the Appendix to the Guidance on matters to be taken into account in determining questions relating to the definition of disability. Whilst the Guidance does not impose any legal obligations in itself, tribunals must take account of it where they consider it to be relevant.

122. The requirement that the adverse effect on normal day to day activities should be considered a substantial one is a relatively low threshold. A substantial effect is one that is more than minor or trivial (s.212 EqA and B2 Guidance).

123. The question of whether the effect is long term is defined in Sch. 1 Part 2 as

a. Lasting 12 months;

b. likely to last 12 months;

c. likely to last the rest of the person's life.

124. Finally, the burden of proof is on the claimant to show she or she satisfied this definition. The time at which to assess the disability i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities, is the date of the alleged discriminatory act (**Cruickshank** v **VAW Motorcast Ltd** 2002 ICR 729, EAT). This is also the material time when determining whether the impairment has a long-term effect

S.15 EqA 2010 - Discrimination arising from disability

125. Discrimination arising from disability is defined in s15 EA 2010:

(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.

126. Section 15(2) EqA 2010 applies only if the employer did not know (and could not reasonably have been expected to know) about the disability itself: ignorance of the consequences of the disability is not sufficient to disapply s15(1).

127. As for the correct approach when determining section 15 claims we refer to **Pnaiser** v **NHS England and others** UKEAT/0137/15/LA at paragraph 31.

128. The relevant steps to follow are summarised as follows:

a. the tribunal must identify whether there was unfavourable treatment and by whom – no question of comparison arises;

b. the tribunal must determine the cause of the treatment, which involves examination of conscious or unconscious thought processes. There may be more than one reason but the "something" must have a significant or more than trivial influence so as to amount to an effective reason for the unfavourable treatment;

c. motive is irrelevant when considering the reason for treatment;

d. the tribunal must determine whether the reason is "something arising in consequence of disability"; the causal link between the something that causes unfavourable treatment and disability may include more than one link – a question of fact to be assessed robustly;

e. the more links in the chain between disability and the reason for treatment, the harder it is likely to be able to establish the requisite connection as a matter of fact;

f. this stage of the causation test involves objective questions and does not depend on thought processes of the alleged discriminator;

g. knowledge is required of the disability only, section 15 (2) does not extend to requirement of knowledge that the "something" leading to unfavourable treatment is a consequence of disability;

129. It does not matter precisely which order these questions are addressed. Depending on the facts the tribunal might ask why the respondent treated the claimant in an unfavourable way in order to answer the question whether it was because of "something arising 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.

130. When considering justification, the role of the Tribunal is to reach its own judgment, based on a critical evaluation, balancing the discriminatory effect of the act with the business/organisational needs of the Respondent.

Burden of Proof

131. Section 136 provides that:

(2) If there are facts from which the court (which includes a Tribunal) could decide, in the absence of any other explanation, that a person (A) contravenes 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 provisions.

Conclusions

Unfair Dismissal

132. It is not in dispute that the Claimant was dismissed by the Respondent.

133. Whilst we had found that the Claimant had raised concerns at the appeal meeting that something other than his conduct was the reason for his dismissal in telling Dale Williams that there was 'another force at play', and that Dale Williams had interpreted this as a reference to the Respondent's professional and/or contractual arrangements with his stepmother and her HR business, this was not an argument that was made by the Claimant at this hearing. Rather, the Claimant's submissions focussed on the failings in the Respondent's procedure, lack of

consideration by the Respondent of the Claimant's mitigation and unreasonableness of the sanction of dismissal.

134. The Respondent's evidence was clear on the reason for dismissal, evidence which was not challenged by the Claimant and, on the evidence before us, we found that Huw Owen and Vicki Jones dismissed the Claimant because of his conduct on 24 September 2020 and consequentially concluded that the principal reason for the dismissal was a reason related to the Claimant's conduct which was a potentially fair reason for dismissal.

135. Moving on to assessment of overall fairness, in considering the section 98(4) test in the context of **Burchell** requirements outlined earlier, turning to belief of that guilt and whether it was genuine, we were also readily persuaded that both the Respondent's witnesses, Huw Owen and Vicki Jones, had a genuine belief that the Claimant had thrown hot water over JP, that he had acted dangerously in doing so and with disregard for health and safety.

136. We also concluded that they had reasonable grounds for forming this belief: The Claimant had admitted the conduct; and, as submitted by the Respondent, the CCTV gave a clear record of the physical aspects of the incident, albeit not the words spoken.

137. With regard to the investigation, the range of reasonable responses test applies to the scope of the investigation undertaken by the employer, as it does to the dismissal decision, as established in **Sainsbury plc** v **Hitt**.

138. In terms of the scope of the investigation, we were satisfied that the Respondent had carried out as much investigation into the matter as was reasonable in this case where there was, with the exception of what words were spoken, no dispute about what had happened in that:

a. statements had been taken from, not just the Claimant and JP, but also those witnessed the incident;
b. The Claimant was offered further opportunity to clarify issues;
c. CCTV of the incident was viewed; and
d. Investigations were undertaken regarding the temperature of the water.

139. We were satisfied that the Claimant was aware of the charges against him, insofar as the invite to the investigation meeting made it clear that it related to the conduct on 24 September 2020, and the letter inviting him to the disciplinary hearing containing enough information to enable him to prepare an answer to the case and giving him details of the time and venue for the disciplinary hearing.

140. The Claimant argued that he was not fully prepared for the hearing due to failures in the process i.e. the invitation letter did not specify dismissal as an outcome and he was not furnished with company handbook, disciplinary procedures and CCTV footage.

141. Whilst the ACAS Code of Practice on Discipline and Grievance Procedures states that the employer should inform the employee in writing of the possible consequences of the disciplinary action (§9), we did not consider that a failure to inform the Claimant in writing, that dismissal was a possible consequence of disciplinary action, would inevitably render this dismissal unfair.

142. Whilst we were not persuaded by arguments from the Respondent, that the fact that the Claimant had secured alternative employment *before* dismissal demonstrated that he was aware that dismissal was likely, we did not conclude that the failure to expressly state in the invite letter that summary dismissal could result in dismissal led to unfairness.

143. Despite the omission to indicate possible dismissal in the disciplinary invite letter, having worked in the abattoir environment for over 10 years, having been subject to previous disciplinary action for a similar offence and being aware of disciplinary action against others, we concluded that the Claimant was aware:

a. Of the terms of the Disciplinary Policy and Health and Safety Policy;
b. That the Respondent would treat such conduct as a breach of health and safety;
c. That the Respondent would treat breaches of health and safety as gross misconduct;
d. That the invite was headed gross misconduct; and
e. That gross misconduct could potentially lead to summary dismissal.

144. Further, the Claimant was told at the outset of the disciplinary that dismissal was a potential outcome. The failure therefore did not lead to unfairness in the dismissal.

145. We found that the Claimant was provided with the opportunity to view the CCTV and chose not to. We did not consider it unreasonable for the Respondent to only allow the Claimant to view the CCTV on their premises and refusal to provide the Claimant with a copy of the footage outside the confines of the Respondent’s premises, was a reasonable response.

146. The Claimant has argued that the hearing was brief, and the hearing was not focused on questioning the Claimant. He also argues that there was an exaggeration of evidence.

147. In terms of the disciplinary hearing, whilst we found that the disciplinary panel had drawn conclusions before the hearing itself in terms of what physical actions had been taken by the Claimant and JP, and when those actions had arisen, we also concluded that this was a case whereby *what* happened and *when*, was not in dispute. Rather, because the conduct complained of was not in dispute, the focus of the hearing was to understand *why* the Claimant had acted in the manner complained of and whether there had been any mitigating circumstances. We deal with this in more detail below.

148. We did not conclude that the focus of the questioning at the hearing, or the length of the hearing, was unreasonable itself. We

concluded that the Claimant had been given a fair chance to explain his conduct during the hearing, including having the opportunity to give his explanation that he had been provoked.

149. We were also not persuaded that there was any exaggeration of evidence reflected in the notes and in particular the example quoted, of a difference of 30 seconds in the timing of the events, that was referred to in the meeting and the outcome letter, was dependent on the calculation of whether the splash or words spoken was the provocation of the parties, and did not lead to any unreasonableness or unfairness in the decision-making.

150. Whilst we accepted that there was lack of clarity in the exact timing of when the Claimant was to appeal, this lead to no unfairness and did not impact at all on his ability to appeal the decision to dismiss.

151. The Claimant has argued that there were no notes taken of the deliberation. At the disciplinary meeting, a notetaker was present and whilst we found that they had not taken notes of the deliberation, we did not consider that failure led to any unfairness. As submitted by the Respondent, there is no obligation on the Respondent to take notes of deliberation.

152. Turning to the general concerns that there had been bias within the process, we concluded that there had been none. We deal in turn with the concerns of bias raised by the Claimant.

153. We accepted Huw Owen's evidence that he had social media contact with both the Claimant and JP, that he was a Facebook 'Friend' of both and that many staff members used social media channels to make contact with him, when he would use his work mobile. His unchallenged evidence, which we accepted, was that it had been the Claimant that had 'unfollowed' him. There was no evidence before us to conclude the relationship between JP and Huw Owen was anything more than a work relationship, similar to the Claimant's own relationship with Huw Owen, which had led to any bias.

154. In relation to the Claimant's arguments, that bias was indicated when certain statements were presented as fact in the disciplinary, whilst we had found that that Huw Owen had told the Claimant that he did not consider that JP's actions had warranted the Claimant's reaction, we concluded that it was more likely than not that this was because he had, prior to the disciplinary hearing and from his review of the CCTV, concluded:

a. That JP had gotten behind in removing the guts from a lamb, having to throw the gut further than normal;
b. This had resulted in a 'splash' or small piece of product, seemingly hitting the Claimant; and
c. that there had been no indication that this had been an intentional or deliberate act by JP, but accidental.

155. We further concluded however, that this was a statement of undisputed facts, that was put to the Claimant to draw from him an

explanation of his own behaviour, and was not an unreasonable approach or indicative of bias.

156. Likewise, as reflected in our findings in relation to the questioning at the disciplinary hearing on the timing of the issues, we did not consider that the conclusions that Huw Owen and Vicky Jones made, regarding the timing of the events from their review of the CCTV footage prior to the hearing, indicated any bias. Rather, they were findings they made on the timing of the incident clearly evidenced by the CCTV footage and unchallenged by the Claimant. Again, this was a reasonable step and response to the evidence presented.

157. We accepted Vicki Jones' evidence that she had raised a concern to the Claimant that the police could have been involved if he had scalded JP to highlight the severity of the issue and not to intimidate. There was no evidence that she had indicated that she was going to report the matter to the police and this did not, in our view, indicate bias during the disciplinary hearing .

158. We concluded that it was a reasonable response on the evidence presented at the disciplinary hearing for the disciplinary panel to take into account the delay in the Claimant's reaction to the splash and comments from JP, to conclude that it was a premediated attempt on the Claimant's part to '*get back at [JP]'* and to conclude that the Claimant's actions had been deliberate and intentional and that there had been insufficient provocation to justify or mitigate the Claimant's actions.

159. The Tribunal concluded that the Respondent had carried out a fair and reasonable investigation which would reach the standard required of a reasonable employer.

160. Turning to the issue of whether the Respondent's belief was held on reasonable grounds, we find that it was. Whilst it is for the employer with knowledge of their own business, to make judgment on whether the behaviour constitutes misconduct, in this case, for the reasons already given, the Tribunal was satisfied that reasonable grounds had been made out for the belief in the gross misconduct.

161. With regards to the appeal, we concluded that the appeal manager considered afresh the Claimant's provocation arguments and had viewed the CCTV himself.

162. We concluded that the Claimant had presented new information; namely that he lived with Asperger's and that social interaction and inability to grasp emotions for those with Asperger's could be in issue.

163. However, we also found that the Claimant did not assert in either the appeal letter or in the appeal hearing that this meant that the delay in his reaction arose out of his Asperger's. He did not raise that he was unable to show remorse as a result of the condition. In those circumstances, we did not consider that Dale Williams's response, to reject the appeal, was outside the band of reasonable responses.

164. As regards procedure generally, on the basis of the Tribunal's earlier conclusions, it also follows that we concluded that the procedure followed was also reasonable as the Claimant was notified in a letter in advance of the allegations against him, was advised he could bring a companion and a hearing was held, the detail of the allegations were put to him and he was able to put his case. He was provided with a right of appeal.

165. Finally, the question is whether dismissal was a fair sanction. Could a reasonable employer have decided to dismiss? Keeping in mind that it is immaterial what decision the Tribunal would have made, the Tribunal concluded that the Respondent held genuine concerns, following a reasonable investigation, disciplinary hearing and appeal, gave the Claimant full opportunity to answer the allegations against him and had evidence before them to form a belief in the Claimant's guilt.

166. With regard to inconsistency of treatment, the Claimant has argued that there has been inconsistency of treatment with JP, who was not dismissed, and we have heard evidence how the Claimant was not dismissed in 2014 for throwing meat product. We were invited to consider **Wilko Retail Limited v Gaskell & Wills UKEAT/0191/18/BA.**

167. In neither case did the Tribunal conclude that the cases were '*truly similar':*

a. We concluded that the Respondent was entitled to consider that JP's actions were not the same as the actions of the Claimant, in that it was reasonable to conclude that the actions of Claimant had been premeditated, after considering how to 'get back' at JP and JP's had been a 'knee-jerk' reaction to having hot water poured over his back unexpectedly. It was reasonable for the Respondent to conclude that the Claimant's actions, in pouring hot water down the back of JP was sufficient provocation for JP, whereas the splash and/or words spoken by JP (even if JP had not apologised and said the words that the Claimant had heard spoken,) was not of a sufficient nature to amount to provocation for the Claimant.

b. We concluded that if the Claimant was relying on the disciplinary action from 2014 (when he had not been dismissed,) the conduct was not similar, as the Claimant had relied on bullying as mitigation which had reduced the sanction down from dismissal, whereas no such mitigation was put forward in this instance.

168. The focus is on the reasonableness of the management action in response to the Claimant's conduct in this instance and the Respondent was entitled to judge the Claimant's conduct on its own merits.

169. Where the conduct complained of was of the nature alleged, a calculated action which could have caused serious injury in a dangerous environment, the Tribunal concluded that the Respondent's decision to dismiss the Claimant was within the bands of reasonable responses to his conduct. We also concluded that Huw Own and Vicki Jones were entitled to take the view that they were not satisfied that the provocation put forward by the Claimant was sufficient to reduce the sanction.

170. In overall terms therefore, the Tribunal's conclusion was that the unfair dismissal claim was not well-founded and should be dismissed.

Disability

171. The Respondent does not admit disability and invites the Tribunal to note lack of updating medical evidence and absence of treatment and support.

172. Dealing firstly with the Asperger's diagnosis, by its very nature this is a lifelong condition and, whilst the medical evidence does date back to 2004, the Tribunal was satisfied that the notes reflected the diagnosis at that stage in the Claimant's life and concluded that the Claimant is a person who lives with Asperger's condition, which by its very essence is a life-long condition.

173. The Claimant's evidence was that he had not spoken about his diagnosis and condition to his father and stepmother, since he moved in with them at 14, and that he had accepted that he had not sought additional support from the NHS since his diagnosis.

174. We did not conclude that this was evidence undermining the fact of the impairment however, as had been submitted by the Respondent, but rather that it was, more likely than not, a form of coping mechanism for the Claimant, which did not undermine our conclusion that the Claimant had established that he did live with Asperger's condition.

175. Diagnosis alone however, is not sufficient to demonstrate that the Claimant is a disabled person (Asperger's not being a deemed disability under EqA 2010 Schedule 1 Para 7). We must be satisfied that the impairment had a substantial adverse effect on the Claimant's normal day to day activities.

176. Whilst the Tribunal also accepted that the Claimant relied on his social interaction as the day to day activity impacted, the Tribunal was not persuaded by the Respondent's submissions that this case had all the hallmarks of an individual who just wished to remain a 'private person'. Indeed, we accepted the live evidence from the Claimant that he wanted friends but that he had struggled with communication and that this difficulty was not just in verbal communication, but also non-verbal communication, particularly in terms of ability to show and have emotional expression with others.

177. We remind ourselves that when determining whether a person meets the definition of disability under the Equality Act 2010, the Guidance emphasises that it is important to focus on what an individual *cannot* do, or *can only do with difficulty*, rather than on the things that he or she can do (see para B9). As the EAT pointed out in **Goodwin v Patent Office** 1999 ICR 302, EAT, even though the Claimant may be able to perform a lot of activities, the impairment may still have a substantial adverse effect on other activities, with the result that the Claimant is quite properly to be regarded as meeting the statutory definition of disability. Equally, where a

person can carry out an act but only with great difficulty, that person's ability has been impaired.

178. The Claimant gave evidence that whilst he desired communication with others, communication was difficult telling us '*I do desire to communicate, but can't*'.

179. Albeit not contained in his witness statement, but in cross and/or re-examination, the Claimant gave candid evidence of examples of how he had coped with this difficulty, evidence which we accepted:

a. That he chose to stay on the Gut Line, as other parts of the line would have a lot more banter whereas the Gut Line had a lot more foreign national workers, who did not interact as much;

b. when shopping, he would use self-checkouts;

c. he would avoid public transport.

180. As reflected earlier, we concluded that these were forms of coping strategies, strategies which didn't alter the effects of his Asperger's such that it could be said that they were not substantial.

181. We were not persuaded that the Claimant's interaction with others when gaming undermined evidence of this difficulty with communication activities, accepting the Claimant's evidence that any interaction on-line with others gaming was not social communication, but instructive and operational for the purposes of the particular computer game.

182. Neither were we persuaded that the Claimant's involvement in the Works Council, as a First Aider, giving work colleagues a lift to work, or actually verbally interacting with others, undermined those conclusions. Rather, we accepted that the Claimant did try to cope with interaction with others, but found it difficult.

183. The Tribunal was satisfied that the Claimant had demonstrated that the impairments from his Asperger's did have a substantial adverse impact on the Claimant's day to day activities and in coming to this conclusion, the Tribunal took into account that the threshold of what is substantial is low; it is more than minor or trivial.

184. Where an individual's condition impacts on his ability to undertake social interaction, such that he is has difficulty in taking part in normal social interaction and communicating with others, and that his impact extends to him avoiding social interaction to the extent that he has no friends, taking into account the purposive approach and the need to focus on what the Claimant cannot do, we concluded that there was a substantial adverse effect on the Claimant's normal day to day activities and that these effects were long term.

185. The Tribunal concluded that the Claimant was therefore a disabled person by reason of his Asperger's at all relevant times.

Knowledge

186. We concluded that the Respondent at no time, either during employment or up to an including the appeal, had no knowledge of the Claimant's disability.

187. Whilst the Claimant accepts that the Respondent had no actual knowledge of disability in the period up to the receipt of the Claimant's letter of appeal, we also concluded that the Respondent did not have actual knowledge of the Claimant's disability after notification to them of his diagnosis either.

188. Reflecting on the Claimant's own terminology in his letter of appeal, in which he stated '*I can advise the organisation that I do have a childhood diagnosis of mild asperger's….'* and then listed some of the symptoms of the condition only, we remind oursleves that knowledge of an impairment does not mean that they had knowledge of disability.

189. We then considered whether it could be said that the Respondent could reasonably have been expected to know of the disability taking into account the EHRC Code (at paragraphs 5.15 and 6.29).

190. We concluded that many of the matters that the Respondent had relied on to submit that the Claimant was not a disabled person were however relevant to the issue of whether the Respondent could reasonably have been expected to have known of the Claimant's disability

191. We further concluded that it could not be said that the Respondent ought to have known that the Claimant was a disabled person at the relevant time, at the point of dismissal on 2 October 2020 and at the point of appeal, on the following basis:

   a. We considered it relevant to the issue of knowledge of disability that the Claimant had, for over 10 years, undertaken communication and social interaction in the workplace, with management and work colleagues, with no evidence before us that his difficulties were such that the Respondent should have been alerted to his disability.

   a. The Claimant had not raised any condition or impairment, during his 11 years' service (whether in his health questionnaires or verbally);

   b. During his employment, he had participated in and been a member of the Works Council, had been a First Aider, and interacted with colleagues in the workplace, offering to give others lifts to work;

   c. This was not an issue he had raised as part of his 2014 disciplinary, or at the original dismissal hearing had attended the 2014 disciplinary hearing. He had attended all disciplinary meetings unaccompanied and without reference by him to any need for support;

   b. there was no evidence presented by the Claimant to question that it should have been evident to the Respondent that the Claimant had not interacted with his works' colleagues;

c. We accepted the evidence of Huw Owen and Vicki Jones that there was nothing in the Claimant's presentation or behaviour at work that would lead them to legitimately consider that enquires should be undertaken to find out if the Claimant had a disability;

d. We also accepted Vicki Jones' evidence that the abattoir was a noisy working environment where many staff 'just did their job' and went home and Huw Jones' evidence that he had no personal knowledge of the Claimant's friendships or lack of them, outside of work.

192. We considered separately whether our conclusions were impacted by the information, contained in the letter of appeal and later provided by the Claimant at the appeal hearing, of his diagnosis. We concluded that they were not.

193. In reaching this further conclusion, we took into account that the information provided by the Claimant in the appeal letter, was of his diagnosis only together with a list of potential symptoms, as opposed to how the Claimant was impacted. We also considered that when discussions took place at the appeal hearing, again the Claimant did not disclose when asked how his Asperger's impacted on him that day and, rather than speak of his own condition and impact on matters such as processing emotions, spoke instead of JP having a 'don't care attitude' and wanting to get back at him.

194. In the context of this diagnosis only being raised in this way, at a disciplinary appeal against dismissal, after over 10 years' of employment, we concluded that it still could not be said that the Respondent ought to have known that the Claimant was a disabled person at that point.

195. On that basis, we concluded that the Respondent had shown that it did not know, and could not reasonably have been expected to know of the Claimant's disability at the relevant time i.e. at the time of the dismissal and/or at the time of the appeal and that the claims of discrimination arising out of disability under s.15 EqA 2010 therefore fail and are dismissed.

196. For completeness, the Tribunal would also say that even if it is wrong on knowledge, we concluded that the s.15 EqA 2010 claims would fail in any event on the following basis:

a. We considered whether 'lack of remorse' was 'something arising from disability' and concluded that the Claimant had failed to establish this. In any event, whilst the Tribunal accept that difficulty in using non-verbal communications to demonstrate remorse may arise from the disability, there was nothing in the Claimant's evidence to demonstrate that he was unable to articulate remorse verbally;

b. We considered whether the 'timing of his retaliation' was 'something arising from disability' and concluded that the Claimant had failed to establish this as whilst we accept that there may be difficulty in interpreting verbal and non verbal language of others, the Claimant

accepted in evidence that his delayed reaction was the production line continuing and time spent thinking '*how to get JP back',* not that he was spending time processing his emotions.

197. The s.15 Equality Act 2010 claims would therefore be considered by the Tribunal to be not well founded in any event and would have been dismissed even if the Tribunal had concluded that the Respondent ought to have known about the Claimant's disability.

Employment Judge R Brace

Date: 2 February 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 7 February 2022

FOR EMPLOYMENT TRIBUNALS Mr N Roche