EMPLOYMENT TRIBUNALS

Claimant:	**Mr L Brown**
Respondent:	**Town Centre Car Parks Ltd**
Heard at:	**Leeds On: 27 and 28 November 2017**
Reserved in Chambers:	**13 December 2017**
Before:	**Employment Judge Trayler**
Members:	**Mr Q Shah**
	Mr K Smith

Representation

Claimant:	Mrs A Rodriguez
Respondent:	Mr G Mitchell, Solicitor

RESERVED JUDGMENT

1. The complaint of unfair dismissal fails and is dismissed.
2. The complaint of disability discrimination also fails and is dismissed.

REASONS

1. The Tribunal heard evidence from Mr Linval Brown, Mr Brown's carer/partner Mrs Amanda Rodriguez, Mr Doug MacFarlane, national service manager for the Respondent, Mr John Gautrey, chief operating officer and Mr Pawel Leputa, Leeds manager for the Respondent. We also considered a written statement of evidence from Mr Mark Wani. We read documents within a bundle of documents agreed between the parties, the pages being numbered to page 345 and viewed recordings from CCTV cameras. We make findings of fact in this matter on the balance of probabilities.
2. Mr Brown was born on 24 February 1987. He was employed by the Respondent at its Merrion Centre car park from 24 August 2010 until his dismissal on 28 February 2017. Mr Brown worked as a car park attendant.
3. Mr Brown's duties are set out within the bundle at pages 119A to D. In brief this included patrols of the car park, collecting and calculating charges, reconciling

transactions and to assist customers within the car park. We need make no detailed findings of fact on Mr Brown's duties save that during the course of his every day work he had contact with the public using the car park as well as the nearby Merrion Shopping Centre. Mr Brown wore clothing identified with the Respondent's name.

4. The Respondent is a small company with some 50 employees nationally and approximately 11 working where the Claimant worked. There were three managers within the Leeds centre each of whom has given evidence to the Tribunal and is named above. The Respondent has a number of written policies and procedures. At page 54 of the bundle is an anti discrimination policy. Within this is identified a general consideration that all employees have a duty to maintain a working environment which is free from discrimination.

5. At page 60 is a bullying and harassment policy in which bullying is identified with a number of examples such as making derogatory remarks and insulting or aggressive behaviours.

6. There is a further policy titled the Lone Working Policy from pages 86 to 87 of the bundle. Within that are guidelines on dealing with aggressive behaviour. In that section it is pointed out that employees should not underestimate the importance of body language and to avoid adopting an aggressive stance which could be seen as a challenge and confrontational. Employees are advised to talk themselves out of problems and placate rather than provoke. They are also advised not to turn their backs on someone who is behaving aggressively and that if someone is so behaving to try to encourage them to move to an open space where there will be other people around. Employees are advised to stay calm, speak gently and slowly and not to get enticed into an argument. They are also advised to keep their physical distance and never try to physically touch someone who is angry.

7. The Respondent also has an employee handbook which includes a disciplinary policy which is at page 264 to 267 of the bundle. At page 64 is a list of matters that may be dealt with under the disciplinary procedure although the list is stated not to be exhaustive and is intended as a guide only. Within that are listed misconduct; offences, breaches or failure to follow company policies/procedures. It is also stated at page 266 that where an allegation of gross misconduct is proven against an employee but there are strong mitigating circumstances disciplinary action short of dismissal may be considered namely demotion or a final written warning. There is also a written right to appeal against a disciplinary decision. At page 266 is a list of gross misconduct examples which include physical violence, bullying, harassment, discrimination or other victimisation and bringing the company's name into serious disrepute. It is stated that whilst allegations of gross misconduct or negligence are being investigated an employee may be suspended from their normal duties during which time the employee will receive normal pay. It is stated that any decision to dismiss an employee will only be taken after a full investigation. The policy also provides, within the bundle of documents at page 74, that employees will be allowed to bring a work colleague or Trade Union representative to all disciplinary hearings and appeal hearings, but not investigatory or fact finding meetings.

8. For the purposes of the hearing the Respondent conceded that Mr Brown, because of his epilepsy, is a disabled person within the meaning of the Equality Act 2010. The Respondent also concedes that it was aware that Mr Brown had epilepsy at

the time of the matters he complains of to the Tribunal. The Claimant is acknowledged by the Respondent to be a disabled person by reason of his epilepsy only. There had been previous concerns by the Respondent because the Claimant had experienced a fit in a store near to the Merrion Centre and the Respondent had wanted to investigate the effect of his condition on his ability to carry out his duties. Initially there had been some denial by the Claimant that he had epilepsy but following his being unable to attend work in 2012 and an incident when Mr Brown had banged his head on two occasions the Respondent had investigated Mr Brown's ability to work alone and also on night shifts. There is extensive documentation within the Tribunal bundle concerning this much of which is not relevant for the purposes of this hearing. Mrs Rodriguez attended meetings with Mr Brown during the hearing of his grievance and the respondent's investigation of his medical condition and its effect on his ability to work alone.

9. The Respondent did contact Mr Brown's GP and various meetings took place to see what adjustments needed to be made. The Respondent also obtained advice from an occupational health adviser.

10. Discussions took place as to whether it was appropriate to provide Mr Brown with an alarm but due to concerns over the effectiveness of this agreement was reached whereby Mr Brown would either be contacted or he would make contact with the respondent on an hourly basis if he was working alone.

11. There is a report dated 8 May 2014 within the bundle at page 143 to 144 where it is confirmed that the Claimant has epilepsy and that this is controlled by medication. It is further confirmed that the Claimant has good health and could work unsupervised but that an alarm is recommended. A recommendation is subsequently made that an alarm need not be obtained and that any risk could be managed by hourly telephone calls.

12. During the course of this there was a meeting on 20 June 2014 and subsequently a grievance by Mr Brown which is at pages 185 A to B of the bundle dated 23 June 2014. The grievance enquiry closes by a letter of 17 July 2014 at page 242/3.

13. There is no evidence of Mr Brown's involvement in this process should prevent his dealing with the issues which led to Mr Brown's dismissal in 2017. The grievance papers show the respondent in the person of a Mr Watson and Mr MacFarlane dealing with the practical problems which may arise should Mr Brown have a fit at work and that is all. The Grievance is dealt with by a Mrs Mendoza. There is an email in the bundle at page125 by Mr Macfarlane in which he states that "Going forward it's going to be difficult to always provide extra shift cover to be alongside [Mr Brown], especially if other staff are on holiday or are off sick. It's an issue we will need to resolve somehow". Our finding is that Mr Macfarlane is simply stating the obvious here, that the issue of Mr Brown's safety at work needs to be resolved and there are practical problems by having a person always working alongside him. The problem needed to be resolved and that is all. Mr Brown says this is evidence of bias and that Mr Macfarlane can be seen as wanting to dismiss him. We find that to be wholly unrealistic. It is more than three years before the events of 2017 and a practical solution was found to enable Mr Brown to safely continue at work. There is no appeal against the grievance outcome. There is no other issue with Mr Brown at work after that save that on 10 September 2015 he was issued with a written warning by Mr Leputa due to unsatisfactory conduct namely acting rudely to a fellow employee (page 248). Mr Leputa expects improvement in conduct by Mr Brown namely not to get involved in arguments/disagreements with work

colleagues and if any problems occur to report them to a line manager. He is also expected not to get in to any disagreements with customers and to stay professional while representing CitiPark.

14. Moving on to the circumstances surrounding Mr Brown's dismissal. An incident occurred on 28 January 2017 in the Merrion Centre which is a shopping centre below the car park operated by the Respondent in which the Claimant worked.

15. There was a great deal of dispute as to what had happened during the course of this alleged incident and the Respondent was able to obtain recordings from CCTV cameras installed within the shopping centre to assist it in it's conclusions.

16. On 28 January 2017 a written complaint was made to the Respondent. This appears at a number of places within the bundle but at page 249 the complaint is set out. Mr Raymond J Mulhall makes the complaint in an email dated 28 January 2017 at 13.51 hours and it is as follows:

> *"Dear Sir/Madam*
>
> *I wish to make a formal complaint about one of your employees – a Linval Brown.*
>
> *Mr Brown saw me walk past the entrance to Merrion Centre Car Park. Alas we don't have the best history (he is an old school bully and drug user).*
>
> *He then followed me and began insulting my disability, weight and harassing me. Even going as far as to threaten "Do me in" and "burn my house". At one point he put himself in front of me and force me to push him out of the way (near Crawford's).*
>
> *At which point he called Merrion Centre security crying assault. I explained my side of things and security cameras backed me up.*
>
> *I hope this isn't standard behaviour for your employees – and that bullying and harassment are not supported by your company.*
>
> *I hope you please sort this – as I have to walk past that car park quiet regularly.*
>
> *Yours*
>
> *Raymond J Mulhall"*

17. The Respondent has a system by which incidents are to be entered by employees on an incident form if there is an allegation of assault or other serious events. There is also a log book in the form of a diary. Mr Brown made an entry in that diary as follows:

> *"I Linval was assaulted by a passer by. Security was informed and it happed just before the shutters in the Merrion as I was on my way to fix the pay machine – the CCTV mite see wot happened because he said he's making a complaint about me. On Monday I will tell you everything."*

18. The Respondent writes to Mr Mulhall on 30 January thanking him for his email and saying that the company is sorry to hear of the distress he faced with one of their employees. Melanie Parker, commercial administrator, writes that "we will of course look into this fully. Please can you let me know the date and time of the event in question."

19. There is a further note by Ms Parker at page 250A "I'm going to reply to the customer to get a bit more information as to times etc and obviously apologise".

20. There is then a meeting between Mr Leputa and the Claimant on 30 January 2017. The Claimant says that no meeting took place but instead there was a brief informal chat. We find that as the Respondent says that Mr Brown was shown a copy of the complaint and asked to give an initial account. There is a note of that meeting at page 251 of the bundle. The document is wrongly dated 20 January 2017. In our finding this does not mean that the meeting did not take place or that because there is an error with the date none of the remainder of the content be relied upon as Mr Brown submitted.

21. We find as Mr Leputa said that he made notes in the presence of Mr Brown and then later wrote these into the notes which appear at page 251. He records that he had a brief informal chat with Mr Brown. Mr Leputa continues that he explained that there was a serious accusation/complaint made against him and asked him if he is expecting anything from over the weekend. Mr Brown said that he did and that he had already told Chris Jones about it. Mr Leputa records showing Mr Brown the email from Mr Mulhall and allowing him to read through it. Mr Leputa then says that he asks Mr Brown for his version of what happened on the day. Mr Brown is noted to say that he noticed "that person" outside Costa Coffee and that they had both noticed each other coming into the Merrion Centre. He said "that person" was an old school friend. Mr Brown is then recorded as saying that Mr Mulhall had asked him about jobs and if any were available in the car parks. Mr Brown said he told Mr Mulhall about his job but that a job in the car park might not be suitable for somebody with a bad leg. He then records that at that point the old school friend took offence and that he told Mr Brown to "go and fuck his mother". Mr Brown says that he then turned to face him at which point Mr Mulhall had pushed Mr Brown with his hands and belly and that Mr Brown had nearly fallen on the floor. Mr Brown is recorded as telling Mr Leputa that Mr Mulhall had pushed him out of nowhere and said go and fuck your mother. Mr Brown said that he started shouting saying that it was an assault and that loads of customers had witnessed it at which point Mr Mulhall had tried to push Mr Brown again. Mr Brown followed Mr Mulhall through the Merrion Centre hoping to meet the security at which point the "old friend" disappeared into a Home Bargains shop. When Mr Mulhall walked outside the Home Bargains shop Mr Brown was already with security and the "old friend" approached them and said that Mr Brown was bullying him at school and that the security said that it sounds as he was making it up.

22. Mr Leputa obtains copies of CCTV camera recordings from the centre security.

23. There is a letter on 30 January 2017 confirming Mr Brown's suspension from duties, see page 252. The letter confirmed suspension on full pay pending the outcome of an investigation into an allegation that on the afternoon of 28 January Mr Brown was involved in an incident with a member of the public during which he had behaved inappropriately both verbally and physical toward the individual and as a result the company had received a letter of complaint. It is confirmed that the allegation is that the incident occurred during Mr Brown's normal working house in a public place and that it may therefore have a detrimental effect on the company and its reputation. It is confirmed that a person appointed to investigate the allegations would be in touch with him to arrange a meeting. It is confirmed that Mr Brown had been suspended due to the allegation falling under the Respondent's categorisation of gross misconduct within the staff handbook. Mr Brown is advised that he should be aware that the suspension is not a

disciplinary sanction and that no decision had been reached regarding the allegations against him.

24. Mr Brown complains that he received no suspension letter until this was requested of the company. However, nothing turns on that as the letter confirming suspension and the reasons is sent to Mr Brown on the day of suspension. It matters not whether this was at Mr Brown's request or on the volition of Mr Leputa.

25. On 2 February Mr MacFarlane writes to Mr Mulhall saying that he has received his complaint and wishes to let him know that he is investigating the incident and will get back to him concerning it as soon as possible.

26. On 6 February 2017 the Respondent writes to the Claimant, page 253 of the bundle. The letter confirms that Mr Leputa is to investigate the matter and he then outlines the allegations he needs to discuss. These are that under the heading of "Misconduct/Harassment and Discrimination" that it is alleged that on 28 January he was involved in an incident with a member of the public Mr Raymond Mulhall. Mr Mulhall is stated to have lodged a formal complaint with the company and at this point the investigation will look to establish whether Mr Brown used inappropriate behaviour, bullied and/or harassed him. It is also alleged that during the incident he had verbally threatened Mr Mulhall and made insulting comments referring to his disability and that he had physically obstructed Mr Mulhall. The second part of the allegation is under the heading "Bringing the Company's name into serious disrepute". It is pointed out that the incident occurred in full view of the general public and that Mr Brown was clearly identified as an employee of the Respondent. It is said that the conduct was unprofessional, the comments made were allegedly also of a discriminative nature which is against company policy and values. It is pointed out that this could fall under the category of gross misconduct and there will be an investigatory meeting on 19 February at the Merrion car park office. It is pointed out that Mr Brown does not have entitlement to representation at the investigatory fact finding stage but would be given a full copy of any notes made during the meeting.

27. The meeting does take place on 9 February and Mr Brown attends with Mr Leputa. The notes of the meeting are at page 254 to 261 of the bundle. During the course of this meeting recordings from the CCTV cameras were shown to Mr Brown. We saw four such recordings during the course of the hearing. We viewed the recording from camera 2 on a number of occasions, that giving the best view what occurred between Mr Brown and Mulhall. There is no audio recording of events. Mr Brown complains that there is an additional security camera visible on the film made by camera 2 and further that he was shown five recordings including one from that camera when he had the meeting with Mr Leputa. Mr Leputa states there were only four recordings accessed. The notes of the meeting similarly only refer to four recordings. Our finding is that only four were provided to the respondent and only four viewed at any stage by Mr Brown. Only four recordings are referred to in the notes and at no stage during the disciplinary and appeal hearings was an additional recording referred to by Mr Brown, neither was the point made that another recording could have been made by an additional camera. Mr Brown first made his point that a recording was missing at the outset of the tribunal hearing. By then he had also been provided with copies of the recordings in advance but had made no comment. He may well not have viewed them as he said at the hearing but he had been noted to have viewed the recordings and commented on them during the process and made no complaint that a recording was missing.

Accordingly we preferred the evidence of Mr Leputa, Mr MacFarlane and Mr Gautrey in that respect.

28. The notes of the meeting take the format of a number of typed questions below which the answers are written after they have been put by Mr Leputa to Mr Brown. Each of the camera recordings is referred to. Mr Brown cannot remember who started the conversation but recalls that they may have been at primary school together. Mr Brown is asked whether it is correct, as he had told Mr Leputa previously, that he had told Mr Mulhall that a job in the car park might not be suitable for somebody with a bad leg. The reply is recorded that he said something in between the lines. He then clarifies that Mr Mulhall had asked about jobs and if any were available and that he had said that there were no jobs in the car park available but there was one in the engine room. Mr Brown said he did not remember saying about a bad leg. He is then quoted as saying "I don't remember really, can't remember saying about bad leg." Mr Brown says he said these things in a polite manner and therefore he was shocked at what happened. There are version of events including that Mr Mulhall had nearly pushed Mr Brown to the floor and that he had pushed him hard. Mr Brwon accepts that Mr Mulhall might have thought Mr Brwon considered him not good enough to do his job

29. Following the meeting a letter is sent to Mr Brown dated 14 February 2017 which is at pages 262 to 263 of the bundle. Within that letter the allegations are put to Mr Brown in similar to those within the suspension letter. Mr MacFarlane in the letter confirms that he will be dealing with a disciplinary hearing on 21 February and that he would chair the hearing and that Mr Leputa would also be attending. It is pointed out that Mr Brown is entitled to be accompanied at the hearing by a trade union representative or work colleague. If Mr Brown wishes to do this he should arrange it and notify Mr MacFarlane in advance. Mr MacFarlane states that he understood Mr Brown had been shown the CCTV footage and that if he wished to see them again he could contact Mr MacFarlane. A copy of the Respondent's disciplinary policy and documents and witness statements relied upon are provided to Mr Brown. These are listed at the end of the letter and include Mr Mulhall's complaint and the diary entry by Mr Brown, the notes of the meeting on 9 February, a statement by Mr Leputa of 30 January, statements by Mr Hampson, Mr Atkinson, Ms Wales, Mr Osarobo and Mr Jones are also included. Mr Brown was also provided with a typed version of the notes of the meeting of 9 February.

30. These are all matters which were taken into account by Mr MacFarlane at the disciplinary meeting and in reaching a conclusion to dismiss Mr Brown. They are referred to in the letter of dismissal.

31. In advance of the meeting Mr MacFarlane with the assistance of an external HR adviser prepared a list of questions to be answered by Mr Brown. These are at pages 285 to 291 of the bundle.

32. At pages 292 to 298 of the bundle is a version of those questions on which the answers given by Mr Brown have been recorded in handwriting.

33. Also considered at the time of the hearing is a document provided by Mr Brown to Mr MacFarlane prepared by a Darrell Crawford which is at page 298A of the bundle.

34. Mr Brown attends without an accompanying worker or trade union representative. Mr Brown is not a member of a trade union.

35. The Respondent's evidence is that Mr Brown was given the opportunity to read through these notes at the end of the meeting and invited to sign them as agreed which he did. Mr Brown's point is that he was told that he needn't worry about signing the documents without reading them as he could amend them later. Certainly at page 298 Mr Brown has signed the documents. Our finding is that Mr Brown did read and sign the notes as correct and that no assurance was given that he could amend them later and that he need not worry. There is evidence of a very structured approach with written questions prepared in advance and a written request to read and sign which Mr Brown did. The documentation supports Mr MacFarlane's version and we believed Mr MacFarlane's evidence that the meeting was properly recorded in the notes which were signed as correct by Mr Brown after reading them

36. In advance of the meeting Mr MacFarlane had decided not to make and communicate any decision to Mr Brown on the day. This is recited in the form of questions prepared in advance of the meeting.

37. The outcome of the disciplinary hearing is communicated to Mr Brown by a letter of 27 February which is at pages 299 to 301 of the bundle. We have considered this by reference to the documentation available to Mr MacFarlane and provided to Mr Brown in advance as well as the notes of the meeting see whether the findings made are supported by the investigation made by the Respondent. These include the notes of the meeting between Mr Leputa and Mr Brown on 30 January, the further more formal investigatory meeting on 9 February, the statements taken from the security staff, the interview with Mr Brown and the email from Mr Crawford.

38. The outcome letter of 27 February does go into some detail as to the findings made and the reasons for them. We find as a fact that this was the reason why Mr MacFarlane decided to dismiss Mr Brown. The reason for dismissal is disputed but no alternative reason is put forward by Mr Brown save that there is some form of bias on Mr McFarlane's part which caused him to dismiss Mr Brown. Mr Brown does not complain of a discriminatory dismissal and very little if anything was put to Mr MacFarlane as an alternative reason for him dismissing Mr Brown. In those circumstances it is difficult to see how the reason given by the Respondent could be displaced unless there are insufficient grounds for making such conclusions so as to raise doubts as to Mr MacFarlane's evidence. Our finding is that the allegations against Mr Brown are serious and we would expect a reasonable employer to treat them seriously as the respondent did. It is not an insignificant issue as it affects the suitability of the employee to do his job in accordance with written policies, affects the respondent's public profile and also relates to conduct identified with in the respondent's policies as serious misconduct.

39. In the letter of 27 February Mr MacFarlane sets out the allegations against Mr Brown namely that it is alleged that he was involved in an incident with a member of the public, Mr Mulhall, who had lodged a formal complaint following the incident on 28 January. It is alleged that Mr Brown had used inappropriate behaviour, the nature of the behaviour is believed to be of a type which constitutes bullying and/or harassment. It is alleged that Mr Brown had verbally threatened Mr Mulhall and made insulting comments referring to his disability and that he physically obstructed Mr Mulhall. The second part of this is an allegation that he had brought the company's name into serious disrepute. It is stated that the incident occurred in full view of the general public, Mr Brown was clearly identifiable as an employee of the company and it is alleged that his conduct was unprofessional and the comments made were allegedly of a discriminative nature

which is against company policy and values. Mr McFarlane says that following the hearing he has had the opportunity to consider the investigation, Mr Brown's comments and the mitigation put forward and he is now therefore in a position to confirm that a decision had been taken to dismiss Mr Brown and terminate his contract of employment. It is stated that this is in accordance with the company's disciplinary policy with specific regards to acts of gross misconduct.

40. Mr MacFarlane then sets out the conclusions he has reached in a number of paragraphs. Firstly he states that Mr Brown was involved in an incident with Mr Mulhall and having studied the CCTV footage this confirms Mr Brown's location initially when Mr Mulhall walked towards the Merrion Centre. Mr MacFarlane says he believes that Mr Brown proceeded to follow Mr Mulhall and moved to walk by his side and that this being the case it is likely that Mr Brown did instigate the discussion. Secondly in respect of the allegations from both Mr Mulhall and Mr Brown in terms of what was said Mr MacFarlane states it is very difficult to ascertain the exact conversation. Having read the statements Mr MacFarlane says that Mr Brown had spoken to individuals about the incident and had referred to mentioning Mr Mulhall's leg. Mr MacFarlane says that he believes this is the disability Mr Mulhall refers to in his letter of complaint and when Mr MacFarlane had asked Mr Brown about it he had agreed his assumptions. In view of Mr Brown accepting he had made comments about Mr Mulhall's leg but later said that he could not remember it he formed the view on the balance that the evidence demonstrated that Mr Brown had indeed referred to Mr Mulhall's leg during the conversation with him. Mr MacFarlane continues that Mr Brown had confirmed he was aware of the company's anti discrimination policy and the bullying and harassment policy and that it was therefore reasonable to expect that in referring to Mr Mulhall's leg Mr Brown would have known that his comments could be considered to be of a discriminative nature and that is behind the decision now to say that Mr Brown could not remember the comments made. Mr MacFarlane continues that during the disciplinary hearing they had discussed a conversation with "James" in which he had referred to the fact that Mr Mulhall had taken to heart some of his comments. Mr MacFarlane says that the discussion with James by Mr Brown and Mr Brown's response to the questions suggested that he did say something negative to Mr Mulhall about his disability or his ability to do work in the car parks. We find this conclusion to be justified as it is backed up by the documentation and interview with Mr Brown.

41. Mr MacFarlane continues that he believes that Mr Brown deliberately sought to obstruct Mr Mulhall's path by stepping in front of him. In doing so Mr Mulhall then appeared to push Mr Brown to one side or to have simply bumped into him as Mr Brown had moved in front of Mr Mulhall. Mr MacFarlane continues that the CCTV footage clearly shows that Mr Brown continued to walk in front of Mr Mulhall facing him and walking backwards. Mr MacFarlane says he does not believe that those are the actions of someone who is scared as Mr Brown had stated. Mr MacFarlane says he has considered Mr Brown's explanation as to why he felt it necessary to walk in front of Mr Hall in that way but he does not accept that this was the best way to try and attract the attention of a security guard. We again find that conclusion to be justified by the evidence Mr MacFarlane had. We viewed the same CCTV footage on a number of occasions and it is clear that Mr Brown unnecessarily steps across the mall to physically stand in front of Mr Mulhall.

42. Mr MacFarlane acknowledges that Mr Brown had produced an unsigned statement from Mr Crawford and having received a contact number the company's HR

adviser had been able to speak to Mr Crawford who confirmed that he had provided a statement and agreed to sign it as a true reflection of the incident, Mr MacFarlane awaiting that statement.

43. Mr MacFarlane continues that he believes that Mr Brown and Mr Mulhall entered into a conversation that became a heated discussion, that Mr Mulhall pushed Mr Brown to one side but that he did not feel this was an intentional act of assault or the action of an aggressor. Mr Brown had initially referred to this action as an assault against him. However during the process he conceded this was not an assault hence that he did not follow the company's reporting procedures even though he had been encouraged to do so by members of staff. Again, this finding is justified as it is supported by the evidence as Mr MacFarlane states.

44. Mr MacFarlane continues that following the incident Mr Brown had met with security and he had felt that Mr Mulhall was threatening him verbally rather than physically. Mr MacFarlane had spoken to security staff who had affirmed that they did not hear any verbal threats made by Mr Mulhall.

45. Mr MacFarlane summarises that he believes Mr Brown's behaviour and the comments made to Mr Hall were inappropriate and insulting specifically with regards his disability. Mr MacFarlane also believes that his actions following the incident were intended to be of an intimidating nature which constitutes bullying and/or harassment and that he did physically obstruct Mr Mulhall who as a result of his actions pushed Mr Brown away. Is this finding is justified on the basis of the CCTV footage.

46. Mr MacFarlane stated it is evident that the incident took place whilst Mr Brown was on duty in full view of the general public wearing his branded uniform which identifies him of an employee of the Respondent. That much is uncontroversial.

47. Mr MacFarlane confirms that in accordance with the contract of employment and the disciplinary policy Mr Brown's employment will be terminated as of that date of the letter and that he would not receive notice pay. Mr Brown's right of appeal against the decision is pointed out to him.

48. A number of issues are disputed in relation to this process. Mr Brown places some great emphasis on the fact that there is no audio recording of the events. Mr Brown also says that a recording is missing as recited above. On his behalf Mrs Rodriguez points out that there is no way of telling whether Mr Mulhall was disabled simply by him using a walking stick. Mr Brown essentially asserts that he was not an aggressor in this situation but that Mr Mulhall was the one who was aggressive towards him. We have to take into account all the information before Mr MacFarlane and determine that he honestly held the beliefs he stated in his dismissal letter to Mr Brown. There is sufficient evidence before him to support those conclusions and Mr MacFarlane has not failed to take into account any relevant factors which he should have investigated so as to bring an investigation within a range of reasonableness. There follows a letter signed by Mr Brown which is at page 302 of the bundle which the Respondent treats as an appeal against the decision to dismiss him. There seemed to be some dissatisfaction with the Respondent treating this as an appeal on the part of Mr Brown. There is no reasonable criticism we can make of the respondent in that respect.

49. In the letter Mr Brown writes that he makes the statement in respect of allegations against him. He says that he saw Mr Mulhall and said hello. He says that he disputes the facts of the case and requests that it is re-heard by the HR

department. Mr Brown states that the evidence relied on by his accuser is insufficient to conclude that the allegations made against him are true. He says in Mr Mulhall's case rests on the CCTV evidence but the statements relied on by Mr MacFaralne were from witnesses who were not present. Mr Brown points out that if the CCTV evidence is to be taken as a starting point for a belief in his misconduct then the Respondent should take note that there is no audio recording and that it can be seen that Mr Mulhall had pushed him as had been agreed by the Respondent in the decision by Mr MacFarlane. Mr Brown disputes the facts relied on are highly consistent and refers to the previous history of Mr MacFarlane where issues in Mr MacFarlane's credibility were an issue. He says that Mr MacFarlane was biased going by the content of a decision letter and gives an example from paragraph 4 of Mr MacFarlane's letter, "You were involved in incident with Mr Mulhall on the 28th January 2017, having studied the CCTV footage, it confirms your location initially when Mr Mulhall walked towards the Merrion Centre. I do believe that you then proceeded to follow Mulhall and move to walk by his side, this being the case I think it is likely that you did instigate the discussion." Mr Brown says that Mr MacFarlane appeared to get to the conclusion going by the images of the CCTV and not the audio. Further Mr MacFarlane had conceded that it was very difficult to ascertain the exact conversations but went on to say that he relies upon witnesses who were not present at the scene or even in the CCTV footage. Mr Brown says he disputes the allegations made against him and request the matter be brought before the HR department for a re-hearing. On the face of it the respondent reasonably concluded that Mr Brown intended to appeal against his dismissal by that letter.

50. Mr Brown's letter is acknowledged on 13 March and a confirmation is given that his appeal had been received within the Respondent's timescales within its disciplinary policy. The letter is by Mr Gautrey who confirms that he will chair the appeal hearing which is to take place on 21 March. As before Mr Brown is advised that he is entitled to be accompanied by a work colleague or a trade union representative. Mr Gautrey says he has been given copies of the evidence gathered by Mr Leputa who will be present during the appeal to answer any questions concerning the investigation. He asks that if there is any new evidence or further mitigation this is provided at least 24 hours before the hearing. Mr Gautrey points out the decision of the appeal hearing is final and there is no further right of review.

51. Mr Brown obtained a letter from his GP Dr Fawzia Hardy which is at page 304 of the bundle and dated 15 March 2017. This states, "This is to confirm that Mr Brown, who suffers from epilepsy and is on medication, has a carer. Her name is Amanda Rodriguez and I feel she is able to attend the appeals process with him at any time. Many thanks for your understanding".

52. Receipt of that letter is acknowledged on 17 March, page 305. No covering letter had been provided by Mr Brown and Mr Gautrey writes that he assumes Mr Brown wishes his carer to also attend. It is confirmed as in the letter inviting Mr Brown to the appeal hearing that he only has the right to be accompanied by a work colleague or trade union representative. Mr Gautrey says that he was not aware that Mr Brown had a carer and he confirms in writing that he will allow Amanda Rodriguez to accompany him to the meeting but that she is not entitled to be at the appeal hearing. Mr Gautrey says he will be happy to provide a seating area in an office or meeting room where she can wait and be on hand should he require medical attention.

53. The meeting takes place on 21 March and the notes of it are at page 306 of the bundle. Mr Brown arranges to attend with his work colleague Mr Wani and Mrs Rodriguez attends with him. Prior to entering the Respondent's premises Mr Brown has a fit in the car park and thereafter goes to attend the meeting with Mr Gautrey. Being advised of this Mr Gautrey states that he will have to postpone the meeting until Mr Brown is feeling better. Mr Brown asked how come human resources are not there and it is explained that they did not have an internal human resources company. He is asked why he feels this is necessary and Mr Brown says that he doesn't trust anybody in the company as past statements were changed. Mr Brown does not want the meeting to be postponed but Mr Gautrey says that he has had advice from human resources and that he will postpone the meeting. Mr Brown points out that his girlfriend is his carer and she should be in the meeting. Mr Gautrey says that Mr Brown had had a seizure 15 to 20 minutes previously and that he does not think he can represent himself fairly. Mr Gautrey says that he would like him to come back on another date. Mr Brown points out there was an 80% chance he will have another seizure the next time. This does not persuade Mr Gautrey. from the previous process conducted concerning the arrangements which

54. Mr Brown reminds us that in 2014 Mrs Rodriguez had been permitted to attend the meetings with Mr Brown. We considered why Mr Brown needed to have Mrs Rodriguez with him on this occasion. As the respondent says Mrs Rodriguez had no actual knowledge of the events of 28 January 2017. By contrast she had some knowledge of his medical condition which would have been pertinent in 2014. IN the Tribunal hearing Mr Brown was asked about the need for Mrs Rodriguez to attend the meeting with him. His consistent response was that he did not trust the respondent to make accurate notes of the meetings. Mr Brown did not rely upon any reason connected or caused by his epilepsy, be it stress however induced or otherwise. If it were connected with the possibility of having a seizure at the meeting Mrs Rodriguez would have been nearby as she was on 21 March. Any concerns over accuracy of the notes could be met by having a work colleague present and is no way related to Mr Brown's epilepsy

55. There is a document at page 306A on which comments by Mr Brown are recorded on the notes of 21 March. In these notes it is corrected that Mr Brown had said that he was not here to answer questions but to ask them. A further letter is sent to Mr Brown on 22 March, page 307. The events of what had transpired on 21 March are recited as is the unhappiness at the postponement on the part of Mr Brown. A further meeting is offered for 28 March on the same terms as previously.

56. On 25 March Mr Brown sent an email confirming that he cannot attend on 28th and asking for it to be re-arranged. Mr Brown says he is awaiting correspondence from his doctor reiterating that his carer should be present during any hearings. He says he has spoken to his GP who states that the previous letter clearly outlined the precautions advised which will be to have his carer present at all times as there is no way to categorically guarantee he will not have a seizure at any time. Mr Brown points out that he had been advised to visit his doctor or hospital when he attended a meeting on 21 March. Also reiterates that he wished to continue on 21 March and felt well enough to do so. He also states that his carer is a trauma nurse at a local hospital and fully trained to assess such situations. He states that both he and Mrs Rodriguez his carer felt he was well enough to continue with the hearing. Mr Brown states that if the company is unable to comply with a further GP request to allow his carer access into the meetings he will request to continue the appeal

process in writing as his health is the most important thing and that every time he attends he feels so stressed and upset it has the potential to make him unwell. Mr Brown highlights that the notes from the meeting on 21 March are inaccurate.

57. By letter of 27 March 2017 Mr Gautrey writes to Mr Brown re-scheduling the appeal to 4 April and confirming that he had agreed Mrs Rodriguez can have access to the meeting by being seated directly outside the meeting room and therefore no more than 10 metres away from him should he need help or assistance. Mr Gautrey says that a written appeal process is unnecessary but they are happy to comply with this request that his carer be present outside the meeting room for the entire duration of the meeting. Mr Gautrey asks for any amendments to be made to the meeting notes to be communicated to him.

58. There is a further letter from Dr Karen Edridge Mr Brown's GP at page 310 and dated 27 March 2017. In this the Doctor states, "This 30 year old gentleman suffers from epilepsy for which he takes medication. I understand he is having problems at work at present and is due to attend meetings in the near future. Due to the stress associated with this he is finding it difficult to articulate his feelings. Because of this I would be grateful if you could agree to his fiancée, Amanda Rodriguez, attending and speaking on his behalf in his presence. I understand he is classified as disabled and is therefore covered by the Disability Act."

59. Mr Brown follows this up with an email of 30 March referring to the doctor's letter and requesting Mr Rodriguez be allowed into the meetings. Mr Brown says that if not he would prefer to continue in writing.

60. Thereafter Mr Gautrey seeks to contact Dr Edridge to have the opportunity to discuss her letter with her and gain a better understanding of the content and how Mr Brown's condition would prevent him from representing himself suitably and that he now requires his fiancée to speak on his behalf. He asks that Dr Edridge give him a call.

61. On 31 March 2017, page 313, Mr Gautrey acknowledges to Mr Brown receipt of the letter from Dr Edridge and states he had attempted to contact her and that he is awaiting a response so as to fully understand the position. He points out that the Respondent currently has no records of any conditions which they feel are likely to impact on his ability to contribute during the appeal hearing. Mr Gautrey repeats that they are happy for Mrs Rodriguez to be outside the meeting. He states however that he remains confident that it will be inappropriate for Mrs Rodriguez to attend the hearing itself. He says that it had been reported to him that following his suspension Mrs Rodriguez made aggressive calls to members of staff over the telephone and in a text message and that Mr Brown had contacted the relevant parties to apologise for her behaviour. Mr Gautrey further states that he feels Mrs Rodriguez would not be in a position to answer questions on his behalf in relation to the actual incidents as she was not present. Mr Gautrey states that he acknowledges Mr Brown's request for a written appeal and says that whilst it is not ideal and fears it will prolong the process he is happy to accept his request. He states that he will prepare a number of questions and send those to him. He asked Mr Brown to submit anything further for his consideration by 6 April.

62. Mr Brown sent an email on 31 March to Mr Gautrey saying that his GP had told him that the Respondent had requested information concerning his health. Mr Brown says he has an appointment for 4 April. He confirms therefore he will be unable to attend the meeting scheduled on the same date. He understands as Mr Gautrey has said that he is on leave later in April and requests that Mr Gautrey contacts him

after reviewing the information from his GP. Mr Brown points out that the Respondent had requested information from the GP stating that it is "for a disciplinary hearing" and that he wants to clarify that he had already been dismissed and therefore this is an appeal hearing.

63. There is a further message on 4 April in which Mr Brown informs Mr Gautrey that after meeting his GP he is aware that the GP had stated she was unable to give the company any further information until there is a written request from the company signed by Mr Brown. The doctor had also stated that Mr Brown needed to be fully aware of what has been requested. Mr Gautrey prepared a lengthy document including 54 questions to be answered by Mr Brown for the purposes of the appeal. These are at pages 316 to 327 of the bundle.

64. There is a letter of 7 April from Mr Gautrey to Mr Brown (page 328) pointing out that a written appeal deviates from the company's normal way of working but that the company agrees on the basis of the GP's comments regarding the health of Mr Brown and the company's refusal to accept that the carer may accompany him in the hearing and answer questions on his behalf. Mr Gautrey confirms that he has read all the documents and asks any further information is sent to him together with answers to the questions by 18 April.

65. There is a reply from Mr Brown on 12 April at pages 329 to 331 of the bundle. This is titled as an Appeal Letter and in it he seeks compensation rather than reinstatement. Mr Brown complains of not having been allowed to make a statement, evidence of a meeting with Mr Leputa, to see a formal statement by Mr Mulhall (as his email would not "stand in a court of law), a failure to carry out risk assessments every six months, inaccuracies on note taking, that additional questions were inappropriate at the appeal stage and that his GP should not have been contacted without his consent. The reply from Mr Gautrey at pages 333 to 336 is dated 20 April 2017. In that Mr Gautrey asks that inaccuracies in notes are identified and also that he provides a written statement of events as well as answers to the questions Mr Gautrey had sent in writing. Mr Gautrey explains that he had agreed a written process as he did not believe it was appropriate for Mrs Rodriguez to answer questions on his behalf. Mr Gautrey also says that he wished to ensure he met the GP's concern and to understand her viewpoint better, hence his attempts to contact the GP. Mr Gautrey seeks to reassure Mr Brown that all relevant material will be considered at the appeal and that he woud seek to address Mr Brown's dissatisfaction with the dismissal.

66. In essence Mr Brown refused to answer the questions. He based this in evidence on what he understood to be advice from ACAS that the investigation stage had closed and that he did not need to answer any further questions. He further states he was advised that this would only give the Respondent more information to rely upon to dismiss him. We find it is very unlikely such advice would be given and find that it was not.

67. There was a further letter of 5 May (page 338/9) from Mr Gautrey to Mr Brown addressing points raised in a letter received on 27 April (pages 336/7).

68. There is a further letter of 11 May from Mr Brown setting out 12 bullet points in relation to his appeal. Mr Gautrey addresses these in the appeal outcome letter.

69. On 19 May 2017 the outcome of the appeal hearing is communicated to Mr Brown by a letter. This is at pages 341 to 343 of the bundle. The process of the appeal is outlined and thereafter the conclusions.

70. The conclusions Mr Gautrey reaches are set out that it is evident from the evidence and the CCTV coverage that an exchange occurred between Mr Brown and Mr Mulhall on 28 January in a busy walkway within the Merrion Centre. After this Mr Mulhall lodged a formal complaint which suggested that Mr Brown had behaved in an inappropriate way towards a member of the public whilst on duty. Such behaviour might amount to bullying and/or harassment and/or disability discrimination. Mr Gautrey says that having observed the CCTV coverage and considering the evidence it also appears that Mr Brown sought to deliberately obstruct Mr Mulhall's path. This had resulted in Mr Mulhall walking into him, a situation which could in the light of Mr Mulhall's limited mobility have caused him physical harm.

71. Mr Gautrey concludes on the balance of probabilities that it is likely that he did behave in the way that Mr Mulhall explained and that he did deliberately obstruct his path. The reasons for Mr Brown's actions on that day remain unclear but any personal disputes with members of the public who have the right to walk in the Merrion Centre must not affect Mr Brown's ability to work professionally and without any personal agenda within the public area and when engaging with members of the public. So far as bringing the company's name into serious disrepute is concerned the public nature of what had occurred is recited together with the fact that Mr Brown was dressed in a branded uniform and that the company expects everyone to conduct themselves in a professional, friendly and courteous way. Given the years of Mr Brown's service Mr Gautrey expects he would have known the standards expected of him. Mr Gautrey continues that he had looked into the possible reasons why he would consider the actions of Mr MacFarlane previously to have been unfair or biased and whether or why the decision of Mr MacFarlane might have been biased. Mr Gautrey confirmed that there had been previous investigations involving Mr Brown and some other members of staff and management whose evidence was taken into account in this process and who took an active part in this disciplinary process. Mr Gautrey says he had been unable to find any evidence to suggest that anyone acted with a malicious motivation or bias against him.

72. Mr Gautrey confirms that the main investigation he had considered had been in 2014 which related to Mr Brown's epilepsy and the nature of the role at the time namely being a one person role. At that time there had been genuine concerns about Mr Brown's health and safety and the suitability of a lone working role. Mr Gautrey states that whilst any investigation can be stressful and unsettling the purpose of the investigation was to ensure that his work for the company did not jeopardise his safety and three years on from that investigation it appears that the process and investigation was a success. In that regard he says that an alternative role had been made for him which had enabled the safe environment. Mr Gautrey says that he had been unable to find any link between the previous investigation and the current allegations or outcome and nothing which suggested that there had been deliberate or malicious steering of the evidence or outcome in favour of any particular decision. Mr Gautrey notes that Mrs Rodriguez had been allowed to accompany Mr Brown in the previous investigations and that that was appropriate given the nature of the discussions namely the concerns about Mr Brown's epilepsy, frequency of seizures and a decision being made that his carer's input would be of value.

73. It is pointed out that the appeal is final.

74. There is a further letter from Dr Hardy of 6 September 2017 at page 344 of the bundle. In it she confirms Mr Brown has suffered from Temporal Lobe epilepsy since 2010. She describes Mr Brown having grand mal seizures in his sleep and that since the tribunal started in January 2017 he had 7 – 8 grand mal seizures. Dr Hardy states that Mr Brown used to have fits three days a week but that the stress of the tribunal made the seizures more frequent. Medical advice as to taking on fluids, sleeping and medication is recited. At page 345 is a letter from by Dr Peter Goulding. Dr Goulding recites that Mr Brown had been discharged from his clinic on 14 October 2014 at which time he had been free of fits since 2013. The notes indicated Mr Brown had been seen in the hospital for assessment after a fit in 2010. Dr Goulding states that Mr Brown is thought to have temporal lobe epilepsy and that here is no evidence of photosensitivity. Dr Goulding states that "Stress, particularly bad enough to interfere with sleep is a common seizure precipitant".

75. As above the Claimant complains of unfair dismissal and of disability discrimination by an alleged failure by the Respondent to make a reasonable adjustment at work.

76. A Preliminary Hearing took place on 6 September 2017 in which the issues were identified. So far as unfair dismissal is concerned the issues are stated to be three fold. Firstly, the question of what the reason for the dismissal of Mr Brown was. It is confirmed that Mr Brown did not seek to amend his claim to include a complaint that his dismissal was also an act of disability discrimination. Secondly the Tribunal is recorded as needing to determine the issue as to whether the Respondent held the belief in the Claimant's misconduct on reasonable grounds after such investigation as was reasonable. Thirdly the Tribunal is to determine whether the Respondent acted reasonably in dismissing the Claimant taking into account the procedure that was adopted.

77. So far as the reasonable adjustment complaint is concerned the Tribunal is recorded as having to determine whether a provision criteria or practice (PCP) of the Respondent placed the Claimant at a significant disadvantage compared to those who were not disabled and whether the Respondent had made reasonable adjustments to remove such disadvantage. The PCP is identified within the minutes of the Preliminary Hearing as "namely that employees be accompanied by colleagues or trade union representatives (or unaccompanied)". It is then recorded that the Tribunal is to determine whether the application of that provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that his "epileptic seizure triggers" include stress, anxiety, de-hydration and lack of sleep, as a result of which he was at greater risk of seizure and of being unaccompanied by someone with knowledge to deal with such a seizure, if not allowed to be accompanied by his partner. The Minutes at paragraph 6.2 also record the issue as to whether the Respondent took such steps as were reasonable to avoid any disadvantage namely by allowing the Claimant to be accompanied by his partner. It is stated that the Claimant was not permitted to be accompanied by his partner at meetings from 30 January onwards and it is raised as an issue as to whether it was reasonable for the Respondent to have permitted her to accompany Mr Brown.

78. At the outset of the hearing these issues were confirmed by Mr Brown. So far as unfairness of the dismissal is concerned he confirmed that he disputes the reason given by the Respondent for the dismissal and asserts that the Respondent had no proof of any misconduct by him. Mr Brown also confirmed that he complained that the Respondent had denied him the opportunity for his carer to accompany him. He had explained why it was necessary namely that stressful situations triggered

his epilepsy. Mr Brown seeks to dispute the fairness of the dismissal in that Mr MacFarlane who took the decision to dismiss had previously dealt with a grievance matter in relation to Mr Brown and that he was therefore in some way biased against him. Mr Brown complains of being patronised and contradicted by the appeal officer and that Mr Gautrey in carrying out the appeal refused to continue the meeting after Mr Brown had an "absence seizure" in the car park outside the meeting. Unusually Mr Brown complains that Mr Gautrey cancelled the meeting rather than let Mr Brown's carer assist in safeguarding him. Mr Brown also complains that the Respondent had denied a request for his carer to be present even when his request was supported by his GP.

79. Generally Mr Brown complains that the Respondent wrongly relied upon other witnesses in his dismissal and that he was never given a fair say and was accused from the start. He complains of unlawful contact by the Respondent with his GP and that the Respondent has slandered his carer as being aggressive. Mr Brown also complains that the Respondent had denied his request to have a human resources representative present within the disciplinary process including the appeal and that the Respondent had failed to issue him with a letter of suspension until requested.

80. We turn now to resolve the issues as identified at the outset of the hearing. In doing so we are to apply the relevant provisions of Employment Rights Act 1996 (the 1996 Act) and Equality Act 2010 (the 2010 Act). During the hearing we explained to Mr Brown and his representative Mrs Rodriguez that we are also to take into account decided cases within the higher Tribunals and the Courts. We have explained the general provisions of the cases referred to below.

81. There are two areas of complaint in relation to the same set of events. We are to deal with these complaints separately even though at times there may be an overlap between the actions complained of in relation to each complaint.

82. We look first of all at the complaint of unfair dismissal. By section 98 of the 1996 Act in determining for the purpose of the Act whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason or if more than one the principal reason for the dismissal and either that it is for some other substantial reason within section 98(1)(b) or within subsection (2). A reason falls within subsection (2) if, amongst others, it relates to the conduct of the employee.

83. Once the employer shows this it is for the Tribunal to apply section 98(4) of the Act and determine the question of whether the dismissal is fair or unfair having regard to the reason shown by the employer. This 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. This is to be determined in accordance with equity and the substantial merits of the case.

84. In our findings of facts above we found that the Respondent in the person of Mr MacFarlane, and again at the appeal stage by Mr Gautrey, dismissed Mr Brown for the events which occurred within the Merrion Shopping Centre on 28 January 2017. This relates to the conduct of Mr Brown towards Mr Mulhall. It is for a reason therefore within section 98 (2) (b) and is potentially a fair dismissal.

85. We actively considered the assertion by Mr Brown that there was bias on the part of Mr MacFarlane which had led to him concluding to dismiss Mr Brown whatever the circumstances. We do not agree with that assertion. We believe the evidence

of Mr MacFarlane. The Claimant's submissions in this respect are substantially weakened by the lack of any credible alternative reason as to why Mr MacFarlane should have dismissed Mr Brown and why Mr Gautrey upheld such a dismissal.

86. The only potential candidate is that Mr MacFarlane was involved in a previous capability issue in which the Respondent had sought to determine whether Mr Brown, in view of his epilepsy, could safely carry out his duties. Thereafter Mr Brown had raised a grievance against Mr MacFarlane.

87. We do not believe there is anything credible to show that Mr MacFarlane did hold any grudge towards Mr Brown or that he secretly wished to dismiss him regardless of the circumstances. The matters for which Mr Brown was disciplined in this case are serious. They involved confronting an individual in a public area in a way that the Respondent found to be aggressive and contrary to its policies. It also formed the conclusion that Mr Brown had brought the Respondent into disrepute in that he was publicly identified as their employee by the clothing that he wore.

88. Our findings as to what occurred on 28 January coincide with those of the Respondent. However we have to find whether the Respondent had an honestly held belief in the misconduct alleged. We find Mr MacFarlane, and in turn Mr Gautrey, did.

89. We were impressed by Mr MacFarlane's evidence in that he restricted his findings to the events which could be seen on the CCTV recordings and which had some other confirmation from outside the recordings of the incident itself. This relates to the admission by Mr Brown that he had made some comment about Mr Mulhall's physical abilities. That much had been accepted by Mr Brown in interview and was supported by other employees who reported what Mr Brown had said. Mr MacFarlane made no finding that Mr Brown threatened Mr Mulhall that he knew where he lived and would burn his house.

90. There was sufficient within the documentation gathered by the Respondent to support the belief that Mr Brown had confronted Mr Mulhall in an aggressive manner. There is also sufficient to show that Mr Mulhall, walking as he did with the aid of a stick, and professing himself to be disabled had a disability in general terms. His difficulty in gait is obvious on the recording.

91. As Mr Mitchell submits for the Respondent Mr Brown for whatever reason put himself in the path of Mr Mulhall in an aggressive and confrontational manner and continued with that confrontation as he walked backwards towards camera 2 which recorded the images. We do believe as Mr MacFarlane found that Mr Mulhall did push his way past Mr Brown. Although the images are incomplete because Mr Mulhall is obscured by a shop sign for the briefest of moments it was found by the Respondent that Mr Mulhall did seek to barge past Mr Brown when he was confronted by Mr Brown. The rresordings support that finding.

92. That, from the recording of camera 2 is clearly aggressive behaviour on the part of Mr Brown and given that Mr Brown had on Mr MacFarlane's finding instigated a conversation and raised comments about Mr Mulhall's bad leg the situation had become inflamed. It may well be that Mulhall made a pejorative comment to Mr Brown to the effect that he should "go and fuck his mother". Whilst that may well have caused the confrontation, it is impossible to say from the recordings, but what is inescapable is that Mr Brown unnecessarily and confrontationally and in an aggressive manner put himself in the way of Mr Mulhall, a member of the public visiting the shopping centre. We find that there was an honest belief on the part of

Mr MacFarlane. We apply the decision in BHS Limited v Burchell [1978] IRLR 379 EAT that there was a reasonable suspicion amounting to an honestly held belief in Mr Browns misconduct and that it was supported by an investigation conducted by the Respondent. We go further and find that the investigation conducted by the Respondent is within the meaning of the decision in Burchell within a range of reasonableness as explained in Sainsbury's Supermarket Limited v Hitt [2003] IRLR 23 CA.

93. We also consider that dismissal is within a range of reasonable responses open to a reasonable employer within the meaning of the decision in Iceland Frozen Foods v Jones [1982] IRLR 439 EAT. That test is there so that we do not substitute our view for that of the employer. The conduct upon which dismissal is based is serious on an objective basis. As Mr Mitchell submitted the conduct raised in question whether Mr Brown could be trusted to carry out his duties in future. The conduct in question is within the respondent's disciplinary code as being such as to justify dismissal. The coduct of Mr Browwn being aggressive behaviour towards a member of the public, potentially brought the respondent into disrepute and had a discriminatory element. The dismissal is within a range of reasonableness in our finding. A reasonable employer could act reasonably in finding such.

94. The Respondent received a statement from Mr Mulhall in an email. Mr Brown complains that this is informal which of course it is. It does not however prevent the matter being treated seriously by the Respondent. Thereafter it seeks to obtain the CCTV recordings from the operators of the shopping centre. The Respondent in our finding gives Mr Brown the opportunity to explain what happened. First of all in the informal meeting on 30 January 2017, secondly in the more formal investigative meeting of 9 February 2017 and thereafter at the disciplinary hearing at which it was decided to dismiss Mr Brown. There is a further opportunity, which Mr Brown fails to take up, to answer written questions and provide a written statement as part of the appeal process.

95. Mr Brown complains that he has not had the chance to make a "statement" but on the face of the documents we have seen this is palpably untrue.

96. Questions are put to Mr Brown from which it is apparent that he has the opportunity to explain the circumstances.

97. The Respondent also obtained short statements from each of the security people. Although none of those actually witnessed the events complained of they do report what Mr Brown had said shortly afterwards. As the Respondent said it is hard to understand how this information could have been communicated unless Mr Brown had communicated it to them.

98. Our finding is that Mr MacFarlane took into account the written statement by Mr Cavendish and sought to have him sign this as correct after checking that he agreed with the contents.

99. We ask ourselves whether this investigation is within the range of reasonableness and we find that it is. The Respondent has explored all available avenues.

100. We made the finding above that the Respondent had available to it four recordings from CCTV cameras. We specifically found that there was not a fifth recording and therefore that the fifth recording was not shown to Mr Brown.

101. Our reasons for that are that Mr Brown clearly went through the contents of the four camera recordings as can be seen from the notes of the meeting of 9 February

and also the disciplinary meeting. Only when he comes to the hearing at the Tribunal did he assert that there was a missing recording which had been shown to him at the time. We do not believe that evidence and Mr Brown is either mistaken about this or misrepresents what had occurred.

102. As well as having the opportunity to state his own case in accordance with the ACAS Code of Practice Mr Brown had notice of the allegations against him in advance of the investigation and dismissal meetings and also had details disclosed to him by showing him the CCTV recordings and providing him with copies of the notes and statements gathered by the Respondent.

103. So far as the appeal stage is concerned Mr Brown had the opportunity to challenge the findings made by Mr MacFarlane at the disciplinary hearing but failed to provide any written information as requested by Mr Gautrey. In this Mr Brown sought to rely upon what he understood to be advice from ACAS that an investigation stage had concluded and therefore he should provide no further written information as to what had occurred as to do so would only incriminate him further. We do not believe that such advice would be given during the course of an appeal by an employer and find that the Respondent did what was reasonable, within a range of reasonableness, by seeking to have Mr Brown attend an appeal hearing as he was at the dismissal meeting accompanied by a work colleague Mr Wani and with Mrs Rodriguez sitting in a room outside. When Mr Brown declined this and requested dealing with the appeal in writing the Respondent, albeit reluctantly on the part of Mr Gautrey, agreed and provided Mr Brown with what can clearly be seen to be a lengthy list of questions to resolve factual issues. We find that is within a range of reasonableness given the circumstances.

104. The ACAS code makes reference to the statutory requirement that at disciplinary meetings an employer allows an employee to be accompanied and thereby represented by a work colleague or a trade union representative. The Respondent reflects that statutory duty in its written procedures. As I have said the statutory code is referred to within the ACAS Code of Practice and that the companion is to be allowed to address the hearing to put the worker's case, sum up the worker's case and to respond on the worker's behalf to any view expressed in the meeting. The companion is also able to confer with the worker and it is said to be good practice to allow a companion to participate as fully as possible in the hearing including asking witnesses questions. It is pointed out that the employer is, however, not legally required to permit the companion to answer questions on the worker's behalf or to address the hearing if the worker does not wish it or to prevent the employer from explaining their case. There are detailed notes within the code in which it is explained that employers are free but not obliged to allow workers to be accompanied by a companion who is not a co-worker or trade union representative. It also points out that a reasonable adjustment may be needed for a worker with a disability and possibly for their companion if they are disabled. An example is given as to the provision of a support worker or advocate with knowledge of the disability and its effects.

105. With this in mind we address whether the Respondent acted unreasonably in the way it dealt with the disciplinary hearing. At the initial meeting Mr Brown attends alone. There had been no detailed request for Mr Brown to be accompanied by Mrs Rodriguez and nothing to suggest to the Respondent without Mr Brown making a request that it should suggest that to him. From the notes it is clear that Mr Brown is able to answer questions and to speak on his own behalf. Such was the case within the Tribunal hearing when he was represented by Mrs

Rodriguez but on a number of occasions made his own point both when viewing the CCTV recordings and during evidence and answering questions.

106. Our finding is that the Respondent acted reasonably in restricting the representation to Mr Brown to that which required by the statutory provisions as above at the disciplinary stage.

107. At the appeal stage the circumstances are different in that Mr Brown has provided the GP letters to the Respondent and the Respondent has made attempts to clarify these with the GP herself.

108. There is also a significant change in that the Respondent, addressing as it was Mr Brown's stated wish to have Mrs Rodriguez present made an arrangement whereby the appeal could be conducted with Mr Wani accompanying Mr Brown in the appeal hearing and Mrs Rodriguez being in a room outside where she could quickly be accessed should the need arise. We find that to be within a range of reasonableness open to a reasonable employer.

109. We made enquiries during the Tribunal hearing of Mr Brown as to the reason why he required Mrs Rodriguez to be present and this is also addressed by the Respondent within the correspondence sent to Mr Brown.

110. Within the Tribunal hearing Mr Brown's stated evidence was that he did not trust the Respondent and therefore required an independent note taker to be present to record what had occurred.

111. This could be a legitimate role of a person accompanying somebody at a disciplinary hearing or appeal. It does not however have any connection with Mr Brown's admitted disability. The circumstances of the epileptiform attacks which Mr Brown experienced from time to time were that Mrs Rodriguez could be called from an adjoining room should Mr Brown have a fit. We believe and find that this is all that was required to meet the possibility that Mr Brown could have a fit.

112. So far as any stress caused by the disciplinary process itself as at the appeal stage the Respondent made an adjustment to its processes to allow a written appeal when Mr Brown requested this. This could have avoided any difficulties had Mr Brown chosen to answer the Respondent's written questions and provide a statement if he chose, which he did not.

113. Mr Brown complains that the Respondent refused to conduct the appeal hearing after Mr Brown had earlier that day and in fact shortly before the hearing had a fit. We believe it is open to an employer to reasonably postpone an appeal hearing in such circumstances and it is within a range of reasonableness given the concerns that Mr Gautrey expressed as to Mr Brown's ability to deal with matters shortly after having a fit. This of course goes against the protest by Mr Brown who wanted to go ahead but we do not feel able to criticise the Respondent for erring on the side of caution in these circumstances. If Mr Gautrey had continued and the result being unsatisfactory he could equally have been criticised by Mr Brown for those failures.

114. We consider with care the letters from the GP which do not at all make it clear that if epileptic seizure triggers include stress, anxiety etc. For example if the stress of attending the appeal hearing had rendered Mr Brown incapable of dealing with it because of a fit Mr Rodriguez was close at hand and it would be no different to have been within the room.

115. We do not believe there was anything for the Respondent to sensibly conclude that Mrs Rodriguez had been aggressive as is recorded within the correspondence above. Mr Leputa in evidence could not remember any text message or any aggression. Clearly Mrs Rodriguez is very concerned for Mr Brown and accepts that she is at times assertive. As the Respondent said she had not been present when the incident occurred and could not have made any factual input about it. Any representation could be carried out by a work colleague or trade union representative although in reality Mr Brown not being a trade union member only that a work colleague could perform that task.

116. Mrs Rodriguez has medical knowledge but on our finding had been immediately outside the room and been known by Mr Brown to be there should be sufficient and the Respondent reasonably concluded that was the case. When questioned in the tribunal Mr Brown gave no evidence to the contrary.

117. We turn now to the complaint of disability discrimination. As recited above the Claimant does not complain of dismissal for being for reason of disability. That may seem unusual given that Mr Brown disputes that the reason given by the Respondent is the real reason for dismissal but fails to give any alternative view. However, having heard the evidence it was in our view a sensible step not to seek to amend the claim at the Preliminary Hearing stage to include a complaint of dismissal as an act of discrimination.

118. We apply the provisions of the 2010 Act in relation to the alleged failure to make reasonable adjustments.

119. The relevant section is section 20 of the 2010 Act and the relevant requirement is that the duty where a provision criterion or practice of the Respondent 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.

120. By section 21 a failure to comply with that requirement is a failure to comply with a duty to make reasonable adjustments. The employer discriminates against a disabled person if it fails to comply with that duty in relation to that person. Although the Respondent properly concedes that it was aware at all relevant times that Mr Brown was disabled due to his epilepsy, there is a further requirement that the Respondent either knew or should have known of the condition and that because of that condition the Claimant was put to disadvantage.

121. By schedule 8 paragraph 20 the employer is not subject to a duty to make reasonable adjustments if it does not know that the Claimant has a disability and is likely to be placed at the disadvantage referred to.

122. We therefore analise what the Respondent did in this case applying section 20 and 21.

123. In the first instance the Respondent required the Claimant to attend a disciplinary hearing. It made plain to him that he could be accompanied by a worker or trade union representative in accordance with its written policies and Mr Brown's statutory rights. At that stage it did not actively refuse the presence of an outsider such as Mrs Rodriguez. The provision criterion or practice therefore is that Mr Brown attends with a representative who is within the description within the Respondent's policies.

124. Our finding in relation to that is that it placed Mr Brown at no significant disadvantage compared to people who are not disabled. Mr Brown, as he did, attended the meeting without anyone to accompany him and in relation to each of the meetings with the Respondent before the appeal stage was able to reply to questions put to him. Indeed as recited above within the Tribunal hearing whenever asked Mr Brown's point in relation to attending the meetings alone was either that he needed to ensure that proper notes were made because he distrusted the Respondent.

125. There is nothing at that stage or indeed at the appeal stage to suggest that any difficulties in attending the hearing and taking part in it were presented by Mr Brown's epilepsy.

126. The secondary point is that there is no knowledge on the Respondent's part that that was necessary, it not having been raised by Mr Brown and not necessarily arising from the Respondent's knowledge of Mr Brown previously.

127. On behalf of Mr Brown Mrs Rodriguez says that the Respondent had allowed her to attend a grievance meeting previously. The Respondent says that this was allowed because Mrs Rodriguez had knowledge of Mr Brown and his personal circumstances which he does not have of the events of 28 January. We find that to be a valid point.

128. At the appeal stage the circumstances are different and Mr Brown specifically makes the request. However there remains the point that no disadvantage significant or otherwise is caused to Mr Brown by his epilepsy so far as attending the hearing is concerned. The disadvantage as he words it is limited to being unable to trust the Respondent to make accurate notes of the meeting and wishing to have an independent person to do so. Medical concerns can be dealt with by having Mrs Rodriguez outside the meeting. The provision criterion or practice at this stage therefore is that the Respondent allows Mr Brown to attend with a work colleague at the appeal meeting and to have Mrs Rodriguez immediately outside the room in the event of any medical necessity for Mr Brown to achieve attention. Our finding is that this has not placed Mr Brown at a significant disadvantage compared to persons who are not disabled for the reasons we have explained. There is a further adjustment to the process to allow Mr Brown to answer questions in writing. Adjustments have been made which were reasonable in all the circumstances but our primary finding is that there was no disadvantage caused by the disability in this case. A need to make a reasonable adjustment to avoid disadvantage therefore does not arise beyond having Mrs Rodriguez nearby as reassurance for Mr Brown.

129. We consider the submissions made by each party.

130. Without setting them out in full we accept the submissions on behalf of the Respondent substantially. These are reflected in the determinations we have made above. As Mr Mitchell submitted there are circumstances in which Mr Brown remembers then fails to remember what had occurred on 28 January and the Respondent was entitled to take this into account. In addition there is evidence that Mr MacFarlane balanced the evidence before him as we have recited above and had not made any findings since there were potentially more serious allegations that Mr Brown knew had said to Mr Mulhall that he knew where he lived and that he would burn his house down. He reached conclusions on the basis of the statements which refer to the comments about Mr Mulhall's difficulty with his leg and there is no evidence of bias given the time which has elapsed since the

events of 2013/14. In addition we have read through the notes in relation to that and what is clearly occurring is an enquiry as to how the safety of Mr Brown could be secured at work. There is no point at which dismissal becomes a significant option. Mr Brown relies upon a document at page 125 from 2013 which refers to the issue needing to be sorted out. Mr Brown suggests this means that his employment needs to be ended but the surrounding circumstances contradict that. There was in addition a further disciplinary action against the Claimant in which he was issued with a warning for rudeness to a work colleague and as the Respondent points out the issues of the need to avoid aggression were pointed out to Mr Brown at that stage. Again we accept the Respondent's explanation and that of Mr MacFarlane that had no issue with Mr Brown remaining at work save for the events of 28 January and we find that as a fact.

131. We have taken into account the size and administrative resources of the employer in relation to the unfair dismissal complaint in that it is relatively small employer with a limited number of employees and an external HR facility. However the enquiries that it did make were in our finding within a range of reasonableness as the Respondent submits. We agree also with the Respondent's submission that regardless of how matters arose, for example however Mr Mulhall might have inflamed the situation by saying to Mr Brown he should go and fuck his mother none of that would excuse Mr Brown's confrontation with Mr Mulhall. That could only serve to escalate the matter which indeed it did and it is within a range of reasonableness even on the basis of that to take a decision to dismiss Mr Brown.

132. On behalf of Mr Brown Mrs Rodriguez submits that the Respondent had taken into account conversations with Mr Brown with the security and other staff and that there is no audio recording of the events. We accept that there was no audio recording and we accept that it was reasonable for the Respondent to make enquiries of those who had had the matter reported to them by Mr Brown and the fact that Mr Brown had not taken the opportunity to make any formal complaint so the matter could have been investigated or referred to the police. Mrs Rodriguez suggested that there was a contradiction between the Respondent's guidance not to act aggressively and not to turn a back on an aggressor. We do not believe that this is a contradiction. It is simply an explanation that matters should not be escalated by employees and if they are under threat they should not turn their backs on the aggressor so as to invite assault.

133. Mrs Rodriguez says that there have been no complaints from members of the public but that really misses the point in our finding in that the Respondent was entitled to take the view that it did that an identified employee of theirs conduct is within the public domain. Mrs Rodriguez suggests that it was justified that Mr Brown obstructed Mr Mulhall. Having seen the recordings as the Respondent had done we disagree with that. The respondent was justified in finding that Mr Brown had acted aggressively as explained above. Although it is true that there was no way of telling as to whether Mr Mulhall met the definition of disability within the Equality Act 2010 there was sufficient for Mr Mulhall to say he was disabled, that he was walking with a stick on that occasion and had clear limitations on his mobility. Again as we have explained the Respondent had grounds to find that the bad leg comment had been made. Mrs Rodriguez says that Mr Brown has limited education and does not have good grammar but there are contradictions in what Mr Brown had said to the Respondent. Given an employee who did not remember on occasions what was said and comparing that with what he reported at the time was a legitimate act by Mr MacFarlane. Mrs Rodriguez said she was never

aggressive and we make no finding that she was. The Respondent contrary to Mrs Rodriguez' submission did make attempts to clarify matters with the GP which was a legitimate step in the circumstances and as the Respondent says there is no identification of any trigger between stress and epilepsy.

134. For the above reasons both complaints fail.

Employment Judge Trayler

Date: 7 January 2018