Case Number: 3332895/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Green	**v**	**Wickes Building Supplies Ltd**

Heard at: **Bury St Edmunds** **On: 18, 19 & 20 November 2019**

Before: **Employment Judge S Moore**

Members: **Mrs KL Johnson and Mrs CA Smith**

Appearances
For the Claimant: **Mr G Probert, Counsel.**
For the Respondent: **Mrs R Dawson, Counsel.**

JUDGMENT

The unanimous judgment of the Tribunal is that the claimant's claim for unpaid holiday pay succeeds; all his remaining claims are dismissed.

REASONS

1. The claims brought were of unfair dismissal, discrimination on grounds of disability under s.15 and s.20 of the Equality Act 2010, sex discrimination, a claim for unpaid notice pay, company sick pay and for unpaid holiday pay. However, at the outset of the hearing the claimant stated that he was no longer pursuing his claim of sex discrimination nor his claim under s.20 of the Equality Act 2010 for failure to make reasonable adjustments.

2. The claimant gave evidence as did his wife, Mrs Sarah Green, and for the respondent the witnesses were Mr Phil Palmer, who at the material time was store manager at the respondent's St Albans store, and
Mr Oscar Pires, who at the material time was store manager at Ruislip. On the basis of that witness evidence and the bundle of documents to which we were referred we make the following findings of fact.

Findings of fact

3. The claimant commenced employment with the respondent at the Letchworth store as a manager in training on 4 October 1999. He was store manager at Watford between 2 March 2008 and 19 June 2010 and then at Stevenage between 20 June 2010 and 12 January 2013. On 13 January 2013 he took up a role as merchandising manager at the St Albans store.

4. On 13 January 2017, 'A', a female employee started work at the St Albans store; she was then 19 years old.

5. In about June 2017 'A' made an informal complaint to James Hollywood, the then operations manager at the St Albans store, that the claimant "was acting weirdly". Mr Hollywood asked Mr Phil Palmer the store manager to have a word with the claimant, which he did informally in the showroom sitting at a desk. In evidence the claimant said he could not remember this conversation ever having taken place however we prefer Mr Palmer's evidence on this point, which was clear and is corroborated by records of the respondent's Human Resources department. However, since Mr Pires was not aware of this initial conversation when he took the decision to dismiss the claimant it forms no part of our reasoning.

6. In early February 2018 'A' made a complaint about the claimant arising out of events that had occurred on 1 February 2018. She alleged that on that date the claimant had made thrusting movements against a desk barrier, that the claimant stared at her for extended periods of time and that when 'A' asked to go home early because she was not feeling well the claimant put his arm around her as he escorted her outside. We have recorded those allegations as they appear from the initial investigatory notes at page 98 of the bundle.

7. Mr Hollywood interviewed a colleague of 'A's' called Arron on 8 February 2018. To be clear the barrier that is referred to in this interview (and in the record of the initial allegations) is a barrier on the side of a counter or desk that could be closed or lowered to prevent customers from going the wrong side it.

    7.1 In his interview on 8 February Arron said:

    > "that [the claimant] came over, then pulled the barrier shut and thrusted three times into the barrier while looking at myself and A. He then said nothing and walked away. He then goes and plays with the counter pens and walks off".

    7.2 Arron was asked if he saw the claimant staring at 'A' for an extended period of time and he replied:

"Yes I only saw him the once although 'A' mentioned 2 other occasions to me that night. 'A' got my attention and I saw the claimant looking over at our direction - I was behind the counter so I assume he was looking at 'A'. It was for around 10 seconds I saw him but he was already looking by then so it must have been longer. I felt 'A' wouldn't have mentioned it if it hadn't made her feel uncomfortable."

7.3 Arron was asked if he had seen the claimant put his arm around 'A' and he said, "No I didn't".

7.4 He was asked about his thoughts on the evening itself and he said:

"Extremely weird behaviour that I wouldn't expect from a manager of that age. The age difference is inappropriate in how he acted towards 'A' that night."

7.5 He was asked if there was anything he wanted to add and he said:

"I feel [the claimant's] behaviour is wrong and he needs to change how he acts around our young colleagues."

8. Between 8 and 10 February 2018 the claimant was away from work because of kidney stones.

9. On 12 February 2018 Mr Hollywood interviewed 'A'.

9.1 He first asked if prior to 1 February 2018 and after the first time she had made a complaint against the claimant, anything had happened that she considered inappropriate. 'A' replied:

"I don't remember the exact date but around 5 months ago – I was locking up the exit and leaning against the wall as I was turning the key in the shutter lock. The claimant came up to me and said "You look like a model I would tie you up, drug you and put you in a suitcase". I replied with "sorry what?" and [the claimant] laughed and referred to a story in the news about something similar happening to a model. He then walked off. Matthew Keohane witnessed this. I found this comment disturbing and not the sort of joke I would expect from a manager especially as I had already complained about him previously."

9.2 'A' was asked to describe what happened with the desk barrier and 'A' said:

"The claimant came over to the desk and Arron explained about the scanner holder to the claimant. They had a discussion about it then the claimant pulled the barrier across and proceeded to thrust into it multiple times. He didn't say anything while doing it and just looked at both me and Arron. As soon as [the claimant] had done it I think he realised how weird

it looked and just walked off without saying anything. It made me feel uneasy because of what the actions were insinuating."

9.3 She was asked whether she thought the behaviour was inappropriate and why, and said:

"Yes because the claimant is a manager and I expect better of him. I feel he takes advantage of the fact he is in a position of power."

9.4 She was asked about the staring and 'A' replied:

"I caught him staring twice. One time was as he was walking from the showroom to upstairs and he was staring straight at me while walking he then stopped by the staff door and kept peaking around from the corner of the kitchen units. He was making it obvious he was doing this as he carried on doing this for around 30 seconds. The claimant then stared a second time when he walked from the kitchen units back to the showroom. I asked Arron to stay with me as the claimant was being weird and this is when Arron saw the claimant stare at me as he walked past. On this occasion he didn't stop."

9.5 'A' was asked about the conversation with the claimant when she asked to go home and she said:

"Around 7pm I went over to the claimant in the showroom and asked if I could go home early as I didn't feel well. He asked why and I told him I felt sick. He then stood up and we started walking through the showroom and the claimant went to put his arm around my shoulder while saying "I hope you feel better". I walked a bit faster so he couldn't get his arm on me. I then went upstairs and got my things and left."

9.6 She was asked whether she was ill that night or whether the claimant's behaviour had made her want to go home early and 'A' replied:

"I was ill but I'd say half and half. I didn't feel comfortable that night so just wanted to go home."

9.7 She was asked whether she thought the claimant intended to make her feel uncomfortable and she replied:

"Yes – he knew what he was doing. I don't feel this was unintentional."

9.8 She was asked whether she had any reason to want to cause trouble for the claimant and said "No".

9.9 She was asked how the incidents made her feel about coming to work and she said:

> "I don't want to work with him as this has happened before and feel something needs to be done".

10. Mr Hollywood subsequently informed Human Resources he did not feel comfortable carrying out the investigation any longer as he was at the same level of seniority as the claimant. The investigation was therefore passed to Mr Palmer.
11. Mr Palmer interviewed Matthew Keohane on 13 February 2018.

    11.1 He was asked if he could recall an incident that took place between the claimant and 'A' by the exit shutter and was told that 'A' had made an allegation that the claimant had made a sexual comment towards her. Mr Keohane responded:

> "As I was walking into the store to change my shoes I went pass them both half way through a conversation about suitcases but I can't be sure exactly what was said as I only heard half of it."

    11.2 Mr Palmer said that 'A' had claimed that the claimant had said that she looked like a model and he was going to drug her, then kidnap her and put her in a suitcase and asked if he could confirm this is what was said. Mr Keohane said that he remembered a conversation that involved suitcases but he could not confirm exactly what was said.

    11.3 Mr Keohane was asked if to his knowledge any other sexual comments had been made to 'A' by the claimant and he replied:

> "A told me around about 4 months ago that the claimant had made a comment about a rash on her neck. He said, was it caused by a STD? I cannot recall if I was there or not but I do remember A telling me about it."

12. By letter of 13 February 2018 the claimant was suspended on the grounds that "it has been alleged that you committed acts of sexual harassment within the workplace including any behaviour or language which indicates a failure to recognise rights of others to be treated with respect and not to be discriminated against in any way".

13. On 15 February 2018 Mr Palmer had an investigatory meeting with 'A'.

    13.1 She was asked about the rash comment, and she replied:

> "Yes it was part of my original complaint with the claimant. He made a comment about the rash on my neck coming from an STD."

    13.2 She was asked how many times she could remember working with the claimant in the last 4-5 months, and she said:

> "A few times (2 to 3) but normally our rotas do not cross over."

13.3 She was asked when the claimant was doing what he was doing how did it make her feel, and she replied:

"Uncomfortable, really uncomfortable. Really creeped out."

13.4 She was asked whether the claimant ever spoke to her in a way that made her feel uncomfortable, and she replied:

"When ever he speaks to me it makes me feel uncomfortable."

13.5 She was asked if the claimant had ever touched her, and she said:

"He has attempted to touch me when I was leaving the store by putting his arm around me but I managed to move away quick enough."

13.6 She was asked whether the problem was what the claimant says or was because of him, and she replied:

"He makes little comments when speaking to me – one example is when I hurt my leg playing football. He asked me what had happened as I was limping and I said my team jumped me. The claimant then made comments about me getting jumped sexually by my team."

14. On 17 February 2018 Mr Palmer had an investigatory meeting with the claimant.

14.1 He read to him the statements from 'A', Matthew and Arron and asked if the claimant recalled making the comment about tying up 'A', drugging and placing her in a suitcase? The claimant said "No".

14.2 He asked the claimant if he recalled making comments about 'A's rash and asking if it was the result of an STD and the claimant said "No".

14.3 He asked if the claimant recalled on 1 February 2018 making thrusting movements with his hips and the claimant replied:

"I remember going over to the service desk, but do not recall making any untoward movements, however if I stand up or sit down for any long periods of time I do get stiff so do move my back and hips around to loosen."

14.4 The claimant was shown the CCTV and said "he was probably loosening up". He accepted that his movements might possibly make 'A' feel uncomfortable but that his attempt to touch her was more of a hand on a shoulder and it was part of his caring approach.

14.5 As regards the staring the claimant said:

> "When I walk past the desk I always look over at all colleagues."

14.6 The claimant said that he had no problems with his working relationship with 'A' and he also said he couldn't recall any incidents in the past where allegations had been made against him.

15. Mr Palmer told the claimant that he felt it was appropriate to put the matters forward to a disciplinary hearing and he would be contacted the following week with a date.

16. On 19 February 2018 the claimant commenced sickness absence with abdominal pain and renal colic.

17. On 28 February 2018 Mr Palmer called the claimant to see how he was doing and to ask for a copy of his medical certificate. The claimant told him he was on medication for abdominal pain and colic, and also that he was on tablets for depression. The claimant then sent a medical certificate that assessed him as unfit to work until 5 March 2018 because of abdominal pain and renal colic.

18. Still on 28 February 2018 Mr Palmer sent an invitation letter to the claimant to attend a disciplinary hearing on 7 March 2018. The letter included copies of the interview notes from 'A', Arron and Matthew. The letter also included the respondent's disciplinary and appeal policy, the respondent's sickness absence policy and the respondent's company handbook.

19. Still on 28 February 2018 the claimant attended his GP and received another medical certificate assessing him as unfit to work until 26 March 2018 because of abdominal pain and reflux that was under investigation.

20. On 28 February 2018 the respondent sent the claimant a letter stating that in view of his doctor's certificate his status had changed from paid suspension to sickness absence effective from 19 February 2018.

21. On 5 March 2018 Mr Palmer had another conversation with the claimant. The claimant confirmed he had received the pack with the interview notes and Mr Palmer confirmed he had received a photograph of the medication that the claimant was taking, including medication for depression. The notes record Mr Palmer telling the claimant:

> "For your information you are unpaid currently. As detailed in the pack you have just received as per the company policy when a colleague goes sick on suspension they are generally unpaid." And that "the claimant should consider his financial circumstances and whether he could attend the disciplinary hearing."

22. It was put to Mr Palmer in cross-examination that this amounted to him bullying the claimant to attend a disciplinary meeting when the claimant was not fit to do so. However, we accept Mr Palmer's evidence that this was not the purpose of his comment and that he wanted to make sure the claimant understood the financial implications, according to the company policy, of going on sick leave while he was under investigation and disciplinary proceedings were taking place.

23. On 6 March 2018 the claimant attended his GP. In the GPs notes there is a reference to the claimant having thoughts of harming himself and to the GP agreeing to provide a letter so that the claimant could postpone the disciplinary hearing and have an opportunity to meet with lawyers. Subsequently the claimant sent a letter from his GP to the respondent, which stated that it would be prudent to defer the disciplinary meeting for at least 4 weeks.

24. On 15 March 2018 the claimant emailed Mr Palmer asking for a missing page of the interview notes of Matthew Keohane and also for a copy of the CCTV recording. The claimant made the same request by email on 17 March 2018. Mr Palmer says that he never received either of those emails and it came to light they had been sent from an email address beginning r.green whereas all the claimant's other emails had been sent from an email address beginning r.green15. Further the claimant said he did not have an email address beginning r.green. It is unclear what happened however in view of the difference and confusion in relation to those emails we accept that Mr Palmer did not receive them.

25. The claimant then submitted a further certificate that he was unfit for work covering the period 26 March 2018 to 16 April 2018 by reason of abdominal pain, reflux under investigation and stress.

26. On 12 March 2018 the claimant sent a further email to Mr Palmer (this time from his normal email address) raising concerns he had had no response to his previous emails. He also complained that he was only receiving statutory sick pay and stated that he suffers from back pain. The reason for him needing to exercise in order to loosen his back was a recurring disability following a prolapsed disc from a number of years earlier, and the exercise that led to his suspension was a result of his disability.

27. Mr Palmer responded on 13 April 2018 informing the claimant that he had not received his previous emails and re-sending the pack of interview notes. In that respect it is to be noted that a page of those interview notes had not been missing, there was simply a typographical error in relation to the numbering of pages. Mr Palmer also re-iterated the company policy as regards to the payment of sick pay during a disciplinary process and noted that as the claimant's sick note would expire on 16 April 2018 he would expect the claimant to be available for a disciplinary hearing from 17 April 2018.

28. On 18 April 2018 the claimant submitted a GP certificate certifying that the claimant would not be fit to work between 16 April to 14 May 2018 by reason of abdominal pain, reflux which was under investigation, and stress.

29. On 30 April 2018 Mr Palmer sent a copy of the CCTV recording by WhatsApp to the claimant, having had difficulty sending it to him by email.

30. On 9 May 2018 the claimant produced a certificate from his doctor saying that he would be fit for a phased return to work from 14 May 2018.

31. On 15 May 2018 the claimant was invited to attend a disciplinary hearing, which took place on 18 May 2018.

32. On 18 May 2018 Mr Oscar Pires conducted a return to work interview for the claimant where the claimant gave the reason for his absence as renal colic and stress, and said that he had suffered from depression in the past and been on medication for 5-6 years. Mr Pires then conducted the disciplinary hearing in the presence of a note taker and the claimant's accompanying person, Paula Kearns.

33. At this juncture it is appropriate to record the CCTV evidence, which we saw several times at the hearing both on full screen and on an iPad.

    33.1 The CCTV evidence showed the claimant standing behind a desk, beside 'A' and Arron.

    33.2 The claimant walked to the front of the desk and stood in front of 'A' and Arron.

    33.3 The claimant then moved to the gap beside the desk and bent down to pull the barrier across in front of him. He then slowly and deliberately lent into the barrier, moving back and forth three times in a thrusting motion while looking in the direction of 'A' and Arron.

    33.4 The claimant then turned around and walked to an area opposite the desk where he appeared to move some small items before walking away.

    33.5 We note that in the CCTV evidence the claimant appears to be moving and walking easily. He does not appear to have a problem bending and does not use his arms to support his back in anyway. The thrusting movements only take a matter of seconds and do not involve hip rotations.

    33.6 We have also seen stills of the CCTV evidence and page 240 of the bundle shows the claimant bending down to pick up the barrier.

Pages 240B and C show the claimant looking at 'A' whilst thrusting back and forth.

34. The disciplinary hearing started at 14:47 on 18 May 2018.

34.1 The claimant produced a letter from an osteopath, Mr Wheadon, which is undated and states as follows:

> "To whom it may concern,
>
> Mr Green comes to see me occasionally for treatment for his mechanical low back pain. It is not unusual for people suffering from periodic low back pain to get some symptom relief from performing simple low back and pelvic exercises. Low back pain is often worse after periods of sitting and doing a minute or two of gentle exercise and stretching can be very helpful when first standing up.
>
> Mr Green finds rocking his hips from side to side and from front to back to be an effective exercise for his low back symptoms."

34.2 The claimant was asked how often he used an osteopath and he said numerous times. However, his medical notes record that prior to going off sick on 19 February 2018 the last time he had seen the osteopath was 2 years previously. The claimant was asked why there was no date on the letter and he was also asked why he had not mentioned the letter prior to the hearing, and said:

> "I visited the osteopath to show him the video of what I was doing and he said that is what you should be doing and that is what he put in writing for me."

34.3 In the course of the disciplinary interview the claimant was also asked if he thought 'A' had any reason to make things up about him and he said "No" and his business relationship with 'A' was fine.

34.4 He was asked about the CCTV footage and he said that the perception of 'A' and Arron was unreasonable and he did not think it was inappropriate for him to be exercising his back, although he did accept that it could be interpreted as inappropriate.

34.5 As regards touching 'A', he said he had attempted to put his hand on 'A's' shoulder as he would any colleague. He said it was merely a compassionate gesture.

34.6 He was asked about his comments about the model being cut up in the suitcase. The claimant denied he had said that 'A' looked like a model etc but said that he had been reading a story about a murderer who cut someone up and put them in a suitcase, and as

he was closing the shutter he had asked 'A' if she had seen that story. When asked what had prompted him to mention it, he said it had just popped into his mind when he went to check that 'A' was closing the shutters and following procedures.

34.7 When he was asked about the football comment, he said he did not make a sexual comment and he also said he did not recall making any comment about a rash because he would never feel comfortable making a joke like that.

34.8 As regards the staring, he said that when he walked from the store to the showroom he looked over to check that everything was ok.

34.9 The claimant was asked again why 'A' might have complained about these things and he said he did not know.

34.10 The meeting was adjourned between 1610-1715 hours, during which time Mr Pires phoned up the respondent's Human Resources function, which is located centrally. The note of that conversation, which is made by Mr Paul Tidman from the Human Resources department states;

"LOS: 19 years

(There has been previous over the years with concerns over his conduct)"

There is then a description of the disciplinary and what had been said at it. Then at the bottom there is a note that says;

"Advised: Adjourn until Monday, digest information before continuing the meeting and deliver the outcome of dismissal."

34.11 Mr Pires returned at 17:15 at which point the claimant made various points, including the lack of signatures on the interview notes and his payment of sick pay only. There was a further short adjournment before Mr Pires came back and stated he needed to get the interview notes signed. The matter was then adjourned until 1pm the following Monday. That Monday Mr Pires responded to the points the claimant had made at the end of the hearing on Friday and, in response to a further question from Mr Pires, the claimant stated that in fact he had not shown his osteopath the CCTV footage.

38.11 That hearing concludes with Mr Pires stating:

"From my point of view everything has been covered and any points raised have been covered and I am going to adjourn and give myself enough time

> because of the seriousness of the allegation until Friday at 10am on 25 May 2018."

35. On 25 May 2018 the hearing was re-convened and at that hearing Mr Pires delivered the decision of dismissal. He stated:

> "After careful consideration of all the facts presented: I consider your actions to be gross misconduct and having considered all alternatives, I have decided to summarily dismiss you. I have decided to take this action because I have a belief that your actions had a sexual tone to them, this made the colleague in question feel extremely uncomfortable and sexually harassed. Your behaviour was unacceptable towards the colleague. It fell below our company standards in the way we lead and care for our colleagues. The physical contact was unwelcomed by the colleague, some of your remarks were also unwelcome in its nature. I consider this a serious breach of our equal treatment policy, which leaves me with no other option but to summarily dismiss you."

36. The claimant did not appeal.

Conclusions

Disability

37. Section 6(1) of the Equality Act 2010 provides that a person has a disability if he has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities.

38. The claimant relies upon a mental impairment, namely depression, and a physical impairment, namely back pain. The respondent accepts that the claimant is a disabled person by reason of his depression but not that he is disabled by reason of his back pain.

39. The evidence shows that on 9 March 2007 the claimant was diagnosed with a degenerative disc together with a left sided disc prolapse and commenced a regular back exercise programme. We accept that in 2007 he experienced severe symptoms, which took time to settle, that he was given pain management advice and exercises, and that he started doing Pilates.

40. However, the claimant's back then became more stable and going forward he consulted osteopaths only once or twice a year and took pain relief as and when needed. The notes from the claimant's osteopath show that prior to 23 March 2018 the last time he saw the osteopath was on 23 December 2016, and that visit was in relation to the claimant's shoulder rather than his back. The last time before 23 March 2018 on which the claimant's back is mentioned is 20 May 2015, when it is stated that he was 75% better. Further, in his undated letter the osteopath refers to the

claimant "coming to see me occasionally for treatment for his mechanical low back pain".

41. The claimant has also disclosed his GP notes between February 2012 and April 2019, and they make no reference at all to back pain.

42. The claimant also accepted in cross-examination that none of his work colleagues at the St Albans store were aware that he had a problem with his back. Further, despite the fact there was evidence the claimant would have to carry heavy items such as bags of cement and sand several times during a shift, he never indicated that these might create a problem for his back or ask for any adjustments to be made.

43. The claimant's wife, Mrs Sarah Green, described the claimant as having had ongoing back problems for the last 23 years and stated that when their boys were younger (they are now in their mid-twenties) the claimant used to complain of back stiffness when watching them play football. She also referred to the claimant rotating his back and using ice packs and Ibuprofen for pain relief. As regards their activities she stated that sometimes the claimant had to lie down to rest his back when they were doing home projects such as laying decking, fitting new bedroom wardrobes or flooring, building stud walls, or painting and re-decorating, and that sometimes digging ponds out, building pergolas or laying patios had been an issue. She also stated that sometimes after about 2 hours driving the car the claimant had to stop and stretch his back. However, she also agreed that the claimant was active and that they enjoyed cycling together, they both had road bikes and that at least once a week they would cycle a distance of about 20 miles.

44. The claimant said that if at work he had to carry an 8ft by 4ft MDF sheet that was 9mm or thicker he could not pick it up by himself because he could injure his back. However, the respondent's witnesses stated it was perfectly normal for two people to carry such an awkward shape of material and that employees were not expected to carry such an item on their own. As stated above, there was no evidence before us that the claimant ever made any of his colleagues or managers aware that he had a back problem and that he needed to take steps to manage his back or limit his lifting.

45. On the evidence we accept that the claimant has an impairment to his back in that he suffers from occasional back stiffness, however we are not satisfied that that impairment had a substantial and long term adverse effect on the claimant's ability to carry out normal day to day activities at the relevant time i.e. during the period of the events leading up to the claimant's dismissal. In this respect we do not consider that the construction and decorating projects referred to in the evidence of Mrs Green are to normal day-to-day activities within the meaning of the Equality Act 2010 or section D of the Guidance (on Matters to be Taken into Account in Determining Questions Relating to the Definition of

Disability). Further, while we accept that driving a car is a normal day to day activity we do not consider that even if sometimes the claimant needs to stop and stretch his back after driving for two hours this amounts to a substantial adverse effect on his ability to carry out that activity. There is no medical evidence that the claimant's occasional back stiffness had a substantial adverse effect on his ability to carry out normal day to day activities at the relevant time and this aspect of his claim is further undermined by the fact that he never made his colleagues or managers at work aware of any problem with his back or asked for adjustments to be made, despite his job regularly requiring him to lift bags of sand and cement. We therefore reject the contention that at the relevant time the claimant was a disabled person within the meaning of the Equality Act 2010 by reason of back pain.

Unfair dismissal

46. The reason the respondent puts forward for the dismissal is misconduct. The first question is therefore whether the respondent had a genuine belief that the claimant was guilty of misconduct and we are satisfied it did, indeed Mr Probert did not seek to argue otherwise.

47. The next question is whether that belief was based on reasonable grounds. In this respect, Mr Probert submits that both the investigation and the procedure were not fair. In particular it is alleged that the investigation and hearing were unbalanced and biased against the claimant, that whereas the claimant was challenged about his account of events the same level of challenge and scrutiny was not applied to 'A's' evidence, that he was not permitted to call witnesses and there was no proper explanation as to why Mr Pires preferred the evidence of 'A' as compared to him, or why Mr Pires did not accept the claimant's explanation for his conduct. The claimant submits that the burden was put on him to prove his innocence, that the balance of evidence for the vast majority of the allegations was simply one person's word against the other and there was no objective evidence to support 'A's' contentions.

48. However, the fact of the matter is that there was objective evidence against the claimant in the form of the CCTV footage, which we have described above. In addition, as regards the 'model allegation' the fact a conversation about suitcases had taken place at the time the claimant alleged was corroborated by Mathew's statement. The comment about the rash on A's neck and as to whether that was caused by a STD was a matter raised by Matthew and confirmed by 'A' when she was asked about it, and the incident in relation to the staring was corroborated by Arron. Indeed, while Mr Probert alleged that the respondent "fished" to find evidence against the claimant we find that the respondent was not fishing, but rather taking reasonable steps to find out if there was evidence to support 'A's' account of the claimant's behaviour by making enquiries of possible witnesses.

49. We also reject the contention that the respondent's questions to 'A' as regards how the claimant made her feel were inappropriate, given that it was an investigation into sexual harassment 'A's perception of the claimant's behaviour was highly relevant. Further the fact that 'A' herself did not use the term 'sexual harassment' is not relevant since she made it clear the actions of the claimant made her "very uncomfortable", "creeped out" and that she no longer wanted to work in the claimant's presence.

50. Further, although the claimant complained that he was only provided with general allegations in the letter inviting him to the disciplinary hearing so that he did not know precisely what allegations he was facing, we note that at his investigatory meeting the statements were read out to him and he was shown the CCTV footage. He was then sent the interview statements and the CCTV footage well in advance of the hearing. Accordingly, while the precise allegations could have been set out more clearly on the face of the documentation we are satisfied the claimant knew what would be discussed at the disciplinary hearing. It is also notable that at the hearing the claimant did not suggest that he had been taken by surprise.

51. As to the assertion that the claimant was not permitted to call witnesses at the disciplinary hearing, this is factually incorrect. The letter on which this assertion is based, dated 15 May 2018, simply states that the claimant's companion at the hearing, Miss Kearns, was permitted only to address Mr Pires and to confer with the claimant but could not answer questions on the claimant's behalf, which is an entirely different matter.

52. As regards the disciplinary hearing we also reject the submission that this was biased against the claimant and/or unfair. Whilst the burden of proof did not pass to the claimant, the evidence against him, including the CCTV footage, inevitably called for him to put forward an explanation that the respondent was entitled to explore and test.

53. We further reject the assertion that the respondent has failed to show good reason why it rejected the explanation given by the claimant.

54. In this respect we find Mr Pires' scepticism that the letter from the osteopath, produced at the disciplinary hearing, provided a convincing explanation for the claimant's hip thrusts was entirely justified:

    54.1 The letter states that "low back pain is often worse after periods of sitting and doing a minute or two of gentle exercises and stretches can be very helpful when first standing up". However the hip movements shown on the CCTV were not conducted after the claimant had been sitting down and did not amount to a minute or two of gentle exercise but three forward and backward hip thrusts in quick succession.

54.2 The second part of that letter, namely "Mr Green finds rocking his hips from side to side and from front to back to be an effective exercise for his low back symptoms" is merely a record of what the claimant apparently told the osteopath.

54.3 The claimant initially suggested that the osteopath had seen the CCTV footage prior to writing his letter but later admitted that the osteopath hadn't in fact done so.

54.4 There was no evidence that the claimant had a back problem at the time of the incident and/or had ever been seen to conduct back relieving exercises at work.

55. Mr Probert relied on the authority of Chamberlain Vinyl Products Ltd v Patel [1995] ICR 113 in which it was held that although in the great majority of cases it would be sufficient for the employer to limit his investigation to the issue of guilt or innocence and listen to the employee's mitigation, there might be cases where some aspect of the background needed investigation to put the misconduct into proper context. The EAT therefore held that the employment tribunal had been entitled to find that the employer's investigation had concluded prematurely in circumstances where the dismissing officer had unsuccessfully sought to obtain medical evidence as to whether the employee's illness had contributed to his misconduct, had asked the employee to contact his own doctor and had then proceeded to reach a conclusion although the doctor failed to answer the question which needed a reply. However, in the present case Mr Pires did not dismiss the claimant following a failure to procure medical evidence he as the dismissing officer had deemed relevant, but rather because he considered the medical evidence the claimant had chosen to provide to justify his hip movements didn't in fact do so.

56. Mr Probert also submitted that the CCTV showed that immediately after the incident 'A' and Arron were not visibly upset and may have found the claimant's behaviour a joke because Arron is seen going over to the barrier himself and mimicking one thrusting motion. Mr Pires said that his interpretation of the CCTV was that he thought Arron and 'A' were shocked and incredulous at what they had witnessed. In any event we do not think that the immediate reaction of Arron or 'A' is of particular relevance; even if their immediate reaction had been to laugh, this is not incompatible with them both feeling uncomfortable after reflecting on the insinuating nature of what they had seen.

57. Further it is clear from the notes of the disciplinary hearing that Mr Pires questioned the claimant about all of the incidents referred to in the statements. As regards the 'model comment', the claimant admitted that he spoke to 'A' about a model being cut up and put in a suitcase, but stated he was referring to a newspaper article that had "popped into his mind".

While the claimant denied the rash comment, the football comment and staring at 'A' inappropriately, Mr Pires was entitled to take into account that all of 'A's allegations except the football comment had some corroboration and that claimant had not suggested any reason why 'A' might want to make up allegations about him. As regards the claimant's attempt to touch 'A' when she left work, Mr Pires was fully entitled to regard that particular incident in the light of the other allegations and reject the claimant's explanation that his actions were motivated by compassion. He was also entitled to consider that, regardless of his motivation, the claimant's actions were inappropriate given that he did not know 'A' well and it was not clear that she would welcome physical contact from him.

58. Mr Probert submitted that Mr Pires should have questioned 'A' and challenged her version of events. However we do not consider the fact that Mr Pires did not question 'A' – or indeed that the claimant did not have an opportunity to cross-examine her – rendered the procedure unfair given, in particular, that 'A' had been questioned in the investigation, the central allegation in relation to the thrusting incident had been captured on CCTV, and there had been no suggestion by the claimant (or anyone else) as to why 'A' might want to make up allegations against him.

59. Mr Probert also asserted that Mr Pires took into account matters that were not specifically put to the claimant, such as his scepticism about the osteopath's letter providing a satisfactory explanation for the claimant's hip thrusts. Further, Mr Pires had stated in evidence that he was influenced by the fact that the claimant displayed no particular remorse or understanding of how his actions had affected 'A', but had not put this to the claimant either. We find, however, that Mr Pires' concerns about the osteopath's letter were made clear to the claimant in the course of the hearing, and we further find that Mr Pires was entitled to take into account the claimant's demeanour throughout the disciplinary hearing without specifically putting the claimant on notice that he was doing so.

60. It was also argued that by reason of the note of advice from Human Resources to Mr Pires recorded at about 5.15pm on Friday 18 May 2018, advising him to deliver the outcome of dismissal, that Mr Pires must have prejudged the outcome of the meeting. Mr Pires vehemently rejected this allegation when it was put to him in cross-examination and said he was very concerned to make a balanced decision and had not at that juncture decided to dismiss the claimant. Mr Pires' evidence is borne out by the facts and we accept that as at Friday 18 May 2018 he had not made a final decision to dismiss the claimant; even though the disciplinary meeting was reconvened on Monday 21 May 2018 Mr Pires then adjourned the matter for a further four days in order to give himself time to reflect, given, as he put it at the time, the seriousness of the allegations. Further, even if the note does reflect Mr Pires' view that dismissal was likely to be the outcome,

he was entitled to reach such a provisional view given that by then he had completed the bulk of the hearing.

61. We also note that the note of advice from Human Resources refers to there having been "previous over the years with concerns over [the claimant's] conduct" and it was common ground that in 2013 there had been a finding of the claimant making sexually inappropriate comments that had led to him moving from the Stevenage Store to a less senior position at the St Albans store. However we are satisfied that Mr Pires approached the allegations with which this case is concerned with an open mind and decided them on the evidence available.

62. Accordingly, in the light of all the above, we are satisfied that Mr Pires had reasonable grounds for his conclusion that the claimant's actions had a sexual tone which amounted to sexual harassment of 'A', and that he arrived at them following a reasonable investigation and a fair disciplinary procedure. We also find that the sanction of dismissal was within the bands of reasonable responses. Mr Pires took into account that he had a duty to protect his staff and his customers, and further that the claimant did not seem to have empathy with 'A's' concerns or as to how he had made her feel. Although Mr Probert challenged the allegation of lack of empathy we agree with Mr Pires that on a reading of the notes of the disciplinary hearing this appears to have been the case. Mr Pires stated "All I got was, I did nothing wrong" and in our judgment this was a fair summary of the claimant's reaction at the disciplinary hearing.

63. It therefore follows that the claim for unfair dismissal is dismissed.

Claim for breach of contract or unlawful deduction of wages

64. The claim is that the respondent acted in breach of contract by failing to pay the claimant the respondent's company sick pay.

65. In this respect, the claimant's contract states:

> "This statement sets out your main terms and conditions of employment and complies, fully, with the Employment Rights Act 1996 (as amended). The Statement must be read in conjunction with the Wickes Building Supplies Company Handbook "Working at Wickes", a copy of which has been given to you. In the event of conflict, the terms of this Statement take precedence."

66. Under section 7, 'Absence due to sickness or injury', paragraph 7(B) of the contract provides:

> "Entitlement to Company sickness benefit in any 12 month period, is dependent on your length of service. Payment will be made in accordance with the following scale:

> More than 2 years the entitlement is Full Pay at 13 weeks and Half Pay at 13 weeks."

67. The claimant's sick pay policy in the company handbook provides:

> "The Company reserves the right to withhold Company Sick Pay in given circumstances including:
>
> ….
>
> When a Colleague currently has outstanding allegations against them, which are being investigated and addressed through the Company's disciplinary proceedings."

68. We heard unchallenged evidence that the respondent's policy is to withhold company sick pay where an employee is the subject of a disciplinary investigation.

69. Mr Probert submitted that under his contract the claimant had an entitlement to company sick pay and that this took precedence over the respondent's sick pay policy set out in the company handbook.

70. In our judgment, however, there is no conflict between section 7 of the claimant's contract and the respondent's company handbook. The starting point is that the claimant's contract states it must be read in conjunction with the company handbook. Section 7 of the contract provides that entitlement to company sickness benefit is dependent on length of service and sets out the scale of payment compared to length of service. It is not stating that entitlement to company sickness benefit is dependent only on length of service and may not be subject to other rules or policies, such as those set out in the company handbook. Rather it is stating that where there is an entitlement to company sickness benefit it will be paid according to a scale that is dependent on length of service. In our judgment the company handbook can and should be read compatibly with the employment contract. It therefore follows that the respondent did not breach the claimant's contract when it applied its policy of paying him only statutory sick pay while he was off sick during the disciplinary procedure.

Claim under s.15 of the Equality Act 2010

71. Although the claimant's claim of being a disabled person on grounds of his back has been dismissed, the respondent has accepted that the claimant is disabled by reason of his depression and it was argued that failure to pay him company sick pay therefore gave rise to a claim under s.15 of the Equality Act 2010. This provision provides:

> "A person (A) discriminates against a disabled person (B) if, (A) treats (B) unfavourably because of something arising in consequence of B's disability, and (A) cannot show that the treatment is a proportionate means of achieving a legitimate aim."

72. It was argued that the respondent's failure to pay the claimant company sick pay was unfavourable treatment which arose because of something arising in consequence of the claimant's depression, namely being off work and not being paid. In this respect Mr Probert relied on the fact that the claimant's later sick certificates included stress, which was wide enough to incorporate his depression.

73. However the reason that the claimant was not paid company sick pay was because he was subject to disciplinary proceedings. It was the fact of the disciplinary proceedings that prevented him from being paid company sick pay and not the fact of him being depressed. Had he been absent from work with depression but not been subject to disciplinary proceedings then he would have been paid company sick pay. Accordingly, the alleged unfavourable treatment (non payment of company sick pay) was because the claimant was subject to disciplinary proceedings, which was not "something arising" in consequence of the claimant's disability of depression. It therefore follows that the claim under s.15 of the disability discrimination act is also dismissed.

Holiday Pay

74. When the claimant's employment was terminated the respondent did not pay the claimant's outstanding holiday pay because of a lease agreement concerning a company car that required the claimant to make a repayment of £600 if his employment was terminated on grounds of misconduct.

75. However, in the course of the hearing the respondent accepted that it had wrongly deducted more than £600 from the claimant's outstanding holiday pay. It therefore follows that the claimant's claim for non-payment of holiday pay succeeds.

Breach of Contract

76. Finally it was argued that the claimant's dismissal was not capable of amounting to gross misconduct and, on an objective analysis, his actions were not sufficiently serious to warrant summary dismissal at common law. We disagree, we consider that the package of incidents including the thrusting incident on 1 February 2018 viewed objectively do amount to sexual harassment of such a nature that is sufficiently serious to amount to gross misconduct and a repudiatory breach of contract. It therefore follows that the claimant's complaint of breach of contract is also dismissed.

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Employment Judge S Moore

Date: 9 December 2019

Sent to the parties on: .....

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For the Tribunal Office