EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MR S RIBY	**V**	**GOWER COLLEGE SWANSEA**

HELD REMOTELY ON: 17, 21, 22, 23, 24 & 25 JUNE 2021

BEFORE: EMPLOYMENT JUDGE S POVEY
MR M PEARSON
MS C PEEL

REPRESENTATION:
FOR THE CLAIMANT: **MR JOHNS (COUNSEL**
FOR THE RESPONDENT: **MR GRIFFITHS (COUNSEL)**

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claim for unfair dismissal is not made out and is dismissed.

2. The claim for wrongful dismissal is not made out and is dismissed

3. The claim of direct discrimination is not made out and is dismissed.

REASONS

Background

1. At the culmination of the hearing of these claims, and following deliberations, the Tribunal provided its judgment and reasons orally to the parties on the afternoon of 25 June 2021.

2. On 28 June 2021, the Claimant made a request for a transcript of the Tribunal's reasons. This is that transcript.

Introduction

3. These are claims brought by Stuart Riby ('the Claimant') against his former employer, Gower College ('the Respondent'). The Claimant was employed by the Respondent as an NVQ Electrical Assessor from 2008 until his dismissal for gross misconduct on 21 Feb 2019. He claims unfair dismissal, wrongful dismissal and direct discrimination on the grounds of disability.

4. By way of background, the Claimant was informed by the Respondent in September 2018 that complaints had been made against him by a fellow employee, Nicola Hughes. An investigation into the complaints ensued, which led to a disciplinary hearing held on 21 February 2019, at the conclusion of which the Claimant was dismissed with immediate effect. The Claimant appealed against that decision and an appeal by way of re-hearing was held on 8 May 2019. The re-hearing panel reached the same conclusion as the disciplinary panel and dismissed the Claimant summarily.

5. Following a period of ACAS Early Conciliation, the Claimant presented his claims to the Employment Tribunal ('the Tribunal') on 12 July 2019. The Respondent rests the claims in full.

6. A notable feature of the discrimination claim is that the Claimant does not contend that he is disabled. Rather, the claim is advanced on the basis that the Respondent had a false perception that he had obsessive compulsive disorder ('OCD') and that the false perception played a material part in the decision to dismiss him.

The Hearing

7. The hearing was, by agreement, conducted remotely over the Cloud Video Platform. The Tribunal heard oral evidence from the Claimant. For the Respondent, we heard from Cath Williams (the investigating officer), Mark Jones (who chaired the disciplinary panel), Gary Williams (chair of re-hearing panel) and Sarah King (the Respondent's Head of Human Resources). Each witness provided a written statement which they adopted as their evidence in chief. In addition, the Tribunal heard from Nichola Hughes, whose attendance had been the subject of a witness order issued upon application by the Respondent. As she had not provided a statement, her evidence was adduced by way of examination in chief and she, like all the witness, had her evidence tested under cross-examination.

8. The Tribunal was also provided with a paginated bundle of documents to which we were referred throughout the hearing ('the Bundle'). We also permitted the Claimant, on application, to adduce his typed transcripts of the audio recordings of the disciplinary hearing and the appeal re-hearing.

9. Finally, we received oral submissions from Mr Johns for the Claimant and Mr Griffiths for the Respondent.

10. In reaching our decision, the Tribunal had regard to all the evidence we saw and heard, as well as the helpful submissions from both counsel. We do not repeat or set out the applicable law, save as detailed in the course of these reasons. However, we did not understand there to be any dispute as to the statutory provisions and legal tests to be applied in claims of this nature.

Findings of Fact

11. As we heard from the Claimant and Ms Hughes, the main protagonists in the allegations which led to the Claimant's dismissal, we begin with a general observation as to their credibility and reliability as witnesses.

12. We found Ms Hughes to be a credible witness. Her account was consistent, detailed, measured, cogent, coherent and plausible, across numerous interviews and in oral evidence. It was also supported by aspects of the Claimant's own testimony and the testimony of others involved in the disciplinary process. In contrast, the Claimant could not remember certain aspects (as oppose to denying them), changed his account (regarding what became known as 'the mother incident'), issued bare denials, claimed collusion and conspiracy and was unable to draw any meaningful support from the other evidence before the Respondent.

13. There were a number of allegations made against the Claimant regarding his conduct towards Ms Hughes, over a period of nine months and beginning on 21 December 2017.

The Zip Incident

14. We begin our findings with the events which in many ways were at the heart of this case – that is, those which were said to have occurred on Friday, 21 December 2017. It was common ground between the parties that it was the staff's traditional end of term Christmas party. What had started at one pub had moved to another, the Uplands Tavern. Ms Hughes alleged that, whilst waiting to be served at the bar, the Claimant walked aggressively up to her and pulled the zip down on her fitted top, exposing her to the rest of the pub. Ms Hughes' evidence was that she was shocked and embarrassed, pulled her zip up, found her friend, told her what had happened and thereafter left the pub and went home.

15. In his investigation interview on 18 October 2018, the Claimant was asked about pulling Ms Hughes' zip down and said that he could not remember the incident. (at [409] of the Bundle). In the disciplinary hearing, the Claimant said that he believed the incident did not happen because that explained why he could not remember it and he had not been drunk at the time. He also claimed that Ms Hughes account of the incident was inconsistent (at [642] – [643] of the Bundle). But the Claimant did volunteer that Ms Hughes told him on 24 December 2017

that he had pulled her zip down (in the course of an exchange of Facebook messages). This was happening a few days after the incident and was properly considered to be a contemporaneous report by Ms Hughes. The Claimant accepted that he apologised to Ms Hughes, a recollection that was consistent with Ms Hughes evidence that she expressed her concern and disquiet at what he had done.

16. The Respondent also had the recollections of Paul Griffiths, another tutor who in his investigation interview recalled the Claimant telling him on 8 January 2018 that he had undone Ms Hughes' zip (at [371] of the Bundle). Mr Griffith's evidence was further explored at the appeal re-hearing, He was questioned by the re-hearing panel about whether the Claimant said that he had actually unzipped Ms Hughes' top or merely been told that he had unzipped Ms Hughes' top. According to Mr Griffiths, the Claimant volunteered that he had pulled down Ms Hughes' zip. Mr Griffith's account was consistent with and corroborative of Ms Hughes' own account. He was questioned about it in the re-hearing and his account remained clear and consistent. The Claimant had told him on 8 January 2018 that he had pulled Ms Hughes' zip down in the pub on 21 December 2017 ([794] - [795] of the Bundle, at paragraphs 3 -16).

17. In contrast, the Claimant denied it happened. So why would Mr Griffiths say, without prompting, that the Claimant told him on 8 January 2018 that he had pulled down Ms Hughes' zip? The Claimant said conspiracy, that witnesses had been primed by Ms Hughes, an allegation not developed by his counsel in submissions for good reason – there was no meaningful evidence to support it. Far more plausible was that Mr Griffiths reported the Claimant telling him he pulled Ms Hughes' zip down because that is what the Claimant told Mr Griffiths he had done - pulled her zip down.

18. Another tutor, Gary Roberts, in his investigation interview, recalled the Claimant telling him about the zip incident. Mr Roberts recalled telling the Claimant that "*he was lucky he didn't get a black eye"* (at [388] of the Bundle). Again, this was consistent with the Claimant saying or believing that he had pulled down Ms Hughes' zip.

19. In his investigation interview, the Claimant said that Ms Hughes told him on 24 December 2017 in those Facebook messages (which both have subsequently deleted) to forget about the incident. Importantly, the Claimant said that he was not asked, prior to 8 January 2018, not to mention the incident to anyone else (at [409] of the Bundle). In contrast, Ms Hughes claimed to have told the Claimant on 24 December 2017 that she was willing to forgive and forget the incident if he never mentioned it again. At [307] of the Bundle, Ms Hughes in her investigation interview explained that she had told the Claimant not to mention it again, only to be contacted on the first day back at work on 8 January 2018 by Gary Roberts and Paul Griffiths, reporting that the Claimant had told them both about the zip incident. Thereafter and on the same day, Ms Hughes claimed that she confronted the Claimant about telling colleagues of the incident. Again, Ms Hughes account remained consistent since her

investigation interview (including such details as the Claimant saying in response to being confronted that he was not a bad person).

20. Another colleague, Coral Planas, recalled in her investigation interview witnessing Ms Hughes telling the Claimant off and hearing reference to something he had told the plumbers (at [378] of the Bundle). This again was wholly consistent with Ms Hughes account. In cross-examination, the Claimant said that this was a fabrication by Ms Planas and that it was only on 8 January 2018, after he had spoken about it to colleagues, that Ms Hughes told him not to mention the zip incident to anyone else.

21. We preferred Ms Hughes' account that she told the Claimant on 24 December 2017 in the course of the Facebook messages not to mention the incident to anyone else,. She has remained consistent in that, consistent that she confronted the Claimant about his failure to adhere to their agreement and consistent in what she said to the Claimant. In contrast, the Claimant couldn't recall conversation with Mr Griffiths or about telling him about the zip incident (as stated in his cross-examination).

22. The Claimant did not dispute that he spoke to the plumbing tutors on 8 January 2018 about zip incident but denied that he did so in breach of being asked by Ms Hughes not to mention it. Again, the Tribunal preferred Ms Hughes' recollection. She remained consistent in her account and it was plausible that due to embarrassment she would not want the incident repeated. The Claimant, under cross-examination, said that he was not confronted by Ms Hughes on 8 January 2018 for breaching their agreement and her trust (by telling others of the incident), whereas Ms Hughes remained consistent and detailed in that aspect of her testimony.

23. It follows that we found that the Claimant did pull down Ms Hughes' zip in the pub on 21 December 2017, as alleged. We also found that the Claimant was aware that it had happened. It did not appear credible that he would have no memory of the incident, given that we find it occurred. The Claimant could provide no explanation for why he could not remember the incident. He did not claim to have been drunk and did not claim to have problems generally with his memory. We also had Mr Griffiths reporting to the investigating officer and under examination in re-hearing that the Claimant expressly told him that he had pulled the zip down.

<u>Clothing Comments</u>

24. In her investigation interview, Ms Hughes alleged that in February 2018, the Claimant rang her after work and said simply "*it is not a good idea to wear dark knickers under light jeans*" and put the phone down (at [307] of the Bundle). The Claimant denied making that comment. However, Ms Hughes again remained consistent about this and the Claimant accepted making other comments about the appropriateness of Ms Hughes' clothing. For example, in his own investigation interview, the Claimant

denied making the comment about Ms Hughes' knickers but admitted telling her that her dress was too short (at [413]). Given Ms Hughes' credibility as a witness and that the recollection was of a very specific comment, we find on balance that the Claimant did say it as claimed.

25. That finding was further supported, in our judgment, by the Claimant's acceptance under cross-examination that he also told Ms Hughes in September 2018 to wear something more appropriate at the next Christmas party, an incident to which we return later.

Photographs

26. The Claimant, in his evidence, characterised a friendship with Ms Hughes that involved walks in the park. As far as we were made aware, this was the only one walk (on 27 April 2018) and that was part of an On Your Feet initiative. Ms Hughes was not challenged in her evidence that she simply asked the office generally if anyone wanted to go for a walk in Singleton Park and the Claimant volunteered. That was a somewhat different from the narrative of their relationship from that suggested by the Claimant, a purported friendship which he relied upon to suggest that Ms Hughes' behaviour after the zip incident was inconsistent.

27. Otherwise, it was not in issue that the Claimant took Ms Hughes' photograph in the park and sent it to the Respondent's marketing department, against Ms Hughes' wishes. The Claimant said it was an error and apologised.

28. In her investigation interview, Ms Hughes said that on 3 May 2018 she caught the Claimant taking sly photographs of her in the office (at [307] of the Bundle). These events culminated in Ms Hughes telephoning the Claimant on 14 May 2018 about the photographs he had taken and asking him to remove any images he had of her from his phone. Ms Hughes also recalled the Claimant saying "should I remove the photos of you in my flat too?" The Claimant confirmed that he was called by Ms Hughes on 14 May 2018 and asked about whether he had any photographs of her on his phone. He also confirmed that she unfriended him on Facebook on the same day (at [410] of the Bundle).

29. Why did Ms Hughes ring the Claimant on 14 May 2018 about photographs on his phone? In our judgment, such action was consistent with Ms Hughes' account of the Claimant taking photographs of her without consent and also her claim that several people in the office had expressed concerns by this stage about the Claimant's behaviour towards her.

30. The Tribunal was also struck by Ms Hughes' oral evidence of being sent a collage by the Claimant, where he had superimposed her face onto everyone else in the photographs. This was not challenged in cross-examination. Rather, it was suggested in submissions that it was a prank which was misinterpreted or taken out of context. In our view, it was

instead consistent with a troubling pattern of behaviour which was both intrusive and increasingly unnerving.

31. It was also consistent with Ms Hughes' evidence that when she rang the Claimant on 14 May 2018, he asked her about the photographs he had of her around his flat. We found, on balance, that such a comment was made, which whether true or not (about having photographs around his home) was intimidating and sinister.

The Further Zip Comment

32. The Claimant also said to Ms Hughes in the office "I'm okay with colours, its zips I have a problem with according to you."

33. In the course of his investigation interview, the Claimant accepted that he had made a comment about zips, after claiming that he was angry after Ms Hughes had revealed to someone on the telephone that he was colour blind (at [412] of the Bundle). In Ms Hughes oral evidence and under cross-examination, she stated that did not mention the Claimant by name. Rather, she had commented, in response to a query about a would-be student who was colour blind, that the department had a number of colour blind staff and students and so it would not be a problem. Even on the Claimant's own case, by this time, Ms Hughes had asked him not to mention the zip incident again. Even on the Claimant's case, Ms Hughes did not refer to colour blindness vindictively (and she denies mentioning him by name) but he chose to deploy the zip incident in that way, presumably knowing (or he ought reasonably to have known) that it would case distress to Ms Hughes.

The 'Mother' Comment

34. On 10 September 2018, Ms Hughes alleged that the Claimant told her, again in the office, that he hoped she would be wearing something more appropriate at the next Christmas party before adding:

> I spoke to my mother and if you'd been dressed appropriately, this would never have happened.

35. Ms Hughes reported the 'mother' comment in her investigation meeting (at [308] of the Bundle). If true, it was vindicative, threatening and sinister. It also revealed that the Claimant had told his mother that presumably Ms Hughes' zip had been lowered and concluded that, given what she was wearing, it was her own fault.

36. Ms Hughes also reported the comment to a number of colleagues (as described below), who were interviewed in the course of the investigation and confirmed the same.

37. The Claimant initially denied making the comment, first in his investigation interview (at [412] of the Bundle) and then at the disciplinary hearing (at [660]). However, under cross-examination, the

Claimant accepted that he had said "wear something more appropriate this Christmas" and also added the comment about speaking to his mother. He also accepted that he had lied at the investigation interview.

38. For those reasons, we found that the Claimant did make the comment as claimed. Even without the 'mother' aspect, telling Ms Hughes to wear something more appropriate after unzipping her top at the last Christmas party was vindictive, threatening and sinister. The Claimant was trying to blame Ms Hughes for having her zip pulled down. It also served to further undermine the Claimant's credibility and reliability as a witness, since he had previously denied making the comment during the investigatory and disciplinary procedures.

The Disciplinary Procedures

The Investigation

39. Following the 'mother' comment (on 10 September 2018), on 14 September 2018, Ms Hughes spoke to a number of colleagues, including Tim Clarke, who was the Claimant's line manager. The Tribunal was struck by his comments to Ms Hughes that if she didn't report this behaviour, Mr Clarke would not be surprised if in six months time, he heard that something had happened to Ms Hughes and about all those cases where if only something had been done sooner. We understood and appreciated how those comments both alarmed Ms Hughes but also chimed with how she was feeling at that time.

40. Ms Hughes reported her concerns to her own line manager and the matter was referred to Human Resources ('HR'). Ms Hughes met with Suzie Hughes, a senior HR officer and provided a statement. Thereafter, on or around 17 September 2018, Sarah King (the Respondent's Head of HR) appointed Cath Williams to investigate.

41. We found that the appointment of Ms Williams was not in breach of the Respondent's Disciplinary & Dismissal Procedures ('the Procedures'), as claimed by the Claimant. So far as relevant, Part 9 of the Procedures stated as follows (at [925] of the Bundle):

> Following consultation with Human Resources, cases of misconduct will normally be investigated by the relevant line manager (the Investigating officer) however In some circumstances it may be appropriate to appoint an Independent Investigating officer, for example, if there is a conflict of interest or if the scope of the investigation is potentially wider. Cases of potentially serious misconduct or gross misconduct will be investigated by an independent investigating officer. The Head of HR Services will appoint the investigating officer ensuring formal training in conducting investigations has been undertaken.

42. Nothing in that section required the appointment of an officer external to the Respondent (as was contended). The requisite independence was established by the investigating officer not being the Claimant's line

manager and Ms Williams confirmed that she had no prior knowledge of the allegations nor did she work with the Claimant or Ms Hughes.

43. The Claimant was informed on 20 September 2018 that allegations of disrespectful behaviour and sexual harassment had been made against him. It was agreed the Claimant would work from home whilst the investigation was on-going.

44. In the course of her investigation, Ms Williams interviewed a dozen witnesses throughout September and October 2018, based upon information provided by Ms Hughes. The Claimant was interviewed last. The Tribunal had no criticisms of that. It was right and proper that the Claimant was interviewed at the end so that all of the allegations and evidence could be put to him and he had opportunity to respond to all of it. Otherwise, allegations and evidence could be heard by Ms Williams without the Claimant having the chance to respond or comment.

45. Ms Williams' investigation report was dated 30 November 2018 and was provided by her to HR, on the basis of which the decision was taken to escalate the matter to a disciplinary hearing.

46. We concluded that for purposes of a fair dismissal process, this was by far a reasonable and adequate investigation. Numerous witnesses corroborated and were consistent with Ms Hughes' primary complaints. It was quite proper for the Respondent to decide that the Claimant had a case to answer and to escalate the matter to disciplinary hearing.

The Disciplinary Hearing

47. The disciplinary hearing was initially scheduled for 20 December 2018 but was moved to 21 February 2019 at the Claimant's request. The Respondent's letter of 28 January 2019 notified the Claimant of the new hearing date, informed him that he could be legally represented and warned that given the allegations, dismissal was a possible sanction. The letter also invited the Claimant to submit any evidence he wished to rely upon.

48. Ahead of hearing, the Claimant was provided with all the evidence gathered in the course of the investigation. In addition, witnesses were called to attend the hearing so that the Claimant and the disciplinary panel could question them.

49. The disciplinary panel, chaired by Mark Jones, (the Respondent's Principal and Chief Executive) was independent of the investigating officer and also had no prior involvement with the Claimant, Ms Hughes or the case generally.

50. The Claimant submitted that he was not made aware clearly enough of the allegations against him. At the disciplinary hearing, the Claimant was represented by his union official (Ron Jobs) and was able to address the panel, respond to the allegations and put his case. The Tribunal had

sight of the minutes of the disciplinary hearing and also a transcript, prepared by the Claimant, from the audio recording of the hearing.

51. We found that the disciplinary panel was impartial and probed the allegations, the evidence supporting the allegations and the Claimant's responses to those allegations. These were serious allegations and were robustly tested and challenged by the panel, by the Claimant and by the Claimant's union representative. Our conclusions as to the impartiality and appropriateness of the disciplinary panel and process were also reinforced by the oral evidence of Mr Jones.

52. We also noted that at the end of the disciplinary hearing, the Claimant's union representative informed the panel that the Claimant had stated his case as fully as he could (at [673] of the Bundle). Mr Jobs went on to address the main allegation (the zip incident from December 2017) and then addressed context and interpretation of what is and isn't appropriate behaviour in the workplace. He mentioned that sometimes people cross a line without realising it and make mistakes. He also raised the potential consequences for the Claimant of dismissal.

53. However, neither Mr Jobs nor the Claimant suggested that they did not know or understand the case against the Claimant. Rather, both Mr Jobs' closing statement and the manner in which the Claimant and his representative engaged in the disciplinary hearing was indicative of the opposite being true, namely that the Claimant was sufficiently aware of the allegations and able to address them in detail.

54. The disciplinary panel preferred the evidence of Ms Hughes and the Respondent's other witnesses to that of the Claimant. The panel thought that the zip incident did happen and that the Claimant had been told on a number of occasions about his inappropriate behaviour but had not addressed it. As such, the disciplinary panel concluded that the Claimant's behaviour constituted gross misconduct and dismissed him summarily.

55. On the evidence presented in investigation report, by the Claimant and orally during the disciplinary hearing, it was open to the panel to conclude that the allegations had been made out, that they constituted gross misconduct and that dismissal was an appropriate sanction.

56. The Claimant was informed of the outcome at the end of the hearing. It was also confirmed in writing in a letter to him dated 21 February 2019 (at [685] of the Bundle). It was argued on behalf of the Claimant that the letter could and should have detailed the findings and conclusions in better detail. We found that there was some merit in that argument. But that was in the context of the Claimant's awareness of the allegations made against him, amply demonstrated in the way that he actively and robustly engaged with them in the course of the disciplinary hearing. To that end, we did not find that any shortcomings in the dismissal letter materially undermined the fairness of the disciplinary process.

57. The Claimant was afforded a right of appeal which he exercised.

The Appeal/Re-hearing

58. In a letter to the Respondent dated 28 February 2019, the Claimant set out what he believed was wrong with both the investigation and disciplinary processes (at [687] of the Bundle). As the Claimant had also questioned the fairness of the process, the Respondent agreed to conduct a full re-hearing (per Paragraph 17.3 of the Procedures at [932] of the Bundle).

59. The Claimant was notified of the date of the appeal by way of re-hearing. It was originally scheduled for 20 March 2019 but the date was moved at the Claimant's request, as his solicitor was not available. He asked for it to be rescheduled for late April/early May. On 5 April 2019, the Respondent notified the Claimant that the re-hearing would now take place on 7 May 2019. On 11 April 2019, the Claimant emailed the Respondent to say that he had a holiday booked and would be out of the country on 7 May (at [745] of the Bundle). By a letter dated 16 April 2019, the Respondent informed the Claimant that date had again been moved, this time to 8 May 2019 (at [747] of the Bundle).

60. On or around 14 March 2019, the Claimant had submitted 26 pages of questions he wanted asking of the Respondent's various witnesses (at [700] – [725] of the Bundle). This again supported a view that the Claimant fully understood what the allegations were and what the evidence was that purported to support those allegations. Ms King condensed them into five pages of questions and put them to the witnesses ahead of the re-hearing (at [750] – [764] of the Bundle). Their answers were provided to the Claimant.

61. On 7 May 2019, the Claimant sent a statement to the Respondent, in which he stated that he would not be attending the re-hearing and setting out points he wanted to be considered, in addition to the evidence and submissions already provided (at [765] of the Bundle).

62. The appeal by way of a re-hearing proceeded on 8 May 2019 in the Claimant's absence. It was chaired by Gary Williams (one the Respondent's governors) and was independent of the disciplinary panel and the investigating officer. The minutes of the hearing and the Claimant's transcript from the audio recording showed that the panel fully tested the evidence presented to it, asking probing questions of Ms Williams and her investigation. They questioned Ms Hughes. They questioned Mr Griffiths (wherein he clearly stated that the Claimant told him that he did unzip Ms Hughes' top). Despite the fact that the Claimant had not attended, the re-hearing panel did not simply go through the motions. They robustly tested the evidence and considered the arguments advanced by the Claimant.

63. The comprehensive and robust nature of the re-hearing came across from the transcripts and also from the oral evidence to the Tribunal of Mr Williams.

64. The outcome of the appeal re-hearing was contained within a letter to the Claimant dated 8 May 2019 (at [766] of the Bundle). Again, it could have been more detailed, perhaps even more so as the Claimant did not attend the re-hearing. But again, the Tribunal found that the manner and extent to which the Claimant engaged in the re-hearing, albeit in writing, was indicative of his understanding and comprehension of the allegations against him and the evidence adduced to support those allegations.

65. Similarly, there was nothing to suggest that either the disciplinary outcome letter or re-hearing outcome letter prevented the Claimant from pursuing his current claims in the Tribunal. Indeed, his grounds of claim were detailed, coherent and comprehensive, again indicative of a full understanding by the Claimant of why he was dismissed.

The Claimant's Criticisms of the Evidence Against Him

66. The Claimant raised a number of general criticisms with the evidence relied upon by the Respondent to dismiss him.

67. The Claimant relied upon his own presentation of Ms Hughes' behaviour towards him following the zip incident. Examples included claiming that he had been invited to her home to fix her shower, that they had gone on walks together and that she had brought in to work gifts for him (see, for example, the Claimant's evidence to the disciplinary panel at [649] of the Bundle and his appeal statement at [692] & [694]). This was relied upon by the Claimant to undermine the evidence against him and bolster his contention that Ms Hughes' behaviour towards him was inconsistent with the allegations she had made.

68. However, there was real difference between the Claimant and Ms Hughes as to their respective perception of the relationship. There was in reality only one walk, referred to above (in Singleton Park as part of a health initiative). Ms Hughes explained in her evidence how her shower had a fault and she raised it in the office, as she works with tradespeople across various disciplines. The Claimant had explained to her that it was an electrical fault and agreed to repair it, for which Ms Hughes paid him. She had made use of other skilled work colleagues in the past. Most importantly, even taken at its highest, absolutely none of this excused the Claimant's behaviour towards Ms Hughes.

69. The Claimant made much of an error by Ms Williams that Ms Hughes had given army bag to the Claimant, not other way round (as erroneously reported by Ms Williams in the course of the disciplinary process). In our judgement, that error was utterly immaterial to the core allegations found against the Claimant. In addition, Ms Hughes' account did not categorise it as a gift (as was continuously claimed by the

Claimant). Rather, the Claimant was after an army bag, Ms Hughes' husband was in the army and he had a spare bag, which Ms Hughes gave to the Claimant.

70. The Claimant made a general claim in his witness statement and his oral evidence that all the witnesses in the disciplinary process had been primed, evidence had been tampered with and there was a conspiracy by the female members of staff, with the tacit collusion of male staff, to have him removed from his job. The Claimant relied on evidence from witnesses of things they said they were told by Ms Hughes.

71. In reality, however, there was no evidence of witnesses being primed, nothing to suggest that evidence had been tampered with, withheld or doctored and no evidence of a conspiracy. Rather, there was extensive evidence that supported Ms Hughes' account and upon which the disciplinary panel, the re-hearing panel and this Tribunal were all able to find that the conduct complained of happened. We are the third independent body to be presented with the evidence, to have that evidence tested and to have found against the Claimant.

72. The Claimant also claimed throughout his testimony that Ms Hughes said that he had been harassing her continuously for nine months (presumably being the period from December 2017 to September 2018, when the investigation began). The Claimant sought to rely on that to seek to undermine Ms Hughes' evidence, given that they were able to work together and that no formal compliant was made until September 2018. However, that was not what Ms Hughes ever said whether to the investigating officer. in the disciplinary hearing, in the appeal or to the Tribunal. The Claimant was starting from a false premise and using that to question Ms Hughes' motives and the allegations made against him (his behaviour versus allegations argument). In addition, Ms Hughes provided a cogent and coherent explanation in her oral evidence for why she did not report the Claimant's behaviour until September 2018. She described how she initially wanted to just try and forget what had happened in the pub, to give the Claimant another chance to make amends and she described how things did initially improve. However, from May 2018 onwards, she felt things began to deteriorate again, culminating with the awful 'mother' comment.

Application of the Findings of Fact to the Law

Unfair Dismissal

73. It was not in dispute that the Respondent dismissed the Claimant by reason of conduct or that he had been continuously employed for 11 years by the time of his dismissal.

74. Conduct is a potentially fair reason for dismissal pursuant to section 98 Employment Rights Act 1996 ('the ERA Act 1996').

75. What was in issue was whether the decision to dismiss the Claimant was substantively & procedurally fair.

Substantive Fairness

76. As this was a conduct dismissal, the well-known "Birchall" principles required determination, as follows:

    76.1. Whether the Respondent genuinely believed that the Claimant had engaged in conduct for which he was dismissed;

    76.2. Whether the Respondent held that belief on reasonable grounds;

    76.3. Whether in forming that belief, the Respondent carried out proper and adequate investigations; and

    76.4. Thereafter, whether the Claimant's dismissal was a fair and proportionate sanction to the conclusions reached by the Respondent.

77. Mr Johns in his submissions accepted that the Respondent's belief that the Claimant had acted as alleged towards Ms Hughes was genuinely held (per the first principle, above).

78. Given our findings, the Tribunal was of the view that the Respondent's genuine belief was reasonably held and arose from proper and adequate investigations. The Respondent was presented with a wealth of consistent, coherent and plausible evidence regarding the Claimant's conduct. That evidence was properly weighed and considered by the investigating officer, the disciplinary panel and the re-hearing panel. It was tested throughout and did not falter.

79. The Respondent concluded that the Claimant engaged in inappropriate behaviour towards a female colleague and that it constituted gross misconduct. It is worth reiterating what that conduct was - pulling down the zip of her top and exposing her in a busy pub; agreeing not to tell anyone else about it and then breaching that agreement at the very first opportunity; making references to the incident in a spiteful manner; taking photographs without permission; making inappropriate comments about her clothes and, perhaps most sinister and troubling of all, the suggestion that in some way Ms Hughes deserved what happened to her (the so-called 'mother' comment). In our judgment, having reached a conclusion of inappropriate behaviour, based upon a genuine belief, reasonably held and following a thorough investigation, dismissal was undoubtedly a fair and proportionate sanction. It was squarely within the range of reasonable responses available to the Respondent.

80. As such, the Claimant's dismissal was substantively fair.

Procedural Fairness

81. As we have found, there was a thorough investigation by an independent officer. The Claimant was invited to meetings at the investigatory, disciplinary and appeal stages of the process. He was provided with all the information and evidence in the Respondent's possession. He was afforded the opportunity to present his own evidence and test the evidence obtained by the Respondent. He was made aware that dismissal was a possible sanction. He was given notice of the disciplinary and appeal hearings. Indeed, both hearings were moved to accommodate him and at his request. Both hearings were chaired by panels not previously involved in the process and each tested the evidence in an even-handed and robust way.

82. Given the issues raised by the Claimant in his appeal against the decision of disciplinary panel, his appeal was by way of a full re-hearing. The Claimant was permitted to bring not just a representative but legal representation to both the disciplinary and appeal hearings. He was represented by his union at the disciplinary hearing but chose not to attend the appeal re-hearing. Despite that, the re-hearing panel interrogated the evidence presented by the Respondent and ensured that the hearing was fair and balanced, which was all the more important given the Claimant's absence.

83. In particular, and despite his claims to the contrary, the Claimant was fully aware of the allegations against him and the conduct complained of. That was evident from the manner and depth with which he engaged in all steps of the disciplinary process. What shortcomings there may have been in the dismissal and appeal letters fell some distance short of rendering the process as whole as unfair. In addition, they were again mitigated by the clear understanding the Claimant had of the case against him, further reinforced by his ability to file a detailed and comprehensive grounds of claim with the Tribunal on 12 July 2019.

84. For those reasons, we found that the procedure followed by the Respondent, from the initial investigation to the re-hearing outcome, was fair.

85. As such the claim of unfair dismissal was not made out and is dismissed.

Wrongful Dismissal

86. Section 86 of the ERA 1996 affords rights of notice to employees, the length of which is determined by their period of continuous employment with their employer. Any failure by the employer to give correct notice constitutes a breach of the employee's contract of employment, save where either the employee waives his rights to, or accepts payments in lieu of, notice. In addition, an employer is entitled to dismiss an employee without notice where satisfied that the employee's conduct amounted to a repudiatory breach of the employment contract and discloses a deliberate intent to disregard the essential requirements of

that contract. The employer faced with such a breach by an employee can either affirm the contract and treat it as continuing or accept the repudiation, which results in immediate dismissal.

87. It was the Respondent's case that the latter applied to the Claimant – that his conduct constituted a fundamental breach of his employment contract. The Tribunal found that the Claimant did engage in inappropriate and at times sinister, sexualised and threatening behaviour towards Ms Hughes. It was, on any basis, serious misconduct, directed towards a fellow employee. In our judgment, the Respondent was quite entitled to consider it to be gross misconduct and a fundamental breach of the Claimant's employment contract. As such, the Respondent was entitled to dismiss the Claimant without notice and the claim for wrongful dismissal fails.

Direct Discrimination

88. The claim of direct discrimination (as defined by section 13 of the Equality Act 2010) was premised upon an alleged false perception by the Respondent that the Claimant had OCD. That arose from comments made by a number of witnesses in the investigatory and disciplinary processes that the Claimant had obsessive and compulsive tendencies. The Claimant did not contend that he was disabled, whether by reason of OCD or otherwise.

89. The Tribunal found no evidence that the investigating officer, the disciplinary panel or the re-hearing panel thought that the Claimant had OCD, still less that they mistakenly believed that he was disabled as a result (as defined by section 6 of the Equality Act 2010). The less favourable treatment relied upon was the disciplinary process and the resulting dismissal. But again, there was no evidence that the disciplinary process was instigated, or that the Claimant was dismissed, because of disability or OCD. As we have found, it was clear why the Respondent dismissed the Claimant. It was because of his conduct and behaviour towards Ms Hughes.

90. Whatever views some of his former colleagues may have had of the Claimant, and despite Mr Johns eloquent submissions on the point, there was simply nothing to suggest that such views infected or influenced those charged with conducting and determining the disciplinary process. Rather, the focus was and remained on the substantive allegations of misconduct, focussed in particular upon the Claimant's behaviour towards Ms Hughes.

91. As the unfavourable treatment of dismissal was not by reason of perceived disability, the direct discrimination claim is similarly not made out and dismissed.

EMPLOYMENT JUDGE S POVEY

Dated: 7 July 2021

Order posted to the parties on
12 July 2021

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For Secretary of the Tribunals
Mr N Roche