EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr N Yaseen	Asda Stores Limited

Heard at: Watford (and CVP in part)
On: 10 to 13 August and 2 September 2021 (13 August and 2 September in chambers)

Before: Employment Judge Manley
Members: Ms H Edwards
Mr T McLean

Appearances
For the Claimant: Mr F Mortin, Counsel
For the Respondent: Mr P Wilson, Counsel

Urdu Interpreter: Mr Saleem

RESERVED JUDGMENT

1. The claimant was disabled at the material time.

2. The majority of the tribunal finds that claimant was dismissed for a reason relating to his conduct.

3. The minority of the tribunal (Mr T McLean) finds that claimant's dismissal was unfavourable treatment because of something arising in consequence of his disability.

4. The dismissal was both procedurally and substantively unfair.

5. The claimant unreasonably failed to comply with the ACAS Code of Practice on disciplinary and grievance procedures when he failed to appeal the dismissal. The tribunal intends to reduce the compensatory award by 10% for that failure.

6. The claimant's conduct was not serious enough to entitle the respondent to dismiss him without notice. He is entitled to pay in lieu of notice unless adequately compensated in any awards made for the unfair dismissal.

7. The matter is listed by agreement for one day on **5 November 2021** for remedy to be determined if it is not settled between the parties before then. Orders are made to ensure that hearing is effective.

REASONS

Introduction and issues

1. By a claim form presented on 26 March 2020, the claimant brought various claims against the respondent following a dismissal which occurred on 6 December 2019. The claims were for unfair dismissal, wrongful dismissal, direct disability discrimination and discrimination for something arising in consequence of disability. After a preliminary hearing on 14 December 2020, the respondent having responded to the claim defending it, the parties had agreed a list of issues. That list of issues appears in the bundle between pages 72 to 75 and are set out below: -

   Unfair Dismissal

   1 Was the Claimant dismissed for a potentially fair reason pursuant to s.98(2)(b) of the Employment Rights Act 1996 (ERA), namely misconduct?

   2 Did the Respondent act reasonably in treating the Claimant's conduct as a sufficient reason for dismissing the Claimant, in that:

   (a) did the Respondent form a genuine belief that the Claimant was guilty of misconduct?

   (b) did the Respondent have reasonable grounds for that belief?

   (c) did the Respondent form that belief based on a reasonable investigation in all the circumstances?

   3 Was the dismissal of the Claimant fair in all the circumstances (whether procedurally or substantively) (pursuant to s.98(4) of the Employment Rights Act 1996)? In particular:

   (a) Was the dismissal within the band of reasonable responses available to the Respondent (substantive fairness)?

   (b) Did the Respondent follow a fair procedure when dismissing the Claimant (procedural fairness)?

   4 Did the Respondent follow the ACAS Code when dismissing the Claimant?

   5 If the Claimant's dismissal is found to be unfair, which is denied by the Respondent, did the Claimant's conduct cause or substantially contribute to his dismissal (contributory fault)? If so, by what proportion would it be just and equitable to reduce the compensatory award?

   6 If the Respondent failed to follow a fair procedure, can the Respondent show that following a fair procedure would have made no difference to the decision to dismiss (Polkey deduction)? If so, by what proportion would it be just an equitable to reduce the compensatory award?

7 If the Respondent failed to comply with the ACAS Code, was its failure reasonable? If the Respondent's failure to comply with the ACAS Code was unreasonable, is it just and equitable to increase any award made to the Claimant?

8 Has the Claimant complied with the ACAS Code? If not, should any compensatory award made to the Claimant be reduced to take into account the Claimant's unreasonable failure to comply with the ACAS Code? If so, by what proportion should the compensatory award be reduced?

9 To what extent, if any, has the Claimant mitigated his losses?

10 To what, if any, compensation is the Claimant entitled?

Wrongful Dismissal

11 Did the Respondent breach the Claimant's contract of employment by dismissing him without notice, or without pay in lieu of notice?

Direct Disability Discrimination

12 Did the Respondent treat the Claimant less favourably than it would treat the relevant comparator who did not share the same disabilities as the Claimant?

13 The Claimant alleges that:

(a) the less favourable treatment was the dismissal.

(b) the real comparators are:

I. Mohammed Jhangir Yaqub

II. Karl Slater

III. Jackson Pereira

IV. Christo Kypragoras

V. Ghulam Murtaza

VI. Javaid Hussain

VII. Fahad Kayani

14 In the alternative, the Claimant alleges he was treated less favourably than the appropriate hypothetical comparator who was not disabled but also had breached the shopping at work policy.

15 If so, was the less favourable treatment because of the Claimant's disabilities contrary to the Equality Act 2010?

Definition of Disability

16 Does the Claimant have physical or mental impairment(s)?

17 If so, do the impairments have a (1) substantial, (2) adverse effect on the Claimant's ability to carry out normal day-to-day activities?

18 If so, is that effect long term? In particular, when did it start and:

(a) have the impairments lasted for at least 12 months?

(b) Are or were the impairments likely to last at least 12 months or the rest of the Claimant's life, if less than 12 months?

19 N.B. in assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood.

20 Are any measures being taken to treat or correct the impairment?

21 But for those measures would the impairment be likely to have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

Section 15: Discrimination arising from disability

22 The allegation of unfavourable treatment as "something arising in consequence of the Claimant's disabilities" falling within section 15 Equality Act 2010 is the Respondent dismissing the Claimant pursuant to the Claimant breaching the "Shopping at Work" policy.

23 Does the Claimant prove that the Respondent subjected the Claimant to the unfavourable treatment?

24 Did the Respondent treat the Claimant as aforesaid because of the "something arising" in consequence of the disabilities? The Claimant alleges that the "something arising" is the following:

(a) the items being too heavy for the Claimant to lift due to his alleged disability and he was unable to take the items upstairs, resulting in him leaving them in the warehouse so he could return to them later and transport them more easily to his wife's car; and

(b) The Claimant being unable to store the shopping in a car owing to the pain that was caused by his disabilities.

25 Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim, such aims including:

a) Ensuring that all products are available for purchase by the Respondent's customers;

b) Ensuring that the Respondent's employees act in accordance with the Respondent's policies; and

c) Ensuring the Respondent's employees do not benefit personally by acting outside of the Respondent's policies;

Remedy

26 If the Claimant's claims are upheld: what remedy does the Claimant seek?

27 If the Claimant seeks reinstatement or reengagement, is it practicable for the Respondent to comply with such an order?

28 What financial compensation is appropriate in all of the circumstances?

29 Should any compensation awarded be reduced in terms of Polkey v AE Dayton Services Ltd [1987] ICR 142 and, if so, what reduction is appropriate?

30 Should any compensation awarded be reduced on the grounds that the Claimant's actions caused or contributed to their dismissal and, if so, what reduction is appropriate?

31 Should there be an adjustment of up to 25% (pursuant to s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992) to reflect the extent either party did not follow the ACAS Code of Practice on disciplinary and grievance procedures?

32 Has the Claimant mitigated their loss?

At the commencement of the hearing the claimant made an application to add something to that list of issues. It having been referred to in the claim form, the tribunal took the view that this was a clarification of the claimant's claims and agreed to that clarification. The respondent objected to that, submitting it was an application to amend the claim, that the issues had been agreed and any such change would prejudice the respondent. The extra section now appears at 24(c) and reads as follows:

> *"The claimant's inability to fill all aspects of his contractual role due to limited mobility".*

2. The question of whether or not the claimant was disabled had been resolved in that the respondent accepted that, at least one aspect of his health which was a bad back was related to the other issues about sciatica and disc prolapse, was sufficient, in this case to amount to a disability. The claimant had submitted a detailed impact statement which set out problems that he has with mobility and other normal day to day activities. This led to the respondent accepting that he was disabled and it was clarified at the commencement of the hearing that was no longer an issue as far as the respondent is concerned. The tribunal accepts that the claimant was a

person with a disability at the relevant time, namely in the period during 2019 leading up to his dismissal.

The hearing

3. The hearing was mostly an attended hearing. One of the tribunal members needed to join by CVP and that gave us occasional difficulties with the audio part of the technology.

4. We were grateful for the services of Mr Saleem who acted as an interpreter for the claimant throughout the proceedings.

5. The tribunal read the three witness statements and the essential part of the bundle of documents which runs to 385 pages.

6. For the respondent we heard from Mr Chapman, who is the Fresh Section manager at the High Wycombe store where the claimant worked and who carried out some health and wellbeing meetings with the claimant and investigated the conduct matter. We also heard from Mr B Hussain, who, at the time, was the George and General Merchandise Trading Manager at the High Wycombe store and was the dismissing officer. We heard from the claimant himself before receiving written and oral submissions.

7. We reserved judgment and began to deliberate on the fourth day, Friday 13 August. We concluded our deliberations on 2 September. We agreed a remedy date in the event that the claimant succeeded in any or all of his claims.

The facts

8. The tribunal find the following relevant facts.

9. The claimant began working for the respondent at its High Wycombe store, in the warehouse part of the store on 5 April 2016. The respondent is a large supermarket chain with approximately 140,000 employees. The claimant completed a Health and Screening record (page 214) which indicated that he had back or neck problems and the details he provided indicated that picking heavy items might be an issue. It was also recorded at the interview stage - "*struggles to understand English*" (page 366). As the tribunal understands it, the claimant can understand some basic spoken English but he asks his wife to read documents in English to him. He required the assistance of an interpreter throughout this hearing and it was clear to the tribunal that he had limited understanding of English.

10. The respondent has a Handbook for its employees which includes a number of policies. The tribunal was shown some of those policies including those which relate to Occupational Health, CCTV, Diversity and Inclusion, Health and Wellbeing and a number of guidelines which have been written for guidance of managers when implementing those policies.

11. The claimant's evidence was that he saw some of these policies and his wife read them to him. In particular, the respondent has a Shopping at

Work policy (pages 88-89). For the purposes of this hearing the important section is under "General Shopping Rules) which reads:

> *"Goods must be paid for at the time of shopping and must not be removed from the shop floor with the intention of paying for it later".*

12. A new document was added to the bundle by the respondent on the second day. This was a document which was headed "*Conflict of Interest – Personal Gain*" (page 385). This reads, under "*Scenario*":

> *"Purchasing mark down items which have not been made available to customers or hiding items for later purchase"*

The potential level of misconduct is stated to be gross misconduct.

13. As the tribunal understands it, this is a document which is guidance for managers when considering conduct matters. The respondent also uses standard forms for managers to complete at various stages of the Health and Wellbeing processes and the disciplinary processes. Amongst other matters there is an Investigations Guide (page 109). An important section of this reads as follows:

> *"Investigations*
>
> *It's really important that a formal investigation is carried out as part of any formal process and it must be fair and thorough to make sure the Hearing Manager has all the information they need to make an informed decision about next steps….*
>
> *The purpose of an investigation is to find out the facts of the case by;*
>
> - *Interviewing the colleague*
> - *Interviewing witnesses*
> - *Gathering evidence that supports the colleague's case as well as evidence that doesn't."*

14. The Disciplinary Policy sets out various levels of sanctions from disciplinary counselling through to progressing a case to a disciplinary hearing. Again, there is advice on conducting an investigation (page 123) and how to come to a decision. Three bullet points within that guidance read as follows:

> - *"Review and consider any mitigating circumstances and ensure these have been explored"*
>
> - *"How will a warning provide the colleague with the opportunity to improve their behaviour?"*
>
> - *"Does the colleague give an indication they regret their actions and will improve?"*

15. There is also a definition of mitigating circumstances which reads:

> *"Mitigating circumstances may explain or be relevant to why a colleague may have acted in a certain way. The circumstances may result in a warning being reduced or stopping the hearing if the circumstances are particularly significant."*

16. It is fair to say that there is a considerable amount of reading for any employee who wishes to be aware of the various policies.

17. The claimant was given a letter at the commencement of employment which set out that his job title was Service Colleague and he accepted that he signed to show that he had understood the terms and conditions and read the Employee Handbook. As we understand his evidence, it was read to him over a period of time by his wife.

18. The claimant's line manager was Mr Wilkhu as he worked primarily in the warehouse. Mr Chapman had been the claimant's manager when he was in charge of "Ambient" section between 2017 and June 2018 but he was not his manager at the time of the events we will shortly come to and had become Fresh Section Manager. Mr Hussain was never the claimant's line manager and was unaware of him before the disciplinary hearing, except to exchange greetings when they passed in the store.

19. The claimant's back issues, which include sciatica, got worse and he had to have a period of sick leave between 1 November 2018 and 14 January 2019 after which he was put on light duties. An OH report was available and the manager at the time recorded this (page 242) as, "*No heavy lifting or pushing until it goes away naturally."*

20. The claimant then had a further period of sick leave from 29 July 2019. The sick notes indicated that the claimant was not fit for work, that he had backache and right sided sciatica. The sick notes ran until 8 September 2019.

21. For reasons the tribunal do not fully understand, Mr Chapman was asked to deal with the health and wellbeing meetings which needed to follow. Mr Chapman's evidence was that he had been asked to carry out the health and wellbeing matters with the claimant because he was experienced in them. He did not give us any examples of that experience. A meeting was arranged for August 2019. The claimant says that he came in from sick leave to attend that meeting but was told that Mr Chapman was too busy to have the meeting. Mr Chapman could not recall that incident. The claimant's line manager completed an absence form indicating that the claimant was returning to work on 5 September 2019. On that day there was a return to work interview with Mr Chapman which indicated that there was to be another referral to Occupational Health and the claimant was referred to counselling. This indicates a level of concern about the claimant's return (page 266).

22. On that same day, Mr Chapman also noted a number of matters on the counselling form. Shortly after that, the claimant produced a statement of fitness for work which said that he might be fit for work with amended duties. The comments read as follows:

> *"Has had long-term back problems. Was under physio. MRI shows disc prolapse. Has been referred to see back specialist. Please allow light duties."*

(page 268)

23. The claimant also gave some evidence about an incident that occurred in September and October. In his witness statement (paragraph 52-54), he said there had been a discussion with Mr Chapman when the claimant asked for an electric pump to help with lifting and Mr Chapman asked the claimant to demonstrate how many pallets he could move using a manual pump. Mr Chapman said he could not recall the incident and that he did not think he would have asked the claimant to demonstrate as it would not be appropriate.

24. The claimant was then called to the first health and wellbeing meeting on 11 October. The claimant was accompanied by Mr Azzam who he told us did some interpreting for him as he also spoke Urdu. Mr Chapman was accompanied by Mr Lambert who took the notes but incorrectly dated those notes as 11 September with a further mistake towards the end about the next meeting.

25. The claimant's case is that he asked for an interpreter at this meeting and at the subsequent meetings that we will come to, including his disciplinary meeting. Those attending those meetings deny that he made that request. It is not recorded in any of the notes. The tribunal is not able to find that the claimant asked directly for such an interpreter although it is possible that those attending should have realised that, from time to time, he might have had some issues following what was being said.

26. In any event, the health and well-being meeting proceeded on 11 October 2019 and there was discussion about the claimant's health and what treatment he was having. He was asked how long he could stand and walk and what tasks he could carry out. The claimant asked about changing his shift times but this was not agreed. The claimant was waiting to see a further specialist and agreement was reached that there would be another meeting in November.

27. The claimant had a telephone consultation with Occupational Health who then prepared a report dated 4 October (page 283). It is not entirely clear when the respondent first saw that report but it seems likely that it was not before Mr Chapman at that meeting in October.

28. That Occupational Health Report gave this management advice:

> *"To continue supporting Mohammad, if feasible, I would advise that the adjustments remain in place long term. If this cannot be accommodated in the warehouse, he could be moved to a light active role eg reductions, price changes and waste.*
>
> *If the adjustments are not sustainable long term, I would advise that you request a physical capacity evaluation via PAM Wellbeing. The assessment will provide you with more information on what he can*

and cannot do physically to help in the decision making regarding his suitability for alternative roles."

29. The claimant recalled an incident involving Mr Sweetser, the General Store Manager, and Mr Chapman on 13 October (paragraphs 86-89). He said he was called into an unscheduled meeting as he was clocking in. The claimant said the tone was confrontational as Mr Sweetser was asking for a sick note and commented on him not fulfilling his tasks whilst he was being paid. The claimant said Mr Sweetser sent him home for the day. The Tribunal has not heard from Mr Sweetser and Mr Chapman told us that he did not believe there was a meeting but that there was a discussion. He did not believe that Mr Sweetser sent the claimant home and could not recall whether he had shown Mr Sweetser the OH report, or whether he had received it by then. He did not recall Mr Sweetser making the comments about the claimant's health and not fulfilling his tasks, saying that, in his opinion, it was not something Mr Sweetser would say.

30. The claimant was invited to a further Health and Well-Being meeting by Mr Chapman on 19 November 2019. At this point the claimant was accompanied by Ms Jelly who was a GMB rep. Again, Mr Lambert took the notes.

31. Although the claimant feels that those notes are not accurate, it is difficult for the tribunal to determine which parts may be somewhat inaccurate or whether they are a summary of what was said. In a large part, we have taken them as being relatively accurate.

32. The claimant repeated that he had backache and sciatica and early in the discussion Mr Chapman is quoted as saying "*For last year you have done light duties. The duties you are doing now is not a job role. One year is very fair for light duties*". He then went on to say, "*This meeting is to say do your job role or do different role you can do."* Mr Chapman then appeared to summarise the warehouse job and asked the claimant whether he could do all these (tasks). The claimant said that he could not unload. He was asked whether he had tried and he said yes but it was painful. He was asked if he could lift and he said he could lift 10 to 12 kilograms. Mr Chapman said, "*To summarise you cannot fulfil the warehouse role. What can you do? Can you stand".* The claimant was asked which department he could move to and the claimant said, "George or Bakery". Mr Chapman also made reference to the claimant's language concerns although there is nothing in the notes to indicate the claimant himself had raised those "concerns". Mr Chapman asked the question, "*If we see that improvement why has your productivity not improved. Do you want to work?"* The claimant replied "*I can't do all my expected duties*." Mr Chapman then said:

"George involves heavy lifting. Bakery stock cages can be heavy and the check out goods can be very heavy to scan. You can't move around on a checkout. If you have no position in store you will have to fulfil warehouse role in full. If you can't do the job then see your GP and tell him/her."

33. The claimant said that he was going to see the doctor next week and that he hoped to have a hospital appointment in three months. Mr Chapman asked

if there was anything he could do to help and the claimant said he could contact his GP. Mr Chapman asked, "*What can Asda do to help you fulfil your entire job role? You haven't' proved you can do your role. If I can't put you somewhere else then you must fulfil warehouse role".* The claimant said he would do it when he was properly fit and Mr Chapman referred again to the fact that it had been a year. Mr Chapman then read the OH summary and said: "*Further OH support will be looked into*." There was then a note, "*Jamie summarises findings*". The tribunal is not sure what that means but the final comment recorded by Mr Chapman reads, "*In future please try to fulfil all your job role".*

34. Mr Chapman filled in a "Health and Wellbeing Plan" for the claimant (page 297). He left blank the "Reasonable Adjustment Offered" section. The summary of points includes the comment:

> *"Yaseen has said himself he cannot fulfil his job role to its full capacity.*
>
> *Yaseen understands the business need for him to complete the job role. This will also be the case if he is able to transfer to a different department – full job role.*
>
> *Yaseen has been accommodated for over one year on reduced duties which is no longer feasible for his position."*

It goes on:-

> "*Yaseen understands the need to attend his full job role daily."*

35. An outcome letter from that meeting appears at page 300. Mr Chapman's evidence was that he did not sign that letter nor is it entirely clear that he saw it before it was sent so we do not know the author of the letter. In any event, it is sent as if written by Mr Chapman. It records who was at the meeting and summarises some of the points that were said to have been discussed. One bullet point reads, "You consider bakery or George department suitable for you to work, however we do not have any vacancies at this time." It goes on:

> "*We are pleased that the Occupational Health Service has provided you with support and guidance. We discussed about the adjustments kept in place over the last 11 months and unfortunately it is not feasible for Asda to consider further adjustments in the warehouse department at this stage."*

36. Something had occurred a couple of days before this meeting. It is unclear to the tribunal whether Mr Chapman was aware of this incident before he met with the claimant then or whether it came to his attention later.

37. What had happened is as follows. On 17 November, the claimant saw the waste trolley with some items that he was interested in buying. It is the respondent's policy that employees can purchase marked down products. The claimant spoke to Mr Kypragoras who was working at the waste cage and asked if he could have those items. It appears that Mr Kypragoras

answered that he would need to mark the products down and a later statement from Mr Kypragoras suggests that he said something about them going on the shop floor. In any event, the claimant saw the products had been marked down. The total value of the items after being marked down was £13.29. They included washing powder, flour, cereal and chocolate. The reduction was significant but there is no suggestion by the respondent that there was anything untoward about them being marked down. The products had been left and the claimant could not pay for them then as the store was closed. The claimant therefore took the items, put them on a dolly and put a piece of cardboard over the top of them to mark them as his.

38. The claimant's evidence is that other people would often do this, sometimes putting notes on the top to show for whom they were reserved. The claimant's evidence is that a colleague also asked for some cereal boxes on the same night, that he also left them in the warehouse and did not pick them up until 22 November. The claimant's evidence is also that other colleagues regularly left items in the warehouse or near the GIC Office. The claimant said he left the dolly with the marked down products in the warehouse area next to the GIC Office.

39. The claimant did not work the next day and his next shift was on 19 November. As already set out above, that was the day upon which the claimant had the Health and Wellbeing meeting with Mr Chapman. After that meeting the claimant asked to go on a break, took the items from the dolly, put them in a trolley, having taped up some of the damaged parts, took them to the till and paid for them. The claimant's evidence is that he saw Mr Chapman watching him but he did not speak to him. Mr Chapman does not recall that. He then took them back to the warehouse. He left them in Asda carrier bags. At the end of his shift, he took the items to his car.

40. Mr Chapman's evidence was that a colleague told him that they had seen the claimant coming out of the warehouse with a trolley with marked down products. Mr Chapman could not recall which colleague had spoken to him although he remembered that it was definitely not Mr Kypragoras. Nor could he remember the date upon which he was given this information. Nor could he remember whether it was before or after the Health and Wellbeing meeting. The tribunal were somewhat surprised by Mr Chapman's inability to recall some facts. It is common for people to find it difficult to accurately remember things that happened, particularly if it was some time ago, but Mr Chapman's memory was particularly poor on some matters.

41. In any event, Mr Chapman looked at CCTV footage for 17 November which showed the claimant going to the waste cages, taking products that were marked down, the claimant putting them on a dolly and covering them with cardboard. Mr Chapman's notes (page 320) also suggest that he looked at the CCTV footage for 19 November which showed the claimant paying for the goods. He did not record that in his witness statement so it is not very clear when he looked at that footage.

42. Mr Chapman invited the claimant to an interview to investigate the incident. This was said to be a fact-finding meeting.

43. The claimant was accompanied by Ms Williams of the GMB. The claimant was asked some questions about the shift on 17 November and when he took his break. Mr Chapman then asked "*At about 18.10 you went through waste cages*". The claimant then said, "*Cristos (Mr Kypragoras) was doing the waste cages*" and "*Sometimes he does waste and I said can I take these ones and Cristos said yes*". He went on, "*When Karl or someone does mark-downs I ask can I take these things and they say ok".* He indicated that they were for him to buy. He was asked about covering with cardboard and said, "*To stop other colleagues taking it*". He went on to say- *"Jackson has put markdown items in GIC Office to buy later*". He said that he was reserving the products for himself and that he had left them there. He said that he had put them in the waste area to stop other people from buying them and that he had asked if he could buy them. He indicated what the items were and that he had taped them to cover up some of the holes in them on the Tuesday (19th) before he paid for them.

44. The claimant was asked whether Cristos did any other markdowns and the claimant answered that he started a cage, then he went to the shop floor. He said, "*He did two other boxes of cereal which were taken by another colleague*". He was asked about this and the claimant said, "*Last Friday he came without uniform and took it*". He was asked whether other colleagues asked for markdowns and the claimant said that he wasn't sure. He was then asked about paying for the products on 19 November and which checkout he went to. It was put to him that they were marked down by 75% and the claimant responded, "*I didn't ask for the price, that was the price that was printed*."

45. He was asked whether he knew the Shopping At Work Policy and he answered "*Yes".* He was asked whether he had a Colleague Handbook and he answered that he did and then he was taken to a part of the handbook which was him signing to say that he had read it. When he was asked. "*Do you think it is reasonable to reserve markdown items for two days*" he replied, "*Yes because before colleagues have done it*". Ms Williams said that the claimant had, "*Reading difficulties*" and there was some discussion about reading of the handbook and the claimant saying that his wife read it to him. Mr Chapman stated, "*The main issue is the reservation of products preventing sale to others. It was hidden to deny others the right to purchase*" and that there was CCTV to that effect. It is recorded that the claimant, "*may view the footage*" although it appears that he did not do so. There was then a short adjournment.

46. The notes record that Mr Chapman read findings to the claimant, presumably drafted in the adjournment. This is a reference to pages 312 to 316 of the bundle. Although this is largely a factual account, it does contain some of Mr Chapman's perceptions or assumptions about the incident. For instance, the suggestion that the claimant was "*hiding"* the products. He did record that the claimant, "*claimed other colleagues had put markdown products in the GIC previously so they could buy them*". It does not record what the claimant said about another colleague doing virtually the same thing on the same day.

47. The notes from the Investigation Meeting were sent to the claimant and his wife read them to him. His evidence was that it was only after these were read to him, that he understood how serious matters were. He does not accept that he said he had "hid" the items.

48. Mr Chapman decided to forward the matter to a disciplinary manager and he did that by filling in an Investigation Summary Form which appears between pages 317 to 318. This document is dated 26 November and indicates there is no live counselling or disciplinary warnings and the incident is "*Purchasing markdown items which have not been made available to customers and hiding items for later purchase*." It is said that the colleague has "*admitted"* the allegation. The named witness is said to be Mr Kypragoras and that he has been interviewed. It is not clear why that is said to be the case as the witness statement the tribunal has in the bundle at page 323 is dated 3 December 2019 which Mr Chapman thinks might have been misdated. The evidence is said to be CCTV and "*Colleague confession*". Mr Chapman circled '*No*' for mitigating circumstances and that he recommends the case referred to be a disciplinary hearing. "*Colleague admits to allegation which is a conflict of interest in regards to personal gain*." The claimant was not suspended.

49. Another document which the tribunal saw was a document at page 319 which Mr Hussain appears to have completed. It is dated 6 December 2019 but Mr Hussain thinks that it might have been misdated. On that document Mr Hussain says that he is satisfied with the investigation. The severity of the alleged offence has "*gross misconduct*" circled and the allegation is as above - "*purchase of markdown items which have not been available to customers or hiding items for later purchase"*

50. By letter of 27 November the claimant was invited to attend a disciplinary hearing on 6 December 2019. That appears at page 321 of the bundle. That letter says that the claimant:

> *"will be asked to respond to the allegation that on 17 November 2019 you breached the Shopping at Work Policy by reserving and hiding markdown products and paying for them on 19 November 2019. More specifically on 17 November you requested a colleague to markdown some products for you. You hid these items in the warehouse and paid for them on 19 November, also after paying you did not remove them from the shop floor but took them back to the warehouse until the end of your shift.*
>
> *Purchasing markdown items which have not been made available to customers or hiding items for later purchase is deemed to be a gross misconduct offence and if proven may result in your summary dismissal."*

51. There is then a paragraph that says what the purpose of the disciplinary hearing is, said to include explaining the allegation and allowing the claimant to respond. That letter also says that relevant documents/evidence which was relevant to the disciplinary hearing are included – although only the investigation notes seem to be included. The claimant was asked to contact the People Team for a copy of the disciplinary policy. It does not

seem that Mr Kypragoras' statement (page 323) was included (and maybe it was not yet obtained) Part of that statement reads:

> *"The markdowns I did were severely damaged and I had planned to tape up the damage at a later time but I didn't on that shift because I was pulled away to do another job. Therefore, the items were not ready for the shop floor. The items I had marked down were suggested by Yaseen for reduction. He had asked me if he could buy them to which I said I'll mark them down but they have to be put on the shop floor for customers first".*

52. He did not know anything more about what happened to the items.

53. The tribunal has seen what appears to be a statement written by the claimant at page 324 which sets out what happened on 17 and 19 November. Included in that statement is the allegation about the colleague who also took some items and did not pay for them until 22 November.

54. The disciplinary hearing was held on 6 December 2019. The claimant attended with Ms Jelly, the GMB Union representative whom he told us he met briefly before the hearing. The claimant's evidence, which the tribunal accepts, is that Ms Jelly advised him to apologise. Mr Hussain had been sent the papers by Mr Chapman. Mr Hussain told the tribunal that he had no knowledge of the claimant, the only interaction he had was to greet him when he saw him in the shop. Mr Hussain said that he had no conversations with Mr Chapman. What he did have were the notes from the disciplinary hearing and the completed investigation summary quoted above. Accompanying Mr Hussain was Ms Priest from HR.

55. There is a lack of clarity in the evidence with respect to a decision taken to progress matters to the disciplinary hearing. Mr Chapman's evidence was that it was not a decision for him but that the disciplinary hearing manager should consider whether a disciplinary hearing was necessary. The tribunal do not believe that Mr Hussain put any thought into whether to hold a disciplinary meeting but that one was simply arranged for him to hear.

56. The tribunal have seen the notes of the disciplinary hearing between pages 327 and 339 of the bundle. Although the claimant does not accept that they are all accurate and it may well be that some things were said which have not all been recorded as they are not verbatim notes, the tribunal accepts that, in broad terms, they reflect the discussion that was held.

57. At the beginning of the hearing the claimant is recorded as saying this:

> "*Can I say something? I am very sorry I know I did a big mistake I am working here for four years and never had any problems or done anything. I am really sorry."*

58. When the claimant was asked why he thought it was wrong, he replied, "*I know now because I have the Handbook and the Policy".* He was also asked whether he had done this before and he replied:

> "*Not like this, sometimes my SL allow me and other colleagues to buy reduced products. Karl, Colin and Jackson are authorising sometimes Karl…."*

59. In summary, the claimant repeated what he had said before about the incident on 17 November. He was asked about the colleague he had referred to who had also taken some markdown items recording that, "*He asked Cristos if he can have cereal boxes.*" Mr Hussain asked the claimant for the colleague's name and he provided the name "*Jay"* (page 329). He was then asked why he put the items in the dolly and he said it was because it was too late to pay and the next day would be his day off. He then said that when he came in the following day (19 November) he went and paid for them on his second break.

60. Mr Hussain asked some questions about why he then took them back to the warehouse and asked the claimant, *"do you think it is the right thing to do?"* the claimant replied, "*No it is wrong*". It is not clear to the tribunal what was particularly concerning about this aspect as the items had been paid for.

61. He was asked "*Do they hide items in the warehouse*?" and he replied, "*No, they just being given and they go out and pay*". The claimant was asked what his understanding was before and he replied, "*I clock out for my break and go and buy items"*. He replied that he knew that it was wrong and that he knew that from the Handbook. When he was asked about covering the items, he indicated that he believed he "*covered the dolly maybe half and I wanted to buy next day I was in*". There was some discussion about the reduction of the items which was carried out by Mr Kypragoras and then a little later in the discussion Mr Hussain asked him further about colleagues taking products. The claimant was asked, "*are they doing wrong*?" and the claimant replied, "I don't know. I know as a colleague is wrong". He went on to explain about a colleague without a uniform coming in and taking products and Mr Hussain replied, "*Just because others are doing it doesn't mean that it is right for you to do it"*". The claimant accepted it was wrong and was asked about whether he understood the policy and he replied that his wife read it and sometimes colleagues were telling him. The claimant went on, "*I am really sorry to make the trouble. Just give me a chance and next time I will be careful*." He was asked further about taking the items back to the warehouse after he paid and there was then an adjournment.

62. In that adjournment, Mr Hussain completed a written Adjournment Summary which appears in the bundle between pages 340 and 343. Having recorded what occurred on the incident, which is not particularly in dispute, Mr Hussain wrote:

> "*Yaseen has no mitigating circumstances to explain his behaviour. However, his explanation and reasoning behind what Yaseen did is that other colleagues are purchasing reduced products from warehouse sometimes at manager's or section leader's discretion."*

63. He recorded that the claimant was fully aware of the policies and had access to the Handbook and that he was very apologetic about it. He recorded: "*However, during the whole event since 17 November 19 Yaseen has not done anything to put it right*."

64. In conclusion he said:

> "*Yaseen purchased markdown items which have not been made available to customers, hidden items for later purchase. This is deemed a conflict of interest for personal gain and therefore classed as gross misconduct. Based on my findings it is my decision to dismiss Yaseen without notice."*

65. The claimant was informed of the outcome at the meeting and he then received a two-page letter confirming the dismissal. Some of the comments that the claimant made in the meeting are included in that letter, including that he had not done any other mistakes in the past and that he was really sorry and that he had witnessed other colleagues in the past taking markdown products. There was reference to his English-speaking skills not being very good and then a summary of the decision to dismiss.

66. The reason for dismissal was that the claimant had committed gross misconduct. Mr Hussain suggested that he had no alternative but to dismiss the claimant as he had seen reference to this the scenario at page 385. Mr Hussain did not consider any alternative sanctions and considered that there were no mitigating circumstances. He did not do any further investigation into what the claimant had said about other colleagues doing similar things including the person the claimant had named who had reportedly done something on the same day and not returned to pay for a few days. Mr Hussain's evidence was that that was something that the People Manager should take forward. Nor did Mr Hussain recall whether he had the statement from Mr Kypragoras or whether he showed it to the claimant. The tribunal find that the claimant did not see Mr Kypragoras' statement. Mr Hussain agreed in cross examination that the decision to dismiss was "too harsh". Mr Hussain's evidence was that he had no contact with Mr Chapman. He did not have any knowledge of the claimant's ill-health and there is no reference to it in the disciplinary hearing notes.

67. The tribunal did not have evidence to whether the claimant's personnel file was available at the hearing. There is no reference in the notes of the hearing to his ill-health and the fact that he was on light duties.

68. The claimant was told of his right to appeal but he decided not to appeal saying that he had lost all faith in the company. He said he was depressed and devastated. He told the tribunal he believed they were trying to dismiss him for gross misconduct because they did not want to allow him to continue with the reasonable adjustments.

Law and submissions

69. The claim for unfair dismissal is brought under the provisions of the Employment Rights Act 1996 (ERA). The test to be applied are those as set out in the list of issues.

70. In summary, the burden falls on the respondent to show a potentially fair reason for dismissal. If such a reason is shown, there is a neutral burden of proof relating to the fairness or otherwise of the dismissal under s.98(4) ERA.

71. The tribunal also needs to consider whether either the claimant or the respondent have failed to follow the ACAS Code on disciplinary and grievance procedures. That will be relevant both for the question of whether the dismissal was fair or unfair but also, in the event the claimant succeeds, whether any increase or reduction in compensation should be made. As the respondent's alleged reason for dismissal is conduct, the tribunal might also need to consider, again if the claimant is successful, whether to make a reduction if he has contributed to his dismissal. Other questions will arise on remedy as set out in the list of issues.

72. The claimant also has a claim for wrongful dismissal. In essence, this is a breach of contract claim. The tribunal has to decide whether there was conduct which was sufficiently serious to entitle the respondent to dismiss him without notice.

73. The claimant also brings claims under the Equality Act 2010 (EQA) for direct disability discrimination under s.13 and discrimination arising from a disability under s.15. Again, the tests are set out in the list of issues as amended.

74. In this case, the claim for disability discrimination relates to the dismissal. This means that the primary question for the tribunal was, what was the reason for dismissal? If the reason related to the claimant's disability or something arising in consequence of his disability, that is not a potentially fair reason and the dismissal will be unfair. We are reminded that it is unusual for there to be direct evidence of discrimination and therefore we are often looking for inferences from facts as found by the tribunal. If the claimant proves such facts the burden will then move to the respondent.

75. The representatives provided detailed written submissions and added to them orally. For the claimant it is submitted that all claims should succeed. The tribunal is reminded that, when considering the reason for dismissal under the ERA, the burden of proof rests on the respondent. The claimant is arguing that the dismissal was related to his disability and the burden of proof is not on the respondent with respect to those claims. It is for the claimant to show facts form which the tribunal could decide that there has been a contravention of the EQA. The leading cases on this include Igen v Wong [2005] IRLR 258 and Hewage v Grampian Health Board [2012] UK SE 37.

76. For the claimant, it is said we should consider the guidance in Shamoon v Chief Constable of the RUC [2003] UK HL 11. We might need to consider "*the reason why*" the dismissal occurred but also the suggested "*but for*" test set out in Nagarajan v London Regional Transport [1999] IRLR 572 (paragraph 55(c) submissions).

77. The claimant's representative asked us to consider recent cases which, it is argued, apply here. These are Royal Mail Group Limited v Jhuti [2019] UK SC 55 which held that: "*If a person in the hierarchy of responsibility above an employee determines that he (or she) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal was the hidden reason rather than the invented reason".*

78. We were also asked to consider Orr v Milton Keynes Council [2011] EWCA Civ 62 and, in particular, a section of that judgment which is said to be of relevance here. There the officer who is deciding whether to dismiss:

> *"has to be taken to know not only those things which he or she ought to know but any other relevant facts the employer actually knows (including) facts known to persons who in some realistic and identifiable way represent the employer in its relations with the employee concerned. If, as would seem inescapable, relevant things known to a Chief Executive must be taken to be known to both the corporation and its decision maker, the same is likely to be the case as the chain of responsibility descends. It is equally likely not to be the case when one reaches the level of fellow employees or those in more senior but unrelated posts."*

79. Also relevant for the question of the reason for dismissal is the judgment in Baddeley v the Co-operative Group Limited [2014] EWCA Civ 658. There was reference to a decision maker's beliefs having been "*manipulated by some other person involved in the disciplinary process who has an inadmissible motivation*."

80. In summary, the claimant's representative says that Mr Hussain's decision is influenced by Mr Chapman having carried out an incomplete investigation using a minor incident as a pretext for dismissal and failing to record any mitigation. This, according to the claimant's submissions, were accepted wholesale by Mr Hussain without any further investigation. It is submitted we should consider the mental processes of Mr Hussain as well as the motivation of Mr Chapman, whose attitude to the claimant changed between one health and wellbeing meeting and the next. The claimant's representative submitted we should think carefully about the October conversation with Mr Sweetser and the lack of any further investigation as well as what was said to be the "conscious limiting" of any further investigation in spite of the claimant mentioning a number of people who had carried out similar acts.

81. In summary, the claimant says that the reason for dismissal was related to his disability and therefore would make it unfair and direct discrimination. The claimant also submitted that this would amount to unfavourable treatment. We were referred to Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305 for the question of how to apply "*because of something arising in consequence of B's disability*". If the claimant succeeds in showing that, then the respondent can rely on a legitimate aim for justification.

82. Facts which we are asked to consider with respect to the reason for dismissal are those such as why Mr Chapman said it was no longer feasible for the respondent to continue with the adjustments and the change in position. It is submitted that Mr Chapman limited his investigation because of his concern about the claimant's inability to carry out his full duties and that that motive is the one that should be imposed upon the purported reason provided by Mr Hussain. He relies on Jhuti and Baddeley for this argument. This would mean that the dismissal was unfair because there was no potentially fair reason.

83. Even if the respondent does satisfy the tribunal that they had the reason of conduct, the claimant submits that it is procedurally and substantively unfair.

84. We were referred to a number of cases, many of which we are familiar with and reminded that we should not substitute our own view. The leading case is of course British Home Stores Limited v Burchell [1980] ICR 303. Further details of the range of reasonable responses tests appear in Iceland Frozen Foods v Jones [1982] IRLR 439.

85. The claimant submits there was no reasonable investigation and reminds us to take account of the size and administrative resources of the employer; that there was a failure to apply consistency of treatment, quoting from Post Office v Fennell [1981] IRLR 221:

> *"It seems to me that the expression equity as they are used comprehends a concept that employees who misbehave in much the same way should have meted out to them much the same punishment, and it seems to me that an industrial tribunal is entitled to say that when that is not done and one man is penalised much more heavily than others who have committed similar offences in the past, the employer has not acted reasonably in treating whatever the offence is as a sufficient reason for dismissal"*

86. The respondent also made written and oral submission. The principal argument that the respondent puts forward is that Mr Hussain was not aware of anything to do with the claimant's disability or something arising, such as his problem with lifting or carrying out his full duties, when he took the decision to dismiss. Although he knew of him, he knew nothing about that aspect of the claimant's health or that he was on light duties.

87. The tribunal were asked by the respondent's representative to consider the case of CLFIS UK Limited v Reynolds [2015] IRLR 562 which makes it clear that, if there is any motivation on the part of Mr Chapman, it cannot be attributed to Mr Hussain. The respondent disputes Mr Chapman's attitude to the claimant was particularly negative. The claimant remained on light duties at the point of dismissal. Mr Chapman had agreed to wait for the claimant's next medical appointment. The respondent's case is that Mr Chapman was not hostile to the claimant.

88. The respondent submitted that reasons given for not investigating allegations about other people was that it was the claimant's conduct that was being considered. Given that the claimant admitted to having carried out that misconduct, it was submitted there was no need to look further. The respondent's case is that no inferences can be drawn from any facts put forward.

89. For the unfair dismissal claim the respondent made oral submissions. The respondent does not accept the case of Jhuti applies to discrimination cases. That is an unfair dismissal (whistleblowing) matter. Even if it could be applied it would be wrong to adopt Jhuti, as, it is submitted, we cannot ascribe to Mr Chapman matters which Mr Hussain has adopted. There is no evidence of manipulation on any scrutiny of the facts in this case.

90. It is submitted by the respondent the facts in this case were clear; there was a clear breach of policy and there is no evidence of hostile animus and no knowledge of the claimant's disability. Although it might have been useful to speak to other employees it cannot be said that the investigation was not reasonable. The investigation only has to be within the range of reasonable responses. The fact that the claimant did not see Mr Kypragoras' evidence makes no difference as he accepted what he had done was wrong. Although a decision to dismiss might seem harsh, that does not make it unfair.

Conclusions

Reason for dismissal

91. The tribunal must decide whether there are facts from which we could conclude that the decision to dismiss was because of the claimant's disability or for something arising in consequence of his disability. The difficulty with connecting the decision to dismiss to any health issues is that the person who took the decision to dismiss, Mr Hussain, gave evidence that he was unaware of either the disability or the ill-health or indeed, that the claimant was on light duties. Although the majority of the tribunal had grave concerns about the evidence given by the respondent's witnesses, which seemed to us to be often evasive or, at best vague, we cannot find any evidence that Mr Hussain did have that knowledge. We are asked to consider that because that knowledge was within the organisation that it should be imputed onto the decision taken by Mr Hussain. We are not able to do that in this case because of the lack of evidence.

92. The tribunal considered the Jhuti case and considered that there are some circumstances in which that case might well apply in a discrimination case, such as this where the reason for dismissal is being considered. However, we have to distinguish the facts in that case where there has been an invented reason for dismissal (as in Jhuti) as against this case which might be described more accurately as an exaggerated case for dismissal. In short, the incident did occur and was a breach of the policy.

93. In the circumstances, the majority of the tribunal has not been able to come to the conclusion that the reason for dismissal was for a discriminatory reason. It is not less favourable treatment because of the claimant's disability nor unfavourable treatment for something arising in consequence of his disability.

94. Mr McLean finds that the real reason for the dismissal was connected to the fact that the claimant was not carrying out his full role and was on light duties. He is not satisfied with Mr Chapman's explanations for carrying out both the Health and Well-Being and the disciplinary investigation meetings, with no explanation for why the claimant's line manager was not involved at all. He has also taken into account the chronology with the close proximity of the OH report, Mr Sweetser's involvement and the harsher approach taken by Mr Chapman at the second Health and Well-Being meeting. Mr McLean finds Mr Chapman's memory lapses, the absence of evidence of investigation for those others whom the claimant had alleged had committed similar acts and statistics on similar treatment for similar misdemeanours as

well as the absence of evidence from Mr Sweetser or HR all contribute to the finding that the real reason was connected to the claimant being on light duties. Mr McLean finds it implausible that Mr Hussain was unaware of the claimant's medical situation and has taken into account the failure to consider any of the obvious points in mitigation.

95. The majority of the tribunal is satisfied, on the balance of probabilities, that the respondent's reason for dismissing the claimant did relate to the incidents discussed at the investigation and the disciplinary hearing. That is that there had been a breach of the Shopping at Work policy. The respondent has satisfied the majority of the tribunal that the reason for the dismissal related to the claimant's conduct.

96. We therefore turn to the question as to whether the respondent acted reasonably in treating that conduct as a sufficient reason for dismissing the claimant. This appears at Issue 2(a) to (c) of the list of issues.

97. The tribunal accepts that the respondent had a genuine belief that there was some misconduct in the actions the claimant took. This is because the Shopping at Work Policy says in clear terms that items must not be reserved to pay for at a later stage. When Mr Chapman looked at the CCTV footage and discussed matters with the claimant, he had a reasonable ground for believing that the claimant had breached the policy.

98. However, the tribunal does not believe that there was a reasonable investigation in all the circumstances. Looking at the CCTV footage and speaking to the claimant was not sufficient in the circumstances of this case. The tribunal entirely accepts that an investigation only has to be one which is within the band of reasonable responses (Sainsbury's v Hitt) but does not accept that this was such an investigation. Mr Kypragoras was not spoken to until after the matter had been referred to a disciplinary hearing and the claimant did not see that witness statement. What is more, the claimant gave a clear indication that other people were carrying out very similar acts of conduct of which he was accused. For reasons the tribunal have not been able to determine, neither Mr Chapman nor Mr Hussain undertook any investigation whatsoever into those matters. There was a complete failure to investigate matters which supported what the claimant was saying about the actions of other colleagues, which would clearly have supported his case (as suggested in the guidance for managers). If it was treated so seriously as to go forward to a disciplinary hearing there was really no explanation for that being missed out. This is a large employer with significant resources. The claimant was not suspended so it was clear that it was not being treated particularly seriously at that stage.

99. We turn then to Item 3 in the list of issues which is whether the dismissal was fair in all the circumstances. First, we must consider paragraph 3(a) whether the dismissal was within the band of reasonable responses available to the respondent. The answer to this is clearly no. Mr Hussain himself agreed that it was too harsh. There were other reasons why it is not within the band of reasonable responses.

100. Mr Hussain did not consider any mitigation put forward in spite of the fact that there was considerable mitigation. The tribunal finds that the mitigation

in this case was in fact substantial. There was no loss to the respondent and the goods were said to be severely damaged. The claimant paid for the marked down goods at the price indicated by his colleague who was responsible for that. He could not pay for them that day as the shop was shut and he was not at work the following day. The claimant admitted that he had reserved the products to pay later and apologised. He pointed to others having done similar things. He had a clear disciplinary record and was considered a good worker. Mr Hussain failed to consider any alternative sanctions, suggesting he was bound by the example on page 385. An officer with the serious task of deciding whether to dismiss an employee must always consider alternative sanctions, especially where there were clear mitigating factors.

101. The tribunal is, of course, acutely aware that it is not entitled to substitute its own view for that of a reasonable employer. We have considered the circumstances of this case with great care. We find that no reasonable employer would have dismissed in the circumstances of this case.

102. As far as 3(b) is concerned, the procedure used by the respondent seemed, for the most part to be fair, in that it broadly followed its own procedure and the ACAS Code of Practice. However, the tribunal was not sure what documents the claimant had at what point and whether he fully understood them. The tribunal had serious concerns about the claimant's ability to understand the process being followed. Although we have found that he did not directly request an interpreter at the meetings, it must have been clear to those holding the hearings that one would have been particularly useful, particularly in view of the fact that the claimant was, on the face of it, facing dismissal for breach of a policy.

103. It cannot be the case that any breach of policy amounts to gross misconduct. Much will depend on the seriousness of the breach and its impact on the employer and others.

104. Issue 4 asks a question about whether the respondent followed the ACAS Code. For the most part, the respondent's own procedure mirrors what the ACAS Code envisages, except the tribunal does has reservations about whether the claimant had all the necessary documentation. Issues 6-10 deal with remedy issues, some of which we decide as below and others may need determination at the remedy hearing.

105. Issue 11 is whether the respondent broke the claimant's contract of employment. The claimant must succeed on this. The respondent was not entitled to summarily dismiss the claimant without notice. There was no indication in the respondent's policies that breach of that item is one which would amount to summary dismissal. There was no loss to the respondent and the breach was relatively minor.

106. Issues 12-15 relate to the claim for direct disability discrimination. The tribunal does not find that there was less favourable treatment of the claimant because of his disability.

107. We find, in line with Issues 16-21 that the claimant was disabled at the material time.

108. Issues 22-25 relate to the discrimination arising from disability claim. As indicated, the majority of the tribunal finds no unfavourable treatment. The minority of the tribunal (Mr McLean) finds that the dismissal was unfavourable treatment because of something arising in consequence of his disability, namely that at Issue 24 (c) – the claimant's inability to fill all aspects of his contractual role due to limited mobility. There was no unfavourable treatment because of the matters at Issue 24 a) or b). Mr McLean is not satisfied that the respondent has shown a proportionate means of achieving a legitimate aim. The dismissal was not proportionate for many of the reasons set out above.

109. Issues 26-32 relate to remedy. The tribunal records that it was informed that the claimant no longer seeks re-instatement or re-engagement. Issue 29 relates to any Polkey reduction and that is not relevant in a case where the tribunal has found substantive unfairness. The tribunal makes no finding under Issue 30, at this point, about contributory conduct, as it may need to hear argument from the representatives at any remedy hearing. The tribunal believes it is able to decide now, under Issue 31, whether there should be an adjustment for failure to comply with the ACAS Code. This relates to the claimant's failure to appeal the decision to dismiss. Although the tribunal has some sympathy for the claimant's statement that he had lost trust in the respondent, he did have the assistance of the trade union and was informed of his right to appeal. His failure to do so was unreasonable. However, given the many problems with the investigation and dismissal, the tribunal finds it is just and equitable to reduce by 10% any compensatory award made. Finally, Issue 32 relates to mitigation of loss which the tribunal may need to hear evidence and argument about.

110. In summary, the claimant has succeeded in his claim for unfair dismissal. By a majority, he fails in his disability discrimination claim. Remedy will be determined on **5 November 2021** unless the parties can resolve matters themselves.

ORDERS FOR REMEDY HEARING

1 The claimant will send an updated schedule of loss to the respondent and the tribunal by **8 October 2021**

2 The respondent will send a counter schedule of loss to the claimant and the tribunal by **22 October 2021**

3 The parties will exchange any witness statements relevant to the remedy issues by **29 October 2021**

4 The parties will exchange and send to the tribunal outline legal arguments by noon on **4 November 2021**. Parties should indicate, where they can, what aspects of remedy are agreed and which are in dispute.

Employment Judge Manley

Date: ……3rd September 2021…..

Sent to the parties on: .8th Sept 2021
THY
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For the Tribunal Office