EMPLOYMENT TRIBUNALS

Claimant: **Mr N Jenkins**

Respondent: **Asda**

Heard at: **Cardiff** **On: 1 October 2022**

Before: **Employment Judge R Harfield**

Representation:
Claimant: Ms Phillips (non-legal representative), and the Claimant also in part represented himself
Respondent: Mr Gittins (counsel)

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that the claimant's complaint of unfair dismissal is not well founded and is dismissed.

REASONS

Introduction and the issues to be decided

1. The claimant worked as a member of the service crew at Asda from October 2014 to 30 April 2020. On 5th August 2020 he presented his claim form complaining of unfair dismissal. The respondents filed a response form resisting the claims. The case came before Employment Judge Ryan on 24th of March 2021 for a case management hearing. Employment judge Ryan made directions to get the case ready for hearing and drafted a list of issues for that hearing. The list of issues is as follows:

   Unfair dismissal

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

2. *If the respondent cannot show that the claimant was dismissed for misconduct, can the respondent show that the claimant was dismissed for some other substantial reason, pursuant to section 98(1)(b) ERA?*

3. *did the respondent act reasonably in treating the claimants' 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? Specifically, the claimant says that:*
        i. *he was the only person suspended pending the investigation;*
        ii. *the respondent did not consider or investigate the assault upon him;*
        iii. *social distancing should have meant that SF did not come into his path in the first place and this was not investigated;*
        iv. *SF had a history of such actions and complaints against colleagues, but no account was taken of this;*
        v. *not all witnesses to the events were interviewed;*
        vi. *the respondent relied upon the "say so" of SF.*

4. *Was the dismissal of the claimant fair in all the circumstances? In particular, was the dismissal within the band of reasonable responses available to the respondent?*

5. *Did the respondent follow a fair procedure when dismissing the claimant? Did the respondent follow the ACAS code of practice?*

6. *If the claimant's dismissal is found to be unfair, did the claimant's conduct cause or substantially contribute to his dismissal?*

7. *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?*

8. *If the respondent failed to comply with the Acas code of practice, was its failure reasonable?*

9. *Has the claimant complied with the Acas code of practice?*

Remedy

10. if the claimant's claims are upheld, the claimant seeks compensation only.

11. What financial loss, if any, has the claimant suffered as a result of any unfair dismissal? If the claimant has suffered financial loss, what financial compensation is appropriate in all of the circumstances? In assessing this:

a. should any compensation awarded be reduced in terms of Polkey v Dayton services Limited [1987] ICR 142 and, if so, what reduction is appropriate?

b. Should any compensation awarded be reduced on the ground that the claimant's actions caused or contributed to his dismissal and, if so, what reduction is appropriate?

c. Should any compensation awarded be increased on the grounds that the respondent unreasonably failed to comply with the ACAS code of practice, and, if so, what increase is appropriate?

d. Should any compensation awarded be reduced to take into account the claimant's unreasonable failure to comply with the ACAS Code, and, if so, what reduction is appropriate?

e. Has the claimant mitigated his loss? Should any compensation awarded be reduced on the grounds that the claimant has failed to mitigate his losses and, if so, what reduction is appropriate?

2. The case was listed for a one day hearing on the basis that the claimant was only calling one further witness other than himself. The respondent stated they were calling two witnesses. On 16th September 2021 the claimant indicated that he was calling five additional witnesses. On 27th September 2021, at my direction, the tribunal wrote to the parties expressing concern as to whether the case could be heard within its allocated time scale bearing in mind the number of witnesses. The parties were asked to confirm whether the hearing could still be completed in time or whether it was appropriate to postpone the hearing and relist it with a longer time listing.

3. The claimant responded to ask whether one of his witnesses could attend and if he could then refer to the other witness statements in writing. The respondent's solicitor responded to state they thought a number of the witnesses were character references and it was their understanding that

the claimant did not intend to call those individuals. On 29th September the claimant wrote to confirm he had told the other four witnesses not to attend and he was only attending with one witness, Mr Gant. He said he hoped he would still be able to refer to the statements submitted. At my direction the claimant was again written to, to inform him that I had not seen the witness statements in question and was unable to give the claimant legal advice. The claimant was told that normally if a witness does not attend to take an oath and answer questions it affects the weight the tribunal can give to that person's evidence. The claimant was informed that if witness statements are character references it may well be, however, that they will not be a central importance to the issues to be decided in the case, such as, for example, the reasonableness of the process followed by the respondent. The claimant was told that it may well be that the judge just considering the statements in written form will be sufficient, however, it remained a matter for the claimant.

4. The hearing proceeded by way of a hybrid hearing. The claimant attended in person. He had one additional witness, Mr Gant. The respondent attended remotely by video link. The claimant said his other witnesses had not attended because there was not room for them. I explained that was not what I had said. The claimant confirmed he was content for the other statements to be read, acknowledging it may affect the weight given to them. The claimant also raised the point that they had only received the respondent's witnesses statements the day before. It transpired the respondent's solicitor had been waiting for the claimant's witness statements to arrive in the firm's post room before the respondent's statements were released to the claimant. For reasons unknown it took Addleshaw Goddard's post room from 15 to 28 September to pass the claimant's statements to the appointed solicitor. I express again, as I did at the hearing, such internal post arrangements are wholly unacceptable and are unfair, in particular, to a self-represented party. I asked whether the claimant was seeking a postponement, or a break for more preparation time, or to alter the order of witnesses. The claimant said, however, that he wanted to proceed and was ready to question witnesses.

5. I heard oral evidence from the claimant and his witness Mr Gant. For the respondent I heard from Mr. Millar, and Mr Tranter. I had written witness statements from those individuals. I was also given a bundle of documents extending to 289 pages. I had written statements from Mr A Griffiths, Mr B Jones, Mr N Paul and Mr L Bevan for the claimant. It was not possible to complete the hearing within the allocated day. The witness evidence was completed but there was not sufficient time for closing submissions. I initially directed that the case be relisted for closing submissions. However, it proved difficult for the listing team to relist the case. The parties were therefore agreeable to providing their closing submissions in writing with a written reserved judgement to follow. I have taken fully into

account the parties written closing submissions. For reasons of conciseness, I have not set them out in this judgement. In this judgment I have referred to individuals who feature in the evidence by initial rather than by name, with the exception of those who appeared as witnesses or who were managers involved in the disciplinary process. I have done so because the other individuals identified have not had the opportunity to give their account directly to the tribunal and indeed it is possible some, at least, do not know about the proceedings. The parties have not had the opportunity to comment upon the anonymisation because of the way the case has concluded. They are, however, at liberty to make an application to me about it if they wish.

The relevant legal principles

The legislation

6. Section 94 Employment Rights Act 1996 ("ERA") gives an employee the right not to be unfairly dismissed by their employer. Section 98 ERA provides, in so far as it is applicable:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it--
…
(b) relates to the conduct of the employee…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

7. Under section 98(1)(a) of ERA it is for the employer to show the reason (or the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee.

Conduct Dismissals

8. The reason or principal reason for a dismissal is to be derived by considering the factors that operate on the employer's mind so as to cause the employer to dismiss the employee. In Abernethy v Mott, Hay and Anderson [1974] ICR 323, it was said:

> *"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*."

9. In considering whether or not the employer has made out a reason related to conduct, the tribunal must have regard to the test in British Home Stores v Burchell [1980] ICR 303. In particular, the employer must show that the employer believed that the employee was guilty of the conduct. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances.

10. The tribunal must have regard to the guidance set out in the case of Iceland Frozen Foods v Jones [1982] IRLR 439. The starting point should be the wording of section 98(4) of ERA. Applying that section, the tribunal must consider the reasonableness of the employer's conduct; not simply whether the tribunal considers the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

11. The band of reasonable responses test also applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23). As part of the investigation an employer must consider any defences advanced by an employee but there is no fundamental obligation to investigate each line of defence. Whether it is necessary for an employer to carry out a specific line of enquiry will depend on the circumstances as a whole and the investigation must be looked at as a whole when assessing the question of reasonableness (Shrestha v Genesis Housing Association Ltd [2015] IRLR 399).

12. The band of reasonable responses analysis also applies to the assessment of any other procedural or substantive aspects of the decision to dismiss an employee for a conduct reason. Any defect in disciplinary procedure has to be analysed in the context of what occurred. Where there is a procedural defect, the question that always remains to be answered is did the employer's procedure constitute a fair process? A dismissal may be rendered unfair where there is a defect of such seriousness that the procedure itself was unfair or where the results of defects taken overall were unfair (Fuller v Lloyds Bank plc [1991] IRLR 336.) Procedural defects in the initial stages of a disciplinary process may also be remedied on appeal provided that in all the circumstances the later stages of the process (including potentially at appeal stage) are sufficient to cure any deficiencies at the earlier stage; Taylor v OCS Group Ltd [2006] EWCA Civ 702.

13. That case also importantly reminds me ultimately the task for the tribunal as an industrial jury is a broad one. I have to ultimately consider together any procedural issues together with the reason for dismissal. It was said:

> "*The two impact upon each other and the ET's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss. So for example, where the misconduct which founds the reason for the dismissal is serious, an ET might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the ET might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee."*

14. Disparity in treatment by an employer between how it deals with employees in comparable situations can be a relevant consideration.

However, whilst an employer should consider truly comparable cases of which it is known or ought reasonably to have known, the employer must also consider the case of each employee on its own merits which includes taking into account any mitigating factors. The tribunal should ask itself whether the distinction made by the employer was within the band of reasonable responses open to the employer or so irrational that no reasonable employer could have made it. Again, here the tribunal should not substitute its own views for that of the employer (London Borough of Harrow v Cunningham [1998] IRLR 256; Walpole v Vauxhall Motors Ltd [1998] EWCA Civ 706 CA; Hadjioannou v Coral Casinos Ltd [1989] IRLR 352). In MBNA Ltd v Jones UKEAT0120/15/0109 it was again emphasised that it remains important to stay focused on whether it was reasonable for the employer to dismiss the employee whose case the tribunal is considering. Therefore, the mere fact that an employer may have been unduly lenient to another employee may be neither here nor there. The tribunal has to ask itself in the first instance whether the circumstances of the claimant and the comparator are sufficiently similar to render an argument about disparity to be appropriate. In MBNA the Employment Appeal Tribunal also discussed issues of provocation. It emphasised that questions of provocation raised by an employee are a matter of mitigation which falls to be weighed by the employer in their overall assessment.

Findings of Gross Misconduct

15. A finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances. Generally, to be gross misconduct the misconduct should so undermine trust and confidence that the employer should no longer be required to retain the employee in employment. Thus, in the context of section 98(4) it is for the tribunal to consider:

    (a) Was the employer acting within the band of reasonable responses in choosing to categorise the misconduct as gross misconduct; and

    (b) Was the employer acting within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal. In answering that second question, matters such as the employee's length of service and disciplinary record are relevant as is his attitude towards his conduct.

Findings of fact

16. The claimant worked as a member of the service crew in the home shopping department in the Asda store at Brynmawr. The claimant's role

included working in the home shopping pod, down stacking totes of home shopping onto dollies in the correct vehicle order ready for the drivers to deliver to customers and restocking the empty totes onto dollies for the pickers to take back onto the shop floor.

17. On 11 February 2020, SF, a home shopping driver made a complaint against the claimant. A witness statement was taken from SF [105]. It is alleged that on 10th of February 2020, when he was in the pod down stacking, the claimant started swearing at him, telling him to leave them alone as it was the claimant's job not his and that SF always messes things up and never did anything right. SF said he told the claimant to leave him alone, that he was nothing but a bully and he was not putting up with it anymore and would report it. He alleged the claimant responded to say he did not care and to carry on. SF said he reported it to DG. A witness statement was taken from a colleague, LP. She said that the claimant had shouted and sworn at SF, telling SF to stop as he does everything wrong that the claimant had to put right after him. She confirmed SF had said he was not having it, it was bullying and that SF asked to see a manager as he had had enough.

18. No further action was taken at the time. The claimant was unaware of the complaint. It appears, the matter rested with a manager, Scott, who for reasons unknown, did not take any further action.

19. On 1st of April 2020 there was an incident between the claimant and SF. The claimant's account in these proceedings is that he was pushed from behind/ assaulted by SF. He states he said "less of the pushing" to SF and that SF then began shouting that the claimant was bullying him. The claimant says he later returned to the pod and SF was still shouting. He says he told the section leader, DG, that SF that pushed him and that he had told SF not to put his hands on him. The claimant and SF were put into different offices.

20. The claimant says that about 15 to 20 minutes after the incident, he was suspended by Mr Hancock. The claimant says in his witness statement for these proceedings that he told Mr Hancock he had been assaulted by SF, it was not for the first time, and a quarrel had ensued between them. He states this was not acknowledged and he was suspended with immediate effect for bullying. He says (although he did not find out about it until that evening) that SF was not suspended. I return to the question of whether the claimant did level a complaint against SF to Mr Hancock later in this judgment.

21. Mr Hancock was also appointed to investigate the incident. Mr Hancock interviewed RJ at 08.09am [107]. RJ's account was that SF walked around the back of the van where the claimant was stacking totes. He said SF

could not get past and stopped and waited for about 10 - 15 seconds. RJ said that SF then attempted to sidestep in the gap between the claimant and the totes. RJ said that the claimant turned to SF and said, “don’t push me”. RJ said that SF responded to say that he did not push the claimant and was simply trying to get past. RJ said that SF and the claimant were then going back and forth saying “don’t push me” and “I didn’t” until SF said “I’ve had enough of this I’m taking it higher.” He said that SF walked to the pod to speak to DG. He said that the claimant had followed, continuing to say that AF had pushed him and that DG took them out of the pod to separate them. RJ said that SF had made contact with the claimant, but SF only brushed past the claimant as he had both his hands up as he side stepped past. RJ was asked about the claimant’s tone and said that the claimant did not shout but it was very intimidating. RJ said that the claimant did not come into the pod for some time after the incident. He said that SF was saying in the pod he had enough, and RJ had the impression there was history between the two. RJ said initially he had thought it was all just banter. He said he felt a little uncomfortable himself. RJ did not recall anyone saying they felt bullied; just that SF said he had had enough.

22. Mr Hancock then interviewed SF at 09:16am [111]. SF said that when he tried to get past the claimant, the claimant turned around and said “I'll fucking have you” in a threatening way. SF said that the claimant had alleged that SF had pushed the claimant, and he said he had not pushed the claimant. SF said he did not have a problem with the claimant, but he did not want to talk to the claimant. SF said he knew another driver, TP had complained about the claimant and that the claimant had shouted at another driver, KE. SF also alleged that for months they had been piling his totes high and in the wrong order, meaning that his runs had taken longer than they should which resulted in him being late to his jobs. He said the claimant had done this recently and that AE, a section leader, had to re-sort the totes. SF said this was done by Mr L Bevan as well as the claimant but that the claimant instigated it. SF alleged that the claimant was a bully and had shouted at him on a number of occasions over the past few months. SF was asked about his earlier statement from 11 February. He said that the claimant had said on that previous occasion “leave those fucking totes alone that’s my fucking job.” He said that the claimant had said that SF always messed the loading up and always made mistakes and that he had responded to the claimant to say the claimant was nothing but a bully and to leave him alone. SF said that LP had reported it to DG and had made a statement. SF said that if Scott had resolved it earlier than maybe it could have been sorted.

23. Mr Hancock interviewed DG at 1pm [118]. DG said SF came into the pod and told him about an altercation between him and the claimant and it was to do with someone bumping into someone. DG said that the claimant

then came in and they had a few words. DG said he came over to them and could tell the situation was heated and that the claimant said to SF "don't put your fucking fingers on me." DG said things escalated further and so he told the two to go into separate offices. DG said they were both quite heated. He said it was only the claimant who swore. He said SF had said he did not come to work to be bullied by people. DG was asked if he was aware of earlier incidents and said he was aware of one where he asked KE to do witness statements. DG said the relationship was tense and the two individuals did not talk, and it was a long term issue. He said that the claimant was a big player in work, but he did not believe that others followed suit. DG said SF had talked about his totes being sabotaged but DG felt it happened to everyone, when mistakes were made.

24. At 3:04pm Mr Hancock interviewed AE. AE said that on the 28th of March there had been an issue with SF's totes. AE said he thought that they were trying to wind SF up, and the claimant was trying to prompt a reaction from SF. AE was asked if he would say that what the claimant was doing to SF was bullying and AE said it was.

25. Mr Hancock completed a suspension risk assessment [127]. It is not known at one point in the day he completed the document. Mr Hancock recorded the allegation as being bullying made by a colleague with there being potentially other alleged victims, Mr Hancock recorded it was potentially a high risk situation. He recorded that it was difficult to move the claimant so that the claimant could be supervised because of Covid 19 issues.

26. On 3rd of April 2020 Mr Hancock interviewed TP [130]. TP said that on one occasion the claimant had got into his face with the claimant saying he was not there to clean up TP's mess. He described the claimant as aggressive and said it had been witnessed by KE. He said that KE had told him she would speak to the claimant, but she had not got back to TP. He said the claimant had not had an issue with him since. He said Scott had also spoken to him to clarify what had happened. TP had transferred to another store, and he confirmed it was nothing to do with the claimant.

27. On the 3rd of April 2020 the claimant was sent a letter confirming his suspension [133]. It was said the purpose was to allow a full investigation to take place into an alleged incident of bullying. The letter also requested the claimant to attend an investigation meeting on 6th of April 2020.

28. On the 6th of April Mr Hancock interviewed LP [134]. Mr Hancock asked LP about the 10th of February 2020. She says that SF went to help the claimant down stack and the claimant shouted and swore at SF telling him that he was doing it "fucking wrong", "fuck off", "stop fucking doing it". LP

said this went on for some time before SF said, “you're a bully, you always bully me”. She said it got quite heated with them both shouting at each other. LP said SF then went to report it to Scott. She said what the claimant said was not banter and was nasty. She said she would describe it as bullying “in a way.”

29. Also on the 6th of April, Mr Hancock held the investigation meeting with the claimant. Mr Garner from HR was also in attendance. The claimant said that he and SF did not associate with each other and that had been the case for about 6 to 9 months. He said they had words and that SF shouts at people and other people had fallen out with SF. He said he thought it started one day when he sarcastically said to SF, who was shouting, “I’m here not in Ebbw Vale” and that SF took umbrage to it. He said at Christmas time SF said don’t speak to me and I won’t speak to you.

30. The claimant was asked to describe what happened on the 1 April. He said, “I was unloading the trollies I couldn’t see him, he brushed past me so I said less of the pushing.” He said SF then blew up and started shouting, saying “don’t you start.” The claimant denied swearing at SF and said it was not often that he would swear. The claimant was asked if it was forceful, and he said it could not really recall and it all happened in the blink of an eye. He said it was a push from SF and it was not nasty or violent. The claimant said he had gone to the pod after he finished loading the trollies and that SF was shouting and carrying on. The claimant said he could not really recall who started in the pod, but he thought he had said “don’t push me.” The claimant said this kind of behaviour from SF was a regular thing. The claimant said he spoke in a normal tone and was not aggressive. He said his body language may have been tense. The claimant was told the CCTV footage showed him pointing and being agitated and the claimant accepted he probably was. It was put to the claimant why would DG have separated calm people and the claimant said he had been talking calmly and it was a matter for DG’s judgement.

31. The claimant was asked about 10 February and the statements about that day were summarised. The claimant said he had said he would do the work and that SF had started again saying he would do it. He said he did not want help from SF as he wanted them to keep their distance. The claimant said he could recall SF calling him a bully in the past and that he thought SF was being childish. It was put to the claimant that SF, DG and LP had alleged the claimant had sworn. The claimant said he could not recall it and he did not swear like that. It was also put to the claimant that the statements had a common theme about the claimant’s tone and aggression he displayed. The claimant said he was not aware of that. He said that everyone gets stressed, and it was nothing personal towards SF. Mr Hancock said he was adjourning the interview as there were other

members of staff he wished to speak to. The claimant was told he would remain on suspension pending the investigation.

32. On the 7th of April Mr Hancock interviewed Mr L Bevan. Mr L Bevan said that the claimant and SF did not get on. He said they tended not to speak to each other, they had had words, but nothing out of the ordinary. He said that SF would whinge about his loads. He said there may sometimes be genuine errors with SF's loads, but nothing was done on purpose to wind him up. He could not recall the claimant ever swearing at SF or acting in an aggressive manner towards SF. He said they were both as bad as each other.

33. On 8 April the investigation meeting was reconvened [153]. Mr Hancock told the claimant that after reviewing the notes and the evidence he had decided to forward the case to a disciplinary manager to review. The claimant was told he would continue to be suspended pending the hearing. Mr Hancock completed an investigation summary. It referred to incident dates of 1 April, 28 March and 10 February and summarised the allegation as being SF alleging he was bullied by the claimant on multiple occasions. The reason for the recommendation that the case should proceed to a disciplinary hearing was that it was said the claimant and spoken to SF inappropriately (swearing/threatening) on multiple occasions which had been witnessed by other colleagues.

34. Mr. Millar was appointed as the disciplinary manager. He reviewed the case and the investigation summary. On 10th of April 2020, he referred the case back to Mr Hancock for further investigations. In particular, he was concerned that KE had not been interviewed. She confirmed there was one occasion when the claimant had shouted at her, but she had nipped it in the bud straight away. KE said TP had also complained about the way the claimant had spoken to him, but TP had not wanted to take it any further. KE said she had not been present on 10 February but the next day she had been asked to take the statements. She said Scott then asked her to lock them away and she was not asked for them again, however, Scott had reviewed them. KE said that the claimant was abrupt and mostly with SF. She said she knew that SF complained about the totes but that it happened all the time.

35. The matter then returned to Mr. Millar. At the time Mr. Millar was deputy store manager. His role did not involve working with the home shopping department. Mr Millar decided he was satisfied with the investigations and agreed with the recommendation that the complaint should proceed to a disciplinary hearing. The claimant was invited to a disciplinary hearing in a letter of 17th of April 2020 [162] to take place on 23 April 2020. The letter said the allegation against the claimant was that on 1st of April 2020 an incident occurred between the claimant and SF, the claimant bullied SF

and this was not the first occasion that SF felt bullied by the claimant. The letter said bullying and harassment of colleagues was a gross misconduct offence and if proven it may result in the claimant's dismissal. The claimant was sent the investigation notes, the witness statements and the disciplinary policy.

36. Before the disciplinary hearing Mr. Millar reviewed the CCTV footage from the home shopping pod on the 1st of April. However, CCTV was not available for the place where the exact incident took place. The claimant was accompanied to the disciplinary hearing by AB. Mr Garner from HR was also in attendance. At the start of the hearing Mr. Millar told the claimant he had noticed on the CCTV DF was present in the home shopping pod. Mr Millar explained he had asked Mr Hancock to interview DF. Mr. Millar gave the claimant a copy of the interview notes and adjourned the hearing so that the claimant could read them. DF told Mr Hancock that he heard SF say he would not be spoken to or treated that way anymore as the same thing had happened the week before and had been reported. He said the claimant did not say anything and someone then came in and separated them.

37. At the disciplinary hearing the claimant confirmed he had had enough time to prepare. During the disciplinary hearing the claimant said they were only there because SF had pushed him that morning and it was assault. He said it was not the first time. The claimant said "It seems he's built things up to build a case against me. He's accused me. I haven't accused him. He pushed me that morning he could have had the choice to go a different way." It was put to the claimant that RJ's statement did not say that SF had pushed the claimant. The claimant pointed out that RJ confirmed contact had been made, and also said that most of the witness statements were not true. The claimant said it was not the first time that SF had pushed him, and that SF was trying to get him into trouble. He said "The statement says he made contact but I haven't accused him of assault. I've been suspended he hasn't. Not that I want him to be suspended."

38. The claimant denied saying to SF that he would "have him." The claimant said that SF was always ranting and raving and 99% of the time the claimant would walk away. The claimant denied shouting or swearing at SF on 10 February and said it was not very often he would swear. But he said he would not dispute LP and if he did swear then it was due to stress. Mr Millar said to the claimant "we are here to ask you about 1/4/2020 although previous statements build a picture. And that behaviour is not acceptable." The claimant said that SF must have put him under stress to be like that. The claimant said they could go and ask drivers and service crew to see what is going on. He said he did not swear and they could confirm that. Mr Millar said he was not there to decide about the claimant's

swearing but whether he had threatened SF that day. The claimant admitted that he may have raised his voice at KE, but he denied having shouted at her. The claimant recalled his interaction with TP but denied getting in TP's face.

39. It was put to the claimant that in the investigation stage he said that SF had pushed past him in the blink of an eye, and it was not nasty or violent, but the claimant was now saying it was an assault. The claimant said at the time he treated it as a minor incident but since receiving the statements it was like SF had built a case against him. The claimant said that about a week prior to the incident in question, SF had pushed a trolley towards him in the presence of Mr L Bevan. He said Mr L Bevan asked him what was that and the claimant had said its just SF.

40. Mr. Millar adjourned the hearing to carry out further investigations. On the 30th of April Mr. Millar interviewed Mr L Bevan [182]. Mr L Bevan was asked if he could recall an altercation between the claimant and SF one week prior to the 1st of April. Mr L Bevan said he could not. Mr. Millar then explained the claimant's allegation against SF and Mr L Bevan was able to recall the incident and give an account. He said SF tried to get past the claimant, and instead of asking the claimant to move, SF had clipped the claimant on the leg with a trolley but not in an aggressive manner. He said he did ask the claimant what it was about, and he had replied it was just SF being SF. Mr L Bevan said the space was so tight that two people could not get past and he would not like to say if it was done with intent or not. He said SF would have known the claimant was there.

41. Mr. Miller then interviewed RJ [185]. He did this because the claimant had said he could only recall saying "don't push me" to SF. Mr. Millar therefore asked RJ to clarify what he could remember the claimant saying. Mr. Jones said that the claimant had said "don't push me, don't push me" and SF replied, " I've had enough of this, I'm going to take this further". RJ said the claimant had a tote in in his hand which he said the claimant moved in a motion to push SF back, although the claimant had not made actual contact with SF. He said the claimant was threatening. RJ was specifically asked if he could recall the claimant saying he would "have him." RJ agreed the claimant had said that. He said that the claimant said, "don't push me" as the claimant was holding the tote at chest height and then said, "or I'll have you now." He said it was then that SF said he was going to take it further. RJ did not think that the claimant had sworn at SF.

42. On 30th of April Mr. Millar then interviewed SF. He told SF that the claimant had alleged one week prior to the 1st of April SF had pushed a trolley towards the claimant in the chilled backup area. SF denied that this happened. SF was asked about whether on 1 April the claimant had a tote in his hand in a threatening manner. SF confirmed the claimant had a tote

in his hand but said he could not recall if it was in a threatening manner. He said he did not want the claimant to lose his job but that he could not work with the claimant in home shopping. SF said that bullying is not acceptable, and Mr Millar said he totally agreed. SF said he had spoken to Scott after the incident in February, but that Scott had not spoken to the claimant.

43. Mr Millar reconvened the disciplinary hearing on 30th April. The claimant was given copies of the notes of interviews with Mr L Bevan, RJ and SF. The hearing was then adjourned so that the claimant had opportunity to read them. The claimant said that SF's assertion that he goes to work to help everybody was not true, and that SF was not truthful. The claimant said Mr. Millar should speak to others in the home shopping pod about SF. The claimant responded to RJ's statement to again deny having said he would "have" SF and pointed out RJ did not say that in his first statement. The claimant said he did not say it and if he had lost his temper he would have held his hands up. The claimant said there were many things he could tell Mr Millar about SF, but it meant bringing other people into it which he did not want to do. Mr Millar said if there were other occasions and they were relevant then it should be raised. He pointed out the allegation was serious, and offered the claimant time to speak with his rep. The claimant said he had asked Mr Millar to go and speak to others about what SF is like. Mr Millar said that was very vague. Mr Millar said he would speak to people if it was relevant, but he needed to know what and why. The claimant took a short adjournment and then stated that he did not want to involve others as he did not think it was fair. The claimant was again asked to confirm that he did want Mr Millar to speak to others. The claimant said he did not know what to do for the best. Mr Millar said again that if the claimant believed that speaking to others had relevance then he would do so. The claimant confirmed there was nothing he was asking Mr Millar to raise. The claimant was given a final opportunity to raise any matters he wished.

44. Mr Millar completed a note of his decision making [197]. It records Mr Millar noting that RJ had confirmed the claimant had said "I'll have you" and that RJ was a new driver with no loyalties to anyone. He recorded it was his reasonable belief that the claimant had threatened SF. Mr Millar noted that KE had said the claimant had shouted at her previously and that TP had stated the claimant had come into his face and TP had found the claimant aggressive. Mr Millar also noted that LP had said the claimant had sworn at SF and that SF had said the claimant was bullying him. He further noted that AE had said that he thought the claimant was bullying SF with winding him up with the totes. Mr Millar noted that the claimant had mentioned about talking to other colleagues but had then said he did not want Mr Millar to talk to anyone else. He also noted that the situation had been going on for some time and could not clarify why it had started.

He recorded that the claimant had raised points about SF's behaviour towards him previously, but also noted the claimant had not raised it until that day's hearing. He also noted that the allegation regarding the trolley from a week before the 1 April was not said to be intentional and that SF had denied it had occurred. He said that, having viewed the CCTV, SF did look frustrated and angry with what had just happened.

45. Mr Millar returned to the hearing to give his decision [206]. He said he formed the conclusion that on 1 April there was an incident between the claimant and SF witnessed by RJ and RJ had confirmed the claimant had said to SF "I'll have you." He stated it was apparent that the working relationship had broken down over a number of months. Mr Millar referred to the evidence about the allegation the claimant made against SF the week before. He referred to the witnesses' evidence about past occurrences involving the claimant. That included the complaint previously raised by SF which had not been investigated further. Mr Millar said one of his recommendations would be to review why that earlier investigation had not happened. He noted that the claimant had made reference to other points he could make about SF but that the claimant had not given any evidence or witnesses to Mr Millar that he could take forward. Mr Millar said it was his reasonable belief that the claimant did make the threatening comment to SF of "I'll have you", and that threatening behaviour was not acceptable and would not be tolerated in the workplace. He said he had decided to dismiss the claimant with immediate effect.

46. Mr Millar's witness evidence was that when considering sanction, he took into account the claimant's length of service and the claimant's employment record. He says that he did not believe these factors were sufficient to avoid the sanction of summary dismissal for gross misconduct. He says he did not believe sanctions such as a warning was appropriate given the severity of the claimant's actions. He says he did not take that decision lightly.

47. On 1 May Mr Millar wrote to the claimant to confirm the decision [211]. The letter informed the claimant of his right of appeal. The rationale in the letter referred to Mr Millar considering the claimant had had a similar approach with other colleagues and that other colleagues found his behaviour intimidating and came across as bullying. He noted that the claimant may not mean to come across that way.

48. On 5 May 2020 the claimant set out his grounds of appeal [213]. These were that he disagreed with the way the disciplinary action was taken, he felt the outcome was too harsh, he considered that the disciplinary process was unfair, leaned heavily towards discrimination and bias and that witnesses are expected to understand employment law. On the 11th

of May Mr Gurner wrote to the claimant to say the grounds of appeal were not clear. The claimant was asked to resubmit his appeal.

49. On 12 May the claimant provided more information. He said the Acas Code of Practice was not considered and mediation was not considered. He said he was challenging the evidence as Mr Millar believed something to be true without evidence or enough evidence to support it. He said the respondent had acted different in the past in similar cases. He said SF had made a similar complaint against another member of staff a year previously. He referred to his clean disciplinary record, work record and length of service. The claimant said his dismissal was disproportionate and referred to rules about social distancing in the workplace.

50. On 19 May the claimant was invited to attend an appeal hearing on 27 of May. The appeal did not go ahead as the claimant attended with a friend who was not a colleague or a trade union official. The appeal was rearranged for the 4th of June. On the 31st of May the claimant sought a postponement to the appeal hearing because he intended to submit a grievance. On the 3rd of June Mr. Roberts wrote to the claimant to say that the decision whether to pause or continue with the appeal hearing would depend upon the nature of the claimant's grievance. On the 4th of June the claimant raised his grievance [222]. He said that the disciplinary process was flawed with assumptions, directional questions and little evidence of probing questions. He said witnesses were asked leading questions and there was no opportunity for individual's own perceptions. The claimant said he was misdirected meaning his mitigation was minimal and focussed to one incident yet multiple were brought up in the dismissal summary. He said witness statements in his favour were ignored or assumed to be false. The claimant said that there was clear evidence SF was prone to flare ups and had accused a few colleagues of bullying him. He said that SF had provoked him and because of that he was dismissed. He said there was evidence of victimisation in the minutes and the outcome prejudged. He said there had been a failure to protect health and safety with social distancing. He complained that management had failed to address their duty of care to address the known relationship difficulties prior to 1 April. He said the behaviours of management and HR were tantamount to victimisation or discrimination. Within his grievance the claimant asked for all communication, including the grievance and the appeal hearing, to be heard via written communication only.

51. On 5 June Mr. Roberts wrote to the claimant to say he could arrange the claimant to meet Ms Griffiths or alternatively he could arrange for Ms Griffiths to investigate the issues and respond in writing. On the 10th of June the claimant said he was not comfortable with a store manager conducting his grievance and it should involve a higher level of human resource intervention. On 12th of June Mr. Roberts wrote to the claimant

to say as the grievance was pointed directly at the process of the disciplinary hearing it would be heard as a disciplinary appeal. Mr. Roberts told the claimant that the disciplinary appeal was to be heard by a manager more senior than the manager conducting the disciplinary hearing and therefore it was appropriate for Ms Griffiths to conduct the appeal. Mr. Roberts asked the claimant to submit the specific details of his appeal including any points of grievance within seven days. On the 19th of June the claimant wrote to Asda setting out the points of grievance [230].

52. Ms Griffiths wrote to the claimant with the findings of her investigation on 10 July 2020 [235]. She said she considered witnesses were generally asked open questions at the start and then more specific questions. She did not consider assumptions had been made. Ms Griffiths said the claimant was dismissed for threatening behaviour on 1 April. She did not consider that witness statements in support of the claimant were ignored and said the claimant had been given opportunities to raise any issues, including the naming of additional witnesses. She disputed that there was evidence to suggest SF was prone to regular flare ups. Ms Griffiths said she did not consider Mr Millar had prejudged the decision. Ms Griffiths said that all colleagues had been briefed on social distancing and she believed it was an isolated incident. Ms Griffiths agreed that the store should have addressed the situation earlier following the incident on 11 February 2020, although she observed the incident on 1 April may still have occurred. She stated mediation would not have been a suitable way to address the issue and the mediation policy said that where the issue is serious such as aggressive behaviour then formal action may be required. Ms Griffiths said she could not see that there had been discrimination or victimisation and that the claimant had been encouraged to raise issues or name witnesses.

53. On 30 July 2020 the respondent wrote to say that Ms Griffiths letter was the grievance outcome not the disciplinary appeal outcome and the claimant was offered a fresh date for an appeal. The claimant said he did not understand that the grievance and appeal were separate and sought a postponement. It was rearranged for 18 September 2020.

54. At the appeal hearing, the claimant said the allegations against him were untrue and the altercation had been caused by SF assaulting him. He said that nothing had been looked at about SF. The claimant was asked what part of the statements were said to have not had enough evidence or no evidence, but the claimant said it was not for him to point out issues. The claimant was asked if there were any questions for Mr Tranter to ask or explore but the claimant again said he did not want to bring other people into it. He said Mr Tranter should ask any drivers or service crew. Mr Tranter asked what the claimant would want them to ask and who. The claimant said he would not line anybody up and Mr Tranter could ask

anybody out there. The claimant said that people should volunteer information and there had not been a proper investigation. Mr Tranter asked the claimant about his assertion that the respondent had acted differently in the past with a similar case. The claimant said it was for the respondent to investigate not for him. Mr Tranter said he needed details to investigate it. The claimant said it was not the first time SF had accused someone of bullying and harassment and that Mr Tranter should look in SF's file. Mr Tranter asked for a name and the claimant said he was making a point to say it had happened before and was not talking about a specific case. The claimant continued to decline to give a name.

55. The claimant was asked about social distancing. He said he was working in a tight space and SF chose to push the claimant out of the way. The claimant said it was only SF and RJ who broke social distancing. He said no one seemed to be looking at the fact that SF could have walked around. Mr Tranter said that social distancing was very new then. The claimant said his overall point was that SF had assaulted him and yet had stayed in work. He said he thought that would have been fully investigated. He said the respondent would find out what SF was like if they investigated SF assaulting him. Mr Tranter asked the claimant why he had not made an allegation at the outset. The claimant said he had made a statement that SF had pushed him. He said no one had spoken to him the morning he was suspended, and Mr Hancock had told him a full investigation would take place. The claimant said that the Saturday before the incident SF had been shouting at LB and was ranting again on the Monday in the office.

56. Mr Tranter adjourned to consider the appeal and came back with his decision. He said that investigations had been undertaken with numerous colleagues on shift at the time and the claimant had been asked to give names of anyone not interviewed that day, but the claimant would not give any names. He said he believed there had been a full investigation and if the claimant did not agree he had numerous opportunities to give names. He said the claimant could not tell him what evidence he was actually challenging. Mr Tranter stated he had reviewed SF's file and there was evidence of a complaint against another colleague, but it was very different and therefore had a different outcome. He said based on what the claimant said he did not consider there were any issues with social distancing other than the incident with SF. He said "I appreciate your length of service and clean disciplinary record however this has no bearing on the outcome. The decision was made on evidence of the incident and not your performance."

57. On 18 September 2020 the claimant was sent a letter confirming the appeal outcome and reasoning.

Discussion and conclusions

Reason for dismissal?

58. In my judgement, Mr Millar decided to dismiss the claimant because he believed that the claimant had acted in a threatening manner towards SF on 1 April 2020. In particular, in telling SF not to push him, "or I'll have you." That was a genuinely held belief on Mr Millar's part. It is a reason relating to the conduct of the claimant and therefore a potentially fair reason for dismissal.

Reasonable grounds for belief?

59. I turn next to the question whether there were reasonable grounds for Mr Millar's belief. I find that there were. Mr Millar had the account of SF supported by the account of RJ, who was the only direct witness to the original incident on 1 April 2020. They said the comment had been made. The claimant denied saying "or I'll have you" (albeit in his written closing submissions he now seems to accept it was said). The claimant made the point that RJ had not recalled the alleged threat in his first statement and only recalled it in the second when asked a direct question. These were evidential points for Mr Millar to take into account. It was Mr Millar's job to weigh the competing evidence and reach a decision as to which version he considered the most likely. Mr Millar was not obligated to find in the claimant's favour because the claimant denied the allegation (or indeed obligated to agree with SF). It was within the reasonable range for Mr Millar to decide he preferred the accounts of SF and RJ. Mr Millar in particular took into account that RJ was a new member of staff, who he considered had no particular loyalty to anyone. Such a viewpoint was in the reasonable range. The claimant suggested in cross examination that RJ had been pressurised to support SF's account and change his witness statement. The claimant had no evidence to support that, and Mr Millar denied it. I do not find that RJ was pressurised.

60. In my judgement Mr Millar also felt that SF's account was supported by the wider evidence in the witness statements about the claimant's alleged behaviour. Mr Millar considered there was some consistency in theme in the evidence of DG, LP, TP, KE and AE about the claimant, on occasion, having raised his voice at colleagues including SF, TP and KE and that the claimant could come across to colleagues as being threatening or intimidating or bullying. Mr Millar also considered that the CCTV evidence from the pod appeared to show the claimant acting in an agitated manner and pointing. Mr Millar considered, in my judgement, that wider evidential picture supported a conclusion that the claimant had acted in the way alleged on 1 April 2020. Again, the claimant denied the wider conduct (or said it had been blown out of proportion). Again, Mr Millar had to take that

into account when weighing all the evidence, but he was not duty bound to accept it. Given the evidential picture from the witness statements there were reasonable grounds for Mr Millar's belief. It was within the reasonable range that a decision maker could reach in the circumstances.

61. The claimant in his closing arguments says that the reasons for dismissal were not based on evidence. For the reasons given, I do not agree. Likewise, I do not find that the claimant was dismissed on the "say so" of SF

62. The claimant asserts that the respondent did not consider the CCTV footage which showed the claimant and SF were yards apart following the incident and that RJ had said SF was the person shouting. It is said this shows that the claimant had not attacked SF and he had just, at last, stood up to AF's long harassment. It is also said that Mr Millar said there was no CCTV or nothing to see. Mr Millar did not say there was no CCTV. He said there was none for the central incident itself but was some for the pod. Mr Millar clearly did consider the CCTV footage carefully as he identified DF as a potential witness from the CCTV and arranged for DF to be interviewed. It was for Mr Millar to weigh the value of the CCTV footage as he saw fit. It was not from the central incident so it cannot have definitively shown that the claimant had not threatened SF, nor would that be demonstrated by the fact the claimant and SF were stood apart.

63. RJ said it was SF who was shouting in the pod. On the other hand, DG said he heard the claimant tell SF not to put his fucking fingers on him. Again, it was for Mr Millar to weigh the balance of this evidence and reach a view. In any event, the extent to which it is said the claimant was provoked by SF would also ultimate be a matter for mitigation as opposed to the primary point of whether the claimant threatened SF. It is also said that Mr Millar did not take note that RJ said that SF shouted at the claimant because it is not in his witness statement. The witness statement is not a verbatim record of every evidential thread. I do not accept that Mr Millar was unaware of what RJ said about SF shouting. Mr Millar in my judgement, paid close attention to the evidence before him, particularly that of RJ. At the end of the day, however, RJ said the claimant had been behaving in a threatening manner towards SF.

64. The claimant says in his closing submissions that the phrase "I'll have you" is ambiguous and therefore even if he had said it, it arguably implies that he intended to take the matter further and to raise a grievance against SF rather than being threatening towards SF. It is said it was SF who then shouted and inflamed the incident. It is said that the intended meaning was not of violent retribution and nothing about the claimant's behaviour at the time and following suggests such or that the claimant would follow through with any violence. This alleged alternative meaning of "I'll have

you" was not a point that the claimant raised, however, in the disciplinary process could not reasonably have been considered by Mr Millar absent such a suggestion. Mr Millar also had other evidence before him supportive of a finding that it was said in a threatening manner, including crucially the evidence of RJ.

Belief based on a reasonable investigation/ procedural fairness?

65. I turn next to the question of whether the respondent's conclusions were reached having carried out a reasonable investigation (in the sense of being within the reasonable range). This overlaps with considerations of procedural fairness which I address at the same time.

Suspension

66. The Acas Code of Practice on Disciplinary Procedures says that where a period of suspension with pay is considered necessary, the period should be as brief as possible, should be kept under review, and it should be made clear that suspension is not considered a disciplinary action.

67. I did not hear from Mr Hancock. He no longer works for the respondent. I do have his suspension risk assessment, albeit I accept it may well have been written later on in the day. I did hear from Mr Millar who told me his understanding was that the claimant was suspended because SF had made a clear complaint against the claimant. I find that is likely to be the case. It is not in dispute that SF had entered the pod complaining about the claimant and alleging the claimant was bullying him. The claimant makes the point that DG's statement refers to SF saying he did not come to work to be bullied by people as opposed to directly naming the claimant. However, it was clearly apparent to all involved that SF was complaining about the claimant. The claimant also points out that DG's statement refers to both the claimant and SF being heated. It does, but Mr Hancock's risk assessment clearly refers to a complaint of bullying. In my judgement, on the balance of probabilities, Mr Hancock's position and understanding was that he was faced with a complaint of bullying made by SF against the Claimant, and that was why he suspended the claimant whilst the matter was investigated. A decision to suspend in the circumstances that Mr Hancock found them was within the reasonable range. He was faced with a heated situation and a complaint of bullying being made against the claimant. Mr Hancock actively considered whether an alternative of moving the claimant was appropriate but discounted it because of the difficulties of arranging supervision in the pandemic.

68. Mr Tranter in his cross examination said it does not matter which employee is suspended and that it is sometimes acceptable to move to another area or store. I did not, however, find his evidence on that point

as helpful as Mr Millar's as Mr Tranter (as he made clear) was not talking about the claimant's specific situation but just his general experiences in other cases.

69. The claimant says that he complained to Mr Hancock that he was assaulted by SF, and that Mr Hancock promised him a full investigation that did not happen. On the balance of probabilities, I do not find it likely that the claimant specifically complained to Mr Hancock of assault. It seems highly unlikely to me that the claimant made a complaint of assault in circumstances in which the claimant said in his later investigation meeting that SF had brushed past him, that it happened in the blink of an eye, was a push but was not nasty or violent. It is much more likely that the claimant said something similar to Mr Hancock on the day of the incident itself and that Mr Hancock would not have understood the claimant to be making a complaint of assault against SF. It is more likely Mr Hancock would have understood the claimant to be saying that he had simply told SF not to push him, and that SF was blowing that all out of proportion; i.e., that SF was blowing something minor out of all proportion.

70. The claimant complains of disparity in treatment between him and SF because SF was not suspended. I do not, however, consider based on what was known at the time, that the claimant and SF were in truly comparable situations. I have found there was a complaint of bullying levelled against the claimant. I have found Mr Hancock did not understand the claimant to be making an allegation of assault against SF. The claimant was saying that SF was blowing things out of proportion. That was obviously for the respondent to investigate, but it did not place the claimant and SF in a truly comparable situation. As I have said, it was within the reasonable range in those circumstances to suspend the claimant whilst the incident was investigated.

71. The claimant alleges that he was suspended, and SF was not, because the respondent was short of delivery drivers and therefore wanted to keep SF in work. Mr Millar denied this. I do not find that it was a consideration. I find that the reason why the claimant was suspended and SF was not, is as set out above.

72. The claimant says that he was not given an opportunity to make a statement before he was suspended. I am satisfied, however, that the claimant was suspended to allow the investigation to happen. It was in the reasonable range to suspend the claimant to allow individuals including the claimant to be questioned. It was also not outside the reasonable range for Mr Hancock to have decided to interview some other individuals, including SF, before deciding to interview the claimant.

73. The documents show that the claimant's suspension was reviewed as the investigation continued and when the decision was made to take the claimant to a disciplinary hearing. Again, I consider that such a decision was within the range of reasonable responses.

Investigation by Mr Hancock

74. The claimant further says that the situation between him and SF should have been mediated rather than taking action against him. I do not consider that it was outside the reasonable range to decide to proceed down the disciplinary route given the content of the information that was taken from witnesses in the initial complaint and investigative processes.

75. The claimant says that SF was accompanied to an interview by his daughter, a section leader in Asda which was against company policy. I do not consider that is a matter that disadvantaged the claimant in his disciplinary proceedings, which is the focus on the unfair dismissal claim.

76. It is said in the claimant's written closing submissions that if a female had complained about being rubbed against with raised hands there would have been a full investigation and there should have been one here. That was not the basis on which the claimant's claim was presented when brought or at the hearing. It is not appropriate to make some veiled attempt to bring a sex discrimination claim in closing submissions. Moreover, it never would reasonably have been within the respondent's understanding at the time that the claimant was making a complaint that SF had brushed against him in a sexualised way. That is a wholly new allegation.

77. The claimant says that the statements Mr Hancock took were done on behalf of SF, were a character assassination of the claimant, and were not relevant to the incident. It is also said that Mr Hancock asked leading questions of witnesses and made assumptions. It is said the witnesses were asking leading questions about the claimant's behaviour but not SF's. I have considered the statements taken by Mr Hancock and Mr Millar with care. It is important to remember that a disciplinary investigation by an employer is not a criminal investigation or indeed high court litigation. I do not consider that the style of questioning was outside the reasonable range in the circumstances. The witnesses were generally asked open questions to start with. It was reasonably necessary to ask them more closed direct questions on occasion to prompt the witness to respond to a specific allegation; for example, when asking RJ about whether he recalled the claimant saying he would "have SF" or indeed when asking Mr L Bevan about the alleged incident with the trolley the week before 1 April. I am satisfied that the witnesses were ultimately able to say what they wanted to say. They sometimes agreed with what was

said to them and at other times disagreed. AE was asked a whole series of questions about the stacking of the totes before he was asked for his view on whether it amounted to bullying. He proffered his view on it. It was not unreasonable to ask AE's view on it as the respondent was trying to get a feel for whether there was something deliberate and individual that was going on in relation to SF's totes on a split run.

78. I do not consider that the statements taken by Hancock (or Mr Millar) were done on behalf of SF, or done as a character assassination of the claimant or were not relevant. Mr Hancock and Mr Millar were following the evidence and pursuing lines of enquiry that came up in the investigation. RJ was interviewed because he was an eyewitness. DG was interviewed because he intervened in the pod. AE was interviewed because SF alleged he had been picked on about the totes and AE had to re-sort them. It was within the reasonable range to consider it as being an appropriate line of enquiry as SF was saying the stacking of the totes was one of the ways in which he was being picked on. TP was interviewed because SF said he had a similar complaint about the claimant. LP was interviewed because she was an apparent witness to the earlier incident on 10 February. KE was interviewed because it was alleged there was an incident when the claimant shouted at her. DF was interviewed because when Mr Millar watched the CCTV evidence from the pod he saw DF there and thought he might have witnessed something. Mr L Bevan was interviewed once the claimant alleged there had been an incident with SF pushing a trolley into him the week before. RJ was re-interviewed because the allegation that the claimant said he would "have" SF had become of particular importance and was denied by the claimant.

79. The investigations were exploring who may have been witnesses to 1 April or its aftermath, exploring the allegation that there had been other occasions when it was said the claimant had picked on SF or had had similar interactions with other members of staff. They were not done at the behest of SF but because they were considered reasonably relevant to evaluating the claimant's conduct. The investigations likewise pursued lines of enquiry identified by the claimant. Mr L Bevan was interviewed in respect of the claimant's claim that SF was acting inappropriately towards the claimant. If the claimant had named other specific individuals he wished to be interviewed I have no doubt they would have been interviewed too.

<u>The disciplinary process before Mr Millar</u>

80. The claimant says there was not a full and fair investigation because the respondent did not investigate or take any action in respect of his own countercomplaint of assault against SF. It was not until the disciplinary hearing on 23 April that the claimant specifically said that he considered

SF had assaulted him and that he said it was not the first time. It was put to the claimant that this was very different from what the claimant had said in the investigation meeting. Mr Millar then paused the disciplinary hearing so that Mr L Bevan and SF could be interviewed again about the alleged incident the week before 1 April, as well as interviewing RJ again. It was within the reasonable range for Mr Millar to take the approach that he did. He stopped and investigated the particular complaint the claimant raised. Mr L Bevan (the claimant's own witness) said the incident the week before was not aggressive and he could not say it was intentional. Mr Millar, when reaching his decisions, was entitled to take into account the fact that the claimant had changed his account from SF having in effect brushed against him (a summary of the incident supported by the only eyewitness RJ) to one of an allegation of assault by the time of the disciplinary hearing (unsupported by RJ, other than to say there had been non-intentional brushing as SF had side stepped past). Mr Millar was likewise entitled to (and it was within the reasonable range to) question the claimant's motivation in changing his account. It followed that it was then in the reasonable range not to view SF and the claimant as being in truly comparable situations and to not pursue the allegations and counter allegations in the same ways.

81. It is also important to bear in mind that even if the claimant's countercomplaints against SF were valid, and even if it said more steps should have been taken against SF, it would not in any event have necessarily meant that there was no case to answer against the claimant. SF was still complaining that the claimant had threatened him. That was supported by RJ and also to an extent by DG. If the claimant was saying he was provoked because SF was knocking into him then it was a matter for Mr Millar to weigh when it came to considering mitigation, it did not necessarily mean the process should just stop against the claimant.

82. The claimant also complains that the respondent did not interview other drivers and service crew about him and about SF. He says it would ascertain his assertion he was harassed previously by SF and that he was the victim of SF. The claimant singularly declined, however, throughout the process, including at appeal stage, to identify any named individuals he was asking to be interviewed other than Mr L Bevan. The claimant said, in effect, it was for the respondent to find the evidence and that he did not want to be putting individuals forward, he wanted to be impartial, and that a full investigation meant individuals should be giving voluntary accounts.

83. It was within the reasonable range for the respondent to decline to accede to the approach requested by the claimant. As the respondent says in their closing submissions, Mr Millar said in evidence that there were over 70 crew members. It would be excessive and outside the reasonable

range to interview them all. It would also have been illogical, to ask a random driver or crew member and it was within the reasonable range to refuse to do so. If the claimant considered there were either unidentified witnesses to the actual incident on 1 April or witnesses that had some relevant evidence to give whether about his own behaviour or that of SF, then it was reasonable to require the claimant to identify them. The claimant was able to identify Mr L Bevan who was interviewed (who incidentally did not say in either of his contemporaneous interviews what he said in his witness statement for the claimant after the event). As I have said already, throughout the process the respondent had stopped and pursued new lines of evidential enquiry when they cropped up, including matters raised by the claimant. If the claimant had given names to Mr Millar or Mr Tranter it is likely the respondent would have spoken to the individuals. That the claimant came to tribunal, long after the disciplinary process, with written witness statements from individuals who sought to now make various complaints about SF is, in my judgement, of no assistance to the claimant. The claimant did not reasonably equip the respondent to explore such matters at the time despite being invited to do so on multiple occasions. Again, they are also matters which would have gone to mitigation as opposed to the fundamental complaint of threatening behaviour.

84. The claimant also alleges the respondent ignored his request to interview other members of staff because they were aware of SF's bullying of staff, and this is noted in the witness statements of staff past and present and in the evidence of Mr Gant. I do not consider this is made out on the facts. The claimant was repeatedly invited to name individuals, it would be foolish of the respondent to do so if they were seeking to hide some conduct of SF. Furthermore, the claimant's complaint about the events in the week before 1 April were not ignored and Mr L Bevan was interviewed. When the claimant, at appeal stage, suggested that SF had made a complaint before about someone else, despite the claimant's consistently evasive answers to questions about it, Mr Tranter also went and looked in SF's file and satisfied himself the circumstances were different.

85. The claimant also says that the case against him should not have proceeded because the bullying allegation was found to be untrue. I have seen nothing to say that the respondent found that the bullying allegation was untrue. Mr Hancock considered there was a case to answer. He recommended that there should be a disciplinary hearing because it was said the claimant had spoken to SF inappropriately (swearing/threatening) on multiple occasions. Mr Millar decided there should be a disciplinary hearing based on an allegation that on 1 April 2020 an incident occurred where it was said the claimant bullied SF, and this was not the first time SF felt bullied by the claimant. It was therefore an allegation of bullying, albeit concentrating more on 1 April 2020 and which had also been

described as threatening behaviour. Mr Millar then ultimately concluded that the claimant had threatened SF on 1 April. It was the same fundamental incident that Mr Millar reached a decision about. As set out above, Mr Millar in his final decision, ultimately considered the other complaints that SF raised about the claimant (and indeed other evidence about the claimant's alleged conduct towards other staff) as supporting evidence tending to show it was likely the claimant had behaved in a threatening way on 1 April 2020. It was not, however, Mr Millar saying that the bullying allegation was untrue. It was put to Mr Millar in cross examination that bullying had to be more than one incident and Mr Millar seemed to agree with this. That does not appear to me to be what the respondent's own policies say and the line of questioning seemed a little confused and confusing as to what it was truly about as it appeared to relate to the decision to suspend the claimant, which was not undertaken by Mr Millar. However, fundamentally it was not, in my judgement, Mr Millar saying that bullying allegations against the claimant were untrue.

86. The claimant says that Mr Millar saw him at 11:11am on 30 April and gave him more witness statements to read that would unsettle him and mean he would not have time to process them properly. The claimant confirmed however he had enough time and was content to proceed. The procedure followed was therefore within the reasonable range.

87. The claimant complains there is an incorrect surname for Mr L Bevan on a statement (he is misrecorded as Davies). It is not clear to me why Mr Bevan would not haven noticed his name was recorded incorrectly but that aside the claimant queried this, and the name was corrected straight away. I do not consider it likely that it disadvantaged the claimant in any material way.

88. It is said that Mr Millar should have investigated further with RJ between the 23 April and 30 April rather than doing so on 30 April, as the claimant would have had more time to prepare. The standard to be applied to the investigation is whether it was within the reasonable range; it is not a counsel of perfection. The claimant said he was able to proceed on the 30 April and did not ask for more time to consider the statements. If he had, I consider it likely more time would have been granted. In the circumstances the process followed was within the reasonable range.

89. The claimant says that the disciplinary and appeal managers did not investigate fully and relied on the initial suspension. I do not agree. There was a detailed investigation by Mr Hancock and then more investigations undertaken by Mr Millar. They were relied on to make the decision, not the claimant's suspension. On appeal Mr Tranter gave the claimant the opportunity to raise what he wanted to raise. The claimant was again

invited to name individuals he wished to be interviewed but did not do so. Mr Tranter went and looked at SF's personnel file.

90. The claimant alleges that Mr Millar was not impartial and that he disregarded all the witness statements in support of the claimant and was selective about entries. In my judgement, however, I consider that Mr Millar did weigh up and balance all the evidence before him. I do not consider he disregarded the witness statements in support of the claimant. He evaluated all the evidence but ultimately decided he considered on balance that the claimant had acted in a threatening manner towards SF.

91. The claimant says in his closing submissions that Mr L Bevan had to be prompted about the incident with the trolley the week before 1 April and that if the incident had been significant as to the claimant's behaviour Mr Bevan would have remembered it without prompt. I do not understand that point because Mr Bevan was the claimant's witness and the claimant wanted Mr Bevan to remember the incident and it was in the claimant's interests that Mr Bevan be prompted. That aside, it is also said that the evidence means AF had clearly bumped into the claimant previously, and that the claimant's evidence and complaint against AF from the week before the 1 April 2020 was dismissed as untrue when it had been witnessed. The complaint relating to the week before 1 April was investigated with statements being taken from LB and SF. I do not find that Mr Millar decided that what the claimant was saying was wholesale untrue. The point was that LB described the incident as minor and non-aggressive and did not support the suggestion that SF was undertaking a campaign of deliberate assaults against the claimant. As before, the point as well would only go to mitigation as opposed to the central question of whether the claimant had threatened AF.

<u>The grievance and appeal</u>

92. The claimant says that Ms Griffiths was biased following the claimant raising concerns about the disciplinary process because she says the witnesses were generally not asked leading questions. Ms Griffiths observations in that regard largely match my own findings and did not in my judgement demonstrate bias. She was in any event looking at the claimant's grievance, not conducting the appeal.

93. The claimant says his first appeal meeting was postponed because the respondent would not let him be accompanied by a family friend (Ms Philips). I do not consider that to have been outside the range of reasonable responses. The respondent was clear with the claimant he could be accompanied by a colleague or trade union representative. He had previously been content to be accompanied by a colleague.

94. The claimant says his health meant he was vulnerable to covid, and this created an anxiety in him which meant he felt threatened by SF coming close to him and ignoring social distancing. He says that despite this it was he who was suspended and the claimant's own health and safety rights, and lack of protection, were totally disregarded in the investigation and in deciding to dismiss him. There is no evidence that the claimant raised this at the time he was suspended. Indeed, it was not raised in any clear manner before Mr Millar. The point was raised to an extent at appeal stage albeit not in the manner in which the claimant has done so in the tribunal proceedings.

95. Mr Tranter said in evidence that no one was used to social distancing at the time and guidance was changing day to day. The claimant says that this treated SF too lightly and treated SF's breach of covid policy as an isolated incident that did not warrant action when the allegations against him were not considered as an isolated incident. The claimant further complains that Mr Tranter said that SF may have made a snap decision in raising his hands and stepping past the claimant which was an assumption on Mr Tranter's part. It is said that this also ignored RJ's evidence that SF had waited before moving. He says that Mr Tranter did not know the store and did not check the area to question any doubt about whether SF would need to brush past with his hands raised. It is said Mr Tranter was not objective or impartial and that Mr Tranter failed to consider the point that SF did not need to be in the area at the time, and therefore had no need to step past the claimant.

96. Again, this is conduct that, if relevant, would go to the question of mitigation rather than the question of whether the claimant had threatened SF. In my judgement, it was also not clear to Mr Tranter at the time that the claimant was saying he acted through covid related anxiety (indeed the claimant's position at the time was that he had not threatened SF). The point being made at the time appears to have been more of a general one that SF in doing what he did was breaching social distancing, and that conduct was worthy of action against SF, hence Mr Tranter's comments that social distancing was new etc. In that context SF breaching social distancing to sidestep the claimant, and in doing so brushing against the claimant (even if there was another route SF could have taken) would not be a truly comparable situation with the claimant threatening SF, in the way that had been found. It was in the reasonable range for Mr Tranter to not have investigated that matter further or taken action against SF. In any event, it was not directly relevant to what was happening to the claimant about his own behaviour.

97. In summary, I therefore do not consider that the conclusions reached by the respondent were based on an investigation and following a process that was outside of the reasonable range.

Sanction

98. Turning to sanction, in my judgement the respondent was acting in the band of reasonable responses to choosing to categorise the misconduct as gross misconduct. Threatening behaviour is an example in the disciplinary policy as the type of conduct that may be considered to amount to gross misconduct. The assessment still has to depend on the individual facts, but in my judgement, it was within the reasonable range for Mr Millar to view the claimant's conduct as serious and as amounting to, in his viewpoint, a direct threat to SF.

99. I accept Mr Millar's evidence that he did not take the decision to dismiss lightly, and he did consider whether a lesser sanction should be applied, taking account of factors such as the claimant's length of service and disciplinary record. I accept that Mr Millar ultimately considered it could not sufficiently militate against the nature of the conduct concerned, and I find that the decision to dismiss, as opposed to a lesser sanction was within the reasonable range. The claimant says that an old customer complaint was unfairly used against him, but I do not find it established that it was used against him by Mr Miller or Mr Tranter, and it was not put to them that they had done so.

100. The claimant says that Mr Millar failed to take into account his evidence that he was provoked by SF. I do not find that to be the case. Mr Millar was aware the claimant was saying he had been pushed by SF and that the claimant was saying it had happened the week previously too. Mr Millar looked into that by interviewing Mr L Bevan and SF again. In my judgement, Mr Millar decided that was not, to him, meaningful mitigation because Mr L Bevan said the earlier incident had been minor, non-aggressive and he could not say it was intentional and because the claimant himself had originally said the incident on 1 April was SF brushing against him (as also said by RJ). As already discussed, the claimant did not give to Mr Millar or Mr Tranter the details of anyone else to interview. It was therefore within the reasonable range for Mr Millar to take that view. I do not consider that Mr Millar or Mr Tranter sensibly had before them a direct complaint by the claimant that he was also provoked because he was rendered anxious by SF breaching social distancing.

101. The claimant says that the sanction of dismissal was also unfair because it was disproportionate when compared with SF who had no action taken against him. I do not consider, however, that the claimant and SF were in truly comparable situations. The claimant was found guilty at a disciplinary hearing of threatening behaviour. SF was not. For the reasons already given the respondent did not consider there was sufficient evidence of an assault or harassment complaint to pursue against SF, which was an

assessment on their part that was within the reasonable range. On appeal Mr Tranter did not consider there was a case to pursue against SF for breach of social distancing, again based on the evidence he had before him that SF was attempting to sidestep the claimant. The seriousness of that situation is a matter for the respondent's managerial judgement, and I do not consider it outside the reasonable range not to have pursued it with SF. But in any event, it would not be a comparable situation.

102. The claimant also says that SF made complaints about other members of staff in the past and they were not dismissed so he was treated disproportionately. He also says that no action was taken against SF for making those complaints. Mr Tranter's evidence was that he checked SF's file and the circumstances were very different and of no relevance here. I was given no further evidence about this. There is therefore no evidential basis on which I can conclude that there was unreasonable disproportionate treatment of the claimant in similar circumstances.

103. The claimant also argues that it should have been taken into account, in mitigation, that there were known relationship issues between him and SF prior to the events in question, which had gone unaddressed by the respondent. He points out that Ms Griffiths said in the grievance investigation that there was no evidence of SF being prone to flare ups whilst also saying it was agreed that the claimant and SF did not have a good working relationship. He says that means it is clear the respondent knew of the issues and took no preventative action such as boundary setting. That there were relationship difficulties between the claimant and SF were known to managers. SF had also made a previous complaint about the claimant that was also not subject to action, other than some statements being taken. This was known to Mr Millar as he said he would be making an internal recommendation about that lack of previous action. In my judgement, Mr Millar took the view this was not sufficient mitigation to militate against the seriousness with which he viewed the claimant's conduct on the day on question. Such a viewpoint was within the reasonable range.

104. I have attempted to address on a thematic basis all the points about fairness that I understand the claimant to be making. There was nothing else before me that led me to consider that the process followed, the decision making, or the sanction was outside the reasonable range. In conclusion, in all the circumstances of the case, I consider that the respondent acted reasonably in treating the conduct reason they found as a sufficient reason to dismiss the claimant.

Other matters

105. The claimant in his closing argument says that he is claiming "harassment and discrimination." The Tribunal has no jurisdiction to hear free standing complaints of harassment or discrimination that are not related to a protected characteristic under the Equality Act. Moreover, there has been no Equality Act discrimination claim brought by the claimant, including any sex discrimination complaint or disability discrimination complaint. There was no such claim identified on his ET1 claim form nor at the case management stage before EJ Ryan. There has been no application to amend to bring such a complaint.

106. The claimant also complains about conduct during the proceedings such as disclosure of documents. But complaints about how the tribunal proceedings themselves were conducted cannot go to the dismissal decision and procedure followed because they had not happened at the time of the decision to dismiss.

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Employment Judge R Harfield
Dated: 9 February 2022

JUDGMENT SENT TO THE PARTIES
ON 10 February 2022

FOR THE SECRETARY OF
EMPLOYMENT TRIBUNALS
Mr N Roche