



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

Mr K Rashid

v

LHR Airports Limited

**Heard at:** Reading Employment Tribunal

**On:** 11-13 July 2022,  
(with deliberations in private on 26 July 2022)

**Before:** Employment Judge Smeaton, Ms J Smith, Ms J Cameron

**Appearances:**

**For the Claimant:** Mr C Barklem (counsel)

**For the Respondent:** Ms A Ahmad (counsel)

## JUDGMENT

1. The claim of unfair dismissal is well-founded and succeeds
2. The claim of unlawful harassment related to disability is well-founded and succeeds
3. The claim of unfavourable treatment because of something arising in consequence of the Claimant's disability is well-founded and succeeds
4. The claim of wrongful dismissal is well-founded and succeeds

## REASONS

### Introduction

1. The Claimant, Mr Rashid, was employed by the Respondent, LHR Airports Limited ("LHR"), from 1 June 2005 until his dismissal (with summary effect) on 27 July 2020. He was employed as a security officer.
2. By a claim form dated 6 November 2020, following a period of early conciliation between 8 September 2020 and 8 October 2020, Mr Rashid brings complaints of unfair dismissal (contrary to s.94(1) Employment Rights Act 1996 ("ERA 1996")),

discrimination arising from disability (contrary to s.15 Equality Act 2010 ("EqA 2010"), harassment related to disability (contrary to s.26 EqA 2010) and wrongful dismissal/breach of contract.

### Disability

3. Mr Rashid has Asperger's Syndrome (High Functioning Autism Spectrum Disorder) ("Asperger's"). The Respondent accepts that Mr Rashid was disabled within the meaning of s.6(1) EqA 2010 at all material times. It concedes knowledge of Mr Rashid's disability from 14 July 2020.
4. Mr Rashid maintains that the Respondent has had knowledge (actual or constructive) of his disability since 2018. This dispute is relevant to one allegation of discrimination contrary to section 15 EqA 2010, only. All other allegations of discrimination relate to the period for which the Respondent has accepted knowledge of disability.

### Issues

5. The issues which fall to be determined were discussed on the first day of the hearing and agreed as follows:
6. Unfair dismissal
  - 6.1. Was Mr Rashid dismissed for a potentially fair reason. The Respondent relies on the potentially fair reason of misconduct
  - 6.2. Did the Respondent genuinely believe that Mr Rashid was guilty of misconduct
  - 6.3. Was that belief based on reasonable grounds following a reasonable investigation
  - 6.4. Was dismissal within the range of reasonable responses open to the Respondent
  - 6.5. Did the Respondent follow a fair process in dismissing Mr Rashid
  - 6.6. If Mr Rashid's dismissal was procedurally unfair, should any award of compensation be reduced to reflect the fact that he would have been fairly dismissed had a fair procedure been followed
  - 6.7. Should any award of compensation be reduced to reflect any blameworthy conduct on Mr Rashid's part that contributed to his dismissal
  - 6.8. Should any award of compensation be adjusted to take into consideration a failure by either party to follow the ACAS Code of Practice
7. Discrimination arising from disability
  - 7.1. Did the Respondent have knowledge (actual or constructive) of Mr Rashid's disability from 2018? The Respondent concedes knowledge from 14 July 2020
  - 7.2. Did one or more of the following matters arising in consequence of Mr Rashid's disability:
    - 7.2.1. Inability to process nuance
    - 7.2.2. Inability to understand social cues
    - 7.2.3. Inability to handle changes to routine or process change

- 7.3. Did the Respondent treat Mr Rashid unfavourably because of any of the matters set out above by:
- 7.3.1. Subjecting Mr Rashid to a disciplinary investigation for raising vexatious and false allegations
  - 7.3.2. Dismissing Mr Rashid for gross misconduct
  - 7.3.3. Refusing Mr Rashid's appeal
- 7.4. Was the Respondent's treatment a proportionate means of achieving a legitimate aim, namely conducting a security operation that relies on the integrity and honesty of security officers.

8. Harassment related to disability

- 8.1. Did the following occur:
- 8.1.1. On 14 July 2020, Marco Ng refused to consider medical evidence at the disciplinary hearing
  - 8.1.2. On 14 July 2020, Mr Ng repeatedly asked Mr Rashid why he had not mentioned disability prior to his disciplinary despite Mr Rashid confirming he had informed his previous manager Anwar ul Islam of this in or around 2018
  - 8.1.3. On 27 July 2020, Mr Ng dismissed Mr Rashid
  - 8.1.4. On 14 and 27 July 2020, the Respondent did not accept Mr Rashid's medical condition as a mitigating circumstance
  - 8.1.5. On 4 September 2020, James Shea refused to accept the medical evidence in the appeal hearing
  - 8.1.6. On 22 September, Mr Shea refused to reduce the sanction from summary dismissal to a final written warning after being shown medical evidence of the effects of Mr Rashid's disability
- 8.2. Was that unwanted conduct
- 8.3. Was it related to Mr Rashid's disability
- 8.4. Did it have the purpose or effect of violating Mr Rashid's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him taking into account his perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

9. Wrongful dismissal

- 9.1. Did the Respondent dismiss Mr Rashid in circumstances in which it was entitled to dismiss him without notice.

Hearing and preliminary discussions

10. Mr Rashid was represented by Mr Barklem. The Respondent was represented by Ms Ahmad. The hearing took place over three days. We were provided with an agreed hearing bundle of 472 pages, an agreed chronology, a bundle of witness statements (one for Mr Rashid and four for the Respondent), an opening note from Ms Ahmad and a proposed list of issues from the Respondent (which was subsequently amended and agreed as above).

11. The Respondent also produced CCTV footage, which was adduced by Mr Ng (who took the decision to dismiss Mr Rashid) and viewed by us, both in the presence of all parties and during private deliberations.
12. We took into account that Mr Rashid has a diagnosis of Asperger's. As a result of that, he suffers from anxiety and required additional breaks, which were accommodated. It was also necessary for questions to be put to Mr Rashid in a clear and simple manner, avoiding compound questions, and for Mr Rashid to be reassured, when he repeated evidence, that we had clear notes of what he had said.
13. We heard evidence from Mr Rashid, Mr Ng, Mr Shea (who heard Mr Rashid's appeal against his dismissal) and Mr Norburn (who heard Mr Rashid's grievance).
14. We were also provided with a witness statement from Mr Mileham (who heard Mr Rashid's appeal against his grievance). Mr Mileham was unable to attend on either of the first two days of the hearing because of a medical emergency. It was possible that he would have been able to attend after 1pm on the third day, but that was not at all certain given that he remained on high levels of pain medication. Calling Mr Mileham at that point would have also prevented us from having sufficient time to deliberate.
15. No allegations of discrimination were made in respect of any of Mr Mileham's acts or omissions and he was not involved in the decision to dismiss Mr Rashid. Ms Ahmad submitted that his evidence was relevant only because it provided corroborative evidence as to the reasonableness of the decision to dismiss and was relevant to question of whether, if the claim for unfair dismissal succeeds, there ought to be a reduction in accordance with Polkey v A E Dayton Services Ltd [1998] ICT 142. Mr Barklem indicated that he would have wished to cross-examine on Mr Mileham on his evidence relating to Polkey.
16. Ultimately, it was agreed between the parties that his evidence was not crucial to the issues we had to determine. We agreed to proceed on the basis that Mr Mileham was only unable to attend because of reasons beyond his control and would otherwise have presented himself for cross-examination. The parties made submissions on his evidence and we have taken his evidence into account when reaching our decision.
17. Prior to hearing closing submissions, we indicated to the parties that we required a clear list of the allegations of misconduct relied upon by the Respondent in dismissing Mr Rashid. The dismissal letter is long and discursive but, on the face of it, limits the decision to dismiss to two, narrow points; firstly, a finding that Mr Rashid made false allegations of aggression, intimidation and threatening behaviour against a security manager and secondly, a finding that Mr Rashid made false claims that there were electrical items, safety boots and tools on the floor in the van which were required to go through the x-ray.
18. Ms Ahmad maintained that the dismissal was not limited in that way. Prior to Mr Barklem's submissions, she identified the following as the acts of misconduct relied upon by the Respondent:

- (1) An allegation that Mr Rashid falsely alleged that on 23 October 2019, John Harrigan, the driver of a vehicle at Control Post 19, asked Mr Rashid to ask Michael Martin (Security Manager) not to stand on his overalls;
- (2) An allegation that Mr Rashid falsely alleged that, on 23 October 2019, Mr Martin pointed his finger at him and kept waving his finger at him;
- (3) An allegation that Mr Rashid falsely alleged that, on 23 October 2019, there had been an incomplete search of three items in Mr Harrigan's vehicle when, in fact, he had only told Mr Martin about one item, the waders;
- (4) An allegation that Mr Rashid falsely alleged that, on 23 October 2019, there had been an incomplete search of Mr Harrigan's vehicle by denying that he had been told the waders were contaminated
- (5) An allegation that Mr Rashid falsely alleged that, on 23 October 2019, Mr Martin allowed Mr Harrigan's vehicle to go airside after a non-compliant search procedure and that Mr Martin raised the barrier putting Mr Rashid at risk.

19. We note that, whilst all of those matters are discussed at various points in the dismissal letter, no clear list of allegations (beyond the two points in the invite letter, repeated at the conclusion of the dismissal letter) was identified at any point during the process and indeed was not clarified until the end of the hearing, and even then only at our request. The relevance of this to the fairness of the dismissal is discussed below.

20. In his closing submissions, Mr Barklem addressed those five allegations in turn.

21. He submitted that, in respect of the first allegation (request from Mr Harrigan to stop Mr Martin standing on his overalls), no finding of dishonesty (etc.) had been made. Mr Ng simply found that Mr Harrigan had not had an issue with the search. That, he said, was the sort of fact finding that occurs all the time as part of disciplinary proceedings (and in the tribunal). The fact that a dispute of fact is resolved against one party, does not mean that that party was vexatious or dishonest. This error, he submitted, is a theme that permeated the entire disciplinary process; any findings of fact resolved against Mr Rashid were immediately taken as evidence of bad faith. The Respondent failed, in respect of the first allegation, to consider whether Mr Rashid could have misheard Mr Harrigan or whether it could have been a casual comment that Mr Harrigan forgot.

22. In respect of the second allegation (pointing/waving finger), he submitted that the finger pointing was visible on the CCTV and that Mr Ng had admitted the same in cross-examination when he acknowledged that the second finger point was "*more assertive*". The question of whether Mr Rashid was lying cannot turn on where Mr Martin's finger was pointing. Mr Rashid found it offensive. Again, he submitted, no specific finding of dishonesty or fabrication had been found. This was no more than a simple resolution of a factual dispute against Mr Rashid and cannot justify a finding of bad faith.

23. He referred to Ms Ahmad's submission that matters have to be looked at in the round, taking a step back and considering all of the evidence. For example, Ms Ahmad submitted that it was clear from the CCTV that Mr Rashid was following Mr Martin around, not the other way around, and that this adds support to the

suggestion that it was Mr Rashid, not Mr Martin, who was behaving aggressively. He invited us to consider the CCTV and to note that Mr Rashid moves back from Mr Martin first, that he then starts to move before Mr Martin and that they then walk side by side. Mr Harrigan, who maintains that Mr Rashid was following Mr Martin around, was on the other side of the van at that point so could not have seen what was happening. Mr Rashid then walked towards the security box. At that point he was behind Mr Martin but there was some distance between them and it is not at all clear that he was following Mr Martin, as alleged. Accordingly, the CCTV in this respect could not be used, as Ms Ahmad urged, to provide support for the Respondent's conclusions.

24. In respect of the third allegation (false accusation of incomplete search and three items of concern), he noted that Mr Ng had accepted that there were, in fact, more than three items on the floor of Mr Harrigan's van. Mr Martin, who maintained that there was nothing other than the waders in the van, has a faulty recollection. Mr Rashid's recollection is consistent with the CCTV. The Respondent's decision to concentrate on the waders only has influenced the way it carried out its investigation. Mr Rashid has been consistent, in any event, that the search of those waders, carried out by Mr Martin using his foot, was not consistent with the Respondent's procedure so that the search was incomplete irrespective of the other items.
25. Mr Barklem submitted that the conclusion that Mr Rashid was untruthful when he said that none of the three items had been checked by him is baseless and incorrect. What the Respondent concluded in the outcome letter was that Mr Rashid said he did not touch or search item A. The Respondent accepts that item A slid across the floor, as opposed to being moved by Mr Rashid.
26. In respect of the fourth allegation (false accusation of incomplete search because told waders were contaminated), Mr Barklem noted that the Respondent's case relies on the fact that Mr Harrigan and Mr Martin said they had a chat about it. That does not mean that Mr Rashid was aware. Mr Rashid's evidence, he says, has been consistent throughout. He said that Mr Harrigan said the waders were never normally checked and that is why he raised the issue with his supervisor, Mr Martin.
27. In respect of the fifth allegation, this contains two elements. As to the first (allowing a vehicle airside after a non-compliant search) it is clear that Mr Rashid believed the search to be non-compliant and there is no basis for concluding that he was fabricating that allegation. [REDACTED]. As to the second (false allegation that Mr Martin opened the barrier without telling anyone) Mr Martin does not, on his own evidence, tell Mr Rashid that he is going to open the barrier. On the CCTV, Mr Rashid is seen on the radio and looking down when the barrier is lifted. It is entirely reasonable to assume that he did not see the barrier being lifted. Further, the Respondent has again made no specific finding of dishonesty.
28. In respect of the allegations of harassment, Mr Barklem maintained that the allegation regarding medical evidence was really an allegation that the Respondent failed to take it into account, not that it refused to consider it at all.

29. In her closing submissions, Ms Ahmad submitted that the dismissal was for misconduct. Vexatious complaints are specifically referred to in the Respondent's disciplinary policy as a potential gross misconduct matter. She maintained that there were reasonable grounds for believing Mr Rashid to be guilty of misconduct and that there was a reasonable investigation. In respect of the investigation, she relied particularly on the interview with Mr Harrigan, who she referred to as an independent third party. She submitted that the process was fair and that, even if there were sufficient breaches to render the dismissal procedurally unfair, we could be satisfied that Mr Rashid would have been dismissed had a fair procedure been followed. She invited us to apply a 100% reduction for Polkey and contributory fault if a finding of unfair dismissal was made.
30. In respect of the claim under s.15 EqA 2010, Ms Ahmad submitted that the Respondent did not have, and could not reasonably have had, knowledge of Mr Rashid's disability prior to 14 July 2020. She noted that there was no evidence that Mr Rashid had told his previous manager about his Asperger's. She also submitted that, in any event, it was not unfavourable treatment to put an employee through an investigation, disciplinary and appeal process. It was simply part and parcel of running an organisation. She also maintained that the Respondent's actions were in no way because of something arising in consequence of Mr Rashid's disability.
31. As to the claim for harassment, Ms Ahmad noted that the allegation about medical evidence was that there had been a "refusal" to take it into account. She submitted that that had not been put to the Respondent's witnesses. They did consider the medical evidence. She also submitted that no evidence had been adduced to suggest that any of the Respondent's actions had the required purpose or effect under s.26 EqA 2010.
32. She confirmed that, in respect of the claim for wrongful dismissal, Mr Rashid's notice period entitlement was 12 weeks.
33. We reserved our decision.

### The law

#### (1) Unfair dismissal

34. The law relating to unfair dismissal is contained in s. 98 ERA 1996. In order to show that a dismissal was fair, the Respondent must prove that the dismissal was for a potentially fair reason (s.98(1) and (2) ERA 1996).
35. "*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*" (Abernethy v Mott Hay and Anderson [1974] IRLR 213).
36. The fact that an employer acts opportunistically in dismissing an employee does not preclude the potentially fair reason from being the true reason for the dismissal. An employer may have a potentially fair reason for dismissing, such as misconduct, and at the same time welcome the opportunity to dismiss for that reason because it is keen to get rid of the employee. If, however, the employer makes the

misconduct an excuse to dismiss the employee in circumstances where it would not have treated others in a similar way, the reason for the dismissal will not be the misconduct at all (Associated Society of Locomotive Engineers and Fireman v Brady [2006] IRLR 576, EAT).

37. If an employee wishes to cast doubt on an employer's seemingly fair reason for dismissal, he or she must adduce some evidence in this regard (London Borough of Brent v Finch EAT 0418/11).
38. Misconduct is a potentially fair reason (s.98(2)(b) ERA 1996). If the Tribunal is satisfied that the Claimant was dismissed for misconduct, it must then turn to consider the question of fairness, by reference to the matters set out in s.98(4) ERA 1996 which include the size and administrative resources of the employer's undertaking. The burden as to fairness under s.98(4) ERA 1996 is neutral.
39. In considering the claim of alleged misconduct, the Tribunal must ask itself a series of questions as set out in British Home Stores v Burchell [1980] ICR 303, EAT:
  - 39.1. was there a genuine belief that the Claimant was guilty of the misconduct as alleged;
  - 39.2. was that belief based on reasonable grounds following a reasonable investigation
  - 39.3. was dismissal within the range of reasonable responses open to the Respondent.
40. Where an employee faces disciplinary proceedings relating to more than one charge, the Tribunal must consider whether the employer regarded the charges as being cumulative or standalone. If the charges were cumulative, in the sense that they formed a composite reason for dismissal, it will be fatal to the fairness of the dismissal if any significant charge is found to have been taken into account without reasonable grounds. If, however, each charge stands on its own, for example, independent acts of gross misconduct each meriting dismissal, then they would require separate consideration in determining whether it was reasonable to dismiss. (Tayeh v Barchester Healthcare Limited [2013] ICR D23, CA).
41. In reaching its decision, the Tribunal must not put itself in the position of the employer and consider how it would have responded to the allegations of misconduct. It is not open to the Tribunal to substitute its own decision for that of the Respondent. That means that, even if the Tribunal finds that it would have reached a different decision, it will not necessarily mean that the dismissal was unfair. There is a band of reasonable responses within which one employer might take one view and be acting fairly and another quite reasonably another view and still be acting fairly (Iceland Frozen Foods Ltd v Jones [1982] IRLR 439).
42. The dismissal may be unfair if there has been a breach of procedure which the Tribunal considers sufficient to render the decision to dismiss unreasonable. In considering this question, the Tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures. The range of reasonable responses test applies to the whole disciplinary process, not just the decision to dismiss (Sainsbury's Supermarket Ltd v Hitt [2003] IRLR 23, CA).



43. If there is a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of Polkey determine whether and, if so, to what degree of likelihood, the Claimant would still have been dismissed had a proper procedure been followed. This is a matter relevant to remedy only. In considering whether the 'Polkey' principles apply, regard should be had to Software 2000 Ltd v Andrews [2007] IRLR 568 EAT.
44. As to contributory fault, the relevant principles are laid down by the Court of Appeal in Nelson v BBC (No.2) [1979] IRLR 346 CA. There must be a finding that there was conduct on the part of the employee in connection with his unfair dismissal which was culpable or blameworthy. That conduct must have caused or contributed to, to some extent, the dismissal. It must be just and equitable to reduce the assessment of the Claimant's loss to a specified extent.
45. Even where the employer fails to establish the reason or principal reason for the dismissal, this does not preclude the Tribunal from analysing contributory fault in precisely the same way as it does where the unfairness arises under ERA 1996 s 98(4) (Polentarutti v Autokraft Ltd [1991] IRLR 457).

(2) Discrimination arising from disability

46. In order to succeed in a claim under s.15 EqA 2010, the Claimant must establish:
  - (a) unfavourable treatment;
  - (b) because of something arising in consequence of her disability;
  - (c) which cannot be shown by the Respondent to be a proportionate means of achieving a legitimate aim.
47. In order to be liable under s.15 EqA 2010, the Respondent must have had knowledge (actual or constructive) of the Claimant's disability at the time it is alleged to have treated the Claimant unfavourably (s.15(2) EqA 2010). The Claimant need not establish knowledge (actual or constructive) of the 'something arising'.
48. In considering whether the Respondent knew or ought to have known of the Claimant's disability, the Tribunal must consider whether the Respondent did all that it could reasonably have been expected to do to find out whether the Claimant had a disability (see paragraph 5.15 EHRC Employment Code). If the Respondent has failed to enquire into a possible disability, the Tribunal should ask itself what the Respondent might reasonably have been expected to know had it made such an enquiry (A Ltd v A [2020] ICR 199, EAT).
49. Knowledge of a disability held by the Respondent's agent or employee will usually be imputed to the Respondent.
50. In considering causation under s.15 EqA 2010, the Tribunal must consider whether the Claimant was treated unfavourably and by whom, what caused that treatment and whether that reason was 'something arising in consequence of the Claimant's disability' (Pnaiser v NHS England and anor [2016] IRLR 170, EAT).

51. The disability must have a significant influence on, or be an effective cause of, the unfavourable treatment (Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893, EAT). A connection less than an operative cause or influence will not be enough (Charlesworth v Dransfields Engineering Services Ltd EAT 0197/16).
52. It is for the Tribunal to conduct a balancing exercise based on all the facts and circumstances of the case as to whether the legitimate aim relied upon justified the unfavourable treatment. The aim relied on should be legal, not discriminatory in itself and must represent a real, objective consideration.

(3) Harassment

53. Harassment is defined at s.26 EqA 2010 as:

- (a) unwanted conduct;
- (b) which has the purpose or effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant; and
- (c) which related to the Claimant's disability.

54. Harassment will be unlawful if the conduct in question had either the requisite purpose or the effect. A claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention.

55. In considering whether the conduct has the effect referred to in s.26(1)(b) each of the following must be taken into account:

- (a) the perception of the Claimant;
- (b) the other circumstances of the case; and
- (c) whether it is reasonable for the conduct to have that effect (s.26(4) EqA 2010).

56. Even when considering effect (as opposed to purpose), the context of the conduct and whether it was intended to produce the proscribed consequences will be material to the Tribunal's consideration as to whether it was reasonable for the conduct to have the effect relied upon (Chawla v Hewlett Packard Ltd [2015] IRLR 356, EAT).

57. An alleged harasser does not need to have used ageist, sexist, racist, etc., language or engaged in behaviour that is overtly age, sex or race specific before a harassment claim can be made under s.26 EqA 2010. Ignoring or marginalising an employee and other forms of unpleasantness that are ostensibly 'neutral' are equally capable of constituting unlawful harassment. The Tribunal will consider the surrounding circumstances to determine whether it can draw an inference that the conduct in question is related to the relevant protected characteristic. Evidence that the employee is being treated differently from other employees who do not share the protected characteristic may be useful to the Tribunal in this regard. Once evidence from which the Tribunal could draw an inference is present, it is then for the Respondent to prove otherwise.

58. In considering whether the conduct complained of is 'related to' the Claimant's disability, the Tribunal must apply an objective test, and must have regard to the

context in which the conduct takes place (Warby v Wunda Group plc EAT 0434/11). It will not be sufficient simply to demonstrate that the background relates to a protected characteristic (UNITE the Union v Nailard [2018] EWCA Civ 1203; [2018] IRLR 730). The focus must be on the conduct of the individual or individuals concerned.

(4) Wrongful dismissal

59. The sole issue in the claim for wrongful dismissal is whether the Claimant was guilty of a repudiatory breach of his contract ('gross misconduct'). A fundamental or repudiatory breach is one that is so serious that it goes to the root of the contract.
60. The burden is on the Respondent to establish that the Claimant did in fact do something that fundamentally breached his contract. Unlike in claims of unfair dismissal, it is not enough that the Respondent genuinely and reasonably believed that the Claimant had done so. The Tribunal must reach its own decision.
61. Since the question of whether an employee is in repudiatory breach is a matter of fact, the employer's motivation for wanting to summarily dismiss is effectively irrelevant. Where there has been a repudiatory breach by the employee that has not been waived or affirmed by the employer, the employer is not prevented from relying on that breach as justifying summary dismissal even if it was looking for a reason to justify dismissal (Williams v Leeds United Football Club [2015] IRLR 383, QBD).

Findings

(1) Mr Rashid's role

62. Having heard the evidence and having considered the documents before us, we found Mr Rashid to be a broadly credible witness. His evidence was detailed and generally consistent, both internally and with the documentary evidence and CCTV. As a witness he presented in a completely different way to how he has been portrayed by the Respondent.
63. By contrast, for the reasons set out below, we were not satisfied as to the reliability of significant elements of the Respondent's evidence.
64. Where there was a dispute of fact between the parties, we tended to prefer the evidence of Mr Rashid, for the reasons we set out below.
65. Mr Rashid was employed by the Respondent from 10 June 2005 as a Security Officer based in Campus Security Airside. He worked permanent night shifts.
66. His duties required him to screen individuals and vehicles seeking access to restricted areas. This involved, amongst other things, profiling individuals, scanning using a metal detector, carrying out physical body searches, searching vehicles and reviewing ID documents.
67. His role was an extremely important one. As Mr Rashid explained in his evidence, as part of his role, he had to sign a document to confirm that he had cleared a

vehicle as safe to proceed, so if a plane were to come down because an item had been missed during his search, he believed that it would be on his conscience.

68. In carrying out his role, Mr Rashid was required to follow strict protocols. The “*Security Standard – Vehicle Search, version 2, issued on 16 December 2015*” (“the LOI”) was applicable at the relevant time. Mr Rashid knew the LOI by heart, read it everyday and had been following all procedures and protocols for years by the time of the incident leading to his dismissal.

69. [REDACTED]

70. Mr Rashid was good at his job. He had worked in the same role for 17 years. Throughout that time he had received various accolades, including a STAR cheque in 2018 for stopping criminal activity by detecting stolen passenger goods which had been concealed as rubbish and hidden under a driver’s seat in a vehicle.

(2) Disability and knowledge

71. Part of what made Mr Rashid so good at his job were personal traits associated with his Asperger’s. According to a consultant psychiatrist who assessed him in 2020, he manages his anxiety associated with Asperger’s by strict and inflexible adherence to protocols, compliance policies and procedures. We found that Mr Rashid was a diligent, thorough and skilled security officer who was a real asset to the Respondent.

72. Those same traits that made him a diligent security officer also had the potential to make him come across as difficult, inflexible and rude to others, although we accept that this was not his intention.

73. In 2018, Mr Rashid’s son was diagnosed with Asperger’s. Through the process of diagnosis, Mr Rashid realised that he shared similar traits with his son. He began the process of receiving his own diagnosis. He maintains that, in 2018, he informed his then manager that he was being assessed for Asperger’s and shared a copy of his son’s report in order to explain some of the effects on him. Mr Rashid’s evidence on this was consistent. He explained that his manager had been supportive and understanding because he had a family member with a similar condition. That sort of detail is indicative of a credible account.

74. The Respondent denies knowledge of disability before 14 July 2020 on the basis that the disclosure is not recorded anywhere and the manager no longer works for LHR, so cannot be asked. No attempts were made to contact the manager.

75. On balance, we accept Mr Rashid’s evidence that he did inform his manager in 2018 that he was being assessed for Asperger’s and did inform his manager of the effects of that condition on him. Mr Rashid provided his manager with a document explaining the effects of his son’s Asperger’s and explained that similar effects applied to him. The fact that he did not have a formal diagnosis at that point does not mean he was not, in fact, disabled nor that the Respondent cannot be fixed with knowledge of his disability. Accordingly, we accept that the Respondent had

knowledge, in 2018, of the facts which met the definition of disability under s.6 EqA 2010

76. Even if we are wrong about that, and the Respondent did not have actual knowledge of Mr Rashid's disability in 2018, upon receipt of the document from Mr Rashid, his manager ought to have referred him to Occupational Health. We find that, had such enquiries been carried out, the Respondent would have had knowledge by the time disciplinary action was taken at the latest, that Mr Rashid had an impairment which had a long-term, substantial adverse effect on his ability to carry out normal day-to-day-activities. Accordingly, we find that by the time of the events relevant to this claim, the Respondent was fixed with constructive knowledge of Mr Rashid's disability.

(3) The 23 October 2019 incident

77. On 23 October 2019, Mr Rashid was on shift when a Heathrow livery van entered the security lane he was assigned to. The issues before us arise out of the incident that followed.

78. [REDACTED]

79. [REDACTED]

80. [REDACTED]

81. [REDACTED]

82. [REDACTED]

83. It is quite clear that Mr Rashid did not carry out a visual search of those items sufficient to be satisfied that the vehicle could be cleared, as has subsequently been alleged by the Respondent. He selected three items that he believed required further searching. There is nothing on the CCTV (or elsewhere) to show that Mr Rashid searched those items himself, or in such a manner as would be satisfactory to the Respondent.

84. Mr Rashid's evidence on this has been consistent throughout the disciplinary process. In his first interview, he refers to discovering "*lots of tools, overalls and safety shoes*". He made clear, in that interview, that he could not recall exactly what the items were, it having been six weeks since the incident and not having been shown any CCTV since the date of the incident (and only then, on his case, part of it). He said in the investigation meeting that the tools were "*possible small electrical items*" but that he wasn't an engineer.

85. [REDACTED]

86. We prefer the evidence of Mr Rashid on this matter. He wrote his statement almost immediately after the event. By contrast, the driver was asked for his version of events on 10 December 2019, nearly seven weeks after the incident. Mr Rashid has been clear and consistent on this point.

87. [REDACTED]

88. [REDACTED]

89. In accordance with the LOI, Mr Rashid requested the assistance of Mr Martin. Mr Martin, who was already close to the van, immediately joined Mr Rashid and Mr Harrigan. Mr Rashid can be seen on the CCTV seeking advice.

90. We accept that there may have been some discussion, at this point, about the waders being contaminated. Both Mr Martin and Mr Harrigan mention it and it makes sense that, upon further interrogation from a security manager, Mr Harrigan would identify a specific reason for not putting the waders through the x-ray. We also accept, however, that Mr Rashid did not hear it or that it did not register with him. The discussion was brief, as can be seen from the CCTV, and by this time Mr Rashid was beginning to get stressed and anxious because the search was not proceeding as it ought to. Further, the area in which they were operating was loud.

91. Even if we are wrong about that, and Mr Rashid was aware that the waders were contaminated and couldn't go through the x-ray, we have difficulty understanding the significance the Respondent has placed on this. Whatever the reason for the waders not going through the x-ray, they still needed to be searched in some way according to the LOI. Accordingly, even if he had been aware that the waders were contaminated, it was not false for Mr Rashid to say that the search was incomplete given that, in his view, no proper search of the waders took place before the vehicle was permitted to proceed.

92. [REDACTED]

93. [REDACTED]

94. There is a dispute of fact here about whether Mr Harrigan said words to Mr Rashid to the effect of "*don't let [Mr Martin] stand on my overalls like that*". In his grievance, Mr Martin alleged that Mr Rashid made this up. The Respondent says he did so to make matters look worse for Mr Martin.

95. In concluding that the allegation was fabricated, the Respondent relied on Mr Harrigan's interview. When questioned, Mr Harrigan said he had no problem with the way the search was performed. Mr Harrigan was not, however, asked whether he said the words alleged to Mr Rashid.

96. Again, on balance, we prefer the evidence of Mr Rashid on this matter. He wrote his statement shortly after the incident occurred and his evidence has remained consistent on this point. Mr Harrigan could have made the comment in a light hearted manner and not remembered it. Given that Mr Martin was in the van, it is not surprising that he did not hear it. Mr Ng acknowledged in cross-examination that, with his back turned, Mr Martin would not have been able to hear what Mr Harrigan was saying.

97. Mr Ng also acknowledged that he did not consider the fact that Mr Harrigan may have had a faulty memory, writing his statement some weeks after the incident. We have had the benefit of hearing from Mr Rashid in evidence and accept his evidence on this point as credible. We have not had the same opportunity to hear from Mr Harrigan.
98. Even if Mr Rashid was wrong, we have seen no evidence which would justify the conclusion that the allegation was “*false*” as opposed, to “*mistaken*”. He may have mis-heard Mr Harrigan or exaggerated what was a brief, throwaway comment. Mr Rashid’s actions subsequent to the incident (discussed below) in which he agreed to mediate with Mr Martin, completely undermine the suggestion that he was trying to get Mr Martin in trouble.
99. In his subsequent grievance, which we will come onto, Mr Martin refers to the waders as being the only item in issue during the search. In his investigation meeting, Mr Martin said he only searched the waders because “*that’s all there was*” and, later, that Mr Rashid’s reference to tools, overalls and high safety shoes was wrong because “*there were no tools and no overalls*”. Mr Martin alleges that Mr Rashid’s assertion to the contrary was vexatious because, if there had been other items, the search would have been incomplete as alleged.
100. It is quite clear from the CCTV that Mr Martin, not Mr Rashid, is mistaken here. The waders were not the only item on the floor. Mr Harrigan accepted in his interview that there were other loose items. Although the box Mr Rashid believed to be tools turned out to be a box of gloves, he did not know this at the time because he had not searched it. Mr Rashid had identified three items which required searching.
101. Accordingly, even on Mr Martin’s own evidence, the search was, in fact, incomplete.
102. We accept, on the balance of probabilities, that when Mr Rashid initially called Mr Martin over, his focus was on the waders, although we do not accept that it was the only item of concern raised. As a result of what followed, there was no further opportunity to discuss the other two items which he had also selected for search in any detail. The focus remained on the waders. The other items were not, however, searched, so it was not false for Mr Rashid to say that the search was incomplete. In any event, it is clear that Mr Rashid was unhappy with the search of the waders. That, by itself, meant that in his view the search was incomplete.
103. [REDACTED]
104. [REDACTED]
105. [REDACTED]
106. We accept, in summary, that the search of the vehicle was not complete when compared to the requirements set out in the LOI.
107. [REDACTED]

108. There then ensued some 'back and forth' conversation between Mr Martin and Mr Rashid, with Mr Rashid seeking further clarification and Mr Martin becoming impatient with Mr Rashid's inability to accept what he was being told.
109. At one point during this discussion, Mr Martin turned his back to Mr Rashid and pointed to the words 'security manager' on the back of his high-vis jacket. We accept that Mr Martin said words to the effect of "*Can you read this I am the manager if I say it's clear you let it through*". This, we find, was a reaction to Mr Rashid's persistent questioning. In the circumstances however, it was not a reasonable response and could reasonably have been interpreted by a junior employee (particularly one with Asperger's) as offensive and intimidating, even if that was not Mr Martin's intention. Mr Martin is using his hands to gesture. He can be seen on the CCTV using his finger to point at the van and his back. It is unclear from the CCTV whether he points directly at Mr Rashid, although we do not accept that on any reasonable interpretation of the CCTV it can be said to show conclusively that he did not do so, as has been suggested by the Respondent. Further, we accept that Mr Rashid genuinely believed him to have done so.
110. In cross-examination, Mr Ng accepted that there was finger pointing but maintained there was no finger waving. In the circumstances, we do not see a valid distinction between the two. Mr Ng also accepted that if someone is pointing in a way that is more assertive than before and raising their voice, as here, that could be misread by someone with Asperger's as threatening.
111. It is clear from the CCTV that Mr Rashid remained dissatisfied with the search carried out. He continued to engage in conversation with Mr Martin, as he accepts. Mr Rashid's need for clarity was, we accept, a feature of his Asperger's. It arose from his difficulties in handling changes to routine or processes.
112. Mr Rashid then walked alongside Mr Martin to the 'security post' by the barrier (to the right of the van on the CCTV). Mr Martin alleges that Mr Rashid followed him, goading him and claiming he had anger issues. We accept that Mr Rashid was, at this stage, still attempting to speak to Mr Martin but we do not find that there was anything wrong with his behaviour. Mr Martin had not adequately explained himself to Mr Rashid. As Mr Ng acknowledged in cross-examination, it would have been important for someone like Mr Rashid, with Asperger's, to obtain clarity on the situation. Mr Ng acknowledged that he did not consider this at the time of reaching his decision.
113. [REDACTED]
114. We found that it was Mr Martin's refusal to engage with Mr Rashid that prevented further discussion about the search and the other items within the vehicle.
115. In cross-examination, Ms Ahmad suggested to Mr Rashid that if he had truly had an issue with the search he would have called [REDACTED]. Mr Rashid said this would not have been appropriate. [REDACTED] would have led to the rapid response team and police attending. The vehicle would have been apprehended



and brought back for another search. We accept that in the circumstances, in which Mr Rashid had been told by his manager that the vehicle was cleared but remained unhappy both about the nature of the search and the way in which he had been spoken to, and unsure about how to deal with future searches, calling his duty manager was the entirely appropriate course of action. It is not in dispute that Mr Rashid did call his duty manager, Jay Mirza, at that point.

116. Mr Rashid alleges, and we accept, that Mr Martin subsequently said words to the effect of "*I don't want to talk to you*". That is consistent with Mr Martin's interview in which he says that he "*refused to get involved in any further discussions with [Mr Rashid]*".

117. There is a further dispute of fact about what happened next. The Respondent says that Mr Rashid came back out of the security box and deliberately stood in front of the van after the barrier had been lifted by Mr Martin because he wanted to stop the vehicle. The Respondent also says that Mr Rashid's motivation for subsequently raising a grievance against Mr Martin was that he realised that what he had done, in stepping in front of the van, was a serious health and safety risk that could have got him disciplined and so he submitted the grievance in order to distract the Respondent from taking such action against him.

118. On the CCTV, Mr Rashid can be seen walking into the security box to get the radio and then coming back out to the search area, clearly on the radio. He says he did this because the signal is not good in the security box. He can be seen walking into the search area and around the van whilst on the radio. It is not clear where he is looking but it is clear that he is on the radio. The barriers are lifted up by Mr Martin as Mr Rashid walks in front of them. He moves in front of the van before it starts moving. It begins to move forward and stops because Mr Rashid is in the way. Mr Harrigan exits the vehicle and appears to ask Mr Rashid to move out of the way. He does so and the van proceeds into the airside area.

119. Having heard the evidence from Mr Rashid, we accept that he was wholly engaged in the conversation he was attempting to have with Mr Mirza at the time. We accept, on balance, that he was not paying attention to the barriers and that he was not expecting the van to move forwards. Importantly, on his own account, Mr Martin did not tell Mr Rashid he was going to open the barrier. He simply said he was not engaging in further conversation. We do not agree that Mr Rashid was deliberately attempting to stop the van from proceeding. He did not raise his hands to tell the van to stop or stand in an obviously obstructive manner. He can be seen on the CCTV fiddling with the radio.

120. In cross-examination, Ms Ahmad suggested that Mr Rashid deliberately stood in front of the van so that if he was harmed he could blame Mr Martin. In our view, this was a serious allegation made entirely without foundation. Mr Rashid did not allege in his grievance that he had been put in harm's way by Mr Martin. Although this was referenced later on, during the disciplinary process, it was clearly not Mr Rashid's focus. We can quite understand why Mr Rashid believed that Mr Martin's actions in raising the barrier when he knew that Mr Rashid remained unhappy with the search and had contacted a supervisor, had the potential to put him in danger, although we do not believe that it was Mr Martin's intention to do so. We believe

that communication, necessary to ensure a safe environment, had broken down by this point.

121. Mr Mirza sent a driver to collect Mr Rashid so they could discuss his concerns. We note that, in his witness statement, Mr Ng suggests that a driver was sent to collect Mr Rashid because of concerns about his behaviour. That is incorrect. The driver was sent to collect Mr Rashid so that he could go and speak to Mr Mirza about the incident, because of concerns he was raising. There is nothing in any of the documents before us to suggest the contrary.
122. Mr Mirza and Mr Rashid watched some, but not all, of the CCTV together and Mr Rashid was asked how he wished to proceed. He indicated that he would be happy to engage in mediation. We noted that this was not the sort of reaction that would be expected of someone who was attempting to get a colleague in trouble, as was suggested by the Respondent.

(4) The Claimant's grievance

123. Mr Mirza discussed the matter with Mr Martin. During this conversation, Mr Mirza told Mr Martin that Mr Rashid had accused him of being aggressive. This is reflected in Mr Martin's subsequent interview notes. Mr Martin then indicated that he was not interested in mediation.
124. Having been informed of Mr Martin's position, Mr Rashid wrote up his grievance. He did so in the early hours of 24 October 2019, during the same night shift. It was emailed on his behalf by Alex Leach, to Mr Mirza, at 03.51.50am. This timing is important because it suggests that it was sent after Mr Mirza had spoken to Mr Martin and after Mr Rashid had been told that mediation was not an option. It undermines what Mr Mirza says in his statement, that Mr Rashid declined to proceed with his grievance once he was aware he would need to write a statement.
125. The grievance policy in place at the time relevant to this claim is dated 27 May 2016. Its purpose is said to be "*a means of resolving grievances at work in a time, fair and equitable manner*". Page one of the policy provides that "*matters will be dealt with confidentially*". Page five of the policy provides:

***False and vexatious Claims:-***

*Employees should be aware that any complaint that is unfounded and not made in good faith, for example a malicious complaint, can be very damaging to the reputation of individual concerned. As a consequence any false or vexatious complaint which is made deliberately, mischievously, recklessly or with the intention to intimidate an employee or frustrate an existing process will be treated as a serious disciplinary matter. Before any action is taken advice should be obtained from Employee Relations."*

126. That makes clear that there are two stages in considering false and vexatious claims. First, the complaint must be unfounded. Secondly, it must be made in bad faith.

127. Employers involved in grievance and disciplinary procedures, and Tribunals hearing claims of all types, are tasked on a daily basis with resolving disputes of fact. In a situation where there are two differing accounts, that task potentially involves rejecting one account. It is not inevitable, however, that in rejecting one account the decision-maker will conclude that one individual has made the allegation in bad faith. In our experience, it is a rare case in which the decision-maker will need to reach such a conclusion. More often than not, one party holds a genuine but mistaken belief as to what took place.
128. Given the importance of providing a grievance procedure for employees and not discouraging them from making complaints, and given the potential consequences of a finding that an unfounded complaint has been made in bad faith, it is vital that if an employer is going to institute disciplinary proceedings for false and vexatious complaints, it makes clear findings to the effect that the complaint is both unfounded and made in bad faith, and the reasons for reaching both elements of the decision.
129. No evidence has been produced which would justify a finding, in our view, that Mr Rashid rushed to raise a grievance because he realised he was at risk of being disciplined for a health and safety breach and was seeking to distract the Respondent from that, as was suggested by Ms Ahmad. There is no suggestion in any of the statements that such action had been threatened or even alluded to by Mr Martin or anyone else. We accept that Mr Rashid raised his grievance following his conversation with Mr Mirza because he remained upset about how he had been spoken to, unhappy with the search and unclear about how to proceed with future searches.
130. We accept that Mr Rashid did not at any stage withdraw that grievance. In his interview, Mr Mirza said that he believed Mr Rashid decided not to go forwards with a grievance because he was told a statement would be needed. That is nonsensical given that Mr Rashid did in fact write and email a statement during the same shift, after he was told that Mr Martin did not want to enter into mediation.
131. We find that this was likely a miscommunication between Mr Rashid and Mr Mirza. We find it more likely than not that there was some discussion about the grievance not progressing immediately and seeing whether the issue resolved itself. Mr Mirza believed that, at that stage, Mr Rashid was not going to progress the grievance. That is reflected in an email Mr Mirza sent on 28 October 2019. It is important to note that Mr Mirza's email says "*At the present time he's chosen not to*". It does not state that the grievance has been withdrawn. Mr Mirza's email suggests the possibility of it being taken forward in the future, depending on how matters progressed. That is consistent with our understanding.
132. Once Mr Martin put in his counter-grievance, however, it was clear that the matter was not going to be resolved. We find that, at that stage, Mr Mirza ought to have gone back to Mr Rashid to ask him how he wished to proceed and to have formally recorded the position. A similar finding, although not one which goes as far as that, was found as part of Mr Rashid's grievance process.

133. At some point in time over the next few days, the grievance was forwarded to Stephanie Calleja, Security Operations Manager and Mr Martin's line manager. It is not unusual for a line manager to be informed of grievances made against their direct report. It is unclear why it needed to be forwarded to Ms Calleja given that the Respondent believed the grievance was not being pursued at that point, but this point did not cause us particular concern.
134. However, Ms Calleja, then forwarded the grievance onto Mr Martin directly. That was entirely inappropriate. It was in breach of the express requirement of confidentiality contained within the grievance policy and confirmed by Mr Ng in his evidence. Of course if the grievance had been progressed, it may have been appropriate, at some point, for Mr Martin to see the grievance. At that stage, however, there was no justification for doing so.
135. The potential adverse consequences of breaching that confidentiality for all those concerned and involved in the grievance are obvious. Understandably, having seen it, Mr Martin was upset and concerned. It made allegations about him personally, including raising concerns about his behaviour including insinuations that he had not carried out security checks properly.
136. We did not hear from Mr Martin but we considered it to be reasonably likely that, having read Mr Rashid's grievance, Mr Martin was concerned about his own position and reputation. It is a natural reaction, when you disagree with a version of events in which you are criticised, to not only disagree with the allegations but to maintain that the individual is lying. Often individuals have different, but genuinely held, perceptions about the same incident. That both accounts cannot be true does not mean that one person is deliberately lying. It is not surprising, however, that Mr Martin made the allegation that the grievance contained lies.

(5) The disciplinary investigation

137. On 28 October 2019, a few hours after receiving Mr Rashid's grievance, Mr Martin raised a counter-grievance. The email says that the grounds for the grievance are "*gross misconduct in the form of a formal statement of events written to a Duty Manager that contains lies and fabrications...*" The email also states that his statement and details of the event will follow. We note that, within his email, Mr Martin requested a copy of Mr Rashid's statement. It is clear, however, from the timings of emails, that he had already been provided with it.
138. It is unclear when Mr Martin's subsequent account of the day in question was written and sent to the Respondent. It is undated. His email of 28 October 2019 suggests that it had not been written by that point.
139. The email correspondence shows that, upon receipt of that grievance, the decision was taken immediately to register Mr Rashid's grievance as vexatious and to proceed directly with a disciplinary investigation. No explanation has been given for why that course of action was taken. It is a significant and telling decision. Rather than hold meetings under the grievance procedure, considering both Mr Rashid's and Mr Martin's grievances, and resolving disputes of fact in a neutral setting, the decision was taken to investigate Mr Rashid for raising false and

vexatious complaints. In our view, this coloured the fairness of the procedure from the outset.

140. Given the lack of explanation for this, we find that it is indicative of a preconceived view that Mr Rashid's grievance was not only baseless but false and vexatious and that the motivation for proceeding in that way was a belief within the management team that Mr Rashid had a tendency to raise false complaints and that there were concerns within management about working with him (discussed below).

141. We note that, during Mr Rashid's appeal hearing, Mr Shea (who chaired the hearing) said "*to clarify you raised a grievance against an SM, then the SM raised a grievance against you. You went through a disciplinary from a complaint made against you from MM which wasn't a grievance*". We did not understand this explanation at all.

142. Mr Martin was interviewed on 21 November 2019 by Ms Calleja, the Interviewing Officer. It is clear from the contents of that interview that he had, in advance, discussed the matter with Mr Harrigan. During his interview, Mr Martin alleged that Mr Rashid had made the following vexatious complaints:

- (a) *That there were tools and overalls in the vehicle when there were not.* As set out above, it is clear on the CCTV that other items were in the vehicle;
- (b) *That Mr Rashid was asked by Mr Harrigan to stop Mr Martin from treading on his overalls and that Mr Rashid felt embarrassed by Mr Martin's actions.* As set out above, we accept Mr Rashid's evidence on this point;
- (c) *That Mr Martin was waving his finger at him in an aggressive manner.* As set out above, we accept that Mr Rashid genuinely and reasonably perceived Mr Martin to be behaving in this way
- (d) *That Mr Martin was shouting "I don't want to talk to you" with the office door open.* As set out above, we accept that this did happen

143. Within his interview, Mr Martin said that he was aware of continuous issues with multiple different people including stakeholders and duty managers in respect of Mr Rashid. He alleged that multiple senior managers had said they will refuse to attend Mr Rashid's requests unless they have a witness with them. No details of those senior managers were provided and the matter does not appear to have been investigated further by Ms Calleja. Although we accept that, as part of the management team referred to by Mr Martin, she would have been aware of any such concerns and, indeed, we find that this was what motivated the decision to proceed with the disciplinary investigation in the first place.

144. Mr Rashid was interviewed by Ms Calleja on 2 December 2019. Early on in the interview Mr Rashid asked to view the CCTV in order to refresh his memory. Ms Calleja declined that request. She said that she didn't want it to "*interfere with his account of the incident on that day*". When Mr Harrigan was interviewed on 10 December 2019, he was treated differently. He was shown the CCTV and asked questions as it played.

145. We could find no explanation for the difference in treatment of Mr Rashid and Mr Harrigan in this regard other than that Ms Calleja was looking to find inconsistencies in Mr Rashid's account from the outset. The decision supports our view that she had a predetermined view that Mr Rashid was guilty of the misconduct alleged and was looking for reasons to justify it.
146. We also note that Mr Rashid was not shown a copy of Mr Martin's grievance but Mr Martin was shown a copy of Mr Rashid's grievance. Mr Martin was given time to consider it and discuss with others before submitting his own grievance. Again, we could find no explanation for the difference in treatment in this respect other than that there was an inherent bias against Mr Rashid.
147. The same day, Mr Rashid sent an email chasing his grievance. Within that email, he repeated the details of the incident. The Respondent relies on alleged inconsistencies between that email and his original statement as evidence that the allegations were fabricated. We found, however, that the two statements were broadly similar. Any inconsistencies were of an insignificant nature. Far from undermining Mr Rashid's account, the second statement showed that he had remained broadly consistent throughout. All that Mr Rashid did in that second email was to provide further detail and clarity of his account. We accept his evidence that, over time, he reflected on the situation, gave more thought to his concerns and then explained himself further. That is entirely consistent with what we would expect to happen in a grievance process. No consideration has been given to this by the Respondent.
148. The day after his interview, Mr Rashid was suspended. Given his length of service, disciplinary record and the nature of the allegations, this seemed surprising and unnecessary to us. We find that the motivation for suspension was likely to be the wider (unsubstantiated) allegations made by Mr Martin and referenced by Ms Calleja, namely that managers were not willing to work alone with Mr Rashid.
149. Mr Mirza was interviewed on 9 December 2019. It was suggested in cross-examination of Mr Rashid that when he contacted Mr Mirza he was complaining only about how Mr Martin had spoken to him. Mr Rashid denied that. His account is supported by Mr Mirza's interview. Mr Mirza confirms that Mr Rashid contacted him on 23 October 2019 to raise concerns both about how he had been spoken to by Mr Martin and about the checks Mr Martin had undertaken (or not undertaken) on the vehicle.
150. During his interview, Mr Mirza was specifically asked whether he was aware of other "*fears or perceptions from the management team*" about Mr Rashid. He responded to say there were such concerns and that Mr Rashid had previously got a different manager suspended. No further details of this allegation were provided.
151. We find that there was a view shared between the relevant management team that Mr Rashid was difficult and caused problems for managers. Ms Calleja was part of that management team. This, we find, unfairly influenced her investigation report. The point was not put to Mr Rashid during his interview and no evidence was gathered from other managers. Given the Respondent's size and resources,

and that pre-existing knowledge, it would have been better for someone more independent to investigate the allegations.

152. Ms Calleja completed her report titled *“Deliberate, Vexatious and False Statements Made Against a Colleague”* on 16 December 2019.

153. Within her report, Ms Calleja made the following findings which were of concern to us:

- *“Item A, on seeing the CCTV, KR remembered this to be an electrical item which would require x-ray screening. JH confirmed, Item A is in fact a box of gloves which form part of his PPE and would not need X-ray screening”.*

154. That statement is wrong in two respects. Firstly, it is not accurate to say that Mr Rashid *“remembered the box to be an electrical item”*. In fact, in his interview, Mr Rashid made clear that he couldn’t remember the exact items inside the van because the incident was over 6 weeks ago and that they were *“possibly small electrical items”* to which he added *“I’m not an engineer”*. [REDACTED].

- *“KR mentions aggression, intimidation and threatening behaviours in his statements, however then clarified this to mean the tone in which MM spoke to him and answered questions”.*

155. No acknowledgement is given in the remainder of the report that Mr Rashid is complaining about how he was spoken to, as opposed to more general aggressive behaviour.

- *“JM and MM interview is consistent – no evidence on CCTV for any aggressive behaviour”.*

156. As set out above, we do not entirely agree with that. We find that Mr Martin was behaving unprofessionally and that a reasonable person in Mr Rashid’s position may have found that behaviour to be aggressive, offensive and intimidating.

- *“There are inconsistencies within KR two different e-mailed statements and his interview. He mentions a tool box in the first statement and then nothing on the second statement about tools and then mentions lots of tools in his interview...When watching CCTV within the interview he could not see any tools but said there were electronics...”*

157. In his first statement, Mr Rashid mentioned tools. In his second statement he said that Mr Martin failed to use the x-ray on reasonably sized goods which could easily be screened. The fact that he doesn’t detail those items or specifically refer to them as tools in that statement cannot on any sensible basis be seen as an inconsistency. We have dealt with the electronics point above.

- *“Within KR second statement he asks what has been done with his first statement reference (sic.) an incident of unprofessional, threatening and offending behaviour as he has heard nothing. KR first statement mentions nothing about any threatening or offending behaviour”.*

158. That is incorrect. Mr Rashid does not use those specific words in his first statement but he describes behaviour which can clearly be categorised as threatening or offending (e.g. *“Said in loudly (sic.) can you read this I am the manager”, “pointed his finger at me and said you can try calling me but I’ll be at home”, “he kept shouting don’t want to talk to you”*). Mr Ng, in cross-examination, acknowledged that Mr Martin had behaved unprofessionally and, further that the question of whether behaviour is offensive is subjective.
159. Ms Calleja concluded that there were a concerning number of inconsistencies which led her to question Mr Rashid’s integrity. She referenced Mr Martin’s interview in which he stated that *“there are concerns amongst the Managers within Campus Security (CS) now as this is not the first time Kashif has done something like this. There are now multiple Security Managers (SM) within CS who are now refusing to deal with KR requests unless they are with another SM as a witness. Leaving the SM community on edge and vulnerable with every conversation and decision made. MM feels KR is a risk to the business due to his behaviours and the effect this is having on OS...”*. She concluded that *“Within the CS Management Team there are also concerns which I believe leads to a loss of trust in KR”*.
160. Other than her own knowledge and the references above made by Mr Martin and Mr Mirza, this point was not investigated at all by Ms Calleja. It was not put to Mr Rashid and no detailed examples of wrongdoing by Mr Rashid were identified beyond the 23 October 2019 incident. Evidence was not collected from other security managers.
161. Ms Calleja concluded that the case required a “gross misconduct hearing” on the basis that the allegation against Mr Martin was false and vexatious and because of the lack of trust in Mr Rashid amongst the CS Management Team.
162. In our view, Ms Calleja’s investigation and conclusions were sufficiently flawed to render that recommendation unreasonable.

(6) The grievance investigation

163. The disciplinary process was put on hold whilst Mr Rashid’s grievance was investigated. A grievance investigation meeting was held with Mr Norburn on 15 January 2020. Within that meeting, Mr Rashid said he felt that Mr Martin had put his grievance in to spite him and that he was a person with influence (initially he said *“dangerous”* but accepted that was the wrong word”). He explained that, because Mr Martin was a manager, he believed other managers who were friends would look after him. He noted that the grievance had not been raised at the time but had been put in weeks after the incident.
164. Mr Norburn did not carry out any further interviews. He was provided with a copy of Ms Calleja’s report but not a copy of Mr Rashid’s grievance, Mr Martin’s grievance, or any of the interviews. He did not carry out any or any adequate investigation into Mr Rashid’s grievance and his conclusions, we find, were simply a wholesale adoption or rubber-stamping of Ms Calleja’s report.



165. In his outcome letter, Mr Norburn concluded that there was no evidence of Mr Martin following a new process in searching the waders with his foot. He did not acknowledge that, to Mr Rashid, that would have been a new process as has now been accepted by the Respondent.
166. Mr Norburn also concluded that there was no evidence of unprofessional behaviour by Mr Martin. Mr Ng acknowledges that there was.
167. Mr Norburn referred in the outcome letter to Mr Rashid's allegation that Mr Martin was a "*dangerous person*" and maintained that "*it is a serious allegation which you have not substantiated in any way*" notwithstanding that he also recorded in the same sentence that Mr Rashid had retracted it, as can be seen in the interview itself. We found this to be indicative of an underlying bias against Mr Rashid. There was no need to mention that allegation because it has been clarified and retracted by Mr Rashid. It ought not to have featured at all. We do not accept that the grievance investigation or outcome was fair.
168. Mr Rashid appealed against the outcome of his grievance. His grievance appeal was dealt with by Ms Lyn Fowler. It is clear that she did not carry out any further investigation. She dealt with the appeal on the papers and dismissed it on 30 March 2020. That process was unfair and contrary to the Respondent's grievance policy.

(7) The disciplinary hearing

169. On 22 April 2020, Mr Rashid was invited to a disciplinary hearing to answer an allegation of "*making false allegations against a Security Manager where upon the Manager could have led to being disciplined*". The allegations were detailed as follows:
- "*Deliberately vexatious and / or unreasonable complaints and grievances; making serial grievances without foundation, namely making false allegations against a Security Manager which could have led to disciplinary action*
  - "*Deliberately making a false statement or dishonest conduct in relation to the company and its employees*"
170. The letter did not detail what allegations were said to be vexatious or false (etc). As discussed above, that did not become clear until the end of the Tribunal hearing.
171. Mr Rashid was warned that one outcome may be dismissal. He was told that he could attend the hearing accompanied. The meeting was to be chaired by Mr Ng.
172. On 2 May 2020, Mr Rashid wrote to the Respondent raising concerns about Ms Fowler's grievance appeal outcome. Specifically, he stated that he had not had a stage 2 meeting with Ms Fowler and that neither Mr Norburn nor Ms Fowler had viewed the CCTV. He also raised concerns about a breach of confidentiality, in that his grievance had been sent directly to Mr Martin in October 2019.

173. Ms Mandeep Kaur, HR, acknowledged that the incorrect process had been followed at stage 2 of the grievance process and re-opened Mr Rashid's grievance appeal. It was then dealt with by Mr Mileham.
174. A grievance appeal meeting was held with Mr Rashid on 22 May 2020. His disciplinary hearing was postponed to allow the grievance appeal to be concluded. Within that meeting Mr Rashid repeated his account. We find that his account was broadly consistent with that that he had given in his previous statements/emails and in his disciplinary investigation meeting.
175. Mr Rashid maintained, in that meeting, that Mr Martin put him in a dangerous position by lifting the barrier without communicating his intentions to him. We deal with that above.
176. Mr Mileham carried out a much more thorough investigation than Mr Norburn. He watched the CCTV with Mr Rashid and interviewed Mr Martin, Mr Mirza and Mr Devan Pillai. We have not been provided with the notes of those meetings, although they are referenced in the grievance appeal outcome letter.
177. On 18 June 2020, Mr Mileham wrote to Mr Rashid dismissing his grievance appeal. Within his outcome letter he referred to two "*very serious allegations*" made by Mr Rashid; firstly that he had alleged that Mr Mirza was "*covering up for a manager*" and secondly that Mr Martin "*had the ability to influence the investigation due to being friends with managers at work*".
178. In our view, the seriousness of these allegations has been grossly exaggerated. It is not uncommon for the Employment Tribunal to see grievance investigations where an employee genuinely believes his account to be true and to allege that management are covering for each other. Often that is a mistaken viewpoint but one that is genuinely held. It does not appear that any consideration was given by Mr Mileham to the possibility that Mr Rashid genuinely, but mistakenly, believed that Mr Mirza was covering up for Mr Martin or to the circumstances that might have led Mr Rashid to form the view that he was not being treated fairly by management, e.g. that Mr Martin raised his grievance weeks after Mr Rashid, that Mr Mirza did not progress his grievance notwithstanding (on our findings) that it had not been withdrawn, that Mr Harrigan had been permitted to view the CCTV but he had not, or that his grievance appeal had initially been mishandled. Combined, those issues would provide reasonable grounds for an employee forming the view that matters were not being dealt with fairly behind the scenes.
179. In his outcome letter, Mr Mileham also alleged that Mr Rashid's grievance submitted on 24 October 2019 was "*significantly different*" to that set out in his email of 2 December 2019. For the reasons set out above, we do not agree. Nor do we consider that Mr Mileham's conclusion on that issue, and his consequent conclusion that Mr Rashid had used the opportunity to submit further, false allegations – "*potentially with a view to frustrating the existing disciplinary matter*" was a reasonable one. Instead, we find, that the view that Mr Rashid had fabricated his complaints was simply snowballing by this stage. Any alleged inconsistencies fed into that belief, compounding it further, as the process continued.

180. The following day, Mr Rashid was invited to a rescheduled disciplinary hearing, to be chaired by Mr Marco Ng. Mr Rashid asked to rearrange the meeting because his union representative was not available on the proposed date. That was agreed by Mr Ng. The meeting was rearranged for 7 July 2020.
181. On 30 June 2020, Mr Rashid emailed Mr Ng asking to rearrange the meeting further because his union representative was not available on the proposed date.
182. Mr Ng replied to refuse that request. He said that the hearing had already been rescheduled more than once, "*which is the permissible number of reschedules*".
183. On 2 July 2020, Mr Rashid emailed Mr Ng with a number of comments on that position.
184. He highlighted that the first disciplinary investigation had not been re-arranged at his request but postponed because the grievance appeal had had to be re-opened because it had not been done fairly the first time.
185. He asked that the HR contact be changed from Ms Kaur. He raised concerns about her involvement to date and indicated that knowing she would be present was making his anxiety worse. He attached to that request a letter from his GP referring to his disability and indicated that he was taking anti-depressants.
186. Mr Rashid also asked for details of exactly what allegations were said to have been made falsely. Mr Ng forwarded this email to Ms Kaur. The only message in his email was an "!". We agree with Mr Rashid's concerns, that the exact nature of the allegations was not clear. Although two specific allegations were set out in the disciplinary hearing invite letter, no detail of those allegations was provided. In fact, as became clear by the end of this hearing, the allegations relied upon were wider than the invite letter (and indeed the concluding paragraphs of the disciplinary outcome letter) suggests. This lack of transparency adds support to our conclusion that the Respondent had pre-determined Mr Rashid's guilt and then looked for examples to justify its conclusion. This may not have been a conscious decision.
187. Mr Ng agreed to re-arrange the meeting again. It was rescheduled for 14 July 2020. It does not appear that there was any response to the remainder of Mr Rashid's email.
188. On the morning of the rearranged hearing, Mr Rashid emailed Mr Ng a copy of a report from a consultant psychiatrist (Dr Hugo de Waal) following an assessment the previous day. That report contained the following key information:
- Mr Rashid has a diagnosis of Asperger's Syndrome (High Functioning Autism Spectrum Disorder)
  - He has little or no flexibility in his information processing and requires time and patience to process information and instructions for change to routine/tasks
  - Things must be done in a particular way or with instructions. He is inflexible and, if challenged, can become anxious

- He worries about making mistakes and manages his anxiety by strict and inflexible adherence to protocols, compliance policies and procedures
- He can be perceived as rude.

189. We note that there was no real dispute by the Respondent to the conclusions in that report. We accept that they accurately reflect the effects of Mr Rashid's disability.

190. The disciplinary hearing took place on 14 July 2020. Mr Rashid attended accompanied by his trade union representative, Matthew Thompson. Ms Kaur was also in attendance.

191. It is important to note at this stage that, according to Mr Ng's evidence, the decision that the conduct alleged was gross misconduct, was not one for him but for the investigating officer. He said that although he had discretion as to what sanction to impose, the decision to identify the conduct as gross misconduct, and not misconduct, was not a matter for him. This was surprising to us. The investigating officer can make recommendations but it is generally for the decision-maker, having heard the evidence, to make a decision both on whether the misconduct as alleged is established and, if so, whether it amounts to misconduct or gross misconduct. Mr Ng's evidence on this issue was of particular concern to us given that a key basis for Ms Calleja's conclusion that the conduct was gross misconduct was the allegation that the management team had no trust in Mr Rashid. Mr Ng accepted that that should not have been part of her decision making but did not give any real consideration to the question of whether, if that element was dismissed, the remaining allegations still amounted to gross misconduct.

192. In the meeting, Mr Thompson asked if Mr Ng had received the medical evidence. Mr Ng confirmed that he had done so and asked why it had only come to light at that stage and not before. In our view, that was a reasonable question to ask. Mr Rashid replied to confirm he had raised it with his previous manager, Anwar, in 2018. Mr Ng repeated his query as to why the report had only been written yesterday. Mr Rashid explained that he had approached his doctor in 2018 but that the process of getting a report had been lengthy. Mr Ng asked again why it had not been raised at the beginning of the process. Mr Rashid explained, in summary, that he had not realised that his Asperger's might affect his actions.

193. Mr Ng repeated the fact that it had not been raised earlier in the process on at least six further occasions. In our view this was entirely unnecessary. That conduct was clearly unwanted by Mr Rashid. After the fourth instance, Mr Thompson asked "*Why should it matter. We have established that he went to the GP in 2018 and a report has been produced...*". We accept that this continuous questioning about the disclosure of disability created an intimidating and hostile environment for Mr Rashid and, further, that it was reasonable for Mr Rashid to have felt that way.

194. During the hearing, Mr Rashid was shown the CCTV and gave his account to Mr Ng. When discussing the 'finger pointing' issue, Mr Thompson explained that those with Asperger's can interpret the actions of others differently to others who do not have Asperger's.

195. At one point, Mr Ng asked Mr Rashid how he would describe his behaviour when “*you followed Mick around*”. Mr Thompson made the point that Mr Rashid’s behaviour was not related to the two charges. Mr Ng disagreed and said that Mr Rashid’s behaviour was related to the charges. This is one example of where the exact nature of the allegations against Mr Rashid was unclear and where his conduct on 23 October 2019 appeared to be taken into account, notwithstanding that the disciplinary allegations made against him did not refer to his conduct on the night of the incident.

196. The meeting adjourned after over five hours. It was excessively long and ought to have been managed more strictly.

197. The hearing reconvened on 27 July 2020. During this meeting, Mr Rashid reiterated that his Asperger’s affected how he viewed Mr Martin’s behaviour on the night in question and, specifically, caused him to feel intimidated. Mr Thompson explained further that Mr Rashid’s Asperger’s can cause anxiety. This was highlighted and explained in detail in Mr Thompson’s closing statement as follows:

*“Kashif’s interpretation of these gestures and forceful instruction is a genuine belief it’s threatening, perhaps because it may have professional consequences, maybe because the tone and body language suggest Michaels angry with him. He’s already likely anxious and worried so in a state of heightened anxiety.”*

198. Mr Thompson also referenced Mr Rashid’s disability as directly relevant to the allegations of fabrication:

*“During the course of the case hearing we’ve touched and examined alleged discrepancies in the way Kashid has communicated what happened that day; any inconsistency of thought or wording is scrutinised as evidence of a fictitious or untruthful record of the events. This does not give adequate consideration to his underlying disability which actively hinders his ability to effectively do this especially when judged against a standard set against behaviour of individuals without Asperger’s.”*

199. At the end of that hearing, Mr Ng informed Mr Rashid that he would be summarily dismissed for gross misconduct.

200. Within the pre-prepared statement that Mr Ng read out during the meeting, he made the following relevant findings:

- There is a small warning sign visible on the outside of the doors
- Mr Rashid’s search was not in line with vehicle searching standards
- Mr Rashid visually checked all three items, despite claiming to have never done so and so was untruthful when he said that none of the three items had been checked by him
- Mr Martin is seen pointing at the back of his high vis at one point
- Mr Rashid followed Mr Martin around
- No aggressive finger pointing can be seen on the CCTV
- Mr Martin informed Mr Rashid he was lifting the barrier

- Mr Rashid verbally informed Mr Mirza that was not proceeding with his grievance
- Mr Rashid only followed up on his grievance in order to frustrate and delay the disciplinary process
- The disciplinary process was delayed due to Mr Rashid's grievance and grievance appeal
- Mr Rashid's medical condition does not cause or negate submitting false allegations or making dishonest statements
- Mr Rashid made false claims that there were electrical items, safety boots and tools on the floor in the van. The only item raised with Mr Martin were the waders and he was made aware that they were contaminated

201. In respect of the five allegations identified by Ms Ahmad as those underpinning the dismissal, Mr Ng reached the following conclusions:

(1) Mr Harrigan did not have an issue with the manner in which Mr Martin searched the waders.

202. As Mr Barklem pointed out, however, that is not the same as a conclusion that Mr Rashid falsely alleged that Mr Harrigan had made the alleged request/comment. If allegations of false and vexatious conduct are to be made, there should be a clear finding on that allegation with reasons for it. Mr Ng has resolved a factual dispute (as to whether the comment was made) against Mr Rashid. That does not automatically lead to a finding that the allegation was deliberately false and vexatious. No consideration was given by Mr Ng to the question of whether Mr Rashid was mistaken or whether Mr Harrigan might have forgotten making a potentially throwaway comment given the passage of time. That is particularly important given that the allegation was not put directly to Mr Harrigan.

(2) There was no *"aggressive finger waving and pointing"* on the CCTV.

203. Mr Ng accepted in cross-examination that there was finger waving and pointing and that this became more assertive. Again, there is no specific finding by Mr Ng that the allegation was deliberately false. Further, there was no consideration as to whether Mr Rashid might have genuinely but mistakenly believed the finger pointing to have been aimed at him and to have been aggressive. Mr Ng jumped from resolving the dispute of fact against Mr Rashid, to the conclusion that he had lied. He accepted in cross-examination that someone with autism could *"misread"* the situation and view someone pointing in a more assertive manner as threatening, but he did not take that into account when dismissing Mr Rashid.

(3) The only item Mr Rashid had raised concerns over were the waders.

204. In support of this conclusion, he referred to Mr Mirza's statement, in which he said Mr Rashid had raised concerns about *"the driver's kit at the back of the vehicle"*. We do not understand on what basis Mr Ng restricted this to the waders. That is not what Mr Mirza says in his email. It is quite clear to us that Mr Rashid's allegation that the search was incomplete is *"based in reality"* to coin Mr Barklem's phrase. Three items had been selected by him for searching. Looking at items and putting them to one side to be searched is clearly not the same as searching the

items. The only item that had been addressed was the waders and, even then, in a matter which was entirely unsatisfactory to Mr Rashid (and to us). We accept, as set out above, that the focus of the discussions with Mr Martin was the waders, but we do not accept that there were any reasonable grounds for concluding that that was the only item of concern raised.

(4) Rashid was told the waders were contaminated.

205. In reaching this conclusion, Mr Ng noted that if Mr Rashid had been unaware that the waders were contaminated, there would have been no reason for him to call Mr Martin; he could simply have asked Mr Harrigan to put the waders in the x-ray. As set out above, this reasoning ignored Mr Rashid's account at the time, that Mr Harrigan had declined to put them in the x-ray and had said that he had never been asked to do so before.

(5) Mr Rashid had not told Mr Martin that the search was incomplete and had confirmed that the customer was free to leave.

206. This conclusion is based on an email that Mr Martin sent to Mr Ng between the first and second disciplinary hearings in which Mr Martin said "*Mr Rashid did not at any time inform me that the vehicle search was incomplete. I actually asked him if the customer was free to leave*". That email is completely contradictory to Mr Martin's original statement, in which he said that he made the decision that the vehicle was cleared and informed Mr Rashid of the same before making the decision himself to let it airside. We found it surprising that this inconsistency was not of concern to Mr Ng and that he simply accepted Mr Martin's account on that point without questioning it at all.

207. Mr Ng also concluded that Mr Rashid deliberately stood in front of Mr Harrigan's van in an attempt to prevent it from proceeding. He also concluded that Mr Martin told Mr Rashid he was going to open the barrier, stating "*Michael has stated he had informed you he was opening the barrier*". In fact Mr Martin does not say that at all, quite the opposite.

208. We note that, in cross-examination, Mr Ng stated that he considered Mr Martin's and Mr Harrigan's accounts to be reliable because they were consistent with the CCTV. In our view, however, the opposite is true. For example, Mr Martin denied that there were any items other than the waders in the van. The CCTV shows the opposite. Mr Harrigan said he pointed to the 'fire and foul' sign on the van doors. That is not shown on the CCTV.

209. Mr Ng concluded that Mr Rashid had decided to follow up with his grievance in order to frustrate and delay the existing disciplinary proceedings. In cross-examination, he said this was based on the timings and on the basis that he could not understand what was taking so long in the grievance procedure. He did not realise that much of the delay in the grievance procedure was caused by the Respondent's failure to carry out a proper, fair grievance appeal with the result that that stage had to be repeated. In his evidence, Mr Shea, who heard Mr Rashid's appeal against dismissal, also stated that he was unaware of that. Both individuals ought to have been aware of it.

210. That outcome was confirmed in a letter sent to Mr Rashid on 31 July 2020.
211. That letter is 18 pages. It is extremely detailed and discursive but it is difficult to identify from the letter what allegations are relied on as misconduct for the purposes of the decision to dismiss.
212. The five allegations relied on by Ms Ahmad are not identified in that way in the decision letter. The conclusions reached on those points (as set out above) appear at different places throughout the letter.
213. The letter follows the format of the invite letter and, at the conclusion, suggests that two allegations of misconduct are brought against Mr Rashid and that both have been established, namely (1) that Mr Rashid made false allegations of aggression, intimidating and threatening behaviours against Mr Martin and (2) that he made false claims that there were electrical items, safety boots and tools on the floor in the van which were required to go through the x-ray, when in fact the only item of concern raised with Mr Martin were the waders and he was told they were contaminated. No reference is made to the fact that, in his interview, Mr Rashid made clear that he was unsure whether the items were electrical items or tools because he had not in fact searched the box.
214. In evidence, Mr Ng said he was satisfied that Mr Rashid's grievance was not only unfounded but also made in bad faith because his story "*changed so significantly*". As set out above, we do not accept that there are any significant inconstancies at all or that there is any reasonable basis for that conclusion.
215. No mention is made in the letter of Mr Rashid's length of service or disciplinary record as potentially mitigating factors. In evidence, Mr Ng said that the Respondent must have 100% trust in a security officer and that because there had been a breach of trust and confidence there was no possibility of a lesser sanction. It does not appear that any consideration was given to whether the situation was likely to arise again or whether there was any fault on Mr Martin's behalf that might have contributed to the incident.
216. Mr Rashid's medical condition is referenced only insofar as Mr Ng concludes that he has no thought disorder, is intelligent and articulate and so he fails to see how his medical condition would cause or negate submitting false allegations or making dishonest statements. In our view this misses the point and ignores the more detailed effects described by consultant psychiatrist. As was made clear to Mr Ng by Mr Thompson and Mr Rashid during the hearing, his disability causes him anxiety in difficult situations and causes him to feel intimidated or threatened in situations where others may not feel the same. No consideration is given to this by Mr Ng in concluding whether Mr Rashid genuinely, but mistakenly, felt threatened (etc).

(8) The appeal against dismissal

217. Mr Rashid appealed against the decision to dismiss him on 10 August 2020. In his appeal letter, Mr Rashid reiterated concerns about the unfairness of Ms



Calleja's investigation, denied making serial grievances without foundation as was alleged in the disciplinary outcome letter, maintained that a gross misconduct finding was disproportionate, alleged that irrelevant factors had been taken into account by Mr Ng and alleged a failure to make reasonable adjustments.

218. The appeal meeting was held on 4 September 2020. It was chaired by Mr Shea. Mr Rashid attended accompanied by Mr Thompson again. During this hearing, Mr Rashid reiterated that his Asperger's causes anxiety, that he is more sensitive to the world around him and that he can lose focus.

219. Mr Rashid raised concerns that Mr Ng had taken into account baseless and un evidenced comments insinuating that he is a person who makes vexatious complaints.

220. The appeal was dismissed on 22 September 2020. Mr Shea concluded, in summary, that:

- *Ms Calleja's investigation was impartial and fair.* As set out above, we do not agree
- *The allegations against Mr Rashid were clear.* As set out above, we do not agree. The five allegations Ms Ahmad confirmed were relied upon by the Respondent were not reflected as five disciplinary allegations in the decision outcome letter.
- *The reference to "serial grievances" in the allegations was just part of the policy wording. It is accepted that Mr Rashid had only raised one grievance*
- *Mr Rashid was alleged to have made several false allegations against Mr Martin – that is action which falls within the range of gross misconduct so it was an appropriate charge*
- *Mr Rashid's employment record shows multiple instances of conduct issues and he made serious allegations of physical assault against a security manager in 2012, of which there was no evidence.*

221. Reference was made during the hearing to one previous conduct matter, when Mr Rashid was dismissed and subsequently re-instated on appeal. That was referenced by Mr Shea in the appeal hearing. All that we were told about that incident was that the dismissal had been overturned and replaced with what was known at the time as a "reprimand". We were not given any details of the incident leading to that disciplinary action. There is reference in the bundle to one previous incident where Mr Rashid was dismissed for sleeping on the job but re-instated upon receipt of medical evidence, but we were not addressed on that.

222. Save as to that incident, no other evidence was produced to suggest that Mr Rashid had been disciplined during his 17 years of service. No HR record has been produced. No disciplinary letters have been shown to us. As far as we can see from the evidence, the only other disciplinary process Mr Rashid was involved in was when he was called as a witness. In summary, we have not been provided with any evidence to substantiate Mr Shea's assertion and, accordingly, we do not accept, that there were "*multiple instances of conduct issues*" or that Mr Rashid "*made serious allegations of physical assault against a security manager in 2012*".

223. Mr Shea said in response to questions from us, that he thought Mr Rashid's disciplinary record was relevant because he considered he was looking at someone who has a "*history of doing this sort of thing*". He acknowledged, however, that Mr Rashid was not given an opportunity to respond to that allegation, and that he could see that that might have been unfair.
224. Mr Shea said that Mr Rashid's conduct was precisely what was brought into question so it was correct for Mr Ng to refer to matters such as Mr Rashid being condescending and undermining. In cross-examination, Mr Shea confirmed that, as far as he was concerned, the dismissal was about conduct more generally. We disagree. The allegations against Mr Rashid were of vexatious (etc) complaints.
225. We find that both Mr Ng and Mr Shea based their decisions on matters which went beyond those framed within the disciplinary allegations and that Mr Rashid was not given a fair opportunity to respond to them.
226. Mr Shea's reliance on those alleged conduct issues was entirely inappropriate. In re-examination from Ms Ahmad, Mr Shea said that his decision would have been the same even if he had not been aware of that previous alleged misconduct but we do not accept that. Given the nature of the allegation, and the reference to it in the appeal outcome, we find that Mr Shea was unfairly influenced by that background.
227. Mr Shea concluded he found it difficult to understand how the Respondent could have supported Mr Rashid with his Asperger's unless they were made aware of his now diagnosed condition. As set out above, we consider that Mr Rashid did make his line manager aware of his condition in 2018.
228. In his evidence, Mr Shea added that he struggled to see how Mr Rashid's disability could play any part in him submitting false allegations. His Asperger's did not make him more likely to lie. As above, in our view this misses the point. The issue was not whether Mr Rashid was more likely to deliberately submit false allegations because of his disability but whether his disability may have caused him to perceive events in a way that someone without his disability may not have done.

### Conclusions

229. Applying our findings of fact to the law as set out above, we reach the following unanimous conclusions:
- (1) Unfair dismissal
230. We accept that Mr Rashid was dismissed for a potentially fair reason, namely misconduct.
231. We are also satisfied that Mr Ng genuinely believed that Mr Rashid was guilty of misconduct.

232. We do not, however, accept that that belief was based on reasonable grounds following a reasonable investigation. We do not accept that Mr Ng limited his decision to the allegations that were made against Mr Rashid in the invite letter. We find it more likely than not that Mr Ng's conclusions were made within the context of wider allegations from Mr Martin (and others) that there was a loss of trust amongst management in Mr Rashid, a matter which was not adequately explored by him or anyone during the disciplinary process and which Mr Ng acknowledged in the dismissal letter had not been substantiated by Mr Martin.
233. We also find it more likely than not that Mr Ng's decision to dismiss Mr Rashid was based on wider concerns about his behaviour on the 23 October 2019, specifically that he was undermining and condescending to Mr Martin, that he followed Mr Martin around, that he made goading comments to Mr Martin, that he behaved inappropriately in front of a stakeholder, and, further that he failed to carry out a proper search of Mr Harrigan's vehicle. Those matters are expressly referred to in the conclusions part of the dismissal letter and we do not accept that they were simply part of the background, or explanation for why Mr Ng concluded that the disciplinary allegations were established, as Mr Ng claimed. We consider that, if that background had been ignored, Mr Rashid would not have been dismissed.
234. We do not accept that there were reasonable grounds for Mr Ng's belief in Mr Rashid's misconduct (whether limited to the original allegations or the wider allegations that we have found the decision to be based on), nor that his belief was based on a reasonable investigation.
235. Ms Calleja's investigation was unfair and based on preconceptions within the management team about Mr Rashid. Support for this conclusion is found in the fact that Mr Martin's grievance was dealt with immediately as a disciplinary matter before any investigation (by contrast, Mr Rashid's grievance was not dealt with as a disciplinary matter against Mr Martin), that Ms Calleja allowed Mr Harrigan to view the CCTV but refused to allow Mr Rashid to do so, and that she referenced a loss of trust amongst the management team in Mr Rashid in her investigation outcome. We find that she approached Mr Rashid's interview with an assumption that his allegations were fabricated and that any inconsistencies, however minor, were fed into that narrative as the process developed. Whenever Mr Rashid said anything which was potentially inconsistent or if he clarified or developed his account, it was viewed as evidence of fabrication. No thought was given to whether Mr Rashid's account could have been affected by memory and the passage of time or, importantly, whether what he thought had happened was a genuine, but mistaken belief. It appears that Ms Calleja, perhaps subconsciously, went into the process looking for reasons to justify what was a preconceived opinion on Mr Rashid's guilt.
236. The unfairness in her investigation was not remedied either by Mr Ng or Mr Shea. Although Mr Ng ostensibly came into the process as a 'fresh' pair of eyes, we found that he was unduly influenced by the conclusions reached by Ms Calleja.
237. In respect of the first allegation that was originally put to Mr Rashid, and which is in the conclusion section of the dismissal letter (false allegations of aggression, intimidation and threatening behaviours), Mr Ng's partiality is evidenced by the fact

that he too jumped straight from the conclusion that there were inconsistencies and that the allegations were false, to the conclusion that Mr Rashid had fabricated his account, without any consideration of whether Mr Rashid's belief that Mr Martin was aggressive, intimidating or threatening might have been genuinely but mistakenly held.

238. Further, and significantly, Mr Ng failed to take into account Mr Rashid's explanation that anxiety is a symptom of his Asperger's and that it was partly as a result of his condition that he felt intimidated and threatened by Mr Martin, in a situation where others may not have done. The CCTV clearly demonstrates behaviour by Mr Martin which could be viewed as aggressive, intimidating and threatening to someone with anxiety.

239. As to the second original allegation (false statement or dishonest conduct), the unreasonableness of Mr Ng's conclusions is made clear when the evidence before him is objectively assessed against those conclusions. He concluded that Mr Rashid had made "*False claims that there were electrical items, safety boots and tools on the floor in the van which were required to go through the x-ray*". As set out above, it is clear from the CCTV that Mr Rashid had identified three items on the floor of the van that needed to be searched. For the reasons set out above, he did not falsely claim that there were electrical items and made clear that he believed the box to be tools but had not searched it so did not know exactly what was inside. None of that detail is referenced by Mr Ng.

240. For the reasons set out above, (and, in particular, paragraphs 201-209) we do not accept that there were reasonable grounds, based upon a reasonable investigation, for Mr Ng's belief in the five wider and more detailed allegations of misconduct.

241. Accordingly, we do not accept that Mr Ng had reasonable grounds, based upon a reasonable investigation, for his belief in Mr Rashid's misconduct, whether limited to the two allegations in the disciplinary invite letter or the five wider allegations now relied on.

242. Finally we find that the dismissal was outside the range of reasonable responses. At its highest, this was a single incident where there had been a clear breakdown of communication following concerns with a senior manager by a more junior member of staff. In concluding that dismissal was the appropriate sanction, no consideration was given to Mr Rashid's exceptionally long service or his previous commendations. No consideration was given to his medical condition and how that influenced his behaviour on the day or the way in which he came across to Mr Martin and Mr Harrigan (matters which, as set out above, we find Mr Ng took into consideration when dismissing Mr Rashid) as mitigation. We make clear here that we are not substituting our view for the Respondent but that we conclude that no employer, acting reasonably, could have dismissed Mr Rashid in the circumstances.

243. For the reasons set out above, we do not accept that any unfairness was remedied by Mr Shea on appeal. To the contrary, he cemented many of the elements of unfairness that we have found.

244. In all the circumstances, we find that Mr Rashid was unfairly dismissed, both substantively and procedurally.

245. We do not accept that there should be any reduction for contributory fault. Mr Rashid was not guilty of conduct which was culpable or blameworthy and which caused or contributed to his dismissal in some way. It would not be just and equitable to reduce the assessment of his loss to any extent. Mr Rashid was working in a high security environment and should not be criticised for being hyper-sensitive and cautious in that context.

246. Although consideration of a Polkey reduction is not necessary given that our finding is that Mr Rashid was both procedurally and substantively unfair dismissed, for completeness we find that Mr Rashid would not have been fairly dismissed had a fair procedure been followed. The findings of gross misconduct were not reasonably open to the Respondent.

(2) Discrimination arising from disability

247. As set out above, we accept that the Respondent had knowledge of Mr Rashid's disability from 2018.

248. We also accept that the matters relied upon at paragraph 7.2 above (inability to process nuance, to understand social cues and to handle changes to routine or process change), arise in consequence of Mr Rashid's disability, as alleged. This was not meaningfully challenged by the Respondent although, in our view, these should more accurately be described as 'difficulties in' rather than 'inability to'. We do not consider that this minor language change requires an amendment to the claim nor that the Respondent is prejudiced in any way as a result of us proceeding in that way.

249. It is not in dispute that Mr Rashid was subjected to a disciplinary investigation or dismissed or that his appeal was not upheld.

250. We accept that these are all instances of unfavourable treatment. We reject Ms Ahmad's submission that they do not amount to unfavourable treatment because they are part and parcel of employment practices. Although 'unfavourable' is not defined in the EqA 2010, the EHRC Employment Code states, at paragraph 5.7, that it means the disabled person must have been put at a disadvantage and specifically refers to action such as dismissal as an example of unfavourable treatment.

251. We also accept that the treatment was because of the matters arising in consequence of Mr Rashid's disability.

252. We accept that the decision to initiate the disciplinary investigation was taken partly based on Mr Rashid's behaviour towards management generally and his behaviour towards Mr Martin on 23 October 2019. Mr Rashid's conduct and general demeanour, presenting as challenging or difficult, arose in consequence of difficulties handling changes to routine or processes, which in turn arose in

consequence of his disability. The expression “*something arising*” in s.15 EqA 2010 can describe a range of causal links and may include more than one link (see Pnaiser v NHS England and another [2016] IRLR 170, EAT).

253. We also accept that the decision to dismiss Mr Rashid was because of something arising in consequence of his disability. In reaching this decision, we adopt the same reasoning as above. Mr Ng’s decision was not based solely on allegations of false or vexatious complaints but on Mr Rashid’s conduct more widely.
254. Finally, for the same reasons as above, we find that the decision to reject Mr Rashid’s appeal was because of something arising in consequence of his disability. Mr Shea accepted that his decision was based both on the allegation of raising a false and vexatious grievance, as well as wider conduct concerns.
255. Mr Rashid’s disability had a significant influence on, or was an effective cause of, the unfavourable treatment relied on.
256. We do not accept that the treatment is objectively justified. Any concerns raised about Mr Rashid’s conduct, both generally and on 23 October 2019, could have been addressed informally or via the grievance process without undermining the security operation run by the Respondent. Further, in circumstances where the decision to proceed with a disciplinary based on an alleged false and vexatious grievance has been found by us to be entirely unreasonable, the treatment cannot be justified.
257. In the circumstances, Mr Rashid’s claims for discrimination arising from disability at paragraph 7 above succeed.
258. The only allegation potentially out of time in this claim is the allegation at paragraph 7.3.1 above (the claim under s.15 EqA 2010 based on the decision to subject Mr Rashid to a disciplinary investigation). In light of our other findings, specifically that the Respondent discriminated against the Claimant throughout the disciplinary process, we accept that this allegation forms part of a continuing act by the Respondent and is, accordingly, in time (applying the approach in Hale v Brighton and Sussex University Hospitals NHS Trust EAT 0342/16 and s.123(3)(a) EqA 2010).

### (3) Harassment

259. We do not accept that Mr Ng refused to consider the medical evidence at the disciplinary hearing. He considered and referenced the medical evidence, albeit in our view in an inadequate way. Accordingly, the allegation at paragraph 8.1.1 above is not well founded.
260. As set out above, we accept that Mr Ng repeatedly asked Mr Rashid on 14 July 2020 why he had not mentioned his disability prior to his disciplinary hearing. Whilst we accept that it was appropriate for Mr Ng to ask that question once or twice, it was neither necessary nor appropriate for him to repeat it so many times after Mr Rashid and Mr Thompson had explained the position. That repeated questioning

was unwanted conduct, related to Mr Rashid's disability, which reasonably had the relevant effect.

261. We accept that both Mr Ng and Mr Shea refused to accept the medical evidence as a potentially mitigating factor and, connected to this, that Mr Shea refused to reduce the sanction from summary dismissal to a final written warning in light of the medical evidence. Their consideration of the medical evidence was limited to the conclusion that it did not excuse Mr Rashid's behaviour because it didn't suggest a propensity to lie. That is an entirely unsatisfactory and superficial consideration of the medical evidence. What Mr Rashid was asking the Respondent to consider was that his perception of events and others' perception of his behaviour was affected by his disability and, at the appeal stage, to take that into account in considering sanction. Both Mr Ng and Mr Shea refused to do this.
262. That was unwanted conduct which was related to Mr Rashid's disability and which had the effect of violating his dignity. It ignored and discounted an important matter that Mr Rashid was attempting to communicate and which was plainly relevant to the disciplinary allegations and sanction. In all the circumstances, it was reasonable for it to have that effect.
263. It is not in dispute that Mr Ng dismissed Mr Rashid. On our findings above, that was partly because of matters which were related to Mr Rashid's disability, namely his conduct on 23 October 2019 and a perception about his conduct more widely.
264. In addition, we find that the conclusion that Mr Rashid falsely alleged that Mr Martin had been threatening (etc.) was related to Mr Rashid's disability. That conclusion partly led to his dismissal. As a result of his disability, Mr Rashid has difficulties in understanding social cues and nuance. As a result, he interpreted Mr Martin's behaviour as more threatening or intimidating than others might. In concluding that the grievance was false and vexatious in that respect, Mr Ng failed to consider that.
265. The dismissal was plainly unwanted and reasonably had the relevant effect.
266. In all the circumstances, all allegations of harassment at paragraph 8 above, save for that at paragraph 8.1.1 above, succeed.

(4) Wrongful dismissal

267. On the basis of our findings, above, we do not accept that Mr Rashid was guilty of gross misconduct, as alleged. We do not accept that his complaints against Mr Rashid were fabricated or vexatious or that he deliberately made a false statement or acted dishonestly. In the circumstances, his complaint of wrongful dismissal also succeeds.

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Employment Judge Smeaton

Date: 27 July 2022

Re-promulgated with amendments and redactions on 17 October 2022

Sent to the parties on: 15 December 2022

For the Tribunal Office

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