



EMPLOYMENT TRIBUNALS

Claimant: Mr C Goh

Respondent: Asda Stores Limited

Heard at: London South (remotely by CVP)

On: 24, 25, 26 April 2023 and in chambers on 11 May 2023

Before:

Employment Judge Heath

Ms N O'Hare

Ms N Styles

Representation

Claimant: In person

Respondent: Mr A Rozycki (counsel)

RESERVED JUDGMENT

The respondent directly discriminated against the claimant by:

- a. Not taking seriously the two assaults he said he suffered at work in January 2019 and 8 February 2019;
- b. Delaying the investigation into the assaults and his complaints;
- c. Not interviewing Ms Chandra;
- d. Mismanaging the grievance and Ethics process and outcome;
- e. Mismanaging the appeal process and outcome.

REASONS

Introduction

1. The claimant, a man, claims sex discrimination against the respondent. His claims are about the way the respondent handled allegations of assault that he made against a female colleague. Essentially, he says that if the roles have been reversed (that is to say, she alleged an assault in the workplace against him) the respondent would have responded in a very different, and more positive way.

The issues

2. The issues were set out in the record of a Case Management Preliminary Hearing heard by Employment Judge Burge on 4 November 2021. At the start of the hearing the claimant indicated that he wanted to raise issues about data protection. The tribunal explained that it had no jurisdiction to deal with alleged breaches of data protection legislation. The issues the tribunal was to determine were those set out by Employment Judge Burge and are as follows:

1. *Time limits*

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 23 March 2020 may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Direct sex discrimination (Equality Act 2010 section 13)

2.1 Mr Goh is a man and compares himself with women.

2.2 Did Asda do the following things:

2.2.1 Not taking seriously the two assaults he said he suffered at work in January 2019 and 8 February 2019;

2.2.2 The Investigation into the assaults and his complaints were delayed;

2.2.3 not interview Chandra;

2.2.4 The grievance and Ethics process and outcome was

discriminatory; and

2.2.5 The appeal process and outcome was discriminatory.

2.3 Was that less favourable treatment?

Mr Goh says that when a woman got assaulted at Asda a man had been sacked within three days.

The Tribunal will decide whether Mr Goh was treated worse than someone else was treated. There must be no material difference between their circumstances and the Mr Goh's.

If there was nobody in the same circumstances as Mr Goh, the Tribunal will decide whether he was treated worse than someone else would have been treated.

2.4 If so, was it because of his sex?

2.5 Did Asda's treatment amount to a detriment?

3. When we began to deliberate, we considered that issues 2.2.4 and 2.2.5 could have been expressed better. The word "discriminatory" seems to incorporate concepts of less favourable treatment and the reason for the treatment, i.e on grounds of sex, which really fell to be considered under the issues at paragraphs 2.3 and 2.4.
4. We note that our core duty is to hear and determine the case according to the law and evidence and that we can depart from a list of issues if not to do so would prevent us from determining the case in accordance with that duty (*Saha v Capita Plc* [2018] EAT 80). We therefore re-examined the pleadings, and noted that the claimant set out at the very bottom of page 7 of his ET1 (page 10 of the bundle) considered that "mismanagement" was the appropriate

word to describe the respondent's approach. On reflection, it appeared to us that it was in the interests of justice to substitute this word. Those issues are therefore as follows:

2.2.4 The grievance and Ethics process and outcome was mismanaged; and

2.2.5 The appeal process and outcome was mismanaged.

Procedure

5. The hearing took place remotely by CVP. There were some technical issues which caused some delays and disruption during the hearing. In particular, one of the claimant's witnesses, Ms Kanagarajah, was unable to be heard when she accessed the CVP room. Both parties agreed that she could give her evidence by telephone.
6. The tribunal was supplied with a 356 page bundle. During the course of the hearing clearer copies of one of the documents within the bundle were supplied, as was a copy of an Investigation Guide.
7. The following provided witness statements and gave evidence to the tribunal:

For the claimant

- a. The claimant
- b. Ms C Kanagarajah (colleague);
- c. Ms I Paramasivam (colleague);

For the respondent

- d. Ms R Anderson (Operations Manager).
8. Additionally, Mr J Pillai, (Foodhall Trading Manager) and Mr S Fisher (former General Store Manager) provided witness statements. Mr Pillai was overseas attending his daughter's wedding at the time of the hearing. The respondent had applied to postpone the hearing, but this had been refused. There had been insufficient time to make the necessary application for him to give evidence remotely from overseas. Mr Fisher no longer worked for the respondent, which was unable to secure his attendance.
 9. The tribunal heard submissions from both parties. There was insufficient time during the three days allotted for the hearing for the tribunal to complete its deliberations and prepare an oral judgement. Accordingly, we reserved our decision, taking a further day to deliberate in chambers.

The facts

10. The respondent is a supermarket chain. The claimant started work at the Wallington branch of the respondent's supermarket on 4 December 2010 as a checkout operator.
11. The respondent is a large company which employs a significant number of staff. It has administrative resources, including human resource professionals, and has a number of employment related policies and procedures.
12. Relevant to this case, the respondent has a grievance procedure which includes the following provisions:

Under "Key Points"

- *Consider mediation as an alternative, informal way to address an issue if you can. Refer to the Mediation Policy for more information.*
- *If the grievance is about bullying, harassment, a relationship breakdown, unfair treatment etc. it may be forwarded to a disciplinary hearing and the grievance investigation forms the basis of any disciplinary investigation.*
- *Where the grievance refers to an incident or allegation that could amount to one of the immediately reportable criteria under the Statement of Ethics, this must be reported to Asda or Global Ethics immediately.*

Under the heading "Considerations" and the sub-heading "When coming to a decision about a bullying and harassment complaint it's important to consider the following:"

- *What was the context of the alleged incident?*
- *How 'normal' is that type of behaviour? How would other colleagues in the team/department view this?*
- *Have any similar issues happened in the past between the colleagues concerned?*
- *...*
- *Do the colleagues normally have banter between each other? Is this two-way?*
- *If it is, what was the trigger for the concern on this occasion?*
- *How does this behaviour make the other colleagues feel?*
- *Do other colleagues in the team consider this behaviour to be normal?*
- *What's the perception of others in the team?*
- *Do the facts, including witness statements, give reasonable belief the colleague's complaint is well-founded?*
- *If the facts are in dispute which version is the most probable - on balance who and what do you believe?*
- *...*

- *Does the alleged behaviour breach company standards and policy and require disciplinary action?*

13. The disciplinary procedure includes the following, under the heading Disciplinary Counselling:

- *Minor cases of misconduct should be dealt with informally with a counselling discussion, giving the colleague the opportunity to resolve and correct their behaviour before any formal action is needed.*
- *Counselling is a one-to-one conversation between the colleague and their manager. The counselling form (found in the toolkit) must be completed and placed on the colleagues file.*

14. The disciplinary procedure also includes examples of misconduct, which include *“Inappropriate behaviour or comments towards other colleagues, contractors, suppliers or customers in work or at a social or training events”*. Examples of gross misconduct include *“Fighting, physical assault, threatening behaviour, or serious provocation of any person on company premises or at a social or training event”*.

15. The respondent also has an “Investigations Guide” which sets out the ways in which investigations under the Disciplinary Grievance and Performance Management policies are to be conducted. This guide stresses how fact-finding should be carried out as soon as possible so that it does not delay the formal processes. It is further stressed that formal investigations are carried out as part of any formal process, and that they should be fair and thorough to ensure any hearing manager has all the information they need to make an informed decision. It points out that if investigations are not carried out properly, this can lead to unfair decisions, incomplete grievance outcomes and other serious risks. It sets out the purpose of an investigation is to find out facts of the case by interviewing the individual in question, interviewing witnesses, gathering evidence that supports the individuals case as well as evidence that does not. The guide sets out the role of the investigating manager as follows:

- *explain to the colleague why investigation is being carried at the start of the meeting.*
- *allow the colleague to explain their version of events.*
- *ask the colleague if there are any relevant witnesses or any other evidence they want to be looked at as part of the case.*
- *interview any witnesses.*

- *gather and review the evidence, and interview the colleague to allow them to comment on the evidence that's been gathered.*
- *review and summarise the full case.*
- *in cases where there's a disciplinary or bullying and harassment complaint, the investigation should be stopped and a recommendation made as to whether or not the case should be forwarded to a disciplinary.*

16. All managers are trained on the relevant policies and guidance.

17. In mid to late January 2019 there was an incident in which the claimant's colleague, Ms Asante, kicked him on the backside. He did nothing about this as he thought that this was a one-off.

18. On 8 February 2019 a further incident took place in which Ms Asante again kned the claimant in the backside. The blow was delivered with sufficient force to make him jolt forward. It caused him pain, but also made him feel both angry and humiliated. The claimant reported this matter to his line manager Ms Hocking, later that day. The claimant needed to attend his GP for medical treatment as a result of this incident.

19. On 11 February 2019 the claimant prepared a witness statement describing the incident. It included the following:

"At the time of the incident I was at my checkout no 4 talking to Irene [Paramasivam]. I felt a hard blow to my backside, making me lift & jilt (sic) forward slightly, it came as a complete shock to me, it hurt & I instantly felt pain. I turned round and saw Mercy [Asante] swearing at me whilst walking away from my checkout. Irene witnessed the incident & I told Irene that I was in a lot of pain & felt that I needed to report the incident to management straightaway as it was unacceptable behaviour.

The same incident happened around 3 weeks ago but I felt that it was a one-off & I let it go. I feel that Mercy's behaviour was inappropriate & my concern is that she might be doing this to other colleagues & could potential cause harm.

I felt that I needed to report this incident management because it is not the kind of behaviour I would expect from a work colleague & this could have potential been a serious incident causing harm to myself or others."

20. The claimant handed this statement to his manager, Ms Hocking a couple of days after it was written.

21. On 26 March 2019 Ms Paramasivam provided a short letter, as follows:

“I am employed as a checkout operator and on 8 March 2019 [this should be February] I observed an incident while working. I was located on Checkout number 5 and the incident occurred on Checkout 4, which was in front of me. I observed Lionel [the claimant] (one of my colleagues) speaking to another colleague, Chandra [Kanagarajah]. Although it was unclear what was specifically mentioned, I noted that laughing was occurring, as such assumed a joke was being said. Another colleague (Mercy) heard and took offence at the conversation. She mentioned to another colleague; action would need to be taken. At this point Mercy walked away then unexpectedly made impact to Lionel’s back with her knee. This clearly caused immediate distress and injury to Lionel. I felt it my duty to report this incident as I observed”.

22. Nothing was done about this complaint by the claimant’s manager or any member of staff employed by the respondent over the following several months. No investigation was carried out, no witnesses were interviewed and the respondent was not providing any feedback to the complainant. The claimant told us, and we accept, that he asked Ms Hocking whether she had received a complaint, and she assured him that it would be dealt with. Further, no arrangements were made to separate the claimant from Ms Asante, and he found himself working in the store with her each week on his Friday shift.
23. At some point, probably in early June 2019, the claimant spoke to a colleague who told him that they had overheard someone in the canteen talking about the fact that the claimant had been kicked. This further upset the claimant, and he decided to approach a store manager, Nathan, to ask what was being done about his complaint. He also sought the support of his trade union.
24. The store manager urged the claimant to re-submit his complaint. He did so by sending an identical copy of his 11 February 2019 complaint but dated 17 June 2019.
25. A fact-finding process was initiated in respect of the claimant’s complaint. On 28 June 2019 the claimant was interviewed by a manager, Mr Pyett. The purpose of the meeting was explained to the claimant, who attended with a representative. The claimant’s complaint letter was read out. He was asked about his relationship with Ms Asante, and he said *“I don’t know her well just as a colleague. We joke, we laugh, but I’m never close to her”*. He was asked to describe the first incident. He described Ms Asante approaching him whilst he was on self-scan, and feeling a kick on his backside. She smirked and walked off. He said that he did not report this as he thought it was a one-off. He had no idea why Ms Asante did this. The notes would suggest that the claimant then

described the second incident. He said he felt a kick which "*lifted me up. I was shocked*". He said that Ms Asante was swearing, using the F-word. He said that he kept calm, but told her that he was hurt and asked what she was doing. He said that Ms Paramasivam witnessed the incident. He described his pain level as being 8 out of 10. He said that he reported it straight away to his manager. He said that Ms Asante must have known that he was hurt and that she has not apologised. He said that he cannot go near her and cannot talk to her. He said that he felt better now, but that he had gone to the doctor as he had problems with his bowel.

26. On 5 July 2019 a different manager, Manju Pillai (not the Mr Pillai who provided the witness statement) carried out a fact-finding interview with Ms Paramasivam. Ms Paramasivam described how she had seen Ms Asante approach the claimant and "*hit him with her knee on his back. Lionel was shocked*". She observed that Ms Asante did not seem to be angry but that she heard the claimant saying something to Ms Kanagarajah, and that she wanted to do something. She was asked about Ms Asante and the claimant's relationship and she replied "*Lionel and Mercy always joke around. But Lionel was upset about the incident and was hurt*".
27. On 16 July 2019, yet a different manager, Ms Hocking (the claimant's line manager) interviewed Ms Asante. She was asked whether she could remember hitting the claimant with her knee, and she did not remember. She was asked why she would "*knee someone up the bum*" and she said that she did not remember, but that she and the claimant "*play jokes with each other. We always hit and punch each other like a joke. So I have nothing against me. We always play games. We always say Ching Chong. I also give him a lift*". She was asked whether there had been a previous incident, and she said "*We always doing it to each other*". It was put to her that the "*second time you did it actually hurt him. He has a personal issue*". She responded "*Why did he not tell me. I did not know I hurt him?*" Ms Hocking advised Ms Asante that she "*should not take these jokes to another level and be aggressive.*" Ms Asante suggested that the claimant had said something to Ms Kanagarajah that upset her, and that Ms Asante told her not to worry as she would "*kung fu him*". She said that she had nothing against the claimant and would be happy to apologise to him.
28. Ms Nathwani, a People Trading Manager ("PTM"), was a notetaker in all of the fact-finding meetings which, as we have pointed out, were conducted by three different managers. What is entirely unclear, however, was who had ownership and who took responsibility for this process. Additionally, the claimant told us, and we accept, that he was never made aware that anyone else was being interviewed, and that he only learnt that his colleagues had been interviewed at fact-finding meetings when he received the bundle in this litigation.

29. It appears the fact-finding meetings were completed by mid-July 2019. From this point, Ms Nathwani had four weeks of annual leave, and the claimant himself had five weeks of annual leave. It has not been easy for us to work out what was going on over this period. The claimant has told us, and we accept, that he was periodically pressing for information that was not being given any meaningful responses.
30. Towards the end of 2019, and again it has not been easy to discern what was happening, it would appear that a proposal of mediation was raised with the claimant and his trade union representative, Mr Williams. The claimant did not fully understand what was being proposed, and assumed that some sort of outcome to his complaint would be forthcoming.
31. On 13 December 2019 the claimant was invited by Mr Malcolm, Trading Manager, to a mediation hearing to take place on 20 December 2019. The mediation hearing took place on this date, with the claimant represented by his trade union representative Mr Williams, and Ms Asante attending with a representative. During the course of this hearing, Ms Asante made allegations that the claimant had touched her breasts. This angered the claimant, who considered that these allegations were completely untrue, and he left the mediation hearing in a state of anger and agitation.
32. On 23 December 2019 the claimant took out a formal grievance against Ms Asante. He wrote a letter of this date raising a complaint under the respondents Ethics Policy. He indicated that he felt he should be able to attend his workplace free of inappropriate conduct, violence, discriminatory bullying behaviour and offensive language, gestures or conduct. He indicated that he had misunderstood the invitation to the mediation, and had felt anxious when he was asked to talk about the matter. He felt that he had been harassed and bullied. He set out that he had experienced medical issues following the incident. He set out two parts to his grievance.
- a. **Part 1** of his grievance was that he felt he had been “*subject to unlawful workplace discrimination and believe that my gender has played a significant role in this case and I feel that if the genders were reversed, I believe that immediate action would have taken and I could have been faced with serious consequences*”.
 - b. He described “One Continuing (*sic*) Act” of a physical assault in January 2019 when he had been kned from behind, and a physical and verbal assault on 8 February 2019. He indicated that there had been one previous instance which he had not remembered, as he felt intimidated and embarrassed.

- c. **Part 2** of his grievance was regarding the length of time and the way the issue had been dealt with. He indicated that he had submitted a formal complaint to his line manager, Ms Hocking's, in February 2019, which was not received by the Wallington store's PTM (Ms Nathwani) until four months later. He pointed out that it had taken a further six months for the matter to be heard. He was furious that it had taken almost a year for a serious complaint to be acknowledged and addressed.
 - d. The claimant indicated that he had not entered into any form of communication with Ms Asante since the incident. He wished an investigation to be conducted by managers from a different store, and to be dealt with as soon as possible.
33. There was a further short delay because the claimant wanted the matter referred to the respondent's Ethics Team. However, that team did not itself carry out investigations, so the matter was referred back to the local store.
34. Mr J Pillai (Foodhall Trading Manager at the Wallington store) was appointed as a grievance manager. The Investigations Guide, and the grievance policy would have been the key policies informing his approach.
35. On 14 February 2020 Mr Pillai held a grievance meeting with the claimant. This meeting lasted for around two hours and included the following issues:
- a. Mr Pillai identified the grievance was in two parts, the first relating to an assault and the second relating to the way the complaint had been dealt with, and the claimant's perception that it would have been dealt with quicker had he not been male.
 - b. Mr Pillai asked the claimant what happened after he submitted his complaint. The claimant described nothing happening, and his having to wait. He described reminding his manager of his complaint and his waiting for her to get back to him.
 - c. The claimant described how he felt uncomfortable coming to work and having to work alongside Ms Asante every Friday when the management did nothing about his complaint.
 - d. He described how Ms Paramasivam was reluctant to get involved in the complaint.

- e. The claimant described how he had told his manager about the CCTV and possible evidence of the incident.
- f. The claimant explained how he was upset when he heard gossip about the incident, which prompted him to go to his store manager to progress the complaint in the summer.
- g. There was discussion about the claimant and Ms Nathwani being out of the business for a period following June 2019. The claimant said that Ms Nathwani told him she would deal with the matter, but that nothing happened.
- h. There was discussion about the invitation to the mediation hearing and what happened at the meeting. Mr Williams, the trade union rep, explained that Ms Nathwani had told him that the claimant had told her that he wanted the complaint to be kept informal and in-store. However, the claimant told Mr Williams that he wanted an outcome from a formal process. He explained that mediation might have been a possibility had it been offered in February 2019, but not December.
- i. Mr Williams said that the claimant felt that if a man had done what was alleged, he would be sacked on the spot, and so he wanted the matter to go ahead as a complaint about gender to the Ethics team.
- j. Mr Pillai mentioned that the claimant had made allegations about an incident in January and one in February 2019. The claimant agreed and indicated that was why he asked the CCTV. Discussion turned to obtaining CCTV, and a security guard was identified (Mr Barnby) as someone to approach. From the meeting notes, this appears to be the full extent of any questioning or discussion relating to the actual alleged assaults themselves by Mr Pillai.
- k. There was discussion about allegations Ms Asante had made at the mediation hearing that the claimant joked around all the time and had touched her breasts. The claimant indicated that this was all lies. He also indicated that Ms Asante's assertion that she gave him lifts was not accurate. He had accepted a lift once before the incident in question.
- l. The claimant explained that Ms Nathwani had lied to him by saying that she had never received a letter from Ms Hocking about the complaint. Mr Williams said that he had emailed

Ms Nathwani seven times to try and progress matters, and that she had avoided the claimant.

- m. Mr Pillai acknowledged that the respondent had a duty to protect its staff. The claimant said that it was important to look at his health. Mr Pillai agreed, and said *“we will look into it all for you when we go into more detail”*.
- n. The claimant described a conversation he had with Ms Nathwani when she had gone into her own personal problems, which included the fact that she was going to lose her job (she was later made redundant).

36. On 23 March 2020 Mr Pillai interviewed Ms Nathwani. She said that she was made aware of the complaint around June or July 2019. She was asked to explain the delay from July to December. The notes of her interview read as follows:

“So I think I started the investigation in mid-July with the colleagues involved and soon after I was off for 2 ½ weeks. I came back there was a load of other stuff going on and then Lionel was off for six weeks and I was off again for another two weeks which was end of Oct. Then we started the ball rolling again. I then invited the mediation as Mercy had said it was only banter. I also spoke to [Mr Williams] on the phone who was Lionel’s rep who mentioned to me that he believed Lionel wanted a mediation. When we did invite all parties involved to mediation which was in December Lionel then stated he did not want to mediation and that he would report it in a formal way”.

37. Ms Nathwani denied she ever try to influence the claimant into mediation. She denied that she had received a complaint letter from Ms Hocking, and said that she had tried to contact her but been unsuccessful.

38. Ms Nathwani was asked *“Do you think there was a deliberate attempt to delay the investigation”* to which she responded *“No, it doesn’t make sense to delay, no”*. She said that the claimant had never once come to her and asked about this until she went to him. She denied ignoring the claimant.

39. Mr Pillai interviewed Mr Barnby, a security officer, on 23 March 2020. Mr Barnby indicated that he had been asked to check CCTV footage by Ms Hocking, he believed. He indicated that there was no footage of an incident because of the way the cameras were facing. He believed that had there been relevant footage, he would have found it.

40. Also on 23 March 2020 Mr Pillai interviewed Ms Asante. The interview lasted just over half an hour. She was asked about the incident, and she explained that she did not know what the claimant was talking about and that she said the claimant her “*mess around a lot, he can even touch my breast and bum joking around. That’s what it’s like we play silly games together*”. She was made aware of the complaint in June 2019 and recalled a mediation session to talk about the issue. She said that she had no issue with the claimant, was still speaking to him, and if there had been a problem he could have talked to her about it and sorted it out. She explained that the claimant had started shouting at the mediation meeting which was then cancelled. She said she had nothing against the claimant, and she still works with him, and had given him a lift. She could not recall an incident in January 2019 was first made aware of a complaint in June 2019. She said that the claimant had never told her not to touch him. Mr Pillai asked what games she and the claimant played, and she said that they did kung fu together or he would sometimes slap her bum. Ms Asante said that was how he and she were together and that Mr Pillai could ask anyone about the fact that they used to touch each other all of the time. She said that they played so much with each other, that she could not recognise the incident the claimant was complaining about. She said that she had not spoken with the claimant since the mediation.
41. Again on 23 March 2020 Mr Pillai interviewed Ms Paramasivam. The interview lasted 13 minutes. Mr Pillai explained he was investigating a complaint made by the claimant, and asked her what if anything she had witnessed. She said that she was in the checkout area and “*I didn’t see but I saw him jolt. I didn’t see the act he then came to me and told me that it was very painful*”. She said the claimant had not said anything to Ms Asante but came to her. Ms Asante just walked off. She was asked whether she had seen them playing with each other before and her response was “*Yes they are quite friendly*”, she was asked whether she had seen them touching each other, and she replied “*Lionel has said that she has touched him before but they are very friendly and he jokes with her as well*”. Ms Paramasivam had not witnessed any other incidents between them.
42. On 14 April 2020 Mr Pillai issued Ms Asante with disciplinary counselling. The disciplinary counselling form signed by Mr Pillai indicated that his investigation concluded that “*Mercy has no case to answer. However during the investigation Mercy has admitted that she had very playful banter/joking relationship with the colleague who raised the complaint*”. Under a section “improvement required” it was stated that Ms Asante had been advised to follow the respondent’s policy and maintain relationships in line with that policy. “*What Mercy may not be acceptable for other colleagues and she got to be always aware of this*”.

43. Around this time an undated letter from Ms Anthony, Ethics Co-ordinator, to Ms Nathwani indicating that the investigation did not support a conclusion that she acted in breach of the Statement of Ethics, and that there was no case to answer.
44. On 28 April 2020, the claimant and his trade union representative attended a meeting with Mr Pillai in which they were told the outcome of the grievance investigation. Mr Pillai said that he had not looked at the previous investigation, but had done a fresh new investigation. He indicated that on the first part of the grievance there would be no further action against Ms Asante, but that she had been spoken to about her behaviour and how it could be seen as inappropriate. In respect of the second part of the grievance, no evidence had been found in relation to the delay in dealing with the complaints. He set out the evidence that Ms Nathwani had given to the investigation about the delay, which was not on purpose. Mr Pillai said that he would send an outcome letter, and the claimant would have a right of appeal.
45. On 29 April 2020 a grievance outcome letter from Mr Pillai was sent to the claimant. The findings were summarised, and under the heading "Workplace Violence/Violent Act" Mr Pillai's summary was as follows:
- *Mercy stated that she did not recall the incident, which we were referring to as the type of relationship she has with yourself, is very joking playful, and it could be any day that you work together. Mercy also stated that you even smack her bum breasts (she did not ask you to stop this) you also joke around verbally by saying inappropriate things.*
 - *Mercy felt that you had a good working relationship and if she had hurt you whilst play fighting etc. you could have come to her and she would have apologised straight away and stopped.*
 - *Mercy did not feel anything was wrong as she still give you a lift to work.*
 - *Witness Irene stated that she did not see Mercy knee you in the back but did see you jolt forward, after that you did come to her to say you are in pain and it hurt, Mercy was not around at this point.*
 - *Irene also stated that yourself and mercy were very friendly with each other and had seen you both playing and joking around together.*

46. Mr Pillai summarised the “Failure to Act/Gender Discrimination” findings as follows:

- *When interviewed Sima [Nathwani] stated she was not informed by Margaret that she had received the grievance from yourself and only knew about it from June/July.*
- *Sima said they did start speaking to people but did not get very far as she was off for a few weeks on holiday and then on her return you were off for 6 weeks, soon after that Sima was off again with a family emergency.*
- *Sima thought that the mediation session was appropriate as it was “banter” and that’s how the two of you acted together. There was no deliberate attempt to prolong the grievance on her part and felt that gender did not come into it [emphasis added].*
- *Tony a security colleague stated that on the day of the incident he was asked by Margaret to review the CCTV but there was no evidence on it.*

47. Mr Pillai concluded that no further action was needed, and gave the claimant a right of appeal.

48. Mr Pillai produced a Findings Summary. It is not known whether this was sent to the claimant or simply retained on file. This document set out similar findings to Mr Pillai’s outcome letter, but also included the following observations:

“Irene also stated that [the claimant] and Mercy were very friendly with each other and had seen them playing/touching joking both of them”

“Due to relationship that both colleagues have been witness to – playful banter/joking around it would be inappropriate to discipline Mercy alone for this, it is recommended that a conversation is had regarding the behaviour and conduct on the shopfloor”.

“Sima thought the mediation session was the best option as when she spoke to Mercy it was classed as “banter” and that’s how the two of you acted together”.

49. Mr Pillai also produced an “Investigation Recap Form”. Again, it is not clear whether this was an internal document or one which was sent to the claimant. Similar findings to the outcome letter and the Findings Summary was set out, but it also included “*Sima thought*

that a mediation session was the best option as when she spoke to Mercy it was classed as “banter” and that’s how they acted together, Sima stated that there was no deliberate attempt to prolong the grievance on her part and sex did not come into it [emphasis added].

50. On 5 May 2020 the claimant set out an appeal against the grievance decision in a written document. In it he asked that his “*previous grievance hearing with Sima and Lewin Pyett, dated 28 June 2019 be addressed*”. This was a reference to the earlier fact finding meeting. He set out his appeal in numbered points, which included:

- a. That his relationship with Ms Asante was not “jokey and playful”.
- b. That he did not smack Ms Asante’s bum or breasts.
- c. That he only had one lift with Ms Asante, prior to the alleged incident.
- d. That he did not understand why Ms Paramasivam characterised his relationship with Ms Asante as playful and jokey, and that this was not true.
- e. That Ms Nathwani’s statement that she did not receive his letter was not true.
- f. That Ms Asante had in fact, prior to the incident, groped his private parts, something he had been too embarrassed to mention previously.
- g. That two named colleagues heard Ms Asante tell them she had kicked him, and she had admitted this in an investigation hearing.
- h. Ms Kanagarajah, a witness to the kicking incident, was not called to give evidence.
- i. That his doctor could be contacted to provide evidence of medical visits following the incident.

51. The claimant stressed that he needed to feel protected and safe work without being physically attacked. He needed to have faith that if an incident does happen, that it will be investigated properly. He considered that Ms Asante was being considered the victim in all of this.

52. On 11 May 2020, Ms Anderson wrote to the claimant to say that his grounds of appeal were not clear. She indicated that appeals should be based on the grounds of procedure not being followed, facts the decision was based on being incorrect or relevant evidence or information not being considered, or relating to the severity of sanction. She asked him to resubmit his appeal outlining his specific grounds within seven days.
53. It appears to us that the claimant's appeal grounds of 5 May 2020 were clearly articulated and fell within the grounds fact or procedure; we did not understand why the claimant was required to resubmit his appeal.
54. On 15 May 2020 the claimant resubmitted his appeal. He set out that "*facts were not heard and this information was relevant to this incident and ultimately not considered*". He went on to set out the main points of his appeal:
- a. Under "Procedure" he requested that the July 2019 investigation be reviewed. He questioned why Ms Hocking was never interviewed when she remained an employee at Asda until November 2019. He questioned why the store manager was not contacted. He further questioned why his GP was not contacted to substantiate his internal injury.
 - b. Under "Fact" he indicated that the description of his interaction with Ms Asante as "banter" was incorrect, as it implied that it was a two-way interaction. He considered that "bullying" or "harassment" would have been more accurate.
 - c. The claimant concluded with the following "*The way in which this incident has been handled and followed through the entire time has been unprofessional and inefficient. Would this case have been handled as ineffectively if I were a female making a claim against a male colleague? It does make one wonder*".
55. The requirement that the claimant resubmit his appeal meant that much of the detail, which had been included in his original grounds of appeal, was lost.
56. On 12 May 2020 the claimant was off work with stress. A "Colleague Absence" form records that the claimant said that he felt uncomfortable being near Ms Asante.
57. On 29 May 2020 the claimant's appeal was heard by Mr Fisher, with Ms Anderson taking notes. The claimant attended, accompanied by his trade union representative, Mr Williams.

58. The minutes of the meeting lead us to the following findings:

- a. At the start of the meeting, the claimant was urged to focus on his points in his letter, presumably the resubmitted appeal.
- b. The claimant outlined the incident. Mr Fisher “jumped in” (to use the words in the minutes) to say that an investigation had happened, and that he wanted to ensure the claimant was comfortable at work. He went on to indicate that Ms Hocking and Ms Nathwani were no longer in the workplace, and that the length of time the investigation took was a point of learning for the respondent, but he wanted to see how “*we can move forward for you*”.
- c. On a number of occasions Mr Fisher accepted that there was some learning for the respondent, that he sympathised with the claimant, but that he needed to know how to get the claimant back into work.
- d. The claimant’s trade union representative is noted to have said “*Want to make sure if genders were reversed would have been dealt with*”. The claimant added “*It’s the urgency*”. Mr Fisher responded “*Can’t disagree; way dealt with not in a timely manner. Understand the frustrations*”. The trade union representative repeated that this was an allegation of sex discrimination. The claimant pointed out that this had taken 16 months. Mr Fisher responded “*We need to try and move forward*”. The claimant indicated that he was trying to prove something, and Mr Fisher said he had no need to prove anything but he was trying to help the claimant back into work and to feel comfortable. He indicated that he could not talk about individuals who had left the business.
- e. The claimant said that he was friendly and could mix with colleagues, but it was explained that this was not a situation of banter. He said Mr Pillai had not investigated.
- f. On several further occasions Mr Fisher indicated that there were learnings the respondent but that he was attempting to look forward.

59. The strong impression we formed from the minutes of the appeal hearing (and we did not have the benefit of Mr Fisher’s oral evidence on the point) was that Mr Fisher was not really focusing on the claimant’s complaint. He did not probe nor ask any questions about the initial incident or the relationship between the claimant and Ms Asante. He appeared to take the view that there was

nothing he could do about the complaints about the progress of the investigation as Ms Hocking and Ms Nathwani were no longer in the organisation. Whenever the claimant focused on the detail of his complaint about the incident or its investigation, Mr Fisher would inevitably indicate learning for the respondent and would look towards getting the claimant comfortable in the workplace.

60. To a limited extent, Mr Fisher's approach is understandable. The claimant's comfort and feeling of safety within the workplace is of course of considerable importance. However, what is also of considerable importance to the claimant is having some sort of determination of the actual issues he was bringing. Those do not appear to have been the focus of Mr Fisher's attention.
61. The notes also make clear that the claimant and his representative were specifically alleging that he had been discriminated against on the grounds of his sex in the way that his complaint had been dealt with, or rather not dealt with. Again, the notes of the meeting would suggest that this was not an issue that Mr Fisher engaged with. There is no evidence that he sought to probe the issue, to ask questions or to follow up with any points of his own. He defaulted to comments about looking forward, and the claimant's place within the workplace.
62. At the end of the appeal hearing, Mr Fisher adjourned for around 45 minutes, and then gave the claimant an oral outcome. Mr Fisher did not uphold the appeal, but apologised on behalf of the respondent. The claimant was told he would be sent an outcome letter.
63. The appeal outcome letter was sent to the claimant on 3 June 2020. Mr Fisher summarised the grounds of appeal as follows:
- Procedure:*
- Margaret was never interviewed.*
- GP not contacted.*
- Nathan Newark store manager was not interviewed.*
- Fact:*
- Using the word "Banter" to describe interactions between myself and Mercy*
64. On the first issue, Mr Fisher indicated he fully understood the claimant's frustrations that his manager should have followed up on his complaint, but the respondent could only speak to colleagues who are currently in the business, and at the point of the complaint she was no longer in the business.

65. On the second issue, Mr Fisher did not believe that the GP needed to be contacted. The bottom of the page at this point is cut off, and it is impossible to see the end of this brief conclusion.

66. On the third issue, Mr Fisher did not believe that it would have made any difference if the store manager had been interviewed. Mr Fisher agreed that Ms Nathwani had not acted in a timely manner, but indicated that action was taken in accordance to this.

67. In terms of the issue relating to “banter, Mr Fisher said as follows:

“Although you disagree that the explanation of your relationship with Mercy as “Banter”, this word had been taken from the statement made during the ethics investigation, I agree that your outcome letter could have been typed in a more sensitive nature, and that there was a quote from all parties interviewed. I believe have this happened you would not feel that the outcome was one-sided.”

68. Mr Fisher then recommended that adjustments be put in place so that the claimant did not have a shift which meant that he worked with Ms Asante. The evidence we heard from the claimant, which we accept, was that this adjustment was not subsequently put in place by the respondent for many months.

69. One thing which is notably lacking in the outcome letter is any reference whatsoever to the claimant’s complaints of sex discrimination. The claimant had explicitly raised sex discrimination in his re-formulated appeal letter, and his representative had clearly raised it during the course of the appeal meeting. Mr Fisher never dealt with it.

70. On 22 June 2020 the claimant began the ACAS Early Conciliation process, and he received his certificate on 1 July 2020.

71. We find that the claimant is an intelligent man, but we believe that English is not his first language, and it was clear to us that he did not have a detailed or sophisticated knowledge of employment tribunal procedure. He was assisted by his trade union representative in all internal employment matters we have considered.

The law

72. Section 39(2) Equality Act 2010 (“EA”) provides as follows: -

An employer (A) must not discriminate against an employee of A’s (B)—

- (c) by dismissing B;
- (d) by subjecting B to any other detriment.

Direct discrimination

73. In respect of direct discrimination, Section 13(1) of the Equality Act provides as follows:

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

74. Section 23(1) of the Equality Act deals with comparisons, and provides:-

On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

75. In *Shamoon v chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 the House of Lords explained that “*the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class*”.

76. The burden of proof provisions (which apply equally to harassment) are set out in section 136 Equality Act 2010:-

- (1) *This section applies to any proceedings relating to a contravention of this Act.*
- (2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
- (3) *But subsection (2) does not apply if A shows that A did not contravene the provision.*

77. Guidance on the application of the burden of proof provisions of the Sex Discrimination Act 1975 (which is applicable to the Equality Act 2010) were given by the Court of Appeal in *Igen v Wong* [2005] IRLR 258:

"(1) Pursuant to s 63A of the SDA 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as “such facts”.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In

some cases the discrimination will not be an intention but merely based on the assumption that “he or she would not have fitted in”.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word “could” in SDA 1975 s 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s 74(2)(b) of the SDA 1975 from an evasive or equivocal reply to a questionnaire or any other questions that fall within s 74(2) of the SDA 1975.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since “no discrimination whatsoever” is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

78. Tribunals are cautioned against taking too mechanistic an approach to the burden of proof provisions, and that the tribunal's focus should be on whether it can properly and fairly infer discrimination (*Laing v Manchester City Council* [2006] ICR 1519).
79. The Court of Appeal has emphasised that "*The bare facts of a difference in treatment, without more, sufficient material from which the tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*" (*Madarassy v Nomura International plc* [2007] IRLR 246). "Something more" is needed for the burden to shift.
80. In the context of what might amount to "something more", the Court of Appeal held that unreasonable behaviour without more is insufficient, though if it is unexplained then that might suffice (*Bahl v Law Society* [2003] IRLR 640). The Supreme Court in *Efobi v Royal Mail Group Limited* [2021] ICR 1263 has commented "*Whether the employer has in fact offered an explanation and, if so, what that explanation is must... Be left out of account. It follows that... No adverse inference can be drawn at the first stage from the fact that the employer has not provided an explanation*". As the editors of IDS Employment Law Handbooks, Volume 5, Chapter 33 33.50 point out "*it appears that a failure to provide an explanation, without more, is not capable of shifting the burden of proof*" [our emphasis].

Time limits

81. Section 123 Equality Act provides:

(1) Proceedings on a complaint within section 120 may not be brought after the end of—

- (a) the period of 3 months starting with the date of the act to which the complaint relates, or*
- (b) such other period as the employment tribunal thinks just and equitable.*

...

(3) For the purposes of this section—

- (a) conduct extending over a period is to be treated as done at the end of the period;*
- (b) failure to do something is to be treated as occurring when the person in question decided on it.*

82. The key question in determining whether there was conduct extending over a period is whether there was an ongoing situation or continuing state of affairs which amounted to discrimination (*Hendricks v Metropolitan Police Commissioner* [2002] IRLR 96). The claimant bears the burden of proving, by direct evidence or inference, that numerous alleged incidents of discrimination are linked to each other so as to amount to a continuing discriminatory state of affairs.

83. In *Hale v Brighton & Sussex University Hospitals NHS Trust* UKEAT/0342/16 the EAT held that a disciplinary procedure

consisting of several stages is an act extending over a period where the issue in question was being subject to a disciplinary procedure which led to a dismissal.

84. As to extending time, the Court of Appeal in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] IRLR 1050 observed that the wording of section 120(1)(b) “*such other period as the employment tribunal thinks just and equitable*” gives the Tribunal a wide discretion in considering whether to extend time. Leggatt LJ said that “*factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reason for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claims while matters were fresh).*”
85. Tribunals are encouraged to “*assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular... ‘The length of, and the reasons for, the delay’*” (*Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 22).

Conclusions

Appropriate comparator

86. The claimant provided further particulars on 9 December 2021 in which he set out his actual comparators. He referred to:
- a. A woman at the Swanley store who alleged “sexual issues” against a man in 2019, and who was sacked in 3 days;
 - b. A woman colleague who alleged a man working on the halal meat counter in the Wallington store had sexually harassed her. The man was either sacked or left.
 - c. A Chinese woman colleague in the Wallington store had “sexual issues” with a man, who was moved to another department.
87. There appeared to be no evidence to support either a) or c) above. In respect of b) Ms Anderson gave evidence that the meat counter was run by an independent company. A couple of female colleagues complained that a man on the meat counter kept staring at them and asked one of them out. This complaint was relayed to the regional manager of the independent company, and the man was moved from the store.
88. On balance we have not been assisted by any of the evidence in respect of actual comparators. We have therefore constructed a hypothetical comparator.

89. The claimant has been clear in his appeal grounds that he considers he would have been treated differently if “*I were a female making a claim against a male colleague*”. We understand this to be what he is saying when he asserts in his claim form that “*if it is on the reverse gender they will take the case seriously*”.
90. The identity of the appropriate comparator was not something the respondent addressed until the tribunal posed its own questions during closing submissions. Mr Rozycki submitted that the sex of the perpetrator does not appear to be relevant in terms of the comparative exercise to be undertaken. He put forward a woman making an allegation of assault against a woman as being the appropriate comparator.
91. We concluded that the relevant characteristics of the hypothetical comparator is as follows:
- a. It is a woman who has raised a written complaint that that a male colleague kneed her on the backside. The blow was delivered with sufficient force to make her jolt forward, cause significant pain and required her to seek medical attention. The hypothetical comparator would have made clear in her complaint that a very similar incident had happened.
 - b. The hypothetical comparator would also have raised during an appeal process that the alleged perpetrator had groped her private parts prior to the above incident, but had been too embarrassed to mention this previously.
92. We concluded that the sex of the perpetrator was a relevant circumstance. Mr Goh says he was kneed in the backside. This is a part of the body which could potentially be associated with a sexual act rather than a purely violent one. It might be less easy to see the potential for a sexual act in a slap around the head, for example. Contact with the backside, however, could raise the possibility that there might be a sexual component.
93. The reference in the appeal letter of 5 May 2020 to the claimant having had his private parts groped is unequivocally a complaint of a sexual act. While there might be something to be said for constructing a different hypothetical comparator for any complaints related to the appeal, given our conclusions about the possibility of sex being in issue for contact with the backside we consider that it is appropriate to use the same comparator for the totality of the complaints.
94. As Mr Goh’s complaints have this potentially sexual component, we find that the sex of the alleged perpetrator was a material factor. It

is appropriate to compare Mr Goh's complaint (in its broadest terms, that when he made allegations that a woman kneed him on the backside, with the background that she had done it before and had groped his private parts before, his complaints were not taken seriously or investigated properly in a timely manner) with the hypothetical situation of how the respondent would have treated a woman having made the complaint that a person of the opposite sex had done these things to her.

Alleged acts of discrimination

Not taking the alleged assaults seriously – February to July 2019

95. The allegations will be taken in turn, but we would remark that, as is not infrequently the case in discrimination and other claims, there is a substantial overlap in the allegations. We will deal first with whether the claimant has established that the acts the claimant relies on occurred, and will move on later to the reason why they occurred.
96. The claimant made it clear in his written complaint of 11 February 2019 that he considered himself the victim of an assault. He speaks of a "*hard blow to my backside*" which lifted him up and jolted him forward. It was something that came as a shock and caused him a lot of pain. He observed that Ms Asante was swearing at him. He mentioned that Ms Paramasivam had been with him at the time. He also said that he had told his manager about the incident.
97. On our findings, nothing was done by the respondent in the face of an allegation of an assault.
98. Ms Paramasivam produced a statement on 26 March 2019 which made clear that she had witnessed and incident. From her statement it was also clear that Ms Kanagarajah had been in the vicinity, as had another unnamed colleague. It is fair to assume that if the claimant and Ms Paramasivam had taken the trouble for her to produce the statement that they would have put it to some use, probably by passing it on to management. Again, nothing was done by the respondent.
99. It is also right to say, that at this time there appear to have been no efforts to separate the claimant and Ms Asante who worked a shift together each Friday.
100. We accept the claimant's evidence that he was asking Ms Hocking what was happening, and he was being told that his complaint would be dealt with. However, nothing happened until hearing gossip in the canteen prompted the claimant to escalate matters in June 2019.

101. We have little difficulty accepting that the claimant's complaints were not taken seriously. By taken seriously, we mean given a priority that their content merited, with action taken to address them in an appropriate manner. This action could have taken a number of forms, but may well have included investigating whether informal action might be appropriate, informing the claimant of the relevant policies and procedures for resolving his complaint, referring the matter to HR or more senior management, exploring and, if appropriate, initiating a disciplinary investigation. It is difficult to say what might have been the most appropriate approach in these particular circumstances, but it is easy to say that the respondent took the wrong approach by doing nothing.
102. We further accept that the respondent subjected the claimant to a detriment by not taking his complaint seriously in this time period. This was not simply an unjustified sense of grievance; the claimant was entitled to feel that his welfare and safety were not being accorded any significance by his employer.

Delaying the investigation into the alleged assaults – February to July 2019

103. This is an area of substantial overlap with the above issue. The respondent did nothing to address the claimant's complaint for five months. The **ACAS Code of Practice on disciplinary and grievance procedures** makes what really is the obvious point that employers should deal with matters promptly and should not unreasonably delay matters. It further states that employers should carry out necessary investigations to establish facts of the case.
104. As set out in the section above, and in our findings of fact, nothing was done. The respondent did delay investigating the alleged assaults.
105. We conclude, once again, that this delay was a detriment. Delaying the investigation has the distinct potential to affect the quality of the evidence it may receive. It also understandably fuelled the claimant's perception that his welfare was not being taken seriously.

Not interviewing Ms Kanagarajah

106. The fact of it was that the respondent did not interview Ms Kanagarajah.
107. We conclude that this amounts to a detriment. The tenor of the respondent's questions to the claimant on this issue was, in effect, the respondent spoke to Ms Paramasivam, and so there was no real point in interviewing another person.

108. However, Ms Kanagarajah gave evidence to the tribunal that Ms Asante admitted to her that she had kicked the claimant. She also told us that the claimant was a bubbly person, but one who would not behave inappropriately at work to anyone. It may be that she could have given evidence significant to the issue of the alleged assault itself, and the background of alleged “banter” which Ms Asante asserted but the claimant denied.

Not taking the allegations seriously – June to December 2019

109. We are focusing on the period from 17 June 2019, when the claimant resubmitted his written complaint related to the incident. Again, we consider whether the allegations were accorded a priority appropriate to their content with appropriate action taken.

110. What is clear during this period is that some sort of a process was followed, in that fact-finding meetings were arranged with the claimant, Ms Paramasviam and Ms Asante. It is not possible to tell what the status of this process was (disciplinary, grievance, other) as no paperwork was supplied to indicate this, and no witness from any respondent gave evidence about it. It was not possible to tell whether the respondent’s Investigations Guide applied to the process, as this document supports the Disciplinary, Grievance and Performance Management Policies. Nonetheless, it might be expected that the principles of this document will be followed regardless of the status of the process claimant found himself in from June 2019 onwards. In particular, it seems uncontroversial that the claimant might expect the investigation then taking place to be “*fair and thorough to ensure the hearing manager has all the correct information they need to make an informed decision about next steps*”. It seems a matter of common sense that the investigation should seek to gather “*evidence that supports the colleague’s case as well as evidence that doesn’t*”, and for the investigating manager to “*ask the colleague if there are any relevant witnesses or any other evidence they want to be looked at as part of the case*” and to “*interview any witnesses*”. After any relevant evidence has been gathered, it is likely to be appropriate to “*interview the colleague to allow them to comment on the evidence that’s been gathered*”. Finally, the reference in the Investigations Guide to an Investigating Manager (singular) gives the quite reasonable expectation that one manager will be responsible for the investigation and will conduct the relevant interviews.

111. What happened in the claimant’s case was that three different managers conducted the three fact-finding interviews. There is no evidence whatsoever of any coordination of the process. The only paperwork is the minutes of these interviews, and no one gave evidence for the respondent about them. We

accept the claimant's evidence that he was not made aware of the interviews of his colleagues let alone given the opportunity to comment on any evidence gathered.

112. From mid-July to December 2019 nothing was done. We accept the claimant's evidence that his and Ms Nathwani's annual leave and absence from the workplace saw a maximum 11 of the 22 weeks delay. It is difficult to reach any other conclusion than that the investigation of a serious issue simply ground to a halt. It may be that had Ms Nathwani given evidence some light may have been shone on some of these issues. But we did not have the benefit of such evidence.

113. In the circumstances we conclude that the claimant's serious allegations were not accorded a priority. If the respondent had treated them seriously it would have investigated them promptly and in line with its investigation guidance. It did not take the claimant's claim seriously.

114. We conclude that not taking the claimant's allegations seriously was a detriment to him.

Delay June to December 2019

115. We have commented above about the delay. We conclude the respondent did delay investigating the claimant's complaints during this time period. No explanation for the delay is evident for at least 11 weeks of this period.

116. We conclude that such delay was a detriment experienced by the claimant. In this case it meant that this line manager Ms Hocking have left the business in November 2019 was not available to be questioned.

Mismanaging the grievance process and outcome

117. To the extent that there is any failure to take complaints seriously or delay in investigating them from June 2019 onwards during the grievance process, that will be considered under this heading.

118. The claimant began the grievance process on 23 December 2019 with a letter to the Ethics team after the mediation process broke down. There was some delay, in part due to the ability of the claimant's representative. Mr Pillai delivered an outcome on 28 April 2020. We do not find any unreasonable delay in this part of the process.

119. The claimant's grievance of 23 December 2019 makes clear that *"my gender has played a significant role in this case and I feel that the genders were reversed, I believe that immediate action would have taken and I could have been faced with serious consequences"* (sic). In short, it is clearly a claim of sex discrimination.
120. The minutes of the claimant's grievance meeting on 14 February 2020 make clear that Mr Pillai recognised this was a sex discrimination complaint, and the claimant's representative made references to it being a "gender" based complaint.
121. We find that there were a number of deficiencies in the grievance investigation and troubling aspects of its outcome:
- a. While the claimant made it clear that his complaint was of sex discrimination, this was not probed by Mr Pillai during his interview with the claimant.
 - b. While it was clear that the claimant was alleging that if he was the woman his complaint would have been investigated immediately, Ms Nathwani was also not asked about the discriminatory aspect of the delay in her interview. Admittedly, she was asked whether there was a deliberate delay, but this is not the same thing.
 - c. Mr Pillai recorded in his outcome letter and that Ms Nathwani stated that there was no deliberate attempt to prolong the grievance and felt "gender did not come into it" (he made a similar comment in his Investigation Recap Form). The minutes do not support a contention that sex had nothing to do with the delay. While it might be argued that the minutes do not reflect what was actually said, or that Mr Pillai made a legitimate extrapolation from the evidence, no witnesses were tendered to support this. His conclusion that Ms Nathwani said sex (or gender) had nothing to do with it is not supported by the minutes.
 - d. Mr Pillai made a conscious decision to investigate afresh, not to consider the fact interviews summer 2019. He was investigating a year after the alleged incident. He denied himself the opportunity of looking at evidence close to the time of the alleged incident and of probing potential inconsistencies.
 - e. The minutes of Ms Asante's interview would suggest that she is not probed at all about the allegations banter and touching her breasts.

- f. Mr Pillai records in his outcome letter that Ms Nathwani considered mediation appropriate *“as it was “banter” and that’s how the two of you acted together”*. There was no probing of Ms Nathwani’s assessment that this was banter that merited mediation rather than investigation.
- g. Mr Pillai referred in his outcome letter to Ms Paramasivam saying that the claimant and Ms Asante *“were very friendly together and had seen you both playing and joking around together”*. Ms Paramasivam had said in interview that the claimant and Ms Asante were friendly and that the claimant jokes with her. She also said she had not witnessed the claimant touching Ms Asante. They seem to be any probing of a potentially “independent” eyewitness of an important aspect of the background.
- h. It is difficult, on looking at the minutes, to see how Mr Pillai came to the conclusion, that there was a background of banter that shed light on the claimant’s complaints. The extent of the evidence that independently supported it was Ms Paramasivam saying the claimant was friendly and joked with Ms Asante.

122. In the circumstances, we considered that the grievance was mismanaged and such fed into the conclusions reached. Evidence taken closer to the time of the incident was not used, the opportunity of exploring inconsistencies was lost, conclusions were made that were unsupported by the evidence and it appears to be accepted without question that there was atmosphere banter that informed the allegations. There was no proper attempt to grapple with the core part of his complaint, namely, that had been a woman his complaints would have been dealt with differently.

123. We conclude that such failures constitute a detriment to the claimant.

Mismanaging the appeal and its outcome

124. We have gone into some detail as to the approach Mr Fisher appears to be taking during the course of the appeal hearing. We have observed that he did not appear to be engaging with the substance’s complaint, but rather was expressing some regret for the position found himself on and sought to focus on the future. He considered the fact that Ms Hocking and Ms Nathwani were no longer in the business meant that he could not do much about complaints in respect of their actions or inactions. This rather ignores the point that it is the respondent’s very delay in investigating that meant that these individuals were not able to play a meaningful part in any investigation.

125. While one can appreciate and understand Mr Fisher's approach, it meant that the substance of the claimant's complaints, which he clearly felt very acutely, were not addressed. The claimant was making the point that he had been assaulted, and hurt badly, and that this could happen to others. Mr Fisher appeared only interested in smoothing things over going forward.
126. Perhaps the most critical issue concerning Mr Fisher's approach to the appeal, is the fact that his outcome letter does not even address the issue of discrimination. He simply does not give an outcome on a central core of the claimant's complaint.
127. We conclude that the appeal hearing and its outcome was mismanaged. The focus was not on addressing the claimant's complaints but smoothing the way forward. The outcome was significantly flawed in that it did not address a crucial element of the complaint.
128. We conclude that mismanagement of the appeal and its outcome represented a detriment to the claimant.

Was the treatment less favourable than would have been afforded to comparator because of sex? Shifting the burden of proof

129. This is not a case as envisaged in *Hewage v Grampian Health Board* [2012] UKSC 37 where the tribunal is in the position to make "*positive findings on the evidence one way or the other*", and where the burden of proof provisions "*have nothing to offer*". The decision-makers did not give evidence to us and were therefore not subjected to cross-examination. This is more a case where the provisions "*require careful attention where there is room for doubt as to the facts necessary to establish discrimination*".
130. We have concluded that the respondent did not take the claimant's assaults seriously, that it delayed investigation into the assaults, it did not interview a relevant witness, that it mismanaged the grievance procedure and its outcome and that it mismanaged the appeal process and its outcome.
131. The respondent's case is, essentially, that it did take the assaults seriously, albeit that there was some delay in investigating it which was as a result of the claimant's and Ms Nathwani's absences from the workplace. The tenor of the evidence is that investigations took place into the grievance and a fair and reasonable appeal took place.

132. We do not accept the respondent's account. What this

means is that there is no proper explanation for each element of the conduct which we found detrimental to the claimant. The only element for which there is an explanation is for the 11 weeks of the period of delay between June and December 2019.

133. In effect, what we have is unexplained unreasonable conduct in a number of respects. That alone is probably insufficient to shift the burden of proof onto the respondent to disprove discrimination (see *Efobi* and *Bahl*). We do, however, consider that there is “something more” which is worthy of examination.

134. As we have set out above, we consider that Mr Pillai reached a conclusion on sex discrimination (in respect of delay) that appears to be unsupported by the documentary evidence of the minutes of his meeting with Ms Nathwani. We also note that Mr Fisher did not appear to engage with the claimant’s complaints, which were clearly framed as sex discrimination complaints. He also did not deliver an outcome in respect of the central complaint of sex discrimination.

135. Can these matters, in conjunction with the unexplained unreasonable conduct constitute “something more”? There are perhaps a number of reasons why the employer might make an unsupported finding of discrimination, fail to engage with a complaint of discrimination and fail to deliver outcome on a complaint of discrimination. One possible explanation is that this employer is consciously seeking to duck the issue because it recognises discrimination. Another possible explanation is that it is ducking the issue to avoid any uncomfortable findings. Either of these scenarios would be of assistance legitimately inferring discrimination. We therefore find that the unexplained unreasonable conduct, and the respondent’s unsupported conclusions on discrimination followed by its refusal to engage with or give an answer to the claimant’s complaints of discrimination are “something more” which shift the burden of proof to the respondent to disprove sex discrimination.

Was the treatment less favourable than would have been afforded to comparator because of sex? Burden shifted

136. None of the decision-makers gave evidence to the tribunal. We note that Mr Pillai had a good reason for going overseas and attempts were made to postpone the hearing. We do not accord his evidence no weight, but we gave it little weight given that it has not been the subject of cross-examination. Similarly, Mr Fisher, is no longer an employee of the respondent and they could not secure his attendance. Again, we give little weight to his evidence.

137. We note that Ms Anderson was the note taker at the appeal

hearing. Nonetheless, her witness statement did not deal with any evidence concerning the appeal. She confined her evidence to addressing the specific comparators that the claimant raised.

138. The tribunal asked Ms Anderson what the normal timescales she, as a human resources professional, would expect a grievance complaint to be dealt with. Her answer was two weeks.

139. The respondent is a large organisation with administrative resources at its disposal. It provided whatsoever about the way in which it dealt with other complaints of assault made by staff members. It has put forward no to prove it did not discriminate against the claimant in all of the ways he suggests.

140. In the circumstances, subject to any time points we find that the respondent directly discriminated against the claimant on grounds of sex in all of the ways he alleges.

Time

141. In essence, the claimant is complaining that the way the respondent dealt with his complaint of being assaulted was discriminatory. He alleges that the respondent delayed and did nothing, thus not taking the complaint seriously, from 8 February 2019 until June 2019. He says that the fact-finding in the summer of 2019 was flawed, and thereafter nothing was done. When a formal complaint was raised, which also raised issues about the way the original complaint was dealt with, that was mismanaged. The appeal was significantly flawed and the outcome, confirmed in writing on 3 June 2020, was deficient.

142. Although *Hale* concerned a disciplinary process rather than a grievance, we conclude that its reasoning is equally applicable to the process here. There were several stages with the common thread of the claimant seeking a determination of his complaint of wrongdoing against him at work. We find that this was an act which extended over the period of 8 February 2019 to 3 June 2020. The claimant therefore presented his claim on 14 July 2020 in time.

Overall conclusion

143. in the circumstances, we find that the respondent directly discriminated against the claimant by:

- a. Not taking seriously the two assaults he said he suffered at work in January 2019 and 8 February 2019;
- b. Delaying the investigation into the assaults and his complaints;

- c. Not interviewing Ms Chandra;
- d. Mismanaging the grievance and Ethics process and outcome;
- e. Mismanaging the appeal process and outcome.

144. The tribunal will list a remedy hearing. The parties are asked to write in to the tribunal with dates to avoid and any suggestions for further orders to prepare for such a hearing.

Employment Judge **Heath**

31 May 2023