EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Jack Clarke	v	Marks and Spencer PLC

Heard at: Reading (in person) **On**: 31 July - 4 August 2023

Before: Employment Judge W Anderson
B Osborne
K Rose

Appearances
For the Claimant: R Morton (counsel)
For the Respondent: L Whittington (counsel)

RESERVED JUDGMENT

1. It is just and equitable for time for the filing of a claim of discrimination on the grounds of disability to be extended to 2 November 2022 for those allegations of discrimination that occurred before 22 June 2022 and were not part of a continuing course of conduct.
2. The claimant's claim of unfair dismissal is upheld.
3. The claimant's claim of indirect discrimination is upheld in part.
4. The claimant's claim of failure to make reasonable adjustments is upheld in part.
5. The claimant's claim of discrimination arising from disability is upheld.
6. The claimant's claim of victimisation is dismissed.

REASONS

Background

1. The claimant was employed by the respondent, a retailer, as a customer assistant, from 12 July 2015 until 2 July 2022, when he was dismissed for gross misconduct. Early conciliation took place from 26 July 2022 until 6 September 2022. The claim was filed on 2 November 2022.

2. The claimant claims that he was unfairly dismissed, and that the respondent discriminated against him on the grounds of disability. The claimant has

autistic spectrum condition (autism). The respondent denies discrimination and states that the claimant was fairly dismissed for gross misconduct after a fair disciplinary procedure was followed.

The Hearing

3. The tribunal received an agreed bundle of 215 pages and a supplementary bundle, filed by the respondent, of 21 pages. Ms Morton, for the respondent, did not object to the inclusion of the documents contained in the supplementary bundle. On the third day of the hearing the respondent filed a set of pay slips for the period January to June 2022. After hearing from both counsel the tribunal decided that the documents should form part of the evidence before the tribunal and as a result the claimant, who had given evidence first, was recalled so that he could give evidence on these documents.

4. The tribunal received eight witness statements and all eight witnesses attended the hearing to give oral evidence. Witnesses for the claimant were the claimant, M Clarke, S Clarke and R Butt. Witnesses for the respondent were J Vain, S Cherrill, I O'Sullivan and M Forester.

5. A dispute between counsel arose about the cross-examination of the claimant on certain documents in the supplementary bundle. The tribunal received brief written submissions from each side on this matter and decided that cross-examination of the claimant in relation to an incident that took place in December 2020 should be limited to those matters that were put to him at the time.

6. There had been no case management hearing in this case and the parties had agreed a list of issues which the tribunal found to be inadequate. The claimant had not set out its legitimate aim defence to the discrimination claim. The claimant had not clarified the protected act it relied upon for the victimisation claim. It later became apparent that the claimant had not set out its case on group disadvantage for the purposes of the indirect discrimination claim. The claimant had obtained a medical report shortly before the hearing commenced. This was not before the tribunal, the claimant having decided not to request to include it as it had been obtained so late. The tribunal decided, taking into account that some pleadings would need to be clarified as the hearing progressed, there was little remedy information in the bundle, the claimant is bringing a personal injury claim which may require expert evidence, and the claimant's evidence may take longer than usual should he become overwhelmed, that the hearing would be for liability only and judgment would be reserved.

The Issues

7. The parties had agreed a list of issues between them as follows:

Jurisdiction – Timing

1. Have the Claimant's claims for discrimination been brought within the relevant time period of three months starting with the acts/omissions to which the claims relate?

2. If not, do the alleged acts or omissions which the Claimant refers to in his claim form constitute a continuing act of discrimination, the end of which fell within the time limit?

3. If not, are there any grounds on which it would be just and equitable to extend time?

The Claimant's position is as follows:

The nature of the Claimant's disability is said to impact upon his awareness and understanding of the disadvantage he was suffering, and the need to take action. The Claimant will rely upon the workplace stress he was under during the period of the alleged failure to make reasonable adjustments and the exacerbation of his symptoms over a two year period leading up to his dismissal.
The matters that may be argued to be out of time and part of the overall factual matrix of the claim, there are no discrete complaints that involve different witnesses, and the prejudice balance falls in favour of having all the matters heard when considered against the gravity and importance of the allegations.

The Respondent's position is as follows:

The Claimant is relying on historical acts or omissions as early as 2020. The Respondent refutes the position by the Claimant stated in paragraph 3 above. The Respondent will put the Claimant to the strict proof that because of his medical conditions/disability his ability to bring the claims/relevant allegations was affected.

Unfair dismissal

4. What was the reason or the principal reason for the Claimant's dismissal? In particular, was the reason or principal reason for the Claimant's dismissal conduct within the meaning of section 98(2)(b) of the Employment Rights Act 1996 (ERA)?

5. Was the Claimant's dismissal fair within the meaning of section 98(4) of the ERA? In particular, did the Respondent act reasonably in treating that reason as sufficient for dismissing the Claimant?

Unfair dismissal – Remedy

6. What financial loss, if any, has the Claimant suffered as a result of any unfair dismissal?

7. If the Claimant has suffered financial loss, should any basic and/or compensation awarded be reduced (having regard to those factors set out in s.122 and s.123 ERA) and if so by what percentage? In particular:

    a. If the Respondent failed to follow a fair procedure, can the Respondent show that that following a fair procedure would have made no difference to the decision to dismiss the Claimant (Polkey)?
    b. To what extent did the Claimant contribute to his own dismissal?
    c. To what extent has the Claimant mitigated his losses?

8. Did the Claimant and Respondent comply with the ACAS Code of Practice on discipline and grievance (Code)? If not, was either of the parties failure to follow the Code reasonable in all the circumstances? If not, would it be just and equitable for the Tribunal to increase or reduce any award?

Disability

9. Was the Claimant a disabled person as defined in section 6 of the Equality Act 2010 ('EqA') at the relevant time, specifically:

    a. Did the Claimant suffer from a physical or mental impairment? The Respondent accepts that the Claimant had Autism at the relevant time. The Claimant states that he was diagnosed with ADHD and Autistic Spectrum Disorder at the age of 11. It is a developmental disability caused by differences in the brain.

    The Claimant relies upon the fact that he was employed by the Respondent pursuant to the Marks and Start Scheme which assists those with disabilities find secure employment. The Claimant also replies upon the Oxfordshire Employment Service and occupation health assessments and the clinical interventions he has had.

    In relation to the Claimant's ADHD, the Respondent does not concede that that it had, or reasonably could have had, awareness or knowledge of this condition at the relevant time. If the Claimant wishes to rely on the condition of ADHD as a disability, the Respondent requests the Claimant provides medical evidence of his diagnosis for the relevant time.

    b. If so, did that impairment have a substantial and long term effect on his ability to carry out normal day to day activities, at the relevant time?

    The Claimant shall provide a fuller disability impact statement if this remains an issue. By way of summary his condition is a lifelong developmental disability. It affects the Claimant's interpretation of verbal and non verbal language and ability to understand others' feelings and intentions and cope with social interactions and the world around him.

    The Claimant needs help to read, process and understand documents and forms. He experiences feelings of being overwhelmed and overloaded by things such as too many people, or by change to routine or not having breaks. The Claimant can find it difficult to express himself. He suffers with meltdowns and is prone to losing behavioural control in extreme situations, or can shutdown mentally from the outside world. He finds it difficult to maintain focus and can have delayed reactions to situations.

Indirect Discrimination and failure to make reasonable adjustments

10. Did the Respondent apply a provision, criterion or practice (PCP) which is applied or would be applied to persons not disabled as the Claimant for the purposes of section 19 of the EqA?

The Claimant relies on the PCPs set out at Paragraph 81 a – j of the Section 8 Grounds.

11. If so, does the PCP put or would it put persons of the same disability as the Claimant at a particular disadvantage when compared with persons not of that disability?

    The disadvantage relied on by the Claimant is set out at Paragraph 81 a-j.

12. If so, was the Claimant put at that disadvantage?

13. If so, was the relevant PCP a proportionate means of achieving a legitimate aim

14. Did the Respondent fail to take such steps as were reasonable to avoid the disadvantage, in accordance with section 20 of the EqA ?

Discrimination arising from disability

15. Contrary to section 15 of the EqA, did the Respondent treat the Claimant unfavourably because of something arising in consequence of the Claimant's disability?

    The unfavourable treatment relied on by the Claimant is the disciplinary action and dismissal due to conduct on 4 June 2022. The Claimant asserts that such conduct arose as a consequence of his disability.

Victimisation

16. Contrary to section 27 of the EqA, did the Respondent subject the Claimant to a detriment because he had done, or because the Respondent believed that he had done or may do, a protected act?

    The protected act the Claimant relies upon are his allegations during the disciplinary process that the Respondent had contravened the Equality Act 2010, and those contraventions had contributed to his conduct.

17. If so, did the Claimant suffer any detriment on the grounds that he did a protected act?

    The detriment(s) relied on by the Claimant is his dismissal.

18. If the Claimant did a protected act and suffered a detriment on the grounds of that/those protected acts, should the Claimant be awarded compensation for injury to feelings?

Discrimination – Remedy

19. What financial loss, if any, has the Claimant suffered as a result of his/her or unlawful discrimination?

20. What award, if any, should be made for injury to feelings?

21. Did the Claimant or Respondent comply with the ACAS Code of Practice on discipline and grievance (Code)?

22. If not, was either of the parties' failure to follow the Code reasonable in all the circumstances?

23. If not, would it be just and equitable for the Tribunal to increase or reduce any award?

Submissions

3. Both counsel provided detailed written closing submissions for which the tribunal was grateful and made short oral submissions in addition. A brief synopsis of those submissions is set out below and some further details of the submissions are included in the decision section of this judgment.

4. For the respondent Ms Whittington said, on unfair dismissal, that the investigation carried out by the respondent was reasonable, Mr Forester had a genuine belief in the claimant's guilt and it was clearly within the range of reasonable responses to find him guilty of gross misconduct and to dismiss him where the respondent had a zero tolerance of sexual harassment. Ms Whitington said it was not credible that the claimant's behaviour was not motivated by sexual gratification when the incident in December 2020 and June 2022 involved similar accounts by two young female members of staff. Ms Whittington said that incidents of alleged discrimination which took place before 22 June 2022 were out of time and it would not be just and equitable to extend time as the claimant had given no good reason, and the respondent was prejudiced by having to defend allegations which took place a number of years ago. She said that appropriate adjustments had been introduced by the respondent and that the respondent had only to take reasonable steps to mitigate the disadvantage. It did not need to implement specific adjustments the claimant sought. On indirect discrimination she noted that the claimant had not pleaded on group disadvantage and provided a list setting out the respondent's position on its claimed legitimate aims. On discrimination arising from disability, she said that there was no expert medical evidence to show that the claimant's conduct arose because of his disability. On victimisation, Ms Whittington said there had been no express allegation of discrimination, or words that would be clear from their context that such an allegation was being made. Furthermore no argument on a causative link between the claimant's dismissal and any alleged protected act had been advanced.

5. Ms Morton, for the claimant, said that the finding of gross misconduct was unsustainable as the respondent had made no finding on whether the claimant's behaviour was wilful. She said that the disciplinary procedure was unfair where no medical or occupational health input was considered. On time she said it would be just and equitable to extend time in relation to the discrimination claims that were out of time as the claimant was waiting for adjustments to be made, he was disabled, and his mental health was deteriorating. Ms Morton said, on discrimination arising from disability, the claimant had established a link between the conduct and his disability. The action the respondent had taken in dismissing him was not proportionate as

no medical evidence was considered and no consideration given to adjustments set out in the OH reports. The adjustments were not implemented and may have removed future risks. In response to the s19 and 20 claims Ms Morton said the claimant withdrew his reliance on PCP C but otherwise the claimant's case was made out on the evidence. On victimisation she said the respondent had dismissed the claimant for making allegations of discrimination on the meetings of 20 and 30 June 2022.

Findings of Fact

6. The claimant commenced employment with the respondent, a retailer, under it Marks and Start scheme on 12 July 2015. He worked in the Oxford store in the Menswear department on a 12.30-20.30 shift. Marks and Start is the respondent's scheme which it describes as 'an inclusive employment programme for disabled people'.

7. The claimant has autism. The effect on the claimant of this condition is set out in the particulars of claim at paragraphs 10-17 as follows:

> *Jack's disability*
> *10. Jack's autism affects his ability to recognise social cues, and to know what inappropriate conversation or conduct is. He relies on others to notify him when his behaviour is not acceptable.*
>
> *11. Jack needs extra time to process information and does not cope well to changes in his routine. He can become panicked and unaware if stressed.*
>
> *12. Working beyond his usual shift hours or additional workplace demands can cause Jack to become increasingly tired and overwhelmed, which in turn can create an autistic meltdown manifesting in episodes of black out, or trance like feeling.*
>
> *13. These episodes of meltdown also lead Jack to becoming very upset, and his emotions become uncontrollable. He needs to have a safe place to go to, and or a person to notify in these situations.*
>
> *14. Jack's disability is not obvious to strangers, and he would find it difficult to explain his condition to those around him unless specifically asked. He finds it difficult to form friendships, and is perceived by others as acting strangely.*
>
> *15. Jack often lacks the ability to appreciate how others are feeling in any given situation. He is not aware of his movements towards another person or even that he is touching them.*
>
> *16. During conversations he can become engrossed in a particular topic and find it hard to move away from something he has become fixated upon.*

> *17. Anxiety is a very prominent feature of autism, especially in social situations, Jack would find it difficult to recognise and regulate his emotions. He is remorseful when notified that he has done something wrong.*

8. The same, or similar descriptions of the effects of autism were set out by the claimant in his oral evidence to this tribunal, also as recorded in the minutes of various meetings he had with the respondent during the relevant times, and by his mother and father in oral evidence. The respondent has not challenged the evidence and the tribunal finds that the effects of autism on the claimant are as set out in the particulars of claim.

9. The claimant worked for the respondent without incident until the onset of the pandemic. Due to the problems caused by the lockdowns and various social distancing measures with which the respondent had to comply, the claimant was moved between departments and stores (menswear, food, bakery, security, in Oxford, Summertown, Didcot and Cowley Retail Park) during the period February 2020 to March 2021 and his shift patterns were changed on more than one occasion between February 2020 and May 2021.

10. On or around 7 December 2020, whilst the claimant was working at the Oxford store a female colleague complained about his behaviour. Specifically, that he had moved her hair, instigated a conversation about pornography with her and talked about sex.

11. Julia Vain, a manager in the Oxford store, but not the claimant's line manager, was appointed to investigate this matter. The complainant made a written statement and Ms Vain met with the claimant to discuss the complaint. Ms Vain said she knew the claimant had autism but not that he had been employed through the Marks and Start programme. She could not locate any personnel file for him or records and did not know about any adjustments he may have had. Ms Vain interviewed the claimant on 7 December 2020. He said that he did not always understand that his conversation was inappropriate and referred to the disruption of the previous year together with periods of not speaking to people having been an issue to him. Ms Vain made a decision not to take any disciplinary action against the claimant. She referred him for an occupational health assessment to better understand the effect of autism on the claimant in relation to his work and particularly in respect of the claimant's stated difficulties with understanding other people's emotions or personal space. Ms Vain said in oral evidence that she did not pursue disciplinary action as she accepted that the claimant had not understood that his actions towards his colleague were making her feel uncomfortable, he was upset with himself, and she did not feel that it was right in that climate to punish the claimant if it was not clear that he understood what he was doing. Ms Vain described a time during the pandemic when it was hard to locate records and many employees were upset over changes to work, such as work patterns and furlough periods.

12. There was some dispute between the parties as to whether the claimant had understood that the allegations were of, or had been categorised by the

respondent as, sexual harassment. The claimant's oral evidence was that he had been accused of making inappropriate comments and no one had said it was sexual harassment. When he was asked by Ms Whittington whether pornography was not sexual the claimant said that he understood this now but did not realise it at the time. He accepted in oral evidence that following this incident he knew he should not talk about sex. The tribunal finds that although the claimant had talked about sex and pornography, he had not understood the allegations against him were of sexual harassment.

13. Ms Vain commissioned an occupational health assessment. An occupational health report was issued on 23 December 2020 and the following advice was given:

> *If operationally feasible I would recommend that Jack and his manager remain in open and honest communication to discuss any work-related issues and to provide him with support. I would suggest that it would be beneficial to Jack if he is immediately told that his behaviour is not appropriate. I would suggest that management undertake a Wellness Recovery Action Plan (WRAP) with Jack. This should be used to help identify his specific symptoms, triggers, and agree practical support that would be relevant to the workplace. This should be reviewed on a regular basis.*

14. This advice was not actioned. Ms Vain was not the claimant's line manager and had simply been asked to carry out the investigation as someone with little or no connection to either party. She had some informal catch ups with the claimant. She thought she would have passed on the report to another manager but could not confirm that she had definitely done so and did not know who the claimant's line manager was at the time. She believed that she had given the report, a letter about her decision, and a copy of the disciplinary policy to the claimant. The claimant denied that he had received or seen a copy of the disciplinary policy before he was given one by Ingrid Stewart on 28 June 2022. As the claimant's recollection of events during the last few years was detailed and consistent, and Ms Vain's memory of her investigation in December 2020 was much less consistent (for example in that she had initially thought she had given the claimant a first written warning at a disciplinary hearing, then found documents a few days before the hearing commenced to indicate that the matter had not progressed beyond an investigation meeting), the tribunal accepts the claimant's evidence that he was not provided with a copy of the disciplinary policy by Ms Vain.

15. The claimant was moved in January 2021, for reasons connected to pandemic store closures and re-organisations, to the Cowley Retail Park store, and subsequently back to Oxford in March 2021. At this time he was put onto a late shift (13:30 to 21:30) on the food section.

16. The claimant said that working a late shift was unsuitable for him. He could not go to the gym and the disruption to his routine caused him distress. The claimant's father became sufficiently concerned at the downturn in the claimant's mental health that he contacted Jenny Cooper, a previous line manager of the claimant with whom he had got on well. The claimant and Mr

Clarke met with Ms Cooper in early April 2021. The meeting is undocumented but led to an 'ill-health' meeting on 9 April between the claimant and Sophie Cherrill, his then line manager. Mr Clarke was also in attendance. In oral evidence Ms Cherrill said that at around the same time as Mr Clarke contacted the respondent, she had noticed that the claimant was struggling and had encountered him sitting on the shop floor and failing to complete tasks. At the meeting the claimant described the impact of autism on his behaviour and the impact of the change of shifts and stores on his life. He said that changes to his routine and lack of routine made him feel very anxious.

17. In the meeting notes Ms Cherrill has recorded that she said *'Whatever adjustments are agreed between you and myself we then need to draw a line under all of this. Any adjustments that are agreed will be as permanent as we can make then. However this does mean that we need to see an improvement in your performance and attitude towards work.'*

18. Ms Cherrill said that 'drawing a line' was poorly worded and she had meant that she acknowledged he had been upset by the changes and they were now going to find a way to work so he felt supported and less anxious, and in relation to permanence – acknowledging that things may change but the respondent was taking the matter seriously and trying to avoid changes. She said the meeting was not a meeting to address poor performance. The tribunal accepts Ms Cherrill's evidence that the purpose of the meeting was to address the claimant's anxiety and that it was not the intention of Ms Cherrill or the respondent that any adjustments agreed would be fixed and final.

19. Ms Cherrill set out a range of possible adjustments to the claimant in the meeting. She said she had discussed and compiled the list with her line manager. From those options the claimant chose to be trained to work in the bakery with a shift time of 12:00 – 20:00. Ms Cherrill also commissioned a further occupational health assessment. In oral evidence, Ms Cherrill confirmed that she had not seen the previous report and had not thought to ask to see it. She said that she was starting afresh with the claimant.

20. Following the meeting Ms Cherrill sent a letter to the claimant setting out what had been discussed at the meeting and stating that there would be a further meeting to discuss the occupational health report once it was produced.

21. An occupational health report was produced on 14 May 2021. The following Management Advice was provided:

> *Jack is fit for work and the duties of his job role. it is advisable for management to have a flexible working approach with Jack, if operationally feasible. Management should be aware that change can cause heightened anxiety and have a negative impact on his mental health and wellbeing. Jack would benefit from regular meetings with his manager to enable any changes to be discussed and dealt with at an*

early opportunity. I also advise increased managerial support at this time.
It is recommended for management to facilitate increased comfort breaks, as required, when he feels overwhelmed or stressed. It is important to note, that mental wellbeing can have an effect on work performance. It can result in reduced levels of concentration, while it can also cause fatigue. It would be prudent to take this into account when delegating tasks and workload.
I recommend that a stress risk assessment/WRAP plan is carried out in order to identify and address any work place concerns. This template can be found at https//www.mind.org.uklmedia/1593680/guide-to-waps.pdf. By developing this WAP, he an actively support his own mental wellbeing by reflecting on the causes of stress and anxiety, and by taking ownership of practical steps to help address these triggers. This process can also help Management to open up dialogue with employees. He would benefit from regular meetings with his manager to enable any issues to be discussed and dealt with at an early opportunity. I also advise increased managerial support at this time. Lastly you may wish to refer Jack for a specialist work place needs assessment. This can be accessed through Pam Assist, Access to Work or the National Autism Society.

22. A stress risk assessment/WRAP assessment is about the claimant's wellbeing and a work needs/Access to Work assessment is about practical steps, e.g. adjustments, that make it possible for a disabled person to work in a particular job or work place.

23. A further ill-health meeting took place between Ms Cherrill and the claimant after the report was produced in which this management advice was discussed Ms Cherrill told the claimant *'I will look into the risk assessments that have been advised and what the next steps are so we can complete them. In terms of regular comfort breaks, if you are finding work difficult and need to take some time off the floor, it is important that this is discussed with management before you leave the shop floor.'*

Leaving the shop floor

24. Ms Cherrill's shifts changed in June 2021, and she ceased to be the claimant's line manager. Ms Cherrill accepted in oral evidence that she had not arranged any scheduled formal meetings with claimant as suggested in the OH advice but said that she had met with him regularly on an informal basis. She said there was no specific space set up, but she did try to create that and there was a room close to the bakery he could use. She acknowledged that she took no further action in progressing any work place assessments. She accepted that although she had acknowledged and agreed to the claimant leaving the shop floor where he felt this was necessary, the claimant had been told that if he needed to leave the shop floor then he must speak to a manager about this first. She said that she had told other managers about this.

25. The claimant's evidence was that he often did ask to leave the floor but was either told no by a manager or it was put to him that he was needed on the floor. He said that Ms Cherrill had left or was away and managers, Michael and Chris, were not aware that he should be allowed to take stress breaks. He said that he did not ask his final manager Sophie Czerwiwiec, as by then he had given up. He said there was an implied 'no' and managers would say 'well we need you on the floor – we need you on the bakery'. Ms Whittington noted that he had not set out that there was an implied 'no' in written evidence or pleadings and this was raised for the first time in oral evidence.

26. Mr O'Sullivan said that he had encouraged the claimant to take time off the floor but other than Ms Cherril's oral evidence that she had told other unspecified managers about the arrangement for the claimant to leave the shop floor there is no evidence that other managers knew that time out was needed, or facilitated it. Mr O'Sullivan had not seen the OH report from 14 May 2021 and does not appear to have been aware of an agreement that the claimant should be allowed time off the floor. That was separate from his personal encouragement of the claimant to do so. Mr O'Sullivan was the store manager, not the claimant's line manager.

27. The tribunal finds as follows on this matter: after Ms Cherrill left, the claimant's subsequent line managers were not aware that there was an adjustment in place for the claimant to leave the shop floor when he was overwhelmed; even though the adjustment was put in place by Ms Cherrill it was always the case that the claimant still had to seek management permission before leaving the floor; on more than one occasion the claimant asked permission to leave and was refused it, either outright or obliquely by being told that he was needed on the floor; and the nature of the claimant's disability (as set out at paragraph 6 above) is such that this state of affairs meant that he was not able to take time off the floor when he felt that was needed because of anxiety or stress he was feeling arising from his disability.

<u>Assessments</u>

28. There was no documentation before the tribunal relating to a handover between line managers. Ms Cherrill said that she spoke to the new line manager, Joao, and told that person that she had not got to the assessments.

29. The claimant's evidence was that he had chased up the respondent on many occasions over its failure to progress the assessments. Ms Cherrill recalled only one occasion on which the claimant spoke to her about this. She recalled that she had been following a shop lifter and had said to the claimant she would speak to him about it in a minute. She did not say that she had taken any further action. She could not remember when this incident had taken place. There was no evidence from the claimant's subsequent line managers about whether he had asked for the assessments to be completed but his evidence is that he was given the forms to complete in respect of a work place needs assessment in January 2022 and was upset at that time to discover that the matter had not progressed in the intervening months. The respondent provided no evidence on when it had next had contact with the claimant over assessments after the meeting with Ms Cherrill in May 2021. The tribunal

finds on the evidence that the claimant raised the matter of when the assessments would be completed with the respondent on more than one occasion after May 2021.

30. It was suggested by the respondent in written evidence that it was the responsibility of the claimant to initiate a work needs assessment. It was admitted by Ms Cherrill that the wording of the occupational health assessment was that this was something for the respondent to action, and the claimant said that he was not aware that he needed to take any action until he was given the forms in January 2022. The tribunal finds that a work place needs assessment was something that the claimant needed to apply for, but that he was unaware of this until January or February 2022 when he was given forms by the respondent and/or when Rosalind Butt, an employment advisor working for Oxfordshire County Council became involved with his case at the request of his parents. The OH report of 14 May 2021 gave details of the two types of assessment required and this was written under the heading of 'Management Advice'. The only reasonable interpretation of the report would be that the respondent needed to take action in relation to both assessments. The tribunal finds that the respondent did not take any steps towards obtaining a stress/WRAP risk assessment for the claimant after the report was produced and no steps had been taken by the time the claimant was dismissed on 30 June 2022. It finds that the respondent did not say at any time to the claimant that he needed to apply for a work place needs assessment. The tribunal finds that the claimant cannot have known that he needed to apply for a work place needs assessment from the information he was given in May 2021 by Ms Cherrill, who said she would look into it, or the OH report. It was suggested to the claimant in cross examination that he could have looked at the internet links provided in the OH report himself. The tribunal finds that this suggestion fails to take into account the nature of the claimant's disability and it was clearly the responsibility of the respondent in this situation to initiate the assessments or provide very clear instructions to the claimant about what steps he needed to do. It did neither of these.

31. In or around January 2022 the claimant's parent's requested assistance for him from the Oxfordshire County Council employment team. Rosalind Butt, an employment advisor, was assigned to the claimant's case. She completed the relevant forms with the claimant and submitted a request for an Access to Work assessment for him. The assessment took place in June 2022, shortly before the claimant was dismissed. Ms Butt, having been assigned to work with the claimant subsequently attended the disciplinary process meetings with him that are described below.

<u>Extra shifts and changes to shifts</u>

32. Although the assessments were not actioned, which the claimant said was a continuing issue for him, with the implementation of a 12:00 to 20:00 shift in the bakery at the Oxford store and the stability to the claimant's working life that brought with it, there was a period up until January 2022 where the claimant was able to get on with his job without issue. He describes this period in his witness statement as 'relatively alright' . In November or December

2021, a weekend baker was signed off sick and that person's sickness continued for many months. This led to the claimant being asked to do extra shifts. The claimant's memory of this is that he had to work many six day weeks between January and May 2022. He said this was excessive and was particularly concerned about a six week period in which he worked four Sundays. Sundays and Tuesday were his days off.

33. Also, in the second half of this period a morning baker was signed off and this resulted in the claimant being asked to cover morning shifts. The claimant gave evidence that another baker who sometimes covered in the mornings was very untidy in his work and left the bakery in a mess for the person next on shift.

34. The respondent disclosed the claimant's pay slips for that period. These indicated that the claimant worked 3 extra days in January, 1 in February, 1 in May and 1 in June. He was off for much of March with Covid 19. No evidence was given by the respondent about early starts other than as follows. The respondent's witness, Ian O'Sullivan, who was the store manager at the Oxford store during January to June 2022 said in written evidence the claimant could refuse extra shifts or early shifts. He also stated that the claimant would sometimes actively volunteer for shifts. In oral evidence he said that he had spoken to the claimant around the end of January, beginning of February 2022 and told him that he should not feel pressured to do extra shifts. He saw the claimant in early one morning and when he asked why the claimant showed him photos of the bakery in an untidy state and said he want to make sure the bakery was clean. He spoke to the claimant's line manager who said the claimant had volunteered to come in. Ms Cherrill gave evidence that when a shift needed covering the practice was to ring round other staff who usually worked these hours and ask them to cover.

35. The claimant acknowledged in cross examination that he would sometimes want to work an extra shift. He also said that he often did not as this meant his routine would change. He said he tried to voice his reluctance but felt pressured to cover. He said that the record of his overtime as set out in his payslips did not show how often he was asked to cover an early shift. He also spoke about the untidy baker and how he had raised this with his managers and let them know this was an issue to him. He said this had led to it being put to him that if he did not cover the early shift then the untidy baker would be brought in, and the claimant would have to deal with the mess when he started his shift at midday. The claimant explained in his witness statement that '*I found it difficult to say no as my autism meant I wanted the bakery to be in order and not have to deal with the consequences of it not being managed properly.*'

36. Mrs Clarke, the claimant's mother, gave evidence that she had witnessed the claimant being called early in the morning to cover morning shifts, he had told her about the untidy baker and that he had been very distressed during that period. He had told a manager, and nothing had been done. She said that it was her view that the claimant was very loyal, that he was nervous about

asking for help as he thinks that he is going to get told off and that he is always worried that he is going to make a mistake. For these reasons he did not raise the problems more than once or more overtly. The tribunal observed the claimant during the hearing to be excessively worried about making a mistake and to be constantly apologising for mistakes he thought he had made but had not.

37. The tribunal makes the following findings on this matter: the claimant was asked to work extra shifts (i.e. come into work on a Tuesday or a Sunday) on at least six occasions during January and June 2022; the claimant was asked to work an early shift due to the absence of the morning baker on a number of occasions; the claimant perceived himself to be under pressure to accept these extra shifts or shift changes; Mr O'Sullivan told the claimant in early January/late February that the claimant did not need to do extra shifts if he did not want to; because of the nature of the claimant's disability he found it difficult to say no to requests despite the conversation with Mr O'Sullivan; it was put to the claimant on at least one occasion by a manager of the respondent that if he did not come in for an early shift he would need to deal with the mess left behind by the other employee they would ask to cover, when the claimant started his 12 pm shift. Because of this last finding the tribunal also finds that despite what Mr O'Sullivan was told by the claimant's line manager, he did not volunteer to come in for an early shift on the day that Mr O'Sullivan noted him to be in early. Instead, he came in in order to have some control over a situation which he knew he would otherwise have difficulty in dealing with.

4 June 2022 and disciplinary process

38. An incident occurred on the shop floor on 4 June 2022. The complainant, whom the tribunal shall refer to as AB, told a friend that during the shift the claimant had leaned on her and thrust at her, also that he had pointed a pricing gun at her chest and called her priceless, and that earlier in the shift he had called her pretty. The friend told AB to speak to a manager which she did, at the end of the shift. The manager's name was Chris. There is no record of that conversation.

39. No action was taken. The following day was a Sunday. The claimant was working an extra shift. The claimant and AB were both in work. The claimant states that towards the end of his shift Chris spoke to the claimant about AB's complaint. There is no record of that conversation. Chris did not give evidence before the tribunal.

40. Mr O'Sullivan's evidence was that Chris had received a call from AB's father on Sunday afternoon (5 June 2022), that he had received half a story and then spoke to the claimant to get details from him.

41. Ingrid Stewart, the investigation manager, wrote in her investigation report that: *Jack had left the store for the evening, so Chris handed over to the next day's duty Manager to ensure Jack was interviewed ASAP*. Ms Stewart has given no source for her comments in the report.

42. As Mr O'Sullivan was not in the store on the 4, 5, or 6 June 2022, and there is no documentary evidence from anyone who was in the store on 4 June 2022 other than AB's statement, dated 9 June 2022, in which she says she reported the matter to Chris on 4 June 2022, the tribunal finds that the matter was reported to Chris on 4 June 2022. The tribunal finds that as both the claimant and Mr O'Sullivan agree that Chris spoke to him in the afternoon of 5 June 2022, the facts are that Chris was working on 4 and 5 June 2022, he did not take any action after AB raised a complaint on 4 June 2022 and did not speak to the claimant until after AB's father called on 5 June 2022. This meant that the claimant and AB were working in the store on 5 June 2022.

43. Mr O'Sullivan's evidence is that the police visited the store on 6 **June** 2022, before his return from leave and spoke to one of the team managers. They returned the next day and spoke to him.

44. Ms Stewart records the following in her investigation report:

> *On Tuesday 7th June 2022 [AB]'s father called the store to speak to the store Manager Ian O'Sullivan, he explained that [AB] had a complete breakdown in school regarding the incident and the school had reported the incident to the safe guarding unit in the council. He also informed Ian that the police would now be involved in the case as it had been reported by safe guarding to them as sexual abuse of a minor; he expressed concern for his daughter and the working environment.*

45. In her investigation report there is a heading of 'Process of Investigation' and a sub heading of 'Evidence Collected'. Under this is written:
    - *[AB] written statement.*
    - *Jack Clarke interview dated 05/06/2022*
    - *Jack Clarke interview dated 20/06/2022*

46. There is no reference to Ms Stewart gathering evidence from Mr O'Sullivan or Chris. There is no record of an interview dated 5 June 2022. It is unclear then what is the provenance of the information set out above by Ms Stewart. In cross-examination Mr O'Sullivan acknowledged that he had spoken to AB's father. He said that AB's father had told him that AB was traumatised and Mr O'Sullivan, asked the father to get a statement from AB and send it to the respondent. It is not clear what date this was. Mr O'Sullivan did not refer to this conversation in his witness statement and did not specify a date in oral evidence. As the statement from AB is dated 9 June 2022, the conversation is likely to have taken place on 7 or 8 June 2022.

47. Mr O'Sullivan states in his witness statement that he spoke to the police when they returned to the store on 7 June 2022, and that the claimant was arrested that evening.The claimant attended for his shift on 8 June 2022 and was arrested later that day and not 7 June 2022. The conversation between Mr O'Sullivan and the police was not documented. Mr O'Sullivan acknowledged in oral evidence that the date of the police visit was 8 June 2022.

48. The claimant had scheduled rest days on 6 and 7 June 2022. He returned to work on 8 June 2022 and at the start of his shift was asked to meet with his line manager Sophie Czerwiwiec. The claimant's evidence is that Ms Czerwiwiec told him that that a serious incident was under investigation. He became very distressed and was sent home after two hours when he was still not in a fit state to answer questions from Ms Czeriwiwiec. The meeting is not documented. Mr Clarke, the claimant's father, spoke to Ms Czeriwiwiec after the claimant called him, crying. She told him that the claimant was being investigated for sexual harassment. She said he was not suspended but he should not be at work. Mr Clarke called back later the same day and spoke to Ingrid Stewart who had been appointed as an investigator. She told him the process would involve a verbal interview and that she was unaware that the claimant was autistic. Mr Clarke said that the respondent had failed to carry out disability assessments. These two conversations were documented by Mr Clarke contemporaneously. The notes were before the tribunal and the tribunal finds that the notes are a true record of those conversations.

49. It is not clear from the evidence whether Ms Stewart was appointed on 7 or 8 June 2022. Mr O'Sullivan thought it was 7 June 2022 and that she was aware from the outset that the claimant had autism. The tribunal find that she was not aware of this until Mr Clarke spoke to her on the afternoon of 8 June 2022. It is unclear what, if any, investigation she had carried out before she was made aware of this fact.

50. The claimant was arrested in the evening of 8 June 2022 and released very early on 9 June 2022. He was arrested for sexual assault. He was not charged with sexual assault and before he was released, he was advised that the matter was being viewed as assault. No charges were brought, and the matter was disposed of by way of a community resolution order.

51. On 9 June 2022 AB submitted a written statement to the respondent as follows:

> *Last Saturday, at roughly 7:30 in the evening, I was pulling forward in the crisp isle - there was nobody nearby. On my left, I noticed that Jack was staring at me - his face was completely blank and he had puffed out his chest. He started walking really quickly in my direction. I did not acknowledge him as he did this because I did not want to be rude or unkind as I am somewhat aware that he has mental health issues. He kept moving until he reached me, pushing himself up against my left side and my back. He was completely silent and so was I - I was sort of shocked but tried to appear unbothered at that point in case there had been some sort of misunderstanding. He then began to thrust himself into my back and side, his thighs and stomach pressed against me the entire time and he stayed completely silent. Although I did not feel his penis, it still very much felt sexual and made me feel incredibly uncomfortable and frightened - Jack is quite a bit taller than me and much older and I did not know what to do. I froze up and did not respond to him at all and this went on for around 10 seconds, possibly longer.*

Suddenly, he stepped back and began to laugh claiming that he "didn't know why' he did that and that he was "bored".

52. Mr O'Sullivan's written evidence was that AB resigned due to the mental health impact the sexual assault had on her, she did not want to work in store and she was worried about the claimant being there. In oral evidence he said that AB returned to the store three times, broke down and then left. Ms Morton asked him why he assumed that this was down to the incident rather than the respondent's handling of it where they let the parties work together the following day. Mr O'Sullivan said he could not comment.

53. The claimant was away from work on 9 and 10 June 2022 due to being too unwell to attend. It is his evidence that he was not told that he needed to stay away from work as if he had been he would not have needed to call in sick. He said that his father did not tell him that Ms Czeriwiwiec he said he should not be in work. The claimant was then on annual leave for a week. He was next due into work on 20 June 2022.

54. The claimant was invited to a meeting with Ms Stewart on 20 June 2022. There was some dispute between the parties as to whether the claimant was aware that this was an investigation meeting. There was no written invitation to the meeting before the tribunal. There was criticism from the claimant that he was not given time to prepare for an investigation meeting but also acknowledgement from Ms Butt, who attended with him, that he wanted the meeting to go ahead, and it was beneficial to him that it was dealt with quickly. She acknowledged that she was aware that she could have asked for a postponement and decided not to do so. Ms Butt and Mrs Clarke, the claimant's mother, were aware from at least 18 June 2022 that a meeting would take place with Ms Stewart on 20 June 2022. Mr Clarke was aware that Ms Stewart had been appointed as the investigating officer. The claimant and Ms Butt both accepted in oral evidence that they knew the incident of 4 June 2022 would be discussed at the meeting on 20 June 2022. The tribunal finds that the claimant had adequate notice of the meeting on 20 June 2022 and knew or should have known that he would be questioned about the incident of 4 June 2022.

55. An investigatory meeting took place on 20 June 2022. Ms Stewart's handwritten notes were in evidence. Ms Butt attended with the claimant. Ms Stewart questioned the claimant about the incident on 4 June 2022 and his understanding of what he had done. The claimant denied any sexual intent or that he had thrusted. He said he had leant on AB and this was a common trait of his when he was in distress, and something he did to his parents. He said he was upset due to doing extra hours, not having enough time off and being tired. He said he likes routines. At the meeting Ms Stewart was given a copy of a document drafted by Mrs Clarke, the claimant's mother, setting out various ways in which she said the respondent had failed to take into account or make adjustments for the claimant's disability.

56. During the meeting Ms Stewart adjourned for what she told the claimant would be ten minutes but was in fact an hour. The claimant said that this

made him anxious. On return she questioned him about the incident of December 2020. He states that it was as if this was new information to Ms Stewart whereas he had raised it with Chris on 5 June 2022 when the complaint was first brought to his attention. Ms Stewart is still employed by the respondent but did not take part in this hearing. The tribunal finds that during the adjournment Ms Stewart discovered information about the incident in December 2020. It is not clear how or what information she received, or why it came to her attention two weeks after her investigation began. No source is stated in the investigation report. The information she received was incorrect and that error is recorded as fact in the investigation report in that she states, 'the case involved viewing and discussing pornography'. It is accepted by the respondent that there was no viewing of pornography.

57. The claimant was suspended at the end of the meeting. Ms Stewart set out clearly the terms of, and the reasons for, the suspension in a letter dated 20 June 2022.

58. Mark Forester, a deputy manager from another of the respondent's stores, was appointed as disciplinary hearing manager, and in a letter dated 28 June 2022 the claimant was invited to a disciplinary meeting to take place on 30 June 2022. The allegations were of gross misconduct and phrased as follows:

> *Sexual Harassment:*
>
> *In that on Saturday 4'" June 2022 an incident involving Jack Clarke occurred on the sales floor where you are accused of approaching [AB] and without consent pressing, trusted and rubbing your body up against her back and her side. The behaviour was unwanted and sexual in nature, and cause [AB] to be fearful, intimidated, alarmed and degraded.*
>
> *Inappropriate behaviour:*
>
> *Also on Saturday 4th June, Jack also engaged in inappropriate unwanted behaviour towards [AB] by making comments about her physical appearance, and saying to her that she was 'pretty' and "priceless".*

59. It is not clear who drafted the charges. The tribunal finds that there was no reference to rubbing in the complaint from AB and this accusation was not put to him by Ingrid Stewart or Mr Forester.

60. Mr Forester said that he reviewed the respondent's disciplinary and bullying policies before the meeting. He reviewed the investigation meeting notes and the investigation report. The report refers to an interview dated 5 June 2022. Mr Forester, in his witness statement assumed this to be an interview between the claimant and Ms Stewart. In fact it could not have been, as Ms Stewart had not been appointed on 5 June 2022. It is more likely that Ms Stewart's reference is to a meeting between the claimant and Chris, of which there are no records before the tribunal. In any event, Mr Forester did not have the notes of that meeting and did not ask for them. He said that he

believed that he had a copy of AB's statement. He said he was almost certain. He confirmed that he did not receive a copy of the notes written by the claimant's parents which were given to Ms Stewart at the investigation meeting.

61. The claimant attended the meeting on 30 June 2022 with Ms Butt. Mr Forester questioned him about the incident on 4 June 2022 and his understanding of the incident. He also questioned him about the incident in December 2020. The claimant said that because of his autism he did not understand how people were feeling and was unaware that he was making them feel uncomfortable. He said that there had been no sexual intent behind his actions, and he said that he had leant into AB but that he had not thrust. He said he had gone limp, and he did not understand how thrusting was involved. He said this was an action he did when in distress and that he did this to his parents. Mr Forester asked him to demonstrate the action, which he did. The claimant said that he was in an autistic meltdown state because of changes to his hours and working extra hours. He raised that no workplace assessments had taken place.

62. Mr Forester asked the claimant about how he could be sure such an incident would not occur again. The claimant referred again to the assessment, saying that it was important. He explained about working extra Sundays and being asked to come in early and this led to him feeling overwhelmed. At one point Mr Forester said 'So let's just get this correct are you blaming this on the business?'. Ms Butt said that 'It sounds like Jack is taking responsibility for his actions but had there been that support in place it may not have happened.' A conversation then ensued about how it could be ensured that the incident was not repeated, and the claimant said that he needed to be told that something was wrong. Mr Forester adjourned the meeting at 17:05. It was reconvened at 17:15 and the claimant was told that he would be summarily dismissed.

63. Mr Forester set out his reasons in a letter to the claimant dated 30 June 2022.

> *During the meeting we discussed the above allegations. You stated that you were in 'a funny mood' which is linked to your autism. You explained that you will 'be funny and annoy people' but not purposely and that these moods happen more often when you are tired. You stated that you can lean on people when you are in these moods and that you trance out during these moods. You explained that you limply leaned on [AB] but did not thrust. You also stated that [AB] is not wrong with her statement, but it was pressure being implied not thrusting. You further stated that you do this to your mum.*
> *During our meeting you also explained that you felt there was no routine at work with your working pattern and work departments and that this impacted your moods as you go into these moods when you feel tired. You also stated that you had not had an assessment completed and that if there had been an assessment completed the behavior outlined in the allegations above may have been prevented. Specifically, you stated that as part of the assessment, you would request that if you*

made someone feel uncomfortable, they should go and tell a manager to then speak to you or that they should tell you directly. While I have considered this, it is my belief that this will not stop you repeating the behavior and colleagues are still at risk of inappropriate behavior towards them which the business would not be able to sustain. In addition, you stated that you behave in a similar way towards your parents often at home which makes me believe that you are likely to repeat the behavior in future and we are unable to put colleagues at risk of harassment or behavior which makes them feel uncomfortable.
M&S have a zero tolerance to sexual harassment in the workplace and I am not confident that you would not repeat this behavior. I have also taken into account the working relationship between you and [AB] since the incident occurred and the impact this has had on [AB]'s mental health. Therefore while I acknowledge you have been remorseful for your actions and your explanation for the mood you were in which is linked to your autism, I have made the decision to dismiss you from the company to protect other colleagues from the likeliness that similar behaviors would be repeated and we are unable to put colleagues at risk of being made to feel very uncomfortable in the workplace.

64. Mr Forester said in oral evidence that based on the claimant's evidence and AB's statement the incident was one of harassment and it was his job to decide if there was any risk of re-occurrence. When asked why he had not obtained and read the OH reports that the claimant had referred to Mr Forester said he did not believe it would make any difference to his outcome as he believed this incident was a case for dismissal. He also said in response to Ms Morton's suggestion that he had already decided the outcome (i.e. before the meeting started) '*Absolutely not I went through every angle and through everything I could possibly do and there was no decision at the outset at all'.* He said that the impact on his decision of the 2020 incident was not huge and he made his decision based on the 4 June 2022 incident being an isolated incident.

65. When asked whether he believed the incident was sexual in nature from the claimant's point of view Mr Forester said that he couldn't in his mind confirm, and uncertainty played a part in his decision. When asked how he knew AB's mental health had been impacted he said it was his belief that that was the case.

66. The claimant did not appeal the decision. His evidence was that he thought that if he was successful in an appeal he would have to go back to work for the respondent and he did not want to as the respondent had ignored his condition for years, and when the matter was raised with him a second time he felt too scared to contemplate any further contact with the respondent. The tribunal accepts that these were the reasons why the claimant did not appeal. Ms Whittington questioned why then he had felt able to put in a claim to the employment tribunal and he said again that he was not in a fit state to appeal. Mrs Clarke's evidence was that she initiated contact with ACAS as a precursor to filing a claim as he was unable to do so.

67. The claimant's oral and written evidence was that the more upset he was by external factors such as changes in routine the more overt were his autistic symptoms. He described, when particularly overwhelmed, zoning out and leaning into people for comfort. This is also what he said to Ingrid Stewart on 20 June 2022 and to Marc Forester on 30 June 2022. Mrs Clarke confirmed this in oral evidence. The tribunal concludes from this evidence that the claimant's behaviour on 4 June 2022 was caused by his autism, where his symptoms were more prominent due to what to him was the stressful situation of an ongoing disruption to his normal shift pattern. While the tribunal kept in mind that Mrs Clarke is the claimant's mother, it found both the claimant and Mrs Clarke to be reliable witnesses.

68. The claimant was questioned by the respondent about the accusation from AB that he had thrust into her. To Ms Stewart he said 'I don't remember. I wouldn't say thrusting. It's like going limp.' To Mr Forester he said 'Not that I know of, I don't understand how I can thrust and stay still. I'm not saying she is wrong I just don't understand how thrusting was involved. I just went limp. It was leaning on someone'. Mr Forester asked him to demonstrate in the disciplinary hearing which he did whilst remaining seated in a chair. In cross examination he said this was awkward but did not say whether or how he had reached a conclusion on whether thrusting was involved. He finds in the decision letter that thrusting has taken place.

69. The claimant denied that there was any sexual intent behind his actions. In oral evidence when asked if he accepted that the claimant believed it was not sexual, Mr Forester said that he 'couldn't see how it wasn't sexual in nature. Uncertainty played a part in my decision.'

70. Other evidence the tribunal had before it was the statement of AB. AB said that the claimant thrusted. She also said that she felt the encounter was sexual. The tribunal also took into account, whilst keeping in mind the different standards of proof, that although the claimant was arrested for sexual assault, this charge had been downgraded to assault by the time of his release a few hours later, on 9 June 2022, and that the matter was dealt with by way of a community resolution order.

71. On a consideration of this evidence the tribunal finds that it was a common trait of the claimant to lean on people when he was in distress. The tribunal acknowledges that this behaviour was inappropriate and that it caused significant distress to AB but also that this was an action he could not always control, in that any knowledge that it was inappropriate was not in the foreground of his mind when his autistic symptoms were at their height. It draws this conclusion from the various explanations provided by the claimant, in evidence and the bundle, of his symptoms and related actions, together with the evidence provided by his parents.

72. The tribunal accepts the claimant's evidence that there was no sexual intent behind his actions on 4 June 2022. It notes that AB said the incident felt sexual but has also taken into consideration that there were no charges brought on this basis, and the decision not to charge on that basis was taken

very quickly. The tribunal's view is that the claimant has been consistent in his evidence and the tribunal found him to be a reliable witness.

Law, Decision and Reasons

Time

73. It was accepted by the respondent that the claim of unfair dismissal was brought in time. Both parties agreed that alleged incidents of discrimination that took place before 22 June 2022 were potentially out of time. It was the claimant's case that some of these allegations related to a continuing course of conduct and where they did not, it would be just and equitable to extend time.

74. As the allegations of victimisation and discrimination arising from disability are both allegations about the disciplinary process and dismissal these two claims are time. The tribunal did not understand there to be a dispute between the parties on this. Instead the parties submissions focussed on the ten PCPs (provision, criterion or practice) on which the allegations of indirect discrimination and failures to make reasonable adjustments were founded. The same ten PCPs are relied upon in each head of claim and are as follows:

A: A requirement that an employee is flexible in relation to their workplace across the M&S departments (food, home, clothing) and store locations, and a requirement that an employee is flexible with their shift hours between March 2020 and June 2022.

B: That employees are called upon with very little notice to cover other members of staff who have called in sick or are otherwise unavailable, and those called upon are expected to provide that cover if they are not otherwise booked for other engagements or commitment between January 2022 and June 2022.

C: Once trained in specific department employees are expected to work within the parameters of their basic training without further support between March 2020 and June 2022.

D: There is a practice of not having any regular scheduled management meetings to discuss employee concerns or difficulties between March 2020 and June 2022.

E: The policy that employees on a shop floor are expected to be on the ship floor unless there is a recognised need such as the toilet between March 2020 and June 2022.

F: The practice of adopting reasonable adjustments on a fixed one-off basis, and drawing a line under it rather than adopting a flexible needs based follow up between April 2021 and June 2022.

G: Where an occupational health measure has been recommended the Respondent expects an employee to follow up and action that themselves. Between April 2021 and June 2022.

H: There is a practice of employing disabled without other colleagues being properly trained to understand the disability over the relevant periods above.

I: There is a practice of handling complaints between colleagues, where parties are spoken to and questioned without any proper notice of the purpose of the meeting, or property recording of what was said, and without any immediate follow up action, both in December 2020 and June 2022.

J: The policy of labelling behaviour of this nature gross misconduct warranting dismissal, in June 2022.

75. S123 of the Equality Act 2010 deals with time limits as follows:

(1) Subject to section 140B 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.
(2) …
(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.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

76. When making submissions Ms Morton confirmed for the claimant that PCP C is no longer relied upon. The tribunal have not given any consideration to PCP C.

77. Claimant's submissions on time: The claimant conceded that PCPs A, E, F and H were failures to do something or otherwise out of time. His position was that PCPs I and J were in time as they related to dismissal. The claimant says that B and D amount to conduct continuing until dismissal. It would be just and equitable to extend time in respect of all other PCPs because of the claimant's disability and as the claimant did not think that he had to bring a claim sooner, because he was being assured that the work place assessment was being done.

78. Respondent's submissions on time: Ms Whittington said that no evidence had been submitted by the claimant on why it was just and equitable to extend the time limit. It was not a good reason for delay in relation to allegations dating back to 2020 and 2021 that the claimant had not been dismissed at that point.

The respondent had suffered significant prejudice in that the delay impacted the cogency of the respondent's evidence. There was no continuing course of conduct in relation to PCPs A, B, D E, F, G and H. PCPs D, E, F, G and H are allegations of failure to act.

79. The tribunal finds that PCP B refers to a course of conduct that continued at the time of the claimant's suspension and then dismissal in that the matter of him being asked to work early shifts was not something that had been resolved by the time of his dismissal and he worked on a non-working day on 5 June 2022, his last working day before dismissal. This allegation was brought in time.

80. When considering the substantive allegations in relation to PCP D the tribunal found that the respondent had a PCP of having unscheduled check ins with employees rather than scheduled meetings. This is a slight recasting of the PCP which the tribunal believed was a clearer expression of the practice. This conduct was continuing at the time of the claimant's dismissal. This allegation was brought in time.

81. Part of the allegation at PCP I (that relating to the meetings for the June 2022 disciplinary process) is in time.

82. PCP J is in time. The parties do not appear to be in dispute about this.

83. The tribunal finds that there was no continuing course of conduct evidenced in relation to PCPs A, E, F, G, and H and went on to consider whether it was just and equitable to extend time in respect of those allegations and also the part of PCP I relating to December 2020.

84. The tribunal had regard to the decisions in *British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT* and *Southwark London Borough Council v Afolabi 2003 ICR 800, CA*. It had regard to the submissions of the parties and considered the reason for the delay, the length of the delay, the prejudice to the respondent and the nature of the claimant's disability. As to whether the claimant had advanced a case on time it had regard to the case of *Rathakrishnan v Pizza Express (Restaurants) Ltd 2016 ICR 283, EAT*.

85. The tribunal's decision is that it would be just and equitable to extend time for the filing of the allegations listed in paragraph 74 that were out of time, to 2 November 2022. The respondent claimed that there was a prejudice in relation to cogency of evidence and pointed to the problems in memory experienced by Ms Vain. The tribunal noted that the writing of Ms Vain's statement and her disclosure search appeared, from her evidence, to have taken place only last week, and therefore any problems in this respect were compounded by the respondent's own actions. It did not perceive Ms Cherrill to have any particular difficulties in relation to the evidence given. The tribunal's decision is that the prejudice to the respondent in this respect was limited. The tribunal decided that it was clearly just that the claimant be given the opportunity to make his claim to the tribunal, and accepted that the

claimant's disability played a part in the delay, as it accepts that he believed the problems would be resolved until he was dismissed. His comment that he did not bring a claim because he had not been dismissed indicated to the tribunal his limited knowledge and understanding of the process. While an ignorance of time limits is not a complete defence, the tribunal's decision is that where the claimant's disability played a part in a lack of understanding, this is a relevant matter.

The PCPs

86. Before considering the arguments made about indirect discrimination and failure to make reasonable adjustments for each PCP, the tribunal considered whether it accepted that each PCP was a PCP applied by the respondent.

87. **PCP A**: the respondent accepted that it did have this PCP.

88. **PCP B**: While there was evidence that employees were called and asked to cover for employees who were sick, as was experienced by the claimant, and confirmed in evidence by Ms Cherrill, the tribunal heard no evidence that employees were expected to provide that cover if not otherwise engaged. The evidence from the claimant and Mrs Clarke was that he felt pressure to cover because of the nature of his autism. The evidence was that he felt unable to say no but there was no evidence that he had been expected to do so. The claimant accepted that Mr O'Sullivan told him he did not need to work extra shifts. The tribunal does not accept that this was a PCP applied by the respondent.

89. **PCP C**: this allegation was withdrawn by the claimant.

90. **PCP D**: the tribunal decided that rather than a policy of not having scheduled meetings, there was a practice of having informal check ins with employees who have concerns or difficulties, rather than having scheduled meetings. The tribunal found on the evidence that the respondent did have and applied this PCP. Oral evidence from Ms Vain, Ms Cherrill and Mr O'Sullivan, all of whom had dealings with the claimant in relation to difficulties he was experiencing, was that they had informal catch ups with the claimant on an ad hoc basis.

91. **PCP E**: the tribunal accepts that this was a PCP operated by the respondent. The fact that Ms Cherrill sought to introduce an adjustment that the claimant be allowed to leave the shop floor as necessary if he notified a manager, is evidence that the PCP existed.

92. **PCP F**: This PCP relates to comments made by Ms Cherrill at meetings with the claimant in May 2021. Ms Cherrill explained what she meant by the comments in her notes and the tribunal accepted that explanation. There is no evidence that the respondent operated this PCP and the tribunal finds that it was not a PCP.

93. **PCP G**: While the tribunal notes that a one off decision can amount to a PCP, (*British Airways plc v Starmer 2005 IRLR 863, EAT)* not all one off decisions

can be defined as a PCP (Ishola v Transport for London 2020 ICR 1204, CA). There is no evidence that the respondent did or would expect employees in other cases to follow up and action occupational health advice. The tribunal finds that this was not a PCP applied by the respondent.

94. **PCP H:** The respondent's evidence, through Mr O'Sullivan, was that there was diversity and inclusion training for store managers, and that employees were not told about colleagues' disabilities for data protection reasons. The tribunal finds that this was a PCP applied by the respondent.

95. **PCP I**: The tribunal found that this PCP was unclear, appearing to encompass a number of different actions, or inactions, and outside of the specific events that had involved the claimant there was no evidence that such matters were generally applied. While noting again that a single act can be a PCP, the tribunal finds that in this case it is not. It was not put to the respondent that any lack of clarity as to the purpose of the meeting on 20 June 2022 was a deliberate practice by the respondent, and both that meeting, and the meeting with Ms Vain were recorded. The PCP is not clear, and unlike with PCP D, it is so unclear that an attempt to clarify by the tribunal is not appropriate. Furthermore, there is no evidence that any of the various issues raised about the treatment the claimant received was a common practice or likely to be applied to others in the future.

96. **PCP J**: The claimant has not clarified what he means by 'behaviour of this nature'. He has not said whether he means alleged sexual harassment or the behaviour of a person with autism leaning against someone. In any event, the behaviour was only labelled as potential gross misconduct until a disciplinary process was concluded. Mr Forester concluded in this situation that it was gross misconduct. That was the only evidence before the tribunal. The tribunal does not accept that the respondent had such a PCP.

Burden of Proof in Discrimination Cases

97. For all Equality Act 2010 claims the burden of proof provisions as set out in section 136 apply. Section 136 reads:

> ***136 Burden of proof***
> *(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.*
> *(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*

Indirect Discrimination

98. S19 Equality Act 2010

> ***Indirect discrimination***
> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*

> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
> *(c) it puts, or would put, B at that disadvantage, and*
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*
> *(3) The relevant protected characteristics are—*
> *…*
> *disability;*
> *…*

99. For each allegation the claimant must show that the respondent operated a PCP which was of particular disadvantage to autistic or disabled people, and the claimant also suffered that disadvantage. If the claimant can show that disadvantage then the respondent has the burden of proving that the application of the PCP was a proportionate means of achieving a legitimate aim.

100. The claimant did not put forward any arguments about group disadvantage in relation to the PCPs. The respondent's case is that it is inappropriate for the tribunal to assume or read in group disadvantage where there is no evidence. [RB 88] The tribunal has taken the approach that where group disadvantage is clear on an application of the PCP and would be a matter of common understanding, such a finding can be made.

101. **PCP A**: The tribunal finds that it is of common knowledge that people who have autism benefit from having stability and continuity in their lives. The tribunal had regard to the Equal Treatment Bench Book as part of its preparation for this hearing in which it is noted that people with autism have difficulties with unexpected and sudden change. The tribunal also noted that the respondent was provided with general advice about autism in the OH report dated 14 May 2021. The following advice is given:

> *Individuals with Autism usually find repetitive tasks easier to cope with than doing different duties each day. Having a set daily routine helps them become familiar and confident in the role that they choose; thus making things more achievable, which minimises stress and anxiety at work.*

102. The tribunal finds that the PCP applied to all employees, it put people with autism at a particular disadvantage in that changes of routine are likely to cause such people stress and anxiety, and the PCP put the claimant at that disadvantage. The claimant has described times when changes of shift and location caused his autistic traits to increase, affecting his ability to function. The respondent was aware of this as is evidenced by the notes of the meetings with Julia Vain and Sophie Cherrill.

103. The respondent's case is that it needed to be able to utilise its workforce effectively and at proportionate cost to meet the demands of the business. The claimant concedes that this is a proportionate means of achieving a legitimate commercial aim. The tribunal finds that this was a proportionate means of achieving a legitimate aim and the allegation of indirect discrimination is not upheld.

104. **PCP D**: For the same reasons as set out in respect of PCP A, the tribunal finds that this PCP, which is that ad hoc and informal meetings are held rather than regular scheduled, meetings puts autistic people at a particular disadvantage and that the claimant was put at this disadvantage. He stated clearly in oral evidence that he did not recognise informal catch ups as meetings and therefore did not understand that he was having meetings.

105. The respondent states that the legitimate aim was *'Enabling the business to utilise managerial time in an proportionate and effective way to ensure that the business is able to remain profitable. Managers do not have unlimited time and would provide support where needed rather than adopting rigid and unworkable practices in scheduling meetings'*.The tribunal does not find that this is a proportionate means of achieving a legitimate aim. In a situation such as the claimant's, where regular support was required to deal with his concerns and difficulties, it is not clear to the tribunal why an unscheduled meeting would be a time saving over an unscheduled meeting. It also finds that one of the main purposes of a manager is to manage (by which it is assumed this includes supporting employees within their management chain), and that this would be a legitimate use of their time. Finally, it was not explained why a practice of scheduling meetings would be unworkable.

106. The claimant succeeds in his claim that the application of PCP D was indirectly discriminatory.

107. **PCP E**: The tribunal had regard to what was within its own knowledge, where it deemed that to be common and not specialist knowledge, as well as to the documents in the trial bundle and to the Equal Treatment Bench Book. In relation to this PCP the tribunal concluded that the need to remain on the shop floor during shifts unless there is a recognised need to leave such as going to the toilet, is not a practice of which there is common knowledge that it would be of particular disadvantage to those with autism or those who are disabled. No other evidence being available, the tribunal finds that group disadvantage was not proven, and this allegation fails.

108. **PCP H**: The tribunal had regard to what was within its own knowledge, where it deemed that to be common and not specialist knowledge. In relation to this PCP the tribunal concluded that while it was likely that such a PCP would be a disadvantage to disabled people generally, it could not conclude that this was the case without further evidence. No other evidence being available, the tribunal finds that group disadvantage was not proven, and this allegation fails.

<u>Failure to make a Reasonable Adjustment</u>

109. S20 and 21 Equality Act 2010

> ***20 Duty to make adjustments***
> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
> *(2) The duty comprises the following three requirements.*
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
> …
> ***21 Failure to comply with duty***
> *(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*
> *(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.*

110. To prove a failure to make a reasonable adjustment the claimant needs to show that the respondent applied a PCP which put him, as a disabled person, at a particular disadvantage. He must then show that the adjustment he seeks in relation to any PCP is reasonable and that the application of such an adjustment would remove the disadvantage.

111. **PCP A**: The tribunal accepts that this PCP put the claimant at a substantial disadvantage in that changes to his routine cause stress and anxiety.

112. The claimant in his pleadings suggests the following adjustments:

> 1. *The most effective adjustment was to keep Jack in Clothing and Home between 12-8pm.*
> 2. *Where that was not reasonably practicable the changes should have been kept to a minimum with options explored more actively to ensure Jack did not work beyond 8pm and did not work in a food environment.*

113. The tribunal finds that the respondent introduced an adjustment when Ms Cherrill offered the claimant the opportunity to work a 12:00 to 20:00 shift in the bakery in the Oxford store. The claimant confirmed there was a period of relative stability until November 2021, so it is clear that the adjustment did remove the disadvantage. The tribunal accepts the respondent's evidence that the first adjustment suggested was not reasonable as shift patterns were to change in menswear and finds the adjustment that was implemented fits the description of the second suggested adjustment. However, this adjustment stopped being implemented from December 2021 when the claimant was asked to work extra shifts and then to change his shifts in 2022 despite the concerns that the claimant raised with Mr O'Sullivan and other managers. The tribunal finds that the respondent failed to make a reasonable adjustment from December 2021.

114. **PCP D**: The tribunal accepts that this PCP put the claimant at a substantial disadvantage as he requires regularity and routine in his schedule and did not perceive the ad hoc or informal meetings to be meetings. The suggested

adjustment of regular fortnightly or monthly meetings for the claimant is likely to have removed the disadvantage. Where the claimant was becoming stressed or anxious over a particular matter it is likely that this would have been apparent to those managing if the matter was discussed at a regular meeting and the success of any suggested solutions monitored. It is not unreasonable to expect a large employer to have regular meetings with a disabled employee and the tribunal does not accept that a monthly meeting between the claimant and his line manger would have had a detrimental impact on the respondent's ability to run its business. The tribunal finds that the respondent failed to make a reasonable adjustment.

115. **PCP E**: The tribunal accepts that this PCP put the claimant at a substantial disadvantage as he could become overwhelmed at work and needed to remove himself from the floor to a quiet place to reset.

116. The claimant in his pleadings suggests the following adjustments:

    1. *A reasonable adjustment would be to have a mentor on duty for Jack's shift to check in and see that he is coping, and for Jack to notify if he needs a comfort break.*
    2. *Similarly to have a quiet area where Jack can go to break away.*
    3. *In the alternative a structured break structure, such as every two hours for Jack to have 20 minutes (an example that should have been considered with occupational health input).*

117. The respondent implemented an adjustment in that the claimant was able to leave the floor when he needed to once he had sought permission from a manager. This was suggested by Ms Cherrill in May 2021 and accepted by the claimant. However, in practice the claimant was refused permission to leave on a number of occasions and the tribunal concludes that the adjustment was not implemented. The claimant's evidence was that he raised this with his line manager Rachel Lee. No other adjustments were considered or implemented. The tribunal takes no view on whether the adjustments suggested by the claimant in its pleadings (not adjustments actually requested by the claimant) are reasonable or would address the disadvantage. It finds that the adjustment agreed with Ms Cherrill would have been a reasonable adjustment had it been implemented, by for example there being a clear communication to all managers that the claimant may encounter on his shifts, that such breaks were to be facilitated when requested. The tribunal finds that the respondent failed to make a reasonable adjustment.

118. **PCP H**: The tribunal accepts that this PCP put the claimant, whose disability is not visible to a substantial disadvantage in that colleagues may perceive his behaviour to be unusual and/or inappropriate without having any context for that behaviour. The claimant suggests the adjustments of training sessions for other employees and offering the claimant a disability badge. The respondent states that it would be unfeasible for all employees to be specifically informed of all disabilities and the claimant could have adopted the adjustments himself. The tribunal finds that the claimant has not suggested that all staff be trained in all disabilities and providing general training on diversity in relation to discrimination to employees would be a

reasonable adjustment, which is likely to have addressed the disadvantage. The suggestion that the claimant could have instigated the adjustments himself does not remove the duty from the respondent and fails to take into account the impact of the claimant's disability on his ability to communicate with others. The tribunal finds that the respondent failed to make a reasonable adjustment.

Victimisation

119. S27 Equality Act 2010

Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

120. The claimant's case is that the claimant raised that the respondent had failed to support him as a disabled employee during the meetings of 20 June 2022 with Ingrid Stewart and 30 June 2022 with Marc Forester and that these comments were protected acts. The respondent denies that the claimant did a protected act and notes that even where an allegation is not express, it must be clear from the words and context that such an allegation is being made, relying on *Chalmers v Airport Ltd and others UKEAT 0031/10.*

121. The tribunal finds that the notes made by Mrs Clarke ahead of the meeting with Ms Stewart and given to Ms Stewart in that meeting are clear, despite the word discrimination not being used, in that it is alleged that the claimant had been treated detrimentally because of his disability. In providing this note to Ms Stewart at the meeting the claimant did a protected act for the purposes of s27 (3)(d). The tribunal also finds that in setting out his difficulties with the respondent at the meeting with Marc Forester which led Mr Forester to comment '*We over the last few questions have spoken around how the business has struggled to support your autism, your words.'* and later '*So let's just get this correct are you blaming this on the business?'* the claimant was doing a protected act.

122. Th tribunal was provided with no evidence that would lead it to conclude that the respondent continued with the disciplinary process or dismissed the claimant because he had done a protected act. Mr Forester denied that this was the reason for dismissal in cross examination and the tribunal accepts his evidence.

123. The claim of victimisation is not proven.

Discrimination arising from disability

124. S15 Equality Act 2010

> ***Discrimination arising from disability***
> *(1) A person (A) discriminates against a disabled person (B) if—*
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

125. The claimant's allegation is that his conduct on 4 June 2022 arose in consequence of his autism. He was dismissed because of that conduct. The dismissal was not proportionate. Ms Morton put in submissions that there were other options which would have removed the risks and that had suitable adjustments been in place the claimant's conduct on 4 June would not have arisen. The claimant relies on the case of *City of York Council v Grosset [2018] EWCA Civ 1105* and the EHRC Statutory Code of Practice at paragraph 5.21 to support the position that because the respondent did not implement relevant adjustments it cannot show that the dismissal was objectively justified, and *Burdett v Aviva Employment Services Limited UKEAT/0439/13* a case where dismissal for a safeguarding purpose was found not to be a proportionate means of achieving a legitimate aim.

126. The respondent's defence is that is that the claimant was dismissed because he was found guilty of sexual harassment and inappropriate behaviour. There is no expert medical evidence that the conduct arose because of his autism, if the tribunal finds against it on those points dismissal was a proportionate means of ensuring the protection of others and a safe workplace.

127. The tribunal has found above that the claimant's conduct on 4 June 2022 was caused by his autism. The evidence on which that conclusion is based is also set out above. The tribunal does not agree that expert medical evidence is necessary in order for it to reach a conclusion on this matter. It finds also that the reason the claimant was dismissed was because of that conduct.

128. In the case of Burdett v Aviva Employment Services Limited HHJ Eady QC said (Para 78)

> *"The task of the ET was to scrutinise the means chosen by the Respondent as against such other alternatives that (on the evidence) might have been available to achieve the aim in question. In so doing, it was required to weigh in the balance the discriminatory impact of the measure chosen against such other alternatives open to the employer."*

129. The tribunal has found that there were no adjustments in place at the time of the incident. It is accepted by the respondent that work place assessments had not been carried out, and it is also accepted that none of the claimant's OH reports were before Mr Forester when he made the decision to dismiss. The tribunal takes very seriously the need for the respondent to provide a safe workplace for its employees and to protect them from harassment and

accepts that that is a legitimate aim for an employer. It accepts that the claimant's proposal at the hearing that he be told after an event that his actions were inappropriate is not a solution to a safeguarding problem. However, it notes that before the pandemic when the claimant had a stable job with stable shifts in menswear no problems arose. After meeting with Ms Cherrill in May 2021 and the adjustment of a stable position with stable shifts in the bakery was introduced, the claimant worked without incident, until the adjustment ceased in that the claimant found himself in a position where shift changes were proposed which he felt, because of the nature of his disability, unable to refuse. Advice is provided in two OH reports on measures that can be taken to assist the claimant in working successfully, and this includes professional assessments to ascertain what other adjustments may be useful. The claimant had such an assessment the day before the dismissal which recommended training for the respondent's employees on neurodiversity issues. Regular scheduled meetings with the claimant's manager as suggested in the OH report of 14 May 2021 would have been an effective way of monitoring the claimant's wellness and any problems, he was encountering which may be leading to an increase in autistic behaviour and would provide an opportunity for that to be addressed before the situation worsened. On balance the tribunal concludes that the decision to dismiss on 4 June 2022 was not a proportionate means of achieving the legitimate aim of safeguarding for a business of the size and means of the respondent which has a specific programme for employing disabled people, particularly when this is balanced against the impact of the dismissal on the claimant, a disabled person who had worked for the respondent for seven years. The claimant's parents gave evidence on the serious impact of the loss of his job on the claimant's mental health.

Unfair dismissal

130. The question for the tribunal is whether the dismissal was fair or unfair. This is a two-stage process. The first stage is for the respondent to show a potentially fair reason for dismissal, and secondly if that is achieved, the question then arises whether dismissal is fair or unfair.

131. Section 98 of the Employment Rights Act 1996 identifies a number of potentially fair reasons for dismissal which include at s98(2)(b) the conduct of the employee. The tribunal is satisfied on the evidence that the Claimant was dismissed for conduct. The claimant has not disputed this.

132. The second stage as set out at s98(4) of the Employment Rights Act 1996 is to consider whether the dismissal was fair or unfair, having regard to the reason shown by the employer and whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.

133. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions *in Burchell 1978 IRLR 379* and *Post Office v Foley 2000 IRLR 827*. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the

Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23,* and *London Ambulance Service NHS Trust v Small 2009 IRLR 563).*

134. The burden of proof is on the respondent to show that it believed the claimant was guilty of misconduct (the first part of the Burchell test). The burden of proof is then neutral as to whether the respondent had reasonable grounds on which to sustain the belief founded on a reasonable investigation.

135. In *Burdett v Aviva Employment Services Limited* at paragraph 29 HHJ Eady refers to gross misconduct being conduct that involves a repudiatory breach of conduct and conduct that would need to amount to either deliberate wrongdoing or gross negligence. In that case it was found that where a claimant committed acts of misconduct because of a mental impairment the tribunal must consider whether the respondent had reasonable grounds for concluding that he had done so wilfully or in a grossly negligent way. It is the claimant's case here that the respondent did not make a finding that the claimant's behaviour was wilful.

136. In the disciplinary hearing on 30 June 2022 the claimant admitted leaning on AB and explained why he had done that (an autistic manifestation of distress). Mr Forester said in oral evidence that he was uncertain as to whether the claimant had perceived his own actions to be sexual. He said that uncertainty played a part in his decision making. Mr Forester accepted that the claimant had never said or accepted that there was a sexual assault. It was not put to the claimant in the disciplinary hearing that Mr Forester did not believe that the conduct was autistic behaviour which the claimant could not control. In his decision letter Mr Forester acknowledges the claimant's explanations and engages with them but does not say that the claimant is disbelieved, referring to and accepting the claimant's statement that he behaves in a similar way toward his parents. Mr Forester states in that letter*: you stated that you behave in a similar way towards your parents often at home which makes me believe that you are likely to repeat the behaviour in future and we are unable to put colleagues at risk of harassment or behaviour which makes them feel uncomfortable*. In the next paragraph he goes straight on to say: M*&S have a zero tolerance to sexual harassment in the workplace and I am not confident that you would not repeat this behaviour*', and then he states that he acknowledges the claimant's remorse and explanations but has decided to dismiss anyway. In oral evidence when Mr Forester was asked whether the claimant's conduct was wilful, he said 'to an extent but not entirely'. When it was put to him by Ms Morton that there were investigatory steps he could

have taken before reaching his decision (in that context in terms of options other than dismissal) he said that he could have done so but he did not believe it would make any difference to that outcome as he believed this incident was a case for dismissal, and he felt that there was zero tolerance so he needed to make a decision.

137. From this evidence the tribunal concludes as follows: The respondent has shown that it formed the belief that the claimant was guilty of gross **misconduct** based on the statement of AB and the admission made by the claimant on 20 and 30 June 2022 that he had leant on AB and had said to her she was pretty and priceless. Mr Forester did not consider whether the claimant's actions were deliberate and reached a conclusion that the conduct, which he described in the decision letter as sexual harassment and inappropriate behaviour, amounted to gross misconduct, without that consideration. The tribunal finds that without putting his mind to that question, where the claimant had denied intent and referred to being in a trance like state, giving his disability as the reason, Mr Forrester did not have reasonable grounds for his belief that the claimant was guilty of gross misconduct.

138. Furthermore, where Mr Forester had no particular knowledge of autism and its symptoms but had access to OH reports already written, HR assistance and could have commissioned an OH report or sought medical advice but did not, the tribunal finds that the investigation was not reasonable, taking into account the size and resources of the respondent.

139. The tribunal did not find that there were any significant delays to the disciplinary process or that conversely it proceeded too quickly, nor did it agree with the claimant that the issues he raised about notification of and labelling of the investigation meeting rendered the process unfair. Mr Forester confirmed that his decision was made on a consideration of the 4 June incident and the claimant's comments about that, and he did not take into account the incident in December 2020. The tribunal accepts his evidence as the December 2020 incident is not relied upon in the decision letter, and does not find that the questions about the incident led to any unfairness.

140. There is no documented record of the complaint raised by AB on 4 June 2022 and none of the interview by Chris of the claimant on 5 June 2022. The interview on 5 June 2022 is referenced by Ingrid Stewart in the investigation report, but it is not clear if she had received a written record. If there were notes they were not before Mr Forester when he made his decision, and he did not enquire into this, nor did he have access to or request a copy of the notes from Mrs Clarke that were given to Ms Sewart on 20 June 2022. The tribunal noted that Ms Stewart misquoted AB's statement in her interview with the claimant on 20 June 2022 in that she referred to the claimant pointing the Honeywell at her breasts. The allegations which were decided upon and set out in the invitation letter of 28 June 2022 contained reference to the claimant rubbing his body against AB. This is not either a part of AB's statement. Neither of these discrepancies was noted by or considered by Mr Forester and the allegation that the claimant rubbed himself against AB was upheld, although it was not put to him. The short notice of the disciplinary meeting

was not itself unreasonable but the provision of Ingrid Stewart's notes, which were lengthy and very difficult to read, without a transcript, was unreasonable where time to the meeting was short and those notes served as the basis for most of Mr Forester's questions to the claimant. Though it is acknowledged that both agreed that breaks could be taken at any time and the claimant was allowed a companion at the investigation meeting, there is no evidence that either Ms Stewart or Mr Forester had taken any advice or put any thought to how to conduct a meeting with a person with the disability of autism and, for instance, how the stress of such a situation may inhibit their ability to defend themselves, or simply how their disability might inhibit their ability to defend themselves. Mr Forester did not take the time to source OH advice about management of the claimant which was already in the respondent's possession or consider obtaining further advice. Given the size and resources of the respondent, the fact that the claimant was suspended and there was therefore no urgent safeguarding consideration, the tribunal finds that these would have been reasonable for an employer to take in such a misconduct investigation, and steps which would have provided essential information on not just intent, but also whether there was a viable alternative to dismissal. For these reasons and the reasons set out at paragraph 138 the tribunal concludes that the investigation was not reasonable. It finds that the failure to conduct a reasonable investigation, and the fact that the respondent did not have reasonable grounds on which to found its belief that the claimant was guilty of gross misconduct, are such that the decision to dismiss was not within the band of reasonable responses.

141. The tribunal upholds the claimant's claim of unfair dismissal.

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Employment Judge Anderson

Date:12 August 2023

Sent to the parties on:15/08/2023.....

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For the Tribunal Office