



EMPLOYMENT TRIBUNALS

Claimant: Mr K Smith

Respondent: WM Morrisons Supermarkets PLC

AT A HEARING

Heard at: Leeds by CVP (online)

On: 15th, 16th & 17th May 2024 and 16th, 17th & 18th December 2025

Before: Employment Judge Lancaster
Members: T Downes
G Corbett

Representation

Claimant: Days 1-3, Ms A Gumbs, counsel
Days 4-6 in person
Respondent: Ms C Urquhart, counsel

JUDGMENT

1. By consent, it is declared that the Respondent had made an unauthorised deduction from wages in respect of the non-payment of salary (including an amount for any additional accrued holiday entitlement) for the final week of employment from 14th to 20th May 2021 - the now-agreed effective date of termination.
2. All other claims are dismissed

REASONS

3. At the conclusion of submissions on Day 5 the parties were released so that the Tribunal could meet to deliberate in private on Day 6. Written Reasons are therefore now required for the unanimous decision reached.
4. The issues in this case were identified at a case management hearing before Employment Judge Schulman on 20th October 2021. That list omits any reference to the alleged "something arising in consequence of disability" which is relied upon for the section 15 claim, but these are clearly set out within the ET1 itself at paragraphs 27 to 29. Inserting those original particulars the list of issues is therefore agreed. It is therefore reproduced as an endnote to this decisionⁱ.

5. Our conclusions on the respective claims are to be read in conjunction with that list of issues.

The misconduct investigation

6. The Claimant had worked for the Respondent since 6th January 2005, had been a store manager since 2010 and was currently based at Doncaster Balby when he was summarily dismissed for gross misconduct on 20th May 2021. He was then aged 47.
7. The investigation into that alleged misconduct started on 11th December 2020. This followed an anonymous report from a different store manager in the area relaying information provided to them by a store manager in another region who had received it via a member of staff at Balby. This was to the effect that the Claimant had been sexually involved with an hourly paid colleague at Balby, who had become pregnant by him, that he had also been sending inappropriate Facebook messages to other young female colleagues and that he had already been spoken to about this on more than one occasion by the People (ie HR) Manager assigned to his store. This was treated by the Respondent as a “whistleblowing” complaint.
8. The Claimant’s Regional Manager, Rebecca Newby, commenced an investigation. On 14th December 2020 together with the Regional People Manager, Danielle Monks, she began a series of interviews. Firstly, she interviewed the Claimant’s assigned People Manager (JB), and four female employees (GG, TT, BL and KE).
9. JB confirmed that she had spoken to the Claimant about the inappropriateness of his messaging young girls when he had had a drink and that he appeared embarrassed when she confronted him about this. She was aware of some interaction between the Claimant and CN and GM. GM had left whilst behaving inappropriately and out of character but that she had not assumed that this was connected to the Claimant messaging her. She said, however, that whilst she was unaware of the sexual relationship with a colleague (FM) but that she had been aware of the Claimant having been in some way involved with another subordinate, CD, which had required him register a conflict of interest when she fell to be interviewed under restructure process.
10. This potential conflict of interest had in fact been registered by the Claimant with a previous People Manager on 28th January 2020. He did so, however, only in respect of his acknowledgement that he had asked for a date some eleven months previously.
11. GG said that the Claimant had messaged her for a short period between 23rd October and 5th November, and that she thought this “weird” because of the age difference, particularly when he said he hoped he was not getting her into trouble with her boyfriend because he was massaging her. She told her mother and her boyfriend about these messages.
12. TT said that although she had not herself received any messages it was common knowledge that others did and that they only replied because of a fear that their jobs were in jeopardy if they did not. She said that EE had been made to “feel sick” by the references to how she looked in pictures on her social media pages. She was aware of the relationship with FM, that the Claimant ignored her once he became aware of her

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pregnancy and was messaging other women at this same time, only speaking to FM again once she had had termination.

13. BL said that she had not received messages but knew specifically that GG and OG had. She thought it “weird” because the Claimant was so much older.
14. KE said that she knew OG had received messages and that it was “common knowledge/rumours” that the Claimant liked young girls and sent Facebook messages telling them how pretty they are. She also knew of the situation with FM and said that the Claimant had wanted nothing to do with her after she became pregnant and that FM thought he was seeing another colleague.
15. Also, on 14th December 2022 Ms Newby carried out the first investigation meeting with the Claimant. It is not a requirement under the ACAS code of practice that an employee be given advance notice of or be provided with any documentation prior to an investigation meeting. The Claimant admitted his relationship with FM but said it had been a joint decision to terminate the pregnancy and that the relationship ended amicably and that he had not messaged any other girls whilst he was with her. He had not told his then Regional Manager about the relationship and said that no one in the store was aware of this. He said that GM had messaged propositioning him, but he was not interested but that he no longer had these messages. He said he was only a Facebook friend with MM, LB and JE. He said that CN had been obsessed with him. He said he did not remember contacting GG and denied having messaged her mentioning her boyfriend at which point he was told that the relevant messages had been seen on GG’s phone. He said he was unaware of EE and that he had only responded to OG to thank her when she had agreed to add him as a friend. He said that he had asked CD out and that during the restructure she had asked to be interviewed by someone else. He did not know why he did not stop messaging girls after JB had asked him twice to stop. He said that he had been lonely, and in his loneliness had sought relationship. That he has always been with younger girls but regretted what he had done. He admitted that it was not right as a store manager to reach out to female colleagues on Facebook and that they could feel under pressure to reply, but that it was banter and nothing malicious. He said he would seek counselling and medication through his GP.
16. On 15th December 2020 Ms Newby carried out further interviews with seven more female employees (SB, CN, OG, MM, FM LB and SC) and also held a welfare meeting with the Claimant because of concerns about his health arising from an email he had sent to Ms Monks.
17. SB said that she had reported to JB issues with both GM and GG. She said that she had heard GM saying the Claimant was texting her “trying to get with her” and that therefore she could “do whatever she wanted in the store”. She said that GM had subsequently left after “going off the rails” and that this was a definite change in character but she was unsure if it was connected to the contacts with the Claimant. GG specifically approached her because she thought it “odd” that the Claimant had contacted her via Facebook rather than in person, that she only replied to be polite as she felt she had to with his being the store manager, but that his communications got “weirder” and he was “old enough to be her dad”. She had only heard rumours about CN.

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18. CN is described as possibly not an entirely credible witness. She did say that she had got the Claimant's number from the whiteboard where he had left it and had messaged him but allegedly only about work. She did make reference to her getting into an altercation with one of the cleaners, about the Claimant also messaging her.
19. OG said that the Claimant added her as Facebook friend, and when she accepted thanked her saying that he did not think that she would". She thought it "weird" as he was much older and had not even spoken to her in work.
20. MM said that she had received messages between June and October 2020. The Claimant had firstly added her on Facebook and then when she accepted the request thanked her saying that he did not think she would have done. She thought it odd that he had found her on Facebook so quickly after she had started work when she did not think that he knew her name. There were comments about how beautiful she was, how pretty she looked in work or how nice she smelt, and she said this "creeped her out" and "made her feel sick". She said this was disgusting as he was old enough to be her dad. Although the Claimant never actually said as much, she felt under pressure to reply because he was the store manager, and that although her parents had encouraged her to report it this was the reason she did not do so. She was aware that LB had certainly received similar messages and that two other young starters may also have done so.
21. The Respondent relies particularly on the content of one message recovered from MM where the Claimant said: "If I could hug you now I would be squeezing you so tight and kissing you on u your lips telling you how amazing you are! To me!"
22. FM said that their relationship, which lasted from August 2019 until March 2020, started when the Claimant thanked her for accepting his friend request on Facebook, saying he did not think she would have done which she thought dd as he did not speak to her at work. The relationship was not conducted openly, but only at the Claimnt's home. She was having difficulty coping with the fact of the termination and felt guilty for ever replying to him in the first place but thought she would get into trouble if she did not as he was the store manager. She had heard rumours that he was massaging other girls whilst he was pregnant and undergoing the termination and believes that by that time he had 200 Facebook friends, all young females which was not right.
23. LB said that when she started employment she was aware of rumours about the Claimant messaging young females. He added her as Facebook friend and when she accepted thanked her, saying that he had not thought she would. She said she felt uncomfortable, particularly as he did not speak to her at work but felt she had to because she needed a permanent contract. She said it was "creepy" because he was a lot older. Although her mother was aware of the constant messaging and said she should tell someone because it was weird, she did not do so.
24. SC said that the Claimant was not professional towards her. She says it was weird how he knew how to contact her on Facebook, and that when he did and she accepted his friend request he then thanked her said that he did not think that she would. He asked if she had a boyfriend. She then deleted him from Facebook, and he does not now acknowledge her in work. She says that she aware he had asked PN for "a drink to see his parrots".

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25. On 18th December 2020 Ms Newby carried out further interviews with JB, GM and CD, and also intended to conduct a second investigation meeting with the Claimant following on from a further welfare meeting. That investigation meeting did not take place because the Claimant was not well enough to continue.
26. The Claimant was then absent from work and did not return. He was certified unfit with anxiety by his doctor from 21st December onwards.
27. JB was asked if she had noted any concerning aspects of the Claimant's behaviour. She said that she was aware he took sleeping tablets, but that he had not raised anything medically with her.
28. GM said that the Claimant had added her on Facebook and that the subsequent messages had "creeped her out" talking about "cuddles by the fire" as it made her feel awkward when she was hounded by messages, yet he would not talk to her at work. She said that she felt he would fire her if she said anything and that he was weird and old enough to be her dad. She said she would love to return to the Balby store if the Claimant were not there.
29. The Respondent relies upon one particular recovered message in a long and similar series: "Was lovely to see you! I have opened the vodka bar! There is one saved for you whenever you need or fancy one?! I will think about you when I am having a vodka and coke or two or three."
30. CD confirmed that the Claimant had asked her out. She also said that he had initially made a Facebook friend request and that when she had accepted had thanked her and said that he had not thought she would, and immediately gave her his phone number. She did not understand how he had known her surname to contact her on Facebook as she had not told it to him. She said that the messages included compliments about her appearance and her personality. She said that she felt on edge and that she had to reply but that it was all a bit weird. She said that she was aware of shop gossip that he had a reputation of messaging young girls and that he would "blank you" if you annoyed him. Once she had turned him down, she said that he had ignored her and isolated her. She had been concerned that he would not score her fairly within the restructuring process, so she had asked for a conflict-of-interest form.
31. On 29th December 2020 the Claimant underwent a telephone consultation with Occupational Health (Medigold) and a report was prepared the following day, 30th December 2020. This stated that he would appear to be suffering with low mood and depression, largely having its origins in his personal and family life, but complicated by the Covid pandemic and a perceived lack of regional support. It noted that his medication for depression had recently been increased and that he was to start counselling. The author of the report felt unable to speculate specifically on whether or not the Claimant's medication or his condition impacted upon his behaviour in messaging colleagues or upon his management of personal relationships. It was opined that he would possibly come within the definition of disability under the Equality Act 2010.
32. On 7th January 2021 Ms Monks carried out further interviews with PN and RD, and on 23rd February 2021 with ALD.

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33. PN said that she received a friend request from the Claimant on 23rd July 2020 at the same time that he provided her with a permanent contract. He then messaged her some weeks later saying he was thinking of her and asking if she had any “kid-free-nights”. In one message he said that she could use his house any time, that he had plenty of vodka and would throw in a takeaway and that she was an “amazing lady”. She was aware that he was messaging another woman at the same time.
34. RD said that the Claimant had begun messaging her last summer, saying that he missed her smile, which she found “creepy” as he was an older man and her manager. She thought he had been drinking when he messaged. She said that he would watch her at work, which she did not encourage, and that this provoked comments from her colleagues. She also said that the Claimant had implied to her that he was in a position to refuse her request to work her preferred school hours. She also said that the messaging died down once a batch of new starters came onboard and they received the attention, and that she was pleased somebody had now spoken out about his behaviour.
35. ALD said that she had begun working at the store for the Nutmeg clothing franchise in June. In November the Claimant had asked her manager if she was single and to tell he that he had been asking. When informed that she was with someone he had messaged; “That’s a shame! Really like her! Oh I shouldn’t say that should I?” She said that she had seen the Claimant hiding behind fringes watching her and that she felt “preyed on” and that it was sexual harassment. She said that her colleagues on Nutmeg called him a “perv”, that he was like somebody’s grandad and that it was not right. She had gone off sick since November 2020 because of the messages and that she was currently receiving counselling. She also said that she had already raised a complaint with her own employer, independently of this investigation by Morrisons.
36. Five other potential witnesses, including EE, JE and the cleaner referred to by CN were uncontactable because they had left to business.
37. On 9th February 2021 the Claimant had raised a grievance. This was primarily about the non-payment of company sick pay, which in accordance with his contract of employment and under the Respondent’s policy had been withheld because he was subject to a misconduct investigation. He also raised issues regarding his mental health and the fact that he considered himself to be disabled under the Equality Act.
38. On 25th February 2022 Ms Newby compiled her investigation report. That is a comprehensive document: the summary of the employee interviews set out above is substantially taken from Ms Newby’s detailed synopsis of the evidence that had been collated.
39. Her conclusion was that there was a case to go forward to a disciplinary hearing on allegations of serious breach of the Respect in the Workplace policy, serious breach in respect of an undeclared conflict of interest and serious breach of trust and confidence in the role of store manager.
40. Also, on 25th February 2021 the Claimant was sent an invitation to a grievance meeting on 10th March 2021 to be conducted remotely via Google Meet.

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41. On 9th March 2021 the Claimant emailed to say he was unable to attend the grievance meeting because of his mental health issues and that he had instructed solicitors to represent him.
42. Those solicitors did write also on 9th March 2021 purportedly requesting disclosure of documents under the Employment Tribunal Rules of Procedure before advising on the postponed grievance hearing and stating that all future correspondence should be addressed to them and not to the Claimant directly.
43. The Respondent had delayed instigating the disciplinary process until after conclusion of the scheduled grievance meeting, but on being informed that the Claimant would not attend either that meeting or a welfare meeting, a decision was taken on 16th March 2021 that he should now be sent a copy of the investigation pack. This was posted to him on 23rd March 2021.
44. On 26th March 2021 the Respondent replied to the Claimant's solicitors asking them to encourage the Claimant's engagement with the process and saying that their request for documents would be dealt with as a subject access request and that legal representation at internal disciplinary or grievance meetings was not permitted.
45. On 8th April 2021 the Claimant was invited to a disciplinary hearing to be held on 15th April 2021 with an offer of reasonable adjustments such as holding the meeting remotely, rearranging the time or allowing submission in writing. The Claimant's solicitors replied on 12th April 2021 in terms that may have been appropriate had there then already in fact been proceedings before the tribunal, including a repeated demand that all documentation sent only to them and purported costs warning. They also stated that the Claimant was unfit to attend the scheduled disciplinary meeting.
46. The Respondent replied to the solicitors and to the Claimant on 26th April 2021 and the disciplinary hearing was then rescheduled to 7th May 2021.
47. On 6th May 2021 the Claimant provided some information about recommendation from his doctor regarding his ill-health and also raised a further grievance in respect of an incorrect wages payment, for April and the delay in resolving that issue, and also in respect of the refusal to postpone the disciplinary hearing.
48. On 6th May 2021 the Claimant's solicitors demanded that the disciplinary hearing should be postponed until after the unspecified date of his return to work, and then only after conclusion of his grievances.
49. The disciplinary hearing went ahead in the Claimant's absence on 7th May 2021. The disciplining manager, Charlotte Exell the Respondent's Director of Online, conducted a review of the evidence in the investigation between 10.30 am and 2.30 pm, including adjournments.
50. The hearing was adjourned until 11th May 2021. Ms Exell invited the Claimant to submit any additional medical evidence, as referenced in his and his solicitor's respective emails of 6th May.
51. On 10th May 2021 the Claimant then sent an email, the major part of which was a copying the grievance he had raised against Ms Newby on 14th October 2020 implying

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that these alleged issues as to her management of him still remained to be addressed. This was accompanied by an allegation that it was therefore a conflict of interest for her to have conducted the investigation and that despite the involvement throughout of Ms Minks, Ms Newby “will have led the conversation/investigation to get the desired outcome she wanted”. He then gave limited medical information, stating that he had also recently been referred to a gastroenterology consultant and listing all the medications he was currently on.

52. Ms Exell clearly did consider this email as she expressly refers to its content within the note of the reconvened hearing on 11th May 2021. There she confirms that she had ascertained that the October grievance had in fact, apparently to all intents, been satisfactorily concluded at a mediation on 5th November 2020.

53. The decision taken in the Claimant’s absence was that the Claimant be summarily dismissed by letter and this took effect from that date, 20th May 2021.

54. The stated reason for dismissal was, following the wording of the disciplinary charge:

“1. A serious breach of the Respect in the Workplace Policy, namely: -

- a. Used inappropriate and unwanted comments towards 11 female colleagues varying in ages starting at 18, and this despite previously being advised to stop by you People Manager.
- b. Harassing colleagues to the point whereby 1 left the business, 1 moved store and 1 still absent from the business since November 2020 due to feeling uncomfortable around you.

2. A serious breach of Conflict of Interest in that as a Store Manager you had a relationship with an hourly paid colleague, FM between late-2029 and mid-2020. During this time FM fell pregnant and was unsupported by yourself. All of which you failed to declare to the business

3. This resulted in a serious breach of trust and confidence in your role as a Store Manager that a working relationship can no longer be maintained.”

55. On 20th May the Claimant wrote to Andrew Higginson, the chair of the Respondent’s board. This letter cut and pasted the grievances from 14th October 2020 onwards together with selected correspondence from the Claimant and his solicitors.

56. On 30th May 2021 the Claimant submitted an appeal against the decision to dismiss, raising issues of procedural unfairness, disparity of treatment, failure to take account of the pressures at work and his ill-health, and alleging that the charges against him were unsubstantiated and without any convincing evidence.

57. On 23rd June 2021 the claimnt was invited to an appeal hearing on 29th June 2011. This was postponed at the Claimant’s request until 14th July 2021. The Claimant attended an in-person meeting which was conducted by Tim Dearing, the Respondent’s Regional Manager for the North East. The letter to the chairman was discussed at this hearing, and Mr Dearing stated that as a result it was agreed that this did not in fact disclose any new evidence. Within that letter the Claimant had stated: “I am not trying to justify what I have done, yes I put myself in this position but the

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unprofessionalism from the Senior Leadership Team is prevalent.” The Claimant also accepted that the answers given by the women who were interviewed would probably have been the same whether Ms Newby or someone else had asked the questions, and there was in fact, in the course of the appeal hearing, no substantive challenge to the findings in the investigation report.

58. The appeal was dismissed, and the outcome letter issued on 22nd July 2021.

59. The Claimant having been unable to attend a scheduled grievance hearing on 8th June 2021 to discuss his still extant 6th May grievance, this matter was dealt with on the papers on 7th September 2021, post-termination. It was found that the Claimant had in fact been overpaid but this sum was not sought to be recovered.

60. The earlier grievance of 9th February 2021 had by this stage clearly been overtaken by the disciplinary process.

Disability

61. It is conceded that the Claimant was disabled by reason of depression and an anxiety disorder from September 2020, and that the Respondent had knowledge of this from 15th December 2020.

62. The Claimant has advanced various dates for the start of his disability, most recently linking it to June 2020 when Ms Newby took over as his Regional Manager.

63. The medical records show that he reported to his GP with low moods in 2012 and 2013 and was prescribed firstly citalopram from 21st November 2012 and then sertraline from 14th February 2013, with the last prescription being on 10th June 2013. He then, in 2015, discussed his having stress and anxiety because he was worried about his mum, but the reason he went to his GP at this time was because of epigastric pain. He again presented with stress on 29th September 2017, after a split with his girlfriend, concerns about his mother not eating and a breakdown in the relationship with his brother. He was again prescribed sertraline on 19th December 2017 but came off it in January 2018 because of the side effects.

64. He did not report further any mental health issues until 3rd September 2020, when he is recorded as suffering from anxiety disorder. At this time, he told his GP that he had been taking propranolol and pantoprazole (gastro resistant tablets) which were helping, and he was advised to try low-dose amitriptyline with a higher dose being recommended on review on 25th September 2020. He was again prescribed sertraline on 4th November 2020. The dosage was increased on 17th December 2020.

65. We apply paragraph 2 of Schedule 2 to the Equality Act 2010 which defines the effect of an impairment as long-term if-

- (a) It has lasted for at least 12 months, or
- (b) It is likely to last for at least 12 months.

In this context we have regard to the Guidance on the Definition of Disability (2011) at Section C

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66. On this evidence we agree with the Respondent's submission that the Claimant was disabled as from 3rd September 2020. There is no evidence that the episodes in 2013, 2015 or 2017 arose from an underlying condition. They appear to have discrete causes arising out of his personal circumstances. Although, if indeed they ought to be aggregated, these instances themselves spanned in total a period of more than 12 months the last had been 2 years and 8 months before September 2020, with no evidence at that time that depression was likely to recur. The onset of anxiety disorder in September 2020 is therefore to be treated as the start of a new and distinct occurrence, at which point it was, however, likely – in the sense that it could well happen – that was sufficiently serious to last more than 12 months.
67. We also agree with the Respondent's submission that knowledge of disability only arose on receipt of the Claimant's email to Ms Monks on 15th December 2020. No communication from him prior to that date, such as, for instance, the content of the grievance against Ms Newby was sufficient to put the Respondent on notice that he may in fact have been disabled.

Unfair dismissal

68. It is, of course, for the Respondent to show the reason for dismissal and that it was potentially fair.
69. It is perfectly clear that the Claimant was dismissed for a reason related to conduct.
70. Ms Exell genuinely believed that he had committed the offences with which he was charged, and she had substantial grounds for coming to that view on the basis of the evidence collected in a very thorough investigation, which had included a reasonable level of enquiry as to the extent of any possible mitigation arising from the Claimant's asserted mental ill-health.
71. The behaviour of the Claimant as described would fall within the definition of sexual harassment in sections 26 (2) or (3) of the Equality Act 2010.
72. It is not an unfair investigation because it was conducted by Ms Newby, even though the Claimant had earlier raised a grievance against her. There is no objective evidence on the records of interview to support the Claimant's speculation that she - not withstanding that Ms Monk was also engaged in the process - will have somehow "led the conversation/investigation to get the desired outcome she wanted". No objection was taken at the time to Ms Newby's involvement. The Claimant in fact expressed his appreciation of the support offered in the concurrently held welfare meetings, not only by Ms Monk but also by Ms Newby. In any event it was accepted at the appeal that the answers given by the women interviewed would have probably been the same. Ms Newby was not, of course the decision maker and the evidence was separately considered by Ms Exell
73. The Claimant was well aware of the existence of the Respondent's Dignity at Work policy. Even if, as he claims, his People Manager had in fact undertaken the required online training upon this policy on his behalf he necessarily was aware of such a policy being in place. Where he is engaging in conduct which on the face of it amounts to sexual harassment, it does not matter that he may or may not have been as familiar as he ought to have been with the substance of the internal policy document.

74. The Claimant was equally well aware of the existence of the Respondent's Conflict of Interest Policy. It is not unfair disparity of treatment that other couples at work who were openly in a relationship may not have been challenged. The termination must be reasonable within all the circumstances of the case; section 98 (4) Employment Rights Act 1996. That means there must generally be consistency of treatment. But the authorities make it very clear that there must be a direct correlation between the circumstances of the person who is said to have been treated in a disparate way. The Claimant was not simply in a relationship with a work colleague. His relationship with FM was secretive, he was directly in her chain of line management and he had not, as store manager, taken appropriate steps - such as carrying out a specific risk assessment - for her safeguarding during her pregnancy. Most significantly this alleged misconduct is to be viewed in the round with the other allegations against the Claimant. It provides a context in which to assess his behaviour towards other women with whom he similarly initiated contact. None of his supposed comparators had also engaged in a pattern of messaging multiple women at work.
75. The reference in the dismissal outcome letter to a breach of data protection is not a new allegation which ought to have been separately charged. It is an obvious inference that may have been drawn from the repeated expressions of concern as to how the Claimant had been able to access personal information so as to approach women via their Facebook accounts. He did not ever offer any alternative explanation as to how he had obtained their details.
76. It was not an unreasonable breach of the ACAS code of practice not to have postponed the disciplinary hearing pending conclusion of the grievances. This is something which the code says may happen. It is not mandatory in order to secure compliance. The Respondent did initially seek to interpose the grievance hearing scheduled for 10th March. In reality there was no reason - and in many ways it would not have been sensible - to address the sick pay issue separately and before the substantive disciplinary. So, the decision then to pause this process upon the Claimant's initial non-attendance was reasonable.
77. The dismissal hearing should, we consider on balance, have been adjourned in the circumstances to consider the postponement request on the grounds of ill-health and to ascertain if he would in fact have been able to attend shortly thereafter. However, in the context of this whole case it does not render the decision unfair. We apply *Taylor v OCS Group* [2006] EWCA Civ 702, to which we have properly been referred by the Respondent. Notwithstanding this procedural imperfection the Respondent still acted reasonably in treating the reason as sufficient to dismiss. These were very serious allegations with abundant evidence to support them; the matter had already been significantly delayed. Following the prompt initiation of the investigation, to accommodate the Claimant's ill-health and his subsequent grievance. And there had already been one adjournment. It was not unreasonable now to progress to a disciplinary hearing to determine this matter, notwithstanding the Claimant's stated inability to attend. There was certainly an argument that it was in the interests of everybody concerned to avoid any further, and as yet unquantifiable, delay. The Claimant had had the opportunity to make representations in writing if he wished, and he had indeed engaged in correspondence on various matters. In any event any defect was rectified at the appeal stage when the Claimant did attend.

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78. Given the nature of the misconduct found to have been committed dismissal was certainly within the band of reasonable responses open to reasonable employer in these circumstances. As a major national retailer employing a significant number of young women in junior positions, and potentially vulnerable to the making of sexual harassment allegations in the workplace, the Respondent was entitled to find that in behaving in this way the Claimant, who was in a position of authority, had indeed destroyed the relationship of trust and confidence.

Disability-Related Discrimination

79. There is no medical evidence produced to support the Claimant's contention that his making contact with only female colleagues in this manner was something which arose in consequence of his disability. He had engaged in this behaviour long before the start of any substantial adverse effects resulting from disability in September 2020. It is an objective test as to whether or not there is in fact any causal link between the disability and the Claimant's conduct after that date. His mere assertion that this was why he had behaved as he did is not sufficient to meet that objective test. His behaviour from this point on cannot be said to have been out of character. The Respondent is right to observe that there is an inconsistency between the Claimant seeking to attribute his misconduct to his disability, so as to excuse it, and his claims that there was in fact nothing wrong in what he was doing in any event.
80. Whilst it is clear that the Claimant did suffer from low moods and that he was lonely, his conduct towards these women was in parallel to that condition and not in series. To have taken away the effects of his anxiety disorder would not have broken the connection: he would, on the totality of the evidence, still have continued this pattern of behaviour just as he had previously.
81. Even if some of his conduct had arisen in consequence of his disability, and that conduct after 3rd September 2020 was clearly in part the reason why, subjectively, he was dismissed, termination would have been justifiable. This conduct over a limited period was not the whole reason why he was dismissed. The other instances of misconduct and the overarching loss of trust and confidence would have warranted dismissal in any event. The instigation of the investigation, which was before the Respondent knew that the Claimant was disabled, and the subsequent dismissal were a proportionate means of ensuring that the Claimant's younger female colleagues were treated with the dignity and respect that they were entitled to expect under the Respondent's policies. The Respondent cannot be expected to be potentially seen to have been condoning proven sexual harassment to this extent in the workplace.
82. The Claimant did not "need" to be represented by solicitors, and that alleged "need" did not arise in consequence of his disability. The Claimant was able to engage personally in communications with the Respondent. He was able to be accompanied at any grievance or disciplinary meeting by a work colleague or union representative, though this may have not been readily practicable. There is no medical evidence to support the contention that his mental health meant that he had to conduct communications through solicitors. He wished, however, to have all correspondence go through them and for them to represent him at any hearing. In this he was no more disadvantaged than any non-disabled person who would have preferred to have been able to conduct these internal procedures in a litigious manner.

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83. Because the Claimant wished to have solicitors represent him he perceived the Respondent's decision not to permit this as placing him at a disadvantage when he did not get what he wanted, That is not, however, the same as saying that he was subjected to a detriment *because* he wished to engage solicitors in the process.
84. The decision not to allow legal representation nor to postpone the disciplinary hearing to permit then to attend is not, therefore, unfavourable treatment because of sonneting arising in consequence of disability.

Failure to make reasonable adjustments

85. The Respondent was not potentially under any duty to make reasonable adjustments before 15th December 2020.
86. The Claimant has not established that the Respondent in fact applied a provision, criterion or practice (PCP) as alleged:
- “The respondent had part of its disciplinary process the refusal to take into account employee disability.”
87. The Respondent did convene welfare meetings during the currency of the disciplinary investigation once it became aware of the Claimant's disability. The Claimant was referred to Occupational Health. The investigation was effectively paused for five months once the Claimant went off sick. The disciplinary hearing was adjourned once when the Claimant was said to be unfit to attend. The Claimant was requested to provide medical information. It was clearly therefore not any part of the policy to refuse to take disability into account. What the Respondent did not do was accede to the specific request for a further postponement or accept the Claimant's assertion that his behaviour was not culpable because it was as a result of his anxiety.
88. The alleged disadvantage that it is said should have been addressed by reducing the Claimant's excessive workload throughout 2020 did not arise as a result of the application of the pleaded PCP. It predated the knowledge of disability in any event. Although the Claimant says that he had complained about his workload to the previous Regional Manager in January 2020, it was not in fact part of the substance of the grievance against Ms Newby. The issue of his hours does nonetheless appear to have been raised at the mediation meeting. There it was reiterated that the Claimant should not work more than 45 hours per week and ensure that he took his rest breaks and days off. The matter does therefore seem to have been addressed, and the reason the planned follow-up review did not then take place was because of the supervening disciplinary investigation.
89. As already stated, there is no evidence that the Claimant was in fact disadvantaged as a disabled person by the refusal to allow legal representation either for sole correspondence purposes or attendance at a hearing.
90. As already stated, the decision not to adjourn the disciplinary hearing further as at 6th May 2021 was within the band of reasonable responses. Similarly, it is not an unreasonable failure to make an adjustment. It is not every possible adjustment which can in fact be reasonably accommodated where there are legitimate competing considerations to be weighed.

91. It is not a failure to make a reasonable adjustment to pay full sick pay rather than SSP to which he was only contractually eligible. The reason why he was disentitled to full pay was because he was properly under investigation for serious misconduct, not because his absence was disability related.
92. The Claimant's stress as at October 2020 was not a disadvantage to which he was subjected by the application of the disciplinary process, as alleged, No other applicable PCP has been put forward. In any event this period predated knowledge of disability.
93. The Respondent did attempt to hear the grievance from February 2021. It is unclear what the alleged stress was after the lodging of this grievance and which should have been ameliorated by the making of any adjustment, though it may be presumed to have been the financial hardship occasioned by the Claimant being on reduced pay. It is correct to say that the Respondent did not simply accede to the request for full sick pay without a hearing to determine the grievance. The contractual position was however clear. There is no indication that this policy disadvantaged a disabled employee in these circumstances any more than a non-disabled one who went off with stress reactively upon facing serious misconduct charges.

Monetary Claims.

94. The Claimant has received all his due holiday entitlement up to 14th May 2021
95. The payment of SSP is not less than that was properly payable under the contract.
96. The Claimant accepts that any entitlement to a bonus or to a Long Term Incentive Plan payment was discretionary and only potentially applicable if remaining in employment.

Time Limits

97. The Claimant had instructed solicitors prior to his raising his grievance against Ms Newby in October 2020. On 17th October 2020 he told MM that those solicitors had told him he had a good case and he said he was looking forward to seeing Ms Newby in a tribunal. There is in fact no obvious basis for any such claim properly within the tribunal's jurisdiction and no allegations against Ms Newby which are contained within the grievance form the subject matter of any complaint now before this tribunal. The solicitors' correspondence from 9th March 2021 onwards explicitly refers to possible Tribunal proceedings.
98. The Claimant clearly therefore had legal advice in respect of possible Tribunal claims and the applicable time limits.
99. There is no good reason advanced as to why any claims from before 13th May 2021 were not therefore brought in time.
100. Even if they had not been dismissed on the merits any complaints from before this date are out of time and it would not just and equitable to extend time for presentation of the claim.

EMPLOYMENT JU DGE LANCASTER

DATE 20th January 2026

JUDGMENT SENT TO THE PARTIES ON

.....

AND ENTERED IN THE REGISTER

.....

FOR SECRETARY OF THE TRIBUNALS

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

ⁱ The issues the Tribunal will decide are set out below.

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 13 May 2021 may not have been brought in time.

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

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

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

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

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

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

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

2. Unfair dismissal

2.1 What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

2.2 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

2.2.1 there were reasonable grounds for that belief;

2.2.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

2.2.3 the respondent otherwise acted in a procedurally fair manner;

2.2.4 dismissal was within the range of reasonable responses.

3. Remedy for unfair dismissal

3.1 Does the claimant wish to be reinstated to their previous employment?

3.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

3.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

3.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

3.5 What should the terms of the re-engagement order be?

3.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.6.1 What financial losses has the dismissal caused the claimant?

3.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

3.6.3 If not, for what period of loss should the claimant be compensated?

3.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

3.6.5 If so, should the claimant's compensation be reduced? By how much?

3.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.6.7 Did the respondent or the claimant unreasonably fail to comply with it?

3.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

3.6.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

3.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

3.6.11 Does the statutory cap apply?

3.7 What basic award is payable to the claimant, if any?

3.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. Disability

4.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

4.1.1 Did he have a physical or mental impairment: depression and anxiety?

4.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

4.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

4.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

4.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

4.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

4.1.5.2 if not, were they likely to recur?

5. Discrimination arising from disability (Equality Act 2010 section 15)

5.1 Did the respondent treat the claimant unfavourably by:

5.1.1 The decision to hold a disciplinary process.

5.1.2 The decision not to adjourn the disciplinary process despite requests.

5.1.3 The decision not to allow the claimant representation at or during the disciplinary process and/or the refusal to substantively communicate with the claimant's chosen representative.

5.1.4 The decision to dismiss the claimant constituting unfavourable treatment contrary to section 15 Equality Act 2010?

5.2 Was the unfavourable treatment because of any of those things?*

5.3 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

5.3.1 The disciplinary process and dismissal were a proportionate means of achieving the legitimate aim of ensuring the claimant's colleagues were treated with dignity and respect in accordance with the respondent's policies. Further, not allowing a legal advisor to attend a disciplinary hearing or to communicate on behalf of an employee is a proportionate means of achieving the legitimate aim of maintaining direct contact with employees whilst off sick and not over-complicating a process which is not a legal process, namely the disciplinary process.

5.4 The Tribunal will decide in particular:

5.4.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.4.2 could something less discriminatory have been done instead;

5.4.3 how should the needs of the claimant and the respondent be balanced?

5.5 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

6. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

6.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

6.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:

6.2.1 The respondent had part of its disciplinary process the refusal to take into account employee disability.

6.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability?

6.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

6.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

6.5.1 Reducing the claimant's workload and/or excessive working hours throughout 2020 and not heeding the claimant's repeated complaints in that regard.

6.5.2 Allowing the claimant to correspond through his solicitor during the disciplinary process. Not unreasonably refusing to correspond directly with the claimant's solicitors and not unreasonably insisting on communicating with the claimant despite his ill health and repeated request for an adjustment in this regard

6.5.3 Adjourning the disciplinary process until such time as the claimant could attend a hearing to make meaningful representations/submissions in response to the allegations.

6.5.4 Allowing the claimant to be represented by a solicitor during the disciplinary process/hearing.

6.5.5 Adjusting its policy on sick pay and not refusing the claimant sick pay on account of the fact that he was under investigation for alleged misconduct.

6.5.6 Taking steps to alleviate the claimant/stress after the claimant lodged a grievance on 14 October 2020 and February 2021.

6.6 Was it reasonable for the respondent to have to take those steps and when?

6.7 Did the respondent fail to take those steps?

7. Remedy for discrimination

7.1 What financial losses has the discrimination caused the claimant?

7.2 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job? 7.3 If not, for what period of loss should the claimant be compensated?

7.4 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

7.5 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

7.6 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

7.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

7.8 Did the respondent or the claimant unreasonably fail to comply with it?

7.9 If so is it just and equitable to increase or decrease any award payable to the claimant?

7.10 By what proportion, up to 25%? 7.11 Should interest be awarded? How much?

8. Holiday Pay (Working Time Regulations 1998)

8.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended? 8.2 What was the claimant's leave year?

8.3 How much of the leave year had passed when the claimant's employment ended?

8.4 How much leave had accrued for the year by that date?

8.5 How much paid leave had the claimant taken in the year?

8.6 Were any days carried over from previous holiday years?

8.7 How many days remain unpaid?

8.8 What is the relevant daily rate of pay?

9. Unauthorised deductions

9.1 Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?

9.2 Was any deduction required or authorised by statute?

9.3 Was any deduction required or authorised by a written term of the contract?

9.4 Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?

9.5 Did the claimant agree in writing to the deduction before it was made?

9.6 How much is the claimant owed?

*Disability Discrimination: s.15 EqA 2010

27. The Claimant's disability impacted on his ability to think and act properly, particularly during stressful times. The Claimant became deeply lonely and sought to reach out to people to communicate with. He became depressed, and isolated, as vividly described in his emails (referred to at para.9 above). In consequence of this extreme loneliness and impaired thinking the Claimant contacted several colleagues during his spare time (out of working hours), which subsequently formed the basis of the allegations against the Claimant and his dismissal.

28. The Claimant's conduct in contacting and communicating with staff as alleged was a consequence of his mental impairment. As a result of this the Claimant was treated unfavourably in that he was subjected to a disciplinary process and dismissed.

29. Moreover, the Claimant's disability precluded his direct involvement in the disciplinary process, as a result of which he sought assistance from his chosen representative. The Claimant's decision to involve his chosen representative was a consequence of his mental impairment.