EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102307/2018

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Held in Glasgow on 14 and 15 August 2018
Members' meeting 30 August 2018

Employment Judge:	**Robert Gall**
10 **Members:**	**Peter O'Hagan**
	Andrew Ross

Ms C Divers	**Claimant**
	Represented by:
15	**Mr M Briggs - Solicitor**
The NIC Services Group Limited	**Respondent**
	Represented by:
20	**Mr S Robinson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that:

25 (1) The claim of breach of contract (wrongful dismissal) is successful. The respondents are ordered to pay to the claimant £778.26, being 6 weeks' wages. That is in respect of 6 weeks' notice of termination of employment due to the claimant but not given to her.

(2) The claim of failure to provide a statement of written employment particulars
30 is unsuccessful.

The Judgment of the majority of the Tribunal is that the claims of unfair dismissal under the Employment Rights Act 1996 and of discrimination under the Equality Act 2010 are unsuccessful.

REASONS

1. This case proceeded to a hearing at Glasgow on 14 and 15 August 2018.

2. The claim brought was brought under various jurisdictions. One element of the claim was that of unfair dismissal. There was also a claim of discrimination, the protected characteristic being disability. In addition, a claim of wrongful dismissal was brought. A claim was also made that there had been a failure to supply the claimant with a statement of particulars of employment.

3. The claimant was represented by Mr Briggs, solicitor. The claimant gave evidence herself. A joint bundle of productions was lodged. Ms Christine Nanguy was a witness for the claimant. Mr Robinson, solicitor, appeared for the respondents. The respondents' witnesses were Ms Leigh Davidson and Ms Donna Colligan.

4. Ms Davidson was the manager with the respondents who dismissed the claimant. Ms Colligan heard the appeal against dismissal. Ms Nanguy was present at the appeal hearing. She is an educator and works with the claimant each Friday to assist her with maths.

5. It was accepted that the claimant was at the relevant time disabled for the purposes of the Equality Act 2010 ("EQA"). If successful, the claimant sought an award of compensation.

6. The following parties are relevantly named at this point, although they did not give evidence:-

- John Todd, union representative for the claimant who was present at the disciplinary and appeal hearings.
- Andrew Barker, store manager with Morrisons at their store in Crossmyloof, Glasgow.
- Ashley Meeton, in store cleaning manager with the respondents based at Crossmyloof.

7. Prior to the Hearing commencing, Mr Briggs said in relation to the alleged failure to make reasonable adjustments that the Provision Criterion or Practice ("PCP") involved was the requirement that employees met certain standards of competency and conduct when working for the respondents. This placed the claimant at a substantial disadvantage, he said. He said that the reasonable adjustment which was contended for by the claimant was that she ought not to have been dismissed, with time being granted to her to improve.

8. Although a claim of direct discrimination was advanced in the claim, prior to commencing submissions. Mr Briggs confirmed that the claim of direct discrimination was not insisted upon and was withdrawn.

9. In relation to the claim under section 15 of EQA, the unfavourable treatment which had occurred was confirmed as being dismissal. The "*something arising"* was memory difficulty.

10. The claims therefore in respect of alleged failure to make reasonable adjustments and unfavourable treatment because of something arising in consequence of the claimant's disability related to the decision taken to dismiss the claimant.

11. The following were found to be relevant and essential facts.

Background

12. The claimant was born on 1 June 1974. She was therefore aged 44 at time of ending of her employment with the respondents. Termination of her employment occurred on 6 October 2017. Her remuneration at that time was £129.71 per week, that amount being both the gross and net amount.

13. The claimant had been employed by the company which operates Morrisons' supermarket from 16 June 2011. There was a transfer of her employment under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). Her employment transferred to the respondents with effect from September 2016. She had continuity of employment such that she had,

at time of termination of her employment with the respondents, six complete years of service.

14. The claimant was employed by Morrisons, and subsequently by the respondents, as a cleaner. It was her role to clean the floors and stairs within the store where she worked. She was also to clean the toilets, that role extending to ensuring that there was toilet roll in the toilets. She was also to attend and to clear up any spillages which occurred. After transfer of her employment to the respondents, those within the respondents' organisation could ask her to do particular tasks as part of her job. Staff within Morrisons however remained able to request that she carried out particular cleaning functions.

The claimant's learning difficulties

15. The claimant is affected by learning difficulties. She can read and can write. She is able to understand both verbal and written communications. Her disability means that she can be forgetful.

Employee Handbook

16. The claimant received an employee handbook from the respondents. A copy of that handbook was present as a production at the Hearing.

17. Section F of the handbook set out the rules and disciplinary procedure operated by the respondents. Paragraph 10 thereof dealt with gross misconduct. It set out examples of gross misconduct offences which it stated would render employees liable to summary dismissal. It said that the list was not exhaustive. Included within that list were the following:

> *"10.2 Failure to carry out a reasonable and lawful direct instruction given by a Supervisor/Manager/Director during working hours.*
>
> *10.3 Gross insubordination, aggressive behaviour or excessive bad language on Company or Clients premises."*

Final Written Warning

18. Following an allegation of aggressive behaviour on the part of the claimant towards a customer at Morrisons, a disciplinary hearing was held on 2 June 2017.

19. The outcome of that hearing was confirmed to the claimant by letter of 16 June 2017. A copy of that letter appeared at page 25 of the bundle. The letter read:-

> *"I am writing to confirm the outcome of the Disciplinary Hearing which was held on Friday 2 June 2017 at Morrisons Newlands.*
>
> *Present at the Hearing was John Todd, Union Representative and ourselves.*
>
> *The Hearing had been arranged to discuss allegations of Gross Misconduct, the details of which are below.*
>
> - **Aggressive behaviour towards our clients' customer.**
>
> *You were given every opportunity to explain and account for your actions throughout the meeting.*
>
> *I have considered your comments and also the witness statements and have decided to issue you with a Final Written Warning, in addition to this we have no alternative but to remove you from Morrisons Gallowgate. We are able to offer you a position at Crossmyloof, the details of which will be sent under a separate letter.*
>
> *You are required to make an immediate, substantial and sustained improvement. In light of being issued with a Final Written Warning, I must stress that any future breaches of any Company Rules and*

Disciplinary Procedures will result in further disciplinary action being taken and you could be dismissed.

*You have the right to appeal against my decision. This should be made in writing, addressed to the HR Department within 5 of (*sic) *working days from the receipt of this written confirmation."*

20. The claimant did not appeal the outcome of this disciplinary hearing. She commenced work at Crossmyloof on 16 June 2017.

Role at Crossmyloof

21. The respondents are contracted by Morrisons to clean instore, including within their store at Crossmyloof. Cleaning of the store requires to be carried out to a standard acceptable to Morrisons. If there is an issue with the cleaning of the store by the respondents then penalty charges apply. There may also be an issue as to renewal of the contract if the respondents do not meet their obligations under it.

22. The claimant carried out within the Crossmyloof store the same duties as she had within the store at Gallowgate. She was aware of what was involved in those duties and understood what was required of her in her role as cleaner.

23. The respondents' instore cleaning manager, Ashley Meeton, worked closely with the claimant when the claimant started at Crossmyloof on 16 June 2017. Ms Meeton went over with the claimant what she was to do. There was a PDA scan system in place. This meant that when an area had been cleaned, someone in the position of the claimant was to implement a scanning arrangement to confirm that she had cleaned the particular area in question. The claimant was aware of and understood the operation of the PDA system.

24. The respondents became aware of difficulties with the claimant and performance of her cleaning role. Ms Davidson was at that point support area manager for the respondents. Ms Meeton reported to her. Ms Davidson

visited the stores including Crossmyloof. She spoke with both Ms Meeton and Mr Barker (Mr Barker being the store manager with Morrisons) to obtain information on the work being carried out in store by the respondents.

5 25. Ms Meeton gave Ms Davidson daily updates over the phone in addition to speaking with Ms Davidson when Ms Davidson was in store.

26. Mr Barker reported to Ms Davidson that the claimant was not completing jobs assigned to her. Ms Meeton also reported that the claimant was not doing a 10 specific job when that was asked of her. Ms Meeton said that Morrisons staff had complained to her about the attitude of the claimant towards them when the claimant was asked to do things in store by them such as to clean a spillage. Ms Meeton said to Ms Davidson that she herself felt intimidated by the claimant by reason of the tone of voice used by the claimant in speaking 15 to her and the refusal by the claimant to do tasks within her job when asked. She said that the claimant had raised her voice to her when asked to carry out cleaning tasks.

27. Ms Meeton also said to Ms Davidson that both the store manager and senior 20 manager within Morrisons had said to her that the claimant was not doing her job as it should be done in terms of the standard of cleaning and that the claimant had refused to carry out jobs when they asked her to do that.

28. Ms Meeton also said to Ms Davidson that the claimant was taking breaks 25 when she was not supposed to be taking breaks.

29. To try to assist the claimant, Ms Meeton altered her shift and worked with the claimant with a view to ensuring that the claimant knew what to do. Recognising that the claimant had difficulty remembering some tasks, Ms 30 Meeton agreed with the claimant that she would give to the claimant a *"ticklist"* with her tasks on it. Ms Meeton did that. The claimant carried this ticklist around the store with her as she worked. It enabled her to confirm tasks that she had already done and tasks that she was still to do.

30. Despite understanding what her role was and what the tasks which she had to carry out were, and having this task list with her as a prompt and reminder, the claimant regularly did not carry out elements of her job.

5 31. In addition, where the claimant had carried out cleaning tasks she had often not done that work to an acceptable standard. She required to re-do some of this work in order to achieve an acceptable standard. On occasion, she refused to redo work. She also refused on occasion to mop up spillages in response to instructions from her instore manager and from staff within 10 Morrisons, notwithstanding that this was part of her role. When she did mop up spillages, she used on at least one occasion a dry mop to do this rather than using a wet mop. She adhered to that method on that occasion despite being informed that a wet mop should be used.

15 32. Ashley Meeton spoke with the claimant informally on various occasions between time the claimant started at Crossmyloof in the middle of June 2017 and prior to proceeding with what is known as a *"golden steps"* process in August 2017. Leigh Davidson also spoke with the claimant both before and after the golden steps meeting, speaking to her on a total four occasions.

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33. The issues with the quality of the claimant's work, approach to others and willingness to carry out tasks when asked continued however.

34. In those informal discussions between Ms Davidson and the claimant, Ms 25 Davidson spoke to the claimant both about her performance and her approach or attitude. She explained that the claimant was not carrying out work to a high enough standard, highlighting the absence of toilet roll in the toilet, that the hand dryer area within the toilet was dirty and that there were no mats on the floor in the shop, for example. The claimant responded by saying that 30 some of those matters had been attended to when in fact they were not. She then apologised and said that she would attend to those matters. She did not however say that she did not understand what she was being asked to do in her role. To check that the claimant had understood the position, Ms Davidson asked the claimant to say back to Ms Davidson what Ms Davidson

had said to the claimant. The claimant was able to do that and to confirm what she ought to have been doing in her role but had not been doing.

35. Ms Davidson said to the claimant that she needed to watch how she approached people and that she should be nice to her manager avoiding raising her voice. She said to the claimant that the claimant was perceived as aggressive and abrupt and that this had been mentioned to her by Morrisons staff and by senior management. She emphasised the need for the claimant to work well with others to build a good relationship. The claimant did not deny raising her voice or being aggressive. She did not offer any explanation for her behaviour, simply apologising, saying *"ok"* and smiling.

Performance Review

36. On 12 August 2017, Ms Meeton met with the claimant and undertook a performance review with her. A copy of the form detailing that review appeared at pages 26 to 28 of the bundle. The claimant and Ms Meeton both signed the form. This meeting was one under what was known as "*the golden steps"* procedure.

37. Two of the three goals specified, the third goal being unclear, are as follows:

> *"1 Complete all tasks given to a high standard.*
> *2 Be polite to colleagues and Morrisons staff."*

38. There are two other categories which are completed with the additions noted as follows:-

> *"ADDITIONAL INFORMATION:*
>
> *PROVIDE SUGGESTIONS FOR SELF IMPROVEMENT:*
> (Added by the claimant/Ms Meeton)
> *clean to a high standard*
> *Be polite*

SUPERVISOR/MANAGER FEEDBACK:

(Added by Ms Meeton)

Cleaning is not satisfactory.

Attitude towards myself and Morrisons staff is unacceptable."

39. The review form then goes on to provide an evaluation in respect of the participant, in this case the claimant. 12 elements are listed on the pre-printed form as categories of evaluation. This form is completed for all employees at time of any such performance review. The answers to any points of evaluation in respect of an individual employee take account of the role of that employee. Although therefore certain categories might not initially seem applicable to the role of the claimant, the respondents' evaluation procedure proceeded on the basis that elements of the role of any employee were appropriate for evaluation in each of the categories.

40. Thus, in the category *"demonstrates problem solving skills"*, the respondents would consider what the claimant did if, for example, the cleaning brush needed new pads. In relation to "*demonstrates effective management and leadership skills",* consideration would be given to whether the claimant took control of her job and fulfilled it. The claimant was refusing to carry out elements of her role.

41. Effective management and leadership also extended to interaction with customers, for example showing someone where the sugar was if asked, and being pleasant to customers.

42. The claimant's attendance was good. She was rated as being "*exceptional*" in that category. She was rated as *"marginal"* in two categories, that of *"open to constructive criticism"* and *"takes responsibility for actions".*

43. Save for the one element mentioned in which the claimant was rated as being *exceptional* and two elements where she was rated as being *marginal*, the claimant was rated as being *unsatisfactory* in the other nine elements. There were twelve elements in total.

44. In terms of the evaluation, there is a key given for the categories. That states that "*marginal*" is appropriate if someone *"needs improvement to quality of work. Completes tasks, but not on time." "Unsatisfactory"* is described as *"does not perform required tasks. Requires constant supervision."*

45. After the meeting between the claimant and Ms Meeton on 12 August 2017 the claimant continued working for the respondents. As mentioned there continued to be issues with her work being carried out satisfactorily, with the interaction between the claimant and her instore cleaning manager and also between the claimant and staff at Morrisons. Refusals by the claimant to carry out works which were within her role also continued. The claimant was also taking breaks at times when those were not authorised. Ms Davidson also spoke to the claimant regarding these matters as detailed above. Ms Meeton spoke with Ms Davidson daily and reported a continuation of those issues in relation to the claimant. It was therefore decided by Ms Davidson that it was appropriate to convene a disciplinary hearing.

Disciplinary Hearing

46. By letter of 21 September 2017, the respondents wrote to the claimant intimating that a disciplinary meeting was being arranged. A copy of that letter appeared at page 29 of the bundle.

47. The letter invited the claimant to attend a disciplinary meeting. It said that this was "*due to a serious allegation made against you of Gross Misconduct. The details of this allegation are as follows:*

- *Aggressive behaviour*
- *Poor work performance*
- *Failure to follow management instructions."*

48. The claimant was informed that summary dismissal might apply. She was also informed of the right to be accompanied.

49. The meeting took place on 28 September 2018. The claimant was present together with Mr Todd, her union representative. Ms Davidson was present from the respondents as the decision maker. Mr Halon-Butcher was present as the minute taker. A copy of the notes of the meeting appeared at pages 65 to 71 of the bundle.

50. Prior to the meeting, Ms Meeton had provided a statement to Ms Davidson. A copy of the statement appeared at page 31 of the bundle. It read:-

> *"Claire can be very abrupt when speaking to people including myself which makes me feel intimidated at times. There has* (sic) *been complaints made to myself about Claire's attitude towards members of Morrisons staff when she has been ask* (sic) *to do things instore e.g. cleaning up spillages.*
>
> *Tasks to be completed are written out for Claire every day with clear instructions however these tasks are not always completed. If they are completed, they are not done to a satisfactory standard."*

51. The notes of the disciplinary hearing are not verbatim. They summarise points raised and discussed during the meeting. They are signed by all those present at the meeting, including therefore the claimant and Mr Todd.

52. Neither the claimant or Mr Todd asked for details of any specific instances of behaviours or failings said to have existed on the part of the claimant. Neither of them challenged there being an issue with each of those aspects.

53. It is recorded that there was discussion regarding the statement provided by Ms Meeton, a copy of which was given to the claimant. The claimant agreed that she wasn't *"speaking nicely"* to Ms Meeton. She confirmed at that point and at various other points in the disciplinary hearing that she understood what was being asked of her. Reference was made to her attitude to tasks and to her behaviour as having been covered in the review. She confirmed that was so. When asked if there was any reason for this to be happening,

she said *"no"*. She was asked specifically whether there was any reason why she spoke to people as she did or did not do tasks. Again she replied *"no"*.

54. Ms Davidson was asked about investigation of the incidents. She said that two senior managers had confirmed the issues. The claimant said she agreed when asked if she understood "*about aggressive tone and behaviour*".

55. There was reference to the performance review which the claimant had signed and to Ms Meeton having gone through the performance review. The claimant said she could not recall that. The claimant did however confirm what her role was and that she completed the list given to her. When it was raised with her that both Ms Meeton and the store said that tasks which were part of her job were not being done, the claimant said that sometimes she forgot to do one stair. It was said to her that this did not occur on one shift but rather on every shift. She agreed, but said she was *"doing the list".*

56. Ms Davidson raised with the claimant standards of cleaning and showed the claimant and Mr Todd the claimant's training record. The claimant agreed that she had cleaned the toilet floor with a dry mop. It was said to her that when asked why and to do the job properly, she had said no. She agreed with that.

57. There was discussion regarding the breaks taken by the claimant. The claimant said that she understood the jobs which she was asked to do and that Ms Meeton told her verbally and in writing about the tasks. She said that she ticked the tasks off. She accepted that she still took breaks although Ms Meeton had explained the position about breaks to her.

58. Ms Davidson said to the claimant that the claimant had been asked by Morrisons to get equipment and to carry out tasks but that the claimant had refused and was failing to follow instructions. The claimant agreed that this was so.

59. Mr Todd concluded by checking that the claimant was to continue her shifts until a decision was made. He referred to the length of service of the claimant

and to the claimant's view that she did what she was asked to do. The claimant said she was happy working at Crossmyloof.

60. Having discussed these matters with the claimant, Ms Davidson then adjourned to consider her decision.

61. Ms Davidson was conscious that the claimant had never been aggressive at any point with her. She was also conscious that she had spoken to the claimant on various occasions in the store about matters reported to her by Ms Meeton and Morrisons' in store management and personnel. Those matters extended to the claimant's tone when discussing matters with them, her refusal to carry out work when asked and the standard to which she was performing her role.

62. In reaching her decision, Ms Davidson kept in mind that the claimant had not disputed raising her voice or being aggressive in the tone she had used. She kept in mind the statement which she had from Ms Meeton and comments made to her by instore personnel at Morrisons. She was also aware from her own discussions with the claimant on at least four occasions that the claimant had not been performing her tasks to an acceptable level and had the benefit of a task list and assistance directly from Ms Meeton working alongside her for a period. Ms Davidson was therefore aware of informal performance management having taken place in relation to the claimant. She was aware of the *"golden steps"* meeting on 12 August 2017 and the goals emerging from that. The fact that the claimant had refused to redo work or to do tasks as asked and had accepted that in the disciplinary hearing as being correct also weighed with Ms Davidson. The claimant said during the disciplinary hearing that she understood the jobs involved in her role and what she was asked to do at different times. Ms Davidson was aware that Ms Meeton had changed her shifts to enable her to work alongside the claimant to assist her.

63. Ms Davidson was also aware of the final written warning given to the claimant following the incident at Gallowgate.

64. In all the circumstances, Ms Davidson concluded that it was appropriate to dismiss the claimant having regard to what she viewed as being the aggressive behaviour of the claimant and the continuous failure by the claimant to perform, as well as her refusal to carry out tasks as asked.

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65. By letter of 6 October 2017, a copy of which appeared at page 30 of the bundle, Ms Davidson wrote to the claimant confirming the outcome of the disciplinary hearing. She referred to the three elements in relation to which the disciplinary hearing had been convened. She went on to say

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> *"After listening to your answers during the meeting and taking into consideration previous conversations with you regarding the similar issues, I consider your actions to be Gross Misconduct and I therefore have no alternative but to take the severest sanction an employer can take against an employee and to summarily dismiss you."*

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66. The letter went on to confirm that no notice pay would be paid but that holiday pay would be sent to the claimant. It confirmed the details in relation to possible appeal by the claimant.

20 **<u>Appeal against dismissal</u>**

67. The claimant, with assistance from Ms Nanguy, submitted a letter appealing against dismissal. The letter was brief in its terms. It referred to the claimant's view that her dismissal was unfair and that proper procedures had not been followed.

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68. An appeal hearing was convened but postponed. The hearing eventually took place on 24 November 2017. At this hearing, the claimant appeared. She was accompanied by Mr Todd once more. The respondents agreed that Ms Nanguy could also accompany the claimant. For the respondents, Donna
30 Colligan was present as appeal hearer. Philip Brown was present as note taker. A copy of the notes of the meeting, signed by all the parties present, appeared at pages 36 to 50 of the bundle.

69. At the appeal meeting, Ms Colligan was keen to understand from the claimant what the basis of her appeal was. A lot of these answers came to Ms Colligan from either Mr Todd or Ms Nanguy.

70. Mr Todd took issue with the statement of Ms Meeton. He said that the claimant's behaviour had not been aggressive. He further said that there were no statements from Morrisons staff. He said that no steps had been taken to challenge poor performance with the claimant. He also said that the claimant had not been supported by the respondents and that there had been no investigation. He expressed the view that given that the claimant had learning difficulties, everything should have been better explained to the claimant. He underlined that the claimant had six years service.

71. Ms Nanguy said that the claimant had a problem remembering some things and that a poor memory was part of her disability. The claimant confirmed that she did not have a case worker.

72. When asked how she felt she had been unfairly treated, the claimant said that she felt she was picked upon. She said this was for not doing the job properly and that she had tried to remember the tasks. She accepted that she had a list with her. It was said on her behalf by Ms Nanguy that her shifts had changed and that this caused confusion for her.

73. Ms Colligan sought to understand the position as the claimant viewed it. The claimant described her tasks and said that she used the PDA scanner. She said that she used it on each shift and that if she was not sure she would ask. There was a brief discussion regarding the training procedure. When asked if she had flipchart training, the claimant said she *"didn't notice it"*.

74. Although there had been no induction for the claimant at Crossmyloof, Ms Colligan said that each store worked on the basis of the same spec for the job.

75. As to performance, Ms Colligan produced the performance review which Ms Nanguy said was very vague. Reference was made to simplified

performance reviews which had been carried out. The claimant said when asked by Ms Nanguy how she could work better, that a ticklist would come in useful. The claimant however already worked with the benefit of such a ticklist.

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76. Mr Todd suggested that the claimant work within a team and asked whether there was enough support. Ms Colligan said that the respondents needed to understand the support sought.

10 77. The claimant confirmed that she had been asked to redo jobs saying that this occurred a couple of times each day. Mr Todd then asked the claimant whether this was every day and she said that it was not every day. She confirmed that Ms Meeton had spent time with her in relation to PDA training and that she understood PDA. The claimant explained the presence and 15 operation of the checklist.

78. Ms Colligan said that the claimant had not ever missed a scan and did extremely well working with PDA.

20 79. It was confirmed by the claimant that she sometimes received prompts from Ms Meeton in relation to tasks being repeated.

80. Ms Colligan asked whether the claimant accepted that she cleaned to a high standard. The claimant replied:

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"I don't think Morrisons were happy with standard."

81. The claimant also said that she had *"never been aggressive before. I am usually nice to people."*

30 82. Mr Todd said that the claimant disagreed with the wording *"aggressive"*. He asked who the claimant was being aggressive towards and who at the Crossmyloof store felt that the claimant was aggressive. He expressed the view that there were no specifics in the statement of Ms Meeton and that the claimant had tried to answer all the questions put to her.

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83. When Ms Colligan said that she required the claimant's opinion, the claimant said that she thought she was picked upon because of her disability. She provided no further details of that.

84. Ms Colligan asked the claimant whether she was happy with the instruction given to her. Ms Nanguy interjected, stating that a better question would be *"can you remember being aggressive?"*.

85. To the question Ms Nanguy posed, the claimant said *"No"*. It is unclear whether she meant that she had not been aggressive or that she did not remember having been aggressive.

86. Ms Nanguy then said that the claimant's reaction could differ from what might be expected. The claimant said she got on well with everyone.

87. The following exchanges occurred in the appeal meeting and are noted at pages 48 and 49 of the bundle. DC is Ms Colligan, CD is the claimant and JT is Mr Todd.

"DC: How do you feel about instructions from Ashley?

CD: I have to sometimes redo instructions.

JT: Do you work without instruction?

CD: I don't mind doing it.

DC: Does Ashley inform you of tasks not completed?

CD: I try to complete tasks if asked to redo them.

DC: How do you react to Morrison's staff instruction?

CD: I do my best.

………

DC: *Do Morrisons management staff give tasks?*

CD: *Yes and I am happy to do it.*

DC: *Do you understand your job?*

CD: *Yes, and I have worked on core shift with other team members.*

……….

DC: *Is there anything you need if asked by Ashley i.e. support?*

CD: *Yes, a bit more support. I.e. physically show me.*

DC: *Has Ashley ever showed you how to clean toilets or sweep shop floor?*

CD: *Yes, clean toilets – no on shop floor.*

DC: *Do you have list you keep with you?*

CD: *Yes."*

88. The claimant said that management should *"treat me fair"*. Mr Todd said that the claimant stated that she was not aggressive and worked to the best of her ability and that Leigh Davidson had given her a good record. He also referred Ms Colligan to the claimant's service, honesty and said that the claimant's disability was covered under EQA.

89. Ms Colligan considered the position following the appeal meeting. She noted the terms of the performance reviews and of the golden steps review. She had regard to the statement of Ms Meeton and to the training records. She also had regard to the notes from the disciplinary hearing. At no time was it suggested to Ms Colligan that Ms Meeton had a personal issue with the claimant or a desire to end the claimant's employment with the respondents. The claimant and her union representative, Mr Todd, did not say that they were not aware of or uncertain as to the allegations. Although the claimant had said a ticklist would be useful, Ms Colligan was aware that the claimant already operated with the benefit of having such a ticklist. She was aware that Ms Meeton had changed her shift in order to spend time with the claimant coaching her, yet the issues had continued. The claimant had accepted in the disciplinary hearing that she had been aggressive to other members of staff in the view of Ms Colligan. It was Ms Colligan's view that any changes in shift hours had not affected the claimant's ability to do the job. The claimant's training and retraining records were considered by Ms Colligan.

90. It weighed with Ms Colligan that members of Morrisons' staff had complained. It also weighed with her that the claimant and those on her behalf had not suggested any further steps, other than more time being given, which might be taken to assist the claimant. She considered whether more time might be given to the claimant. The claimant was however, in the view of Ms Colligan, aware of her job and had had support. She concluded that the appeal would be unsuccessful, considering all the reasons for dismissal, aggressive behaviour, failure to follow reasonable management instructions and poor performance as amounting together to gross misconduct. The fact that, if the respondents did not deliver the cleaning service to Morrisons to the standard required, penalty fees would be imposed and there would be potential disruption to the business relationship was something which Ms Colligan kept in mind. There had been no explanation given to her as to how any extra time being given to the claimant would result in any change in her performance or approach both to her job, to instructions and to others within both the respondents' organisation and Morrisons.

91. By letter of 8 December 2017, Ms Colligan wrote to the claimant. A copy of that letter appears at pages 51 and 52 of the bundle. That letter enclosed a copy of the minutes of the appeal hearing. Ms Colligan set out her conclusion which was that although dismissal was a severe action, she regarded it as being appropriate. She said in the course of the letter:-

> *"The reason for your appeal was a claim that correct procedures were not followed and that you were not supported in line with your disability.*
>
> *I have looked into the points from your Union Representative and your support raised during the meeting and I do feel we have given you support. This has taken several forms such as amending your shifts, additional training, daily ticklists and the PDA.*
>
> *During the meeting, both your Union Rep and support acknowledged you have a clear understanding of your role and this would again demonstrate we have provided the support you required to undertake* (sic).
>
> *At no time have you raised concerns you have not been supported nor asked for any additional assistance from ourselves.*
>
> *Regarding the allegation of aggressive behavior, having reviewed the allegations, there is reasonable belief that you have been aggressive towards your colleagues.*
>
> *"You also stated that you felt we had not followed NIC procedures, I have reviewed the disciplinary process and can find no evidence of this."*

<u>Claimant's position after termination of her employment</u>

92. The claimant has received Jobseekers' Allowance following termination of her employment with the respondents. She has sought alternative employment

in conjunction with personnel at the Jobcentre. She has attended there every fortnight confirming that she has been looking for work. She has also gone into different work places enquiring as to whether they are seeking any employees. She had a scheduled two week trial with Marks & Spencers to gain experience. She worked for one week of that. She has sought employment with Cancer Research. No job has however materialised. At time of the Tribunal, she was awaiting an appointment for interview with Barnardos. She has often checked on S1Jobs website, without successfully finding a post.

The issues

93. Was the PCP, the requirement that certain standards of competency and conduct were met, one which placed the claimant, as a disabled person, at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled, thereby imposing a requirement upon the respondents to take such steps as it was reasonable to have to take to avoid the disadvantage?

94. If the requirement to take reasonable steps to avoid the disadvantage referred to in paragraph 1 existed, had the respondents failed to meet that duty by not giving the claimant the claimant more time rather than dismissing her (the reasonable adjustment said to have been required of the respondents)?

95. Had the respondents treated the claimant unfavourably because of something arising in consequence of the claimant's disability? The "*something*" said to have arisen was memory difficulties. The unfavourable treatment alleged was dismissal. If there had been treatment of this type in that circumstance, had the respondents shown that the treatment was a proportionate means of achieving a legitimate aim?

96. If the view of the Tribunal was that discrimination had occurred in relation to either of the matters just mentioned, what compensation was to be paid to the claimant?

97. What was the reason for dismissal of the claimant by the respondents?

98. If the reason for dismissal was one which was potentially fair under ERA, was the dismissal fair? This would involve an assessment of fairness, keeping in mind the need to avoid substitution of the Tribunal's own view of the matter. The decision taken would be considered. The Tribunal would have regard to procedures followed or not followed as well as to the substantive basis on which the decision to dismiss was taken. The "standard" would be whether the decision to dismiss fell within the band of reasonableness, applying the legal test as set out more fully below

99. If the dismissal of the claimant by the respondents was unfair, what level of compensation was to be paid by the respondents to the claimant? This would involve an assessment of whether, if any procedural failings had occurred which contributed to the dismissal being unfair, a percentage reduction to any compensation would appropriately be made on the basis of the principles set out in ***Polkey v AE Dayton Services Limited 1998 ICR 142 ("Polkey")***.

100. The Tribunal would also require to consider, as part of its assessment of what compensation was just and equitable by way of a compensatory award, whether there had been any contributory fault on the part of the claimant. This is in terms of Sections 122 and 123 of ERA. Any deduction for a contributory fault falls to be applied after any percentage deduction in terms of ***Polkey***.

Applicable law

101. The terms of section 20 of EQA imposes a duty on employers to make reasonable adjustments in certain circumstances. The circumstance which applied in this case was that detailed in section 20 (3) of EQA. That imposes a requirement in the following terms:-

> *"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."*

102. In ***Project Management Institute v Latif 2007 IRLR 579***, the EAT said that *"There must be evidence of some apparently reasonable adjustment which could be made."*

103. The onus is upon the claimant and not upon the respondent to point the Tribunal in general terms to the nature of an adjustment which would avoid the substantial disadvantage. Where that is done, the burden shifts to an employer, on the basis that the employer might show that the disadvantage would not have been addressed by the proposed adjustment. Alternatively, the employer may in that scenario demonstrate to the Tribunal that the adjustment proposed was not a reasonable one.

104. ***Leeds Teaching Hospital NHS Trust v Foster EAT 0552/10 ("Leeds")*** is authority for the proposition that in considering whether an adjustment is reasonable or not, it is not necessary that there has to be a good or real prospect of the disadvantage being removed by the adjustment. The test is whether there is a prospect of the disadvantage being alleviated.

105. Compensation is payable if a duty to make reasonable adjustments applies but is not met.

106. Section 15 of EQA states:

> *"(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."*

107. The case of ***Charlesworth v Dransfields Engineering Services Ltd EAT0197/16 ("Charlesworth")*** confirms that in the context of section 15 of EQA, the unfavourable treatment must be because of something arising in consequence of the disability in the sense that a significant influence is

required, not a mere influence. The something arising must be an effective cause of the treatment complained of.

108. Compensation is payable if the terms of section 15 of the EQA are breached.

109. Section 94 of ERA provides that an employee has the right not to be unfairly dismissed by his employer.

110. Section 98 of ERA stipulates that in determining whether dismissal of an employee is unfair, it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal and that it is a reason detailed in section 98 (2) of ERA or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position of that employee.

111. A potentially fair reason, in the context of this case and relevant reasons for dismissal, is one which relates to the capability of the employee to perform work of the type which she was employed to do by the employer and one which relates to the conduct of the employee.

112. An employer may have more than one reason for dismissal. It is for the employer to show the reason or principal reason for dismissal. If there are various elements all combining to form the reason for dismissal, a Tribunal must assess the fairness of that combined or composite reason. For the dismissal to be fair in that circumstance, it must be viewed by the Tribunal as being within the band of reasonableness having regard to the totality of the reasons established by the employer.

113. The burden of proof in determining fairness is neutral.

114. The case of ***British Home Stores v Burchell 1980 ICR 303 (“Burchell”)*** set out what are now well-established principles in relation to dismissals where the reason is conduct.

115. There must be a genuine belief on the part of the employer that the employee is *"guilty"* of the conduct alleged. That belief must be based on reasonable grounds. A reasonable investigation must have been carried out. The decision to dismiss must lie within the band of reasonable responses of a reasonable employer for it to be considered to be a fair dismissal.

116. In relation to the investigation, the case of ***J Sainsbury plc v Hitt 2003 ICR 111 ("Hitt")*** confirms that in this context an investigation must be a reasonable one with the band of reasonableness applying to the assessment of that.

117. In considering reasonableness of the investigation, the Tribunal is to take account of all the circumstances which pertained. The case of ***ILEA v Gravett 1988 IRLR 497 ("Gravett")*** highlights the variety of circumstances which may exist as to any event and whether or not the employee disputes that a particular event has occurred. If there is substantial doubt and perhaps guilt by inference, the level of investigation required will be at a higher level than in circumstances where there is an admission or it is clear that the conduct occurred.

118. The case of ***Iceland Frozen Foods Limited v Jones 1983 ICR 17 ("Iceland")*** confirms that the Tribunal is not to substitute its own view for that of an employer in assessing reasonableness.

119. A dismissal may be unfair if there are procedural failings. ***Polkey*** confirms that if there has been a failure to take appropriate procedural steps, the dismissal will be unfair. If that is so then the Tribunal must consider any evidence available and take a view as to the percentage chance of a fair dismissal having been carried out if a fair procedure had been followed. Calculation of compensation may then be affected accordingly.

120. In terms of section 119 of ERA, the provisions are set out for calculation of a basic award in the event of a successful unfair dismissal claim.

121. Section 122 states that there are to be reductions made in the basic award if the facts of a case meet the tests set out in that section. In particular, with regard to submissions in this case, section 122 (2) states that if the Tribunal considers that any conduct of a complainant before dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, that reduction falls to be made.

122. Section 123 of ERA details the provisions applicable in calculation of the compensatory award in the event of a successful unfair dismissal claim. That is to be such amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of dismissal in so far as attributable to action taken by the employer. Section 128(6) states that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, the compensatory award is to be reduced by such amount as the Tribunal considers just and equitable having regard to that finding.

123. A claim for wrongful dismissal is determined by a Tribunal on the basis of whether there has been a breach of the employment contract or not. Whereas in assessing the position under the ERA as to unfair dismissal, the reasonableness of the actions of an employer are to be considered, that is not so in terms of a claim of wrongful dismissal. In a claim of wrongful dismissal, the Tribunal has to consider whether the employee was *"guilty"* of conduct which was serious enough to constitute a repudiatory breach of contract entitling the employer to terminate the contract without notice. A dismissal can be both wrongful and unfair.

Submissions

Submissions for the Respondents

124. At the outset of his submission, Mr Robinson referred to the case of ***Attorney General v Bruce***, believed to be a reference to that case reported at ***UKEAT, 0586/05***. He said that case pointed out that discrimination was an evil. He said that to be accused of discrimination was therefore to be accused of an evil act. The Tribunal should keep in mind the seriousness of the allegation. He recognised that the claimant had learning difficulties and that she had been pleasant and nice whilst giving evidence. The Tribunal should not assess her evidence in the context of feeling sorry that she was in this situation.

125. The reason for dismissal was conduct, according to the respondents. Mr Robinson highlighted that was a potentially fair reason in terms of section 98(2)(b) of ERA. Both the witnesses for the respondents and the claimant herself accepted, the claimant in cross examination, that this was the reason for dismissal.

126. Mr Robinson anticipated that it would be said for the claimant that certain elements of her evidence were unreliable given the circumstances of her learning difficulty. That however placed the respondents in an impossible situation, Mr Robinson said. He said that if his anticipation was correct, the Tribunal were being asked to ignore the claimant where her evidence was contrary to her own interests but to accept her evidence where it supported her case.

127. The Tribunal required to bear in mind that the claimant had chosen to bring the claim. There had been no medical evidence as to the difficulty by which she was affected. She had accepted that she knew what the disciplinary hearing was to be about. She accepted that Ms Davidson and Ms Meeten had spoken to her about her conduct, Ms Davidson on four occasions and Ms Meeten on two occasions. There were instances in giving evidence where the claimant's bad memory had been apparent. She did however remember the elements just mentioned.

128. The respondents had, Mr Robinson submitted, shown that conduct was the reason for dismissal and the claimant had accepted that as being the reason for her dismissal. Conduct had been referred to in the letter inviting her to the disciplinary hearing. There had been reference to a refusal to carry out management instructions, to her aggressive behaviour and to poor work by her.

129. It might be, Mr Robinson said, that the Tribunal would have a view that capability had been the reason for dismissal. It was a matter for the Tribunal to determine whether there was a "hybrid" reason for dismissal or indeed some other substantial reason for dismissal.

130. Turning to fair procedure, Mr Robinson reminded the Tribunal that the claimant had been invited to the disciplinary hearing by letter. In that letter the allegations against her had been set out. There had been no specific detailing of dates or events. That was not required however, he submitted. The claimant knew the "charges" and accepted that she knew them. She had been spoken to previously. The disciplinary hearing and the references to the issues to be addressed were not out of the blue. She knew the background.

131. At the hearing, the claimant was accompanied by her trade union representative. She was dismissed. An opportunity was given to her to appeal. She took that opportunity.

132. Both the reference to a failure to follow management instructions and to there being no tolerance for aggressive behaviour were within the handbook supplied by the respondents which the claimant confirmed that she had seen. She had been warned as to her future conduct prior to the disciplinary hearing. A final written warning had been given to her in June of 2017. There had been no appeal against it being issued. That warning was not reopened or sought to be reopened during the claimant's case.

133. There had been a documented meeting with Ms Meeten on 12 August 2017. The claimant had been informed that a higher standard of work was required. She had been told that she required to be more polite. She had also been informed that her attitude towards Ms Meeten and the staff at Morrisons was unacceptable. There had then been the four conversations which she accepted had occurred between herself and Ms Davidson regarding her failure to do her job properly and her attitude. She had therefore been warned and told repeatedly of the need to improve both her behaviour and performance. There was an onus on her in that circumstance to improve.

134. Mr Robinson referred to ***Burchell.*** Applying principles of that case to this one, the respondents believed the claimant was guilty of misconduct. There were reasonable grounds for that belief. The claimant's own admissions to the respondents and that the Tribunal confirmed that. The investigation was a reasonable one. It was one which would be carried out in what Mr Robinson referred to as *"the real world".* He referred to ***Hitt.***

135. It should be kept in mind by the Tribunal that the case as pled for the claimant did not say that the investigation was unreasonable or indeed was poor. The case of ***Gravett*** illustrated the range of investigation and the fact that less investigation was required as the circumstances moved away from those of inference to a situation where someone was *"caught in the act".* In this case, there had been complaints about the claimant's performance and those had been drawn to her attention. She accepted that.

136. As to providing extra time to the claimant to improve (the reasonable adjustment said to have been appropriate), nothing had been said in evidence to demonstrate that the claimant would improve. There was no basis on which it could be said that performance would improve if, for example, a further month had been given to the claimant. She was happy with what the respondents had done to support her. She could not think of anything else which would help her. Accordingly, the Tribunal should ask itself what would change if extra time was given to her. There was no credible suggestion, Mr

Robinson said, that her performance or attitude would improve. There was no recognition on her part of the situation or any promised change. Even if that had been the case however, she was subject to a final written warning and the consequences of any further incident had been explained to her.

137. The dismissal was procedurally and substantively fair, Mr Robinson submitted. To argue that it was not so due to there being no specific warning that if things continued dismissal would result was to place too high an onus on the respondents. The Tribunal should keep in mind the reality of what had happened in relation to the claimant and then the disciplinary hearing.

138. Moving on to address the issue of disability discrimination, Mr Robinson said that the Tribunal should keep in mind that the allegation was that the reasonable adjustment was that the claimant should not be dismissed. The case was not based on an alleged failure to make reasonable adjustments during the claimant's working period in the respondents' premises. It was important that the Tribunal kept in mind that the claim of failure to make reasonable adjustments was in relation to the act of dismissal rather than in connection with the job which was being carried out by the claimant.

139. There was no indication that a reasonable adjustment ought to have been made. The claimant could not think of any such adjustment. She was happy with what had been put in place. She accepted in cross examination that she was not saying that the respondents should put up with aggressive behaviour or with a failure to follow instructions. She had accepted that there was an impact on the respondents and upon Morrisons if cleaning was not carried out or not carried out properly. The respondents were a cleaning company. Their role was to clean premises. Failures of the type which had occurred must impact upon their ability to meet the requirements of Morrisons.

140. An adjustment was only reasonable if it would address the issue. Not sacking the claimant would not do that. It was not a practicable or reasonable adjustment. Nothing would in fact change. The claimant had been rude and had shown an unwillingness to do the job. Any adjustment beyond those

made would have been a futile gesture. Mr Robinson referred to ***Leeds Teaching Hospital.*** There required to be a reasonable prospect, he said, of a disadvantage being alleviated. There was no evidence that deferring dismissal would work. He said that to do that would *"burden"* the respondents with an employee who was not doing what she was asked. The claimant had been asked as to whether there was any reason why she did not do what she was asked to do during her job. She said "*no"* when asked at Tribunal. That was consistent with what she had said to the respondents directly.

141. The section 15 claim of there having been unfavourable treatment because of something arising in consequence of the claimant's disability should also be unsuccessful. There had been no evidence that any aggression or intimidating behaviour on the part of the claimant had occurred due to her disability. The disability was said to affect her memory. The dismissal was not a discriminatory act on that basis. It was not unfavourable treatment because of something arising from her disability. If the claimant refused to do jobs, that was not an instance of having forgotten to do them. The refusal did not arise from her disability. The respondents had provided a tick list for the claimant which she carried with her. She was happy with that action. That had broken the link and causation, said Mr Robinson.

142. If the Tribunal was to conclude that there had been unfavourable treatment due to something arising from the claimant's disability, the respondents submitted that dismissal was a proportionate means of achieving a legitimate aim. They were a cleaning company. They provided services to their clients. They had to provide those to a satisfactory and proper level. There was no indication of what would change if the claimant had been kept on. Dismissal was a proportionate means of achieving a legitimate aim. The alternative, he said, was that the respondents would have to *"put up with"* the situation "*ad infinitum".*

143. In relation to remedy, Mr Robinson said that the claimant was being optimistic in seeking an award for 156 weeks of lost pay. She had made little or no meaningful attempt to find alternative work. There was no specific evidence

of any such attempts. There appeared to be two unpaid roles which she had been involved with and one placement. She had not produced any job applications. The dismissal had taken effect in September of 2017. She had said in evidence that she had no time to look for a job. She had not fulfilled her obligation to mitigate her loss.

144. The injury to feelings award sought was overstated in the circumstances. Ms Nanguy had said that the claimant was upset. The claimant however did not say that. Even Ms Nanguy's evidence referred to her having only seen the claimant being tearful on one occasion. She had said that the claimant talked about work each week but this was about being at work and doing work rather than about any issue over the respondents' decision.

145. If the claimant was successful, the Tribunal should also keep in mind ***Polkey.*** If there had been a procedural error then there was 100% risk that the claimant would have been dismissed had correct procedures been followed.

146. There had also been contributory conduct which should reduce the basic and compensatory awards, Mr Robinson submitted. The claimant had not provided a realistic explanation for her behaviour and had contributed to the decision. Again, 100% deduction was sought.

147. In relation to wrongful dismissal, the Tribunal would recall that the claimant had admitted in evidence the behaviour which had led to her dismissal. It had not been a wrongful dismissal.

Submissions for the claimant

148. Mr Briggs said that the credibility and reliability of a witness such as the claimant could be doubted in relation to some evidence but accepted it in relation to others. He accepted when it was raised with him that it was unusual for ae party's own representative to be arguing that some of the evidence from that party should not be accepted by the Tribunal as being credible.

149. Bits of the claimant's evidence, Mr Briggs said, should not be treated as being wholly reliable. There were however very good reasons for that. The claimant had not lied. Some elements of her evidence however required to be treated with a degree of caution given that she was answering questions in cross examination and was inclined to agree with questions put as she wished to please the questioner. Ms Nanguy had commented on that trait.

150. The respondents' witnesses should have their evidence assessed on the basis that they were not credible. They had given their evidence in a very guarded manner and had reached conclusions in the process contrary to common sense. An example of that was the assessment carried out with the claimant on 12 August 2017 in which management responsibility and leadership skills were matters discussed with her and on which she was graded. Witnesses had not accepted that these were inappropriate categories in relation to the claimant.

151. Ms Collinton should have little weight attached to her evidence in chief in relation to the claimant potentially having been aggressive. She had said that this was not something she believed but then had said that it formed part of her decision. That was a damaging reversal.

152. In relation to the claim of unfair dismissal, Mr Briggs said that the respondents had not discharged the burden on them to show the reason as being one which was potentially fair. The claimant had not been dismissed due to conduct. He said that reason for dismissal did not chime with the evidence as led. He submitted that the perception of the respondents was that the claimant was not doing the job to the required standard and that conduct was *"lipstick"* placed upon that. There had been a *"risible"* allegation of aggressive behaviour by the claimant.

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153. Mr Briggs referred to the timeline. A statement which was of relevance in the disciplinary hearing was not taken in writing until four days after the invitation to the disciplinary hearing had been given to the claimant. That statement

said that the claimant was *"abrupt".* That was not the same as being aggressive.

154. Similarly in the assessment carried out on 12 August 2018 with the claimant, there was no mention of aggressive behaviour on her part. Aggression had been added, Mr Briggs submitted, to make it appear to be misconduct.

155. The reason for dismissal, he said, was that the claimant was not doing the job she was paid to do to the standard desired.

156. The allegation that the claimant had been aggressive did not stand up to scrutiny. There had been no investigation by the dismissing officer as ***Burchell*** required.

157. There had been a concession by the claimant to a very broad question put to her which appeared at page 67 of the bundle. To rely on that concession in circumstances where the claimant had a learning difficulty was something which no reasonable employer would do. The respondents knew that the claimant had a learning difficulty. They ought to have taken steps to ensure that the claimant clearly understood what was going on. There had been no investigation prior to the disciplinary hearing.

158. Turning to what Mr Briggs said was the real reason for dismissal, poor performance and failure to follow management instructions, he said that the only document relied upon was that of 12 August 2018. The claimant had not been reappraised after that. Ms Davidson had said that there was a *"treasure trove"* of documentation. The Tribunal should have a large degree of hesitation before accepting that. The documentation was not before the Tribunal and there had been no mention of it until the Tribunal.

159. As to reasonable belief on the part of the respondents in the behaviour of the claimant, there had been no serious intellectual engagement, Mr Briggs said, by Ms Davidson with the document produced from the meeting on 12 August 2018. That was, he said, a *"fig leaf"* produced at the disciplinary hearing. The scoring was not appropriate in some instances looking at the claimant's

role. No reasonable employer could conclude on the basis of this one document that the claimant had been guilty of gross misconduct.

160. Further, what had been sent to the claimant was wholly insufficient to allow her to prepare adequately for the disciplinary hearing and to present her defence. She did not have the first clue what she was facing.

161. As an example of this, there was reference to abrupt tone on her part. That was not something which she could defend. It was vague and unspecific. This matter ought to be spelt out in the circumstance of any employee but particularly given that the claimant had learning difficulties.

162. As to the decision to dismiss, no reasonable employer would dismiss an employee on the three allegations advanced. The decision lay outwith the band of reasonableness.

163. If the claimant was not doing her job properly then it was up to the respondents to say what she was not doing and the risks from her point of view if she did not improve. They then ought to have provided reasonable assistance in that area. The claimant was not maintaining that the respondents should have to employ her *ad infinitum* as Mr Robinson had suggested. It was however appropriate that she was given a reasonable time within which to improve.

164. There was a clear distinction between conduct and capability. That went to the heart of the fairness of the dismissal.

165. At appeal, there had been no attempt by the respondents to go back and to reopen issues. It was clear from the questions asked that the claimant did not know what it was she was supposed to have done.

166. In relation to wrongful dismissal, the matters founded upon were not a fundamental breach of contract. There was insufficient evidence from which to conclude that the claimant had acted aggressively. There was an admission as to anger having been exhibited by kicking of a door in May of 2017. The respondents had however waited too long to act upon that breach

and had waived it. Poor performance was not a material breach of contract. Notice was therefore required rather than dismissal without notice.

167. Turning to the case of discrimination brought, Mr Briggs said that the claim under section 15 of the EQA was made out.

168. The unfavourable treatment was dismissal. That arose in consequence of the disability of the claimant. That disability had resulted in her work performance. Assessed on any objective criteria, her performance was clearly impaired by the fact that she had a disability. It was accepted that there had been no medical evidence. The learning difficulty had however affected her work performance.

169. There was a paucity of evidence, Mr Briggs submitted, regarding aggression on the part of the claimant. The earlier incident had been referred to by the respondents. That was not similar to the matters raised at a disciplinary hearing. The earlier incident had occurred after the claimant herself had been abused by a customer, Mr Briggs said. She had admitted that she had lost her temper and kicked the door. She denied shouting at a customer. It did not follow that as she had been involved in this conduct in May, she had then been aggressive in August or September.

170. Looking at the defence to the claim under section 15, Mr Briggs said that the respondents' reaction was wholly disproportionate. There had not been much evidence about issues with Morrisons other than the broad statement that the respondents required to keep Morrisons happy. There had been no evidence as to possible cancellation of the contract by Morrisons or of any financial impact or cost if they did that. There was no need to dismiss the claimant. That was not a proportionate means of achieving a legitimate aim. There had been an abrupt dismissal which was not capable of justification. Justification became more appropriate if time passed and efforts failed in having performance addressed by the claimant. She could have been kept on with consequences of failure spelt out to her and with more time being given to her to settle in. There would come a point when it was proportionate

to dismiss her. That however had not been reached. Had the position been that the respondents were saying that they needed to get rid of the claimant to avoid cancellation of the contract, that might have been a reason to take steps to end her employment. That was not however the case here.

171. The same arguments applied in relation to the reasonable adjustments case as to the case brought under section 15, Mr Briggs said. Reasonable steps could have been taken to remove the disadvantage. The claimant could have been kept in employment. As to how long she was kept in employment, that could have been kept under review. The PCP was the requirement to obtain a certain level of competence and of conduct in employment. Disability had impaired her achieving that. Performance management was appropriate.

172. Mr Briggs reminded the Tribunal that Ms Davidson had said that the claimant was treated the same as was anyone else.

173. In relation to remedy, both the claimant and Ms Nanguy had spoken of the difficulty of finding alternative work. There had been contradictory evidence from the claimant as to what steps she had taken. The Tribunal should prefer the evidence of Ms Nanguy as to the steps taken by the claimant. Ms Nanguy's evidence had been that the claimant had obtained a week's work experience with Marks & Spencers although had not received any payment for that. She had also done voluntary work.

174. Mr Briggs said that if the Tribunal accepted that the claimant had not applied for other jobs then it would involve a finding that Ms Nanguy was mistaken or had lied. The evidence on this point from the claimant should be treated with caution.

175. The claimant's disability made it difficult for her to find work. The Tribunal should view her as having mitigated her loss.

176. Three years of wage loss was not unreasonable in the context of the disability claim. Mr Briggs confirmed that it was accepted that the cap applied in relation to the unfair dismissal claim.

177. Mr Briggs said it was appropriate that the first six weeks be awarded as damages for breach of contract with wage loss then applying thereafter.

5 178. In relation to injury to feelings, the dismissal of someone who had learning difficulties had caused upset. The claimant had been employed for some six years. Ms Nanguy had talked of the upset on the part of the claimant.

Brief reply from the respondent

179. Mr Robinson repeated his position that it put the respondents in an impossible
10 position if the Tribunal was to accept evidence from the claimant which supported her case but to reject evidence from her where it did not support her case. The Tribunal should think very carefully before adopting that position.

15 180. There had not in reality been a great deal of difference between the evidence of the claimant and Ms Nanguy in relation to impact of dismissal. It was clear that there had not been substantial job hunting. No evidence had been led as to difficulty in obtaining work. The claimant did not say that she had tried and failed to find work and Ms Nanguy did not say that either. Three years
20 wage loss was not appropriate as an award.

181. In response to the submission as to the witnesses for the respondents, Mr Robinson reminded the Tribunal that Ms Davidson did not work for the respondents any longer. She had no motivation to give any evidence other
25 than the truth. She had taken time off the new place of work to attend to give evidence. It had not been put to her that she was giving guarded evidence.

182. The respondents were entitled to take into account aggression on the part of the claimant. Ms Collinton had said that she understood Ms Meeten's
30 statement to express her thought that the claimant had shown aggression to her.

183. It had not been put to witnesses that conduct was *"lipstick".* It was not being suggested by the respondents that the claimant was going about being aggressive to everyone all the time. It was difficult however to know what further investigation was required. The claimant said that she knew what the charges were about. She had a final written warning. That had said that a future breach of any disciplinary rules would result in a disciplinary hearing and possible dismissal. She had been told by her line manager that she required to improve. There had also been numerous extended conversations with Ms Davidson regarding her performance.

184. The claimant did not say that she had not been aggressive. She did not dispute having being aggressive. She was accompanied by a union representative. Neither the claimant herself nor her union representative had sought any further investigation.

185. The claimant had been given a reasonable time to improve. That had been the case since June at the latest when she had a final warning. She had been told by her manager in August of the continuing problems. Those had also been highlighted to her *"on the floor"* on numerous occasions. It was arguable that the respondents should have acted sooner.

186. Medical evidence was necessary, said Mr Robinson, if it was to be argued that the learning difficulties had caused the circumstances in which dismissal had applied. The most which could be discerned was that the claimant forgot to do tasks. There is no suggestion that her learning difficulties caused her to refuse to do tasks or to exhibit aggressive behaviour. It did not require to get to the point where Morrisons were going to cancel the contract before the respondents could act.

187. The case of ***Iceland*** was referred to. The Tribunal had to look at what a reasonable employer in that type of business would do.

188. The claimant had a list of tasks which she was to do. It was difficult to provide her with clearer objectives as Mr Briggs seemed to say was appropriate. The

claimant could not herself suggest any steps which might be taken either at the time or at Tribunal. She had been given time in which to respond.

189. It was difficult for the claimant, Mr Robinson accepted. The respondents had sympathy with her. The point had been reached however where action was appropriately taken.

190. There was in reality no link between the disability of the claimant and her conduct or capability.

191. The Tribunal should keep in mind that she had been given a list and had been shown how to do things with retraining also being involved.

Discussion and decision

192. There was no dispute in this case that the claimant was disabled by reason of her learning difficulties. The respondents accepted that they were aware or ought to have been of that disability.

193. The claims which the Tribunal was asked to determine were as recorded above namely:

- whether the dismissal was unfair in terms of ERA;
- whether there had been a failure to make reasonable adjustments, the adjustment contended for being in order to address the PCP said by the claimant to be applicable. That PCP was the requirement to clean to a certain standard and to have a certain standard of conduct. The reasonable adjustment which had not been carried out and which was alleged to be a failing in that duty was to give more time to the claimant before dismissal;
- whether there was discrimination through unfavourable treatment, namely dismissal, because of something arising in connection with her disability. The *"something"* which arose in consequence of the claimant's disability was said by the claimant to be memory loss.

194. The Tribunal claim and its defence were conducted over a two day hearing, concluding at just prior to 3.30pm on the second day. Both parties were represented by experienced solicitors. The case gave rise to many issues and has not proved an easy one for the Tribunal to determine.

195. The claim of direct discrimination was withdrawn by the claimant. She also did not allege that there had been an act of discrimination, whether direct discrimination, failure to make reasonable adjustments or discrimination arising from disability, in the period prior to dismissal.

196. There was no medical evidence led as to the extent of the claimant's disability. The "*something*" arising from her disability which the claimant said had led to the unfavourable treatment by way of dismissal was memory loss, as mentioned above.

197. The respondents had sought to assist the claimant in performance of her duties including in particular by giving her a ticklist to assist her to remember the tasks which she was to carry out. They did not propose any other steps as possible adjustments. The claimant and her union representative did not suggest any further steps which the respondents might take by way of reasonable adjustments. Similarly, at Tribunal, there was no position put to the Tribunal that a reasonable adjustment could appropriately have been made, other than the one said to constitute the failure on the part of the respondents, namely granting of more time to the claimant rather than dismissing her.

198. It was not said on behalf of the claimant that the final written warning issued was manifestly inappropriate or was in any sense discriminatory. The claimant did not seek to *"open up"* that final warning. She had not appealed against it being issued to her. The context of the decision made therefore by the respondents was one in which the final written warning had been issued to the claimant with intimation that any further breaches would result in disciplinary action and potential dismissal. That final written warning was

issued on 16 June 2017. That was the date on which the claimant started at the Crossmyloof store, her transfer being as a result of that disciplinary action.

Wrongful Dismissal

199. The Tribunal unanimously concluded from the evidence that the respondents had determined that misconduct on the part of the claimant was to be viewed as gross misconduct warranting summary dismissal by reason of her behaviour having been aggressive in the view of the respondents. It had been what they had viewed as aggressive behaviour which had led to that categorisation on their part.

200. The refusal to do tasks had not been by way of any form of *"showdown".* The claimant had on occasions been asked to do a task and had said "*no*" to that. Similarly, the poor performance had not led to any particular incident. It would be unusual for poor performance to warrant summary dismissal. There was no explanation of how that element fitted into the Gross Misconduct section in the handbook or why it might be categorised as a fundamental breach of contract by the claimant warranting summary dismissal.

201. The Tribunal was not satisfied that the description of the claimant's behaviour as *"aggressive"* was the appropriate label to place upon it based on the evidence which the respondents had. It may be that the statements made by Morrisons' staff went further than the written material which the respondents had, although that was unclear both from the disciplinary appeal meetings and indeed from the evidence at the Tribunal hearing.

202. The claimant was in receipt of a final written warning as mentioned above. There clearly had been an issue at an earlier time with the claimant's behaviour towards a member of the public. It was difficult to know what the basis was for the respondents attaching the label of "*aggressive"* to the claimant's behaviour after that incident.

203. There obviously was an ongoing issue with the behaviour of the claimant. Ms Meeton spoke to that. She described the behaviour as being *"very abrupt".* She said that she felt intimidated. She referred to Morrisons' staff having spoken to her about the claimant's attitude. The claimant herself accepted that she had not spoken particularly nicely to Ashley (Ms Meeton). The Tribunal was not satisfied, however, that the behaviour of the claimant as that was explained to it and as it had been set out in the disciplinary process could properly be labelled as being aggressive. There was no specific incident mentioned by Ms Meeton. The Tribunal did not read the notes of the internal disciplinary and appeal meetings as revealing in any admission of aggressive behaviour by the claimant. The claimant was clear at the Tribunal that her behaviour had not been aggressive. Both Ms Davidson and Ms Colligan accepted that the claimant had not been aggressive to them and that they had never seen her being aggressive. That did not mean, as the respondents said and as the claimant accepted, that she had not been aggressive to others. There was however no evidence before the Tribunal, which provided a basis for it to determine that the claimant's behaviour had actually been aggressive.

204. Whilst the Tribunal understood concern over the attitude and approach of the claimant, there therefore was no material put to the claimant or indeed led at Tribunal which could lead the Tribunal to conclude that there had been aggressive behaviour by the claimant since moving to Crossmyloof. The Tribunal did not therefore find there to be a basis for the decision that the claimant had been *"guilty"* of gross misconduct by virtue of aggressive behaviour. The other elements (poor performance, not doing some tasks and refusing to carry out management instructions) whilst established in the view of the Tribunal, did not, on the evidence before the Tribunal, lead to a situation in which summary dismissal was warranted in law.

205. For that reason, the claim of wrongful dismissal is successful in the unanimous view of the Tribunal. Any dismissal of the claimant ought to have been on the basis of notice being given to her or alternatively payment in lieu of notice. The claimant had worked for the respondents, taking account of

her time with Morrisons, for six years. Her gross weekly wage was £129.71. That is set out in the schedule of loss and was not challenged at Tribunal. The sum to which she is therefore entitled is £778.26, six weeks' pay.

Reason for Dismissal

206. The reason for dismissal amounted, in the view of the Tribunal, to an amalgam of conduct and performance. One element was the claimant's behaviour as mentioned. The respondents also had their view on the standard of her performance and also upon the failure to carry out management instructions. The claimant accepted that there were deficiencies in her performance over a period, that she had not, reasonably regularly, done some tasks allocated to her and that she had refused to carry out some tasks notwithstanding management instruction so to do.

207. The Tribunal was unanimously satisfied that the grounds of dismissal were the failure to follow instructions to carry out particular tasks and also the unsatisfactory standard of performance of work carried out by the claimant, which had not improved over a period despite this being raised with her on various occasions by the respondents. There was also clearly an issue with the behaviour of the claimant, relating to her interaction with others. The respondents regarded this as being aggressive behaviour and set that out as being one of the reasons for dismissal. The Tribunal was satisfied that the interaction between the claimant and other members of the respondents' and indeed with staff of Morrisons' was not as it ought to have been and had not improved despite that being raised with the claimant. Behaviour did therefore form part of the reason for dismissal.

208. The reason for dismissal was potentially fair.

209. All three elements, performance, behaviour and refusal to carry out instructions, were said by Ms Davidson and Ms Colligan to form the basis of the decision to dismiss the claimant. The three elements were not broken down in the evidence at Tribunal. There was, for example, no questioning of

the witnesses as to what their position would have been had it simply, for example, been a question of poor performance or had it been poor performance together with failure to carry out a reasonable management instruction which was before them as the general basis for disciplinary action.

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210. The Tribunal was satisfied that the respondents had a genuine belief in the reason given for dismissal. The reason was a potentially fair one in the unanimous decision of the Tribunal.

Failure to Provide Written Statement of Employment Particulars

10 211. The Tribunal noted that it was accepted by the claimant the claimant that she had received the Handbook from the respondents. There was no evidence as to there being, or not being, any contract of employment or statement of written particulars of employment.

15 212. There was therefore no evidence to support a claim under Section 38 of the Employment Act 2002. Any such claim, to be successful, depends on there being a successful claim of the type detailed in Schedule 5 of that Act. There was no such successful claim in this case.

20 213. For those reasons the claim under Section 38 of the Employment Act 2002 is unsuccessful.

Majority Decision

Assessment of claimant

214. The majority of the Tribunal (Employment Judge Gall and Mr O'Hagan) was
25 satisfied that the claimant gave answers to the best of her recollection and ability and, where she accepted points, did not simply do so in order to please the questioner. She took issue at the disciplinary and appeal hearings with some points raised with her and indeed did so when questioned at Tribunal. She was also able on all three occasions to reflect back to working with the
30 respondents and, in the internal processes for example, to remember times when she had been asked to redo work, times when she had refused to carry

out tasks and times when she had simply not done tasks. She was able to describe what her job entailed. She volunteered that Morrisons' staff were not happy with her standard of work. She accepted that if she was unsure of what was meant in a particular circumstance, she would ask about this. It was also her evidence that the respondents had been helpful to her, with Ms Meeton showing her what to do in particular areas and working with her.

215. The majority of the Tribunal therefore was satisfied that where the claimant made a concession, she did so in the knowledge of what it was she was being asked, answering the question as she genuinely wished to do so. The majority of the Tribunal was not of the view that the claimant, when she made a concession or accepted culpability for any particular matter, was simply doing this in order to appease or please the questioner. The questions put to her in cross examination at the Tribunal hearing were not put in any aggressive or intimidating tone or in any tricky fashion where, for example, double negatives were involved.

216. Where therefore a concession was made or an answer given which did not entirely favour her own position, the majority was satisfied that it could treat that as the genuine position on the part of the claimant.

217. Significantly, there was often consistency around the claimant's position on these matters. As examples of this, the claimant accepted both in the internal process and at Tribunal that she had not carried out jobs although had been asked to do that. She also accepted both in the internal process and at Tribunal that she had not carried out jobs satisfactorily and had to be asked to redo them. She accepted in the disciplinary process that she had not spoken particularly nicely to Ms Meeton at some points. She also accepted at Tribunal that Ms Davidson had spoken to her at different times regarding her performance and her interaction with others. In response to questioning from her own solicitor, she said that she carried the list of tasks with her.

<u>Fairness of dismissal</u>

218. The majority concluded that in the circumstances, on the basis of the information before the respondents as to the claimant's behaviour, poor performance and failure to follow instructions, given the attempts made to address those matters by the respondents, the decision to dismiss her lay within the band of reasonable responses of a reasonable employer. Clearly, some employers might not have dismissed or might have waited longer to see whether these matters were addressed and resolved with the claimant. The majority concluded that the decision to dismiss however was not one which could be said to lie outwith the band of reasonable responses of a reasonable employer. It could not be said that no reasonable employer acting reasonably would dismiss the claimant.

219. There was an element of concern on the part of the majority as to the information given to the claimant prior to and at the disciplinary hearing to enable her to respond. The Tribunal was in a little difficulty in this regard. There was reference during the hearing to there being training records and informal performance reviews present at the disciplinary hearing. Those were exhibited to the claimant during the hearing. No documentation relating to these matters was, however, produced to the Tribunal. Training records were shown to the claimant during the internal disciplinary process. The claimant did not raise any matter in relation to those documents whether at the disciplinary hearing, the appeal or the tribunal hearing. There was reference to staff from Morrisons' having made complaints and indeed to statements. It appeared that those had not been given to the claimant.

220. Against those concerns, the majority weighed in their consideration the fact that neither the claimant nor her trade union representative, nor indeed Ms Nanguy at appeal stage, challenged the respondents by seeking specifics of the refusals to do work which were said to have existed, or the failure to perform work to a satisfactory standard which was said to have occurred. Indeed there was acceptance that this behaviour had occurred.

221. The Tribunal concluded that the respondents, on the evidence before them, had reasonable grounds for the belief which they held as to the claimant's conduct and poor performance, conduct extending to the refusal to carry out tasks as requested as well as the general behaviour or approach of the claimant.

222. It was therefore the view of the majority of the Tribunal that the investigation, in the context of what was accepted, was a reasonable one in the sense that it lay within the band of reasonable investigations which would be carried out by a reasonable employer. It therefore met the test in ***Hitt***.

223. The decision to dismiss must also be seen in the context of there being a final written warning just under four months prior to dismissal.

224. As detailed above the decision to dismiss lay within the band of reasonable responses of a reasonable employer in the view of the majority of the Tribunal. It was therefore the decision of the majority of the Tribunal that the dismissal was not unfair and that the claim in that regard was unsuccessful.

Discrimination

Failure to make reasonable adjustments

225. The majority of the Tribunal did not regard there as having been a failure on the part of the respondents to make reasonable adjustments.

226. The PCP identified by the claimant was the requirement to meet certain standards of competency and conduct. It was said that this placed the claimant at a substantial disadvantage due to her disability. As identified above, the disability was that of learning difficulties. The aspect advanced as the way in which that affected the claimant was that it meant that she had memory difficulties.

227. The reasonable adjustment which it was said the respondents ought to have made and which they had failed to make was that of permitting the claimant

more time rather than dismissing her. Given the claimant's position as to the PCP and the nature and effect of her disabilities, the majority of the Tribunal were of the view that the reasonable adjustment put forward of more time being given to the claimant rather than dismissal occurring, would not have addressed the substantial disadvantage to which it was said that the claimant was put by the PCP. It was difficult to see that this would avoid the disadvantage given that refusal to carry out instructions and poor performance were not said to have occurred as a result of the claimant's disability. Awareness of memory difficulties on the part of the claimant had seen the respondents make an adjustment by providing the claimant with a list of her daily tasks. That enabled her to consult it and use it as a prompt, ticking off jobs as she did them. Notwithstanding that, the issues of refusal to carry out some work, issues with poor performance and the requirement to redo work and issues with tasks not being done continued.

228. At Tribunal, the claimant said that she believed that it was appropriate to give her more time to allow her to get better at her job. Her disability, which as mentioned evidenced itself by way of memory difficulty, did not however affect the standard of her work. It did not lead to her refusing to carry out tasks within her job role, when instructed to do those tasks.

229. The respondents could not themselves come up with any other adjustment which might assist the claimant. The claimant did not propose either at the stage of internal proceedings or at the Tribunal hearing any other steps which she or those assisting her, Mr Todd and Ms Nanguy, regarded as being possible adjustments.

230. The majority of the Tribunal therefore came to the view that this head of claim was unsuccessful.

Discrimination arising from disability

231. The "*something*" which arose in consequence of the claimant's disability was an issue with memory. That was as advanced on behalf of the claimant. There was no medical evidence given in the case. The claimant's position was that dismissal was the unfavourable treatment which was because of memory loss.

232. In the view of the majority of the Tribunal, there was no evidence at the disciplinary hearing or appeal or at the Tribunal that the decision to dismiss was affected in a significant way by a failure, caused by memory loss, to do particular elements of work. If that is incorrect as a conclusion, the majority of the Tribunal were satisfied, given the history and the issues which had occurred with the attempts made to address matters, that dismissal was a proportionate means of achieving a legitimate aim. The decision was based on performance being poor, refusal to carry out tasks requested and which were within the job role of the claimant and tasks not being done at all. There was no evidence that these matters were related to memory loss. The legitimate aim was to maintain the standard of performance of the respondents in cleaning the store at Crossmyloof. Morrisons' clearly had concerns as to the standard and as to the interaction of the claimant with their staff, in particular her refusal to carry out tasks at their request and the standard to which cleaning was carried out by her. Penalties could be imposed upon the respondents by Morrisons if poor performance occurred. The respondents existed to provide and carry out cleaning functions for clients. There was no sign of any improvement having taken place or despite efforts made in that regard.

Minority Decision

233. In the opinion of one member of the Tribunal, Mr Ross, the final written warning related to behaviour which was out of character for the claimant. To discipline her for that was unfavourable treatment. That final warning played a part in the decision to dismiss. Equally, the performance review carried out in August 2017 contained some nine elements out of the twelve elements which, in his view, did not apply to the claimant. To apply them to the claimant

was an act of discrimination, in his view. The performance review also played a part in the decision to dismiss. That decision to dismiss was also tainted by the consideration given to the performance review in reaching their decision to dismiss.

234. Mr Ross recognised that these points had not been contended for by the claimant in the claim form, in evidence or in submission. He was also aware that the claim of direct discrimination had been withdrawn. Nevertheless, his view was that where the Tribunal heard evidence which he regarded as discriminatory conduct, it was appropriate that the relevant finding be made, whether or not it was part of the evidence and case brought before the Tribunal. His opinion was therefore that the claimant was successful in her claim of discrimination.

235. In the opinion of Mr Ross, the comments or concessions made by the claimant whether at the internal disciplinary stage, appeal or Tribunal hearing, should not be accepted where the claimant made a concession or provided information contrary to her own interests. She was someone who wanted to please.

236. In relation to the alleged failure to make reasonable adjustments, his view was that the respondents had failed to meet the burden which he regarded as being placed upon them. In his view, a performance plan ought to have been put in place with a period of perhaps three months being given to the claimant to improve. He regarded the weight placed by the respondents on any admission by the claimant as being suspect given her disability. There was in his view no evidence that the respondents had treated the claimant as a disabled person in the process which they had undertaken.

237. It was also the view of Mr Ross that the dismissal was unfair. The allegations were vague and the claimant had trouble responding to them. The appeal against dismissal had been dealt with in an inadequate way by the respondents. The decision to dismiss was one which no reasonable employer acting reasonably would have taken.

238. Mr Ross would therefore have found that this was an unfair dismissal and that discrimination had occurred, the protected characteristic being disability. The discriminatory conduct consisted, in his view, of the decision to dismiss which was tainted by inclusion within it of consideration of the performance review and of what he viewed as a final warning tainted by discrimination.

239. It was also the view of Mr Ross that the description of the claimant's behaviour as being aggressive was not supported by the evidence the respondents had before them at the time. Further, he agreed with the other two members that gross misconduct had not occurred warranting summary dismissal. The claim of wrongful dismissal was, as recorded above, unanimously determined as being successful.

Employment Judge: Robert Gall
Date of Judgment: 21 September 2018
Entered in register: 27 September 2018
and copied to parties