EMPLOYMENT TRIBUNALS

Claimant **Respondent**

GT **v** **RV**

Heard at: London Central
On: 1 July – 8 July 2019
and 9 - 10 July and 16 August 2019 (in chambers)

Before: Employment Judge Hodgson
Ms C McClellan
Mr D Carter

Representation

For the Claimant: Mr P Smith, counsel
For the Respondent: Ms C Palmer, counsel

JUDGMENT

1. **The claim of unfair dismissal succeeds.**
2. **The claim of victimisation succeeds.**
3. **The claim of harassment fails.**
3. **The claim of failure to make reasonable adjustments succeeds.**
4. **The claim of breach of contract succeeds.**

REASONS

Introduction

1.1 On 2 May 2018, the tribunal accepted service of the claim form. He alleged unfair dismissal, wrongful dismissal, harassment, failure to make reasonable adjustments, and victimisation

The Issues

2.1 The issues were identified at the commencement of the hearing.

2.2 The tribunal produced a list of the issues, which was handed to the parties on day three of the hearing. The parties were invited to bring to the tribunal's attention, during the course of the hearing, any corrections.

2.3 The tribunal confirmed, in response to the respondent's request, that no soft copy would be provided. No comments were made on the issues during the hearing. The respondent sets out in its submissions a number of comments.

2.4 The issues are reproduced at appendix 1. Where necessary, we have noted the effect of the respondent's comments, as made in the written submissions.

2.5 There are claims of unfair dismissal, wrongful dismissal, harassment, failure to make reasonable adjustments, and victimisation.

Evidence

3.1 We received an opening note and draft chronology from the respondent.

3.2 We received a bundle of documents and a bundle of medical notes.

3.3 The claimant gave evidence and called the following witnesses: KA, CC, and HS.

3.4 The respondent called the following witnesses: LK, HH, JM, HY and KH.

3.5 The respondent also relied on a statement from PC who did not attend as he was not in the country.

3.6 Both parties gave oral submissions. The respondent provided written submissions and subsequent further supplementary written submissions. The claimant provided written submissions confirming the oral submissions.

Concessions/Applications

4.1 On day one, at the commencement of the hearing, we considered the issues.

4.2 It was noted there was an unfair dismissal claim. The respondent relies on a reason related to conduct, or some other substantial reason.

4.3 Disability was admitted and the parameters of the concession were recorded and set out in written note of the issues.

4.4 We explored the reasonable adjustments claim; it was apparent that there were a number of new claims raised concerning a disciplinary process which took place in 2015/2016. We confirmed that no claim could proceed in relation to the 2015/2016 disciplinary process without an amendment.

4.5 The claimant confirmed the harassment claim was identified correctly in the original issues.

4.6 We considered the victimisation claim. It was agreed that allegation 3 was unclear and Mr Smith confirmed that he would take instructions.

4.7 We considered the wrongful dismissal claim, the tribunal specifically asked the respondent to consider its position on affirmation.

4.8 Ms Palmer stated that the respondent had made a further rule 94 application on 28 June 2019, which was supported by a statement.

4.9 It remained the claimant's position that the respondent should not be anonymised. Initial submissions were heard in the public hearing. Ms Palmer indicated it would be necessary to first have a private hearing where matters could be discussed before the claimant and his representative. (Mr Smith had no security clearance, but the respondent had chosen to allow him to see a number of documents which may be sensitive for the purposes of national security.) Thereafter, it would be necessary to have a closed hearing.

4.10 It was the respondent's position that if the respondent were not anonymised, it would not be possible to have a public hearing. The claimant did not accept this.

4.11 It was necessary to have a closed hearing from which the claimant and his representative were excluded. This was to consider anonymisation of the respondent. The detail of the closed session cannot be recorded in these open reasons. We should note that the closed session was adjourned, for provision of further clarification, to resume the following day.

4.12 On day 2 of the hearing, we resumed in closed session. The respondent had provided a draft order for the purposes of the closed hearing. It had also been provided to the claimant. The draft order introduced two matters which had not previously been raised. The first concerned an attempt to remove references to the nature of the claimant’s work and other operational matters. It was envisaged this would be by redaction from the bundle. The second concerned the removal of a document from the bundle.

4.13 In closed, we dealt only with the question of anonymisation of the respondent and the order for anonymisation was confirmed. The parties

and the witnesses will remain anonymised. We considered all relevant evidence and gave full oral reasons in the closed session. We confirmed the remainder of the respondent's application arising out of the letter of 28 June 2019 and the draft order would be considered in open.

4.14 On day 3, we resumed in open session. The tribunal had drafted a record of the issues, as discussed on day one. This was handed to the parties, and they were invited to consider the note as soon as was practicable and to confirm if it was accurate.

4.15 We confirmed we had made an order in the closed session continuing the anonymisation of the respondent and that the remainder of the rule 94 order, as made on 5 June 2019, continued.

4.16 The claimant had sent a letter raising a number of matters and we dealt with those. In particular, we noted that there were no written reasons which could be viewed, and that we could not give details of the reasons. W noted it would be possible for written reasons to be produced. However, we were not treating the letter as a request for written reasons. We confirmed that time would be extended to request such written reasons until time for requesting reasons in the main action.

4.17 As to the balance of the respondent's application of 28 June 2019, Ms Palmer stated the only matter being pursued was the removal of a single document from the bundle. It follows the request to redact the bundle in relation to the nature of the claimant's role was not pursued.

4.18 We considered it necessary to hear submissions in private. One member of the public objected. She did not identify herself; we stated she was not required to. However, we did enquire whether she was a witness or otherwise associated with either party. She indicated that she was not, but she was DV cleared and therefore believed that she should remain present. We noted that DV clearance is only one consideration. As to clearance, the general principle is even those who are cleared should only receive secret information on a need to know basis. As we considered it necessary to hear argument in private, we asked her to leave. She indicated that she would raise the matter with the Employment Appeal Tribunal.

4.19 The tribunal explain to the parties that it was necessary to hold a private session in order to review a document in the bundle said to be sensitive by reason of national security. It was the respondent's position that identification of, or discussion of the document, in public would lead to the claimant's identity being easily confirmed and also potentially the identity of the respondent. It may lead to identification of location 5 and thereafter location 3. None of this could be considered adequately in a public session without causing the damage which the respondent said must be prevented. Hence it was necessary to have a private session.

4.20 In the private session, we identified that there were a number of options. First, the document could be left in the bundle. Second, it could be treated as private. Third, it could be left in the bundle, but the entire hearing could proceed in private.

4.21 We noted that there had been no application to proceed entirely in private, and no such application was made at the hearing.

4.22 We ordered the sensitive document be removed from the public bundle and directed it should be treated as a private document. Any reference to the document should only be made in a private hearing. It followed, if reference was made to it by either party, it should be accompanied by a request to go into private.

4.23 As to our reasons, we confirmed them to the parties in the hearing. We should note, briefly, that we accepted that the documents was a public document. However, that was not determinative of whether it should be in the bundle for the purposes of this public hearing. There are situations when there are breaches of security. Such breaches may happen for numerous reasons. However, there may be matters which should be protected for the purposes of national security. Even where there are breaches, the fundamental principles employed to protect national security are not abandoned. Where it is necessary for individuals to have anonymity for the reason of their safety and others, and where it is necessary to maintain secrecy for legitimate reasons of national security, the fact that there may be speculation, or that there may be leaks or breaches, does not mean admissions must be made. It is still legitimate to seek to minimise any damage. Putting the document into the open bundle would be likely to lead to the claimant's identity being revealed more widely and would potentially undermine the legitimate attempt to maintain secrecy around location 3 and location 5. In the circumstances, removing the document and treating it as private was a proportionate response when the alternative was a hearing totally in private.

4.24 We then resumed the hearing in public, and the public were invited back.

4.25 When the hearing resumed, we noted that the claimant was, potentially, a vulnerable person. We had observed he had exhibited significant signs of stress. We noted our concern that he found the process difficult and we were concerned to minimise any further damage that may be caused to his health. Therefore, we needed to consider how to proceed in ways which allowed a fair hearing for the claimant and respondent, but which minimised any negative psychological impact.

4.26 We agreed that it was not necessary at that stage for any formal ground rules hearing. However, we indicated a number of possible approaches that the parties should endeavour to observe. First, the length of the cross examination could be limited, as far as practicable. Second, the claimant should be allowed breaks as necessary. Third, the cross examination should be focused and clear and designed to extract information, and as

far as possible, to avoid distress. We indicated that it may be appropriate for the parties to agree facts, as far as practicable. Moreover, it may not be necessary for the entirety of the respondent's case to be put to the claimant, as much of the background could be agreed or was uncontentious. All parties recognised the appropriateness of the suggestions and agreed to seek to apply those principles proactively.[1]

4.27 We considered the timetable. About a day had effectively been lost to the hearing to deal with the rule 94 application in closed. This could have been dealt with before the hearing had the matter been addressed by the respondent.

4.28 The respondent requested up to 7 hours to cross examine the claimant. Up to two days was requested for cross examination of the claimant's witnesses. Similarly, 2 days was requested to cross examine the respondent's witnesses. We noted that would leave insufficient time for proper consideration by the tribunal, which would require at least 2 days.

4.29 Both parties indicated they would need one hour for oral submissions. We confirmed we expected to receive written submissions, even if they were only to confirm the oral submissions given.

4.30 Following adjournment, we considered, briefly, the timetable proposed. We indicated that the time requested by both sides was unnecessary, as the factual issues in dispute were narrow, and much of the background was uncontroversial.

4.31 We dealt with one of the claimant's witnesses prior to lunch. We took an early lunch and resumed just after one. The tribunal, having reviewed the matter, considered the timetable further. We indicated that it appeared unnecessary to cross examine the claimant for up to 7 hours. We

[1] The tribunal notes paragraph 6 of the respondent's written submissions. The first part of that submission states, "The ET has exercised reasonable adjustments particularly in relation to the evidence of C and KA by limiting the cross examination permitted both in terms of topic and time. R understands the need for caution but observes that the ET must also ensure that our has a fair trial." The submissions fail to give any further detail. It is not accepted that the respondent was required to avoid any specific relevant topic, either by way of reasonable adjustment or otherwise. It is not accepted that the type of cross-examination allowed was curtailed by reasonable adjustment either as to topic or time. The time permitted for the cross examination of the claimant and his witnesses was more than sufficient, regardless of any need for a reasonable adjustment. The timetable was agreed. There was no indication by the respondent, either at the hearing, or in the submissions, that it had been unable to pursue any specific relevant topic, or the time allocated for cross examination of any witness was insufficient. The tribunal was lenient in allowing both parties to pursue cross examination as they saw fit, even though on occasions it noted the pursuit of irrelevant matters. We do not read the submissions as suggesting that any action taken by the tribunal prevented a fair trial; we observe we agree that the tribunal should ensure a fair trial, for all parties. As regards any limitation of topic, the only suggestion made to the respondent by the tribunal was that it may not be necessary to put the entirety of its case to the claimant. This was permissive and suggested no limitation. In no sense whatsoever could that be a disadvantage to the respondent; it was merely a suggestion and understood by all at the time that it was a matter open for discussion. As it was, the respondent did not seek to take advantage of the offer, and the scope of cross-examination was not curtailed, other than by the usual requirement that it should be relevant.

indicated that the rest of the afternoon should be sufficient to complete the cross examination, but that time would be extended if it became apparent that the time suggested was insufficient and should it be clear the cross-examination was reasonable and focussed in that it was not repetitive, and that it sought to deal succinctly only with matters which were sufficiently relevant.

4.32 There were a number of challenges to the cross examination in the afternoon; it was apparent that it did stray into irrelevant areas. Further, there was an attempt to cross examine the claimant on matters which were only relevant to credibility. Nevertheless, we agreed that the cross examination could continue for one hour on day 4.

4.33 The parties then cooperated to complete all evidence by the end of day 6. No complaint was made about any aspect of the management of the timetable, or the management of the available time, adopted by the tribunal.

4.34 We had oral submissions on day 6. Both parties provided written submissions (the respondent on the day, and the claimant subsequently). In addition, the respondent filed supplementary submissions.

4.35 Prior to submissions, neither party sought to raise any points in relation to the issues drafted by the tribunal. The respondent's written submissions contained a number of comments. It was unclear why these had not been raised earlier. There was reference to there being no soft copy of the issues form the tribunal, but the tribunal had not agreed to provide a soft copy and when the possibility had been raised, the tribunal stated it was disinclined to do so. The request was not renewed.

The Facts

Overview

5.1 The claimant is a civilian who undertook work with the military. During a social event on 12 December 2014, the claimant was involved in an incident with a female member of the military, WS. This led to an initial complaint which the claimant thought had been resolved. WS did not initially allege that there had been any physical contact of a sexual nature.

5.2 In November 2015, WS, for the first time, elected to approach the police. As a result, the claimant was prosecuted and was found guilty of sexual touching by a magistrates' court. That conviction was eventually overturned in February 2018 by the crown court (we do not know the name of the judge who dealt with it).

5.3 The claimant was not initially subject to any disciplinary action. The claimant faced two subsequent investigations. The nature of, and parameter of, the first investigation is unclear. It may have concerned an

unrelated complaint by another individual, HC. It commenced after WS's complaint to the police, but before his conviction on 5 October 2016. That investigation resulted in no formal disciplinary action. Whilst it appears to have arisen out of statement given by HC to the police, there were no proceedings in relation to any matter raised by HC.

5.4 Thereafter, following his conviction, a second investigation was undertaken by HY. There is dispute as to whether this was a new investigation concerning the events of 12 December 2014, or whether it was a continuation of an investigation which had never been closed. Whatever the position, it led to disciplinary proceedings and the claimant was dismissed on 6 December 2017, in his absence, by LK.

5.5 The claimant appealed the dismissal. The appeal was heard by HH, the director of human resources and security for the respondent. HH listed the appeal in the week leading up to the hearing of the criminal appeal. The claimant requested an adjournment till after the criminal appeal had been heard. In part, the claimant relied on the fact of his disability and requested reasonable adjustments. The claimant's appeal was dated 23 January 2018. HH confirmed on 25 January 2018 that the appeal would be held on 30 January 2018. The claimant's letter of 29 January requested a postponement of the hearing until after 6 February 2018, as the criminal appeal would be heard on 2 February 2018. HH refused the request, but adjourned until 31 January 2017; on that day, HH refused the claimant's appeal.

5.6 The criminal appeal went ahead on 2 February 2018. The conviction by the magistrates' court was overturned. The respondent, therefore, did not take into account either the content of, or the outcome of, the criminal appeal. It has been the respondent's position in this case the fact that the criminal conviction was overturned on appeal did not change the reasonableness of either the decision to dismiss, or the procedure adopted.

<u>The claimant's role</u>

5.7 The claimant started work for the respondent on 5 May 2009 as an operational team leader. He had been employed by the Armed Forces as an operator in military intelligence. He was approached by the respondent's chief of staff with the offer of a role. The team is made up of employees from multiple government organisations including the armed forces and the respondent. He worked at location 3.

5.8 It is accepted that the claimant performed well, and at times exceptionally, in his role. He was dismissed on two alleged separate counts of gross misconduct on 8 January 2018, following a hearing in his absence on 6 December 2017. His appeal was unsuccessful.

<u>The incident 12 December 2014</u>

5.9 The incident which founded the first allegation of gross misconduct occurred on 12 December 2014. In 2012, WS joined the team. She was part of the military. She worked in the team that the claimant led. Initially, they worked well together. However, there where issues and friction had developed which adversely affected their working relationship.

5.10 On 12 December 2014, both the claimant, GT, and WS attended a social drinks event with co-workers. It was an informal get-together before Christmas. Although the claimant denies being seriously inebriated, it is accepted that he, and others, including WS, consumed large quantities of alcohol.

5.11 The exact sequence of events is unclear. We have not heard from WS. As to her lack of attendance, we have not enquired why, nor has any information been volunteered. The claimant accepts that during the evening he chatted with WS. He states he tends to be demonstrative with his arms when speaking. At one point, his elbow touched WS's breast. He says it was a genuine accident. It happened a second time, and he states WS pointed it out. It happened a third time and he stated he apologised saying, "I can't believe that I've done that again." He describes her as pulling her cardigan around herself. He states that she was annoyed, but maintains any contact was an accident.

5.12 He describes tension at the event. LDB and IL had a drunken argument early in the evening, which nearly resulted in a physical confrontation. The claimant was then told by HC that LDB was going to "smash [his] face in."

5.13 Later in the evening, it is not clear whether this was before or after his elbow made contact with WS's breast, the claimant was in the toilet talking on his phone and he believes a member of the military team used a hand dryer so he could not hear. This led to him commenting to WS to have a word with LDB. At that time the claimant stated to her that she sided with her team and that was why she was "ineffective." He said she could not discipline her staff. He accepts this was an insensitive comment to make. He described WS as blowing up and being offended. She began to shout at him and left the room. The claimant followed WS and her colleague, JMC2, outside.

5.14 The claimant's account is that WS launched herself at him, waving her arms, and hit him in the face. We do not need to resolve whether that in fact happened. It is clear, and accepted by all, that JMC2, a member of the military, punched the claimant in the side of his head. JMC2 justified his actions by saying that WS "is my warrant officer." The claimant tried to report the assault that evening, but the on-site security officer refused to take down details or give him access to CCTV footage.

<u>Initial complaints and the initial action taken</u>

5.15 The claimant was not working the following day. CC, the claimant's immediate manager, who was employed by the respondent, initially heard a complaint from WS. WS reported the matter on Monday, 15 December 2014. Her complaint was that the claimant had questioned her performance, and had alleged she was distant and taking a lot of time off. She also mentioned that GT had knocked her breast with his elbow on two occasions. CC reports that she stated the first occasion was accidental, but the second was deliberate.

5.16 The claimant reported the matter on 16 December 2014 and complained that he been verbally and physically assaulted by WS's colleague, JMC2, and verbally by LDB who was very drunk.

5.17 CC realised it was a serious complaint and he escalated the matter to his senior, MR, and the commanding officer, WCW. He made no notes.

5.18 CC was not involved further, save that when he returned, he was sent a report from February 2015. This appeared to be produced by WCW and had been sent to him in error. We know of one report from the time, and we were informed it was produced by DW, and we will come to that in due course.

5.19 CC's evidence is that he believed the matter had been resolved informally, but in working with WS it became clear to him that she did not accept the matter had been resolved and he states in his view WS created a toxic environment; he is critical of her performance.

Informal resolution

5.20 When the claimant returned to work (it appears this was in December, but the claimant is unclear about the date) he states he reported the assault to CC, we do not need to resolve exactly when it was reported, but it was at least two days after the incident. CC told the claimant the matter would be reported to CC's senior, MR. It was also reported to JB. JB told the claimant that WS's commanding officer would interview the claimant; however, the claimant was not interviewed at that time, or at any time thereafter during any of the subsequent events, to obtain his account of the incident.

The claimant's absence and further action

5.21 In or around December 2014, as a result of the assault, the claimant suffered an episode of anxiety and was thereafter absent from work until 22 January 2015, albeit part of the initial period was holiday. He was prescribed antidepressants.

5.22 When he returned on 22 January 2015, CC told him, "This thing before Christmas, they are being stubborn about it." CC suggested the claimant apologise, so that it could be forgotten. The claimant was not told at this

stage of any formal complaint by WS. He was not told that there was any concern about him accidentally knocking her breast.

5.23 He believed that the complaint concerned his inappropriate comments concerning WS's effectiveness. He discussed the assault by JMC2 and agreed that he would not proceed with a formal complaint, as he was friendly with JMC2. The claimant believed JMC2 had already been subject to disciplinary proceedings and a further complaint could lead to a court-martial. The claimant did not believe he should be apologising, as he been assaulted, but he wished to keep the peace.

5.24 The claimant met with WS. They sat on the sofa in a corridor and he explained he was not happy with how things had escalated on 12 December; in that context, he offered an apology.

5.25 Around that time, or shortly thereafter, WS, without the claimant's knowledge, submitted an official complaint. That complaint was never shown to the claimant. He did not know that she had had a meeting with her superiors or that they suggested mediation. The claimant was unaware that there had been an investigation completed by DW or that a report had been produced. A report had been completed by DW, which has been referred to as a "point brief" (R1/387). He did not receive that until March 2016 when it formed part of the police investigation.

5.26 In February 2015, the claimant attended a meeting with JB who told the claimant that he must apologise. He was told then that WS wanted an apology about the fact he had knocked her breast with his elbow. The claimant stated the military personnel were closing rank and he wished to raise an official complaint about the assault, but was told, "You cannot now, that's all been done and dusted. They have conducted an investigation and it's concluded." The claimant confirmed he had played no part in the investigation and had not even been contacted.

5.27 The claimant was then told by MR that WS had complained and if he did not apologise, he would be moved. The claimant felt let down but was concerned that he may lose his job. He thought the action one-sided and unfair but nevertheless agreed to apologise. At 6 PM on 25 February 2015, the claimant was taken to a room where WS, her boss, MR, a military captain, an RAF flight lieutenant, and three others were present. He was told to apologise. The claimant felt intimidated and he was starting to suffer anxiety. He apologised. He disputes the description of this process as a mediation.

5.28 As far as claimant was concerned the matter was then closed.

<u>The investigation December 2014/January 2015</u>

5.29 It is apparent that a number of statements were taken. It is unclear exactly what information was obtained or from whom. We have DW's "points review" (R1/387), which is a summary. However, we have been

told a number of primary documents were destroyed. We do not know when, how, or why.

5.30 We are told that the points review was finalised in January 2015. However, the exact date is unclear from the document. It does contain a number of recommendations and refers to two incidents.

5.31 Incident 1 concerns a complaint about a sarcastic comment of a sexual nature made by IL (R1/388) and a verbal exchange. It does not appear to refer to the claimant.

5.32 Incident 2 does refer to the claimant and states that WS and GT "were chatting in general and also talking shop on occasion. At some point during a conversation there was a sudden verbal disagreement between WS and GT it quickly escalated to name-calling, gesticulation, finger pointing and shouting." It describes JM (we assume JMC2 referred to above) striking GT. WS alleged GT had made several inappropriate sexual lewd comments during the evening, but they are not specified. The note records "in spite of this, she insists that she does not wish to take any further action against GT in respect of the lewd and inappropriate remarks." There is no mention of him touching her breasts, whether accidentally or otherwise.

5.33 There is a record of an interview with WS (R1/393). Part of the record of the interview states, "He then changed the conversation, which is when unwelcome comments about WS's chest started. WS observes that GT talks with his hands and in doing so his elbow caught her chest at least three times during the evening. She admits it could have been accidental, although noted that he had managed to avoid doing this since 22 April 12 when she joined the team. WS pointed out to him that she wasn't happy and made a point of folding arms and clamping her cardigan shut when they chatted again until she thought the message had been understood."

<u>WS's complaint February 2015</u>

5.34 On 25 February, WS filed a service complaint (R1/401); she recounted the events of 12 December 2014. She refers to the claimant making inappropriate comments and says he "touched my breast a number of times during a series of conversations." She states that she told him to stop after the first occasion and made a point of folding her arms thereafter. She alleges he enquired about her sex life and would it be okay for him to "share [her] bed." She replied that she did not wish to discuss her personal life and only her two cats shared her bed.

5.35 It appears that it was this complaint which was dealt with in the "mediation."

5.36 On 27 February 2015, MR, who is from the military, wrote to CGB, from the respondent stating the military had now concluded their investigation. He recorded the matter was filed initially under sexual harassment, but the

wording of the complaint was consistent with inappropriate behaviour. MR states that LM and the GO agreed it was alcohol-fuelled inappropriate behaviour and best dealt with under the military's informal resolution model. He stated GT apologised at length and with sincerity, which was accepted by WS, and that both parties put the matter behind them (R1/73).

5.37 CGB replied on 27 February thanking MR for the update and asked for any copies of relevant documents. The email neither confirms that there would be no action against the claimant, nor that further action would be undertaken. We have no evidence as to what response was given at all, or whether any documentation was forwarded. What is clear is no action was then taken against the claimant at that time. This concluded the first stage of the relevant events.

The criminal proceedings

5.38 On 5 November 2015, nearly 11 months after the material incident, WS reported to the police that she alleged she had been sexually touched or assaulted by the claimant on 12 December 2014. Her email to PC (who we understand to be her line manager at the time) of 5 November 2015 (R1/76) refers to previous paperwork and made a number of further points. She states that the claimant's apology was not sincere. She alleged the claimant's line manager did not speak to the claimant for two weeks. She describes feeling stressed. She does not in this email describe what she alleged to be the sexual touching.

5.39 This email was forwarded to HY (head of casework for the respondent at the material time). PC informed HY and stated that he was meeting with WS to discuss the incident the following afternoon. It is unclear whether that meeting took place, or whether it led to any documentation. No such documentation has been disclosed to us. PC states that paperwork would be brought which would take 5 to 10 minutes to read. It is unclear what paperwork is referred to.

5.40 On 21 November, the claimant was interviewed by the police about an allegation of "sexual touching of WS." He records the allegation was that on 12 December 2014 that he had "placed [his] hand on her left breast cupping it and squeezing it slightly" and that "this had occurred a further three times during the night." This was the first reference to cupping or squeezing of the left breast and appears to be the matter being investigated by the police; therefore, it would appear to be the specific allegation made by WS. However, we have not received a copy of any statement made by WS to the police.

5.41 It appears that the version of events as reported to the police contradicted the version as recorded by DW, and was inconsistent with the account as given to CC.

5.42 On 10 December 2015, HY wrote to the claimant stating that she was aware that he was awaiting a summons to appear in the magistrates' court. She stated, "I must also inform you that I received a complaint about your behaviour in the workplace. I am conducting a separate disciplinary investigation in relation to this and would like to meet with you to conduct an investigatory interview" (R1/82). As to the complaint, she gives no details about the complainant, when it was made, or the alleged circumstances.

5.43 During these proceedings, this investigation by HY has been referred to as the first investigation. It is her case that it did not concern the events of 12 December 2014 and will return to that shortly.

5.44 The criminal trial at the magistrates' court took place on 5 October 2016. The claimant was convicted of sexual touching of an adult female. It is his case that he was told, by the respondent, that he should make no reference to his employment. He had no evidence of good character, employment history, or performance. He had no witnesses to support his account. He complained he was given no support by RV on how to defend himself without disclosing the identity of his employer. The claimant is critical of WS who he says was open about her employer and where she was located. He was cautious about how he answered questions, and believed this made him look evasive.

5.45 Notes were taken by JL at the magistrates' court hearing. The claimant is critical of those notes and states they are misleading. The notes suggested that he would be required to sign the sex offenders' register within three days, but he was not. It appears this reference to the register was in fact a mistake made by the magistrate.

5.46 The conviction led to his developed vetting (DV) security clearance being suspended on 10 October 2016. This was not a disciplinary suspension. We need consider this no further.

5.47 At the time the claimant was absent. We understand he did not present sick notes during the period of suspension, but he was absent from 5 October 2016. Whilst this entire period may not be covered by fitness notes from his GP, we have no doubt that his mental health was seriously affected and subject to deterioration. He found it extremely difficult to cope as a result of anxiety, inability to concentrate, and extreme stress, all of which led to suicidal ideation. The claimant's own description is that his health "deteriorated massively."

<u>The first investigation</u>

5.48 As noted above, HY conducted the investigation. This commenced on or around 10 December 2015 (R1/82). Ultimately, she wrote to the claimant on 6 September 2016, nearly 10 months later, stating "As you know the investigation considered your use of language and other behaviours that members of your staff found to be unacceptable, including the use of

swear words and inappropriate sexual innuendo." She went on to say that her decision was the allegations were "founded," but that she would not recommend "formal disciplinary action." However, she said she would be making recommendations. It is the respondent's position to the tribunal, as confirmed by HY, that, as regards the events of 12 December 2014, we are to treat this investigation as totally irrelevant. It is the respondent's case that it did not concern the events of 12 December 2014.

5.49 As to the matters under investigation, it is conceded that there is no clear statement, anywhere, whether in a report, an email, or otherwise, of the matters under investigation.

5.50 It is alleged that as a result of the criminal investigation, HC made some form of statement. We have not seen that statement. It appears that it concerns allegations against the claimant by HC and we understand some of those allegations go back as far as 2011. However, it is difficult to discern what was being investigated.

5.51 HY conceded that whilst she had in mind a number of matters raised by HC, as she began to interview witnesses, and as witnesses referred to various complaints about the claimant, those additional matters were also added as part of the investigation.

5.52 At no time was the claimant given any clear indication of the complaints that he was to answer. Whilst a number of matters were raised with him, no specific complaint was set out. As to the scope of and the purpose of the investigation, both are puzzling. It is clear that the investigation was not limited to any specific matters raised by HC, although some action by her appears to be the starting point.

5.53 A number of witnesses were interviewed, and we have been provided with a copy of the disciplinary investigation report produced by HY, albeit that it was not disclosed to the claimant until Friday, 28 June 2019. It is included at R1/144a; contained within the report is a summary of interviews and there is reference to "folio 1." It became apparent during the course of the hearing that there were specific records of interviews, including an interview with CC (who gave evidence for the claimant before us). The respondent chose to disclose the witness interviews after day 4 of this hearing before us. They were not disclosed as part of the original disclosure process. On 8 July 2019 the respondent provided a written explanation of its failure to disclose the documents earlier. It is alleged that a number of documents arising out of the investigation were disclosed but "that the remainder of that investigation was not relevant to the issues in the claim, understanding that it was a separate investigation to the police investigation and it was not an investigation of the allegation of sexual touching by the claimant on WS."

5.54 We have reviewed the statements disclosed. It is apparent that the document at 144a refers extensively to what is said to be a "background investigation" which refers, in detail, to the events of the evening on 12

December 2014. As regards the investigation conducted by HY, it refers to one member of staff providing a statement to the police of supporting evidence which led to her being interviewed.

5.55 An email from the police of 23 November 2015 (R1/381) refers to the criminal case and records it now has statements from MS and HC. It refers to the attachment containing a statement from HC. The email refers to an allegation by HC about "dry humping," but it states there is no criminal offence. The email goes on to say, "he was unaware it upset HC. " The email reports she never told him she did not like it; her usual reaction was to laugh it off and turn it into a joke. Whilst this is a report of the contents of her statement, the statement itself has not been disclosed. However, it was a document which was available to HY. As to whether the alleged dry humping was the focus of the first investigation, we have no direct evidence. HY's statement on this point lacks any relevant detail.

5.56 At paragraph 21 of her statement she simply refers to investigating the complaint from HC." What is meant by the complaint, and whether it was put in writing, is unclear.

5.57 It is apparent from the interview with CC that he was asked about the events on 12 December 2014 and his involvement. CC referred to the claimant agreeing the claimant accidentally touched WS's breast with his elbow. He confirmed that he had spoken to both the claimant and WS. It follows that a major part of the interview, in this first investigation, concerned the events of 12 December 2014 and the evidence which CC could give. It should be apparent from that interview that CC could have given material evidence about the nature of the complaint, as reported to him by WS immediately after the alleged incident on 12 December 2014.

5.58 It is clear that HY was also concerned about other conduct of the claimant. However, the conduct investigated was never set out clearly at any time. Moreover, even though she found the allegations founded, she did not set out adequately, or at all, what those allegations were. As to the relevance, there can be no doubt, whether it was HY's intention or not, that this investigation considered evidence relevant to the subsequent dismissal. At the very least, it was clear that CC could give relevant contemporaneous evidence. Moreover, it should have been obvious to the respondent, when reviewing these documents during disclosure, that they provided clear evidence about the events of 12 December 2014, and therefore were relevant documents.

<u>The second investigation and the subsequent disciplinary</u>

5.59 In early 2017, the respondent employed a new director of HR, HH. Mr HH, in his statement, states that the claimant's case "first came to my attention either as part of briefings by my staff on live issues within the department or as an exercise in reviewing outstanding complex cases within the department after my arrival." During cross-examination, he agreed the claimant's case was neither live, nor seen as an outstanding

complex case. He accepted that his statement was inaccurate. As to why the matter came to his attention, and the full circumstances thereof, his evidence was unsatisfactory. He was unable to give any adequate explanation.

5.60 He states that he was briefed about the documents, but it is unclear by whom, and he stated it resulted in informal mediation. He refers to the emails at pages 73 and 74 from 27 February 2015. The email from MR refers to documentation and an email from CGP requesting that documentation. As to whether that documentation was available to HH, his statement is silent. It remains unclear what documents were available to him, or what he saw. It is clear that he should have been alerted to the possibility of further documentation; however, it is unclear whether he sought it.

5.61 HH told HY that he wanted her to investigate the incident from 2014. She contacted WS to obtain a copy of the statement she had made to the police. HY knew the claimant had appealed his conviction.

5.62 Around that time, HY was contacted by the police and ultimately disclosed "details of the separate internal investigation." It is not clear exactly what was disclosed. This disclosure is a reference to the document at 144a. The contemporaneous emails appear to be from 28 June 2017 to 12 July 2017 (R1/225 – 227). It is apparent there was a request from the police on around 20 June 2017, as it was referred to in the email of 20 June, but we have not seen that request. Paperwork was sent on 12 July. Why this paperwork was requested, or why it was relevant, is unclear. It is difficult to reconcile HY's evidence to us that the first investigation was wholly irrelevant to the incident on 12 December 2014, with her disclosure of the same documentation to the police, presumably on the basis of relevance to the investigation of the events of 12 December 2014.

5.63 HY chose not to interview the claimant. As to the reasons for that omission, her statement is silent. HY's evidence to the tribunal was that she did not consider it to be appropriate. Although it was less clear to us whether that was because of an ongoing criminal appeal, or whether she considered that the account he gave at the magistrates', as recorded in the notes taken by the respondent, was adequate.

5.64 As to the reason for not interviewing WS she states this at paragraph 37:

> **After discussion with the HR team I proceeded with a shortened investigation process, relying mainly on the police investigation into the incident rather than carrying out a new investigation. In part this decision was due to the fact that I was unable to obtain the witness statement made by WS. She was also unable to obtain it and the alternative would be for her to give a further witness statement to me. We did not want to put her through this again given the obvious distress she displayed at the court hearing. Also, given that the burden of proof at the criminal hearing was "beyond all reasonable doubt" and the disciplinary process was "on the balance of probabilities", I did not believe that the panel would need additional information to make a decision.**

5.65 It follows an active decision was taken to not interview WS. It does not explain why the claimant was not interviewed. Moreover, the circumstances of the discussion within the HR team are not set out. If this resulted in any documentation whether by email, or otherwise, that information is not disclosed.

5.66 She goes on to say at paragraph 38 that she concluded her investigation in early July 2017 "such that it was," as she puts it in her statement. On 11 July 2017 she wrote to the claimant setting out the charges (R1/180).

5.67 HY compiled the disciplinary pack including an investigator's report and timeline. It included a number of press cuttings relating to adverse publicity around the incident and the summary of the case to the police. The point review from December 2014 was included together with a copy of WS's service complaint. She did not include her own previous investigation, or any of the witness statements obtained.

5.68 The letter of 11 July 2017 (R1/180) records the "charges" as follows:

> **Charge 1: that you touched a female colleague [WS] in an inappropriate manner, during a work-related social event on 12 December 2014.**
>
> **Charge 2: that as a result of your subsequent conviction for the offence of sexual touching you caused reputational damage to [RV].**

5.69 The initial disciplinary hearing was set for 21 July at 14:00.

5.70 The claimant did not receive the original letter, but did receive a follow-up letter on 18 July 2017. On 19 July 2017, the claimant's solicitor sent a letter confirming that the conviction was being appealed and that the panel should appreciate that the appeal was a right and therefore any decisions based on information at the magistrates' court should be "automatically treated as unsafe until such time as conviction is either quashed or upheld by a higher court" (R1/182).

5.71 It is the claimant's case that the appeal was delayed, at least in part, because of a failure to provide documentation by either the respondent or the military. The letter refers to his fragile mental health and requests that he be given ample opportunity to assess any evidence prior to the hearing.

5.72 HY says she consulted LK and they agreed it was not appropriate to defer the hearing indefinitely, albeit that is not entirely consistent with LK's evidence to us, in which she suggested that she was less concerned about delay.

5.73 The hearing was deferred until 11 August 2017, by letter of 28 July 2017 (R1/185).

5.74 On 8 August 2017, the claimant's solicitor confirmed, once again, that it was the claimant's right to appeal the conviction. The solicitor confirmed that the appeal had been put back to 8 December because of court and CPS failures. The solicitor stressed the effect on the claimant and the need for the crown court proceedings to be resolved.

5.75 On 10 August 2017, KA, the claimant's partner, wrote to the respondent on the claimant's behalf. She advised in the letter that he was not currently fit to travel to location 1, which we understand was several hours away, or endure the ordeal of the panel hearing. She urged the respondent to postpone the disciplinary hearing until after the criminal appeal was finalised and a medical report and/or counselling report was obtained. The letter specifically referred to the claimant's anxiety/depression and asserted it was a disability covered by the Equality Act 2010. It specifically noted an employer must consider reasonable adjustments under the Act, including adjustments to the disciplinary process. It stated, "It is unreasonable and unfair for him not be given access to the evidence against him before any disciplinary hearing takes place, and he should be given reasonable time and opportunity to prepare for the hearing" (R1/194). It records that the respondent had refused to send the documents because of security classification. The letter also makes general allegations that the claimant had not been treated fairly in accordance with the Employment Rights Act 1996 or the Equality Act 2010 and that there had been a "severe lack of line management responsibility" towards his mental health. It explains at length the severe effect on his mental health.

5.76 On 2 August 2017, the claimant by email requested "more detail regarding the charges… In particular charge 1." He stated, "It's very vague and ambiguous regarding what it is that you're trying to prove." At no time did he receive any clarification despite his request. In her statement, HY says the following, "I responded the next day setting out that the evidence relating to the charge was in the pack and that he'd been invited to view that either through contacting me or his representative at employee assistance… the claimant knew broadly what the charges were as they were related to his criminal conviction" (paragraph 43 of her statement). It follows no clarification was given.

5.77 Around that time, HY was removed by her line manager LK from direct involvement.

5.78 There is a specific allegation against LY which is that during a telephone conversation on 3 August 2017, HY stated, "Your mental health is your issue." Her account is that she may have said to him something about "taking control of his own recovery." In her statement she absolutely refutes the accusation that she meant it in the context of the respondent having no interest in his mental health.

5.79 The email from KA of 10 August referred to a copy of the recording being kept. It is unclear whether the conversation was recorded. The best

evidence we have is from the claimant that it would have been. The respondent has given no relevant evidence on this matter, despite being requested to consider giving such evidence. We find on the balance of probability it was recorded. We are told that any recording was not available at the time of disclosure. We have received no explanation for this, or any detail as to what investigations were appropriate, possible, or made. We find, on the balance of probability, that the account given by the claimant as to the words used is accurate.

The disciplinary

5.80 The disciplinary hearing was undertaken by LK, deputy director of HR operations. She first learned of the claimant's case in 2015 when she learned of the complaint to the police, but believed the matter had been resolved until HH joined the team in February 2017 and told her he had decided "to reopen the matter" (paragraph 4 of her statement).

5.81 In July 2017, HY told LK that she had decided the claimant had a case to answer. LK was appointed chair of the panel. She received the hearing pack (R1/345 – 443). LK agreed to a number of postponements and on 11 August 2017 asked the claimant to provide a prognosis for recovery from his doctor (R1/196). She accepted, in evidence, that it would have been appropriate for the respondent to take active steps to seek medical evidence either from the claimant's GP, or occupational health, or otherwise. She accepted by putting the onus on the claimant, she now believes she acted inappropriately.

5.82 There was further correspondence which concerned both the location for the disciplinary hearing and the obtaining of medical evidence; we do not need to record the detail of that at this stage. We should note the claimant's letter of 26 September 2017 (R1/213). He confirmed he would scan and send any medical certificate. He allegedly received no paperwork concerning how the hearing would work, details of the charges, or detail of how he could represent his own defence. He referred to difficulties with the location.

5.83 LK gives little evidence as to what then happened leading up to November. However, she records that JM succeeded HY as head of casework in September 2017 and proposed to LK the matter should be drawn to a conclusion. LK took no specific decision that it would not be appropriate to wait until after the criminal appeal, but concurred with JM's direction (see paragraph 10 of her statement). The hearing was then listed for 6 December 2017. The claimant was advised of this on 27 November 2017 (R1/231). The letter repeated the charges, but did nothing to clarify them. The disciplinary pack was forwarded to the claimant in a redacted form. No explanation was given either then, or since, as to why it could not have been redacted and sent earlier.

5.84 LK stated she was unaware that the claimant would not be attending until the morning of 6 December 2017; she was told to call JM. JM informed

LK that there had been a chain of emails from the claimant which were "abusive" and that she believed he would not attend.

5.85 LK neglected to ask for the emails. The emails had, in fact, been forwarded to her, but they had been sent to an email address LK did not check frequently. It is not clear to us which email address it was sent to, or why it was not checked. However, HY was alerted to the emails, and she chose not to request them, and so was unaware whether they contained relevant information.

5.86 The emails are relevant. The claimant's email of 4 December refers to the fact that no prognosis had been obtained from his GP because the respondent neglected to request one. He stated, "The disciplinary panel cannot be convened until you have considered an official medical update." He stated he was medically unfit, but would be unable to obtain a doctor's appointment until 6 December. The email itself is then concerned with criticisms of the process and observations about the disciplinary pack. It referred to the fact that civilians had been ordered not to communicate with the claimant. It referred to a failure to release documents regarding his character. It stated there is no statement from him within the paperwork; this was clearly referring to the fact that he was not interviewed. It asked why no statement was taken from him regarding the assault. It went into detail concerning the apologies he gave and the reason behind them. It records the fact that he could not pursue his complaint of assault because he was told it was past 3 months. It referred to HY's first investigation and stated he does not know who complained about him. This was a detailed and focused two-page letter. The matters raised in it are directly relevant to the disciplinary hearing, the conduct of it, and the available evidence.

5.87 In relation to this detailed email of 4 December 2017, LK says the following, "I've been copied into an email in from JM to the claimant on 4 December 2017 acknowledging that he did not intend to attend the hearing on 6 December but advising that it would still go ahead." She then explained that the emails were sent to an address she rarely used and that the emails were not checked. There is no suggestion that when JM spoke to LK that she alerted her to the email of 4 December 2017 which was clearly relevant to the conduct of the disciplinary hearing. LK did not take it into account.

5.88 The claimant's email makes it plain that he believed proceeding with the disciplinary hearing would leave him unable to defend himself.

5.89 It is unclear to us why JM considered the emails to be abusive. Whilst it is reasonable to say that at times the claimant's language was blunt and direct, it is hardly surprising language from someone who was clearly desperate to avoid dismissal, believed that he could not attend, and was seriously affected by mental health issues.

5.90 As to the email of 5 December from KA, this records that the GP said the respondent must contact the GP rather than the claimant. This was in response to JM's email of 5 December which specifically stated it was not the department's responsibility.

5.91 JM was unable to give any adequate explanation as to why she believed the emails were abusive. The reality is that the email of 4 December provided cogent submissions which were relevant to the disciplinary process, but it was not taken into account. Whilst we have no reason to doubt that it was sent to an email address not used regularly by LK, it was forwarded by JM, and the breakdown in communication between JM and LK is serious, and not one that should be expected.

5.92 LK confirmed that the panel discussed the documents in the pack and then reached its decision.

5.93 LK confirmed that the panel reached a unanimous decision. The pack documents were discussed. She confirmed that the claimant had provided no written evidence. They relied on the fact of the conviction, but her evidence is that the witness statements and other documents in the pack were considered and the witness evidence was found to be compelling.

5.94 LK confirmed that she had concluded, in relation to charge 1, that the claimant had cupped and squeezed WS's breast. It was her position that she did not rely solely on the conviction, but that she considered that the evidence in the pack, which she refers to as the witness statements, provided compelling evidence in support of her factual conclusion.

5.95 In her oral evidence she confirmed that the only statements considered were the record of the evidence given at the magistrates' court hearing. The reference to statements is a reference to the note about evidence in chief and cross examination of the various witnesses. LK was asked to detail which parts of those statements she relied on and found compelling. She referred to a number of references in particular she cited the following pages: 367, and 370. Page 367 is simply a general reference to the respondent's record. Page 370 is the account of the evidence of TK. TK was challenged under cross examination, at the magistrates' hearing as to her account that both hands were on both breasts and she stated "his hand brushed breasts." LK did not specifically refer to page 369, which is cross examination of WS at the magistrates' where there is reference to "touched breast."

5.96 Ms Palmer stated that the respondent accepted that none of the witnesses referred to cupping breasts at the magistrates' trial. The reference to cupping is in the opening statement of the prosecution which refers to cupping and squeezing breasts. That opening statement reflected the charges. The charges should reflect the exact complaint made be WS to the police.

5.97 LK also referred to DW's report from late December or early January 2014 (R1/387), but accepted that it did not refer to cupping breasts. LK confirmed that she was aware the claimant said that he had touched her breast with his elbow.

5.98 As to reputational damage, LK's statement states the respondent's reputation with the military partner had been damaged by the claimant's actions and there was damage to reputation of the military partner as the claimant was reported in the press as working for them. It is unclear why a misreporting by the press was considered to be reputational damage caused by the claimant; it appears that the military's involvement was identified as a result of the prosecution witnesses accounts, and not the claimant's account. His statement does not explain further why the respondent's reputation was damaged with the military and she was unable to expand on that evidence when cross-examined.

5.99 LK wrote to the claimant on 8 January 2018 dismissing him (R1/251). As regards the rationale for the decision, she simply repeats the charges, as put, but makes no attempt to explain further. As to the reason for proceeding in his absence she said at paragraph 4, "In the absence of any information from your GP to indicate that you might be well enough to attend a hearing in the near future, we informed you that we would be proceeding with the panel hearing on 6 December." It goes on to say that he provided no statement. It is unclear when, if at all, LK saw the claimant's letter of 4 December, and if so, why she did not consider that to be a written statement which should be considered. It is said that charge 1 and charge 2 were proven. There is an attachment which states that WS asserted the claimant had touched her in an inappropriate manner during a work-related social event. Again, the detail is not given. The document stated, "This charge was proven on the basis that you were convicted in court of the offence of sexual touching" (R1/253). It says nothing about consideration of any witness evidence from that hearing. In relation to charge 2, the appendix suggested it was the claimant's barrister who referred to the claimant's employer and place of work, but not detail is given. The written conclusion does not properly reflect the factual conclusions which she maintained before us she had reached. It does not refer to the claimant touching WS on her breast on three separate occasions or that WS had made it clear that the intention was unwelcome. It does not record LK's conclusion that the claimant had cupped and squeezed WS's breast.

5.100 The claimant was given the right of appeal.

<u>The appeal</u>

5.101 The claimant appealed by letter of 23 January 2018 (R1/258). This is a detailed letter and covers a number of points. We should detail the main points relied on. First, the claimant maintained his innocence and stated that the crown court appeal was due to take place on 2 February, 6 days following receipt of the letter of appeal. He records his mental health has

deteriorated significantly. He stated new witnesses had come forward since the magistrates' court hearing and it appeared to be his intention to call them for the criminal appeal.

5.102 He challenged the process giving a number of examples. He was concerned that the pack referred to him being put on the sex offenders register when that was incorrect and that it could have influenced the outcome. He confirmed the apologies were for comments about WS being an ineffective manager, and not in relation to any sexual touching. He stated he had provided a fit note. He stated that the investigating officer, fundamentally, failed to follow a fair investigation, in particular the failure to consider why he was not allowed to proceed with his own grievance. He noted his performance had been exceptional, not good. He noted he had been refused access to work. The respondent had materially failed to obtain medical evidence pursuant to the Access to Medical Reports Act 1988. The impact was worse because of his severe depression, anxiety, and post-traumatic stress disorder in relation to a crime for which he believed he would be proved innocent at the crown court. He therefore put in issue the relevant finding of fact as to his guilt.

5.103 He says in his letter he is a disabled person who would expect reasonable adjustments and further that the dismissal panel did not have a full view of his medical issues at the time it reached the decision. He says he was not permitted to bring forward witnesses who were no longer employed by the department despite his questioning this on a number of occasions. He says that HY told him that he could not rely on such witnesses and that breached natural justice. Nevertheless, those witnesses would now attend the crown court appeal. He urged the department not to make any decision prior to the crown court hearing. He stated he was not allowed to present his case fully and that the investigation was not fair. He says he had received no proper notes from the disciplinary hearing and in particular no notes as to the alleged considerable deliberations. He asked what alternatives to dismissal were considered.

5.104 On 25 January 2019, HH confirmed that the appeal would proceed on two basis: "1. New information relating to the case that was not considered by the panel. 2. The process has not been followed correctly" (R1/261). HH does not identify what is meant by new information. The hearing was listed for 30 January 2018.

5.105 By letter of 29 January 2018, the claimant wrote to HH stating that the date was not convenient, as it clashed with conference calls planned by his legal team prior to the crown court appeal; he noted he was due to have a review with his GP on 6 February when the appeal would be behind him. He offered to attend any appeal hearing after 7 February, as time was needed for him to fully prepare. He once again asked for an explanation as to what were the alleged considerable deliberations.

5.106 By letter of 29 January 2018, HH changed the location to location 1 and rescheduled the appeal for 15:00 on 31 January. The claimant responded

by letter of 30 January 2018 questioning whether HH had misunderstood his letter and the 'Wednesday' referred to. He confirmed the crown court appeal was due on Friday 2nd February and that every day that week he was involved in telephone conferences or face-to-face meetings in order to prepare for "one of the most important days in my life." He noted that there were three days to the crown court appeal date and 481 days since the original verdict handed down by the magistrates' court. He noted that the last postponement was not his fault, but was due to the fact the military had failed to disclose essential documents. He once again asked for an explanation as to what was discussed at the disciplinary hearing.

5.107 HH's reply of 30 January 2018 was brief (R1/273). He stated, "I appreciate that you will not be able to attend the meeting tomorrow, however, this letter is to inform you that the appeal will still be going ahead at 15:00 on Wednesday, 31 January 2018…" He stated that any new evidence should be submitted before 13:00 on 31 January. As to the rationale for the dismissal, he stated that had already been communicated.

5.108 In his statement, HH states that he asked for a briefing on the process to date and noted there have been long delays. He stated he considered the respondent had taken into account the claimant's health and his requests on many occasions. He decided that delaying would put the claimant in no better position. He thought there was evidence of repeated delay, but the delays had not been effective in helping the claimant to attend the hearing and therefore the hearing should go ahead. He explained to us his rationale was that he didn't believe the claimant would be able to attend, even if it were adjourned.

5.109 It is unclear what medical evidence HH had in mind. It is not clear what view he had, if any, on the respondent's assertion that the claimant should provide medical evidence and the respondent's failure to obtain medical evidence itself. His evidence is to the effect that he made a number of assumptions about what would be the evidence the claimant could present. He believed it must be prepared for the criminal appeal and therefore should have been available. However, this was an assumption that he made. He does not adequately explain what he made of the claimant's allegation that he had been refused the right to call witnesses. He did not believe the claimant's request was based on the fact he was too ill to attend the hearing. He did not believe that waiting for the crown court appeal would put the claimant in a better position. He expands on that reasoning at paragraph 16 of his statement where he refers to the criminal appeal and notes that the conviction was overturned.

5.110 He says he reviewed the transcript at some later date. He maintains his view that the decision to proceed before the criminal appeal was reasonable he maintains, despite the conviction being overturned, that there is nothing at all within the crown court transcript which would lead him to believe that the charges against the claimant were anything other than made out. He refers to the different criminal and civil standards

approved. In his oral evidence he conceded, contrary to his written evidence, that there was material within the crown court proceedings which may have materially affected his decision.

5.111 As regards the decision, he says at paragraph 15 that he proceeded to make the decision on the papers that he was given and refers to the disciplinary review pack. In his evidence before us, he confirmed that he, in fact, did not read the entirety of the pack, and it is unclear what he read and what he did not. He does say that he read the decision letter of 8 January, the claimant's letter of 23 January 2018 and his further letters of 30 and 31 January 2018. He makes no reference to the claimant's letter of 4 December, or the fact that this letter was not considered by LK.

5.112 HH's written evidence, as to his rationale, simply says that the claimant did not provide new evidence and further that he "considered each of the procedural points made by the claimant and concluded that he had not made out a case on any of them. HH explained this to the claimant in his letter.

5.113 The letter communicating the outcome of the appeal is dated 1 February 2018, and therefore prior to the crown court proceedings (R1/278).

5.114 His letter acknowledges the claimant wished to rely on new evidence but says it had not been provided to him.

5.115 He states he was satisfied that reference to the sex offenders' register was not a significant factor in the original panel's decision, but does not explain why. He is satisfied that the apology given by the claimant was not a significant factor in the panel's decision making but does not explain why.

5.116 As to the claimant's fitness to attend, he relied on the fact that the disciplinary hearing went ahead and that there was a "lack of any medical information on the likely prognosis for your recovery that might assist the panel." He does not acknowledge that the respondent had any obligation to obtain medical evidence or to explore the matter further.

5.117 As to the allegation that the investigating officer did not conduct a fair investigation he says, "The panel's decision was based on the facts of your conviction and the investigated evidence provided in the magistrates' court for sexual touching." On that basis, the investigation was said to be reasonable.

5.118 He stated the fact of good performance at work was not sufficiently relevant.

5.119 He stated that the claimant's ill health had no direct bearing on the disciplinary panel's decision, but he does not explain it further.

5.120 He stated that his view was that appropriate adjustments were made over a five-month period to provide the claimant with the opportunity to attend the disciplinary panel. The adjustments he had in mind, or how they facilitated the claimant's attendance, are not explained. His rationale for saying that reasonable adjustments were made is not set out.

5.121 He stated the witnesses who are not employees cannot be brought to the disciplinary panel for examination, but that the claimant could have stated his case. He did not explain why.

5.122 He believed that the original panel provided full reasons for their decision.

5.123 He said the panel had considered imposing a final written warning, as detailed in the decision letter.

5.124 He summarised by saying that a fair process was followed, and the panel had reasonable grounds for believing the claimant was guilty of charge 1 and charge 2.

<u>crown court appeal</u>

5.125 We do not need to consider this in detail. It is clear that the claimant's conviction was overturned. The name of the judge is not noted. However, the judge noted the allegation that original statement had been destroyed was a matter of policy. This appears to refer to statements taken from WS and others at the time, presumably by the military. The judge confirmed that what someone says initially is "of huge importance." It is apparent that the appeal was carefully considered initially during a conversation between the judge and counsel for both the prosecution and defendant.

5.126 Mr Wrack for the claimant was critical of the procedure in the magistrates' and was critical of the procedure adopted by the military. He referred to information being shredded. The judge expressed concern saying "this is what used to happen 40 years ago." Mr Wrack confirmed that he had seen a handwritten transcript of the evidence allowed by the magistrates and describes some of the matters allowed in evidence as "hair-raising," he stated, without objection, that counsel for the prosecution agreed with his observation. It is apparent that the circumstances, as understood from the documents available, from 12 December 2014 were outlined in detail. The report by DW was referred to. The initial allegation appeared to be that WS was caught by the claimant's elbow on three occasions. The judge noted that her allegation appeared to have developed by the time the criminal proceedings started and had become a hand cupping the breast. The judge noted that the initial report to the police was nearly a year after the event. The judge reiterated that the initial account of the complainant is crucial. Mr Wrack referred to WS's statements of 6 and 13 November and is critical of WS for remembering things in the second statement which she ought to have remembered in the first.

5.127 Counsel for the prosecution, Ms Summers, referred to the point brief report of DW and the fact that accounts that he recorded were not given to, or shown to, any of the individuals, albeit he maintained that he believed his record was accurate. The original notes, however, had been destroyed.

5.128 WS's statement of 6 November is referred to and appears to be quoted (R1/297). This refers to feeling a hand on the side of her left breast and states the claimant slightly squeezed the breast. The statement itself refers to his right hand being "cupped" over the left-hand side of her breast. It is clear, therefore, that a statement of 6 November 2015 refers to a cupping and squeezing of the breast. It was observed by both counsel and the judge that this contradicted the account as recorded in the point brief. It is apparent that the appeal then went into much further detail considering what had been the nature of the investigation. In the appeal, the judge continued to express concerns about various aspects of the procedure. At page 302 there is reference to CPT (it is not clear if this should be CBT) stating that he read DW's point brief after Christmas when he returned to work. He stated he was happy with the work done. It is therefore apparent that there was possibly a review by the respondent organisation. However, this is not absolutely clear. What is clear is that the point brief was shared, and action was taken; it is less clear what action the respondent took and we have already referred to this.

5.129 Ultimately, evidence was heard from WS. She confirmed that the claimant's hand had touched her left breast and she said, "Stop it." Following a lunch adjournment, the prosecution confirmed that there was no longer a realistic prospect of conviction. The judge agreed it was a sensible view. The judge made a number of comments (see R1/332). He drew a distinction between a reasonable prospect of conviction and the fact that the appellant could not have had a fair trial. The judge stated that it was certain he would have found an abuse of process on the basis of the inability of the defence to use material which had been destroyed. That material was highly relevant. The Crown stated it could not resist the abuse argument. The judge went on to say that the way the military went about examining the complaint was completely unsatisfactory. WS had been treated badly because of the failure of the military to follow proper procedure. He stated that the approach of the military would simply "not do." He quashed the conviction.

The law

6.1 Under section 98(1)(a) of the Employment Rights Act 1996 it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it

relates to the conduct of the employee. At this stage, the burden in showing the reason is on the respondent.

6.2 In considering whether or not the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in **British Home Stores v Burchell [1980] ICR 303**, and in particular the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal as confirmed by the **EAT in Sheffield Health and Social Care NHS Foundation Trust v Crabtree EAT/0331/09**.

6.3 In considering the fairness of the dismissal, the tribunal must have regard to the case of **Iceland Frozen Foods v Jones [1982] IRLR 439** and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the Employment Rights Act 1996. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal consider the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

6.4 The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (see **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**.)

6.5 The respondent's submission refers to a number of cases said to be relevant to reasonableness. We set out the relevant part of the submissions.

> **117. In considering whether an investigation is reasonable, the extent and form will vary according to the circumstances. As the ACAS Code explains, sometimes the investigation stage will only involve collating the evidence, on other occasions an investigatory meeting with the employee is required.**
> **a. It may be acceptable for an employer to rely upon a police investigation (including where there are no criminal charges) rather than conduct its own investigation: *Harding v Hampshire County Council EAT***

***0672/2004*. The EAT found that there was no obligation to re-interview the witnesses where there was no suggestion that the statements were inaccurate. The correct test is not whether further investigation could have been carried out, but whether the investigation is reasonable in all the circumstances.**
b. See also *Rhondda Cynon Taf County Borough Council v Close [2008] IRLR 868*, EAT: where the EAT concluded that it was not outside the bands of reasonableness for an employer to choose not to carry out its own independent questioning of witnesses, instead relying on police witness statements, even though they related to a different investigation.

118. Investigations / ACAS Code: if, once an investigation has been completed, disciplinary action is considered necessary, the ACAS Code requires that the employer should inform the employee in writing of the charge(s) against him or her and the possible consequences of the disciplinary action. At the investigatory stage, significantly reduced requirements apply as a matter of law (e.g. no need to be provided with specific charges, no right to be accompanied)

119. In considering a fair procedure, the employee should have an opportunity to consider the evidence against him and go through that evidence to set out his / her case, answer any allegations that have been made, a reasonable opportunity to ask questions and call witnesses and to raise points about any information provided by a witness.
a. A disciplinary hearing may go ahead in an employee's absence where the employee is persistently unable or unwilling to attend at a hearing without good cause;
b. There is no obligation for an employer to call a witness to the events and allow C to cross-examine them: *Santamera v Express cargo Forwarding t/a IEC Ltd [2003] IRLR 273* and Rhondaa (as above).
c. The fact that a witness is not an employee of R may also affect the question of attendance of witnesses: in which case a written statement can be obtained.

6.6 All of the cases cited are fact dependant. They remind us that each case must be treated on its own merits.

6.7 Harassment is defined in section 26 of the Equality Act 2010.

<u>Section 26 - Harassment</u>

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

> **(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are—**
>
> **age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.**

6.8 In **Richmond Pharmacology v Dhaliwal [2009] IRLR 336** the EAT (Underhill P presiding) in the context of a race discrimination case, made it clear that the approach to be taken to harassment claims should be broadly the same. The EAT observed that 'harassment' is now defined in a way that focuses on three elements. First, there is the question of unwanted conduct. Second, the tribunal should consider whether the conduct has the purpose or effect of either violating the claimant's dignity or creating an adverse environment for him or her. Third, was the conduct on the prohibited grounds?

6.9 In **Nazir and Aslam v Asim and Nottinghamshire Black Partnership UKEAT/0332/09/RN, [2010] EqLR 142**, the EAT emphasised the importance of the question of whether the conduct related to one of the prohibited grounds. The EAT in **Nazir** found that when a tribunal is considering whether facts have been proved from which a tribunal could conclude that harassment was on a prohibited ground, it was always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may in fact point strongly towards or against a conclusion that it was related to any protected characteristic and should not be left for consideration only as part of the explanation at the second stage.

6.10 In **Dhaliwal** the EAT noted harassment does have its boundaries:

> **We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award.**

6.11 Harassment may be unlawful if the conduct had either the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

6.12 A claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the Employment Tribunal to draw inferences as to what that true motive or intent actually was: the person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift, as it does in other areas of discrimination law.

6.13 Where the claimant relies on the 'effect' of the conduct in question, the perpetrator's motive or intention even if entirely innocent does not in itself afford a defence. The test in this regard has both subjective and objective elements to it. The assessment requires the tribunal to consider the effect of the conduct from the complainant's point of view: the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that effect: the objective element. The fact that the claimant is peculiarly sensitive to the treatment does not necessarily mean that harassment will be shown to exist.

6.14 The requirement to take into account the complainant's perception in deciding whether what has taken place could reasonably be considered to have caused offence reflects guidance given by the EAT in **Driskel v Peninsula Business Services Ltd [2000] IRLR 151**, which concerned the approach to be taken by employment tribunals in determining whether alleged harassment constituted discrimination on grounds of sex. In **Driskel** the EAT held that although the ultimate judgment as to whether conduct amounts to unlawful harassment involves an objective assessment by the tribunal of all the facts, the claimant's subjective perception of the conduct in question must also be considered.

6.15 Victimisation is defined in section 27 of the Equality Act 2010.

Section 27 - Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because--

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act--

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

> **(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.**
>
> **(4) This section applies only where the person subjected to a detriment is an individual.**
>
> **(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.**

6.16 Prior to the Equality Act 2010 the language of victimisation referred to less favourable treatment by reason of the protected act. Under the Equality Act 2010, victimisation occurs when the claimant is subject to a detriment because the claimant has done a protected act, or the respondent believes that he has done or may do the protected act.

6.17 We have to exercise some caution in considering the cases decided before the Equality Act 2010. However, those cases may still be helpful. It is not in our view necessary to consider the second question, as posed in **Derbyshire** below, which focuses on how others were or would be treated. It is not necessary to construct a comparator at all because one is focusing on the reason for the treatment.

6.18 When considering victimisation, it may be appropriate to consider the questions derived from Baroness Hale's analysis in **Derbyshire and Others v St Helens Metropolitan Borough Council and others 2007 ICR 841**. However as noted above there is no requirement now to specifically consider the treatment of others.

> **37. The first question concentrates upon the effect of what the employer has done upon the alleged victim. Is it a 'detriment' or, in the terms of the Directive, 'adverse treatment'? But this has to be treatment which a reasonable employee would or might consider detrimental… Lord Hope of Craighead, observed in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 at 292, paragraph 35, 'An unjustified sense of grievance cannot amount to "detriment"'.**
>
> **40. The second question focuses upon how the employer treats other people…**
>
> **41. The third question focuses upon the employers' reasons for their behaviour. Why did they do it? Was it, in the terms of the Directives, a 'reaction to' the women's claims? As Lord Nicholls of Birkenhead explained in *Khan*'s case [2001] IRLR 830, 833, paragraph 29, this**
>
> > **'does not raise a question of causation as that expression is usually understood ... The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'**

6.19 Detriment can take many forms. It could simply be general hostility. It may be dismissal or some other detriment. Omissions to act may constitute unfavourable treatment. It is, however, not enough for the

employee to say he or she has suffered a disadvantage. We note an unjustified sense of grievance is not a detriment.

6.20 The need to show that any alleged detriment must be capable of being objectively regarded as such was emphasised in **St Helens Metropolitan Borough Council v Derbyshire 2007 IRLR 540**. **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 IRLR 285** was cited and it was confirmed an unjustified sense of grievance cannot amount to detriment. That in our view remains good law. In **Derbyshire**, Lord Neuberger confirmed the detriment should be viewed from the point of view of the alleged victim. Rather than considering the 'honest and reasonable test as suggested in Khan' the focus should be on what constitutes a detriment. It is arguable therefore that whether an action amounts to victimisation will depend at least partly on the perception of the employee provided that perception is reasonable. It is this reasonable perception that the employer must have regard to when taking action and when considering whether that action could be construed as victimisation. Detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment. The detriment cannot be made out simply by an individual exhibiting mental distress, it would also have to be objectively reasonable in all the circumstances. The stress and worry induced by the employer's honest and reasonable conduct in the course of his defence cannot, except in the most unusual circumstances, constitute a detriment. The focus should be on the question of detriment.

Reasons for unfavourable treatment.

6.21 When the protected act and detriment have been established, the tribunal must still examine the reason for that treatment. Of course, the questions of reason and detriment are often linked. It must be shown that the unfavourable treatment of a person alleging victimisation was because of the protected act. A simple 'but for' test is not appropriate.

6.22 It is not necessary to show conscious motivation. However, there must be a necessary link in the mind of the discriminator between the doing of the protected act and the treatment. If the treatment was due to another reason such as absenteeism or misconduct the victimisation claim will fail. The protected act must be a reason for the treatment complained. It is a question of fact for the tribunal. **Chief Constable of West Yorkshire Police v Khan 2001 IRLR 830 HL** is authority for the proposition that the language used in the Sex Discrimination Act 1975 is not the language of strict causation. The words by reason that suggest that what is to be considered, as Lord Scott put it, is "the real reason, the core reason, the causa causans, the motive, for the treatment complained of that must be identified." This in our view remains good law.

6.23 It is not necessary for a person claiming victimisation to show that unfavourable treatment was meted out solely by reason of his or her having done a protected act. Lord Nicholls found in **Najarajan v London**

Regional Transport 1999 ICR 877, HL, that if the protected act has a significant influence on the outcome of an employer's decision, discrimination will be made out. It was clarified by Lord Justice Gibson in Court of Appeal in **Igen and others v Wong and others 2005 ICR 931** that in order to be significant it does not have to be of great importance. A significant influence is an influence which is more than trivial.

Subconscious motivation

6.24 The House of Lords in **Nagarajan** rejected the notion that there must be a conscious motivation in order to establish victimisation claims. Victimisation may be by reason of an earlier protected act if the discriminator consciously used that act to determine or influences the treatment of the complainant. Equally the influence may be unconscious. The key question is why the complainant received the treatment.

6.25 Section 136 Equality Act 2010 refers to the reverse burden of proof.

> **Section 136 - Burden of proof**
>
> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**
>
> **(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.**
>
> **(5) This section does not apply to proceedings for an offence under this Act.**
>
> **(6) A reference to the court includes a reference to--**
>
> **(a) an employment tribunal;**
> **(b) …**

6.26 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

> **Appendix**
> **(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which**

the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

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

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

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

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

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

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

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

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

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

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

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

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

6.27 The law relating to reasonable adjustments is set out at section 20 of the Equality Act 2010.

> **Section 20 - Duty to make adjustments**
>
> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **…**
>
> **(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.**
>
> **…**

6.28 In considering the reverse burden of proof, as it relates to duty to make reasonable adjustments, we have specific regard to **Project Management Institute v Latif 2007 IRLR 579** we note the following:

> **… the Claimant must not only establish that the duty has arisen, but there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred, that there is a breach of that duty. There must be evidence of some apparently reasonable adjustments which could be made.**

6.29 The tribunal has regard to **Environment Agency v Rowan [2008] IRLR 20**, the EAT provided guidance on the sequence of steps that an employment tribunal should follow. In summary, the Tribunal should do the following: identify the provision, criterion, or practice applied by or on behalf of the employer; identify the non-disabled comparators, where appropriate; identify the nature and the extent of the substantial disadvantage suffered by the claimant; and consider how that proposed adjustment would overcome the substantial disadvantage in question.

Breach of contract by employee

6.30 If the employee is in repudiatory breach of contract, the employer may affirm the contract, or the employer may accept the breach and treat the contract as terminated. In the latter case, the employee will be summarily dismissed. If the employee's breach is repudiatory and it is accepted by the respondent, the employee will have no right to payment for his or her notice period.

6.31 In order to amount to a repudiatory breach, the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract **Laws v London Chronicle (Indicator Newspapers) Ltd 1959 1WLR 698, CA**.

6.32 The degree of misconduct necessary in order for the employee's behaviour to amount to a repudiatory breach is a question of fact for the court or tribunal to decide. In **Briscoe v Lubrizol Ltd 2002 IRLR 607** the Court of Appeal approved the test set out in **Neary and another v Dean of Westminster** 1999 IRLR 288, ECJ where the special Commissioner asserted that the conduct "must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment." There are no hard and fast rules. Many factors may be relevant. It may be appropriate to consider the nature of employment and the employee's past conduct. It may be relevant to consider the terms of the employee's contract and whether certain matters are set out as justifying summary dismissal. General circumstances, including provocation, may be relevant. It may be appropriate to consider whether there has been a deliberate refusal to obey a lawful and reasonable instruction. Clearly, dishonesty, serious negligence, and wilful disobedience may justify summary dismissal, but these are examples of the potential circumstances, and each case must be considered on its facts.

6.33 If it is alleged the respondent affirmed the contract, it may be appropriate to look at the full circumstances of the alleged affirmation.

Time

6.34 It is possible to extend time for presentation of discrimination claims. The test is whether the tribunal considers in all the circumstances of the case that it is just and equitable to extend time.

6.35 It is for the claimant to convince the tribunal that it is just and equitable to extend the time limit. The tribunal has wide discretion but there is no presumption that the tribunal should exercise its discretion to extend time (see **Robertson v Bexley Community Centre TA Leisure Link** 2003 IRLR 434 CA).

6.36 It is necessary to identify when the act complained of was done. Continuing acts are deemed done at the end of the act. Single acts are done on the date of the act. Specific consideration may need to be given to the timing of omissions. In any event, the relevant date must be identified.

6.37 The tribunal can take into account a wide range of factors when considering whether it is just and equitable to extend time. The tribunal notes the case of **Chohan v Derby Law Centre** 2004 IRLR 685 in which it was held that the tribunal in exercising its discretion should have regard to the checklist under the Limitation Act 1980 as modified by the Employment Appeal Tribunal in **British Coal Corporation V Keeble and others** 1997 IRLR 336.

6.38 A tribunal should consider the prejudice which each party would suffer as a result of the decision reached and should have regard to all the circumstances in the case particular: the reason for the delay; the length of the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued had cooperated with any request for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to a cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

6.39 This list is not exhaustive and is for guidance. The list need not be adhered to slavishly. In exercising discretion, we should have regard to what prejudice if any would be caused by allowing a claim to proceed.

Conclusions

7.1 It is the respondent's position that the dismissal was fair. It is alleged the dismissal was either for a reason related to conduct or was for some other substantial reason.

7.2 The conduct relied on when dismissing was set out in "charge 1" as follows: "you touched a female colleague [WS] in an inappropriate manner, during a work-related social event on 12 December 2014." LK, and her panel, concluded that he had cupped her breast had happened.[2] There was second charge: "that as a result of your subsequent conviction for the offence of sexual touching you caused reputational damage to [RV]."

7.3 The nature of the allegation was not set out adequately in the original disciplinary allegation and the rationale applied by LK is not fully explained; we will consider it further below.

[2] We have no evidence from any other member of the panel. When we refer to LK's decision, we are assuming that the panel agreed with her finding and that her view and the panel's view were the same.

7.4 The first question to consider is the reason for dismissal. It is well-recognised the reason is a set of facts known to or beliefs held by the respondent. There may be various aspects relevant to that reason. Here, we accept that there was a belief that the claimant had sexually touched WS on 12 December 2014. That touching was believed to be the touching for which he was prosecuted. That touching was cupping and squeezing of her breast on at least three occasions.

7.5 All the dismissal letter says, concerning the alleged inappropriate touching of WS's breast, was, "This charge was proven on the basis that you were convicted in court of the offence of sexual touching." It is clear that LK believed the claimant had touched WS in an inappropriate way. She stated in evidence that she concluded, specifically, that he had cupped WS's breast with his hand.

7.6 We have considered whether, when reaching her conclusion, she did so relying entirely on the conviction itself, as would appear to be the position from her letter of dismissal, or whether, in some manner, she had considered the transcript of the magistrates' court case and reached an independent conclusion, as she alleged in evidence. The magistrates' court record, as we have noted, only refers to cupping and squeezing of the breast in the prosecution's opening. The witnesses' and the claimant's evidence, as recorded, do not repeat that allegation. We have noted the specific sections relied on by LK before us. It is clear that the evidence to which she referred in fact casts doubt on the allegation that there had been a cupping of WS's breast. We have concluded that the reality is that LK did believe the claimant had cupped WS's breast in an inappropriate sexual manner. (Hence her reference to the conviction for sexual touching.) However, a detailed consideration of the transcript does not reveal good evidence in support of the criminal charge and on the balance of probability, we do not accept that LK reached an independent conclusion, at the time, based upon the transcript itself. She relied on the fact of the conviction only. However, this does establish her belief that the misconduct had occurred.

7.7 As regards the second charge, the evidence given on this is confusing and confused. The charge itself refers to the fact of the subsequent conviction for sexual touching having caused the respondent reputational damage. In her statement at paragraph 15, she said:

> **We also considered the matter of reputational damage. Our view was that our reputation with our military partners had been damaged by the claimant's actions and there was a reputational damage to our military partner as the claimant was reported in the press as working for them.**

7.8 It does not go on to say to what extent that conclusion influenced her decision. The respondent's submissions suggested that both charges were of equal relevance and independently established gross misconduct, but that submission is unsustainable. The second charge concerned the result of the conviction. LK's witness statement, and LK's subsequent oral

evidence, suggest in some manner that what she had in mind was the reputational damage between the respondent and the military internally, and externally reputational damage to the military because the military was identified in the press. The letter of dismissal suggests that the respondent believed the claimant's barrister had referred to his work at location 3, and hence it was reported he worked for the military. Whilst this is disputed, it is not a matter we need to resolve. It is not referred to in LK's written evidence. We accept there was some belief that there was some form of reputational damage. However, this came about primarily because of the conviction itself; we do not accept that any concern about reputational damage was either the reason, or the principal reason for dismissal. Moreover, LK's statement does not support a finding that it was any action of the claimant's barrister which formed the basis of the charge.

7.9 We are satisfied that the reason for dismissal revolved around the belief that there had been sexual touching by cupping and squeezing WS's breast. Any reputational damage was consequential and coincidental and not in itself the reason. For the removal of doubt, we do accept that LK believed there was reputational damage, albeit it was poorly articulated; we do not accept it was any material reason for dismissal.

7.10 It is clear the reason related to conduct; it is necessary to consider whether there were reasonable grounds for the belief, and when that belief was formed whether those grounds were supported by an investigation which was open to a reasonable employer. We remind ourselves that it is not for us to substitute our view. There may be a range of reasonable responses both in relation to the decision and the nature of the investigation.

7.11 It is convenient to first consider whether there were grounds for holding the relevant belief.

7.12 The claimant was convicted in the magistrates' court. The charge was clear and concerned the claimant cupping and squeezing WS's breast on three occasions on 12 December 2014. The fact of the conviction provides grounds for the belief. The evidence as presented to the magistrates' court is transparently unsatisfactory and contradictory and does not directly support a finding that the claimant's breast was cupped or squeezed. Nevertheless, there is evidence that there was some contact and that is supportive. Further, there was evidence of an admission by the claimant that he had touched WS's breast with his elbow on three occasions, albeit he claimed it was inadvertent.

7.13 As to any evidence relied on in support of reputational damage, that is less clear. It is clear that there was a report in the press and the report identified the military, and wrongly identified the claimant as working for them. As regards the claimant identifying his employment and the location, the position is less satisfactory. It appears that there may have been a reference by his barrister to location 3, but the evidence for this is unclear, and it is unclear why that supports a finding of reputational

damage by disclosure from the claimant. Nevertheless, it cannot be said that there were no grounds in support of the conclusion reached by LK and her panel. At best, it is of little relevance, as it was not the reason for dismissal.

7.14 The respondent's submissions at paragraph 114 refer to the potential defence of some other substantial reason. The submissions state the following:

> **As R also contends that it could rely upon SOSR, the tribunal should consider whether there were reasonable grounds to believe that C was unable to return to the workplace.**

7.15 This reference is puzzling. We have recorded the two specific charges. We have reviewed the evidence of LK. There is nothing in her evidence which would suggest that she had in mind the alleged substantial reason as recorded above. HH speculates that had he allowed the appeal, and had he overturned the dismissal, questions, including whether the claimant would have returned to the workplace, would have had to be considered. We refer to this further when looking at the victimisation claim. However, he did not overturn the dismissal. The respondent's case has not been advanced on the basis that there was a substantial reason revolving around the claimant's ability to return to the workplace. It simply forms no part of the evidence. It is unclear where this submission of some other substantial reason comes from. It does not reflect the respondent's case, and it was not advanced at the hearing. It is possible that it is advanced as some form of remedy issue, but if that is the case, it is premature. Whatever the intent, in no sense whatsoever was inability to return to the workplace a reason for dismissal.

7.16 As to the investigation, there are serious difficulties both in relation to the procedure adopted by HY, and the subsequent procedure adopted by LK. We should take each in turn.

7.17 There is an initial difficulty with HY's investigation of the events of 12 December 2014. She states that her first investigation was wholly independent and unconcerned with the events of 12 December 2014. Therefore, any evidence raised during that investigation appears to have been entirely ignored. It did not filter through to the second investigation, which was directly concerned with the events of 12 December 2014, and it was not, therefore, brought to the attention of the disciplinary panel.

7.18 HY's approach to the first investigation was characterised by a failure to adequately identify what was being investigated and what should be the appropriate parameters of the investigation. The reality is, whether it was her intention or not, which we do not need to resolve, that during the first investigation HY considered matters relevant to 12 December 2014, at the very least as relevant background. Whether she should have done that is not a matter we need to decide. The fact is that she did, and it was not appropriate to ignore this entirely when considering the subsequent investigation.

7.19 As to the parameters of the second investigation, it is clear that HY took the view that it should be limited given the criminal conviction and the record of the magistrates hearing. At paragraph 37 of her statement she says:

> **After discussion with the HR team I proceeded with a shortened investigation process, relying mainly on the police investigation into the incident rather than carrying out any new investigation.**

7.20 One proviso was that she sought a copy of WS's statement. However, when she was unable to obtain that[3] she simply gave up. She did recognise that it may be appropriate to interview WS, but for reasons which are unconvincing, she chose not to. It seems that she did not wish to cause WS stress. Why she failed to interview the claimant remains entirely unexplained and is not addressed in her statement.

7.21 HY did collate a number of documents and she did identify the point brief from 2014/2015. It is clear that did contain relevant information. However, it is unclear why she failed to flag, in any adequate or reasonable way, the potential discrepancies in the evidence of WS.

7.22 HY knew from her first investigation that WS had reported the matter initially to CC. CC had made it clear that WS had confirmed the claimant touched her breast with his elbow. That is also confirmed in the point brief. As noted in the crown court, what a person says initially is extremely important. This is particularly so when there is clear evidence of a story changing and evolving over a period of time. Perhaps this is even more important when there is potential evidence of general hostility, or where there is potentially an ulterior motive. There was ample evidence that there was a degree of hostility from WS to the claimant. The main focus of her complaint, in December 2014, concerned the claimant's criticism of her work. There was at least enough evidence to put any investigating officer on notice that WS's motivation may be multifaceted.

7.23 It is clear the approach by HY was consciously selective. Paragraph 5 of the ACAS code[4] stresses the importance of investigating allegations promptly and adequately. No reasonable employer would have failed to have sought out as much detail as possible from the original investigation. It is equally important to identify what information remains, when something is investigated long after the event, and also what information has been destroyed. An investigation of any reasonable employer acting reasonably should focus on all the relevant facts. The person investigating should, as far as is practicable, exhibit neutrality and should identify relevant evidence which may be supportive of the employee.

[3] It appears to there were at least two statements, as both were referred to during the criminal appeal.
[4] ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015).

7.24 It is unclear what steps were taken by HY to identify and obtain any documents produced by the military. It is apparent that those documents may have been sent to the respondent, and thus there may have been more than one copy. The reality is HY did not look.

7.25 HY was also alerted to the fact that there was at least one witness, CC, who could give clear and detailed evidence as to what was reported at the time. She had obtained a statement from him in relation to her first investigation. His evidence was relevant. It demonstrated that WS had not initially suggested any form of cupping or squeezing. It would have supported a possible finding that WS had changed her account to suggest some form of deliberate, as opposed to inadvertent, touching. That was clearly relevant. It is difficult to see on what basis it could have been ignored.

7.26 We should summarise the position. There was evidence that WS had shown little concern about what she accepted may have been accidental touching of her breast when the initial complaint was made in 2014. She appeared to accept the claimant used his elbow. She appeared to accept that it may be accidental. The touching was not the focus of her complaint. By the time the matter became to the criminal investigation, there is clear evidence that her account had fundamentally changed. No reasonable investigation would have failed to observe those matters and to seek to obtain, codify, and highlight the available evidence. The investigator should identify evidence from which the relevant facts can be found, including evidence that assists the person accused. The approach to this investigation was inadequate and one-sided, hence why there was a failure to identify relevant evidence. This was not an investigation open to a reasonable employer; it was outside the relevant band. For that reason alone, the dismissal is unfair.

7.27 HY did identify and include the point brief. The point brief is a significant document. This is, essentially, a contemporaneous document and it records the incidents which were under investigation, as we have noted above. It does appear to contain a record of an interview with WS, albeit it is the author's summary of an interview. That record (at 393) refers to the claimant's elbow catching WS on at least three occasions. It specifically records that she admits it may have been accidental. There is no evidence within the entirety of that document which would support a conclusion that the claimant had deliberately cupped or squeezed WS's breast, whether in a sexual way or otherwise.

7.28 It is clear that the service complaint of 25 February 2015 is a development of WS's position. In this WS says that the claimant touched her chest a number of times. It is obvious that there was a fracas and a falling out. It is obvious that the claimant was assaulted and punched and there is clear evidence of a potentially ulterior motive by WS. It still does not suggest cupping or squeezing.

7.29 The pack contains the respondent's report from the magistrates' court. It is clear that the charge concerned cupping and squeezing her breast and it should have been readily inferred that the allegation must have come from the complaint made by WS. HY did not have WS's statement. It appears the respondent did not understand that there were two statements from her. The crown court later referred, critically, to the way in which her evidence developed in her second statement.

7.30 No reasonable employer could have failed to note the fundamental change in the nature of the allegation made by WS. Whilst it is at least possible that it could be argued that there was a legitimate reason for the change, the discrepancy was not noticed or considered.

7.31 Moreover, the record of the factual evidence, as set out in the respondent's record of the magistrate's court proceedings, does not directly support the allegation of cupping and squeezing. It refers to touching her breast; it falls far short of an allegation of cupping and squeezing. The inherent contradictions in WS's account are plain on a simple reading of even the documents before LK.

7.32 Further, LK should have been alerted, by the documents in front of her, to the failure to interview the claimant. There is no account from him, and she should have recognised that. No reasonable employer would have failed to follow it up and enquire why he had not been interviewed.

7.33 The reality is that LK, and the panel, based their decision, either exclusively, or almost entirely, on the fact of the conviction. That is consistent with the letter of dismissal. The suggestion that in some manner the documentation clearly supported an independent finding that the claimant cupped and squeezed WS's breast is not credible and it is not sustainable. The evidence LK sought to give in support of her contention that there were clear statements in support of the position was weak and lacked any credibility. Her evidence would appear to be an attempt to rationalise her position after the event. We do not accept her evidence that she undertook some sort of independent review of the evidence in order to assess its weight and came to her own decision. She did not; she relied on the fact of the conviction.

7.34 There are further difficulties with the dismissal itself. The claimant wrote a letter on 4 December 2017, which contained clear representations that ought to have been taken into account. LK did not see that document at the commencement of the disciplinary hearing. She did become aware of its existence, because she was told by JM who simply described it as "abusive." However, it is difficult to understand why LK, having been alerted to the existence of the letter, took no steps to obtain it. Relying on the description of it as being abusive, without reading it herself, was a serious omission. When she became aware of it, she should have, at the very least, considered whether it made any difference to the decision. It may be possible to say that her failure to take account of the documentation was inadvertent. However, whilst there may be some

justification for this, LK was alerted to the fact the claimant had sent emails, but instead of identifying and viewing those emails, she was content to accept the pejorative account of JM. When an individual fails to appear at hearing, particularly one who is disabled by reason of mental health issues, it is vital that any communication sent is identified and read. LK simply ignored the fact that he had sent documents and this itself is procedural unfairness. No reasonable employer would have behaved in that way.

7.35 We come to the appeal. It is clearly the respondent's case that the appeal was so limited in nature that it was in no sense whatsoever a rehearing. We use that word in a general sense and not as a term of art.

7.36 The terms review and rehearing should be viewed with some caution. The ACAS code provides an employee should be able to appeal a decision. The appeal should be heard without unreasonable delay. The grounds should be set out in writing (see paragraph 26 of the code). The appeal should be dealt with impartially by a manager who has not been involved in the case (see paragraph 27 of the code).

7.37 It is clear that the appeal itself is an important part of the overall process, whether it is described as a rehearing or a review. It is about ensuring there is natural justice. Where there are procedural deficiencies at an earlier stage, it is important to examine the subsequent appeal hearing and to review its approach to a number of matters: procedural fairness, procedural thoroughness, and the open-mindedness of the decision maker (see for example **Taylor v OCS Group Limited** 2006 ICR 1602, CA). It is possible for an employer to act reasonably when initially dismissing, on the basis of the facts known at the time, but quite unreasonably in maintaining that decision in the light of new facts which come to light in the course of the appeal procedure (see for example **West Midlands Cooperative Society Ltd V Tipton** 1986 ICR 192, HL).

7.38 HH viewed his role as limited. He was reviewing the procedure. However, even on that limited basis, and even if he limited himself to the matters raised by the claimant, there are serious deficiencies in this appeal.

7.39 Underpinning his failure of approach is the fact that HH based his decision on the documents, but failed to read them. This seriously undermines any assertion that he approached the matter with an open mind. Had he read all the documents and viewed them with an enquiring and open mind, his decision may have been materially different. Had he read the pack, he should have noted the discrepancies in WS's account. That alone should have alerted him to the potential difficulty. It does not appear that he identified the fact that the claimant's email of 4 December 2017 was not taken into account. He should have noted the claimant had not been asked for a statement. Put simply, he should have had some appreciation of the failures of the investigation and the failures of the disciplinary panel

to take into account the totality of the relevant evidence. That in itself should have been sufficient to require his consideration and intervention.

7.40 It is apparent that HH did read, carefully, the claimant's letter of appeal. We have noted that he rejected each aspect of the appeal; however, he materially failed to explain his reasoning in relation to numerous matters as we have detailed above.

7.41 Even on his own narrow interpretation of his role, this appeal failed to identify the clear and material deficiencies we have pointed out, and there is no reasonable explanation for this failure. A simple reading of the pack provided should have made it obvious that the investigation was inadequate and the decision suspect.

7.42 There is a more fundamental difficulty with this appeal. In the days leading up to the appeal against his dismissal, the claimant was fully engaged in relation to the crown court appeal. He had no option other than to try to cope with the criminal appeal, despite his clear and obvious ill-health. There was no reason to believe the claimant was being anything other than truthful in saying that he was engaged in the days leading up to the criminal appeal in various responses and conferences. It should have been obvious to HH that requiring the claimant to cope, at the same time, with an appeal against his dismissal was a significant burden. Moreover, on a plain reading of the documentation, including the dismissal letter, it was obvious that LK had relied largely on the fact of the conviction. There was a letter on file from the claimant’s solicitors confirming that the conviction should be treated with caution.

7.43 It is difficult to understand the evidence of HH, as to why he refused to adjourn until after the conclusion of the criminal appeal. There appear to be two strands relied on. The first is that waiting would not have made it any more likely the claimant would attend. The second is that the crown court appeal could have no bearing on the decision.

7.44 We find no reasonable employer could have formed either of those views. First, the claimant had indicated he would attend after the crown court appeal any time from 7 February 2018. In the absence of any medical evidence (there was no relevant medical evidence because the respondent had failed to obtain it) it could not be assumed he would not attend. If HH were to assume anything, it should have been that if the claimant managed to attend the crown court proceedings, it was also likely he could attend the appeal hearing. It may be that HH simply did not believe the claimant would attend and that he was avoiding attendance, but that is not the nature of his evidence. The nature of his evidence is that the medical position would not have improved permitting him to attend, but there is no reasonable basis for believing that. Even if he had believed it, and even if it were true, it is difficult to see why he would not have either sought medical evidence or agreed to a short adjournment.

7.45 As regards what appears to be the assertion that the crown court proceedings could make no difference, such a belief is irrational. HH sought to persuade us in his statement that it would have made no difference. At paragraph 16 of his statement he said the following.

> **I am aware that the claimant's criminal appeal did go ahead on 2 February 2018 and that his conviction was overturned. In the course of preparing for this tribunal I have been shown a copy of the transcript of the appeal hearing and note that the conviction was overturned due to deficiencies in the way it was investigated. I have considered whether in light of this turn of events, I should have taken a different approach to postponing the hearing in January 2018. On balance I do not. I still believe that the decision I made to proceed, on the evidence I had at the time, was reasonable. I have also considered whether had I delayed until after the appeal, the overturning of the conviction would have affected my decision… there is nothing in the transcript that would lead me to believe other than that the charges against him were made out on the evidence available, on the balance of probability.**

7.46 He went on to draw a distinction between the higher burden of proof in the criminal court, but does not explain the relevance of that.

7.47 His written evidence is clear: he considered the transcript carefully, after the appeal against dismissal had concluded, and reached the conclusion it would not have affected his decision. HH resiled from that position during cross-examination. He accepted that the appeal could have made a difference.

7.48 When HH made his decision to proceed with the appeal, he could not have known what would be the outcome of the criminal appeal, or what it would reveal. It should have been obvious to him that LK had placed enormous reliance on the fact of the conviction. If that conviction had been overturned, it would, at the very least, have led any reasonable employer to question whether the dismissal should be reconsidered. The claimant had indicated new evidence would be given. It is not enough for HH to simply say the claimant had failed to disclose that. There may have been reasonable and legitimate grounds for not disclosing it prior to the criminal proceedings being concluded. He could have sought further detail but chose not to. It would have been appropriate to review the matter after the criminal proceedings had been concluded.

7.49 This is a case where it is absolutely clear that the sole or main reason for the dismissal was the fact of the conviction. At the very least, if that conviction were overturned, it would be necessary to review whether there was sufficient evidence to maintain a finding of gross misconduct in relation to the events of 12 December 2014. As it happens, the crown court proceedings identified the discrepancies in WS's evidence and account. It also identified the destruction of evidence. To suggest that those two factors were not relevant to the decision on appeal, or to the reasonableness of the original decision to dismiss, is fanciful.

7.50 The reality is this appeal did nothing to identify the deficiencies in the original dismissal. There was no good or rational reason to proceed a matter of days before the crown court appeal. The claimant was already dismissed. He was not being paid. There was no good reason not to wait. It was clear that the appeal might make a significant difference. Proceeding to decide the appeal in the face of an imminent criminal appeal, was unfair; no reasonable employer would have proceeded at that time.

7.51 For the reasons we have given, we find that the dismissal was unfair.

Wrongful dismissal

7.52 It is the respondent's case that the claimant was in fundamental breach of contract. The respondent relies on three matters being sexual touching of a colleague in December 2014, the fact of the criminal process against the claimant, and reputational damage to the respondent.

7.53 The respondent's submissions state that the tribunal must conclude on the balance of probabilities whether the claimant committed gross misconduct. It is acknowledged that there is no live evidence from WS or any witnesses (other than the claimant) present at the incident in December 2014. Whilst the issues referred to the fact of the criminal process and the reputational damage to the respondent, those matters are not pursued, or elaborated on, in the submissions. The submissions deal with the question of whether the claimant inappropriately touched WS's breast on 12 December 2014.

7.54 The fact that the claimant faced criminal charges was not an act of gross misconduct on his part. He was wrongly accused and the conviction overturned. Facing the criminal charges is not an act of gross misconduct.

7.55 The fact that there may have been reputational damage to the respondent or to the military is not a matter of gross misconduct. To the extent that the identity of the military or the respondent came out at trial, that is not a matter of gross misconduct by the claimant. It is clear that the respondent did little or nothing to clarify how the claimant should approach the nature of his employment during the criminal proceedings. Had it given clear guidance, it is possible the respondent could allege any breach was gross misconduct, but no such guidance was given. It is also clear that it was the claimant who was most concerned to prevent disclosure of the identity of his employer and the nature of his work. That concern is inconsistent with a finding of gross misconduct, on the contrary he was doing all he could to preserve the relationship.

7.56 In order to find gross misconduct, it is necessary for us to find some behaviour which shows a deliberate intention to disregard the essential requirements of the contract. It must undermine the inherent trust and confidence. The relevant conduct cited by the respondent in this context is the alleged inappropriate touching of WS's breast. It is for the tribunal to

have regard to all of the evidence and to decide whether or not he behaved in the way alleged. It is undoubtedly the respondent's case that the touching was sexual, whether that was the claimant's intention or not.

7.57 We have the claimant's evidence. His evidence is that he touched her breast on three occasions, with his elbow, inadvertently. That evidence has been consistent at all times. We do not have any direct evidence from WS. We have the evidence of CC. He is clear that WS said initially the touching was or could be inadvertent, at least initially. The respondent's submissions invite us to doubt CC's credibility and make a number of factual assertions about his conduct which are unsustainable on the evidence before us.[5]

7.58 Even if it were possible to doubt CC's credibility, and we do not doubt it, the evidence from the point brief is consistent with CC's evidence.

7.59 It is apparent WS produced two statements for the criminal proceedings, as they were referred to by the judge in the crown court. It is also clear that at some point she alleged that the claimant cupped and squeezed her breast. That much must be inferred from the wording of the criminal charges. It therefore appears that the allegation of cupping and squeezing would have appeared in the statements. It is clear that the statements of WS developed in a way which was criticised at the criminal appeal. It is apparent that her account changed over time. Whilst it is noted, by the respondent, that WS attended and gave evidence in two criminal courts, this is of little assistance. It may be that she was not directly criticised by the judge at the criminal appeal. However, the scope of that appeal is limited, and it was never necessary to take the view that WS may have misled. However, having regard to all the evidence, and the way in which WS's account developed, it is a real possibility that the development of her account indicated a degree of exaggeration, or even invention. We have received no explanation from anyone as to how her original account of being touched by the claimant's elbow could then change into a claim of deliberate cupping and squeezing of the breast.

7.60 We have to decide the facts on the balance of probability. We find there is nothing which would undermine the claimant's account. There are substantial and sound reasons for doubting WS's account. We find that any touching of WS's breast in December 2014 was inadvertent. We should add that we have no doubt that all concerned had consumed significant quantities of alcohol. Whilst the claimant may not have thought of himself as subjectively drunk, he would have been drunk to some extent, this may well have contributed to the inadvertent touching.

7.61 There is no suggestion that the inadvertent touching of WS's breast by the claimant was an act of gross misconduct. The fact of the inadvertent touching is not an act gross misconduct.

[5] We are invited to find misconduct on his part when such matters are not before us. To the extent the allegations were put to CC and go to credibility his answer was final.

7.62 As there was no fundamental breach the question of affirmation does not arise.

7.63 It follows that the claimant was not in fundamental breach of contract. He is entitled to his notice period.

Harassment

7.64 There is only one allegation of harassment. It is alleged HY harassed the claimant by saying on 3 August 2017, “Your mental health is your issue.”

7.65 It is clear that there was a conversation on 3 August 2017. Both the claimant and his partner allege that the words were used. HY’s evidence is less clear. She states that she cannot recall the specific conversation. She does accept that she may have made a comment about taking control of his own recovery. She believes her intent may been misinterpreted.

7.66 The claimant's case is as much concerned with the tone employed by HY as with the words used. In that regard, he points to the interviews on 14 and 28 January 2016 in which he said that she behaved aggressively. In her statement and denies any aggressive or interrogatory manner. She does say that the second interview concluded in 30 minutes, as she was concerned about the claimant’s health. She says, "I can understand that the claimant may have found the questions intrusive."[6] She stated the claimant behaved aggressively on 13 June 2016.

7.67 The respondent's submissions invite us to conclude that the claimant had a negative view of HY prior to the phone call of 3 August. We accept that he did have a negative view of her. HY also describes the claimant as aggressive in the meeting on 13 June 2016.

7.68 It is not surprising the claimant had a negative view of HY. There had been an initial investigation in which both the parameters and the allegations were unclear. Despite this resulting in no disciplinary action, and despite it being an investigation, she nevertheless formed a negative view of the claimant and on 6 September 2016 (R1/145) stated that her decision was the allegations (which were not set out in detail) were founded. As a result, she made a number of recommendations including undertaking an unconscious bias course and undertaking a refresher in diversity training. It is unclear why this was an appropriate outcome of an investigation.

7.69 It follows that we accept that there was a degree of mistrust on both sides and it is possible that contributed to a negative tone.

7.70 As regards the words alleged, we accept that the words relied on by the claimant were used.

[6] Paragraph 21 of her statement.

7.71 The first question we must ask is whether the words were intended to harass. Harassment involves actions which violates dignity or are intimidating, hostile, degrading, humiliating, or offensive in the environment they create. These are strong words. It is possible that HY was frustrated or perhaps exhibited a degree of exasperation. However, the evidence of intent to harass is insufficient.

7.72 We find the burden does not shift in relation to intent.

7.73 The next question is whether the conduct was unwanted. The respondent does not allege that the conduct was other than unwanted; we have no hesitation finding it was unwanted conduct.

7.74 It is clear it was a reference to his disability. Therefore, it related to disability.

7.75 In deciding whether it had the effect of harassing, we must consider the claimant's perception, the other circumstances of the case, and whether it is reasonable for the conduct of had that effect.

7.76 We have no doubt it was the claimant's perception was the conduct was unwelcome. We can accept that the claimant considered it, subjectively, to be harassment.

7.77 Is it such serious conduct as be a violation of dignity or some form of humiliation? For the purpose of this analysis, we will assume that his perception was it was harassment.

7.78 As regards the other circumstances of the case, we cannot wholly ignore the fact that there was a degree a breakdown between HY and the claimant. At the very least, she had viewed him as aggressive in June 2016. She was aware he had viewed her as aggressive and there had been difficulties in previous meetings. That does not mean to say, necessarily, that HY should have had no further involvement. However, as a HR professional with specific experience of individuals with mental health difficulties, she may have been expected to tread carefully. It is possible that the comment she made was insensitive. The claimant's evidence (see paragraph 89 of his statement) is brief. He states he tried to explain the impact on his health and his inability to deal with the appeal hearing. He stated HY was irritated by the conversation and said, in a hostile tone, the claimant's mental health was his issue. We have noted it is possible there is a recording, and on the balance of probability we find that there was one, albeit we have not reason to believe HY could have readily accessed it. It is not clear why it is not available. In any event, what is at issue largely is the tone employed and the context in which the comment was made. The claimant has chosen to give us little detail of the context. We assume that the tone showed, at the very least, irritation and possibly hostility.

7.79 It is not every unfortunate or inopportune comment, every poor use of words, or every inappropriate term, even when described as hostile, which will give rise to finding of harassment. This, essentially, is a one-off act. It is likely that the claimant viewed the comment more negatively because he had a negative view of HY. That view was understandable, but in itself does not justify a finding of harassment. We have taken the view that HY appears to have been insensitive. It may have been that she showed a degree of irritation at the time. We accept that the claimant's perception was that HY was hostile, but when we consider whether it is reasonable for the conduct to have had that effect, we find it was not. Her action fell short of harassment.

Reasonable adjustments

7.80 We next consider the reasonable adjustments claim.

7.81 It is agreed that the claimant is disabled. Disability is admitted, as set out in the issues. The respondent's submissions set out in detail how a tribunal should approach a finding of disability. It appears that the submissions may contain a number of sections of law which have been cut and pasted from other cases. We note that there is a long section in the submissions concerning the approach to capability dismissals in the context of ill health, a matter which is not before us.

7.82 Whilst there is a lengthy description of the law, there are no specific submissions on disability albeit the submissions comment on the issues to say that stress is not a disability and it is not accepted any PTSD's long-term, but nothing turns on these matters.

7.83 We accept that the claimant had the alleged impairments as set out in the issues: stress and anxiety; depression; and PTSD. We accept the substantial effect on day-to-day activity for each is not materially different: he has difficulty with concentration, and periods of significant low mood which are unpredictable; his ability to sleep, work, and interact with others is adversely affected. The stress and anxiety became long-term on 24 November 2015, as it had lasted more than a year. The depression became long-term on 14 December 2015, as it had lasted for 12 months.

7.84 We do not have to resolve when the PTSD became long term, as there is no suggestion that any claim is based solely on a disability founded on the impairment of PTSD. The effects on day to day activity relied on are the same. The fact that there was an impairment recognised and diagnosed as PTSD does not add to or alter our analysis for the reasonable adjustments claims.

7.85 We should deal with each of the three alleged duties relied on in turn.

7.86 In the issues the first provision criterion or practice is identified as follows:

> ***As regards the second set of disciplinary proceedings, it is said the practice commenced on 11 July 2017 and resulted in the claimant's dismissal. It is said there was a failure in relation to the claimant's letters of 21 and 28 July 2017, for which evidence was not provided. It is accepted on 27 November 2017 that Mr JB, the respondent's senior caseworker, wrote to the claimant and made available redacted information.***

7.87 It is clear to us that this alleged provision criterion or practice is badly set out. That much is implicitly recognised in the respondent's own submissions. The claimant was notified of his ability to review the pack of documents when the disciplinary proceedings were commenced. He was invited to contact the respondent to make arrangements, as confirmed at paragraph 194 of the submissions. The submissions go on to say that the documents were unredacted and therefore classified as a result he was required to attend premises. It is this requirement to attend premises to review the documents which is the provision criterion or practice.[7] To that extent it is made out. The respondent's submissions make it clear that the nature of the provision, criterion, or practice as relied on was understood, regardless of the deficiency in the pleading.

7.88 The substantial disadvantage is alleged to be by prolonging the claimant's paranoia, heightening his anxiety, and causing him to isolate himself within his own home leading to exacerbation of his confusion as a result of the unreasonable delay.

7.89 We find the claimant was less able than a person who is not disabled to attend at any of the respondent's locations. Moreover, the stress involved in doing so, considering that he needed to spend time considering the documents, had a substantial adverse effect on him, as alleged, when compared to people who are not disabled. The disadvantage is made out.

7.90 The specific adjustments contended for is by providing the claimant with evidence relating to the disciplinary charges when it became available and in any event prior to 27 November 2017. The claimant has not specifically relied on the provision of redacted documents as a reasonable adjustment.

7.91 As to the adjustment, the respondent has given no proper explanation as to why the redacted documents could not be made available earlier. Had such documents been provided earlier, it would have reduced the amount of stress and paranoia. It may materially have helped the claimant to prepare.

7.92 It is less clear as to when it would have been reasonable to take the view that redacted documents should be provided. The evidence from both parties is poor. The respondent does not suggest there was anything specifically done by the claimant which caused it to change its view. It is apparent that the respondent simply reviewed the matter and then

[7] The respondent's submissions say, "It is accepted that The R's practice was to require C to contact it to make arrangements to view the material at location 1 or some other secure location."

provided the documents. It follows that at some point prior to 27 November, in our view, the respondent could have been in breach of its duty. If there were a breach, that breach was remedied on 27 November and to the extent there were a breach of the duty to make reasonable adjustments in this respect, that is when time starts to run, i.e., time starts to run at the end of the period which is when the breach was remedied.

7.93 KA's letter of 10 August did refer to the need to give him access to the evidence before the disciplinary took place. It does not suggest redaction of the document.

7.94 However, the test is not whether an adjustment could have been made earlier. The test is one of reasonableness. The provision, criterion or practice is understandable. There is at least a potential for the release of sensitive documents and precautions should be taken. Not releasing those documents is an appropriate precaution. Had the claimant been asking for redacted documents, it may be possible to say the respondent should have reacted within a period. However, that is not the basis on which this case is advanced. The reasonable adjustments suggested is not cited by the claimant. Whilst we can suggest an adjustment, we should be cautious about doing so when it has not been fully identified before the parties. It is said that there was an omission to act. In order for there to be a breach we must be satisfied that action should have been taken by a particular time and that the delay thereafter was a breach. The fact that the respondent reviewed the position and took a unilateral view to redact and send the documents demonstrates an engagement with, and compliance with, the duty.

7.95 A further difficulty arises. The claim would be out of time. Given that any breach was remedied by 27 November 2017, that is the end date of any continuing breach of duty, as the duty was no longer breached. We would have to extend time, and we can consider this briefly. The claimant has given limited evidence. There is little hardship or prejudice to the claimant. The claimant has other claims to pursue. It is for the claimant to show the reason for delay, and he has not addressed this adequately; we take the view that it is not just and equitable to extend time. It follows we do not have to come to a final conclusion on whether there was a breach of the duty to make reasonable adjustments prior to 27 November 2017.

7.96 The second provision, criterion or practice relied on is as follows:

> ***By requiring the claimant to travel to meetings. The further and better particulars identified only one date which is contained within the claim form being 6 December 2017.***

7.97 We accept that there is a general provision that meeting should be held at premises belonging to the respondent, or otherwise at suitably secure premises. The specific claim concerns the meeting of 6 December 2017. This is the disciplinary meeting.

7.98 The substantial disadvantage is alleged to be by heightening of the pressure on the claimant and increasing his feelings of anxiety by lengthening the negative experience of those meetings. We have no doubt that, compared to those without the claimant's disabilities, he would have the substantial disadvantage of feeling heightened pressure and anxiety. It follows that the duty engages in relation to all meetings he was required to attend.

7.99 The specific adjustment contended for is by holding the meetings at location 5 or at another location nearer to the claimant's home. The essence of the adjustment is to ensure a reduced travel time.

7.100 The question here is whether the duty has been breached. Had the claimant written to the respondent to say that he would attend at the meeting if the venue were changed, the respondent's attention would have been directed to the particular problem. However, that was not the reason why the claimant did not attend and as such, it would have been arbitrary for the respondent to offer a change of venue, when that was not something which was directly raised by the claimant at the time. Whilst we have no doubt that the respondent should have had regard to the potential effect of attending at a venue a long way from his home, it was not a breach at this stage.

7.101 The third provision, criterion or practice relied on is as follows:

> ***By not postponing the disciplinary or appeal meetings. It being the claimant's case that the late 2017 and early 2018 meetings should have been postponed until a time he was medically fit to attend.***

7.102 Here the provision, criterion, or practice is not set out clearly, but the submissions make it clear that the relevant provisions, criterion, or practice was understood at the hearing. There was a provision or practice that required the claimant to attend meetings at a particular time. To that extent, being required to attend disciplinary and appeal meetings at the time set was a provision criterion or practice.

7.103 The substantial disadvantage is alleged to be that the claimant was not in a fit state to attend, or adequately defend himself as a result of heightened stress and anxiety which increased the sense of hopelessness and led to suicidal ideation.

7.104 It is clear that the claimant was extremely concerned about his employment appeal and that the added pressure of the criminal appeal had an adverse effect on his stress and anxiety and led to suicidal ideation. That added stress and anxiety was a substantial disadvantage when compared to people without his disability. He was even less able to deal with the two appeal processes at the same time than a person without his disability.

7.105 The specific adjustment contended for is by postponing the meetings until a time when he was adequately able to defend himself.

7.106 We first consider the 6 December 2017 disciplinary hearing. We are not satisfied that it would have been reasonable to postpone the disciplinary until after the criminal appeal. He had been convicted. The respondent was able to take that conviction into account. It would have been possible to take a statement from the claimant. It would have been possible to prepare adequately for the disciplinary hearing. The disciplinary hearing could have gone ahead, for the reasons we have given it cannot be assumed that the outcome would have been dismissal. Dealing with the disciplinary hearing, prior to the criminal appeal, could have led to reduction in stress. Failure to postpone at that time was not in itself a failure to make reasonable adjustments.

7.107 The position is fundamentally different when it comes the appeal. The claimant was already dismissed. It follows that the main purpose of the appeal was to conclude a fair process. It was absolutely clear that the criminal conviction being overturned by the crown court could provide evidence which would materially affect the fairness of the decision to dismiss. At the very least, it may have been appropriate to review the initial decision.

7.108 Failing to postpone the appeal until after dismissal would have been a disadvantage to any employee, whether disabled or not. In that sense, it is arguable that there is no breach at all. However, we have reached the conclusion that the claimant was disadvantaged when compared to employees who are not disabled. There are two aspects to the disadvantage. The first disadvantage is failure to take into account the fact that the conviction was overturned, and that disadvantage would have been suffered by anyone. The second is the specific disadvantage caused by the extra stress and anxiety felt by the claimant because of his condition. The claimant was seeking to cope with the stresses of the criminal appeal and all that that entailed for him. Someone without his ability may have been able to attend at both hearings and, as well as suffering less stress, and may have influenced the outcome of the appeal in a way the claimant could not. The claimant lost the opportunity to have that influence. It follows a substantial disadvantage is made out when compared to those who are not disabled.

7.109 We have considered why HH did not postpone, we will consider this in more detail when looking at the victimisation claim. We have explored the reasons that he advanced when considering the claim of unfair dismissal. Neither is a good reason. There was no good reason to believe that the claimant would not attend after the criminal appeal. There was no basis for assuming that the criminal appeal would have no effect on the relevant factual circumstances. All that was required was a postponement for a few days. It was unreasonable not to postpone. This was a failure to make a reasonable adjustment.

<u>Victimisation</u>

7.110 Did the respondent victimise the claimant by subjecting the claimant to a detriment? The specific detriments relied on are as follows: by dismissing the claimant on 8 January 2018; dismissal of the claimant's appeal on 1 February 2018; and by the refusal on 30 January 2018 to allow an adjournment of the appeal until after the appeal decision of the crown court.

7.111 The respondent accepts that KA's email of 10 August 2017 and the claimant's appeal letter were both protected acts. The respondent does not seek to suggest either the dismissal or the failure to adjourn, and subsequent refusal of the appeal, are not detriments for the purposes of victimisation. They clearly are.

7.112 The defence is advanced on the basis that there is no causal link between the protected acts and the detriments.

7.113 We should first consider the dismissal. Causation of victimisation claims is a legal construct. What we are concerned with is the reason for dismissal. It is rare to find direct evidence of discrimination.[8] Therefore, it may be necessary to consider what secondary inferences may arise from primary facts.

7.114 It is often said that unreasonable conduct will not in itself demonstrate any form of discrimination, this would include victimisation. However, **Bahl**[9] is clear that were there is no adequate explanation for unreasonable conduct, that lack of explanation can lead to an inference of discrimination, or in this case victimisation. It follows it is not the unreasonable conduct itself, but the failure of explanation from which and inference is drawn. Put another way, an employer can behave unreasonably, but provided that the explanation is clearly not for discriminatory reason, no inference should be drawn.

7.115 As regards the dismissal, the claimant identifies a number of facts from which it is said we could conclude there was victimisation. We will now consider what facts there are from which we could draw and inference of victimisation in the context of the original dismissal.

7.116 It is said there was a failure to make reasonable adjustments. There is some evidence for this as we have noted, in particular in relation to provision of documentation. There is a failure of the respondent to takes steps to obtain medical evidence. The respondent accepts that it should have taken active steps to obtain medical evidence but failed to do so. There is some indication of a degree of irritation, at the very least from HY, which it is alleged leads to an inference. It could be argued there was some general reluctance to accept the extent of the claimant's disability.

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[8] We are using the term discrimination broadly to include the concept of vicitmisation.

[9] See the judgment of Gibson LJ in *Bahl v Law Society* [2004] IRLR 799, paras 100-101. If the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. The inference is then drawn from the failure to provide a non-discriminatory explanation for the unreasonable treatment.

However, when it comes to the dismissal, the tribunal is looking at the mindset of LK and the panel that made the decision. (We assume that the panel had the same mindset as LK.) We are not convinced that any matters relied on tells us much about the mindset of LK or are sufficient to turn the burden.

7.117 We have found that the dismissal was unfair, in that sense we have found that there was unreasonable behaviour. However, we also find that there is a clear explanation for that unreasonable behaviour. We have explored the reason for dismissal in detail when considering unfair dismissal. Whilst we note the legal tests for victimisation and unfair dismissal are different, in this case, the analysis of the thought processes of LK are common. LK relied entirely or almost entirely on the conviction. We have found that was unreasonable for the reasons given. However, there is no requirement for an explanation to be reasonable. It simply must demonstrate the contravention did not occur. In our view the explanation demonstrates that for LK the protected act, being KA's email, was neither a conscious part, nor a subconscious part, of any motivation. Her approach was unreasonable. It may be that the failure to consider the evidence, and observe the weaknesses of the allegations against the claimant, demonstrates a degree of naivety. However, we are satisfied that she simply assumed that the conviction was sufficient to justify the dismissal, and that is why she dismissed. It follows that the allegation the dismissal was victimisation fails.

7.118 The remaining allegations of victimisation are the rejection of the appeal and the failure to postpone.[10]

7.119 We need to consider if there are any facts which turn the burden.

7.120 We remind ourselves that we are looking at the thought processes of HH. HH is a senior employee. He is director of human resources and security for the respondent. He is a HR professional with 24 with years' experience. He holds a postgraduate certificate in human resource management and organisation development. He is extremely experienced.

7.121 Are there any facts which would turn the burden? We already noted that his failure to allow an adjournment was unreasonable. We have considered the explanation for that when considering unfair dismissal. The different legal tests for unfair dismissal and victimisation do not change the factual finding as to the reasons for his actions.

7.122 As to his reason for refusing the postponement, HH has relied on two elements: first, that the claimant would not have attended because of his medical condition; second, that the outcome of the criminal appeal could have made no difference.

[10] Allegation 3 – by the continuing delay in prosecuting the allegation of sexual touching and reputational damage, shortly after 10 August 2017 – was withdrawn.

7.123 As to the first, the respondent had not obtained medical evidence. As an experienced human resources professional, he should have understood the risk of making such a decision without medical evidence. Further, to the extent that his statement indicates that awaiting the outcome of the criminal appeal would have made no difference, it is clearly an unsustainable position. He resiled from that position during cross examination.

7.124 We have already noted that the appeal could have made a significant difference. On the perusal of the documentation relating to dismissal, it should have been obvious that the most important factor relied on when dismissing was the fact of the conviction. If that conviction were overturned, that in itself would have been sufficient reason to consider the matter carefully. Further, if the criminal conviction were overturned, the basis for the crown court's decision could not be assumed, and at the very least, it would be necessary to look at it. The criminal appeal could have directly criticised WS's evidence, and that clearly would have had an influence. In any event, even on the perusal of the documents before him, it should have been obvious that there was a change in WS's account, that change of account could have been relevant both to the criminal case and to the reasonableness of the dismissal.

7.125 It is possible that HH did not appreciate, fully, the way in which WS's story had developed. However, that change of account was obvious from the documentation. HH's position is that he did not read all the documents before him. No explanation is given for that failure, and it is a serious failure that is indicative of a closed mind.

7.126 There was a failure to make reasonable adjustments. For the reasons we have already found, it would have been reasonable to postpone.

7.127 There can be no doubt that HH had in mind the request to postpone. That was a request expressly made in the context of the claimant's disability and it was a request for a reasonable adjustment. It follows that the protected act was at the forefront of his consciousness and understanding. That request was specifically refused. It follows part of the protected act was reference to the claimant's disability and his need for adjustments pursuant to the Equality Act 2010. HH had in mind the protected act when reaching his decision to refuse to postpone. The date set by HH ensured that the appeal against dismissal was completed before the criminal appeal; this was a conscious decision. This made it certain that any matters arising in the criminal appeal would not be taken into account.

7.128 As we have noted, it is rare to find direct evidence of victimisation. In relation the adjournment and the subsequent refusal to uphold the appeal, there is ample evidence on which we could find the relevant provision has been contravened. That is to say the burden shifts. The protected act was at the forefront of HH's mind. He was unreasonable in refusing the adjournment and that in itself was a failure to make reasonable

adjustments. It may be possible to infer hostility to the request for reasonable adjustments. That possible hostility is underpinned by the failure to obtain medical evidence. The reasons advanced for refusing the postponement are unsustainable. The suggestion that the criminal appeal could make no difference is without foundation, and ultimately HH conceded this.

7.129 We have considered whether, during cross-examination, HH realised for the first time that the appeal could have made a difference. On the balance of probability, we do not believe that can be true. The reality is that HH understood at least prior to completing his witness statement, that the criminal appeal could have made a difference to the appeal against dismissal. Therefore, his witness evidence in relation to this was misleading and on the balance of probability, deliberately so. The reasonable inference is that he deliberately misled the tribunal. We note that his evidence as to the reason for proceeding with the disciplinary process was also misleading. It follows that there is ample evidence to turn the burden both in relation to the refusal to adjourn and the ultimate dismissal of the appeal.

7.130 Once the burden has turned (i.e. there are facts from which the tribunal could decide in the absence of any other explanation that a person contravened a relevant provision of the act), we must hold that the contravention occurred unless there is an appropriate explanation which demonstrates the provision was not contravened. That is to say in no sense whatsoever was the alleged contravention a part of the reason.

7.131 We have considered carefully the submissions in this case. As to this allegation of victimisation, the submissions are brief. It is dealt with at paragraph 191. The submissions state:

> **As to the second protected act, it is again plainly part of the chronology that the claimant submitted his appeal. Whether the tribunal agrees with HH's decision to only adjourn for one day not to uphold the appeal, again there is no basis to suggest that the fact C had claimed he had been discriminated was the reason why. In any event, at this stage, conviction was extant. The appeal was a review of the decision to dismiss and not a fresh decision.**

7.132 There is no attempt in the submissions to identify the explanation. The explanation as advanced during the case, and in particular in HH's statement, is unsustainable. No explanation is identified in the submissions at all. The supplementary submissions do not assist.

7.133 HH’s statement refers to the vetting suspension, his sickness leave, the possibility of dismissal for long term absence, and the possibility he would not have been able to return to location 3. HH’s purpose for raising these possibilities is unclear. It falls short of establishing a reason for refusing postponement of the appeal or for explaining the refusal to overturn the dismissal. At best it appears to be his case that had the claimant’s

dismissal been overturned, this would have led to procedures which may have resulted in his dismissal.

7.134 We find that there is no explanation advanced by the respondent that would support a finding that the failure to adjourn was in no sense whatsoever because of the alleged contravention. It follows that we must find the failure to adjourn was victimisation.

7.135 As to the reasons for upholding the dismissal, no specifc explanation is identified. It is clear that HH's mind was closed. It is possible that his mind was closed long before any protected act. Indeed, it is clear that he was instrumental in initiating the disciplinary proceedings, and his evidence as to how that came about is unsatisfactory and misleading. It is possible that his mind was made up at a very early stage. Prejudgment at an early stage could be a defence to the victimisation case, however unreasonable it would be. That is not his case, and it is not his explanation. It is for the respondent to prove the explanation and to provide the cogent evidence where it exists. The respondent has not made out such an explanation in this case and it follows we must find that refusing the appeal was an act of victimisation.

Time

7.136 We have considered time in retain to one allegation. We should note that the successful claims are all in time, and so any submissions concerning extension of time need not be addressed further.

Employment Judge Hodgson

Dated: 24 Oct 2019

Sent to the parties on:

24/10/2019

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For the Tribunal Office