



THE EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr A Sadeghi

v

TJX UK

Heard at: London Central

On: 5-7 July 2017 and in Chambers 31 July
and 2 August 2017

Before: Employment Judge P Stewart

And members: Mr R Pell
Mr S Soskin

Representation:

Claimant: Mr T Gillie, Counsel

Respondent: Ms S McKinley, Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1. The claim of unfair dismissal succeeds;
2. The claim of wrongful dismissal succeeds;
3. The claim of Discrimination Arising from Disability (s. 15 of the Equality Act 2010) succeeds;
4. The claim that there was a failure on the part of the Respondent to make reasonable adjustments (ss 20 and 21 of the Equality Act 2010) succeeds;
5. The issue of remedy will be determined at 10 a.m. on 18 September 2017 save in the event of the parties advising the Tribunal that such issue has been settled between them.

REASONS

Introduction

1. The Claimant claims unfair dismissal and disability discrimination. At a Preliminary Hearing Case Management held on 30 March 2017, the issues in the case were agreed and set out by Regional Employment Judge Potter as follows:-

UNFAIR DISMISSAL SECTION 98 EMPLOYMENT RIGHTS ACT 1996.

1. Was the Claimant dismissed for a potentially fair reason, his conduct?

2. If so, did the Respondent:
 - (a) have a genuine belief that the Claimant was guilty of misconduct?
 - (b) carry out as much investigation into the matter as was reasonable in the circumstances?
 - (c) from that investigation, were there reasonable grounds for the Respondent to conclude that the Claimant had committed misconduct?
3. Was the dismissal within the range of reasonable responses open to a reasonable employer?

WRONGFUL DISMISSAL

4. Did the Claimant's conduct amount to gross misconduct?
5. If so, was such conduct a repudiatory breach of contract as such that the Respondent was entitled to summarily dismiss the Claimant?
6. If not, what sums are owing to the Claimant?

DISABILITY

7. Was the Claimant at any material time a "disabled person" within the meaning of Section 6 in Schedule 1 of the Equality Act 2010, in relation to the following conditions:-
 - (a) Depression and/or;
 - (b) Anxiety.

DISCRIMINATION ARISING FROM DISABILITY (S. 15 OF THE EQUALITY ACT 2010)

8. Was the Claimant treated unfavourably for something arising in consequence of his disability, namely, the Claimant's inability to make decisions under pressure.
9. Has the Respondent shown that it did not know and could not reasonably have been expected to know that the Claimant had a disability?
10. What was the unfavourable treatment? In particular, was it any/all of the following:
 - (a) Subjecting the Claimant to a disciplinary procedure?
 - (b) Dismissing the Claimant?
11. If so, was the treatment a proportionate means of achieving a legitimate aim?

FAILURE TO MAKE REASONABLE ADJUSTMENTS (SS 20 AND 21 OF THE EQUALITY ACT 2010)

12. Did the Respondent apply the following PCPs?
 - a. applying/instigating a disciplinary procedure; and/or
 - b. applying its policy on dismissal.
13. If so, did any of the above PCPs put the Claimant at a substantial disadvantage?
14. If so, did the Respondent take steps as were reasonable to avoid the disadvantage to the Claimant? The Claimant contends that the Respondent should not have dismissed the Claimant and/or not subject him to a disciplinary procedure.

15. Has the Respondent shown that it did not know and could not reasonably have been expected to know that the Claimant had a disability?

REMEDY

16. How much compensation should the Claimant receive for:-
 - (a) Injury to feelings;
 - (b) Financial loss.
 - (c) Should any adjustments be made for failure to follow the ACAS Code and/or Polkey or contributory fault?

Witnesses

2. We heard evidence from Mr Simon Abel, Ms Wendy Lachman, Mr Asad Dogar and Mr Matthew Cuff for the Respondents and, for the Claimant, only himself.

Facts

3. The Respondent Company is a large retail company comprising two brands TK Maxx and Home Sense. The Respondent company has 495 stores in Europe and employees around 15,000 people in Europe, including 11,000 in the UK.
4. The Claimant started working for the Respondent in their TK Maxx stores in October 2003. Initially he was employed as a Christmas temporary worker but was promoted a number of times, becoming a Store Manager in 2009 and a General Manager in 2013. On 1 March 2016, the Claimant had become the General Manager for the High Street Kensington [HSK] store, one of the larger and busier stores in the capital, and thus reported directly to Mr Simon Abel, his District Manager. He was still in that position at the time of his dismissal for gross misconduct on 7 October 2016.
5. The Claimant suffers from depression and anxiety. He first started suffering from these conditions in 2014 and has continued to suffer with those conditions ever since. In his ET1, he described his conditions or condition has a substantial and long term adverse effect on his ability to carry out normal day to day activities; he suffers from severe mood management issues, has difficulty sleeping, lacks energy and tends to withdraw from any social situations, his condition can also affect his ability to make decisions under pressure.
6. In May 2016, shortly after having moved to his position as General Manager of the HSK store, the Claimant was the subject of allegations of having behaved in an inappropriate manner towards fellow colleagues. On 23 May, the Claimant was issued with a written warning in respect of these allegations and, shortly thereafter, he received a visit from his District Manager, Mr Abel, and the Regional HR Manager, Fiona Hanley. The object of the visit was to discuss how the Claimant and the Respondent could move on from the allegations and what were the Respondent's expectations of the

Claimant in terms of his behaviour. Over a cup of coffee, the Claimant informed them of his condition. The Claimant's evidence is that he informed them of his condition and elaborated on the severity of it – he had been having suicidal thoughts, it affected his sleep and mood such that he was quick to anger - and that he was in receipt of therapy and was taking anti-depressants for it.

7. Mr Abel's evidence was that the Claimant had mentioned he had previously suffered from depression and that this had caused him to have suicidal thoughts. However, he had not said that this was an ongoing illness and neither did he mention that he was on medication. Mr Abel said that, in the course of the discussion, he and Ms Hanley had considered a number of ways to support his behaviour but the Claimant had not suggested that any illness had impacted on his behaviour. Mr Abel asserted that the Claimant had not mentioned being on medication or that he needed any particular support or adjustments.
8. There clearly is a conflict in the evidence concerning the extent of the Claimant's disclosure. We heard from Mr Cuff who later conducted the internal appeal that he had spoken to both Mr Abel and Ms Hanley on the subject. Mr Cuff ascertained from Mr Abel that the Claimant had spoken about his illness as a historical issue and did not indicate that it was an ongoing issue. Mr Cuff did not record Mr Abel as having learned from the Claimant that his depression had caused him to have suicidal thoughts. We did not hear from Ms Hanley herself. Mr Cuff told us that Ms Hanley recalled the Claimant talking about his dad dying and referred to historic issues. She had told Mr Cuff she did not recall the Claimant referring to suicidal thought but that he talked about how he felt when his dad died. It was all "past tense". She asserted that the Claimant did not say he was currently depressed or suicidal and that, if he had, they would have acted on it.
9. From the two witnesses to this conversation from whom we heard, there was no dispute that the Claimant had mentioned his depression caused him to have suicidal thoughts. The fact that Mr Cuff's evidence of what Ms Hanley recalled of the conversation included her inability to recall his reference to having suicidal thoughts made us very aware of the difficulty in giving much weight to such hearsay evidence.
10. For this hearing, the Claimant had disclosed his GP's medical notes covering the period leading up and beyond his dismissal. From these, we see that the Claimant was indeed being treated for depression and anxiety and in receipt of medication at the time of this discussion.
11. With the Claimant undisputedly admitting to adverse family events having caused depression and to the fact that such depression caused him to have suicidal thoughts and to the clear evidence we have in the form of the GP's medical notes that he was prescribed anti-depressants, we arrive at the

conclusion on the balance of probabilities that the Claimant did inform both Mr Abel and Ms Hanley that his depression was ongoing and he was taking anti-depressants. It seems to us unlikely that he would choose to disclose a serious condition but consign the ongoing treatment he was receiving to the past.

12. Although the Claimant accepts that he had received a written warning for the incident which had given rise to the conversation with Mr Abel and Ms Hanley, we were not shown a copy. However, included in our bundle was a letter dated 7 March 2016 addressed to the Claimant from Mr James Emmerson, the District Manager for London 4. This was described a "letter of concern". The letter recorded an outcome of a one to one conversation that Mr Emmerson had had with the Claimant on 26 February 2014 at the Waltham Abbey Store concerning a recent customer service complaint. That discussion had taken place on 26 February 2016 and the letter of concern was dated the 7th March 2016. Mr Emmerson's concern did not prevent the Respondent from appointing the Claimant to be the General Manager of one of their busiest stores, HSK, on the 1st March 2016.
13. On the 17th August 2016, an incident took place at the HSK store which ultimately led to the dismissal of the Claimant for gross misconduct. Unusually for an Employment Tribunal hearing, the members of the Tribunal have been able, through the availability of footage from CCTV cameras, to view the events that unfolded on the 17th August albeit that the footage did not record sound.
14. A customer had come into the store in order to return a pair of trainers that he had brought several days previously. He claimed the trainers were faulty. He was originally served by Ms Amelia Hussein, one of the employees who was working on the till. She considered the trainers to be worn and therefore in a state that did not qualify for a refund. She showed the trainers to one of her colleagues, Ms Lipsa Patel, who advised her to check with the Claimant who, of course, was the general manager of the store. The Claimant came to the serving area and examined the trainers. He concurred with the view that the trainers had been worn outside and that therefore did not qualify for a refund. This was in line with the damage return guide which formed part of the bundle before us. At page 89 (b) of the bundle, we were able read the following:-

If a customer returns a pair of shoes that has been worn outside stating they are giving him blisters etc ... we need to refer them to our refund policy as we give all our customers 28 days to return any items. The customer therefore has the opportunity to wear these items around the house to make certain they fit correctly and are fit for purpose. We cannot accept returns on footwear because they don't fit correctly once they have been worn outside.

Any easy way to tell if a shoe has been worn is simply to inspect the soles, heel tips and heel covers for wear and marks/dirt etc. All items that come back to store should be in a saleable condition; worn shoes are not saleable and brand damaging.

15. This particular customer claimed that the trainers in fact were faulty, that there was something wrong with their sole. The Claimant rejected the customer's assertion that the trainers were faulty. The Claimant knew from previous experience with the trainers that there was an insole which was removable. He did not agree with the customer's contention that this constituted a manufacturing fault. As he both rejected that the trainers were faulty and as he ascertained that the trainers had been worn outside, he told the individual he would not give him a refund. The customer then became somewhat aggressive and his aggression manifested itself in swearing loudly. Initially, the Claimant remained calm and polite and told the customer that, if he was unhappy with the Claimant's decision, he could contact Customer Services. He gave the customer the number of Customer Services. Mr Michael Krzystofek, the Loss Prevention Officer in the store also spoke to the customer and made him aware of the Customer Services option.
16. The customer was unhappy with this response. He became loud and abusive. He swore. He called the Claimant a "dickhead" some 15 times, called the Respondent company "fucking thieves" and called the Respondent's customers "fucking idiots". Later, in the course of the appeal against the decision to dismiss, the Claimant asserted that the customer had called the Claimant a "fucking Paki". The Claimant, who is of Iranian origin, did not make that allegation at an earlier stage in the investigation. We are not able to come to any conclusion as to the racial insult but what we are sure of is that the customer was loudly swearing and being abusive to the Claimant and about other customers and Respondent company.
17. In the CCTV recording, it is clear that several times the customer presented the trainers and the Claimant gave them back to him. Then came a point where the customer brought out his mobile telephone. He wanted to take pictures of the trainers and the receipt which he had brought. He also started to use his phone as a video camera to record the Claimant and what the Claimant was saying. The Respondent had experience previously of covert recording made in one of the its stores forming the basis of a report on it made in a television programme. As a result of that TV exposure, the Claimant knew the Respondents to have provided advice to employees to avoid having the company's activities within stores recorded. In addition, the Claimant had formed a view of the customer that he might be under the influence of drugs or possibly alcohol such was the department of the customer.
18. The Claimant not only was concerned that the Respondent had put a prohibition on recording within the stores, but he was also concerned that the customer might use the footage of the Claimant to organise some sort of attack, physical or otherwise on the Claimant outside of the store. As a result, the Claimant reached forward and, with his left hand, grabbed hold of the customer's wrist and, with his right hand, covered the face of the phone

to prevent recording taking place. He also attempted to pull the phone away from the customer's right hand. The customer's left hand was then brought into action to reinforce the grip that he had on the phone. The Claimant's efforts to extract the phone resulted in the customer's arms being pulled towards the Claimant and the upper half of his body bending over the counter. This was described by certain of the investigators thereafter as being the customer being pulled across the counter. However, it is not literally the case that the customer was moved bodily from one side of the counter over the counter to the other side, merely that his upper half was bent across the counter.

19. After a short period of this tussle, the Claimant let go of the customer and the phone while still telling the customer that he was not to use the telephone as a video camera. A cleaner in the Respondent's store, a man called Emmanuel, had been hovering in the background of this tussle. When the customer straightened up now in sole possession of the telephone, Emmanuel tapped him on the shoulder, thereby distracting the customer's attention and smartly snatched the phone and tossed it to the Claimant. Whereupon the customer being incensed at this snatching of the telephone from his hand, turned on the person who had snatched it, Emmanuel, and proceeded to assault him. Emmanuel resisted. This struggle ended with other members of staff, including Mr Michael Krzystofek, the Loss Prevention Officer in the store, taking hold of the customer and detaining him until some ten or so minutes later two policemen arrived.
20. Pending the arrival of police, the customer was detained at the end of the line of tills with Mr Krzystofek and other members of staff in the vicinity. During this period, the Claimant twice was observed to bring out his own telephone and start filming the customer. This activity induced a vocal response from the customer to the effect that he called the Claimant an idiot for repeating or replicating the behaviour that the Claimant had prevented the customer from doing.
21. When the Police arrived, it seemed they had prior knowledge of the customer for they arrested him and put him in handcuffs with the result that the customer was taken to a Police Station where he was held for 18 hours only being released around 1pm the following day.
22. On the 19th August, the customer wrote a complaint to the Customer Service department of the Respondent highlighting his perception that there had been interference with certain of his rights. Firstly, that the Claimant had denied him his consumer rights of a refund or exchange of faulty goods. Secondly, that the Claimant had attempted to rob his phone in broad daylight. Thirdly, that another member of the Respondent's staff (Emmanuel the cleaner) had actually stolen his phone. Fourthly, that the cleaner had then punched the customer when he, the customer, attempted to grab the cleaner. Fifthly, that the Duty Manager, the Claimant and the Security Guard joined in. Sixthly, that he had been arrested and held for 18 hours. Seventhly,

that he had no phone for 42 hours, a separation that was continuing and eighthly, the accumulated humiliation, hardship, inconvenience, financial hardship and damage to the phone screen which the customer stated had occurred during the tussle with the Claimant.

23. As a result of this complaint being received, Mr Abel as District Manager received a telephone call from Mr Andy Stewart who was the District Loss Prevention Manager. Mr Stewart informed Mr Abel that the Claimant may have hit a customer following an altercation.
24. Mr Abel was in the Respondent's Clapham store at the time and he asked the Loss Prevention Manager there to show him the CCTV footage. He viewed the incident as it had been recorded by two different cameras. Mr Abel was not aware at that time that there was a third camera whose footage would have provided him with a clearer view of the till and of the interaction between the Claimant and the customer. Mr Abel, although he was able to view the footage on 19 August, did not make a report on what he had seen until 30 August. By then, he had taken statements from four of the Associates who had been working on the tills that day where the incident happened, Ms Katherine O'Rourke, Ms Chloe Gammalliere, Ms Zena Zeinab Shoukry, Ms Lipsa Patel and he also read a report that was made by Mr Michael Krzystofek, the Loss Prevention Officer in the store.
25. The report that Mr Abel made was to his Line Manager, Ms Natalie Sammon and it reads as follows:-

"Hi Natalie

On camera you can see Ali [*the Claimant*] appear, and to be fair on the face of it calmly, refused the refund on the trainers ... Ali and the customer played tennis with the box of trainers pushing them back and forth across the till. Again there is no aggressive body language on film from either party.

I have statements from members of the team to say that the customer was raising his voice and being verbally aggressive. The film itself then really very clearly shows what happens, there is no room for doubt. Michael the LP (Loss Prevention Officer) who appears on the scene also mentions the customer being verbally aggressive. I have read his report but then he went on hols too, back this week.

The customer takes a phone out and holds it up and reportedly is telling Ali that he is filming him ... Ali asks him to stop and leave, he carries on, then Ali covers the phone with his hands.

On camera you can see them basically holding the phone together with both their hands in front of them out stretched without a demonstrable struggle. Ali never takes the phone off the customer.

The customer then draws the phone back ... the cleaner appears behind him, pats him on the arm and carries on sweeping. Cleaner then returns and suddenly snatches the phone, at which point the customer and cleaner simultaneously raise hands and have some fisticuffs. Police were called and the customer who has a record is arrested. Customer denies the phone he used to try and record Ali is his accordingly to the team.

Looks like if the customer is arrested, then the cleaner should have been too.

Cleaner went on holidays the next day and is still off, I do know that Danilo the Noonan Area Manager has been down to view the tape. I have since been told by many people that this cleaner has history of involving himself in disputes and arrests which I wasn't aware of previously. As advised I emailed Warren the details on Friday 19th.

Ali has basically touched the customer's hands and phone after a long discussion and asking the guy to film, it's not done aggressively on film. Ali should not have got involved was his feedback from me before, post the incident with the female customer with the alleged Rabbit-skin boots ... and he should have just walked off when the guy started filming. As we have said before re. our discussions on his first few weeks in HSK he shouldn't be touching people or making physical contact in any way other than a traditional greeting. Ali could have done the refund and then told the customer to not come back and he could have asked the customer to move away from the tills to discuss the issue to calm the situation. However, the situation escalates on our side because of the cleaner as a matter of record on film.

Can I ask if you have any views on the next steps please or desired outcome?

Kind regards

Simon

26. Emmanuel was a contract cleaner and Mr Abel sent copies of the CCTV footage to the cleaning company employing him so that that cleaning company could decide on whether to take disciplinary action against Emmanuel. Mr Abel asked the cleaning company that whatever the outcome, Emmanuel was not to return to the HSK store.
27. It appears that, when Mr Abel reported to Ms Sammon, she had already reviewed the footage that Mr Abel had looked at and also that of the third camera, the one Mr Abel did not know about. She had concluded that the incident was more serious than Mr Abel had realised. The third camera's footage showed more clearly the Claimant tugging at the phone and the way in which the customer had been pulled partially across the counter. Rather than ask Mr Abel to view the footage from the third camera, Ms Sammon decided instead to ask Ms Wendy Lachman, who was a District Manager for the East and South East London region of the Respondents to carry out an investigation in place of Mr Abel.
28. Ms Sammon asked Ms Lachman to conduct that investigation on or around the 1st September 2016. When Ms Lachman viewed the footage, she considered that the Claimant's actions were aggressive and inappropriate, particularly given that there were other customers in the vicinity. She was particularly shocked at the fact that the Claimant had taken his own phone out of his pocket during the time that the customer was waiting for the Police to arrive and looked as though he was filming the customer. These actions she considered were antagonistic and unprofessional. The Claimant was seen on the footage to start filming the customer a second time and appeared to Ms Lachman to be smirking.
29. Once she had viewed the footage, Ms Lachman emailed Ms Sammon, Mr Stewart and Ms Hanley and indicated that, in her opinion, there was enough

to go back to the store the following day and suspend the Claimant (he being on his day off on 1st September) pending investigation. On 2nd September, she interviewed the Claimant and got his comments on viewing the footage from the CCTV and she provided a letter confirming that he had been suspended on full basic pay pending:

further investigations into inappropriate behaviour during the incident on 17th August 2016 during which a physical altercation occurred with the customer, potentially bringing the company into disrepute.

30. On the 8th September 2016, Ms Lachman interviewed Mr Krzystofek and Mr Ritesh Patel, who was the Deputy General Manager. On the 16th, she interviewed Ms Aisha Akmad whom she thought incorrectly was the employee who had originally served the customer. Ms Akmad had called in the Loss Prevention Team during the incident. Following these interviews, Ms Lachman concluded there was a case to answer.
31. Her concern was that, instead of giving the customer a refund which she asserted a manager always has the discretion to do, the Claimant physically handled the customer pulling him across the cash desk. With the matter escalating and the customer shouting, the Claimant did not take the customer aside and continued to deal with him in front of customers. She told the Tribunal that the thing that really concerned her was that the Claimant had pretended to film the customer, an action which she considered had antagonised the customer and appeared to be smirking during the process. She considered that the Claimant's actions potentially were gross misconduct.
32. Ms Lachman then spoke to Mr Asad Dogar, a fellow District Manager, to see whether he would be free to conduct a Disciplinary Hearing. He confirmed that he would be. As a result, she met with Mr Dogar and Ms Hanley of HR on 22 September to review the CCTV footage and to take Mr Dogar through her findings. Thereafter, Ms Lachman had no further involvement in the matter save that she was interviewed as part of the appeal hearing regarding allegations that the investigation was predetermined. Mr Dogar, after viewing the TV footage and hearing from Ms Lachman as to what her findings were, then read the customer's complaint, the notes of the meetings with the Claimant, with the Loss Prevention Officer Mr Michael Krzystofek, with Mr Ritesh Patel and with Ms Aisha Akmad.
33. On 29 September, Mr Dogar sent the Claimant a letter inviting him to a Disciplinary Hearing on 7 October 2016:

to discuss the allegation of serious misbehaviour towards fellow associates, customers, suppliers or visitors e.g. use of verbal abuse, violence, fighting, bullying or harassment. Specifically, for inappropriate behaviour during the incident on 17 August 2016, during which a physical altercation occurred with the customer, potentially bringing the company into disrepute.

34. As well as drawing to the attention of the Claimant that he was entitled to be accompanied to the Disciplinary Hearing by either another employee or a Trade Union Representative, Mr Dogar informed the Claimant that he should be aware that the allegation as the letter contained was considered to be potential gross misconduct which might result in his dismissal from the Company.
35. The Disciplinary Hearing took place on 7 October with the Claimant confirming at the outset that he did not wish to be accompanied. The hearing started at 1120 and finished at 1621 hours. During that time, there were breaks and Mr Dogar told us that he “made sure that the Claimant had every opportunity to put his side of events forward.” In the course of that hearing, the Claimant spoke of a previous incident in which a customer complained about him while he was working at the Walthamstow Store. Mr Dogar had asked the Claimant what lessons he had learned from that incident. The Claimant’s response was that, if he did not do anything, then no one would question him. Mr Dogar was aware that the Claimant had been issued with the letter of concern dated 7 March 2016 by Mr Emmerson. The body of that letter reads:-
- We discussed your role in a recent customer service complaint and that the situation should indeed have been handled better. We also discussed the records at Head Office Watford which hold many accounts of customer complaints regarding the stores you have run and further examples of where you personally have failed to offer the correct standards of service expected of a TK Maxx General Manager. In light of this, further failures to meet the right service levels personally or in store may lead to formal disciplinary action being taken against you.
36. The Claimant had attempted, in Mr Dogar’s eyes, to justify his behaviour towards the customer on 17 August by asserting that, as he had been abusing members of staff, that customer did not have the right to be treated as a customer. Mr Dogar asked the Claimant as to how he could be sure that the customer was under the influence of drugs and the Claimant said that the customer was shouting and swearing but when he was told he could not use that language he changed his tone and said he was sorry. The Claimant also said that the customer smelt of weed.
37. The Claimant accepted that there were several different ways of dealing with this customer but he did not accept that his own behaviour had provoked the customer. As well as interviewing the Claimant during this hearing, Mr Dogar showed the Claimant the CCTV footage, pausing at times and asking questions. He asked the Claimant why he reached out towards the customer’s phone. The Claimant said that he was holding his hand in front of it so that the customer could not record him, he was insistent that his hand was on top of the phone and not on the customer’s wrist. Mr Dogar could see from the footage that the Claimant was grabbing the customer’s wrist. Mr Dogar said the Claimant grabbed with his right hand and was pulling the phone with his left, however, the Tribunal viewing the footage could see the

Claimant's left hand being the one that grabbed the customer's right wrist and his right hand the one that was used to pull the phone.

38. Towards the conclusion of the interview, Mr Dogar asked the Claimant whether now, having had the opportunity to reflect on the incident, he would have done anything differently. The Claimant said that he should not have gone to the till and dealt with it in the first place, but that he would have still refused the refund. He said that what he thought he did was right at the time, he was trying to calm the customer down. He said that he was polite, calm and professional until he was filmed without his consent. Mr Dogar adjourned the meeting at 1530 hours to reflect on his decision. He then made findings of fact which he listed over 29 sub paragraphs in his witness statement. His conclusion was set out at paragraph 32 of his statement, it was that the Claimant:-
- Behaved inappropriately towards a customer and this had led to physical contact with the customer.
 - Ali's behaviour had escalated the situation and could have brought the company into disrepute.
 - Ali was not remorseful for his actions.
39. Mr Dogar found all of the above individually and cumulatively amounted to an act of gross misconduct, specifically "serious misbehaviour towards fellow associates, customers, suppliers, or visitors e.g. use of verbal abuse, violence, fighting, bullying or harassment" quoting from the company's staff handbook.
40. Mr Dogar considered whether the Claimant's service history was a mitigating factor. Whilst he acknowledged that the Claimant had been employed for 13 years, this was one of a number of incidences in short succession in which the Claimant had been involved. The Claimant had not offered other mitigation for his actions; at no point in the meeting with Mr Dogar did the Claimant indicate he was unwell or that this contributed to his actions. Neither did the Claimant, who did refer to the customer having used bad language, suggest that the customer had been racist.
41. Mr Dogar concluded that dismissal for gross misconduct was an appropriate sanction in the circumstances. He told us that he considered alternatives to dismissal including placing the Claimant in another role, however, he did not consider this appropriate as "customer service is important for any role within" the Respondent Company.
42. Mr Dogar thereupon called Ms Sammon to inform her of his decision and to ask if she would act as the appeal manager. He did this before reconvening the meeting at 1615 hours. When he reconvened the meeting, he informed the Claimant of his decision and that the Claimant had got a right of appeal. By letter dated 13 October of 2016, the Claimant exercised his right of appeal against the decision to dismiss him for gross misconduct.

43. The first point the Claimant made in his appeal letter was to take issue with Ms Sammon hearing the appeal. He advanced his view that it was not appropriate for Ms Sammon to consider his appeal as he believed her to have had some involvement in the disciplinary process. Further, he believed he had been treated so harshly because he had, in the past, questioned some of her business decisions, something which he understood she had not liked.
44. As a result of the Claimant's objection, Ms Sammon did not hear the appeal. Instead, it was heard by Mr Matthew Cuff who, at this stage, was Regional Manager for the South Region of the Respondent's operation in the UK.
45. In the remainder of his letter, the Claimant rehearsed the details of the incident and, on this occasion, specified that the customer in the course of his abuse of the Claimant had called him "a fucking Paki". His account of the history of the matter was set out over four full A4 pages.
46. Mr Cuff in his witness statement summarised the Claimant's appeal as follows:-
 - a) The allegation of gross misconduct was false.
 - b) Other store managers would have behaved in the same way.
 - c) Mr Abel had discussed the incident with him after reviewing the CCTV and as far as he was concerned the matter had been resolved. The Claimant thus believed that Ms Sammon had intervened and he questioned her impartiality.
 - d) The investigation was flawed and predetermined.
 - e) Mitigating factors weren't taken into account. [The Claimant] had explained that 2 years ago he lost his father, his marriage had abruptly ended and, a year later, his mother was critically ill. [The Claimant] said that he had been diagnosed with depression and anxiety. He alleged that Mr Abel and Ms Hanley were aware of these issues and that he was on strong medication. He said he did not always make the best decisions under pressure.
47. Mr Cuff treated the Appeal Hearing as a re-hearing allowing the Claimant to put forward any new evidence or additional points as he wanted to make sure "that the decision made to dismiss him was correct".
48. In the course of the discussion, the Claimant mentioned his sad family circumstances and said that he had gone to his GP more than a year ago. The GP had given him medication and the Claimant said that depression could make him angry and he had been referred to a Mental Health Centre. He proceeded to show Mr Cuff a prescription for the anti-depressants he was taking and showed him a letter from his GP. That letter was undated and said:

To whom it may concern, this is to inform you that Mr Sadeghi, who is registered with our practice, suffers from depression and takes his medication Mirtazapine regularly. Yours sincerely Dr S Joshi.

49. The Claimant said that he had told Mr Abel and Ms Hanley about his depression and that he was on medication and that Mr James Emmerson was also aware of these facts. He explained that he was normally fine but medication did knock him out and that, when he got angry or something disturbed him, he could not have “paradoxical and agile thinking”. This term was used by him because, in the handbook that the Respondent had provided their managers, there is a section which listed nine leadership competencies that they suggested where appropriate, one of which was “paradoxical and agile thinking”.
50. Mr Cuff asserted that throughout the hearing the Claimant remained resolute that he had made the right decision and that he would do what he needed to do in order to carry out the instructions regarding customers’ filming, that is to say he would attempt to stop them filming. Mr Cuff explained to the Claimant that he wished to investigate further and he would write to him with his outcome.
51. Following the meeting, Mr Cuff telephoned Mr Abel, met with Ms Hanley, spoke with Mr Dogar and Ms Lachman and reached the conclusion that he should reject the appeal against dismissal. He confirmed his decision in a letter dated 7 November 2016.
52. Finally, we should record that, as a result of the views that Mr Simon Abel formed in his investigation, Ms Sammon conducted a meeting with him on 3 October 2016 which resulted in her addressing a “Letter of Concern” to him. This undated letter reads as follows:

Dear Simon

As agreed in our meeting on 3rd October 2016. Please find a summary of the salient points that we discussed and the key outcomes that you agreed to drive forward. The purpose of the meeting was to discuss a number of concerns that I had in relation to an incident that took place in High Street Kensington store on 17 August 2016.

This incident resulted in a customer (named) being allegedly assaulted by the store manager (the claimant) and a cleaner who works for a third-party supplier. The key areas we discussed were: 1. The initial investigations following the customer's formal complaint.

1. Your lack of judgement following the viewing of the CCTV footage.
2. Agreed actions going forward. 1. The initial investigations following the customer complaint: With regards to the above point, you realise that your initial investigations did not cover the whole footage of the incident, as you only viewed part of the CCTV footage available to you at the time of the investigation. Once you were informed there was additional footage available for you to review, you did this as soon as possible and realised the impact of the incident, which left you shocked by the behaviour from your store manager (the Claimant). You agreed that this was poor judgement by yourself and that this should not have happened, although you don't understand why you hadn't viewed the full footage at the time of the incident. 2. The lack of judgement from yourself after reviewing the CCTV footage:

After discussing the incident in full, you agreed that this was a "true miss" from yourself and that you understood that this would have left the business exposed to further

consequences. You further expressed how you will take this learning on board in the event of any similar incidents going forward.³ Agreed actions going forward

Any complaints that are made within your area of accountability will be reviewed in a timely manner. This will include a full investigation involving the appropriate business partners and a full record with findings and recommendations that will be presented back to myself for final sign off. This process will be reviewed in six months' time. Please let me know whether you require any additional resource support needed in relation to the above matter.

Yours sincerely

Unfair dismissal

53. The Respondent has satisfied us that the Claimant was dismissed for a potentially fair reason, namely, his conduct in dealing with a difficult customer on 17th August.
54. We conclude that Mr Dogar had a genuine or honest belief that the conduct of the Claimant on the 17th August amounted to misconduct. However, we do not think the Respondent carried out as much investigation into the matter as was reasonable in the circumstances. Understandably neither Ms Lachman nor Mr Dogar had checked on the customer's pair of trainers to see whether they exhibited a fault - our understanding is that the trainers had departed the store along with the customer in the custody of the police - but neither had checked whether, as the Claimant asserted, they were of a type which had a removable insole and thus gave rise to the customer's rebuttable complaint that they were faulty. Neither Mr Dogar or Ms Lachman choose to interview the four employees from whom Mr Abel had taken statements. One or more of them could have confirmed whether the trainers were exhibiting wear consistent with having been worn outside.
55. The Respondent had a written returns policy on shoes which specified that "We cannot accept returns on footwear because they don't fit correctly once they have been worn outside." The Claimant was clearly applying that policy in his refusal of a refund to the customer. In her evidence, Ms Lachman referred to guidelines about shoe returns and these words which were printed under the rubric "Manufacturing Faults versus Fit Faults" but said:

The written guidelines at 89B have been relaxed - by unwritten information which I have, as area manager, disseminated through discussions at an area manager's meeting. But I would not know whether other area managers' meetings necessarily disseminated the same information and I recognise that a manager in my area might have been sick or absent when that information was discussed and would have therefore been left in a difficult position if, later, I were to say he should have overridden the written prohibition on taking shoes back if they had been worn outside. I would not have known whether the claimant was in that difficult position.

56. Later, she said:

During this investigation, I did not ask Simon Abel, on the same level as me, whether he had had conversation with his general managers about relaxing the 89B prohibition

57. It seemed to us that this failure to find out whether Mr Abel had disseminated the relaxation of the guidelines to his staff and whether, if so, the Claimant was among the staff to whom this relaxation of the guidelines was made known made Ms Lachman's investigation incomplete.
58. But leaving aside those matters which might have made the investigation more complete, we accept that there were reasonable grounds for the Respondent to have concluded the Claimant to be guilty of misconduct. The CCTV evidence showed the Claimant to have put one hand on the wrist of the customer and the other hand over the camera which the customer was holding. The Claimant knew, as Mr Abel put it in his email to Ms Sammon, that:
- ... he shouldn't be touching people or making physical contact in any way other than a traditional greeting
59. We then moved on to consider whether the dismissal was within the range of reasonable responses open to a reasonable employer. In considering this question, we were grateful to Mr Gillie for drawing to our attention the cases of Johnson Matthey Metals Ltd v Harding [1978] IRLR 248, Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854 and East England Ambulance Services v Sanders UKEAT/0319/15/DA. In particular, we found particularly instructive the elucidation that Laing J provided in the third of those cases of what the EAT chaired by the President, Langstaff J, had been concluded in the second case:
54. ... the ET must not jump from a finding that a dismissal has been for gross misconduct as a matter of logic to a finding that the dismissal is therefore fair. In many cases that will be the outcome, but there are cases, albeit a small number of cases, where if there is actual mitigation that could lead to the dismissal being unfair.
60. There was mitigation in this case. First, in the actual incident, there was the behaviour of the customer. When faced with the polite refusal of the Claimant to refund him the money he had paid for the trainers (for valid reasons – the trainers were not faulty and they bore marks of having been worn outside), the customer had become loudly abusive of the Claimant, the Respondent and of other customers for shopping in the store.
61. Furthermore, the customer had attempted to use his phone to make a video of the refusal of his application for a refund. This was an action of a type which the Respondent had previously deplored urging managers to prevent filming within the store. However, there had been no guidance from the Respondent as to how a manager was to achieve this aim.
62. We considered the behaviour of the customer amounted to a degree of provocation which should have been factored into the decision on sanction.
63. Then there was the behaviour of the cleaner. His intervention – snatching the phone and tossing it to the Claimant - led to a scuffle between him and the customer. That scuffle led to the customer being detained by the store staff

until the police arrived with the consequence that, for some 18 hours, the customer was detained in a police station. That most unhappy outcome for the customer makes it hard not to sympathise to a degree with the view expressed by Mr Abel in his report to Ms Sammon:

Looks like if the customer is arrested, then the cleaner should have been too.

64. Up to the point when the cleaner snatched the customer's phone, the only criticism that might be made of the Claimant was that he attempted to stop the filming by covering the camera lens of the telephone while, at the same time, attempting to take the phone off the customer, an action which entailed the Claimant taking hold of the customer's wrist. The toing and froing of the camera gripped by both the customer and the Claimant for a short period until the Claimant released his grip both on the customer's wrist and on the camera was unlikely of itself to have led to a complaint by the customer and the subsequent investigation.
65. But, even if a complaint had been made, there would have been considerable mitigation at that stage not only in the behaviour of the customer up to the point where the Claimant released his grip on phone and customer but also in the fact that the Claimant was attempting to comply with his company's policy of preventing filming. In that attempt (the first time that the Claimant had been faced with a customer attempting to film), the Claimant had not received any guidance from his employer. The guidance given by the Respondent on "Leadership Competencies" had included in its section on "Paradoxical and Agile Thinking" (and elsewhere) as one of the "Cultural Factors To Consider" the line "Results are Critical and Mistakes are Acceptable".
66. The seizing of the customer's wrist was clearly a mistake and amounted to misconduct. However, we do not consider that a reasonable employer in such circumstances would have regarded such misconduct as anything other than an error of judgment from which the employee could learn. Mr Dogar told us that his conclusion was that the Claimant had "behaved inappropriately towards a customer and this had led to physical conflict with the customer". We did not understand him to be suggesting that the physical conflict to which he referred was other than that engaged in by the customer with the cleaner. We consider the inappropriate behaviour of the Claimant not to fall within the category of gross misconduct for which the Respondent has provided examples. The Claimant was not verbally abusive or violent: he was not fighting, bullying or harassing the customer notwithstanding that his attempts to stop the filming led to a tussle over the camera. There did not appear to be any application of the Respondent's publicised readiness to accept mistakes.
67. Ms Lachman and Mr Dogar highlighted only one activity on the part of Claimant occurring after the phone snatch by the cleaner and that was his action in pretending to film the customer. Mr Dogar had acknowledged that

witnesses disagreed as to whether this had “antagonised the situation but Michael [Krzystofek, the Loss Prevention Officer] was of the view that it definitely made the customer more angry”. In fact, there were at least two witnesses – Mr Ritesh Patel and Ms Ashiya Akmat – to the Claimant’s activity who agreed with the Claimant’s view that the pretend filming had actually calmed the customer. Ms Lachman had established their views but had preferred that of Mr Krzystofek because he, as she put it, “has to be more observant”. We could find no rational basis for this preference of Mr Krzystofek’s views on this issue, particularly when, as Ms Lachman said, the footage showed:

The customer did not appear to be doing anything differently from before and after the pretence of filming

68. We have the same concern about the readiness of Mr Dogar to accept that the pretence of filming had “antagonised the situation”.
69. There was, as we have found, knowledge on the part of Mr Abel and Ms Hanley that the Claimant had an ongoing depression for which he was taking medication. None of this found its way into the initial report of Mr Abel, the conclusions of Ms Lachman or the considerations of Mr Dogar into the matter. We accept that the Claimant did not, in his interviews with Ms Lachman and Mr Dogar, raise the issue of his depression. However, we consider that, with his line manager and the HR manager having knowledge of his condition, that should have been fed into the investigation.
70. When, however, the Claimant did bring his condition directly to the attention of Mr Cuff, there was a complete failure on the part of Mr Cuff to regard the Claimant’s disclosure as worthy of further investigation. As his evidence to us was that he regarded the appeal as a re-hearing and himself as conducting a “thorough investigation”, his failure to make any enquiries into whether depression or medication would have affected the Claimant’s judgment was extraordinary. He had open to him the resources of the Respondent’s occupational health back-up and he had an open invitation from the Claimant to communicate with his GP. Mr Cuff did not have medical training himself but told the Tribunal at the end of his evidence that:

Had I been told by GP that depression and medication being taken would have affected his thinking and his judgment, it would not have affected my decision.

71. We regard the depression and medication as potentially mitigating factors in the assessment as to whether dismissal was the correct sanction for Mr Dogar to have chosen. Absent medical advice, we do not know whether Mr Dogar, properly informed and exercising appropriate curiosity about the effects of depression and medication, would have decided not to dismiss. Similarly, we do not know whether Mr Cuff, had he chosen to investigate the effects on the Claimant’s performance of depression and the medication he was taking, would have discovered such information that would have affected his decision. What we do know is that these matters had the

potential for influencing the decision to dismiss by providing mitigation and the Respondent failed to investigate that potential.

72. In this regard re the appeal, we consider we are supported by the conclusion of the EAT in The City of Edinburgh Council v Dickson UKEATS/0038/09/B1 that an Employment Tribunal was entitled to form the view that a dismissal was unfair where the decision-maker refuses to engage with the defence. The fair course for the decision-maker would have been to take advice.
73. There was also mitigation in the form of the Claimant's long service - 13 years - and his competence in his job that had propelled him into the General Manager's job at one of the Respondent's busiest stores. In the last three six-monthly appraisals before he was dismissed, the Claimant was assessed as exceeding expectations. The customer feedback for the HSK store during the period the Claimant was General Manager recorded, per Mr Abel, 158 out of 159 customer feedbacks that were categorised as "extremely" or "somewhat" satisfied. Mr Dogar had not considered the Claimant's appraisal record nor the customer feedback. He did not speak to Mr Abel to appraise himself of these matters. Mr Cuff asserted he was aware of the Claimant's previous appraisals and that they were of a "good grade" but failed to indicate such awareness in the letter dismissing the Claimant's appeal.
74. And there was mitigation available in the remorse that the Claimant showed in the course of the investigation which was not taken into account because, although he expressed remorse, he also attempted to defend his actions. This the Claimant did by pointing to the customer's behaviour, viz openly swearing and abusing the Claimant, the Respondent and other customers and to the concern generated by the customer choosing to video the Claimant as the manager of the store refusing the refund.
75. All in all, we considered there to be mitigation and potential mitigation not investigated which made the decision to dismiss the Claimant one which was outside the range of reasonable responses of an employer to the misconduct of the Claimant.
76. We were also concerned about the procedure adopted in the investigation of this incident. Mr Gillie has referred us to the ACAS Code of Guidance on Disciplinary and Grievance Procedures at paragraph 4 which refers to the need to deal with disciplinary or grievance issues fairly with one of the principles being that employers and employees should act consistently. Mr Gillie asserts that the actions of the Respondent were not fair in:
 - a) Appointing Mr Abel to investigate but without the necessary independence as demonstrated by the question he posed to his superior on presenting his report: - "Do you have any views on desired outcomes?"

- b) Removing Mr Abel from the conduct of his investigation after establishing he had viewed footage from 2 and not 3 CCTV cameras without giving him the opportunity of reconsidering his report in the light of the further footage;
 - c) Substituting another investigator, Ms Lachman, who was aware that she was being appointed in place of Mr Abel because the line manager of both her and Mr Abel, Ms Sammon, considered him to have shown a lack of judgment;
 - d) Permitting Ms Lachman to handover her investigation to Mr Dogar, the manager charged with conducting the disciplinary hearing that she had recommended and in whose appointment she was involved, at a joint viewing, along with Ms Hanley from HR, of the footage from CCTV cameras at which it would seem inconceivable that Mr Dogar would not have learned the above history of the investigation.
77. Mr Gillie encourages us to form the view that the Claimant's dismissal was at least to some degree pre-determined. Without detracting from our finding that Mr Dogar genuinely considered the Claimant to have been guilty of misconduct, we consider there to be some force in that submission. Before he announced his decision to the Claimant, Mr Dogar phoned Ms Sammon to inform her of his decision and to enquire whether she would act as the appeals manager. Although Mr Dogar did say that Ms Sammon made no comment about the incident beyond enquiring whether he was comfortable with his decision before assenting to be the appeals manager, the history of the matter would have already suggested to Mr Dogar that she would not have welcomed hearing that he had adopted a lenient approach to the misconduct he had discerned.
78. We do think the change of investigator at the behest of Ms Sammon denoted procedural unfairness on the part of the Respondent. Mr Abel had identified that the Claimant had touched the customer's hands which, in earlier discussions relating to his first few weeks in HSK, he had been counselled against doing. Mr Abel had further identified that the Claimant should have done the refund (notwithstanding the written policy against refunding for shoes worn outside) for expediency purposes. Mr Abel attributed the situation to have escalated because of the involvement of the cleaner and, tellingly, did not appear himself to be suggesting disciplinary action against the Claimant. We consider the removal of Mr Abel from the role of investigator demonstrated an unwillingness on the part of Ms Sammon to abide by the process which the Respondent had set in train when Mr Abel was appointed.
79. Therefore, for all the above reasons, we consider the dismissal of the Claimant to have been unfair. Further, we do not consider the Claimant's misconduct amounted to gross misconduct such as to constitute a repudiatory breach of contract.

DISABILITY

80. The Respondent has conceded that the Claimant was a disabled person within the meaning of Section 6 in Schedule 1 of the Equality Act 2010. The only issue was whether the Respondent knew of that fact before the event which led to his dismissal and we have indicated our view on that to be that the Claimant had disclosed his ongoing condition in May 2016 to Mr Abel and Ms Hanley.
81. We are not able to determine on the present evidence whether the Claimant, in consequence of his disability, had an inability to make decisions under pressure.
82. As we have already commented, the Respondent has not shown that it did not know and could not reasonably have been expected to know that the Claimant had a disability. We consider that the Respondent did subject the Claimant to unfavourable treatment both in subjecting the Claimant to a disciplinary procedure following an incomplete investigation and in dismissing him without obtaining medical opinion as to the effect which his depression and ongoing medication would have had on his performance on 17 August.
83. We do not consider such unfavourable treatment constituted a proportionate means of achieving a legitimate aim. The reputational damage resulting from failing to deal effectively with an irate and abusive customer does not outweigh the reputational damage resulting from the dismissal of an employee who has mental health issues which may be relevant without checking on their relevancy by obtaining medical opinion thereon.
84. We should say at this point that we do not accept without medical opinion the proposition which was advanced in paragraph 64 of the Respondent's written submissions that there was considerable evidence in the Claimant's medical records disclosed for this hearing that his depression causes a propensity to anger which manifests as aggressive and violent behaviour towards others.
85. With regard to the alleged failure to make reasonable adjustments (ss 20 and 21 of the Equality Act 2010), the Respondent did apply two PCPs, that of applying/instigating a disciplinary procedure and of applying its policy on dismissal.
86. These PCPs did put the Claimant at a substantial disadvantage in that the Claimant needed his medical condition and the pharmaceutical treatment he was receiving to be taken into account and medical opinion sought, something that someone without his disability did not require. The Respondent could have taken steps to avoid the disadvantage, namely, obtaining medical opinion at the investigation stage which may have resulted there being no instigation of a disciplinary procedure and /or no dismissal. However, the Respondent did not take such steps.

87. We repeat that the Respondent has not shown to our satisfaction that it did not know the Claimant had a disability.
88. We had adjourned the issue of remedy to be heard, if so required, on 18 September 2017. That hearing date is therefore now required unless the parties indicate that agreement on remedy has been reached.

Employment Judge P Stewart

Dated: 25 August 2017