EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

"This has been a remote hearing not objected to by the parties. The form of remote hearing was V – Video by Cloud Video Platform or CVP. A face to face hearing was not held because it was not practicable and no-one requested the same."

Claimant		**Respondent**
Mr T King	v	Tesco Stores Limited

Heard at: Watford; fully remotely **On**: 5, 6 and 7 May 2021

Before: Employment Judge George
Members: Mrs J Hancock; Ms K Turquoise

Appearances

For the Claimant: Mr M Blackburn, friend
For the Respondent: Ms J Ferrario, counsel

RESERVED JUDGMENT

1. The respondent subjected the claimant to harassment related to sex by his line manager subjecting him to the following unwanted conduct:

    a. Preventing him from leaving the room where he was being interviewed on 19 December 2018 by (1) putting her hand out firmly; (2) placing her foot against the door to prevent it opening further and/or (3) blocking the claimant in the doorway.

    b. Using her shoulder to block the claimant in the doorway to stop him leaving the room;

    c. Making robust physical contact with the claimant by grabbing and holding onto his arm and stopping him from leaving the room.

2. The respondent discriminated against the claimant on grounds of sex by not reasonably investigating the conduct of his line manager and his allegations of intimidation and harassment against her.

3. The respondent subjected the claimant to harassment related to sex by dismissing him with effect from 2 March 2019.

4. Alternatively to 3xx above, the respondent discriminated against the claimant on grounds of sex by dismissing him with effect from 2 March 2019.

5. Otherwise, the claimant's allegations of direct sex discrimination and harassment related to sex are not well founded and are dismissed.

6. The claimant was not in repudiatory breach of contract such as would entitled the respondent to summarily dismiss him.

REASONS

1. In this hearing, which took place by CVP between 5 and 7 May 2021, the Tribunal had the benefit of a bundle of documents running to 208 pages which contained the documents set out in the index. In these reasons, pages numbers in that bundle are referred to as pages 1 to 208 as appropriate. We heard from the claimant who gave evidence with reference to a typed, 4-page witness statement which he adopted in evidence and upon which he was cross-examined. The respondent relied upon the evidence of 4 witnesses all of whom adopted written witness statements in evidence and were cross-examined by Mr Blackburn: Lee Murphy-Store Manager, who took the decision to dismiss; Joe O'Halloran-then Fresh Lead Manager at the Aylesbury store; Jo Francis-Lead Manager who was the claimant's line manager at the relevant time; and Sawat Khan-Dot Com Team Manager. The witnesses, and other individuals involved with the incidents that formed the basis of the claim are referred to in these reasons by their initials. No disrespect to them is intended thereby.

2. The claim arises out of the claimant's employment by the respondent as a Customer Assistant from 18 November 2017 (see the terms and conditions of employment at page 103) until his dismissal with effect on 2 March 2019 which the respondent says was because he had been absent without leave. The claim form was presented on 23 May 2019, following a period of early conciliation from 26 March 2019 to 26 April 2019. In it the claimant brought complaints of unfair dismissal, sex discrimination and breach of contract but the claim for unfair dismissal was rejected by the Tribunal due to lack of qualifying service.

3. In the event, the Tribunal was unable to complete its deliberations in time on Day 3 of the final hearing so as to be able to deliver an oral judgement with reasons. We therefore reserved judgement and a provisional remedy hearing was fixed for the 17 September 2021. In the light of our judgement, case management orders for that hearing are sent out separately to these reasons.

The Issues

4. The claim was case managed at a preliminary hearing conducted by Employment Judge Daniels at which the issues were agreed to be those set out on page 42 of the bundle. Ms Ferrario and Mr Blackburn confirmed at the start of the hearing before us that those remained the issues to be decided. It was agreed that the Tribunal should in the first instance decide the issues set out in paragraphs 4.1 to 4.10 of Judge Daniels' order and additionally, in the event that the claimant was successful, go on to consider whether it was possible that the claimant would still have been dismissed for a non-discriminatory reason and whether any reduction should be made to his compensation as a result. In the interests of brevity, we have reference to those issues but do not repeat them here.

Findings of Fact

5. We make our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgement all of the evidence which we heard but only our principal findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

6. According to the terms and conditions which the claimant signed on 19 May 2018 (page 103), he started employment as a Customer Assistant-replenishment with core hours of 7.5 hours per week and flexible additional hours. Since he was employed on a flexible contract he was expected to work additional hours which "combined with your core hours will be no more than 36.5 hours in any one week". These were to be at times agreed with his manager and it is specified that a minimum of 24 hours' notice would be given prior to any additional hours being worked. According to JOH, at the time of joining, a Customer Assistant will state the days of the week and the times when they are flexibly available and manager will agree additional hours within those times. We note that the terms and conditions require the employee "to maintain the flexibility you have specified". The claimant also had another job with for Aylesbury Fire Service and was studying for a qualification as electrician.

7. On 20 October 2018 JF conducted an absence review meeting with the claimant because he had a level of absence which was causing concern (page 112). One of the reasons given for his absence at that point (see page 109 in the return to work meeting) was a change in the medication he was taking for PTSD which had had side-effects. JF accepted that, in the absence review meeting, the claimant had given an account of his absence that included that he had been told by his GP that he was suffering from PTSD and was on medication as a result. The minutes of the meeting include the following at page114,

"Q: with the PTSD how are you coping.
A: I'm in the angry and bitter phase now there isn't much joy at the moment."

8. The incident between JF and the claimant which is central to this claim took place on 19 December 2018. There was an initial phase which, according to the claimant, took place on the shopfloor or, according to JF, in the warehouse. There was then a second phase to the incident which took place in the staff search room to which the claimant had been invited by JF. In addition to the statement evidence and oral evidence of the claimant and JF, we had still photographs at pages 185 to 193 taken from CCTV footage from a camera inside the staff search room showing the claimant and JF by the door to that room.

9. Both the claimant and JF were questioned about those stills and the CCTV footage itself was viewed by LM shortly after the incident and by SK on 22 December 2017. We therefore have their impressions about the footage from their oral evidence to us.

10. We also have SK's impressions as recorded in the minutes of the investigation meeting on 22 December 2018 just after she had viewed the footage (page 125 and following). She was tasked with an investigation of allegations against the claimant of failing to comply with a reasonable management request because he had walked away from his line manager and left his shift thereafter. The footage itself does not seem to have been preserved. SK verified that the claimant had spoken to the duty manager, MSH, who had authorised his early departure so her decision that no action should be taken against the claimant was clearly right. The alleged link between the incident and the claimant's dismissal is that it is his case that JF's behaviour on 19 December 2018 triggered a recurrence and exacerbation of the symptoms of PTSD that he has and that it was the impact of those symptoms on him which caused the absence for which he was dismissed with effect on 2 March 2019.

11. JF claimed that by the time of the events of 19 December 2018 she had forgotten that the claimant has PTSD and that he hadn't mentioned it during the exchange on 19 December or said at any time that he had been claustrophobic or scared. She also told us that when she found out, which she stated was during a meeting she had joined between the claimant and RT on about 29 December, she was particularly upset because she herself has the condition. She described herself as feeling "horrible" about what had happened. When reminded of the details of the attendance review meeting of 20 October, she gave oral evidence that she had said in the meeting with RT, "When [RT] said – I said 'Oh my goodness I forgot!'".

12. Having considered her evidence carefully on this point, our finding is that it shifted and developed. Despite giving direct evidence of her words in the meeting with RT (see paragraph 11 above), when pressed on the point, she could not actually remember saying in the meeting with RT that she had forgotten the claimant's condition. She said elsewhere in her evidence, in answer to Mrs. Hancock's questions, that she didn't *know* until that meeting

that he had PTSD. She also said that she hadn't *realized* until the point of the meeting with RT that she had really affected the claimant. She explained her forgetfulness was due to the fact that during that period she was pregnant (at the time of incident she told us that she was five months' pregnant) and was suffering from pregnancy-related ill health and was very forgetful as a result. There is support for that in the fact that it seems that she was relieved of her obligation to do the rotas at that point in time.

13. We give some weight to her explanation and to the fact that she was managing 18 or 19 people. However, we find it very hard to accept that, even in those circumstances, she would forget the information given to her two months earlier in a formal absence review meeting that the claimant had PTSD when she herself has the same condition. We reject that evidence. Elsewhere in her oral evidence it was clear that the claimant had also told her (more casually and not in formal meeting) that there had been an incident in his previous employment with Prison Service which was a bad experience. What JF said in oral evidence was,

> "Just that [he] worked for the prison – [had had a] bad experience. Taking them to tribunal like – just a general chat. He said that he didn't want to go into it more. That's what he said."

14. This seems to us to be enough to suggest that JF knew or ought to have known that the claimant's statements that he had PTSD were based on an actual event. The inconsistency in JF's evidence on this point damages her credibility generally.

19 December 2018

15. The gist of the claimant's account was that he had undertaken additional shifts on Wednesday, Thursday and Friday but that at his regular shift on the Sunday JF had "berated" him on the shop floor for being inflexible about offering additional hours in the run up to Christmas. His evidence was that he was upset because he considered himself to have been as flexible as he could be and that it was a "smack in the face" to be accused of not being flexible.

16. The first written account of what happened on 19 December is that of the claimant given to SK (page 125 @ pages 126 to 127). That is, in its essentials, consistent with his account thereafter.

17. JF's statement evidence was that she had understood that the claimant had agreed with the senior manager (who had relieved JF of the obligation of organizing the rotas) to do overtime and that the claimant had stopped attending work in December for his scheduled shifts (para.8). This was contrary to the way the respondent put their case in original grounds of response which was that JF had told him that he needed to do more overtime (para.11 on page 29). The respondent has not produced rotas to show that the claimant had failed to attend for any overtime shifts in December 2018 on which he had been expected to work. We think that had any such been available they would have been produced. Furthermore,

based upon the rigour of the process eventually followed and the SK investigation following events of 19 December 2018, had he failed to attend when rostered to do so, we think it probable that documented informal or informal action would have been taken against him.

18. We therefore reject JF's oral evidence of her purpose for approaching the claimant on 19 December 2018. Nevertheless, she was within her rights to ask him to do additional overtime because he was a flexible worker. JF's account is that the initial phase took place in the warehouse and that the claimant became upset and walked off, kicking cages.

19. We prefer the claimant's account. Had JF's purpose been as set out in her statement (and not as in the grounds of response which accords with the claimant's case) that would have been supported by documentary evidence. Her evidence that the claimant had said to her that he was working 18 hours when he wasn't (i.e. he wasn't working 18 hours for Tesco) suggests to us that she was not listening to what he was saying to her about his other commitments. A statement to her that he was working 18 hours a day (in total) was consistent with the claimant's evidence that he was concerned not to work further additional hours. We think it unlikely that, had the incident happened as JF described it, then she would not at least have recorded it in some way.

20. In investigating the allegations which arose out of the 19 December incident (page 124 is the invitation), SK did not bring up the alleged behaviour in the warehouse when discussing the claimant's explanation for leaving the store – namely that he had been upset at being accused of being inflexible. No written record was made of her conversations with the managers: JF (who asked SK to carry out the investigation and therefore must have given some information about the grounds for it) and MSH (whom she spoke to during the adjournment on 22 December). SK carried out no review of any CCTV footage save for that in the staff search room. If JF had told her colleagues at the time (as she now claims) that the claimant had been aggressive, why would they not have viewed relevant CCTV footage of the shopfloor and warehouse when viewing footage of the room? Why would they not have investigated a potential allegation of aggression towards a pregnant (and therefore potentially vulnerable) line manager? We reject JF account that the claimant was aggressive towards her. The precursor incident happened on the shopfloor in the manner alleged by the claimant.

21. After he left JF on the shopfloor, the claimant spoke to MSH who told him that he would send a text to JF to ask her to give the claimant some space. JF denied receiving such a text. There is no statement from MSH. We have no reason to doubt what the claimant says but there is no evidence that the text was actually sent. Whether 2 hours then passed (as suggested by JF) or less (as the claimant recollects) both parties agree that the claimant agreed to go to talk with JF.

22. We find that the reason why JF invited the claimant into staff search room which has CCTV footage was that she wanted to discuss his attitude to

working additional shifts. This was not an unreasonable request in itself. The claimant agreed to go into the room with her. The photograph on page 185 shows the door closed, JF standing behind the door next to the hinge edge – where the door would be if it were open - and the claimant standing facing her, to one side of the opening edge of the door.

23. The claimant's version is that, during the discussion he told JF that he felt uncomfortable staying in the room with her, that he was leaving and he went to open the door to leave. When it was suggested to him that JF had only reacted to get him to hold on so that they could conclude the conversation he said,

> "I think that unreasonable, I'd stated already before I'd reached for the door that I've got nothing more to say, ending the conversation – 'Not comfortable in this room I'm leaving'. [There was] every opportunity for her to stand aside if she was concerned about her safety. She chose not to."

24. The way that he seems from the photos to squeeze out of the door is consistent with him having become increasingly anxious and borderline desperate to get out of the room.

25. It is worth noting that JF's evidence, which we have no reason to reject on this point, is that she has never seen the CCTV footage of the incident. JF originally said that she chose a room with CCTV for the protection of both of them to make both comfortable. She subsequently, in oral evidence, accepted that it was more so that "if he does something I can prove it – more for myself". She had not realised that there was no sound. Her version is that he then was rude and said that he had "had enough of this shit" and was about to walk out the room (JF para.11). In her statement she said that her reaction was to ask the claimant to hold on so that they could have a "mature conversation to resolve the problem".

26. We are mindful that we have already rejected part of JF's account of the precursor incident. In her account of that, JF sought to add details which were unjustifiable critical of the claimant and made his behaviour in the run up to the incident in the room appear worse than it had been. We do not accept that her tone was aggressive – in her oral evidence her tone was firm, direct and concise and that is probably her usual style of communication. Furthermore, we do not accept that she said that she "did not care". However, JF is quite capable of retelling events in a way which seeks to support her claim that the claimant was aggressive in the room. We don't find that he was but that he was abrupt and anxious to leave. What we know about the degree to which the claimant was affected by the incident (which JF seems to accept to judge by what she says of the subsequent meeting with RT) is consistent with his account. His account to SK explains his position well and consistently and we accept it.

27. We have to be very careful not to judge too much from stills of CCTV when do not know how fast the incident was. Furthermore, the enlarged photos are somewhat pixelated in places and that distorts perspective.

28. Nevertheless, we're quite satisfied that what JF did (page 186 and 187) was to put her hand out towards the door to prevent it from opening and to prevent the claimant from leaving or going through it. Her statement evidence was that she said "please stop pulling at the door". The claimant accepted that she said "Toby I'm pregnant I'm pregnant". We accept that, in part, she was concerned that she might be in harm's way. However, even though the stills do not convey the speed of the incident it is surprising that she did not move out of the way and she appears to have put her arm in the way rather than move out of the way.

29. There are ways in which JF's statement evidence is plainly inconsistent with the stills, even giving full weight to the limitations of the stills as evidence. JF's recollection that she would not have used her shoulder to block the claimant from leaving (para.12) and did not recall putting her foot against the door and trying to block a doorway (para.13) is plainly faulty. Her foot appears to be against the door on pages 190 to 193. The photographs on page 189 seem to us to show the claimant beginning to try to get the door open and JF step towards it not away from it. Pages 190 to 193 seem to us to show JF putting her hand on the claimant's arm as he is trying to leave and still holding him as he moves more of himself through the partially open door. She does appear to be physically trying to prevent him to leave not just verbally trying to persuade him not to leave. JF's evidence was that she may have put her hand out to encourage the claimant to stay in the room but did not make "physical contact" (para.13) – this is contrary to pages 191 to 193. She says that (para.12) if he left the premises he would be leaving without authorisation and would be classed as absent without leave.

30. On any view her actions were misguided. It was the wrong way to handle the situation because the effect was to seek to physically prevent someone from leaving the room when they wanted to go. We find that not only did JF go about handling the claimant's actions in leaving the room the wrong way, she has lied about the incident in her witness statement to the tribunal in order to make her actions appear more reasonable.

31. We find that when JF took the claimant into the staff search room she persisted in asking whether he had problems and he eventually said words to the effect "If you really want to know, it's you. You've assumed I'm not flexible." He then said that he wasn't comfortable being in the room with her and reached for the door. He started to open it and JF stepped forward and put her shoulder and foot against the door to try to prevent the claimant from leaving. It may be that she thought she risked harm if the door opened suddenly but at least in part she intended to prevent him from leaving – possibly she thought the situation would get more serious if he did. The claimant squeezed out of the opening and, as he did so, JF grabbed his arm to try to prevent him from leaving.

32. After the investigation on 22 December 2018 there was a meeting with RT which seems to have been intended to seek to repair relationships although the claimant may not have agreed to JF joining it. We accept that JF said

words in that meeting to the effect that she did not think that the claimant would be intimidated by her.

33. His recollection was that she said "I didn't think you'd take it seriously as I'm only a 5' 8" woman." (page 8 and 35). JF denied using those words. When it was put to her in cross-examination that she had used them her oral evidence was,

> "No. I'm only 5 foot 4 inches. I wouldn't say that. When I was talking to [the claimant] with [RT] [I said] 'I'm sorry that I made you feel that way' and 'I didn't think that you would felt threatened by me' – I am little and I am a woman. If I made him feel that way - I didn't expect him to be intimidated, from a human perspective – he's a 6 foot guy – I am a little woman. I felt the same way"

34. Our findings on this are that the differences in the two accounts are not material to the sense of JF's words. At the time of the incident, when JF was reacting to the claimant saying that he was uncomfortable in the room and intended to leave, she did not think that he would be intimidated by her or "would take seriously" her actions in the room because he is a 6 foot man and she is a 5 foot 4 inch woman. The words she said in the meeting with RT indicate that it was part of her mindset at the time of the incident in the staff search room on 19 December 2017 that the claimant would not be intimidated by her and that view was partly based upon him being a man; partly based upon his sex.

35. This may be difficult for JF to accept. She told us that she is not of British origin and that she is conscious that her (slight) accent might cause her to be misjudged. She described herself as a champion of diversity and as having been extremely upset to find out how much the claimant was affected by her actions on 19 December 2018. We have no reason to doubt what she says on this point and hope that she will take our conclusions on this as something from which to learn that preconceptions can be difficult to self-identify which means one should be alert to the risk of them. Good equality and diversity training, regularly repeated, covering a wide range of protected characteristics, is the best way to support managers in what can be a challenging job in a high pressured environment. We heard evidence that, despite the large numbers of colleagues employed in store, the managers' access to professional HR advice is remote. None of the managers from whom we have heard described taking HR advice before making decisions in relation to the claimant. A greater willingness to do so is desirable, in our view.

Subsequent events

36. As we have already found, after he left her on 19 December 2018, JF initiated an investigation into the claimant's conduct in allegedly failing to comply with a reasonable managers request and leaving work without authorisation. Presumably, she did not speak to MSH first because neither of these allegations were justified. The first of these (to judge by the discussion in the investigation meeting at pages 125 – 126) was about a refusal to work additional overtime which JF considered to breach the

claimant's requirement to be flexible. However, based upon her evidence to us, we find that JF had presumed that the claimant's college had broken up two weeks previously when it had not and therefore made presumptions about whether he was available to work additional shifts. There is no documentary evidence that he had failed to turn up for shifts he had actually been rostered to fulfil. She had prevented him from leaving the room (albeit for a very short period) and he had authority to leave his shift early from MSH.

37. In addition to giving his full account of how he felt about the meeting, the claimant told SK in the investigation meeting (page 125 and following) that his minimum hours were 7.5 hours and that he had been working 7.5 hours on Sunday, and that on Wednesday, Thursday and Friday had been working a minimum of 4 hours through until midnight. Other details that the claimant provided (which have not already been referred to) were that JF had followed him down the corridor and he went to speak to MSH and told him that he was upset saying "What gave them the right not to let me go". MSH had authorised him to go home and return on his next scheduled shift.

38. SK had already seen the CCTV footage and at page 128 the following exchange is recorded in the minutes,

C	All due respect. What right did you have to hold me in that room. She told me she was pregnant, so why have me in there?
SK	Like I said I could see her grab you in the CCTV. Do you feel that you could have said [*reproduction of next three words too faint to read*] she made you feel?
C	I did I told her in the room
SK	Why did you feel you were going round in circles?
C	Same conversation over again I told her she was issue to get out. I wasn't comfortable with her in the room.
SK	What would you like the outcome to be?
C	I don't know. I want both allegations knocked on the head. I had no respect.
SK	I would advise it is rectified. You relationship – mediation – to be resolved.

39. SK confirmed that she would not be taking the investigation further and adjourned for 20 minutes to review the CCTV and speak to MSH. She dismissed both allegations (page 129). In relation to the CCTV, SK said,

> "it shows a true representation of what have said, only thing I would say it looks like JF doesn't quite grab your arm. I personally think this got way out of control and could have been prevented."

Her attempts in oral evidence to say that she hadn't seen what she describes contemporaneously do her no credit at all.

40. SK referred that complaint about not being permitted to leave the room to JOH. It was accepted by the claimant that there was no complain against

her that she had failed to deal appropriately with it. We accept that that fulfilled her responsibility.

41. Following that, JF attended a meeting with the claimant and RT (see paragraph 31 to 33 XX above). The claimant also had at least one meeting with JOH to discuss his concerns. The parties were not certain of the date of the meeting or meetings with JOH. We note that in his paragraph 7, JOH records that the claimant left work without authorisation on 19 December 2018, which had been accepted by the respondent as not true. In his paragraphs 8 and 9, JOH refers to having a number of conversations with the claimant with a view to resolving the issue and it is clear that he understood that the claimant complained that JF had "physically prevented him from leaving a room and I remember him referring to it as false imprisonment." He lists suggestions which he put forward for a resolution in his paragraph 9. There are no notes of this meeting or meetings in evidence. JOH thinks that he probably took notes, but none are available. JOH recorded that the claimant took the decision to remain in his role and that he was shocked. We infer from this that JOH must have been aware that the claimant wanted minimal contact with JF.

42. He explains in his paragraph 10 why he thought that the incident was nothing to do with the claimant being male and JF, female,

> "[JF] was heavily pregnant at the time and she is a smaller person. I could not see a smaller person who is heavily pregnant making robust contact with [the claimant] or acting aggressively or in an intimidating manner. As [JF] was heavily pregnant it was my belief that she was quite vulnerable and would have avoided any form of physical altercation at all costs to protect her baby."

43. JOH did not then, or at any time, himself view the CCTV. He made very clear that his understanding was the claimant wanted it dealt with informally. The claimant accepted that he did not raise a formal grievance at that point. However, at the same time, we find that the claimant told JOH that he was annoyed that no formal sanction was being applied against JF. We can only assume that the claimant described what happened in the same terms as he told SK. JOH agreed that the claimant had complained of false imprisonment and that those were the words he had used – he agreed that the claimant said that he had been,

> "physically prevented from leaving the room and went on to link it to one of the incidents in his previous job where he had been held hostage in his role for the prison service. I remember him talking about that in our exchanges. Also worth noticing that I believe I would have said to the claimant if you want to make it formal he needs to raise a grievance - he didn't do that. No reason for me not to advise him to do that. I detached and unbiased."

44. Given the terms that the claimant is accepted to have used, we do not think it was unreasonable for him to expect the managers to take some action without him making a formal grievance against his line manager. JOH

accepted that each case needed to be dealt with on its own merits, when it comes to a decision about whether to investigate in the absence of a formal grievance or not. JOH did not himself view the CCTV. He seems to us to have concluded that there was nothing that warranted action against JF that was based upon the presumption that as a "heavily pregnant woman she was quite vulnerable and would have avoided any form of physical altercation at all costs to protect her baby" (para.11). We infer from that that JOH dismissed the claimant's account as implausible because he thought that JF, as a pregnant woman, would not have behaved that way. When this was suggested to him in cross-examination by Mr Blackburn he denied dismissing it out of hand, said his recollection was somewhat sketchy but recalled spending quite a lot of time discussing it with the claimant,

> "I'm merely saying that someone who is a larger person, the claimant, versus smaller person - JF in a vulnerable position – which I describe as vulnerable. Reasonable to assume that someone wouldn't want to put herself in harm's way."

45. It is accepted by the respondent that JOH did not investigate the claimant's concerns about JF and the claimant's allegation is that he should have done so, irrespective of whether he himself said that he wanted an informal resolution. JOH made the decision not to do so without viewing the CCTV footage himself when he had available to him the statement made by the claimant to SK and despite it being clear to him that the claimant wasn't happy with no action being taken and regarded himself as having been falsely imprisoned in the office. It is clear to us that JOH did not regard the claimant's complaint seriously. That may well, in part, have been because the claimant did not make a formal complaint at that time but, based upon JOH's evidence, he also seems to have been influenced by relative size - by the claimant being a big man and JF a small pregnant woman. We also find that he was influenced by LM's impression of the CCTV footage.

46. LM – the store manager – who had not himself heard the claimant's version of events, had decided that the CCTV footage did not show what the claimant said that it did and that it did not warrant action. His witness statement does not show when (or why) he originally viewed it and, in oral evidence he said that he could not recall the date but thought that it was very close to the event and prior to instructing JOH to deal with it informally. He also struggled to recall details of what had happened but said that he would have known a brief outline of the event but not so much of the detail and his approach had been to attempt conflict resolution "we start off with trying to resolve informally".

47. LM's statement account of seeing the CCTV is in his paragraph 9 and was made for the purposes of the witness statement when the CCTV footage was no longer available. He is therefore looking back in April 2021 to his recollection of brief CCTV footage which he viewed probably in December 2018 or no later than January 2019. He recalled telling the claimant in the disciplinary hearing that JF did not seem to him to be

"using any physical force or making any form of robust physical contact with [the claimant]. Whilst [JF] stood in front of the door, it did not appear to me to be threatening at all".

48. We record here our observations that LM's response to perfectly reasonable questions about the CCTV stills was, we find, uncooperative. Of course when looking at a picture which is somewhat pixelated and with the disadvantages of the potential for that to distort perspective, we would not expect a witness to say they saw something they did not see. It was being suggested to him that he could not reasonably have seen the absence of something which needed investigating from CCTV footage which led to the stills and he seemed to us to be uncooperative, for example when he said that he did not see a door on page 192. His alleged impression that there was nothing that needed investigating is, we find, contrary to SK's impressions as recorded in the minutes of 22 December 2018 that the CCTV footage "showed a true reflection of what [the claimant] said". It is also contrary to the impression we get from the stills.

49. On 6 February 2019 the claimant was signed off as unfit for work until 13 February 2019 (page 139). He telephoned and told the respondent this on 9 February 2019 at 0927 ahead of a shift due to start that day at 1300 (page 140). The claimant gave the reason for his absence to JOH (who we can see from the absence log took the call) as "Signed off with PTSD until 13/2/19. Can't leave the house without crying, being anxious. Awaiting appointment to see counsellor."

50. The claimant accepted that the respondent attempted some calls and texts/What's Apps messages to him that he didn't respond to. The explanation for that which he gave to us was that he was too unwell with the effects of PTSD which, for him, included agoraphobia and the fear of talking to people. None of the MED3 sick notes that he obtained give PTSD as a reason why he is unfit. That on page 139 cites "low mood" and is valid until 13 February 2019. There is one other in evidence dated 25 February 2019 (page 161) which also cites "low mood" and covers the period to 22 March 2019. The claimant accepts that his GP did not include PTSD on any of the sick notes.

51. The second sicknote, covering the period 12 February 2019 to 24 February 2019, is at page 105 – which is not in its chronological place but immediately before the absence log for the claimant's October 2018 absence. Whether for that reason or for some other reason, during the hearing Mr Blackburn apparently believed that it was not in evidence and cross-examined LM about its absence – which questioning therefore proceeded under the misapprehension that the sicknote was not in the bundle. The Tribunal was not taken to it. In writing this reserved judgment we became aware that page 105 was the apparently missing sicknote.

52. The claimant's evidence was that his sick note was extended but that he had been unable to find the Tesco sick line and had rung the general number and spoken to the duty manager who said that they would make a note in the book. Notwithstanding the misunderstanding about whether the

second sicknote was in evidence before us, it was common ground that there had been 3 sick notes because the minute taker in the disciplinary hearing on 2 March 2019 recorded LM stating that on 1 March 2019 the claimant had given JOH 3 sick notes (page 168).

53. LM was asked why (as it was then believed) the key sick note was missing and also why there was no record of the telephone call which the claimant said he had made to the duty manager. His answer was that it was

> "Part of my rationale – there was no phone call. There was no sicknote for that period. Probably doesn't exist – my opinion."

54. LM then had to accept that it was unlikely that the minute taker on 2 March 2019 would have recorded in two places LM stating that there were 3 sick notes if he did not have 3 sick notes. His assertion on oath that there was no sicknote and that it probably doesn't exist suggests a cavalier approach to the evidence which he should have weighed carefully when deciding whether the claimant was guilty of conduct which merited dismissal.

55. The claimant did not make contact with the store when the sicknote expired (see page 140) but, according to the claimant, he left a message with the duty manager saying he was unfit to attend for his next shift. JF recorded in a note on page 141 that JOH had texted the claimant on 15 February 2019 with no reply and that SK had called him the following day (when he should have attended for work) and that there had been no answer. Letters stating that he was absent without leave were sent on 18 February (page 142 – inviting him to a meeting on 23 February) and 25 February (page 159). The claimant did not attend the meeting arranged for 23 February and a voicemail message was left (page 146). It is clear that he did not receive either letter because they had been sent by recorded delivery and he had been too unwell to answer the door to the postman. He in fact collected both letter from the sorting office on 2 March 2019 (page 144 and 160). That means that he received the invite to 2 March 2019 disciplinary meeting scheduled for 11 am at 9.37 am that morning which was conducted by LM.

56. As a matter of fact, the claimant was told about the disciplinary hearing on the previous night, 1 March 2019, when he had attended the store with the 3 sick notes. JOH saw him in store, shopping, and approached him and the claimant told him that he had been unwell and had not been out of the house (JOH para.12). The manager made a note of this conversation (page 164). The copy in the bundle is somewhat faint, but it supports JOH's evidence that he told the claimant about the hearing the following day and the claimant confirmed that he had not received the letters. LM was aware that the claimant had had limited notice of the meeting and had only collected the formal invitation that morning.

57. The only plausible reason for the claimant to have brought 3 sick notes to the store is that he intended to hand them in, even if he was also doing some shopping. Why else would he have had them with him? LM suggestion in oral evidence (and to the claimant's face in the disciplinary hearing) that he would not have handed them in had JOH not approached

him is not justified. We find that it betrays an unsympathetic mindset to the claimant and to his explanations. That part of his evidence is one reason why we conclude that LM did not approach the disciplinary hearing with an open mind able fairly to consider what the claimant was saying. There are also parts of the minutes which support that conclusion. On page 168 LM is recorded as saying "I've done loads of these meetings and predicted your answers." When asked about that in oral evidence he said that the comment had been

> "Around the fact that he said that he hadn't received the texts and phonecalls – we see a few where people say didn't get the text of phone call. … Highly unlikely that he would not get them. That's why I said that."

58. However that was not the whole of the explanation given by the claimant, as the minutes reveal.

LM	First tried contacting through text
C	Haven't received anything on my personal
LM	On 15th Feb [JOH] Fresh had sent a text. Hello m… how are you
C	Whatsapp
LM	You got that
C	Yes
LM	Read the same day. Why wouldn't you reply
C	Not in a fit state went doctors have to go through CBT. All effort previously undone. (Avoid things, going out) Go shopping when must
LM	Bearing in mind we don't know where you are
C	Last sick note I rung up, lost clocking in card rung through head office, got through duty manager said I was signed off
LM	9th
C	16th – 17th
LM	16th Feb [SK] called you to see where you are?
C	Didn't receive anything

59. In our view LM's reasoning was flawed.

60. The invitation letter accused the claimant of being "absent from work without prior agreement or notification since 16/02/2019" but the allegations were recorded in the disciplinary checklist as being,

    a. Unauthorised absence from work with no prior agreement or notification;

    b. Failure to keep in contact with the store regarding your absence. (page 154)

61. LM found both allegations proved. He had in front of him a sick note certifying that, as a matter of fact, the claimant had been unfit for work during the relevant period. The first allegation is of being absent since 16 February without prior agreement or notification. The disciplinary checklist shows that the information before him going into the meeting was that the claimant had reported sick with PTSD on 9 February 2019. The sick notes suggest there was a valid reason for his absence on the 9 February, even

though they do not mention PTSD. JOH had asked the claimant how he was on 1 March 2019 (page 164) and the latter gave him details of the effects upon him of his mental health problems. These were difficulties in going out and not able to collect the letters.

62. The respondent purported to apply the unauthorised absence policy to the claimant (page 98). However, in the disciplinary hearing, there were several references to the claimant not feeling well. LM knew that the claimant had reported that he was unfit to work on 9 February 2019 and that was not included as a date on which he was absent without leave. We are of the view that the situation clearly fell within sickness absence policy page 74. para.7 "What happens if I don't call in to say I can't come to work?".

63. It appears that no one may have drawn the policy to LM's attention – potentially because of the limited HR resources available in-store despite the respondent's size and large number of employees. It is clear under the sickness absence policy that "if you continue to or persistently fail to keep in contact, this may lead to a disciplinary investigation being held" (para.5). However, para.7 explains that the process is different to the normal discipinary process and sets out a schedule of how to deal with non-notification of absence. The policy certainly suggests that first non-notification does not warrant dismissal. The claimant should have attended for work on 16 February and 23 February. The disciplinary hearing at which he was dismissed was held on the next date on which he was scheduled to be on shift, 2 March.

64. LM's answer to why the claimant wasn't dealt with under the sickness absence policy was that they weren't using the policy which did not answer the question asked. There was an argument for using the disciplinary policy at the time the invitation was sent out – although the facts still fell within paragraph 7 in that he had not been in contact after expiry of the stated validity of a MED3 certificate. However, faced with the information in front of him on 2 March 2019, LM could and should have changed tack to use the sickness policy. Even though the sick notes did not refer to PTSD, they indicated that a General Practitioner certified the claimant unfit for work. Therefore, the claimant had medical evidence to explain and justify his absence from work.

65. LM's evidence was that he dismissed for failure to keep in touch (rather than for the absence) but both reasons are on the dismissal letter which purports to dismiss giving pay in lieu of notice. We consider dismissal this to be too harsh a sanction compared with the ordinary position set out in the sickness absence policy. LM continued to say in oral evidence that the sickness policy did not apply because he thought that the claimant could have got in touch.

66. We find that LM did not take seriously the claimant's explanations for not having responded to the respondent's attempts to contact him and must have rejected them in order to find the allegation proved. In answer to the judge's questions on this point he said that he didn't accept the claimant's explanation for not getting in contact because he thought the claimant could

have replied – which did not explain why he thought that. The explanations he was given included that the claimant said that he was not in a fit state to respond to the WhatsApp message (see the quotation from the minutes at paragraph 56XX above) and that he needed to undergo CBT. He said in a response to a question about why he had been in shopping before "night time. You avoid people" and there is also a noteworthy exchange at pages 168 to 169.

LM Why left so long, you wouldn't of given them to [JOH] if he didn't ask

C Little did I think I had a manager of false imprisonment (sic) – (explaining around Prison Service) I felt if it's happened before.

LM I've watched CCTV and I disagree

C I'm describing my manager's false imprisonment

LM I disagree

Back to sick notes (3) [JOH] approached you and spoke around letters. Why didn't you collect letters

C Fear of going out, life stops 18 months to feel comfortable of going out again.

67. We also note the following exchange at page 172,

LM We got them [the sick notes] 12 hours before this meeting. To me it sounds like you don't care about it. Not questioning [*difficult to read]*

C Seems as the company are shouting about mental health awareness. You would think company would understand. I've worked over Christmas change shifts the lot including cancelling booked holiday

LM Are you saying I'm shouting my mouth off

C Not at all – the company. I've tried to come in but after the incident I couldn't. Spoke to [AB] and went off. It gets worse and worse. Arrange therapy. I can show you letters. I don't like being like this.

LM Would be nice to support you, letters, shifts helped if you came and spoke to us. We don't know if you were dead anything

C I've been at A&E myself due to my own health. I've thought it would be easier at times

LM Well that's just stupid.

68. LM described receiving some training on mental health awareness (3 hours of online training) but did not seem to us to have been at all receptive to what the claimant was telling him, including in these passages. The claimant is clearly putting forward as his explanation for not coming in that

he considered himself to have been subjected to false imprisonment by his line manager and that he had tried to come in after the incident but had been unable to. There also seems to have been some discussion about the incident in the claimant's previous employment. When asked what he remembered the claimant explaining in that passage (see page 169) LM was vague but said that he remembered the claimant saying that he'd got trapped in the Prison Service. It may be that LM's final comment set out in paragraph XX65 was not intended to be dismissive and did not come across at the time in quite the way it reads on paper but the claimant was clearly expressing information about the serious consequences to him about a mental health condition which deserved to be taken very seriously. It is hard to see why LM apparently dismissed this description of a genuine and serious condition as a potential explanation for the claimant's failure to get into contact, particularly when he claims not to have dismissed for the absence (which was covered by a sick note) but for the failure to get in touch. He himself put forward no explanation for his reasoning on this point. Furthermore, he apparently did not set out to make enquiries about whether the claimant had made contact with the duty manager on 16 February 2019 before making his decision which was a failure to look for information which might have exculpated the claimant.

69. LM's decision to reject the claimant's explanation for not getting in contact calls for explanation in all those circumstances. What he said was

> "I just felt that like he could have replied - made contact – especially as he was shopping in the store as well. I just felt he could have done. Especially with [JOH] as well. It was [JOH] who contacted him."

70. We think that LM had a perception of the claimant that was influenced by his view that the 19 December 2018 incident was not as the claimant described. His swift rejection of the claimant's description of the incident as false imprisonment, including some explanation about a previous experience which should have alerted LM to the claimant's vulnerability, was based solely upon his viewing of the CCTV footage – by then some two months previously. He seems to us to have dismissed, almost without thinking about it, the claimant's allegations that he had been falsely imprisoned by his manager and that the impact upon him had been sufficient serious to trigger a relapse of his pre-existing symptoms of PTSD (all of which information was explained to him orally in the disciplinary hearing). He did not ensure that the correct policy was applied and did not make all relevant enquiries about the claimant's version of event.

71. It seems to us to be clear, based primarily upon SK's reflection on the CCTV footage as recorded on 22 December 2018 but also on the stills, that the actions of JF were clearly inappropriate and she clearly made a physical attempt to prevent the claimant from opening the door and leaving the room. LM's lack of co-operation with the questions about the CCTV stills suggests to us that he is now unwilling to accept that, because he unwilling to accept his earlier misjudgment. When it was suggested to him that he could not fail to conclude from the CCTV footage that JF blocked the door out of the room and was aggressive his reply was that his instinct was that it didn't happen.

He denies that his view of whether JF was intimidating to the claimant was based upon gender but because it was his view that "as [JF] was heavily pregnant at the time, she was in fact the vulnerable individual and I could not see any indication that she was trying to intimidate [the claimant]." However perceived vulnerability is relative. LM did not see the claimant as vulnerable in that situation and we are of the view that part of the reason for that was a presumption, or instinct as LM put it, that JF would not have been intimidating to a man.

72. The hearing resumed after a 10 minute adjournment for LM to consider the evidence following which he announced his decision to dismiss the claimant. At that point the claimant handed in the letter dated 28 February 2019 (page 162) which was accepted as a grievance.

73. The letter confirming the claimant's dismissal was sent on 4 March 2019 (page 181). On 15 March 2019 LM wrote to the claimant inviting him to a meeting with JOH on 21 March 2019 to discuss his grievance (page 182). The latter's notes of what are described as a "courtesy meeting" are at (page 184). JOH recorded that he told the claimant at that meeting that there was nothing new in the grievance letter which they had not already discussed and suggested that the claimant's absence from work had meant that the previous efforts to deal with the matter were unable to be fully explored.

Law applicable to the issues in dispute

74. Sections of the Equality Act 2010 (hereafter the EQA) relevant for our determination include the following,

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

…

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

…

26 Harassment

(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.

…

(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.

S.39(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

By s.212(1) *"detriment"* does not, subject to subsection (5), include conduct which amounts to harassment;

…

(5) Where this Act disapplies a prohibition on harassment in relation to a specified protected characteristic, the disapplication does not prevent conduct relating to that characteristic from amounting to a detriment for the purposes of discrimination within section 13 because of that characteristic.

75. In addition, by s.40 EQA an employer must not harass an employee and the time limits within which a claim under Part 5 of the EQA must be presented are set out in s.123. The effect of the definition of detriment in s.212(1) is that, if we conclude that particular conduct amounts to harassment, there is no need to go on to consider whether it is direct discrimination because it cannot amount to a detriment within s.39(2)(d).

76. What is and what is not harassment is extremely fact sensitive. So, in a case which concerned allegations of race related harassment (Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT), Underhill P (as he then was) said at paragraph 22:

"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 (…), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

77. The importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created for him was reinforced in Grant v HM Land Registry & EHRC [2011] IRLR 748 CA. Elias LJ said, at paragraph 47:

"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

78. Underhill LJ set out guidance on the relevant approach to a claim under section 26 EQA more recently, in Pemberton v Inwood [2018] EWCA Civ 564; [2018] ICR 1291, as follows (at paragraph 88):

"In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

79. The difference between the test of harassment and that of direct discrimination was considered in Bakkali v Greater Manchester Buses (South) Ltd [2018] ICR 1481 EAT,

"Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, "related to" such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader inquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. As [counsel] submitted, "the mental processes" of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the claimant….. A tribunal will determine the complaint on the material before it including evidence of the context in which the conduct complained of took place." (paragraph 31)

80. Direct sex discrimination, for these purposes, is where the employer treats the male employee less favourably than they treat, or would treat, a female employee in comparable circumstances because of the male employee's sex.

81. When deciding whether or not the claimant has been the victim of sex discrimination, the employment tribunal must consider whether we are satisfied that the claimant has shown facts from which we could decide, in the absence of any other explanation, that the respondent has discriminated against him in the way alleged. If we are so satisfied, we must find that discrimination has occurred unless the employer shows that the reason for their action was not that of sex. Igen Ltd v Wong [2005] I.R.L.R. 258 CA – the "so-called" two-stage Igen test.

82. We bear in mind that there is rarely evidence of overt or deliberate discrimination. We may need to look at the context to the events to see whether there are appropriate inferences that can be made. We also bear in mind that discrimination can be unconscious. However, the fact that the employer's behaviour calls for explanation does not automatically get the employee past the first stage of the Igen test: B v A [2010] I.R.L.R.400 EAT where it was held by the EAT, as recorded in the headnote,

> "Although tribunals must be alive to the fact that stereotypical views of male (and female) behaviour remain common, there must still be in any given case sufficient reason to find that the putative discriminator has been motivated by such a stereotype (or in cases which turn on the burden of proof, that there is sufficient reason to believe that he could have been so motivated)."

83. Although the law anticipates a two stage test, it is not necessary artificially to separate the evidence when considering those two stages. We should consider the whole of the evidence and decide whether or not the claimant has satisfied us to the required standard, not only that there is a difference in sex and a difference in treatment, but that there is sufficient material from which we might conclude, on the balance of probability, that the respondent has committed an unlawful act of discrimination.

84. Although the structure of the Equality Act 2010 invites us to consider whether there was less favourable treatment than a woman in comparable circumstances, and also whether that treatment was because of sex, those two issues are often factually and evidentially linked. If we find that the reason for the treatment complained of was not that of sex but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to. However, it is important that the appropriate hypothetical comparator is chosen in order that the requirement in s.23 EQA that there be no material difference in circumstances be adhered to.

Conclusions on the Issues

85. We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions.

86. We start by considering whether the underlying facts have been proven by the claimant and use the numbering in Judge Daniels' list of issues for ease of reference. The first 4 allegations concern the behaviour of JF:

    a. Para.4.2.a: JF accused the claimant in a meeting on 19 December 2019 of being inflexible in relation to not agreeing to do more shifts. We do not accept that her tone was aggressive or that she said that she "did not care". The gravamen of this allegation is therefore not made out.

    b. Para.4.2.b. is made out, in its essence, as alleged. JF prevented the claimant from leaving the room where he was being interviewed on 19 December 2018 by (1) putting her hand out firmly; (2) placing her foot against the door to prevent it opening further and/or (3) blocking the claimant in the doorway

    c. Para.4.2.c is made out. For a relatively short period JF used her shoulder to block the claimant in the doorway to stop him leaving the room.

    d. Para.4.2.d. JF grabbed and held onto the claimant's arm although, again, that must have been for a relatively short periof of time. It is clear that when SK viewed that CCTV she thought the word grab was an appropriate way to describe that action. That is consistant with the stills. We accept that JF made robust physical contact with the claimant by grabbing and holding onto his arm and stopping him from leaving the room.

87. It is clear that the above was unwanted conduct.

88. Did that conduct have the effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him? Looking at the facts we have found, and bearing in mind the factors in s.26(4)(a) to (c) of the EQA, we conclude that the facts found in relation to paragraphs 4.2 b to d. did have that effect. The relevant circumstances include that JF had legitimate grounds to seek to question the claimant about working hours and the claimant's perception, which was that he was trapped. We readily accept that it was intimidating for him.

That come across from the stills and we accept his evidence and consistent accounts about that. He perceived that he was trapped because he has PTSD and had had a previous bad experience and that was known to JF. It is also relevant that it was a very quick incident. Despite that, we consider that it was reasonable for him to have that perception in all those circumstances.

89. It is clear to us that JF's accusations that the claimant was inflexible were not related to his sex. Her purpose was to arrange hours for Christmas period. There is nothing from which to infer that her conduct was related to sex, nor was it reasonable for the claimant to consider that her request had the harassing effect, although we accept that her accusation was very unwelcome to him.

90. Was the conduct we have found proved in relation to paragraphs 4.2.b to d. related to gender?

91. JF did not think that the claimant would be intimidated by her or "would take seriously" her actions in the room because he was a 6 foot man and she a 5 foot 4 inch woman. She said words to that effect in the meeting with RT and we have found that it was part of her mindset in acting as she did that he would not be intimidated by her. Her words cause us to thing that her mindset was partly based upon his sex – upon him being a man and not simply upon them being of different sexes. It is that which provides the connection with sex. In that split second, part of the reason why she thought it wouldn't upset him if she tried to stop him from leaving and took hold of his arm was that he was a big man and she was a little woman. In that sense her conduct was related to sex. We reject the argument that she was solely concerned with her own vulnerability because she was pregnant, despite saying "Toby, I'm pregnant, I'm pregnant". She stepped towards and not away from the door. The allegation of harassment related to sex is made out in relation to these 3 allegations – which all stem from the same incident.

92. The allegations in paragraphs 4.2.g & h. relate to the disciplinary allegations which were dismissed by SK. JF initiated them and they were pursued by R generally. The facts are made out.

93. As to paragraph 4.2.g., it seems that the reasonable management request was the request to work additional overtime in the run up to Christmas. JF made an assumption about his availability. She presumed that college had broken up two weeks before but it had not broken up. There is no documentary evidence that he failed to turn up for shifts which he had been rostered to fulfil and we reject JF's assertions to that effect. The contract says the company needs the employee to maintain the flexibility they have specified. There is no evidence to show that the claimant was refusing to do shifts within the hours that he had committed to being flexibly available. The allegation was of failing to comply with a reasonable managers request – not of failing to turn up for shift. Nothing was put to the claimant in the meeting with SK about the detail of any particular shifts he was alleged to have missed. Once SK investigates them she dismisses them. We accept

that the allegations set out in paragraphs 4.2.g and h were made and pursued but they were dropped once investigated by SK.

94. Making and pursuing those allegations was unwanted conduct. Was making an pursuing the allegations related to gender? Despite our conclusions on para.4.2.b to d., our view is that to conclude that JF's initiation of disciplinary action after the incident of 19 December is also related to gender takes the alleged link too far. Our view is that she thought she was in the right and wanted her agenda achieved of getting staff to work the shifts needed. Her view of the claimant as a big man who would not be intimidated by her did not impact in any meaningful way on her decision to initiate disciplinary action.

95. As an aside, viewed objectively, it was completely unreasonable to initiate that unfounded disciplinary action. There were no sufficient grounds and we are surprised that no statements were taken from JF or MSH. The gist of SK's evidence seemed to be that the practice is not to take statements from managers – they simply assert that in incident needs investigating and that is taken for granted to be justified. The attitude seems to be that statements by managers do not need recording. The consequence is then that the allegations against them cannot be effectively challenged by the employees. We can accept that making and pursuing unfounded disciplinary action has the potential to be harassment but these particular allegations are not made out as allegations of sex related harassment because the conduct complained of is not related to sex.

96. We turn to para.4.2.e. and the allegation that the respondent did not reasonably investigate the conduct of JF: was an investigation wanted – yes. Therefore the absence of a reasonable investigation could be unwanted conduct.

97. We take on board that the claimant agreed to continue to be managed by JF, to deal with things informally and did not make a complaint. He also said that he wanted to try and deal with it as informally as possible in order to prevent a breakdown of the working relationship. On the other hand, he also said to JOH that was unhappy with there being no sanction against JF. We note that most of the options offered by JOH involve the claimant (the complainant) moving.

98. In those circumstances we have considered carefully whether it could legitimately be said that investigation was wanted prior to the formal written grievance handed to LM on 2 March 2019. Based upon the statement to JOH that he was unhappy with no sanction against JF, on balance, we think that investigation was wanted.

99. We all think that the situation was undermanaged and that JOH and LM jumped to conclusions that the situation was not as bad as the claimant described based in large measure upon JF being a pregnant woman and the claimant's comparative size and sex. Therefore the lack of action was related to sex.

100. That is insufficient, however, for a successful claim of sex related harassment. We are firmly of the view that good practice would have been to investigate notwithstanding the equivocal statements by the claimant. However did the lack of a wanted investigation create the prescribed environment for the claimant, taking into account the matters set out in s.26(4)(a) to (c) of the EQA? The relevant circumstances included that the claimant had said that he was willing to deal with the matter informally. Our view is that it is not reasonable to regard the absence of investigation as harassment in those circumstances, despite it being good practice to investigate and despite the failure to investigate being based in part at least upon the claimant's size and sex.

101. We have come to very similar conclusions in relation to the issue at paragraph 4.2.f. The respondent took no action. Action was wanted. The lack of action was unwanted conduct. Of the people who could have taken action against JF some knew that the claimant had been taken hostage by a prisoner in previous employment and that knowledge is part of the relevant circumstances. JOH was told during conversations immediately following the 19 December 2018 incident that the claimant had PTSD. LM was told about PTSD and something of the hostage taking incident in the disciplinary meeting of 2 March 2019. JF knew about the PTSD and something about prison service in her role as his line manager. The claimant's reasonable perception was that he'd been falsely imprisoned by a manager and he told the respondent about that. They did not follow up on his report. However, taking into account all the circumstances, including that he accepted that the matter should be dealt with informally, it could not reasonably be regarded as harassment to fail to take things further.

102. Having concluded that allegations at paragraphs 4.2.e to h. were not sex related harassment, did they amount to direct sex discrimination contrary to s.13 and s.39(2)(d) of the EQA? We start with paragraphs 4.2. e and f. The claimant's complaint is that he thinks that if the roles were reversed, the respondent would have treated a complaint by a female customer assistant made against a male manager more seriously. As it was put in the claimant's witness statement "Their attitude appears to be a male cannot feel bullied, and vulnerable by the actions of female managers." This is also how the comparison was made in Mr Blackburn's closing written submissions.

103. Ms Ferrario, by contrast, argues that the correct comparable situation is female assistant complaining that JF took her into staff search room and prevented them from leaving. We agree that the suitable hypothetical comparator would be a woman challenged by JF. There is nothing inherent in the situation which requires us to change the gender of JF to have a comparable situation (unlike in cases such as Home Office v Saunders [2006] ICR 318 EAT).

104. Was the failure to follow good practice and not investigate the conduct of JF towards the claimant less favourable treatment than would have been given to a comparable female employee, who was known by her line manager and by those to whom she complained to have PTSD arising out of a previous employment in the Prison Service, who described herself as having been

falsely imprisoned by JF and where CCTV footage "showed a true reflection of what you have said" – as SK put it?

105. Part of the reason why LM, when viewing the CCTV footage, concluded (without speaking to C) that it didn't bear out his account of false imprisonment by a manager was his presumption that JF would not have been intimidating to a man. Part of the reason why JOH did not investigate the claimant's concerns was his presumption that JF, a little pregnant woman, would not be intimidating to the claimant, a big man. We have reached these conclusions based upon evidence which LM and JOH themselves gave and not solely by inference. We recognise that there has to be a factual basis for ascribing stereotypical views to individuals but in this case there is evidence that they were swayed by an instinct (as LM put it) that a big man would not be intimidated by a little woman. They would not have made that presumption had the claimant been a woman. This reasoning was subconscious in the sense that they were perhaps not consciously aware that not only was JF's sex and pregnancy part of their comparison but that the claimant's sex was also.

106. If one analyses this applying the statutory burden of proof and the Igen two-stage test, excluding the respondent's explanation, we are still of the view that the burden of disproving discrimination would transfer once one correctly identifies the comparator as a woman with the mental health condition and background experiences which the claimant was known to have. Our findings about the presumptions of LM and JOH mean that the respondent would not satisfy that burden of disproving discrimination.

107. The allegation in para.4.2.f. is only made out to the extent that the respondent would have carried out a reasonable investigation in the case of the hypothetical comparable female customer assistant who made a complaint but did not say that she wanted to pursue it formally. It is not possible for us to reach a conclusion based upon the evidence before us about what would have happened as a result of such a reasonable investigation. Although a reasonable investigation could be said to be encompassed within "taking further action", in reality there is no distinction between this allegation and that at paragraph 4.2.e.

108. In relation to allegations at paragraph 4.2g. and h., we ask what evidence is there that, in instigating disciplinary action for alleged failures to agree to work additional hours and for leaving work, JF treated the claimant less favourably that she would have treated a comparable female customer assistant? We remind ourselves that in relation to her actions in the room, JF said that she thought that the claimant would not take it seriously because she was little woman and he was a big man. Our conclusion about JF is that she was not a reliable witness in that she embellished her account of 19 December 2018 to make it appear that the claimant had been aggressive towards her and said that she had forgotten that he had PTSD when our view is that such forgetfulness was highly improbable. Even we were to assume that the burden of proof transferred and taking into account our reservations about JF as a witness we are persuaded that JF would not have treated a woman any differently. JF believed that the claimant had

shown inflexibility in breach of contract (although there is nothing beyond her assertion that he had) and that she had warned him that would face the allegation were he to leave. These were the reasons why she asked SK to commence the investigation and that decision was not in any sense sex discrimination. The same reasoning causes us to dismiss the claim of sex discrimination based upon paragraph 4.2.h.

109. The allegation at paragraph 4.2.i. concerns dismissal. Dismissal was unwanted conduct. In deciding to dismiss the claimant for alleged unauthorised absence without prior agreement or notification and/or for failure to keep in contact LM rejected the claimant's version which included that he had spoken to the duty manager, that he had certified grounds for sickness absence, that he had a diagnosed mental health condition arising out of a traumatic incident at his previous place of work and that that had such an impact upon him that he was unable to respond to texts, come into work or come into the store except at night. Our conclusion is that LM's conduct in dismissing the claimant's explanation about the impact on him of his mental health and his reasons for not keeping in touch did meet the test of creating an intimidating, hostile, degrading, humiliating, or offensive environment. It seems to us that the emphasis would be on the humiliating and offensive part of that definition. It was reasonable in all the circumstances for it to have that effect.

110. Was dismissal related to sex? When LM rejected the claimant's explanation for not keeping in touch, that was based upon LM's preconceptions that the claimant's account of the incident was incorrect. He had viewed the CCTV and dismissed the possibility that the claimant's account was correct based at least in part on the claimant being a big man and JL being a small pregnant woman. It seemed inherently implausible to him that the claimant was vulnerable and therefore he rejected the claimant's account out of hand. He did so when it wasn't investigated at the time but also during the disciplinary hearing when the claimant started to explain that his treatment by JF was the explanation why he had not brought his sick notes in sooner (pages 168 to 169 see paragraph 64XX above). This preconception obviously influenced LM's view that the claimant could have kept in touch notwithstanding his stated mental health condition and his description of not being able to visit the store since the incident was rejected.

111. In the alternative, although there is no need to do so because the effect of s.212(1) definition of detriment is that harassment and direct discrimination are mutually incompatible, we find that the claimant's dismissal was an act of direct sex discrimination. The hypothetical female comparator would have been treated in accordance with the right policy: the sickness absence policy and given a reminder of the process (for a first non-notification – page 74) or, at worst an informal conversation (for a second non-notification) and not dismissed. LM's explanation for not using that policy was self-serving and amounts to no effective explanation. There are ample facts from which we could infer that the reason for that less favourable treatment was that of sex but the failure to follow the correct policy is sufficient to mention here.

112. There is no basis for concluding that the respondent would treat all mentally ill employees equally badly. A comparable female employee would be one who had self-reported an absence for PTSD (when that was the known reason for a previous absence – see paragraph 7XX above) but (allegedly) failed to report for work on one occasion. We do not see evidence from which to conclude that the respondent would, in such a case, routinely instigate disciplinary action and then, when they failed to turn up for a disciplinary meeting, dismiss them without properly investigating their account of the contact they say they have made in the interim.

113. What were the grounds for that less favourable treatment? Our conclusion is that they included sex because part of the reasoning of LM was his peremptory dismissal of the claimant's account of the incident of 19 December 2019. That was based upon his presumption about what was likely to have happened, given that the claimant is a big man and JF was little pregnant woman.

114. We have found five incidents to be unlawful harassment or discrimination stretching in time from 19 December 2018 to dismissal on 2 March 2019 and go on to consider whether they are conduct extending over a period within the meaning of s.123(3) EQA. They are the 19 December 2018 incident, the failure to investigate in the period December to January 2019 and dismissal. The claimant claims that the symptoms of his condition were exacerbated by these incidents. The only medical evidence in evidence before us does not refer to a diagnosis of PTSD which is something the claimant may wish to address at the remedy stage. We make no findings now about the alleged effect upon the claimant of the incidents which we have found proved but consider that his reliance on his mental ill health as the explanation for any conduct which he was accused of at his disciplinary provides a link to the earlier incident and failures. The decision of LM to dismiss was a culmination of a series of events which had their origins in the incident on 19 December 2018. We therefore find that the claim had been presented in time in relation to all allegations which we have upheld.

115. If we are wrong about that we consider that it would be just and equitable to extend time for presentation of the claim in the light of the claimant being certified unfit for work between 8 February 2019 and 23 March 2019.

116. We have also been asked to consider what are the prospects that, had the discrimination and harassment not happened, the claimant would have been dismissed for a non-discriminatory reason in any event. Our clear view is that, on these facts, the absence should have been dealt with in the first instance under the sickness absence policy and there is a negligible likelihood that he would have been dismissed at this stage for absences up to the end of the MED3 certificates which are in evidence.

117. There is additionally a claim of breach of contract on the issues. The dismissal was specified to be with notice to be paid in lieu (page 181). There are no payslips in the bundle but emails (page 194) suggest that the

respondent alleges that they paid something by way of notice pay in May 2020. Calculation of any loss for failure to pay notice pay when due shall be considered with other remedy issues, unless compromised by the parties beforehand, on 17 September 2021. However, to deal with the issues set out in Judge Daniels' order:

a. The evidence before us does not enable us to make a finding on the claimant's contractual notice entitlement. The terms and conditions at page 103 cross-refer to "Our Tesco, People Policies" for notice entitlement which is not in evidence. The email at page 194 suggests that the respondent thought that the claimant was paid more than the statutory minimum which would in his case have been one week (s.86(1)(a) of the Employment Rights Act 1996. This can be considered further at the remedy hearing, if it cannot be agreed between the parties.

b. There was no gross misconduct such as to justify a summary dismissal.

I confirm that this is our Reserved Judgment with reasons in case number 3315945/2019 and that I have approved the Judgment for promulgation.

_____
Employment Judge George

Date: …25 July 2021 ……..

Sent to the parties on: .....

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For the Tribunal Office