



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Jody Hatton

v

Secretary of State for Justice

Heard at: Reading Employment Tribunal

On: 21 and 22 July 2022, 26, 27 and 28 July 2022 and 1 August 2022

Before: Employment Judge Eeley

Members: Mr P Hough
Mrs H Edwards

Appearances:

For the Claimant: Mrs J Hatton (Wife)

For the Respondent: Ms G Hirsch (Counsel)

JUDGMENT having been sent to the parties on 26 August 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. In determining the claimant's claims the Tribunal heard oral evidence and considered written witness statements from (on behalf of the claimant):

- The claimant, who was a former Band 4 Caterer at HMP Huntercombe,
- Mrs Jennifer Hatton, the claimant's wife,
- Mr Nicholas Bonner, Band 3 Chef at the prison.

On behalf of the respondent we received written witness statements and oral evidence from:

- Ms Mandy Lee, the investigating officer in this case. Her current job title is Deputy Governor of North Sea Camp Prison and at the time of relevant events she was Operations Manager for the Foreign National Prisons and Immigration Removal Centres.

- Mr David Redhouse, the dismissing officer in this case. He is the Governing Governor of HMP Huntercombe,
 - Ms Alison Clarke, the appeals officer in this case. She is currently the Prison Group Director of North Midlands Prison Groups. At the relevant time for the purposes of these Tribunal claims she was Prison Group Director for Immigration Removal Centres Foreign National Prison Group.
2. The Tribunal read the relevant pages in the joint bundle of documents. The bundle comprised about 1,600 pages, along with additions that were made during the course of the hearing. The claimant also wanted us to refer to pages in the claimant's own specially compiled bundle. For the reasons that we have already given during the course of the hearing we did not do that save during the course of cross examination when the respondent's representative had a fair opportunity to challenge the appropriateness of doing so on a case by case basis. One reason for proceeding in this way was that the claimant's documents were not complete copies of the originals. Rather, they were a compilation of excerpts from the documents which had been compiled by Mrs Hatton with some 'running commentary' alongside the original text to help her to prepare and make sense of the evidence for the Tribunal. We considered that it would not be appropriate to refer witnesses to documents which were incomplete and not set out in their original format and context. This might well mislead the witnesses, however innocently, and make it harder for them to respond to questions accurately and appropriately.
 3. We also received written and oral closing submissions from both parties, for which we were grateful.
 4. Although the parties referred to the complainant in this case by initials during the hearing, all the written documents and these reasons will refer to her as Ms X (or X) in order to adequately preserve her anonymity. As a victim of sexual assault and as someone who was not party to these proceedings (and not called as a witness) it was appropriate to preserve her anonymity. Her identity is not relevant for the purposes of the issues which we have to determine and her Article 8 ECHR rights are engaged. The appropriate balance has been struck between the principle of open justice and Article 10 ECHR on the one hand, and Article 8 ECHR on the other hand, by use of a Restricted Reporting Order during the proceedings and an anonymity order in perpetuity.

The issues

5. The issues for determination in this case were set out by Employment Judge Gumbiti-Zimuto in his case management order which was to be found at page 128 to 129 of the main bundle. The issues were:

"Time limits/limitation issues

1. Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a)&(b) of the Equality Act 2010 ("EQA"), sections 111(2)(a)&(b) of the Employment Rights Act 1996 ("ERA")?

Unfair dismissal

2. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (“ERA”)? The respondent asserts that it was a reason relating to the claimant’s conduct.
3. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called ‘band of reasonable responses’?

EQA, section 15: discrimination arising from disability

4. Did the following things arise in consequence of the claimant’s disability (Asperger’s syndrome): the claimant does not understand the world around him, lacks empathy, does not understand personal boundaries or pick up on subtleties?
5. Did the respondent treat the claimant unfavourably as follows:
 - a. Fail to support the claimant in respect of or recognise of the claimant’s Asperger’s syndrome in navigating the disciplinary procedure;
 - b. Failing to investigate the index incident properly;
 - c. The respondent deliberately protracted the appeal process;
 - d. The respondent failed to follow its policies and procedures; or
 - e. Dismiss the claimant?
6. Did the respondent treat the claimant unfavourably in any of those ways because the claimant does not understand the world around him, lacks empathy, does not understand personal boundaries or pick up on subtleties?
7. If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?
8. Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

Remedy

9. If the claimant was unfairly dismissed and the remedy is compensation:
 - a. If the dismissal was procedurally unfair, what adjustments, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8;

- b. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?
 - c. Did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?
10. If the claimant succeeds, in whole or part on his claim of disability discrimination, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much he should be awarded.

Findings of fact

6. The claimant was a Band 4 Caterer working at Huntercombe Prison. He had supervisory responsibility for some of the Band 3 Caterers. One of these was Ms X. She was employed as a Band 3 but effectively carried out the work of a Band 2 administration role during the relevant period for the purposes of these Tribunal claims.
7. In addition to the claimant, there was another Band 4 supervisor called Adam Beech. He worked the other half of the rota from the Claimant. Mr Hatton and Mr Beech's working days overlapped on Wednesdays. Otherwise they worked on separate parts of the rota but at the equivalent level of seniority.
8. Senior to both the claimant and Mr Beech was Derek Edwards. He was the line manager for the claimant, Mr Beech and Ms X. He was the Catering Manager at HMP Huntercombe.
9. The central issue which led to the claim in this case is a complaint raised by Ms X about the claimant's conduct towards her on 17 May 2019. We were taken through a considerable amount of evidence from which we derived the following timeline.
10. The alleged incident of sexual assault took place on 17 May 2019. We will return to that in a moment with the details of what it involved.
11. Ms X was away from work from 18 May to 27 May 2019 on annual leave. Her initial report of the incident post-dates her return to work from leave.
12. Ms X reported something to Mr Edwards about the claimant and there then followed an email which we find at page 247 of the bundle. It is dated 31 May from Ms X to Derek Edwards and states as follows:

“Dear Derek,

Well no improvement from Jody today he did not speak one word to me and did not enter the office whilst I was around only when I wasn't. I felt quite upset to

tell the truth and the situation is making me feel stressed and anxious. I spoke with 'GS' as felt I needed support and a woman's take on it that was not 'NG's. She felt I needed to tackle the problem head on as obviously it can't continue. I will gear myself up over the weekend to tackle this on Monday. 'NG' and 'NB' were supportive which seemed to annoy him all the more. Hope you can manage to talk to him over the weekend and all goes ok. Thank you very much for your support. X”.

13. That email does not give us details but it clearly indicates that something had arisen which needed to be addressed and that Ms X was asking for her manager's support. I note in passing that 'NG' was a female Band 3 Catering Assistant and the reference to 'NB' is a reference to Nicholas Bonner, one of the witnesses who gave evidence before the Tribunal.
14. It is apparent from the terms of this email that it followed on from a previous conversation. We do not have a written record of that earlier exchange but it is apparent from the wording of this email that Ms X had already raised the issue prior to sending the email (set out above.) Obviously, this had not been tackled or dealt with to her satisfaction and she felt the need to escalate it. Hence, she then reported something to Neil Hankin on 6 June and indicated that the claimant had behaved inappropriately towards her. Neil Hankin was the Head of Residents, a prison governor.
15. The issue was raised again in an email on 14 June at page 248. This time the email was sent to Neil Hankin and copied in Derek Edwards. It followed on from a previous conversation which had apparently taken place earlier that day and it states:

“Hi Neil

I am sorry to bother you again today, following our conversation this morning I've found myself in the very difficult position known as Lunchtime!! I go home around 2pm so do not go out to lunch but continue to do my odds and bobs, NB and NG go out to lunch. So I'm left with Jody who is not going to talk one word to me unless he has to, he has pretended to go to sleep in the office which has just made a really uncomfortable atmosphere so I've come into Derrick's office until the others come back, I'm not at all sure if he realises what he is doing to me personally but I really can't continue to work with him with his manner this way. I just find it extremely uncomfortable and actually upsetting. I'm literally dreading coming to work Monday morning when I will have to go through the same situation again! Kind regards X”

16. Even if there had been no repetition of an assault at this stage, it is clear from the email that the problem had not been resolved and Ms X still had a complaint about the claimant's behaviour and what he was or was not doing in the workplace. We cannot say, based on this evidence, that the problematic behaviour was 'all over' and complete by this stage. It had not been resolved: there was an ongoing complaint about behaviour and the impact upon Ms X's ability to work in the kitchen.
17. Mr Hankin discussed the behaviour with the claimant and sent an email confirmation of that discussion on 17 June. It is the document at page 249 which reads as follows:

“Hi Jody,

Just wanted to confirm the gist of our conversation on Friday- I advised that some staff had been feeling uncomfortable with the way you had presented at work and you disclosed that you had a lot of problems externally that may have been impacting on your work and the approach to it. You felt that staff you supervise weren't pulling their weight and this had caused frustration. I also discussed that behaviour/language needs to be appropriate and that unnecessary or inappropriate touching could be misconstrued and could cause significant problems for you if raised as a complaint. Even if there is no complaint, it's not acceptable. You accepted that your approach needs to be better and to your credit, you arrived for work today (17/06/2019) with a changed approach and appeared to be trying to manage your issue and not let them affect your work. As importantly as the above record of our chat on Friday afternoon 14th June I wanted to ask if you needed a referral for Occupational Health/Counselling. I know that the sessions might be limited, I believe to 4 sessions -you could also approach GP. Please catch me and let me know, either way and if you need to “sound off” give me a shout and we can do it away from the kitchen- at this time we are the only people aware of the content of this conversation.

Cheers.

Neil Hankin”

18. The reasonable conclusions to draw from this email are that the precise nature of the assault has not yet been reported to Mr Hankin. The claimant has referred to a general mental health issue that he is suffering with at this point in time though it arises from his personal life not from Asperger's. The terms of the email do not suggest that the allegation of physical or sexual assault has been raised with the claimant. The email reflects much more general advice from Mr Hankin to the claimant and also the provision of support to the claimant about his mental health (i.e. regarding depression rather than Asperger's.) Mr Hankin was looking to provide an Occupational Health referral to the claimant from a welfare and support point of view rather than looking to examine whether the claimant has Asperger's and how it affects him.
19. The Tribunal finds as a fact that the document at page 249 is not the product of either a formal or informal disciplinary process or investigation. There had been no disciplinary hearing at this point in time. It is not recording a disciplinary sanction. To the extent that the claimant asserts that this represented a prior disciplinary sanction for the events which subsequently led to his dismissal, he is wrong. Rather, it records the gist of the conversation that Mr Hankin had had with the claimant, which included welfare concerns. This means that this document cannot be used in support of the claimant's assertion that he was subjected to 'double jeopardy' in respect of the assault (i.e. disciplined twice for the same offence). By this stage the allegation of sexual assault had not yet been made to the respondent and so this could not be a disciplinary sanction applied in response to that allegation.
20. Mr Hankin followed up with an email at page 251 regarding sources of support for the claimant. This again shows the welfare context of this exchange.

21. Even though there may have been a discussion of the claimant's behaviour towards Ms X, it clearly had not resolved the problem because Ms X sent an email to Mr Edwards and Mr Hankin regarding subsequent comments. This is the email of 21 June at page 252 (which indicates that the matter has not been fully dealt with.) That document reads as follows:-

“After Neil Hankin had spoken to Jody there has been some improvement in his attitude and behaviour towards me. However yesterday I had to put up with comments whilst other staff were around for example, “Don't walk too close to X,” “make sure you give plenty of room to X.” He also keeps making comments but walking away whilst muttering so I could not hear. I did say to him I could not hear him so come back and say what you have to say. However, he ignored me. He also passed comments about me working part time. Overall this is making working with Jody extremely difficult and uncomfortable. Lunchtimes are also difficult as when the other staff go he just pretends to sleep and this makes me trying to work in the office difficult, I know that at lunchtime he may want to rest but a suggestion would be if he were to go into the other office that might work better.

Also I was told by NG that Jody had told her you and I was sexually involved. This horrifies me as this gossip could easily be spread around and cause damage.”

22. Following this, Ms X sent an email on 1 July saying that she did not want to be near the claimant, it is at page 253. It states:

“Hi Neil, Would it be possible to have a chat today. I have had a meltdown today and I'm finding the situation almost unbearable. I find being around Mr Hatton distressing and I am struggling to cope with the situation. Though he obviously has not touched me since, I find his whole presence around me uncomfortable even small things like standing in doorways and not moving. I do not want to sit in our small office with him or want him anywhere near me. I have questioned myself to see if I have encouraged this in any way and I know I have not. I seriously need help coping with what has happened to me and what to do now.

Kind regards

X”

23. It is relevant to note that in this email that there is a change in tone to a more formal mode of address. For example, Ms X refers to the claimant by his surname. In this email she is inviting the respondent to take matters further and to take action. Furthermore, there is explicit reference in that email to physical contact implying that the claimant has previously touched Ms X. This is the first written record of that sort of allegation.

24. The notes at page 256 in the bundle show conversations between Ms X and Mr Hankin. The top note on page 256 relates to 1 July and this is the first time that the exact nature of the inappropriate contact is recorded as having been reported to a manager. We can see from that note that mediation is what Ms X asks for but it is not Mr Hankin's preference. For example, the note states:

“X was clearly distressed and at this point clarified the nature of the inappropriate contact- I apologised as I had previously believed it to be not quite so grievous- I advised the best course of action was to initiate an investigation with potential for disciplinary action. X “didn’t want to get Jody in trouble” and asked for this to be dealt with via mediation- I said I’d prefer an investigation but understood that she was feeling that she couldn’t. She wanted Jody to apologise and explain why he felt he could do this to her and why he had treated her the way that he had- she felt that if he could provide these answers then she would be able to move on. I told her that I would speak to Jody and tell him that he had one opportunity to address his behaviour in a meeting with X scheduled for the morning of 03012019 and that he needed to be very clear about answering fully anything that was put to him. He agreed. OH referral submitted for Psych support/counselling for X.”

25. So, after Mr Hankin discussed the matter with Ms X there was clearly a follow up meeting between Mr Hankin and the claimant at page 257, also on 1 July. He met the claimant and advised him that he needed to consider the impact of his behaviour on his colleagues and that it was not acceptable. He advised that an OH referral had been submitted for a psychological assessment and counselling and suggested the EAP and the claimant said he would call them. He said:

“I told Jody that I had spoken with X and that he had one opportunity to apologise for and explain his conduct and that he needed to be as engaged as possible. He agreed that he would.”

26. The plan, therefore, was to have a meeting to have mediation or to resolve matters on 3 July.

27. Two days later, on 3rd July, we can see from the middle note on page 256, that Ms X and Mr Hankin met again. At that meeting (which took place prior to the scheduled meeting with the claimant) Mr Hankin noted in relation to Ms X that:-

“Again she was distressed and I said that really the best option was an investigation- I considered the matter serious/gross misconduct and I would be in a difficult position if I failed to report- she agreed to support an investigation because she said in the kitchen that same morning Jody had said something like “the contractors never do any work because they are only interested in getting into the knickers of the escorting staff.” X was in tears and believes that Jody cannot or will not change his ways and she can’t tolerate this any longer. I told her to change ready to go home early and I waited to escort her from the kitchen as Jody was obviously working that day. Email to Governor submitted- Jody suspended and I advised X at home that this was the case.”

28. It is apparent that there had been a further inappropriate comment (which did not relate directly to Ms X) and Ms X now felt unable to go ahead with the mediation. So, Mr Hankin said that he would open an investigation. As a result, on 3 July at page 258, Mr Hankin reported it up the chain of command to Mr Redhouse and suggested that it needed to be investigated. The email is at page 258 and states:

“Sir, I have recently been made aware of an allegation that Jody Hatton touched X in a sexually inappropriate way. The allegations is that in May (date to be clarified) that Jody walked up behind X and placed his hand directly between her buttocks and touched her crotch. She states that she was completely shocked and

has understandably been struggling working near him since.

It is also becoming clear that he has made numerous inappropriate comments and has acted in a way that has made X feel very uncomfortable in the workplace, blocking her way and suggesting “you can move me if you wanted to” X states that this has been going on for her entire 2 years here.

Other staff have witnessed some of these events and challenged Jody (PW mainly) when I raised the matter with Jody recently (before I became aware of the intimate nature of the level of contact) he accepted that he had touched her and that he had said some things that could be construed as upsetting.

I have today convinced X that this matter needs to be addressed formally and although she feels unable to support a Police prosecution for sexual assault due to her own current situation- (she has a handicapped son and her father is terminal) she has agreed to support an internal disciplinary investigation-

I am aware now that this has been going on for some time and Jody has previously been spoken to about this by Derrick Edwards, apparently to no avail (possibly a year ago). X has agreed to support an investigation, because she feels that there is no way to resolve this and she does not want to leave this job. I have sent her home early today because she is in an emotional state again. I had previously arranged OH and Panoptikon support for Jody and will do the same for X later today. My view is that the allegation is so serious that suspension from work or working at an alternative establishment during this investigation is the only way to support those staff involved.”

29. As a result, later that same day, Mr Hankin met the claimant. The record is at page 257 (the 14.30 meeting.) The note states:

“Met with Jody at 14.30 and advised that the meeting for the am had obviously not happened because an investigation was initiated and that I would take him to the governor’s office to be suspended at 15.00 hours- Jody was clearly upset said things like he would lose his flat, lose his job etc. I explained the process for the investigation and what support would be available. Also that I was happy to continue to talk to him about issues not relating to the allegations and he could email or call. Suspended at 15.00 hours see related email.”

30. The suspension letter is at page 261 of the bundle. Particularly pertinent are the following paragraphs:

“You are being suspended from work to allow us to look into allegations that you touched Caterer X in a sexually inappropriate way and that this was the most extreme behaviour in a pattern of sexual harassment about which you had previously been warned by your line manager Derrick Edwards. I have decided that you should be suspended, rather than place you on alternative duties or detached duty because the nature of the allegation constitutes gross misconduct and the risk to the business of any such behaviour is great both in terms of our duty of care to employees and also reputationally in the outside world. In addition, I am mindful of the risk to yourself which could come from remaining in the workplace and so being open to further allegations being made against you. While you are suspended you must be available to meet with the investigating officer.... I will be in contact again shortly to let you know who that will be so that a date for your meeting can then be arranged. I will keep your suspension under review and it may be possible for you to return to work before the investigation is complete. As such, while you are suspended you must:

- report to HR Business Partner Andrea Knight by telephone... on Monday

at 9.30 each week

- notify Andrea if you would be unfit to attend work due to sickness.”

The point is also made that suspension on full pay is not a disciplinary action but the claimant is warned that whilst he is suspended he should not enter HMPPS premises without permission of Andrea Knight. He must not make contact with colleagues or other employees that could be involved as witnesses in an investigation.

31. On 4 July Mandy Lee was appointed as the investigating officer (page 263) and the terms of reference for the investigation were set out (page 265).
32. On around 9 July the claimant produced a written apology to Ms X. This is the written apology which he later said he was coerced into writing. The terms of the apology are set out at page 288 of the bundle. It reads as follows (the precise wording being relevant to the nature and extent of any admissions made by the claimant):-

“This letter signifies my profuse apology over the incident that happened in May, I sincerely apologise for over stepping the line in our friendship by doing what I did. I recognize that it was thoughtless and irresponsible of me to ever think of doing such an act and I did not intend for the consequences to happen. Please know that I did not intend to disrespect you. Moreover, I take responsibility for all the consequences and I promise that I will reflect on my actions. To make up for my behaviour. I had not realised that it had caused you stress and discomfort and was only done in a jokey way, The past six months my head hasn't been in the right place and I have had a lot to deal with, I haven't been thinking Straight for a while and with my cognitive process I put people in the wrong friendship bracket and over step the mark. This has been an ongoing issues most of my life and I know this is no excuse for my actions, I am seeking concealing on my other issues which I hope to get sorted and get me back to being me. Everyone should feel safe and at ease in their work environment and I am so very sorry that I made you feel otherwise. I will work hard to modify my behaviour and maintain a professional atmosphere in the workplace.

My sincerest apologies.

Jody Hatton”

33. It is notable that in this apology the claimant does not refer to the Asperger's specifically. He does, however, talk about cognitive processes and other things which are going on in his life at the time. He also does not specify the nature of the incident he is apologising for.
34. Following receipt of this the next moment of note is 16 July when Ms X decided to report the issue to the police (page 256). Ms X confirmed in an email to Mr Redhouse and to Mr Hankin that she had decided to report the matter to the police (page 289.) In response to that letter an email came back (page 290) from Mr Redhouse to the complainant, copying in Mr Hankin, Paul Crossey (the commissioning officer for the investigation), and Mandy Lee (the investigating officer for the investigation). It says that, for the avoidance of any doubt the investigation would continue under the provisions of the relevant Prison Service Instruction (PSI 06 of 2010) which was reproduced below the email. The excerpt from the relevant Prison Service Instruction reads as follows:-

“Police and other external investigations

Internal investigations with a criminal element

Misconduct may give rise to criminal prosecution as well as disciplinary proceedings, e.g. an assault on a prisoner. If evidence of a possible criminal offence comes to light during an internal investigation, or if an allegation of a criminal offence is made against a member of staff, the Lead Investigator should liaise with the Commissioning Manager regarding the necessity for referral to the police. An objective of this policy and a requirement under statutory procedures is that disciplinary processes are conducted in a timely fashion and without unreasonable delay. Therefore, NOMS operates on a presumption that internal disciplinary procedures will run in parallel to any criminal investigation and may conclude prior to the criminal investigation.) The only general exceptions to this presumption are that internal disciplinary action should be postponed in circumstances where:

- An alleged or suspected criminal offence took place away from the workplace and the investigation has been initiated by the police.
- The Investigating Officer is unable to obtain evidence relating to any possible disciplinary charge, pending the outcome of criminal investigations.
- The principal evidence comes from a prisoner and the nature of any possible disciplinary charge is identical to the criminal charge.

If, in these cases, at the conclusion of the police investigation no action is taken, contact should be made with the officer in charge of the case to discuss sharing information that may be useful to NOMS.”

So, it is apparent that according to the respondent’s own policy, the respondent does not have to wait until the police have finished their investigation before the respondent can get on with its own internal investigation. There are specific exceptions to that general rule but none of those apply in this case. The presumption is that the investigations will run in parallel. So, to the extent that the claimant says that this was in breach of the respondent’s own policies and procedures, that is not correct.

35. The Tribunal can see (page 306) that Optima Health (the Occupational Health provider) rejected the referral that had previously been made, on a welfare basis, for the claimant. (This refers to the conversation between the claimant and Mr Hankin on 1 July 2019 which included a discussion about occupational health and EAP (page 257)). The referral referred to was not a referral to obtain an expert report on the claimant’s Asperger’s, it was a welfare referral that pre-dated that issue.
36. Letters inviting the witnesses to the investigation were sent out on 8 July and several investigation interviews took place for the purposes of the investigation on 24 July. Drawing the salient points from the interviews we note that there was an interview with Ms X and the transcript is at page 317. There are some notable points to draw from that transcript. First of all, the complainant gives evidence about the prior relationship between her and the claimant. She says:-

“So I can say that possibly within the first week of me being here he would stop me going in and out of the office by putting his feet across the table so I couldn't pass, so when I asked him 'excuse me please' he would say things like 'you can get over if you want to', 'you can get past if you want to' but in a laughey, jokey kind of way, which other members of staff would laugh along with. Which I wasn't laughing along with, I felt awkward, but they were laughing so it was just accepted.

He used to stand in the doorways and not let me past, again I would ask him to move, but, he would say that I could squeeze next to him, or squeeze past him, he was very sexual, all of the time, sexual conversations, asking about sexual relationships that you were in, or were you, or you know, it was a very instigated conversation at me. He would look at me through my clothes saying that he could see my breasts through my clothes, but he would say, he didn't refer to them as breasts, he referred to them as 'mounds' so he would make comments about them, and about how I looked in clothes. Obviously he only saw me in outdoor clothes as I was coming in, and get changed straight the way into whites, and then I would obviously get changed to leave, but when I first came here obviously, I was working full time shifts with everybody else, so it was more difficult, because I was here the same amount of time as they were.”

37. When asked how this made her feel X stated:-

“I was very upset, I felt intimidated by him, I felt uncomfortable with him, I didn't want to be on my own with him, I made it clear, quite early on in, when I started here that I was not happy with what was going on.”

She was asked whether she had made that clear to either the claimant or Derek and she said:-

“To Derek and to AB at first when I was first here, it was pretty much said that, “it's ok, it's Jody's way, 'It's fine, he's harmless, he's just a twat” was quite often used. 'Take no notice of him, it's nothing personal' but I felt like, we have another female member of staff called NG, and I felt that he was not treating us the same, so he was doing it to me, but he was not doing it to her.”

She made reference to the fact that he used to deliberately give her dishes to cook that she had never heard of and that this would be done to make her look stupid. He would make comments about this and she noted that NG and Jody were cooking together, standing by each other and would be laughing and joking together and seemed to have quite a good team. So, Ms X felt very much on the outside. She tried very hard to be friends with everybody and get along with everybody. She said that it was just not happening for her in that way with Jody at all. He would fluctuate from being overly nice to being really nasty so it was difficult to get a happy medium with him. She confirmed that she had spoken to Derek Edwards many times about the situation and when asked what action he had taken, she pointed out none. He only said that he was going to speak with the claimant. Ms X thought that Derek did speak to the claimant, but only for a couple of days.

38. Ms X noted that:-

“Sometimes Jody would be ok, as in, he would just not speak to me, that was him being ok, ignoring me, not talking to me, that was Jody being ok, and then after a couple more days, he would just go straight back to how he was, with the feet

putting across the room, I mean it wasn't just once or twice, it was every single day, 3-4 times a day, it was a lot. When last year I started getting medical problems which made his comments even worse."

She referred to having had a bladder operation. She noted that the claimant had picked up on this vulnerability and had made comments about her needing to use the toilet, such as:

"Does anyone need the toilet because X will need the toilet." When he talked about that he used to talk about sex constantly, he would, he would ask, about whether you had had sex and he would say "No, you can't can you, cause you've just had your bladder operation, sorry I forgot about, you must be gagging for it." So nine times out of 10, I just didn't answer him, I would just ignore him, and then he would be laughing and say that I was frigid and that I was a prude again when I had a womb operation as well, he would make comments about not being able to have babies anymore, you know you're not like a real woman anymore. It was just disgusting, it just was horrific. I just cannot describe it any more than that."

39. She explained that he also talked about porn addiction and talking to girls in America online. Ms X noted that she had said to the claimant "Jody, you know I don't care." She said that he wanted her to go to his flat and talked about drinks, getting together, because he had left his partner all of 10 years and their children and moved into a flat. She said that he was literally focussed on himself and what he wanted. She explained that if NG came into work and didn't speak to him he would be fuming mad with everybody whoever got in his way. He started throwing insults at AB. He would throw insults at anybody, including X, because he wasn't getting the attention from NG. X confirmed that the atmosphere made her not want to come into work and she started to spend more time out on the wings in order to get away from him.
40. Ms X also pointed out that Derek Edwards had changed her working days so that she was not with him rather than sort the matter out. Alternatively, he would give her a day off to stop her being with the claimant. She also recorded that the claimant would stand behind her and put his arms either side of her and her other colleague (PW) would say, "Jody get off her." She explained that people started stepping in and trying to help. PW and AB in particular. AB spoke to Derek and said, "You need to do something about this." Ms X said that she thought Derek knew that it was a situation that needed to be dealt with but he found it hard to deal with because he felt he had not witnessed it. However, Ms X felt that Derek had witnessed it because the claimant used to do it front of 'whoever,' he did not care. She felt that because it was accepted and this was 'Jody's way' it was considered to be ok.
41. Ms X gave an example of a time where Derek shouted at the claimant to move and he just used to laugh when he was blocking the doorway. She made the comment:

"I think he was well aware of what he was doing, but I just think he felt that, he had worked there so long that he was untouchable. And he had got away with it for so many years, that he thought that it was ok, that nothing is going to happen to me, I'm not going to get disciplined, because I can do what I like, and no one is going to take it seriously. Because to be honest with you it's took a very long time for

people to take me seriously, it's took him to assault me, before people started listening to me and even after that, it still took a long time, to get to this stage."

42. When asked about witnesses to the claimant's behaviour she said that AB and PW took breaks at different times so that she was not left alone with the claimant and that they were trying to be supportive in that way but it was not dealing with the problem. She was asked why she thought that the claimant had behaved like this towards her and she stated:

"The only reason why, I've tried to think about it, but I, I've tried to think, was there any way that I encouraged him, is there anything that I have done, and there absolutely is not anything that I have done. I never, ever was friendly other than work colleagues, but the only reason why I can think that maybe he singled me out, was because, when I came into the job, I had worked in a prison before, I'm not sure if he was aware of that. I was very confident with the guys and the actual environment, I don't know whether he felt threatened by that, I don't know, I've thought about it, so much, or whether he felt that I was vulnerable, like one way or the other, was she a vulnerable female, or is she quite a strong character so I am going to bring her down. I'm not sure, but I can categorically say, that I have never encouraged Jody, in any way, to be sexual towards me."

43. Ms X was then asked to give details of the assault itself and she gave those (at page 325 of the bundle). She said:

"Friday 17th May 2019, actually it was a day where it was me, Jody, NG and NB. Mostly it was worked out that I wouldn't be alone with Jody. Mostly. This day, when they went to lunch, I would be, so, NB, lives local, he goes home, and comes back. NG, she always used to go to the gym, but she has stopped going, but she goes out to check her phone and then comes back. I finish at 2, so, I don't go out. I am entitled to a break, but I feel like I don't need a lunch break. I have not taken one since I started by new hours. So I stay and, I clear all up. Make sure all the afternoon paperwork is ready, put anything in the ovens that need to go in, do the coffee cups, do the coffee pots ready for the morning that is what I do.

Jody was sitting in the office, he never goes anywhere, so he was sitting in the office pretending to be asleep, with his feet across the room, but the other way, so he had his back to me, and his feet were across the desk, and I was able to get through. We didn't talk, there was no conversation going on. So I got all the coffee cups and the coffee pots and went to the pot wash.... Double sink, dishwasher that I had pressed on as I walked past, so that was on. So, I was washing up, the coffee cups and the coffee jugs in the sink, its low, slightly bent over, when I didn't hear anything, didn't see anything, I just felt something. Because obviously at that point, at that second, I didn't know who it was. So I just felt someone grab my bum, and because my legs were not shut, his hand went to my legs, so he, he grabbed my bum and into my vagina. So I shot round, because I didn't know if it was a prisoner, some people do let them into the kitchen all the time. It was Jody, he was laughing, I went "Jody, no" like that and he said, "you know you love it," and walked off laughing and left me in the pot wash."

She said, importantly:-

"I can't event explain to you, because, I couldn't believe it. I was processing what had just happened, I stayed in the pot wash, I didn't move. I went over my mind, did he just do that? Did that just happen? I thought that I would wait for NG to come back, from, I didn't know where to go, because I knew that, if I

come out of the pot wash, he could just be in the kitchen, he could be anywhere. I didn't know where he had gone, I didn't have a clue, I just stayed in the pot wash. It was about 10 minutes, I had my watch on, it was about 10 minutes. I went straight to the girls changing room. It was 12.30, and I got changed, to go home. I thought, I got to get out of here. I can't be in here with him a minute longer. I need to go and I need to go now."

When asked how she felt she said:-

"Shocked, and that's still how I feel, shocked, I ran over in my mind so many times, did he actually do that? Did that actually happen? Did I dream it, did, I couldn't believe it, I just, I knew he had done it, I knew that that had just happened to me, I didn't know how to deal with it. And I tell you for why, because, I knew in the end nobody would believe me, because, I tried so hard to get away from that guy, so many times, I thought, no one is going to take any notice of this incident. I was on leave actually, that was a Friday, I work one weekend in four, and it was my weekend off. I was then off Monday – Friday, I was off, I came back on Bank Holiday Monday and I told AB straight away, I had had a week off and I thought of nothing else, I thought you cannot leave me with him now, you got to sort this out, we need to do something, so I told AB. "

44. Ms X made the point that she told AB on the 27th, then there was a delay. Within a couple of days or so Derek was told on 28th or 29th. Nothing seemed to happen. She said that Derek said to her to start coming in later and to stay in the car park until other people arrived. Then after the conversation she said that the claimant did not come into the office for the whole day. He did not get a drink, did not go anywhere near her and she thought that that was good but, on the other hand, it was not good because it was not sorting the situation out. The next day he did exactly the same and she thought she needed someone to help her. She says that she reported it to Neil Hankin and she said that it was inappropriate behaviour. She did not tell Mr Hankin exactly what had gone on at that point. She did not say that she had been assaulted. Then there was a conversation with Derek Edwards and a conversation with the claimant (which is detailed at page 329.) At the conclusion of that Derek was more interested in the claimant's marital problems and the suggested reason why the claimant was behaving so badly was because he had marital problems. Ms X made the point that Derek was offering the claimant help and she, Ms X, was still sitting there. She felt let down and that nobody was taking her seriously.
45. Ms X confirmed that the next day the claimant left a cup of tea for her on the side (but without talking to her). It was his way of saying 'sorry.' But at the same time he was also saying to other staff "Don't walk too close to X' or 'Give her a wide berth." Ms X felt like it just went on and on. She said that PW was the only one that ever challenged him.
46. Miss X gave an account of her further discussions with Neil Hankin and how the issue was relayed 'up the chain of command.' She made the point that the claimant had snuck up on her when he knew that she was all alone and he knew there was no one else there. She felt that it was not an impulsive thing, that he had left the office and walked around to where she was. He knew that she was there and what she was doing. She went on to talk about what other people had done to intervene and made the point that PW had told him to get off her many times, to leave her alone, but he had never taken it seriously. He would always laugh. PW had said things like "Get off

her, she doesn't like it" and he didn't take this on board. So he would cuddle her, try to put his arms around her and she would be like "Jody, no" and it would be in front of people. PW would pick up on it and say to him to get off her and he would be laughing. She confirmed that his behaviour continued. She also confirmed that he had tried to exclude her from the group.

47. Ms X confirmed that her medication for fibromyalgia, which was a painkiller, had a mild antidepressant effect and so her doctor had increased the dosage in order to help her with the psychological effects of what had happened. She confirmed that this was a direct result of what had happened.
48. She confirmed that she had received the written apology from the claimant. She confirmed that he had acknowledged what he had done but did not say what he had done. He just referred to 'the incident.'
49. So, we have set out at some length, the complainant's account of what had been going on. That was the evidence which the respondent was looking at, as the starting point to the investigation.
50. One of the issues that arose during the course of the Tribunal hearing was the question as to why it was that Ms X did not report the detail of the allegation straight away, straight after it happened. I have just read into the record, the section where Ms X describes the emotional impact of the events and how she felt immediately after the incident, how she questioned herself and questioned her recollection of what had happened. I refer to that now because, as we will see in due course, the respondent came to a conclusion about why Ms X had not reported all the detail of the incident at the outset. The respondent concluded that it was, in essence, the 'classic' or common reaction of victims of sexual assault. That passage of Ms X's account is the evidential starting point on which it could base that conclusion. It shows that X was in shock and questioned herself about it a lot in the immediate aftermath. She paints a vivid picture of how difficult it was to handle the incident and how she did not know what to do for the best.
51. The other point that was made in the course of the Tribunal hearing was that the complainant had escalated the seriousness of the complaint over a period of time. The complaint had gone from being about a relatively minor incident to a full-blown sexual assault, latterly referring to a grab to the vagina. The point that was made on behalf of the claimant was that the change in the report over time undermines the credibility of the complainant and her evidence. However, looking at the timeline and the record of the complaints in detail, and taking out the days where people were not in work, we consider that the period over which the escalation took place is not unreasonable. It is not a case, as one sometimes sees, where an issue has been dealt with, 'put to bed' by management action and then is resurrected by a complainant some six months later after the case has been considered closed. By contrast, this chronology all happens over a matter of days. The full story comes out when the complainant is not taken seriously and the employer's approach does not deal with the issue properly and sufficiently. The Tribunal considers that it was in fact a normal escalation of the report through the line management structure when the issue was not adequately

resolved at the outset. All that happened was that, within days, the complainant gave further specific detail as to what had gone on during an incident which she had already reported.

52. The claimant characterises this as a deliberate manipulation by Ms X. His case is that she did this in order to ensure that the claimant was sacked from his job, rather than out of genuine distress and desire for a resolution. The claimant says that that undermines the credibility of the allegation against him.
53. This tribunal does not accept the claimant's characterisation of the escalation as a manipulation which undermines credibility of the allegation. Ms X was obviously genuinely trying to get past Derek Edwards who was not dealing with the problem appropriately. She was not required to put up with this and was entitled to make a clear complaint to someone higher up the chain of command who might take appropriate action. That does not undermine the fundamental credibility of the report or the account or evidence that Ms X gave. What the claimant refers to as an escalation has been taken out of context by the claimant during this Tribunal hearing. When it is put back into its proper context then the Tribunal is entitled to conclude that Ms X's credibility is unharmed.
54. We also note, on Ms X's account of the incident, that the claimant waited until she was on her own. Why? If this incident had happened during the course of 'horseplay' and 'banter' in the way that the claimant suggested during the course of the hearing, why did he need to wait and touch or assault X whilst she was alone? Also, we have to question why it would be done without any preamble or banter. Why would it be done outside the context of 'joking around' or some prior conversation. In fact, the incident itself came somewhat out of the blue. There was no lead up or prior conversation. The complainant had been in a room on her own and the claimant touched her without her realising beforehand that he was even there, in the room with her.
55. The claimant referred to a previous report to Dave Willis, who was a previous line manager. The claimant questioned, during the course of the Tribunal hearing, as to whether he should have been interviewed. However (we note from page 331) that the reports to Dave Willis were not about the assault. He was not the line manager at the time of the assault. We also heard that he was not available to interview during the investigation period and was not seen as a central witness by the respondent because he was not a manager at the time of the assault. The Tribunal also notes that Mr Willis was present at the subsequent appeal hearing and nobody at that meeting said that he had anything relevant to contribute to the evidence, including the claimant. If he had had something material to say one would have expected him to volunteer the information or for the claimant to have asked him to say it at the appeal.
56. In addition to the interview with the complainant on 24 July, the claimant himself was interviewed. The transcript starts at page 339. The claimant

was represented by a Prison Officer Association representative (i.e. a trade union representative.) He received the documents and confirmed that he was fit to do the interview and gives his account at page 340. In the interview the claimant admitted that he had pinched the complainant's bottom, he admitted that this meant he could lose his job. He denied touching her vagina. He denied being challenged or warned by any other members of staff. He set out the context of the apology that he had given at page 341. He says,

“I was informed by my line governor, that it was a good idea to write her a letter of apology, to apologise for the bum pinching incident. Because that was all I was aware of happening, so I did as I was told by my line governor.”

He was asked,

“So you are stating you didn't put your hands between her legs at any stage?”

He said:

“No.”

He was asked:

“No, Ok, why did you pinch her backside?”

His response was

“I just did it out of a joke, I wasn't anything behind it, it was just joking around.”

He was asked why he would think it was acceptable and he said:

“Because in the kitchen, it's historically a flirtatious environment. I've been in catering for 20 plus years, and every kitchen that I have worked in, that's the banter we have, and that is the banter we have had in the main, in our kitchen here as well for ages, people have made sexual innuendos and jokes all the time”.

57. He was asked whether he had pinched anybody else's backside and he confirmed that he had jokingly done it to NB (who was a male member of staff.) The claimant was asked,

“Do you not realise that, that action's overstepping the line?”

He replied,

“Well I do now but at the time, I was, because I thought we were just having a joke around.”

Mandy Lee said,

“But there's banter, and there's physical assault, isn't there, why would you think it is ok, going from banter, to physical assault?”

His response was

“I wasn't thinking that I was physically assaulting her.”

He was asked:

“So what did you think afterwards?”

His response was:

“Well, considering the fact that she was laughing, smiling when I left her, I didn’t think anything more of it.”

He was asked:

“Do you think that is acceptable in a workplace?”

His response was:

“Well I guess it’s not, no.”

He was also asked whether he thought that, as a band 4, he should set examples for behaviour. His response was:

“The issue that we have got in the kitchen, cause we have got such a small group are, the current managers seem to think that we should gel as a family unit, not as work colleagues, but that’s why there are blurred lines between our working relationships.”

He was also asked whether he had ever been spoken to or challenged by anybody about his behaviour and he says “No.” Mandy Lee then says:

“...So no one has ever spoken to you? So no one has ever told you to get off, while you were giving her a hug and said that she doesn’t like that, get off?”

The claimant denies it. He says “No.” It was put to him again:

“No, never, nobody did? No one’s never told you to get out her way, when you are blocking the doorway?”

The claimant did not answer that question directly. Then, when it was put to him again, he said,

“Oh Derek did that, cause I was talking to him at the same time.”

He was asked about hugging the complainant. He said he had never given her a hug, not from behind and only from the front when she had asked for one.

He was asked

“Have you ever made sexually inappropriate comments towards her” and his response is

“No”

He was asked whether he had made comments like “I can see your mounds through your top” and he says “No.” He was asked whether he had ever said things like “I bet you are gagging for it” and he says “No, I have never said that to her.” When asked why she would allege that he says that he honestly does not know. He was asked whether he was alleging she was making it up and his response is “I’m not saying that she is making it up, but at the moment, I’m sat here being told that she has accused me of these things and I’m like, that’s not happened, I don’t understand what’s going on.” But he did confirm that he admitted that he

touched her that day and that he pinched her backside. He again denied having been spoken to by Derek about any of 'this.'

58. Derek Edwards was also interviewed that same day. The transcript is at page 309. In brief, his account was that he was told about the sexual assault about a week after it happened. When asked about previous behaviour he volunteered examples about the blocking of doorways and leaning across the complainant on the computer. He confirmed that there was no reason he would think that the claimant would think that it was alright to behave in this manner towards Ms X.
59. After these interviews (page 346) the Tribunal can see that Mandy Lee told the claimant that she was asking for an extension of time to complete the rest of her investigations. The extension of time is to 1 September. This shows that the claimant was being updated and knew what was happening. It was reasonable for the respondent to do this when it became clear that Ms Lee could not speak properly to all the relevant witnesses within the standard timeframe. The Tribunal accepts that the respondent cannot be expected to just drop the investigation because it cannot complete it within this standard time frame.
60. On 25 July further invitations were sent out for interviews that were scheduled to take place on 1 and 8 August.
61. On 1 August there was an investigation meeting with Mr Bonner and with Paul Walker.
62. Mr Bonner confirmed at page 404/5 that there was sexual innuendo within the workplace but that Ms X did not participate as much as the others. He did not think that Ms X flirted with the claimant. He confirmed that the claimant blocked the route and put his legs across with everyone. He had not seen the claimant put his arms either side of Ms X and did not witness comments about 'mounds' or X 'gagging for it.' After the assault he did witness the claimant making comments about staying away from Ms X. When asked directly (at page 407) what he thinks about the claimant's behaviour towards Ms X he said, "I think that he has over-stepped the mark, way, way over the line." He only changed his opinion about that subsequently. In the interview he said, "there is a boundary like, you might step over it, but there's stepping over it and there's taking a flying jump, that's a flying jump over it." He also mentioned (at page 407) that he had asked the claimant to tone it down.
63. The note of Mr Walker's interview is at page 410. He backed up the allegation that the claimant had given Ms X tasks that she was not trained to do. He talked about the claimant putting his legs across the table (page 412). He referred to the complainant being hugged by the claimant and visibly cringing. He made the point that the behaviour was more specific towards Ms X. He also made the point that he had had to step in lots of times and that the complainant did not want to be with the claimant. He also confirmed that changes were made to shifts and X would meet someone in the car park so they could act as a chaperone. He referred to the claimant's behaviour as being stronger than flirting and indicated that Ms X had not encouraged him and had not participated in it. He also referred to a comment made by the claimant about Ms X's uterus. He also said that these sorts of things were said when prisoners were present. He confirmed

that, although the claimant was a Band 4, lower band employees would not be able to go to him. He confirmed (at page 419) that the claimant had said things such as “don’t talk to her or you’ll get accused of sexual harassment”. He referred to the claimant as a creep.

64. The claimant then emailed Mandy Lee with his review of the interview transcript of 5 August and informed her of his Asperger’s. The full record of that is at page 422. He said:

“Thank you for sending the transcript to me I’m concerned that the wording of the investigation has changed from sexual harassment which is bad enough to sexual assault. Please could you clarify.”

He said:

“I have Asperger’s syndrome and I struggle sometimes to communicate and process questions. Having read the transcript I would like to clarify the following points.

I would like to clarify that prior to the incident in the pot wash I have never been spoken to about any aspect of my work life by any member of staff as a verbal or written warning. I had an exemplary work record. Your line of questioning was confusing. Since the incident with X I have had discussions with Derrick and Neil Hankin. Since these discussions I have been very mindful of my interactions with X (some would say overly cautious) however there have been no further instances which could be deemed as inappropriate.

The discussions with myself, Neil and Derrick only referred to me pinching X’s bottom which is all that happened - the first mention of me allegedly touching her vagina came on the date of my suspension informally when Neil Hankin walked me to see the governor I still did not realise that I was being accused of touching her intimately because I didn’t touch her in that way.

You questioned me about touching people in the kitchen, on reflection I can think of a time when I went to hug someone I was romantically linked with at the time who was annoyed with me, NG. This was in front of X- she told me to get off at the time, it is the only incident I can possibly think of that we have not discussed..... When I talking about banter in the kitchen between myself and other members of staff I mentioned touching NB bottom, his name is wrong on the transcript.

65. There were then further reinvestigation interviews with NG, AB and Mr Hankin. The notes of the interview with NG, are at page 429. She confirmed that X was not flirting with the claimant. She also made a distinction between banter and touching and said that nobody should touch you or make you feel uncomfortable. She personally had not witnessed anything in terms of the hugging or touching or the sexual comments. At page 433 she said that the claimant’s behaviour to X was not appropriate and ‘nobody has the right to put hands on you.’ Even though she had not witnessed certain things directly she thought other people’s accounts were credible and that they would not be made up. She could not think of a reason why he would behave in that way. She did not volunteer the Asperger’s as an explanation.
66. In the notes of his interview (at page 437) AB noted that the claimant had treated X differently from the others since the beginning, that he seemed to

make an effort to be in her way and blocking her route and she confirmed that he commented on Ms X's breasts. AB had 'pulled him up' on the comments and had said that he should not make comments like that. He recounted that the claimant tried to hug X and X visibly tensed up. Ms X did not want it and obviously felt uncomfortable about it. He confirmed that he had never seen X flirt with the claimant. Ms X was clearly less comfortable with the banter and less of an active participant. He noted that what the claimant did was more than flirting, he was trying to get something out of it but did not get anything back from X. He confirmed that the claimant had been told 'umpteen times' not to behave that way towards X and confirmed that when X told him to get lost he would say "You love it really." He confirmed that the claimant singled X out for this treatment. When X reported the assault to AB he could see that she was upset about it and advised her to take it higher. At page 444 he noted that the claimant chose when to do it. He chose to do it when AB and Derek Edwards were not around. He "was very clever about when he did it." This witness also never suggested that the claimant has Asperger's. He stated that he would label the claimant's behaviour to X as bullying. He also confirmed the issue of shift pattern changes.

67. In the notes of his interview (at page 448) Mr Hankin stated that he was not initially told about the nature of the physical contact. He referred to background marital difficulties and the claimant being 'stropy.' Mr Hankin explained that his knowledge of the allegation changed and that if he had found out the nature of the contact earlier he would have speeded up the formal report. The record mirrors the notes and the email trails that we have already referred to. Mr Hankin also referred to the 'last straw' in that Ms X was going to mediate until she heard the comment about 'getting into people's knickers.' Mr Hankin was clear that it should be a formal investigation and explained that X's background issues might explain why she wasn't immediately making it formal (given her son's brain injury and her father's terminal illness). He confirmed that he encouraged the claimant to make the apology before he was made aware that the touching was alleged to be sexual.
68. Following all these interviews the investigation report was submitted on 16 August and it is located at page 467. It referred (at page 472) to the assertion by the claimant that he has Asperger's. It is there to be seen and looked at and considered in a disciplinary procedure. Mandy Lee has not concealed it. The claimant had been asked to produce evidence to support his diagnosis but, at this stage, had not. When she had already submitted the report he emailed her (at page 477) about the diagnosis. This was on 18 August but he did not submit a document in support of the diagnosis. Indeed, Mandy Lee responded to him (at page 480) noting that there was no supporting evidence and that she had already submitted her report. In light of this, the claimant's assertion that she had concealed evidence from the disciplinary process in some way, is wrong. He had not provided any supporting evidence so there was nothing that she could add to the report before she submitted it. She did say that she would update Paul Crossey about what she found out subsequently and we do not know from Mr Crossey if she did this. Indeed, Mr Redhouse did not receive a verbal update from Mr Crossey. The point is that the issue is there on the face of the report. It is there to be looked at and discussed at the disciplinary, which

is what subsequently happened. This is not a case where the evidence on behalf of the claimant was withheld from the disciplinary officer. Furthermore, the claimant could provide documents regarding health to Mr Redhouse, if relevant.

69. So, the investigation report summarised the evidence, it quoted the relevant excerpts and it set out the CPS definition of sexual assault. This can be found at page 468. It is of some relevance to the decision this Tribunal has to make. It states:

“The elements of the offence of sexual assault are:

- A person (A) intentionally touches another person (B).
- the touching is sexual
- (B) does not consent to the touching, and

(A) does not reasonably believe that (B) consents.”

70. The investigation report summarised the evidence in defence, the corroboration and the mitigation. The conclusions were set out towards the end of the report as follows:

- “It isn’t in dispute that on 17th May Jody Hatton did touch X in a sexually inappropriate way.
- There is clear evidence to demonstrate this was the most extreme behaviour in a pattern of sexual harassment.
- Jody Hatton had been made aware of his impact on others by his manager, Derrick Edwards, though in a generalist way.
- Jody Hatton had been made aware of his inappropriate behaviour and his impact of his behaviour on X by his colleagues Band 4 AB and Band 3 PW.

The severity of the assault is disputed by Jody, from all the evidence heard during the investigation and using balance of probability I draw the conclusion that Jody did place his hand between X legs and touch her vagina.

During the course of this investigation it’s been apparent that there is a culture of inappropriate behaviour and sexual innuendos that has become accustomed to the culture in the kitchen. It is seen as part of the normal working environment by those working in there, this behaviour hasn’t been challenged by the manager. This culture is inappropriate and needs to be addressed.

X raised concerns soon after arriving about Jody’s behaviour towards her and the way it was impacting on her to Derrick. The explanation given was “that’s the way he is.” There isn’t any evidence to suggest that Jody was challenged about his behaviour at the earliest opportunity. A lack of intervention by Derrick and an unwillingness to engage in difficult management conversations with Jody led to his perception that his behaviour was the norm and acceptable. This resulted in an escalation and Jody pushing the boundaries of what he thought was acceptable, culminating in him assaulting X in the pot wash on 17th May.

Whilst it wasn’t part of the Terms of reference, it is clear from the evidence we have

heard that X suffered bullying by Jody over a period of two years and this wasn't challenged by Derrick. We feel this is due to the amount of time Derrick had worked with Jody and the close working relationship they had.

The evidence trail suggests that X was consistently registering her concern and documenting her anxiety about the assault from 31 May – 1st July. No apparent action was taken in response to X's concerns until Neil Hankin became aware of the seriousness of the situation.

Recommendations:

- Allegations against Jody Hatton to be tested at a formal disciplinary hearing for Sexual Assault, Sexual Harassment and Unprofessional Conduct.
- Culture behavioural change in the kitchen particularly around the sexual conversations.
- Training for Derrick Edwards in “having difficult conversations.”
- A review of management processes in the kitchen.
- Consideration of performance management for Derrick Edwards.
- Kitchen staff to be made aware of what constitutes sexual assault.
- Staff to be made aware of what constitutes bullying and harassment.
- Needs to be, clear signposting for staff wanting to raise complaints about higher bands.”

71. Having read all of this the Tribunal concludes that Ms Lee came to a rational and evidentially based conclusion that there was a case to answer and that the issue needed to go to a disciplinary hearing. She, of course, did not make the decision as to whether there should be a dismissal, that was not the scope of her task.
72. Some of the recommendations she made are directly about the claimant and the disciplinary process but others are wider issues which were not directly part of the disciplinary process. Only the first recommendation is directly about the claimant. At this point the issues separate out on to two different tracks. There is the disciplinary process (regarding the claimant) and the wider issues, such as the pre-mediation report, which deals with the department. The respondent was not required to wait for one matter to be dealt with before dealing with the other. We find that they were able to get on with the disciplinary process without waiting for a review of the culture in the kitchen as a whole.
73. The pre-mediation report was produced as part of this separate track and came out on 18 December 2019 (page 774.) Although we were referred to it during the hearing, it did not form part of the disciplinary evidence considered by the respondent. Nobody brought it up at the appeal hearing and it was not directly relevant to the disciplinary decision and the steps that the respondent could and should have taken regarding the claimant.
74. On 21 August the clamant submitted a letter of resignation (page 481 to 482). In it he said:

“It is with great sadness that I feel I have no other option but to hand in my resignation due to the investigation of an alleged sexual assault/sexual harassment of one of my colleagues. I am disappointed with the support I have been given from the prison service over the past few months where I have been under an incredible amount of stress/pressure on a work and personal front. I am also shocked at the lack of support/recognition I have been given with regard to my Asperger’s syndrome in navigating this disciplinary procedure. I feel that this lack of support may in the future effect my ability to continue working for the prison service so I feel I must leave. I am very sorry that the 14 years of my life I have spent working at Huntercombe has ended in this way.”

75. The respondent accepted the resignation but decided to complete the disciplinary hearing inside the notice period. The leaving date would therefore be 18 September.
76. The invitation letter for the disciplinary hearing (page 491) set out the charges. It warned that it could be considered gross misconduct. It enclosed the investigation report and the documents in support and set out the range of sanctions open to the respondent. The claimant was offered the option to bring a witness in support. He was also asked to return a response by 4 September, together with any documents to be considered by the disciplinary officer.
77. On 1 September the claimant sent in his statement in advance (page 493 to 497) and that was read and taken into account by the disciplining officer. Within that statement the claimant said:

“... I would like to say a sincere apology to all concerned for my behaviour. It was never my intention to make anyone uncomfortable working with me and it is clear from reading what my colleagues have said that there are occasions where I have not understood how my actions have affected people. It is a fact that I have Asperger’s, I sought a diagnosis because I was aware that there are times where I do not understand the world around me. I lack empathy and I do not understand personal boundaries. I do not pick up on subtleties or social cues. This is not an excuse, because I understand my intentions, I assume that others will know what I am trying to convey. On the day of the incident I overstepped a boundary, I understand that now. My contact with X was intended as a cheeky joke. I did not touch her vagina I pinched one of her bottom cheeks. I admit this and I now fully understand that this was wrong. I however, need to make it clear that in no way did my hand venture between her legs. There was no mention of this at all prior to my suspension, I am shocked that this has been said as I have been open and honest from the start about this incident. The account that X gave Neil Hankin ...differs from her account that she gave to Derrick Edwards and myself during our conversation about the incident and is also different to her account in the interview. Pinching someone’s bottom is very different from grabbing or touching their vagina though their legs. This investigation was escalated based on the fact that the nature of the assault changed...Neil Hankin also referred to Derrick giving me a verbal warning a year ago. This never happened, I am unsure as to why this was stated. ..With regard to blocking people’s way with my feet or in doorways, this is something I have done to everyone in the kitchen, again I can see how irritating this must have been and seeing how it annoyed all of my colleagues is embarrassing as I only intended it to be funny. I can see how it has been perceived as intimidating, for this I am very sorry...It is also true that I did not understand how X’s medical issues affected her job, I lack empathy and my frustration at the limits that her condition placed on her ability to carry out her role as a band 3 caterer have meant that I did not show her enough understanding. For this I am also sorry. I never intended for any of my actions to make her feel that I was bullying her or trying to knock her confidence...The kitchen can be quite a tactile place I have on other occasions hugged carious member of staff male and female, the questioning has deliberately portrayed me as targeting X and this was not the case or my intention. The

report also states that I blocked X's way and suggests that I targeted her. In all the transcripts everyone has stated that this is something I do to everyone. ... the environment is flirty and there is banter. This translates as others also make inappropriate comments and this has not been looked into. The report suggests that I am the only member of staff saying anything which I should not, however in Mrs Lee's recommendations it is clear the issues are throughout the kitchen and not simply with me. This suggests a culture of behaviour. In the transcripts it clearly shows that some people accepted this as a normal part of working in a kitchen as I did....After the incident I apologised, I didn't know what to say to X and I thought the best course of action was to say nothing. As you can see from her many emails after the incident I was trying to take the warning I had been given seriously and I was trying my hardest to work with X in a professional way. ..The kitchen is an environment where rightly or wrongly jokes can be in bad taste and although this has been a steep learning curve it is something which I have fully taken on board.

I am disappointed to say the least with how this whole situation has been handled with specific regard to:

There have been no questions asked as to why X changed her account of the assault from a pinch on the bottom in May to me touching her vagina in July. I did not know what I was being accused of until the day of my interview, I was advised to apologise in writing which was then used as an admission for something I categorically deny. (Touching her vagina)

I gave supporting evidence of my Asperger's syndrome on 18th August, 13 days before the report was due in, this was not only not included in the findings but that the report still falsely says that I offered no supporting evidence, despite Derrick Edwards, Dave Willis and occupational health all being aware prior to this incident. Not one member of staff was asked about my condition in their interviews. Given the nature of my condition and the fact that every member of staff knew, this should have been addressed. The Governor Dave Willis...was not interviewed even though he returned to the prison well before the cut-off date for the report was due and is in a far better position to answer questions about the team and kitchen than Neil Hankin. The report says that I had been previously warned about my behaviour, I contest this, casual comments do not constitute a warning nor is there any record of these. I certainly did not acknowledge or understand these to be warnings. I understand that I should not have pinched X's bottom, I have apologised sincerely for my wrong doing and I accept that. I have handed in my notice and I will not be working at Huntercombe any longer but I wanted you to consider the above facts when making your decision."

78. The email enclosed information regarding autism (page 498) which was there to be considered at the disciplinary hearing.
79. The hearing date was confirmed by letter (page 506) and the respondent accepts that the claimant's initial termination date was going to be 18 September. However, the respondent reinstated him on nil pay (and thereafter reinstated pay.) The respondent accepts, for the purposes of these proceedings, that the effective date of termination was 15 June, which was the date of the appeal outcome.
80. The disciplinary hearing took place on 18 September. The transcript of the hearing is at page 522 and the accuracy of the transcript has not been challenged.
81. In that hearing the claimant accepted that he pinched X's bottom. The issue of Asperger's and the impact of it was discussed. Mandy Lee's view was sought on the impact of the Asperger's but she accepted that she is not an expert and so further questions were asked of the claimant directly. This

was the claimant's representative's opportunity to make comments and say what he needed to regarding the diagnosis and the impact of Asperger's. Mr Gosling said that the claimant has difficulties in interpreting instructions if they are too general but he will understand what he is supposed to stop doing.

82. There was a debate in the course of the hearing about whether a bottom pinch is always sexual. The point was made about it being intimate touching or touching to a sensitive part of the body rather than, by contrast, touching someone on the arm (page 528.) The claimant's own evidence was that, with the Asperger's, if he is told directly that something is not really appropriate it takes him a little bit longer to realise it. If it is not a direct comment then he does not take much notice of it (page 528.) The claimant, in the hearing, still disputed having been spoken to about his behaviour or told not to behave in that way.
83. Mr Gosling highlighted the escalation in the seriousness of the allegation and made the credibility point that we have already outlined in relation to Ms X's account (page 529.) Mr Redhouse explained how a victim may not immediately be able to recognise the seriousness of what has happened to them and to make a full report (page 529.)
84. Mr Gosling conceded that the bottom pinch, in itself, was a sackable offence. Mr Redhouse made it clear that, as far as he was concerned, the issue was not about the touching of the vagina.
85. At page 530 Mr Redhouse focused on the relevance of Asperger's regarding the claimant's ability to understand when he should or should not do something. He sought to consider whether the Asperger's would prevent the claimant from understanding, internalising and then acting on having been told repeatedly that particular behaviour was not wanted. He stated that he had not heard anything to suggest that having Asperger's would prevent the claimant permanently being able to understand that something wasn't wanted. He stated, "initially yes you so something you don't understand how it feels to somebody else but if you're then told by other people you do not have a problem just because you have Asperger's in understanding that instruction, that information etc. That's where I think we are on the issue of Asperger's but you know I stand to be corrected if it is the case that people can't respond to new information clear instruction etc." In that part of the discussion the claimant said, "It is possible for someone with Asperger's to start changing their ways but it is a slow process." Mr Redhouse asked whether such a slow process would be for two years.
86. Mr Redhouse queried whether, if the behaviour was because of, or linked to Asperger's, why it was that the claimant was not behaving in the same way towards everyone. He pointed out that Asperger's does not explain the differentiation in the behaviour towards X as opposed to the others the workplace (page 531 to 532). He would have expected everyone to be treated the same. Whereas, as he understood it, there was a clear difference in the way that the claimant was interacting with and treating X compared with the other woman in the kitchen, NG or other people in the kitchen...., "Right but I get those personal space type issues although there were times when other people said don't do it you know stop doing it in relation to them then you did but the other stuff that's been described like giving people a hug and being told by other colleagues no she doesn't like it don't do it. It wasn't the case that you were doing that

equally to say NG or indeed to PW or to AB or to NB or being told equally by them. It wasn't the case that other people were recipients of that kind of physical behaviour also and you were being told not to do it to them that was very specific to X is my understanding from the report from what Mandy has also said in response to my question..."

87. Comments have been made in the course of the Tribunal proceedings about Mr Redhouse 'Googling' Asperger's. The Tribunal's view of this is that it does not indicate that he was ignoring the claimant's evidence on the issue, rather he admitted that he needed to look into it and he was seeking to supplement the information and evidence he already had by doing his own research.
88. In the course of the hearing the claimant made it clear that it takes time for him to learn and to change his behaviour, page 531.
89. The claimant still denied being spoken to previously about his behaviour regarding X.
90. Mr Redhouse adjourned the meeting to make his decision. He reconvened the hearing to deliver the decision (at page 534.) He noted that the fact of the assault was not in dispute as the claimant had admitted pinching X's bottom. He said that it was not necessary to resolve whether it was a pinch to the bottom or a hand between the legs as, in Mr Redhouse's view, either way there was physical contact that had not been invited so that it constitutes an assault. He found the sexual assault allegation proven. Mr Redhouse found, on balance of probabilities, that there was harassment over a period of time up to the entire 2 years that X had been working in the kitchen. His research into Asperger's led him to conclude that Asperger's does not prevent people from being taught to do the right things. It might make it a bit harder for them to learn the lessons but there was no suggestion that it was not possible so, whilst he appreciated there might be difficulties with empathy, he did not believe it would prevent the claimant understanding warnings or instructions about his behaviour. He also did not believe it would explain the claimant targeting X and the evidence that the claimant went beyond the general culture of banter in his behaviour towards X with more physical contact which culminated in the assault. The second charge was 'unprofessional conduct' but as that was defined as improper relations with prisoners, ex-prisoners or their families, the second charge was found not proven. The final charge related to exploitation of working relationships and abuse of seniority. As the claimant was a Band 4 and X was Band 3 he felt that X was entitled to expect protection and a good role model from her senior. Instead she got the reverse. Mr Redhouse acknowledged that there were management deficiencies but concluded that they would be addressed as recommended but they did not go to the issue of the claimant's guilt or innocence in the disciplinary case. He concluded that the claimant was guilty of exploiting the access to X which his working relationship gave him and that he was therefore guilty of exploiting working relationships.
91. The claimant and his representative were given the opportunity to make representations on the issue of sanction but they had nothing to add. No further adjournment was taken and the sanction was conveyed to the claimant at the end of the hearing. Mr Redhouse decided that the claimant

should be dismissed.

92. An outcome letter was produced (page 520). It pointed out that two allegations had been found proven: sexual harassment/assault and also exploitation of working relationships. The sexual assault was based on the bottom pinch and quite explicitly *not* on the allegation that he had touched the complainant's vagina. Although it was accepted that Asperger's could cause initial misunderstandings the respondent concluded that it did not prevent the claimant from comprehending warnings or instructions on how to behave. Explanation was given as to the allegation of exploitation of working relationships. This was centred on the supervisory relationship between a Band 4 and a Band 3 and the fact that the claimant, in assaulting Ms X, was assaulting someone below him in the chain of command or line management structure.
93. The conclusion was that the two allegations proven constituted gross misconduct and that the claimant would be dismissed. The right of appeal was set out and potential grounds were set out in writing in the letter.
94. The claimant did submit a letter of appeal on 23 September (page 536). He set out his grounds of appeal at length. These were received by the respondent on 26 September and acknowledged (page 600).
95. An invitation to an appeal hearing was sent out, dated 29 October. However, a number of different practical problems then arose. As the claimant was no longer employed by the respondent, the Occupational Health provider, Optima, would not deal with the Occupational Health referral. Hence, the respondent took the decision to reinstate the claimant pending the appeal.
96. We have been referred to a document (at page 606) which contains some HR advice. The claimant contended that this was relevant to the respondent's decision and processes in this case. However, on reflection and on reading the terms of the document closely, we can see that it refers to a completely different case so is not in fact directly relevant or applicable to Mr Hatton's case. We should be clear that this Tribunal is not going to judge the respondent on the contents of this email. In any event, all the respondent is apparently trying to do at this stage in the process is to get expert evidence in relation to the claimant's diagnosis and any impact it might have had upon his actions (which form the subject of the disciplinary proceedings).
97. Alison Clarke informed the claimant that she wanted to get an Occupational Health report before the appeal hearing and she warned him that this might cause some delay.
98. On 23 October Alison Clarke asked Mr Redhouse to arrange the Occupational Health report. In about October Ms Clarke reinstated the claimant into employment in order to facilitate the provision of the Occupational Health report. It was then in December that the claimant's pay was reinstated (even though by this stage he had already obtained another job). Ms Clarke's acted in this way in an attempt to be fair to the claimant during the delay and to ensure that he was not unfairly disadvantaged by the delay in resolving his appeal.

99. The consultation with Occupational Health was originally due to be a telephone consultation. The claimant said that this was not appropriate because of his Asperger's. Consequently, a face to face appointment was arranged for 17 December. In the run up to that appointment the claimant became increasingly wound up and requested that the consultation take place during a home visit instead of the face to face appointment at a third party venue. The claimant made that request on 16 December (i.e. the day before the appointment was due to take place.) Occupational Health refused to carry out a home visit and instead recorded on their system that the claimant had cancelled the appointment.
100. A further telephone appointment was arranged for 31 January but that did not go ahead because the wrong phone number was provided.
101. The claimant provided his own medical report. This had been commissioned from Dr Turner. That report is dated 28 January 2020. Even though the claimant provided this report, the respondent maintained its position that it still wanted its own independent report (i.e. a report that had not been commissioned by the claimant.)
102. A face to face consultation with Occupational Health was arranged for the claimant for 18 February but the Occupational Health advisor did not complete the assessment on that day because of the employment status issue outlined above.
103. In light of the above, the Tribunal can see that there were a number of reasons for the delay in actually holding the claimant's appeal hearing. A further reason for the delay was that Ms Clarke was reassigned to do Covid response work during the period in question. As a result she reassigned the appeal to Andy Latimer so that it could be determined whilst she was otherwise engaged. She was reassigned on 9 March 2020. It was then discovered that Mr Latimer would have to shield from 1 May and so Ms Clarke took the task back and undertook to deal with the appeal herself so as to avoid further delay.
104. Subsequently, the video conference Occupational Health appointment was arranged for 14 April. This took place as planned and the report was written.
105. The Tribunal has taken time to consider the timeline in respect of the appeal and to consider whether or not it can be said to be unreasonable. On the face of it a delay of this length would, generally speaking, be unreasonable. However, that would be to look at the delay without considering the circumstances which explain it. Those circumstances were outside the respondent's direct control. We can see from the chronology that Optima can be said to have obstructed rather than assisted in getting a report written. Optima acted in this way for their own reasons and the respondent had no direct control of this. The Tribunal can also see that this all happened during the course of the Covid 19 pandemic which, in itself, created an unanticipated hurdle. We have reminded ourselves of the impact that Covid 19 had upon every organisation's ability to carry out its normal activities during this period. We have reminded ourselves how organisations had to innovate, at speed, in order to get on with jobs which were pending when the pandemic struck. We also note that the Christmas holiday fell

within this time period. We have seen that there was a period of time where the way that the appointment was supposed to take place was up for debate and it was changed between telephone, face to face (in person) and face to face (by video call.) We can see the development of the issue over time. We also note that the claimant contributed to the delay insofar as he needed certain measures in place before he would attend the Occupational Health appointment. This may well have been a justifiable approach for him to take (and we are not criticising him for that) but, as a matter of fact, it did contribute to the delay in the claimant's case.

106. We can see that the respondent's managers responded appropriately to each problem as it arose and dealt with it as best they could. It was not vexatious and malicious on the respondent's part. They were doing their best to get to an appeal hearing in order to resolve the appeal.
107. In the run up to that appeal the claimant submitted further documents for consideration. The appeal hearing transcript is at page 1007 and, once again, the accuracy of that was not challenged.
108. The claimant was allowed to bring his wife to assist him at the appeal hearing. This was outside the respondent's normal process and procedure and the respondent permitted this in light of the claimant's Asperger's. In addition, Dave Willis was present as an internal support for the claimant. So, the claimant actually had two companions at the appeal to assist him in presenting his case.
109. We note that during the appeal hearing there was an apology from the respondent about the delay in getting to the hearing and an explanation of the problems that the respondent had encountered with Occupational Health.
110. During the course of the appeal hearing the arguments that the claimant raised were that he had been coerced into making an apology, although he did not say that anything he said within the apology was actually untrue or not correct.
111. The claimant said that there was an 'off the cuff' conversation with Derek Edwards where he just said, "Don't pinch people's bums." The claimant alleged that everyone in the kitchen knew about his Asperger's because he told them. He said that he had told his manager in 2016.
112. In terms of the appeal transcript the claimant was asked whether he wanted reinstatement. He was not sure. He was asked whether he understood the process and he confirmed that he was ok to proceed. Ms Clarke apologised for the delay and set out the chronology and the explanation for it. She explained why they needed an Occupational Health report. The claimant maintained his position that this was not a sexual incident. He indicated that it was without malice and was a snap decision that he would 'just go and do this' and it would be funny. The claimant talked about conversations with managers and talked about the assertion that he had been coerced into writing an apology (page 1013.) He outlined what previous warnings he had had from Derek Edwards (page 1014.) He confirmed that he had told people about Asperger's and that Derek Edwards knew in 2016. The respondent queried whether a formal

diagnosis had been given or whether any documents had been passed to the respondent at that time.

113. The claimant also made the point about the changes in Ms X's account over time (the escalation argument.) The claimant alleged that Mr Redhouse did not properly take into account the Asperger's diagnosis and dismissed the information that the claimant had given him. There was an exploration of the evidence that the respondent had about Asperger's at the various stages of the process. There was a discussion about other emails from Ms X which did not complain about the claimant. The claimant said that they show that she knew how to make a complaint if she wanted to.
114. The claimant alleged that he had already been disciplined for the incident and so it was not fair to dismiss him for it too. This was the so-called 'double jeopardy' argument (page 1026.) He alleged that it was not sexual, that he had pinched a man's bottom also. The claimant alleged that the investigation was completed outside the 28 day time limit in the respondent's procedures. The respondent's manager made the point that time starts to run from the date of commissioning the investigation and not from the date of the incident itself. The respondent explained that more details of the incident came out and it became clear that the incident/allegation was more serious than first thought, hence it needed to be taken to a disciplinary. There was a discussion about the alleged discrepancies in the evidence of the witnesses. The claimant asserted that they undermined credibility. The respondent said they would not expect the witness accounts to be identical as different witnesses would see different things. Indeed, if witness statements had been identical one could have suggested they were not genuine.
115. There was a discussion about the christening photograph. The claimant asserted that this indicated that Ms X had consented to physical contact with the claimant. There was discussion about consent and the suggestion that the claimant behaves in the same way towards men. A query was raised as to why Dave Willis was not interviewed. There was a criticism of the length of time spent interviewing the claimant (compared to the witnesses) and it was suggested that Mandy Lee had deployed an aggressive approach to questioning. The claimant complained that he had not received the welfare checks that he should have had during the suspension. The claimant alleged that X was not offended by the incident at the time and there was a discussion of the inter-relationship between the disciplinary allegation and the police investigation. He raised questions about whether the respondent had shared information about the allegations with the police. The evidence from Mandy Lee to the Tribunal was that she was not asked by the police for a copy of (or access to) her evidence. She did not hand over her documents or investigation report to them. There was also a discussion about whether Mandy Lee's questioning was suitable for somebody with Asperger's.
116. The claimant was given every opportunity to put forward his grounds of appeal and, indeed, his wife spoke on his behalf at length.
117. The appeal outcome letter is dated 15 June (page 1057) and it addressed

each of the grounds of appeal which had been raised on behalf of the claimant. The contents of the discussion at the appeal hearing were summarised. Ms Clarke noted that given the nature of X's allegation it should have been taken more seriously by management as soon as it was made. She concluded that once the nature of the allegation was known by senior managers it was right to commission an investigation. Ms Clarke concluded that touching another person's bottom could be considered a sexually motivated act. She shared Mr Redhouse's view that even if the only part of the body touched was the bottom (as opposed to the vagina) this was still unacceptable. Ms Clarke examined the evidence which had been put forward suggesting that X had consented to physical contact with the claimant and concluded that the circumstances were very different to those of the disciplinary offence. She did not find evidence that X had consented to this sort of physical contact. She considered the evidence where other employees had told the claimant that his behaviour towards X was not welcome and that she was uncomfortable. Ms Clarke concluded that Mandy Lee's questioning of the claimant was not inappropriate, particularly given when she was made aware of the Asperger's issue and the extent of the information she had about the condition. She concluded that it would not have been reasonable for the establishment to have known more about the claimant's diagnosis. She also considered the length of the disciplinary process and concluded that, taken in context, it was not unreasonable and did not give rise to a significant detriment. She decided that the omission of Dave Willis as a witness did not render the process unfair and she decided not to have the matter reheard by an independent Governor. She did not accept that the original finding and decision was made against the weight of the evidence. Having reviewed the evidence Ms Clarke had no doubt that the claimant did act inappropriately in touching X, either on the bottom or on her vagina. She shared Mr Redhouse's view that this was deeply inappropriate. She considered the evidence of others who described the claimant's actions in the time before the incident and found their recollections of events to be broadly similar and also disturbing. She therefore did not think that the allegations being found to be proven was against the weight of the evidence. She explained why she felt it necessary to obtain medical evidence. She concluded that the claimant's actions had overstepped a line which marks the boundary between acceptable and unacceptable behaviour and concluded that they had. She explained that she had given considerable consideration as to whether it would be reasonable for the claimant to know where the boundary between acceptable and unacceptable conduct was given the culture in the kitchen and the claimant's condition. She concluded that, given the length of the claimant's employment and the fact that he had not faced disciplinary action before, he must have been aware of such boundaries. She considered the apparent frustration shown by colleagues in telling the claimant to leave X alone as she was not comfortable with the claimant's attentions. She considered whether it would have been reasonable for the claimant to have picked up on the messages, as others did, when he hugged X and, with the exception of her asking him to stop, she considered that he may not have. However, she was clear that the claimant's colleagues and managers had concerns and gave the claimant instructions to stop these behaviours and the claimant did not. Instead, he decided to approach X when she was isolated, not anticipating his attentions and touch her inappropriately. She concluded that the decision to dismiss the claimant reflected a position that

the trust had broken between the employer and employee and that this trust could not be rebuilt. She concluded that this was the case and the decision to dismiss was upheld.

The Law

118. This is an oral decision and reasons therefore I am not proposing to insert a lengthy explanation of the case law or recitation of it. We can set out the applicable principles relatively concisely.

Unfair dismissal

119. The relevant part of the Employment Rights Act 1996 is section 98 which states (so far as relevant):

- (1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show-*
 - (a) *the reason (or if more than one, the principal reason) for the dismissal, and*
 - (b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

- (2) *A reason falls within this subsection if it-*
....
 - (b) *relates to the conduct of the employee,*....

- (4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-*
 - (a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee, and*
 - (b) *shall be determined in accordance with equity and the substantial merits of the case.*

120. It is for the respondent to prove the reason or principal reason for the dismissal. A 'reason for dismissal' has been described as 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee' (*Abernethy v Mott, Hay and Anderson 1974 ICR 323*). Thereafter the burden of proof is neutral as to the fairness of the dismissal (*Boys and Girls Welfare Society v Macdonald 1997 ICR 693, EAT*).

121. In a conduct dismissal case the questions to be addressed by the Tribunal are:

- a. Did the respondent have a genuine belief that the claimant was guilty of the alleged conduct?
- b. Did the respondent carry out a reasonable investigation into the allegations of misconduct?
- c. Following the investigation, did the respondent have reasonable grounds or evidence for concluding that the claimant had committed the alleged misconduct?
- d. Did the respondent follow a fair procedure in relation to the disciplinary allegation? If there is a failure to adopt a fair procedure at the time of the dismissal, whether set out in the ACAS Code or otherwise (for example, in the employer's disciplinary rules), the dismissal will not be rendered fair simply because the unfairness did not affect the end result. However, any compensation is likely to be substantially reduced (*Polkey v AE Dayton Services Ltd 1988 ICR 142, HL*)
- e. Did the decision to dismiss the claimant fall within the band of reasonable responses which a reasonable employer might have adopted?

(See *British Home Stores Ltd v Burchell 1980 ICR 303, EAT*)

122. In considering the so-called 'band of reasonable responses' the Tribunal must not substitute its own view for that of the reasonable employer (*Iceland Frozen Foods Ltd v Jones 1983 ICR 17, EAT; Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA*). As stated in the *Jones* case:

'We consider that the authorities establish that in law the correct approach for the... tribunal to adopt in answering the question posed by [S.98(4)] is as follows:

- (1) the starting point should always be the words of [S.98(4)] themselves;*
- (2) in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the... tribunal) consider the dismissal to be fair;*
- (3) in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*
- (4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*
- (5) the function of the... tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.'*

123. The band of reasonable responses applies to the question of the procedural fairness of the dismissal as well as the substantive fairness of the dismissal.

(J Sainsbury plc v Hitt 2003 ICR 111, CA; Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 699, CA.)

124. The reasonableness test is based on the facts or beliefs known to the employer *at the time of the dismissal*. A dismissal will not be made reasonable by events which occur after the dismissal has taken place (W Devis and Sons Ltd v Atkins 1977 ICR 662, HL.)
125. We must be clear that this Tribunal is not substituting its own view for that of the respondent. We are not saying what we would have done, we are looking at what the respondent knew at the time and judging the fairness of the respondent's decision based on the matters that were presented to the respondent at the time and the process that the respondent followed at the time of the decision to dismiss.
126. If an employer categorises the actions of its employee as gross misconduct this is not the end of the matter. The employer still needs to consider whether dismissal is the fair and appropriate sanction. Are there mitigating factors indicating that there should be a lesser sanction. (Indeed, aggravating factors may also be considered and taken into account). What is the attitude of the employee to their own conduct? Is there remorse? Will the conduct be repeated in future?
127. An employee may argue that he has been unfairly dismissed on the basis that the employer has treated him inconsistently as compared to other employees. Dismissal might be considered an unfair sanction because the employer has, in the past, treated other employees guilty of similar misconduct more leniently. Such a dismissal may then be unfair because it is not in accordance with equity within the meaning of section 98(4) (see Post Office v Fennell [1981] IRLR 221). However, provided the employer has considered previous situations and distinguished them on rational grounds, it will not be possible to say that the sanction of dismissal is inappropriate. In general terms, inconsistent behaviour can arise in one of two ways. First, the employer may treat employees in a similar position differently. Second, he may, in relation to a particular employee, have treated certain conduct leniently in the past and then suddenly treated it as a dismissible offence without any warning of this change in attitude. Both forms of inconsistency may render a dismissal unfair.
128. Although the employer should consider how previous similar situations have been dealt with, the allegedly similar situations must truly be similar (Hadjoannou v Coral Casinos Ltd [1981] 352). This is likely to set significant limitations on the circumstances in which alleged inequitable or disparate treatment can render an otherwise fair dismissal unfair. Second, an employer cannot be considered to have treated other employees differently if he was unaware of their conduct. Third, if an employer consciously distinguishes between two cases, the dismissal can be successfully challenged only if there is no rational basis for the distinction made (Securicor Ltd v Smith [1989] IRLR 356.)

Section 15 discrimination

129. Section 15 Equality Act 2010 states:

(1) A person (A) discriminates against a disabled person (B) if-

- (a) A treats B unfavourably because of something arising in consequence of B's disability, and*
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

130. Four elements must be made out in order for the claimant to succeed in a section 15 claim:

- (i) There must be unfavourable treatment. No comparison is required.
- (ii) There must be something that arises 'in consequence of the claimant's disability.' The consequences of a disability are infinitely varied depending on the particular facts and circumstances of an individual's case and the disability in question. They may include anything that is the result, effect or outcome of a disabled person's disability. Some consequences may be obvious and others less so. It is question of fact for the tribunal to determine whether something does in fact arise in consequence of a claimant's disability.
- (iii) The unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability. This involves a consideration of the thought processes of the putative discriminator in order to determine whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, whether consciously or subconsciously, at least to a significant extent.
- (iv) The alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

See Secretary of State for Justice and another v Dunn EAT 0234/16.

131. The consequences of a disability 'include anything which is the result, effect or outcome of a disabled person's disability.' Some may be obvious, others may not be obvious (paragraph 5.9 EHRC Employment Code 2011).

132. Following the guidance given in Pnaiser v NHS England [2016] IRLR 170 at paragraph 31 the correct approach to a section 15 claim is:

- (a) A tribunal must first identify whether there was unfavourable treatment and by whom. No question of comparison arises.

- (b) The tribunal must determine what caused that unfavourable treatment. What was the reason for it? An examination of the conscious or unconscious thought processes of A is likely to be required. There may be more than one reason or cause for impugned treatment. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
- (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is irrelevant
- (d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability.' That expression 'arising in consequence of' could describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
- (g) The knowledge that is required is knowledge of the disability only. There is no requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. (See also City of York Council v Grosset [2018] ICR 1492).
- (i) It does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability.' Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

133. The first limb of the analysis at section 15(1)(a) is to determine whether the respondent treated the claimant unfavourably "because of something arising in consequence of the claimant's disability". This analysis requires the tribunal to focus on two separate stages: firstly, the "something" and, secondly, the fact that the "something" must be "something arising in consequence of B's disability," which constitutes a second causative (consequential) link. It does not matter in which order the tribunal takes the relevant steps (Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305 at paras 26-27) also City of York Council v Grosset [2018] IRLR 746 paragraph 36).

134. When considering an employer's defence pursuant to section 15(1)(b) the 'legitimate aim' must be identified. The aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. (Bilka-Kaufhaus GmbH v Weber von Hartz [1986] IRLR 317.) The question as to whether an aim is "legitimate" is a question of fact for the tribunal. The categories are not closed, although cost saving on its own cannot amount to a legitimate aim (Woodcock v Cumbria Primary Care Trust 2012 ICR 1126.)

135. Once the legitimate aim has been identified and established it is for the respondent to show that the means used to achieve it were proportionate.

Treatment is proportionate if it is an ‘appropriate and necessary’ means of achieving a legitimate aim. A three- stage test is applicable to determine whether criteria are proportionate to the aim to be achieved. First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective? (R(Elias) v Secretary of State for Defence [2006] IRLR 934).

136. Determining proportionality involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the treatment as against the employer’s reasons for acting in this way, taking account of all relevant factors (EHRC Code paragraph 4.30). The measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see EHRC Code (para 4.31). It will be relevant for the tribunal to consider whether or not any lesser measure might have served the aim.
137. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business but it has to make its own judgment, based upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary (Hardy & Hansons Plc v Lax [2005] IRLR 726 and Hensman v Ministry of Defence UKEAT/0067/14/DM). It is not the same test as the ‘band of reasonable responses’ test in an unfair dismissal claim. However, in Birtenshaw v Oldfield [2019] IRLR 946 (para 38) the EAT highlighted that in considering the objective question of the employer’s justification, the employment tribunal should give a substantial degree of respect to the judgment of the decision maker as to what is reasonably necessary to achieve the legitimate aim provided it has acted rationally and responsibly. However, it does not follow that the tribunal has to be satisfied that any suggested lesser measure would or might have been acceptable to the decision-maker or would otherwise have caused him to take a different course. That approach would be at odds with the objective question which the tribunal has to determine; and would give primacy to the evidence and position of the respondent’s decision-maker.
138. It is necessary to weigh the need against the seriousness of the detriment to the disadvantaged person. It is not sufficient that the respondent could reasonably consider the means chosen as suitable for achieving the aim. To be proportionate a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so (Homer v Chief constable of West Yorkshire Police Authority [2012] IRLR 601.)
139. In this case the ‘something arising from disability’ was identified at the case management hearing by Judge Gumbiti-Zimuto (at page 129 of the bundle.) The ‘something arising’ is said to be “the claimant does not understand the world around him, lacks empathy, does not understand personal boundaries or pick up on subtleties.”

140. The legitimate aim relied upon in the defence of the respondent is that the respondent is seeking to keep the workplace (and the employees in it) safe from a sexual harasser. Furthermore the respondent aimed not to give out a 'bad message' or set a 'bad example' of appropriate and acceptable conduct to prison inmates.
141. We have to ask ourselves if the 'something arising' from disability was genuinely something which arose from the disability. There is no requirement that the respondent should understand and know of the causal link (see Grosset above). We also remind ourselves that there may be more than one link in the chain of causation. We need to identify what is the 'something' which arises from disability, does it in fact arise from disability, and was the unfavourable treatment meted out to the claimant 'because of that 'something' which arises in consequence of disability.

Conclusions

142. So, we arrive at our conclusions.
143. Firstly, in relation to the unfair dismissal claim, we accept that the reason for dismissal was conduct. We also accept that there was a reasonable investigation carried out by the respondent. They spoke to all relevant witnesses; they gave the claimant an opportunity at length to explain what he did and why; they took into account what was said about Asperger's and the medical evidence which was available to them (both independent and that which was provided by the claimant.)
144. It is important to note that the claimant made an admission. He admitted that he had pinched or touched the complainant's bottom. The respondent was entitled to rely on that. There was nothing to suggest that he had been provoked to make an admission which was not in fact accurate or true.
145. We considered whether the respondent had reasonable evidence on which to base its conclusions. There were multiple witnesses plus an admission from the claimant regarding touching X's bottom. I have gone through that evidence at some length already in the oral reasons. One can see the source of that evidence in the investigation transcripts and the quotations from the documents.
146. We have concluded that there was no good reason why the respondent could not rely on the evidence of the witnesses who gave evidence against the claimant. There does not have to be unanimity between those witnesses, nor does there have to be a majority of the witnesses who see all of the instances or incidents described. The nature of the workplace is such that not every witness will see every incident. Indeed, it would be more suspicious if all of the witnesses said exactly the same thing and saw all of the incidents. That would be grounds for suggesting collusion. That was absent here.
147. The claimant says that the majority of the witnesses did not see the problematic behaviour, only a minority did. However, we conclude that the weighing of evidence in a case such as this is not just a 'numbers game.' It is not correct to say that one always has to believe the majority if the minority are credible and consistent. Furthermore, the majority of witnesses

in this case did not say “this did not happen,” just that *they* did not see it and so *could not comment either way*. Their evidence does not prove the claimant’s innocence. It just means that those particular individuals did not witness the particular incident.

148. In any event, if one reads all the evidence from all of the witnesses, even those who are most sympathetic to the claimant are also critical of him. None of the witnesses is saying that the claimant acted entirely appropriately.
149. The allegation by the claimant that only two witnesses back up the allegation of the assault and misconduct is wrong. There is corroboration from multiple sources. AB and PW give the most concrete examples but the others do not deny that the incidents occurred just that they were not necessarily there to witness it. All the others paint the same picture: that Ms X did not actively participate and did not actively invite or encourage the behaviour that she received from the claimant.
150. As I have said, one would expect some differences in the evidence of different witnesses. That makes their accounts more credible than multiple identical accounts which would perhaps suggest collusion.
151. The evidence available to the respondent passes the reasonable grounds test. It was not perverse of the respondent to conclude that the claimant was guilty, they had reasonable grounds for that belief and that finding. It was not unreasonable for the respondent to find the allegations proven. Bear in mind, of course, that it was ‘only’ the bottom pinch that the claimant was found guilty of. Although the allegations go further, that is not the focus of the respondent’s decision. The respondent focusses on the bottom pinch and not any alleged touch to the vagina. It is for this that the claimant is disciplined. So, the question is whether it is reasonable to conclude that he pinched the complainant’s bottom and that this was gross misconduct. The respondent does not have to show that the claimant touched X’s vagina, this is not the act for which the claimant was dismissed.
152. We have looked at the fairness of the process. The claimant had a fair opportunity to put his case and have his arguments considered. He was able to put forward all relevant evidence. He was able to put forward evidence regarding Asperger’s and the respondent considered it.
153. We do not accept that the complainant’s credibility was undermined by changes to the allegation over time. We can see that the respondent actively considered whether her credibility was undermined and reasonably came to the conclusion that it was not. They looked into how the allegations came to light and why they were added to over time. They reasonably took into account the fact that a victim of sexual assault may not be able to be completely frank about what has happened from the outset. They may not feel comfortable in reporting all the details. Ms X’s experience was of reporting something and it not being taken seriously. She had tried to deal with it informally but when she realised that the claimant was not going to change (and the respondent had not really addressed the problem) she had to make it formal.
154. The claimant was not coerced into making an apology. It was suggested to

him at a stage in the chronology when Ms X did not want to pursue formal disciplinary proceedings. The crucial point is that the claimant did not say anything in this apology which he later claimed was untrue. He was not tricked into making an admission of guilt. The claimant was not trying to please others by telling them what they wanted to hear. He subsequently 'stuck to his guns' about this. The presence of the apology does not make the dismissal unfair nor does it suggest that evidence was collected in an underhand way.

155. The double jeopardy argument does not stand up to scrutiny. There was no prior formal disciplinary process nor was there an informal disciplinary process. The claimant had not previously received a disciplinary sanction for the same offence. None of the evidence suggests that the claimant had received a disciplinary warning for this. Taken at its highest, the claimant had been given management guidance and instructions about how to behave appropriately in the workplace. The respondent could not take disciplinary action until it knew the true nature and extent of the allegation. At that point it was handled under the correct procedure. The claimant was only disciplined once for this, by way of the dismissal.
156. The reason the complaint was escalated to disciplinary proceedings was because the nature of the allegation only became clear later. An employer cannot reasonably decide how to handle a disciplinary allegation if they do not know the full nature of the allegation.
157. The tribunal does not criticise Ms X for deciding to make her complaint formal in the end. She reasonably took the view that the situation would not be resolved if she did not make it formal and she was entitled to demand a safe working environment.
158. Looking at whether dismissal was within the range of reasonable responses, we consider that the respondent was objectively entitled to categorise this as a sexual assault which was clearly gross misconduct. Touching of the bottom is sexual. It is clearly intimate touching. It is invasive. It clearly requires the consent of the recipient in a way which is not required for, example, touching the arm of a colleague. There is also the fact that it happens in the context of a male to female relationship where both protagonists are said to be heterosexual. That in itself gives it a sexual aspect.
159. The slap to Mr Bonner's bottom is not comparable to the incident involving Ms X. Quite apart from the fact that he is male, he also consented. The evidence suggests this was done in the course of jest whereas the incident with X was outside such a context.
160. The respondent was entitled to conclude, based on the evidence it had seen, that the incident happened out of the blue and that the claimant chose to do it when Ms X was alone with him.
161. When asked during the investigation even Mr Bonner himself thought that what the claimant had done was 'out of line.'
162. Nor do we accept that this incident was 'normal behaviour' in the context of the kitchen culture, even for the claimant. He did not do this to everyone.

He had not done it to other women. He had not done it to X before 17 May. If he thought it was normal and not sexual he would have been doing this all along as part of the 'banter' and "culture of the kitchen." He would have done it in front of witnesses rather than when X was alone. He was not doing this to anyone else and certainly not to other women.

163. We find that the claimant's behaviour could reasonably be found to meet the CPS definition of sexual assault, particularly as he had waited until she was alone.
164. The fact that the claimant maintains that he does not think that the behaviour is sexual does not mean that it does not constitute a sexual assault. If the claimant genuinely, subjectively thought or believed that it was not sexual that was not a *reasonable* belief. In reality, the evidence suggests that the claimant would have known that it was sexual, hence the fact that it was done once and away from witnesses.
165. The second disciplinary charge was also proven: the abuse of the power relationship between the Band 4 and the Band 3 employee. Both of those proven disciplinary charges could reasonably be categorised as gross misconduct. Both were proven as they were inextricably linked given the nature of the allegation and the line management relationship of seniority between the claimant and X.
166. We considered the claimant's Asperger's at length and all the relevant surrounding evidence. We are satisfied that the respondent was entitled to conclude that the claimant had been told *not* to behave this way with X before the index assault took place. So, to the extent that Asperger's means that the claimant misinterprets situations and cannot read people's reactions, this is not an answer to the charge. He did not have to rely on his own powers of empathy in this situation. He did not need to read the social cues or interpret the feedback. He just needed to follow the instructions he had previously been given not to behave that way with Ms X because she does not like it. In short, he did not have to work this out for himself or decide for himself what was appropriate. He just had to act on previous guidance given to him.
167. The claimant said, in submissions, that there was ambiguity and stress which would justify a misinterpretation on his part. We do not accept that the situation was ambiguous or emotionally challenging in the way that the claimant alleges. This argument does not assist him.
168. We are satisfied on the evidence that the respondent was entitled to take the view that Asperger's does not mean that the claimant does not know right from wrong or that he cannot learn how to behave properly. The evidence that the claimant gave was that he can learn but that it takes him more time because of his Asperger's. The claimant's evidence was that instructions or warnings have to be repeated. He himself said that it could take a long time for him to learn to behave differently. Viewed objectively, the problem was that the respondent could not be sure that this sort of behaviour would not happen again. The way that the claimant presented and came across during the disciplinary process could have given them no confidence that he had learnt his lesson and would not repeat this behaviour.

169. There was evidence available, that on being spoken to by others (something which the claimant himself denied) the claimant would only improve for two to three days and then went back to his normal mode of behaviour. His own evidence was that it takes weeks for him to learn something new and that repeat instructions are required.
170. The claimant says that the behaviour did not recur in the period after the warning but before the suspension. Whilst the assault did not recur, the other inappropriate and unwelcome comments did continue (see the notes in the evidence bundle which we have already referred to.)
171. In giving evidence on oath to this tribunal the claimant could not satisfy us that even now, all this time after the event and after he had been convicted in a Crown Court, he really recognised that it was a sexual assault. If he does not understand it by now then he certainly would not have been able to convince the respondent that he understood it at the time they made the decision to dismiss. We accept that they could not have been reassured that he would learn his lesson and not repeat the behaviour in future. So, the respondent would have had a genuine and legitimate concern about the risk or likelihood of repetition. The most that the claimant can really say, even now, is that he understands that *other people* categorise it as sexual assault and therefore 'wrong.' Whilst the Asperger's is not something which the claimant is to be blamed for, the respondent has to look at appropriate sanctions taking into account *all* the relevant circumstances. If the respondent could not be satisfied that this would not happen again in future then that was a relevant factor which tends to show that dismissal was within the band of reasonable responses. The respondent did not have to abandon its duty of care to other employees, including X, because of the claimant's disability. The respondent was still entitled to insist on a workplace which was free from sexual assault and harassment, even if the claimant might have difficulties in taking this on board that other employees (without Asperger's) might not. The respondent is entitled to look at the bigger picture and the duty of care that it owed to all of its employees.
172. The claimant made a point about the culture in the kitchen regarding the pre-mediation report but this does not render the dismissal unfair. The respondent was taking steps to deal with the inappropriate culture and that that was a separate matter to the appropriate disciplinary sanction for the claimant as an individual. Furthermore, nobody before this Tribunal was alleging that sexual assault had happened before in the kitchen or that others in the kitchen thought it was acceptable at the time in question.
173. In looking at a claim like this the tribunal has to compare like with like and ask the respondent to compare like with like. One cannot say that the respondent can only dismiss the claimant for sexual assault if it dismisses others for inappropriate banter. The conduct is not the same and therefore the sanction and the approach does not have to be the same. The respondent is entitled to uphold proper standards of conduct and ensure that an appropriate message is given to staff (and prison inmates) about what is and is not acceptable. It is appropriate to ensure that the disciplinary record accurately reflects the seriousness of the incident.
174. The fact that the claimant was going to resign in any event does not mean

that the claimant cannot be dismissed. If the claimant had only left because he chose to, that would not set an appropriate behavioural benchmark for the workforce. It would not indicate that the respondent will take such allegations seriously or that sexual assault will not be tolerated. We are satisfied that no alternative sanction would appropriately meet the charge, mark the seriousness of the offence or adequately and appropriately protect other members of staff. Indeed, we note, that it would not be possible to relocate the claimant and a final written warning would not reflect the fact that he had already been cautioned about such behaviour.

175. We looked at the process and we accept, from one point of view, that the appeal took too long. However, applying the appropriate standard, the process was reasonable and within the reasonable range of responses. The respondent did not deliberately protract it. They did what they could, as soon as they could, given the circumstances. They were reasonably entitled to commission their own Occupational Health report. They were not required to abandon that because of the delay in obtaining it. They needed to have relevant medical evidence in order to make the disciplinary decision fairly, particularly given the arguments that the claimant raised on appeal. The respondent was not duty bound to accept everything that the claimant said about the impact of his Asperger's without getting that independent advice to provide independent guidance on such matters.
176. We also note that there were also wider practical difficulties at this time surrounding the Covid pandemic. Obviously a delay of this magnitude is regrettable but it is genuinely explicable and does not take the decision to dismiss outside the range of reasonable responses, particularly as the claimant had been reinstated and was going to receive back pay.
177. In the course of the Tribunal hearing the claimant made a point of inconsistency with other cases but he was unable to cite examples of similar cases within the respondent's organisation. Indeed, no such examples were raised with the respondent during the process. It cannot be said that the inconsistency argument is made out on the facts of this case. The requirements of the case law in this area on inconsistency (*Hadjiannou* etc) were not satisfied. There is no proper comparator for the respondent or the tribunal to consider here in assessing whether there has been inconsistency of treatment.
178. So, in light of the above, the unfair dismissal claim is dismissed.
179. We turn to the s.15 disability discrimination claim. In this case we are satisfied that the 'something arising from disability' asserted and relied upon by the claimant is established given the available evidence.
180. We then considered the acts of unfavourable treatment complained of in order to determine whether the alleged unfavourable treatment had in fact been established on the balance of probabilities. We address the list at page 129.
181. The first allegation was that the respondent failed to support the claimant in respect of, or recognise of, the claimant's Asperger's syndrome in navigating the disciplinary procedure. We do not accept that they failed to support the claimant as alleged. The purpose of the process was to have a

fair hearing of the allegations in the disciplinary procedure. The respondent took all reasonable steps to facilitate a fair hearing. The respondent ensured that the claimant understood the allegations and had time to prepare. The respondent ensured that he had appropriate people to assist him, including trade union representatives and his wife. They did not ignore the Asperger's. They took extra steps to find out about it, including asking the claimant and his wife and medical experts. There is nothing in the evidence that we have heard to suggest that the claimant was not able to fairly participate in the process given the way that it was actually carried out. There was no unfavourable treatment in this regard. The primary purpose of the process is not to support the claimant, the primary purpose is to ensure a fair hearing of the disciplinary allegations. Part of that entails giving necessary and reasonable support to the claimant to facilitate a fair hearing. We cannot see that the claimant was asked questions that he did not understand, for example. We cannot see what adjustments were required to account for the claimant's Asperger's which the respondent in fact failed to put into place.

182. We do not accept that it would be reasonable to do the entire process in written format with written questions and answers. There was nothing in the evidence that we heard to indicate that the claimant was in some way caught out or said something that he did not mean to say during the disciplinary hearings. He had support during the relevant meetings.
183. The assertion that the claimant made that Mandy Lee had closed her investigation early is also not established on the evidence. She had asked for an extension of time up to a particular date and was granted this. This did not mean that she was precluded from presenting the report before that date. She never indicated that the investigation would be held open until the last possible date before she submitted the report. Indeed, she included reference to the Asperger's on her report. The claimant did not provide any further documents for her to pass on to substantiate the diagnosis or provide more information to the respondent.
184. We do not accept the claimant's assertion that the respondent did not take account of the information he provided on Asperger's in considering the disciplinary charges and procedure. The fact that the disciplining officer also 'Googled' the issue does not mean that he ignored the claimant's evidence on this, just that he sought to supplement it.
185. The respondent did not rely on Mandy Lee's experience of having a relative with Asperger's. She herself said that she was 'no expert.' Indeed, the claimant was asked directly about his condition as it was thought that he would know more about it than the other people in the room. On top of that, the written documents on Asperger's were read and considered.
186. The second aspect of unfavourable treatment was alleged to be "failing to investigate the index incident properly." We do not accept that the respondent failed to investigate the incident properly. We have already set out the reasons why Dave Willis was not interviewed. Apart from that we cannot think of anything that the respondent could have done and failed to do. There is no unfavourable treatment here. All reasonable lines of enquiry were pursued.

187. The third allegation of unfavourable treatment is that the respondent deliberately protracted the appeal process.
188. We do not accept that this is factually accurate. The appeal process was longer than anybody would have wished but the reasons were not deliberate and the respondent did its best to resolve it as soon as reasonably practicable. The claimant's assertion that it was deliberate is not proved on the evidence. The respondent did not have to base its decision solely on the claimant's answers to questions, it was entitled to wait for independent guidance. We have set out the reasons why the process took as long as it did above. These were genuine explanations for the delay and they were matters over which the respondent had limited control.
189. The fourth allegation is that the respondent failed to follow its policies and procedures. We do not accept this: they *did* follow the procedures. Where they had to extend time for investigation they explained this to the claimant. They were not debarred from carrying on the process to a conclusion just because it fell outside what might be considered a 'standard' timeframe. Nor do we accept that they had to wait for the police to conclude their investigation. Indeed, the respondent did not pass its investigation notes to the police, that was entirely separate. The respondent's policy says that it does not have to wait for the police and, in any event, it is up to the claimant what he says about the incident to both the respondent's investigation and the police investigation.
190. The claimant makes allegations that the respondent negatively influenced the criminal proceedings to its advantage. That is not proven. The criminal proceedings are an entirely separate matter dealt with by the CPS and the police. There is no evidence that the respondent had any influence or made any contribution to the police investigation. Nor is there any reason to suppose that they would want to interfere with the criminal process. Furthermore, the criminal law is not a matter for this tribunal. If the claimant believes that he was wrongly convicted of sexual assault then his remedy is to pursue an appeal in the criminal courts. We are not going to undermine that conviction in these proceedings. Nor is the conviction particularly relevant as it postdates the respondent's decision to dismiss the claimant. The respondent did not know of the conviction at the time it dismissed the claimant.
191. Finally, the last allegation of unfavourable treatment is the one that is proven on the facts and that is the allegation that the claimant was dismissed by the respondent. However, we then ask was the dismissal 'because of something arising from disability.' For the reasons we have already referred to above, we do not think so. The claimant was not required to use empathy to avoid behaving in the way for which he was disciplined. He just had to follow the instructions people had already given to him. The claimant's lack of empathy is not causally relevant to his behaviour: it is not a materially contributing factor in the circumstances of this case.
192. There are also other features of the claimant's conduct which indicate that he was not unaware that what he was doing was wrong. He had sufficient

insight (even with the effects of Asperger's) to know that what he was doing was wrong. He did not do the sexual assault because of the disability. The something arising from disability did not materially contribute to the conduct for which he was dismissed. If the conduct had been because of the disability or linked to it, he would not have waited until the complainant was alone and there was nobody present to witness it. Furthermore, he would not have had the wherewithal, insight and understanding to change his behaviour for a couple of days after being 'told off' before going back to behaving in his usual way. All of this suggests that the Asperger's (and the identified features of it) did not materially contribute to his actions and therefore he was not dismissed because of something arising in consequence of his disability.

193. The claimant was not copying other people. It was not 'copycat behaviour.' He selected one female to do this to. It also occurred in the context of evidence of sexually inappropriate comments towards Ms X. The claimant has some insight from his own personal relationships about personal relationships and sex. He is not somebody whose limited personal life means that he is wholly 'in the dark' about sex and sexual relationships. He is not wholly unaware of what sexual behaviour consists of and what is (and is not) part of a normal relationship at work, as compared to a person's private sexual relationships. He is a married man and a father.
194. We do not accept that we have to find causation established on the basis of the medical evidence in this case. It is clear that the expert reports were based on the claimant's report/account of his prior relationship with X. This report was not accurate. It portrayed a tactile or flirty relationship between X and the claimant which did not, in fact, exist. The experts evidently based their conclusion (that the claimant would have misunderstood what was appropriate and what was acceptable to Ms X) at least partially on this mischaracterisation of their prior relationship. What was to be considered 'appropriate' from the claimant's point of view could be seen as open to interpretation if the prior relationship between the claimant and Ms X was tactile or flirty etc. If that 'tactile' or 'flirty' relationship was not actually present prior to the assault and the claimant had actually been told to leave Ms X alone by colleagues, there was nothing for him to misinterpret and, therefore, nothing which the Asperger's would adversely impact upon in terms of empathy, 'crossing social boundaries,' or misinterpreting social cues.
195. The medical evidence of both experts is based on a false narrative of the working relationship and this undermines the conclusion that the experts come to.
196. Even if the claimant had established the necessary causation between the unfavourable treatment and the 'something arising' from disability, we find that the respondent's defence of a 'proportionate means of achieving a legitimate aim' was made out on the facts of this case.
197. The aims identified by the respondent are clearly legitimate given the nature of the workplace and the respondent's organisation. Given the risk that the behaviour would be repeated there was no suitable lesser sanction available to the respondent. No lesser sanction would set the appropriate

standards of behaviour for staff and inmates. No lesser sanction would keep the workforce safe from future sexual harassment.

198. The claimant says that Ms X continued to find that the issues in the kitchen were a problem. That is a misreading of the evidence. The complainant was still troubled by what had happened to her in the past (i.e. the claimant's behaviour). She was not troubled by ongoing or continuing assaults or harassment from other people. The evidence described the ongoing impact of the index assault, not an ongoing course of sexual harassment or assault.
199. In light of the findings above, the issue of knowledge of disability does not have to be determined in this case. The only act of unfavourable treatment which the claimant has proved is the dismissal. The respondent conceded that it knew of the disability by the time it dismissed the claimant. Furthermore, as the effective date of termination had been conceded as the date of the appeal outcome, then the out of time/limitation issue has been resolved and we do not need to address it further here.
200. In light of the above, all the claimant's claims are dismissed.

Employment Judge Eeley

Date signed: 29 November 2022

Reasons sent to the parties on
30 November 2022

For the Tribunal office