



EMPLOYMENT TRIBUNALS

Claimant: Mr N Davidson
Respondent: Pharma-Z Limited
Heard at: Norwich
On: 19, 20 & 21 November 2019, in Chambers 2 December 2019
Before: Employment Judge M Warren
Members: Mrs Prettyman and Ms Edwards

Representation

Claimant: Ms Macheta, HR Consultant
Respondent: Mr Brown, Counsel

RESERVED JUDGMENT

The Claimant's claims that he was unfairly dismissed and of discrimination on the grounds of age, sex and sexual orientation fail and are dismissed.

REASONS

Background

1. By a claim form dated 2 May 2018, Mr Davidson brings claims of unfair dismissal and of age, sex and sexual orientation discrimination arising out of his employment with the Respondent as a Healthcare Assistant and Dispenser, which came to an end upon his dismissal for alleged gross misconduct on 6 December 2017. The matter was case managed by me on 1 April 2019. During that preliminary hearing we identified the issues. The representatives subsequently agreed upon a list of issues, which appears in the bundle at pages 74 to 75 and which is replicated below. At the outset of the hearing, the parties confirmed that the agreed list of issues could be relied upon by the tribunal.

The Issues

2. The agreed list of issues is as set out below, replicating the parties' wording:

Unfair Dismissal

1. What was the reason for the Claimant's dismissal? The Respondent alleges it was the bullying of a colleague Bethany Whittaker and inappropriate behaviour towards 2 other members of staff.
2. Did the Respondent have a genuine belief in respect of the alleged misconduct?
3. Did the Respondent have reasonable grounds to sustain that belief?
4. Did the Respondent carry out such investigation as was reasonable in all the circumstances? (The Claimant argues that in using Emma Murphy as an investigating officer the investigation was unfair given her relationship with the complainant. The Respondent contends that, in the absence of any evidence to the contrary, no prejudice was suffered by virtue of her involvement, irrespective of any relationship that may have existed with the complainant.)
5. Did the decision to dismiss fall within the range of reasonable responses?

The Claimant argues that in allowing him to work alongside colleagues for a number of weeks, that was incompatible with a finding of gross misconduct.

The Claimant also argues that a delay in reporting the complaints by Bethany Whittaker was such that dismissal was outside the range of reasonable responses.

The Claimant contends that mitigating factors such as his attendance record and the fact that he had no previous disciplinary action were not taken into account.

The Respondent's case is that the delay in reporting packs of bullying did not diminish the gravity of those acts and it is any delay s [sic] after they were reported to the Respondent that is relevant:

The Respondent argues that the mitigating factors were taken into account but not sufficient to result in a finding other than gross misconduct particularly and is more relevantly the Claimant offered no apology or showed any recognition of the gravity of his conduct.

6. If the dismissal was procedurally unfair, should there be a Polkey reduction?
7. Did the Claimant cause or contribute to his own dismissal and is it just and equitable to reduce any award?

Discrimination

8. The decision not to allow the Claimant's appeal against dismissal but to allow Lorraine Cheney's appeal an act from which the inference of unfavourable [this should be, "less favourable"] treatment on account of his age, sex or sexual orientation could be drawn?
9. Was the decision not to uphold the Claimant's grievance an act of discrimination on the aforesaid grounds? (The Claimant's main grievance related to 1 of the Respondent's

pharmacies, around Christmas 2016, giving him a mug with the words, “Thundercunt” written on it and the use of inappropriate language at around that time.)

10. In not upholding his grievance was this treatment less favourable treatment than that which was afforded to Bethany Whittaker whose complaints were also alleged to have been historic?

(The Respondent’s case is that its decision not to uphold his grievances was not because of the lapse of time in reporting them but because a finding of inappropriate conduct did not necessarily equate to discrimination, and there was a lack of evidence to support his other complaints.)

11. Was the decision not to uphold his grievance an act which was part of a continuing course of conduct such as to bring the historic complaints within the 3 month time limit for bringing such a claim?

12. Was it appropriate, fair and reasonable, that Emma Murray, who conducted the investigation that led to the Claimant’s dismissal, also conducted the claimant’s grievance appeal hearing?

3. Mr Davidson’s discrimination case is therefore that he was subjected to harassment, (unwanted conduct related to the protected characteristics relied upon that violated his dignity or gave rise to an intimidating, hostile, degrading, humiliating or offensive environment) or in the alternative, to direct discrimination, (treatment that was less favourable than the way a real or hypothetical comparator was or would have been treated).

Evidence

4. This case was listed for 4 days but was allocated only 3 days. It was heard over the course of 19, 20 and 21 November 2019. The tribunal reconvened in Chambers to reach its decision on Monday, 2 December 2019.
5. We had before us a properly paginated and indexed bundle of documents running to page number 414. We were not required to add any further documents to the bundle during the course of the hearing.
6. For the Respondent, we had witness statements from Mr David Standerwick, Ms Emma Murray, Mr Justin Dicks and Ms Deirdre Wyatt. We heard evidence from each of those individuals.
7. For the Claimant, we had witness statements from Mr Davidson himself, Ms Lorraine Cheney and from Ms Chrissie King. We heard evidence from Mr Davidson and Ms Cheney. We did not hear evidence from Ms King. Whilst we read Ms Kings witness statement, we treated its contents with circumspection as she did not attend the tribunal to have her evidence tested under oath; we attributed to her evidence such weight as we considered appropriate in circumstances.
8. During a break at the outset, we read the witness statements and read or looked at in our discretion, the documents referred to. We warned the representatives that they must not assume that we have read every document, we would only read what

we were taken to and that they must make sure they take us to what they consider to be important passages in the documents during their cross examination.

The Law

Discrimination

9. The relevant law is set out in the Equality Act 2010.
10. Section 39(2)(c) proscribes an employer from discriminating against an employee by dismissing the employee or, at (d) by subjecting the employee to any other detriment.
11. Age, sex, (gender) and sexual orientation are 3 of a number of protected characteristics identified at section 4.

Direct Discrimination

12. Mr Davidson says that he was directly discriminated against because of his age, his gender and/or his sexual orientation. Direct discrimination is defined at s.13(1):

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

13. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the Claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the Claimant, but not having his protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The employee must show that he has been treated less favourably than that real comparator was treated or than the hypothetical comparator would have been treated.
14. How does one determine whether any particular less favourable treatment was, “because of” a protected characteristic? Under the previous legislation, the term used to proscribe direct discrimination was, “on the ground of” the particular protected characteristic. In the Court of Appeal, Lord Justice Underhill confirmed in Onu v Akwivu and Taiwo v Olaiye [2014] IRLR 448 at paragraph 40 that there was no difference in meaning between, “because of” and “on the grounds of”.
15. The leading authority on when an act is because of a protected characteristic is Nagarajan v London Regional Transport [1999] IRLR 572. Was the reason the protected characteristic, or was it some other reason? One has to consider the mental processes of the alleged discriminator. Was there a subconscious motivation? Should one draw inferences that the alleged discriminator, whether he or she knew it or not, acted as he or she did, because of the protected characteristic? - (see paragraphs 13 and 17).

16. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, “significant influence”:

“Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.”

17. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285; the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work.

Harassment

18. Harassment is defined at s.26:

(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B...
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.
(5) The relevant protected characteristics are—
age;
...
sex;
sexual orientation.

19. We will refer to that henceforth as the proscribed environment.
20. The conduct complained of that is said to give rise to the proscribed environment must be related to the protected characteristic. That means the Tribunal must look at the context in which the conduct occurred. It also means that general bullying and harassment, in the colloquial sense, is not protected by the Equality Act;

protection from such behaviour only arises if it is related in some way to the protected characteristic. See Warby v Wunda Group Plc UKEAT/0434/11/CEA.

21. The EAT gave some helpful guidance in the case of Richmond Pharmacology v Dhaliwal [2009] IRLR 336. It is a case relating to race discrimination, but his comments apply to cases of harassment in respect of any of the proscribed grounds.

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

22. Those sentiments were reinforced by Sir Patrick Elias in Grant v Her Majesty’s Land Registry [2011] EWCA Civ 769. Of the words, “intimidating, hostile, degrading, humiliating or offensive” he said that Employment Tribunals, “*should not cheapen*” the significance of those words, they are an important control to prevent trivial acts causing minor upsets being caught up in the concept of harassment.

Burden of Proof

23. Section 136 deals with the burden of proof:

“(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if (A) shows that (A) did not contravene the provision.

24. It is therefore for the Claimant to prove facts from which the tribunal could properly conclude, absent explanation from the Respondent, that there had been discrimination. If he does so, the burden of proof shifts to the Respondent to prove to the tribunal that in fact, there was no discrimination. The Appeal Courts guidance under the previous discrimination legislation continues to be applicable in the context of the wording as to the burden of proof that appears in the Equality Act 2010. That guidance was provided in Igen Limited v Wong and others [2005] IRLR 258, which sets out a series of steps that we have carefully observed in the consideration of this case.
25. This does not mean that we should only consider the Claimant’s evidence at the first stage; Madarassy v Nomura International plc [2007] IRLR 246 CA is authority for the proposition that a Tribunal may consider all the evidence at the first stage in order to make findings of primary fact and assess whether there is a *prima facie* case; there is a difference between factual evidence and explanation.

26. Madarassy v Nomura International plc [2007] IRLR 246 CA also confirms that a mere difference in treatment is not enough, Mummery LJ stating:

“The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination, they are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination”

27. In Denman v Commission for Equality and Human Rights and Others [2010] EWCA Civ 1279 Sedley LJ made the point though, that the something more which is needed need not be a great deal, it might for example be provided by a failure to respond, or an evasive or untruthful answer to, a questionnaire or by the context in which the act has occurred. In other cases, that something more has been statistical evidence suggesting unconscious bias, inconsistent explanations or refusal to provide information.

Unfair Dismissal.

28. Section 94 of the Employment Rights Act 1996 contains the right not to be unfairly dismissed. Section 98 at subsections (1) and (2) set out five potentially fair reasons for dismissal, one of which at subsection (2)(b) is the conduct of the employee. Section 98(4) then sets out the test of fairness to be applied if the employer is able to show that the reason for dismissal was one of those potentially fair reasons. The test of fairness reads:

“Where the employer has fulfilled the requirement of subsection (1) the determination of the question whether the dismissal was 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 a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case.”

29. We have guidance from the appeal courts on how to apply that test where the grounds for dismissal relied upon by the employer is misconduct. The first is the test set out in the case of British Home Stores v Burchell [1980] ICR 303. The Tribunal must be satisfied that the employer holds a genuine belief, based upon reasonable grounds and reached after a reasonable investigation. It is for the employer to show the genuine belief, the burden of proof in respect of the reasonable grounds and the investigation is neutral.
30. If the employer is able to satisfy that test, the Employment Tribunal must go on to apply the test set out in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439. The function of the Tribunal is to determine whether in the particular circumstances a decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If a dismissal falls within the band the

dismissal is fair, if the dismissal falls outside the band it is unfair. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

31. The band of reasonable responses test also applies to the question of whether or not the employer's investigation into the alleged misconduct was reasonable in all the circumstances. See Sainsbury v Hitt [2003] IRLR 23.
32. Mitigation must be actively considered by the decision maker.
33. We should look at the overall fairness of the process together with the reason for dismissal. It might well be that despite some procedural imperfections, the employer acted reasonably in treating the misconduct as sufficient reason for dismissal. We should not be distracted by questions such as whether an appeal is a rehearing or a review, see Taylor v OCS [2006] IRLR 613.
34. In this case, the Claimant argues that he was treated inconsistently with others. Insofar as that argument relates to a claim of unfair dismissal in the context of Section 98(4), the ACAS Code of Practice on Discipline and Grievance Procedures (2015) provides at paragraph 4 that dealing with issues fairly includes acting consistently. By the same token, the ACAS guide explains that does not necessarily mean that similar offences will always call for the same disciplinary action, one has to look at the context of the particular circumstances. This is reflected in the relevant case law and in particular, the cases of Hadjiioannou v Coral Casinos Limited [1981] IRLR 352 and Paul v East Surrey District Health Authority [1995] IRLR 305 in the Court of Appeal. These cases enjoin Tribunals to scrutinise arguments of disparity with particular care, because ultimately it is a question of whether, in the particular case, the decision to dismiss was a reasonable response. An employer in fairness ought to consider whether it has dealt with similar cases differently and equally, take into account the particular circumstances of the instant incident and any particular mitigation.
35. In this case, the Respondents say that Mr Davidson was guilty of gross misconduct justifying dismissal without warning. The test for gross misconduct, or repudiation, is that the conduct must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in its employment, see Neary v Dean of Westminster Special Commissions [1999] IRLR 288.
36. Section 207(2) of the Trade Union & Labour Relations Act 1992 provides that any Code of Practice produced by ACAS under that Act which appears to an Employment Tribunal to be relevant shall be admissible in evidence and shall be taken into account. One such code of practice is the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015). We have had regard to that ACAS code in considering our decision in this case.

The Facts

37. The respondent operates a pharmacy practice from 6 branches in Norfolk. It had at the material time 55 employees, (according to the ET3) of whom about 64% were part time. A qualified pharmacist is required to be present at each of the premises

at all times. The shareholders are Mrs Deirdre Whyatt and Mr Linden Whyatt. Mrs Wyatt is a director, Mr Whyatt is not. Mr Wyatt is a pharmacist, Mrs Wyatt is not.

38. Mr Davidson commenced employment with the respondent on 1 August 2015. Latterly, he was employed as a Dispenser/Healthcare Assistant at the Mundesley branch, (at which 6 people were employed). He is gay and was at the time in question, aged 19.
39. Other key characters are:-
 - Lorraine Cheney – Dispenser/Healthcare Assistant, also worked at Mundesley
 - Justin Dicks – Pharmacist Manager of Hamblin’s Branch
 - Sue Furr – Pharmacist, also worked at Mundesley
 - John Gilbey – Pharmacist, occasional locum at Mundesley
 - Chrissie King – Pharmacy Manager of the Mundesley branch
 - Jane Kirby – Dispenser/Healthcare Assistant at the Mundesley branch
 - Emma Murray – Superintendent Pharmacist across the practice
 - David Standerwick – Pharmacist and Branch Manager of the Hemsby Branch
 - Bethany Whitaker – Dispenser/Healthcare Assistant at Mundesley
40. On 30 October 2017 whilst visiting the Mundesley branch, Ms Murray was spoken to by Ms Whitaker, who complained of having been bullied by Mr Davidson and Ms Cheney. She said that she was considering leaving her employment because of this. Ms Murray decided to return to the practice the next day in order to hold informal conversations with Mr Davidson and Ms Cheney. In the meantime, she informed Ms Wyatt.
41. On 31 October 2017, Ms Murray spoke informally, (without making notes) with Mr Davidson in the presence of Ms King and Ms Furr. Her purpose was to try and resolve the issues which had been raised. From the interaction between Mr Davidson and Ms Furr and, as she put it, the depth of emotion expressed by both, it became apparent to her that a serious situation had developed which she felt would require a more formal approach.
42. Ms Cheney was also spoken to on 31 October 2017.
43. Ms Murray reported the situation to Ms Whyatt, who decided that Ms Murray should investigate, that she herself would deal with any disciplinary action that may be necessary and that Mr Standerwick would hear any appeal.
44. Between 6 and 10 November 2017, Ms Murray spoke to a number of people and took written statements, summarised as follows:-

- 44.1. Ms Whitaker complained of Mr Davidson and Ms Cheney continually questioning her, undermining her, ignoring her and generally making her uncomfortable in the workplace. She said that this had been going on since October or November of the previous year. She said that she regularly cried, she had started taking antidepressants, (although she acknowledged this was not necessarily entirely due to work) and that the two of them were also disrespectful to Ms Furr. She said she had spoken to Ms King about these matters. She gave a number of examples of the conduct she was complaining of as follows:
- 44.1.1. Mr Davidson complaining on a Monday that a box of deliveries from the previous Friday had not been dealt with saying, *“What was it doing there? It’s been there since Friday. This is why people get annoyed with you because you fuss about with your folders”*.
 - 44.1.2. Mr Davidson had refused to work with her the previous Wednesday.
 - 44.1.3. She felt she was not allowed to work in the dispensary because Mr Davidson did not like working with her.
 - 44.1.4. When she had mentioned that she had a problem with fleas at her home, Ms Cheney, “interrogated” her and Mr Davidson and Ms Cheney then, *“spent the afternoon moving their stuff away from my stuff”*.
- 44.2. Ms Furr gave a statement supporting Ms Whitaker’s complaint about the way that she was treated by Mr Davidson and Ms Cheney. She gave a further example, referring to an occasion when she felt the two of them had, “penned” Ms Whitaker in a consulting room to interrogate her, which she described as, “dreadful”. She confirmed Mr Davidson said to her that he was not comfortable working with Ms Whitaker because she was messy and rude. She also made reference to another occasion when Mr Davidson and Ms Cheney had driven past the home of Ms Kirby, apparently checking up on Ms Kirby because she had called in sick.
- 44.3. Ms Kirby said that she had seen Ms Whitaker often crying, that this had been going on for more than 6 months and she corroborated the comments made by Mr Davidson relating to the box that had not been dealt with. She also said that Mr Davidson was disrespectful toward Ms Furr and that it was not the same when 1 of the other 2 pharmacists, (Mr Wyatt and Mr Gilbey) were working in Ms Furr’s place. She said there had been an incident when Mr Davidson and Ms Cheney had driven past her house twice within 5 minutes on a day when she had called in sick; she had seen them from her garden and when she was back at work, had challenged Mr Davidson about it. In connection with that, she also said that Mr Davidson had challenged her over whether she had a discharge letter, as she had been to hospital that day with chest pains.

- 44.4. Ms King acknowledged that there was tension in the branch. She confirmed she had seen Ms Whitaker crying. She confirmed that Ms Whitaker had spoken to her about Mr Davidson and Ms Cheney, as indeed they had about Ms Whitaker. The interview notes suggest that she was exasperated. She did not know about the box incident. She did know about the drive past incident; she confirmed she knew Mr Davidson and Ms Kirby had spoken about it at the time. She perceived a division in her team between Ms Kirby, Ms Furr and Ms Whitaker on the one part and Mr Davidson and Ms Cheney on the other.
- 44.5. Mr Wyatt said that he had not seen anything he would regard as bullying. He did however, confirm that he had seen Mr Davidson and Ms Cheney talking behind Ms Whitaker's back. He did feel that there was something in the air not conducive to the work environment.
45. On 10 November 2017, Ms Murray wrote to Mr Davidson and invited him to an investigation meeting, attaching a copy of the statement taken from Ms Whitaker, (not the other statements). He was told of the existence of statements from Ms Furr, Ms Kirby, Ms King and Mr Wyatt, (page 90).
46. Ms Cheney was spoken to before Mr Davidson. She confirmed amongst other things, that there had been an occasion when she and Mr Davidson had driven past the home of Ms Kirby when Ms Kirby was off sick; it was during the lunch hour, he had driven to North Walsham, (a nearby town) via a Tesco's store in Mundesley, (by way of explanation of the apparently indirect route they had taken).
47. The investigation meeting with Mr Davidson took place as planned on 15 November 2017, (page 197). The following points are of note:
- 47.1. He thought that Ms Furr was unprofessional in the way that she treated others and that in effect, she showed favouritism toward Ms Kirby and Ms Whitaker as compared to himself and Ms Cheney.
- 47.2. He acknowledged that he had indicated he did not wish to work with Ms Whitaker and gave Ms Furr's disclosure of this to Ms Whitaker as an example of her unprofessionalism.
- 47.3. He confirmed that he was frustrated because Ms Whitaker was messy.
- 47.4. Broadly speaking, he acknowledged the incident with regard to the box that had not been dealt with.
- 47.5. He acknowledged that he had driven past Ms Kirby's house, claiming that the route chosen was the quickest route between Mundesley and North Walsham. It was clear from his comments that he suspected Ms Kirby was malingering; he reported to Ms King that he had seen Ms Kirby in her garden and later asked whether she had produced a sick note.
48. Ms Murray produced an investigation report dated 22 November 2017, which she supplied to Ms Wyatt. A copy was not provided to Mr Davidson until April 2019 during the process of disclosure in these proceedings. In her report, Ms Murray expressed the view by way of conclusion, on the balance of probabilities, that

actions by Mr Davidson and Ms Cheney over a period of time amounted to behaviour that would be considered bullying.

49. By letter dated 20 November 2017, (page 203) Ms Wyatt invited Mr Davidson to attend a disciplinary hearing on 1 December 2017. He was to answer 3 charges of potential gross misconduct which he was told, could result in his dismissal as follows:

- 49.1. Bullying Ms Whitaker since November 2016;
- 49.2. His conduct toward Ms Furr and Ms Kirby, and
- 49.3. His refusal to carry out reasonable requests by his pharmacist.

He was provided with copies of the relevant procedures and the statements, (but not the investigation report).

50. Mr Davidson provided a written response to the allegations, (undated). The accusation of failing to carry out a reasonable request related to his indicating that he did not wish to work with Ms Whitaker. He stated in his response that he had not said that he would not work with her, simply that he was uncomfortable working with her and that he had proceeded to carry out his duties. He, in short, said that he could not see in what way his conduct toward Ms Furr and Ms Kirby was inappropriate. He gave examples of how he says he had been supportive and friendly toward Ms Whitaker. Attached to his response were some documents which included a photograph of a Christmas present he had received from Ms Furr, a mug with the word, "Thundercunt" written on it, ("hereinafter referred to as the TC mug").

51. The disciplinary hearing took place on 1 December 2017 chaired by Ms Wyatt. The hearing notes begin at page 227. Notable points are:

- 51.1. Mr Davidson denied ignoring Ms Whittaker, but acknowledged that if he became frustrated by something, he would only speak when it was necessary.
- 51.2. He accepted the basic facts of the box incident, but said that he thought Ms Whitaker's statement was exaggerated.
- 51.3. He denied refusing to work with Ms Whitaker, stating that on the day in question there had been a lot of tension and he had said he would have felt uncomfortable working with her, but that he had continued to work as directed.
- 51.4. He felt that the so-called penning-in incident in the consulting room had been exaggerated. He explained that Miss Whitaker had said that he talked down to her and he was asking for examples. He said he wanted to understand where she was coming from.
- 51.5. He confirmed he had overheard Ms Whitaker talking about having fleas and so he had moved his belongings, because he has 2 cats and a dog and so he did not want fleas. He said it took 2 minutes to move his things and that his doing so was not malicious.

- 51.6. His explanation of the drive-by incident was that he had gone to the local Tesco with Ms Cheney to get sandwiches for lunch, they had then driven to the vape shop in North Walsham, the most direct route for which from Tesco passed Ms Kirby's house. He acknowledged that they also drove past her house on the way back, because it was the most direct route, but that this was not 5 minutes later as alleged.
- 51.7. He acknowledged that he thought that Ms Kirby had been dishonest when she had not gone into work; they had seen her outside in her garden in the sun, talking. He also acknowledged that when Ms Kirby was at work the next day, he did not think that things made sense and so he had written down what he had seen. He reported this to Ms King. He said he did not recall asking about a discharge letter.
- 51.8. He expressed the view that Ms Furr had coerced Miss Whitaker into making the bullying allegation against him. He felt that Ms Whitaker, Ms Furr and Ms Kirby did not like him or Ms Cheney.
52. Ms Whyatt prepared a disciplinary report. This was a detailed narrative setting out her analysis of the evidence she had considered and the conclusion she reached. As with Ms Murray's investigation report, this was not shared with Mr Davidson until April 2019. It begins at page 249. She is most strident and critical in her analysis of Mr Davidson, describing him as distorting versions of the truth, constantly building up his power base in the branch, it being obvious to her that he was a very skilled bully, that he used his anger as a weapon of intimidation, that he spoke with a soft-spoken anger, just barely under control, that it was clear he had bullied Ms Whitaker by manipulating her, intimidating her, playing mind games, building a powerbase around him and disguising his true intentions and emotions. She also set out an analysis of the routes taken and the potential routes from Mundesley to North Walsham, reaching the conclusion that it was implausible for Mr Davidson to have chosen to drive back to work from North Walsham using the route past Ms Kirby's home for a second time.
53. Ms Wyatt decided that Mr Davidson should be dismissed for gross misconduct. She set out her decision and reasons to him in a letter dated 6 December 2017, (page 263). She did not uphold the allegation of not carrying out a reasonable request, she did however uphold the allegations of bullying and inappropriate conduct toward Ms Furr and Ms Kirby. With regard to Ms Whitaker she noted:
- 53.1. He had said that he did not ignore Ms Whitaker, but that if he was upset by something or frustrated, he would only speak when necessary
- 53.2. With regards to the box incident, he acknowledged that he had been frustrated.
- 53.3. Whilst he had denied asking not to work with Ms Whitaker, he acknowledged he had said he would feel uncomfortable working with her.
- 53.4. With regard to the penning-in incident, he had claimed it had been exaggerated by Ms Furr, said he had wanted to be as reasonable as possible and that she had the option to leave the room.

- 53.5. He admitted moving his belongings away from Ms Whitaker when hearing about fleas.
- 53.6. She concluded that he had bullied Ms Whitaker.
54. With regard to the drive-by incident, Ms Whyatt did not accept Mr Davidson's explanation with regard to the routes taken and his excuses given. She took the view that his action of speaking subsequently to his manager and his taking an interest in Ms Kirby's return to work interview, indicated that the real reason for his journey was to check up on Ms Kirby.
55. Ms Whyatt wrote that there was evidence that Ms Whitaker was visibly upset more than once and she believed Mr Davidson had shown unnecessary irritation on a regular basis, he had created an unpleasant and unacceptable work environment and a degree of intimidation, all contrary to the respondent's bullying and harassment policy.
56. Ms Whyatt stated that she had considered Mr Davidson's length of service and whether a sanction other than dismissal would be appropriate. She referred to the respondent's zero tolerance policy with regard to bullying and harassment. She considered Mr Davidson's actions had spanned a significant period of time and had caused distress to Ms Kirby and Ms Whitaker.
57. Mr Davidson appealed against his dismissal by letter dated 11 December 2017, (page 267). He set out 13 points of appeal as follows:
- 57.1. The meeting on 31 October 2017 was not carried out in an appropriate manner as the presence of 2 others was unnecessary and intimidating.
- 57.2. Ms Murray was friendly with Ms Whitaker and so was not impartial.
- 57.3. Ms Murray had breached confidentiality in sending an email on 15 November 2017 to the pharmacy computer that all staff had access to, (not something that has featured in this case).
- 57.4. The process had taken 5 weeks.
- 57.5. Ms Whitaker did not complain until October 2017 and yet claimed to have been bullied from October 2016.
- 57.6. It is unreasonable to investigate matters that were alleged to have taken place such a long time ago.
- 57.7. There was no evidence to support the allegation he had chosen the route that he did in order to check up on Ms Kirby.
- 57.8. Ms Kirby raised the drive-by incident four months after the event and it had been resolved at the time.
- 57.9. The documents attached to his written response should have been considered as mitigating factors.

- 57.10. Ms Wyatt had not followed up on his allegations that he had been subjected to profanity by Ms Kirby in a Facebook conversation and had been given the TC mug.
- 57.11. It was inconsistent not to have suspended Mr Davidson if the conduct of which he had been accused amounted to gross misconduct.
- 57.12. It would be inappropriate for anybody junior to Ms Whyatt to consider the appeal.
- 57.13. It was unfair and caused stress, to require Mr Davidson to continue working with the people who had accused him of bullying during the disciplinary process.
58. Also on 11 December 2017, Mr Davidson submitted a grievance, (page 270). He complained of:
- 58.1. Being given the TC mug which he complained in effect, was an act of sex, age and sexual orientation discrimination
- 58.2. That on 12 July 2017 he had made a light-hearted remark to Ms King, querying whether Ms Kirby would be at work the following day as she had called in sick on the previous Monday, (this is related to the drive-by incident). Ms Furr having overheard said, *“she didn’t fucking make it up. She was in an ambulance. I don’t think she would have faked that”*. As she had walked away she had said, *“fucking ridiculous”*. He also referred to this as an act of sex and age discrimination.
59. By letter dated 12 December 2017, Ms Whyatt invited Mr Davidson to attend a grievance hearing on 5 January 2018. The hearing was to be chaired by Mr Dicks.
60. On 14 December 2017, Mr Standerwick wrote to Mr Davidson to invite him to attend a disciplinary appeal hearing which he would chair, on 9 January 2018. In his letter, Mr Standerwick explained that he had considered Mr Davidson’s objection that anybody junior to Ms Wyatt would not overturn her decision. He said that he had regard to the ACAS guide on discipline and grievances at work, that prior to his employment with the respondent, he had 13 years’ experience in senior management and a proven track record of being fair and impartial in dealing with disciplinary matters. He said that he had therefore decided that it was appropriate for him to hear the appeal.
61. In the grievance hearing on 5th of January 2018, Mr Davidson said that at the time of the Christmas gift, (the TC mug) in 2016, his relationship with Ms Furr had been purely professional. He confirmed that she had bought Christmas gifts for other members of staff. He confirmed he had not protested about the gift to Ms Furr, but he said he had spoken to Ms King. There is no reference to any action being taken. With regard to the complaint about Ms Furr’s outburst in relation to Ms Kirby’s trip in an ambulance, he confirmed that he had not raised the matter further with Ms Furr. He went on to make reference to Ms Furr having once said to him in relation to a prescription he was looking for, *“I haven’t done a fucking prescription for aspirin”*. He also quoted her as having referred to, *“a butch male character”* in a soap opera

as a, “fucking tranny”. Mr Dicks said that he would investigate the matters raised in the grievance.

62. Mr Dicks subsequently spoke to Ms Kirby, Ms Whitaker, Ms Furr, Ms King and another member of staff, Ms Mann:

62.1. Ms Whitaker said that the word on the mug was Mr Davidson’s favourite word and he used the mug at work.

62.2. Ms Furr said that Mr Davidson had thanked her for the TC Mug gift. She confirmed that when he had made the comment about Ms Kirby’s absence, suggesting her illness had not been genuine, she had responded in a way that made it known she was not happy. She recalled that she had said the male soap opera character dressed as a women, “looked really good”. She did not recall the incident in which she was alleged to have sworn about not having done a prescription.

62.3. Ms King said Mr Davidson had seemed embarrassed about the mug and had put it out of the way. She confirmed Ms Furr, “went for Nick” when he had queried Ms Kirby’s absence. She did not hear the remark about the soap opera character. She did hear Ms Furr swear about a prescription, in front of a customer.

62.4. Ms Mann recalled the mug and Mr Davidson using it.

63. The grievance outcome was provided in a letter from Mr Dicks which is undated, copied at page 301. He concluded that the gift of the TC mug was inappropriate. It had been used by Mr Davidson, who had thanked Ms Furr for it. He concluded that the gift did not amount to discrimination or harassment. Ms Furr had, he thought, reacted poorly to the remark about Ms Kirby, which had implied her absence had not been genuine. He concluded Ms Furr’s reaction was not an act of discrimination. He found that Ms Furr’s comments in relation to the prescription she had not done was not appropriate, but was not directed toward Mr Davidson and was not an act of discrimination or harassment. He concluded that there was no evidence that Ms Furr had made the comment about the soap opera character. The grievance was not therefore, upheld.

64. The disciplinary appeal hearing before Mr Standerwick took place on 9 January 2018, the notes begin at page 278. We were not taken to anything in particular in the appeal notes. Mr Standerwick went through of Mr Davidson’s 13 points of appeal and discussed each with him. Subsequently, Mr Standerwick spoke to Ms Whyatt and Ms Murray. He also set out his thoughts in a document that was not shared with Mr Davidson at the time, page 287 to 291. In these notes, he refers to Mr Davidson’s attitude in the appeal hearing as having been confrontational and passively aggressive.

65. The appeal outcome was provided in a letter from Mr Standerwick dated 15 January 2018, (page 292). He responded to each of the 13 points of appeal as follows:

65.1. The informal discussion on 31 October 2017 was with a view to resolving matters informally. It was not inappropriate for Ms King and Ms Furr to have

been present and their presence did not impact on his case or amount to a breach of procedure.

- 65.2. Ms Murray and Ms Whittaker did not have a personal relationship and Ms Murray was an appropriate person to carry out the investigation.
 - 65.3. No one other than Ms King had seen the email of 15 November 2017.
 - 65.4. It was not unreasonable not to have suspended Mr Davidson and the time taken for the disciplinary process was not unreasonable.
 - 65.5. Ms Whittaker had not delayed a year before raising matters; she had complained to Ms King a number of times but the behaviour complained of had continued. There was no collusion between Ms Furr, Ms Kirby and Ms Whittaker.
 - 65.6. It was not unreasonable to investigate the matters raised, notwithstanding the period of time that had elapsed.
 - 65.7. Having driven the routes himself, Mr Standerwick formed the view that the Tesco to North Walsham journey was plausible, but not the return journey to the place of work using the same route. Subsequently questioning Ms Kirby's absence corroborated the conclusion that Mr Davidson had been checking up on Ms Kirby.
 - 65.8. Ms Kirby had not raised the matter of the drive-by, Ms Furr had.
 - 65.9. He concluded that Ms Whyatt had considered the, "mitigating factors" set out in Mr Davidson's written response to the charges, notwithstanding that he had not pressed his point during the disciplinary hearing.
 - 65.10. This appears to repeat the previous point.
 - 65.11. This appears to repeat point 4.
 - 65.12. Mr Standerwick did not consider it inappropriate for him to consider the appeal. He referred to his experience and having full authority to overturn the decision to dismiss if he thought it appropriate.
 - 65.13. This appears to repeat points 4 and 11.
66. One further point Mr Davidson had raised was that Mr Gilby had not been interviewed. Mr Standerwick agrees that he should have been but concludes that to have done so would have made no difference and did not alone render the process flawed.
 67. In conclusion, Mr Standerwick found that the decision to dismiss was appropriate.
 68. Mr Standerwick also heard Ms Cheney's appeal on 9 January 2018, (page 372). Her grounds of appeal were almost identical to Mr Davidson's. He decided to uphold her appeal, (page 383). He decided that her demeanour had been different, less confrontational, than Mr Davidson's. He found that Ms Cheney had been led by Mr

Davidson, who had been the prime motivator. He therefore reduced her sanction from dismissal to final written warning.

69. Mr Davidson appealed against the grievance outcome by letter dated 25 January 2019, (page 303). In summary, his grounds of appeal were:
 - 69.1. He thanked Ms Furr for the TC mug gift because that is the social norm and he was so embarrassed, he did not know what else to do;
 - 69.2. Mr Dicks failed to take into account Ms Furr did not give a similarly offensive gift to anyone else;
 - 69.3. It was not true that he had used the mug;
 - 69.4. Mr Dicks had failed to interview Ms Cheney;
 - 69.5. He did not understand why a Ms Mann had been interviewed, and
 - 69.6. Mr Dicks had taken into account that Mr Davidson had not complained at the time, yet the matters for which he had been dismissed were also historic by the time that they were raised.
70. Mr Davidson objected to Ms Murray dealing with the grievance appeal on the basis that she had conducted the disciplinary investigation. Ms Murray nevertheless proceeded to deal with the appeal and met with Mr Davidson on 5 February 2018. She asked him questions, seeking elaboration on his grounds of appeal. Notable from her notes, (page 307) are that Mr Davidson could not explain why he had not thrown the mug away and suggested that Ms Cheney should have been interviewed, as she witnessed Ms Furr swear in relation to the Aspirin prescription.
71. Ms Murray interviewed Ms Cheney on 12 February 2018. She said she had never heard the word on the TC mug used. She said she heard Ms Furr swear when Mr Davidson asked Ms King about Ms Kirby's return to work after her absence and the drive-by incident. She said she heard Ms Furr swear in front of a customer in relation to the Aspirin prescription. She did not hear a comment about a soap opera character.
72. Ms Furr was interviewed on 12 February 2018. She said she chose the word on the TC mug because it was, "a word he loved & used". She denied swearing about the Aspirin prescription and she denied making an inappropriate remark about a soap opera character.
73. Ms Whittaker, also interviewed on 12 February, said Mr Davidson used the word on the TC mug and that he used the mug.
74. Ms King was interviewed on 14 February. She said Mr Davidson had not spoken to her about the mug, (Mr Davidson said he had done so). She said it was put in a cupboard.
75. Ms Murray provided an outcome to the grievance appeal by letter dated 15 February 2018, (page 327). She wrote that she felt she was an appropriate person to hear the grievance appeal; as Superintendent Pharmacist, she had the authority to overrule Mr Dicks. She had been the investigator on the disciplinary matter, not

the decision maker. The Respondent is a small business with limited resources available to it to deal with such matters. In relation to the grievance appeal, she found:

- 75.1. Mr Davidson had thanked Ms Furr for the TC mug, both in person at the time and subsequently by text. If he had felt embarrassed or awkward about protesting to Ms Furr, he could have spoken to Ms King and he did not do so.
 - 75.2. Three people had said Mr Davidson has used the offensive word on the mug, although two others had said he had not.
 - 75.3. There was nothing to suggest that the mug was given to him because he was young, male or gay. It is a word which has no connotations with being gay.
 - 75.4. The gift of the TC mug was not a calculated act of unkindness.
 - 75.5. Four people said he had used the mug, three had said he did not. He had confirmed he had not thrown it away. It was reasonable of Mr Dicks to conclude that Mr Davidson had used the mug.
 - 75.6. As Ms Cheney had been reinstated, Ms Murray had felt able to speak to her and she had confirmed that Ms Furr had sworn as alleged but that Mr Dicks conclusion that any such swearing had nothing to do with the fact that Mr Davidson was young, male or gay, was reasonable.
 - 75.7. It was reasonable to ask Ms Mann and Mr Whyatt if they had any knowledge of the use of the TC Mug.
 - 75.8. That the incidents complained of had not been raised until after his dismissal was a reasonable matter to take into account.
 - 75.9. Mr Davidson had not been treated differently from Ms Whittaker nor Ms Cheney; their cases were different.
 - 75.10. There was no evidence that any of the allegations made against him were because he was young, gay or male; allegations were also made against a colleague, (Ms Cheney) who was female and neither young nor gay.
 - 75.11. Ms Furr behaviour had been inappropriate but did not constitute discrimination or harassment.
76. We heard that after these events, Ms King was investigated for failing to manage the situation appropriately.

Conclusions

Discrimination

77. We approach our conclusions by dealing with the discrimination claims first of all.

78. Issue 8 poses the question whether the failure to allow Mr Davidson's appeal against dismissal contrasted with allowing the appeal of Ms Cheney, is something from which one can raise an inference of unfavourable treatment? We interpret this as an allegation that the failure to uphold Mr Davidson's appeal against dismissal was direct discrimination either on the grounds of sex, age or sexual orientation.
79. In respect of the direct sex discrimination claim, Mr Cheney is an actual comparator. In respect of the direct age and sexual orientation claims, there is no actual comparator and so the Tribunal must look to a hypothetical comparator who would be an older person or alternatively, a person who was not gay and who faced the same allegations of bullying as did Mr Davidson.
80. We note that Ms Cheney's grounds of appeal are almost identical to Mr Davidson's.
81. Are there facts from which we could conclude that the reason Mr Davidson's appeal against dismissal was not upheld was because of his gender, sexual orientation or his age? There are clear reasons why Mr Standerwick regarded Mr Davidson as more culpable than Ms Cheney:
- 81.1. He was the driver of the car in the drive-by incident; he was responsible for the route taken.
- 81.2. He was the one who queried Ms Kirby's absence.
- 81.3. He was the instigator of the penning-in incident.
- 81.4. He made the comment about the box.
- 81.5. He was the one who said he was not comfortable working with Ms Whittaker.
82. Mr Standerwick, (who we consider a reliable honest witness) found Mr Davidson to have been confrontational and passively aggressive, (see his note at page 290). This is borne out by a reading of the minutes of the appeal hearing, which contrasts with Ms Cheney's demeanour in her appeal hearing. She was for example, prepared to accept that things may have been taken the wrong way, prepared to accept that the relationship between Ms Murray and Ms Whittaker was nothing other than a working relationship and she was prepared to say that she did not mean to be disrespectful and that her job meant a lot to her.
83. This is a case therefore where in respect of the sex discrimination claim, one can look to the explanation given by the Respondent for the difference in treatment and conclude that the reasons for the difference were non-discriminatory.
84. With regard to the age and sexual orientation discrimination claims, there are no facts from which, (absent an explanation from the Respondent) we could properly conclude that an older person or a person who was not gay, (or any combination of female, straight and older) accused of exactly the same behaviour as Mr Davidson, in the same circumstances, with the same length of service, would have been treated any differently.

85. We are satisfied that age, gender and/or sexual orientation played no part, consciously or unconsciously, in Mr Standerwicks' decision not to uphold Mr Davidson's appeal against dismissal.
86. Mr Davidson's complaint of discrimination in respect of the Respondent's failure to uphold his appeal against dismissal therefore fails.
87. Issue 9 asks whether the failure to uphold Mr Davidson's grievance was an act of discrimination. The list of issues records that his main grievance was related to the TC mug and the inappropriate language to which he was subjected. It should be noted that the allegation of discrimination relates to the decision of Mr Dicks, not the subject matter of the grievance. However, the merits of the grievance are relevant to considering whether the decision of Mr Dicks was discriminatory.
88. There is no actual comparator. We must therefore construct a hypothetical comparator. That would be an older person, a straight person or a woman, (or all three or any combination of the three) who made precisely the same complaint as did Mr Davidson.
89. Are there any facts from which we could conclude that such a person would have been treated differently, more favourably?
90. We should record that it was not suggested to us that there was anything significant in the word appearing on the mug, (other than it is obviously a vile expression). Expressly, we were told that it is not suggested that there were any homophobic connotations. The Information which the Respondent had before it was that: (1) some said that the word on the mug was a word Mr Davidson used, (others said not) (2) some said he used the mug, (others said he did not) (3) he had expressed his thanks to Ms Furr for the gift, and (4) he had not complained at the time, (Mr Davidson said he complained to Ms King). It is not immediately obvious to us why the mug gift might be less favourable treatment because of Mr Davidson's gender, sexual orientation or age; the same inappropriate gift might have been given to a women, a non-gay man, an older man or any combination of the three, if that other person had the same relationship and interaction with Ms Furr as had Mr Davidson. Mr Dicks was entitled to conclude that the gift was inappropriate, but that it was not an act of discrimination. Nor can he be criticised for not considering harassment, given Mr Davidson's apparent reaction at the time, which would have indicated that the gift did not creat the proscribed atmosphere. Further, the gift of the mug is not related to Mr Davidson's gender, age or sexual orientation.
91. The second allegation in the grievance related to Ms Furr's outburst when Mr Davidson queried whether Ms Kirby had been genuinely unwell. Although Ms Furr used abusive language, there is nothing at all to suggest that her reaction had anything to do with either of the 3 protected characteristics relied upon. Mr Davidson was entitled to conclude that her outburst was not an act of discrimination or harassment.
92. Mr Davidson mentioned 2 further matters in the grievance hearing which he had not raised in his written grievance. Mr Dicks very sensibly considered them as further allegations of discrimination. These are the allegations that Ms Furr had referred to a soap opera character as a, "fucking tranny", (Mr Davidson had made it clear that

he does not identify himself as transsexual or as a transvestite) and the allegation of Ms Furr swearing in front of a customer that she had not done an Aspirin prescription. Mr Dicks found that Ms Furr had not made the offensive and inappropriate remark about the soap opera character; that was a conclusion he was entitled to reach. He found that Ms Furr had sworn in front of a customer, but found that the swearing was not directed at Mr Davidson and that it was not an act of discrimination or harassment; a finding he was entitled to make.

93. In our view, there are therefore no facts from which we could properly conclude, absent an explanation from the Respondent, that Mr Dicks' failure to uphold Mr Davidson's grievance was an act of discrimination on the grounds of any of or any combination of the protected characteristics relied upon, nor an act of harassment. We are satisfied that age, gender and/or sexual orientation played no part, consciously or unconsciously, in Mr Dicks' decisions in relation to the grievance.
94. Issue 10 is whether not upholding Mr Davidson's grievance in contrast to acting on Ms Whittaker's grievance, (by dismissing Mr Davidson) was an act of discrimination, given that Ms Whittaker's allegations were also historic. We take this as an allegation of direct discrimination on the grounds of the 3 protected characteristics relied upon or as an allegation of harassment. If the implication is that Mr Davidson's allegations were not upheld because they were historic, that is not correct; there is no mention in the grievance outcome letter of the grievance not being upheld because the allegations are historic. In any event, the comparison is not apt, in that Ms Whittaker's allegations were not historic, her complaint was of on-going bullying.
95. The Respondent investigated the allegations of both people. They upheld most of the allegations of Mr Davidson; clearly Ms Furr's actions and words were inappropriate, have no place in the workplace and Mr Dicks so found. What he did not do, was find that her actions were acts of discrimination. He was entitled to so find and genuinely did so.
96. We have already found, as set out above, that Mr Dicks' decision on Mr Davidson's grievance was not an act of discrimination.
97. A different person dealt with Ms Whittaker's grievance, which was investigated and subsequently treated as a disciplinary matter, leading to Mr Davidson's dismissal. This leads, somewhat obliquely, to the question, was the decision to uphold Ms Whittaker's allegations of bullying and so dismiss Mr Davidson, an act of discrimination or harassment?
98. The decision maker was Ms Whyatt. We found her a reliable witness, we had no reason to doubt her honesty. She found Mr Davidson's evidence about his denial of ignoring Ms Whittaker and his denial of asking not to have to work with her, inconsistent. He admitted the essential facts related to the pinning-in incident and the fleas incident. She found his evidence in relation to the whether he had spoken to Ms Whittaker harshly in relation to the box and in relation to the drive-by incident, both inconsistent and contradictory. In respect of the drive-by incident, as a person with local knowledge, she found his explanation of routes chosen not credible. These are all views she was entitled to take. She also noted a lack of contrition, remorse or apology, which is born out by the documents. She was entitled to

conclude that the specific incidents corroborated Ms Whittaker's complaint that she had been subjected to bullying behaviour over the course of a year.

99. There are no facts from which it can be suggested that the act of dismissal was related to age, gender or sexual orientation such that we could properly conclude, absent an explanation, that it was act of harassment.
100. There are no facts from which we could properly conclude that had an older person, a women, or a straight person, (or a combination of all 3) had been in the same circumstances, Ms Whyatt's decision would have been any different. In any event, we accept Ms Whyatt's explanation of the reason for dismissal and accept that age, gender and sexual orientation played no part, consciously or unconsciously, in her decision to dismiss.
101. Issue 11 asks whether the decision not to uphold the grievance was part of a course of continuing conduct for the purpose of calculating time. That is only relevant if we were to find that not upholding the grievance was an act of discrimination and we did not so find.
102. Issue 12 asks whether it was appropriate, fair and reasonable that Ms Murray conduct both the disciplinary investigation and hear the grievance appeal. The suggestion is that the decision to appoint Ms Murray to both is an act of discrimination. There is no evidence that it was. There is nothing to suggest that the decision to appoint Ms Murray to both was because of Mr Davidson's age, gender or sexual orientation. Nor is there anything to suggest that the decision was related to those protected characteristics in any way, such as to give rise to a claim of harassment. There are no facts from which we could properly conclude that this was direct discrimination or harassment, the burden of proof does not shift.
103. We will deal with the fairness of appointing Ms Murray as disciplinary investigator and grievance appeal officer further in considering the unfair dismissal claim below.
104. For these reasons, the complaints of discrimination fail and are dismissed.

Unfair Dismissal

105. The reason for dismissal was undoubtedly conduct. It was never suggested otherwise.
106. It is important to understand that the tribunal's role in an unfair dismissal case where the reason for dismissal is misconduct, is not to determine whether the claimant was guilty of the conduct alleged. It is not our role to consider and decide whether Mr Davidson bullied Ms Whittaker. Our role is to review the evidence before the Respondent and decide whether the decision to dismiss lay with the range of action that a reasonable employer might have taken. We must not substitute our decision for the Respondent's.
107. Having heard evidence from Ms Whyatt and having reviewed the evidence which was before her, we have no doubt that she genuinely believed that Mr Davidson was guilty of bullying Ms Whittaker over a period of a year. Her assessment of his conduct as described in her written narrative as referred to in our findings was genuine. Although the dismissal letter in respect to allegation 2 refers to his conduct

toward Ms Furr and Ms Kirby, the focus of the reasoning in the letter and in Ms Whyatt's written narrative is on his behaviour toward Ms Kirby in relation to the drive-by incident and querying whether her illness was genuine.

108. Did Ms Whyatt have reasonable grounds for reaching those conclusions? The allegations of Ms Whittaker, both general and specific, were supported by the evidence of others, Ms Furr and Ms Kirby in particular. That Ms Whittaker had complained to Ms King a number of times corroborated her allegations. Mr Davidson's account contained contradictions and inconsistencies. She felt he had deliberately tried to humiliate Ms Whittaker by for example, pressing her for examples of her speaking down to him in the penning-in incident and moving his belongings in the flea incident. She noted that he did not acknowledge that his behaviour might have had an adverse effect on Ms Whittaker, nor offer any form of apology if it had done so.
109. With regard to the drive-by incident and challenging Ms Kirby about her absence, Ms Whyatt found that Mr Davidson had lied about his reasons for the drive-by. She found his explanation for the route he had taken on the return journey unconvincing and she found his subsequent actions, apparently challenging whether Ms Kirby's illness and absence was genuine, corroborated her view that the drive-by was Mr Davidson deliberately checking up on a work colleague, something he had no business doing. She was entitled to find that Mr Davidson's conduct in this regard was unacceptable.
110. Did the Respondent carry out a reasonable investigation? The test is whether the investigation was reasonable, whether it was an investigation that a reasonable employer might have carried out in the circumstances. It does not have to be perfect.
111. It was suggested that Ms Murray ought not to have conducted the investigation because of her relationship with Ms Whittaker. There was no evidence that Ms Murray had anything other than a working relationship with Ms Whittaker. Ms Cheney accepted as such in the hearing of her appeal against dismissal. We find that Ms Murray was a suitable person to conduct the investigation and that she did so in good faith, without bias.
112. In our view, the investigation was reasonably thorough. Ms Murray failed to interview one pharmacist, Mr Gilby. Mr Standerwick acknowledged this on appeal. Mr Gilby was rarely on the premises with Mr Davidson and Ms Whittaker; we were referred to a letter from Mr Gilby in the bundle dated 25 March 2019 at page 394 which states that Mr Gilby worked for 30 days over the course of 2 ½ years and the occasional Saturday. Furthermore, Ms Kirby had said that Mr Davidson's behaviour was different when Mr Gilbey was at the premises. One can see therefore, why Ms Murray would not have felt it necessary to interview him. There was nothing in particular to suggest that he might have anything specific to contribute to the investigation. We see from his letter that he says that he thought Mr Davidson had a good relationship with all his colleagues. However, that does not mean that there was not a problem he had not observed and it is perfectly possible that Mr Davidson's behaviour was different when Ms Furr was the pharmacist as compared to when it was Mr Gilby. We do not think that the failure to interview Mr Gilby amounted to a procedural fault that rendered the dismissal

unfair. Had we found otherwise, we would have found that interviewing Mr Gibly would have made no difference to the outcome.

113. Was the decision to dismiss within the range of reasonable responses? The evidence which Ms Whyatt had before her and the genuine views she had reached on reasonable grounds, was that:
- 113.1. Ms Whittaker had been reduced to tears a number of times.
 - 113.2. Ms Whittaker had complained to Ms King a number of times; Mr Davidson had been spoken to, the behaviour had ceased for a short time, but then resumed.
 - 113.3. This had been going on for more than a year.
 - 113.4. Ms Whittaker's complaint was not limited to the specific examples given, but she had given examples which on the evidence, Ms Whyatt was entitled to conclude were well founded and corroborated the general allegation of bullying.
 - 113.5. Ms Whyatt formed the view that Mr Davidson was a skilled bully, that he had manipulated Ms Whittaker, intimidated her and played mind games with her.
 - 113.6. Mr Davidson's behaviour toward Ms Kirby when she was ill corroborated that Mr Davidson's behaviour toward his work colleagues was capable of being inappropriately challenging.
 - 113.7. Ms Whyatt found that Mr Davidson had lied with regard to the drive by incident.
 - 113.8. Mr Davidson's demeanour in the disciplinary hearing, (and subsequently in the appeal hearing) lent support to the nature of the alleged behaviour on his part.
114. Ms Macheta argues that allowing Mr Davidson to continue working with Ms Whittaker during the investigation was inconsistent with a finding of gross misconduct. In some cases, that might be so, but not in this case. Suspension should never be an automatic reaction. Moving Mr Davidson to another branch was not a practical solution, given the geographical spread of the branches. The Respondent being aware of the allegations, was able to monitor the situation and provided increased supervision, making it unlikely that the alleged behaviour would continue. If the behaviour had continued, the respondent was entitled to be confident that it would be noticed and acted upon.
115. It is suggested that delay in reporting the complaints on the part of Ms Whittaker rendered the decision to dismiss outside the range of reasonable responses. We do not accept that. It is often the case, as here, that a person does not report problems with colleagues at work, trying to just get on, until they reach breaking point. It was an allegation of bullying over a period of time; it had been going on recently, it was not just a complaint about something that happened a year ago. Furthermore, Ms Whittaker had complained about Mr Davidson's behaviour to her line manager, Ms King, during the course of the year.

116. Mr Davidson contends that Ms Whyatt failed to take into account mitigating factors such as his attendance and disciplinary record. We accept Ms Whyatt's evidence that she did take these factors into account, corroborated by the content of the dismissal letter.
117. We considered the point made under the heading of discrimination, that Ms Murray had heard Mr Davidson's grievance appeal. Even if there were something in that, it does not assist Mr Davidson in relation to his unfair dismissal claim, because the grievance was considered after the dismissal and if Ms Murray's judgment on the grievance appeal was tainted by what she had learnt during the disciplinary investigation, that would affect the fairness of the grievance appeal outcome, not the dismissal, which had already taken place.
118. The nature of the Respondent's business is that it must maintain a professional environment that presents a calm reassuring ambience to its customers. The situation created by Mr Davidson, on the Respondent's findings, was not conducive to that.
119. The Respondent also has a legal obligation to maintain a safe working environment for its employees. The behaviour it found Mr Davidson guilty of was not conducive to that, creating a risk of mental illness on the part of Ms Whittaker, or anyone else subjected to such treatment. It had to act, or risk facing a personal injury claim, a discrimination claim or a claim of constructive unfair dismissal. Ms Whyatt considered moving Mr Davidson to other premises. Quite apart from the geographical difficulties, which might have been overcome as Mr Davidson had a car, the issue for Ms Whyatt was, we accept, she had no confidence in Mr Davidson recognising the failings in his behaviour and not repeating it elsewhere.
120. Bearing all of the foregoing in mind, the decision by Ms Whyatt to dismiss Mr Davidson was within the range of reasonable responses of the reasonable employer.
121. Although not appearing in the list of issues, Ms Macheta has understandably argued that it was unfair that Mr Standerwick should hear the appeal against the dismissal decision made by the owner and most senior person in the business. That is contrary to the ACAS code. It was a mistake. Although it is a small employer with limited managerial resources, although it faced the additional pressure of having to find and pay for a locum if one of its pharmacists was engaged on other tasks such as investigating or hearing disciplinary matters, had the decision to dismiss been faulty in anyway, the Respondent might have lost an opportunity to correct such an error on appeal. However, the decision to dismiss was fair in the first place; there was no error to correct. As it happens, in any event, we were satisfied that Mr Standerwick was highly professional and experienced in such matters. He was, we accept, entirely free to change the decision to dismiss if he felt it necessary to do so, evidenced by the fact that he changed the decision to dismiss Ms Cheney, who was reinstated.
122. There are some further points not in the list of issues Ms Macheta made in oral closing submissions, which we will deal with briefly, for the sake of completeness:
 - 122.1. Some of the meetings were not recorded, or no notes were taken. A Respondent that does not take notes of meetings runs the risk that it lacks

contemporaneous evidence of what may or may not have been said. It is not of itself a failing that renders a process unfair.

- 122.2. There was no in depth probing of the witnesses. We felt this was a harsh criticism. The investigation was adequate.
- 122.3. Two new incidents were investigated that had not been raised by Ms Whittaker. We accept that as the incidents came to light in the investigation and pertained to the behaviour of Mr Davidson toward work colleagues, the Respondent was entitled to incorporate them into its investigation and subsequent disciplinary charges.
- 122.4. The investigation and disciplinary reports might have been prepared later, after the event, as they had not been copied to the Claimant. Yes, they might have been. We accepted the evidence of Ms Murray and Ms Whyatt that they were not and that the documents record a contemporaneous marshalling of their thoughts.
- 122.5. We do not accept the suggestion that Ms Whyatt prejudged the disciplinary outcome.
- 122.6. That Ms King may have subsequently been disciplined for failing to manage the situation does not excuse Mr Davidson his behaviour, as the Respondent saw it.

123. For these reasons, Mr Davidson’s claim of unfair dismissal also fails.

Employment Judge M Warren 10.12.19

JUDGMENT SENT TO THE PARTIES ON

.....19.12.19.....

.....

FOR THE TRIBUNAL OFFICE

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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