EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4120663/2018

Heard in Edinburgh on 10, 11, 12, 13 June 2019 and Members Meeting of 24 July 2019

Employment Judge: J Young
Tribunal Member: Ms J Chalmers
Tribunal Member: Mr S Cardownie

Mr J Watson	**Claimant:** **Represented by** **Mrs M Watson, mother**
Whitbread Group plc	**Respondent:** **Represented by** **Mr I Hartely, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that:-

(1) The claimant was not discriminated against on the grounds of disability by the respondent under sections 13,15,19,20,26 or 27 of the Equality Act 2010;
(2) That the Tribunal has no jurisdiction to determine the claim of breach of contract in respect of notice pay.

REASONS

Introduction

1. In this case the claimant presented a claim to the Employment Tribunal complaining that he had been unfairly dismissed by the respondent and separately that he had been discriminated against on the grounds of disability. By judgment dated 1 March 2019 the Tribunal found it had no jurisdiction to consider the claim of unfair dismissal and that claim was dismissed but did have jurisdiction to consider the claim of disability discrimination. That judgment identified the need for the claimant (a) to plead more fully why he claimed to be a disabled person and (b) to set out more fully which claims he was bringing under the Equality Act 2010.

2. At a closed preliminary hearing for the purpose of case management held on 15 April 2019 there was produced for the claimant "Disability pleadings" and "Summary of complaints". The "Disability pleadings" were allowed as a Disability Impact Statement; and the "Summary of complaints" as Further and Better Particulars of the claim.

3. At that time the respondent was not in a position to advise whether it was conceded that the claimant was a disabled person. However on the first morning of the final hearing the Tribunal was advised that in light of the information produced it was conceded that the claimant was a disabled person as that is defined in the Equality Act 2010 on account of his dyslexia. It was not conceded however that the respondents had knowledge of that disability at the material time. It was also advised that the judgment of 1 March 2019 had been predicated on a case of discrimination arising as a consequence of termination of employment on 9 May 2018. In the Further and Better Particulars it appeared reliance was made on matters occurring 6/9 months prior to dismissal being the conduct of the claimant's Manager Mrs Whyte. In those circumstances the issue of time bar in respect of those acts was a relevant consideration.

4. It was pointed out for the claimant that the Disability Impact Statement and Further and Better Particulars had been allowed with no response being made for the respondent (albeit time for a response allowed). It was maintained that the acts relied on formed part of a continuing act to date of termination of employment. Accordingly there was no need to consider any separate issue of time bar which

would prevent the Tribunal having jurisdiction to determine the complaints of discrimination made.

5. The note of preliminary hearing of 15 April 2019 also accepted that the claimant had made out a claim for breach of contract in respect of non payment of notice pay.

Issues for the Tribunal

6. In light of the foregoing the issues for the Tribunal were:-

(a) Was the claimant discriminated against on the grounds of disability in respect of the claims made under the following provisions of the Equality Act 2010 namely:-

(i) Section 13 (direct discrimination) – in respect of the 6 claims within the Summary of complaints and the separate claim that the claimant was dismissed because of disability

(ii) Section 15 (discrimination arising from disability) - in respect of the 16 complaints made in the Summary of complaints

(iii) Section 19 (indirect discrimination) – in respect of the 7 complaints made in the Summary of complaints.

(iv) Sections 20/21 (failure to make reasonable adjustments) – in respect of the 7 complaints made in the Summary of complaints.

(v) Section 26 (harassment) – in respect of the 10 complaints made within the Summary of complaints.

(vi) Section 27 (victimisation) – in respect of the 3 complaints made within the Summary of complaints.

(b) Whether the respondent did not know (and could not reasonably have been expected to know) that the claimant had a disability.

(c) Whether time bar operated in respect of any of the complaints of discrimination relied upon by the claimant so that the Tribunal had no jurisdiction in respect of any of these complaints; or whether the incidents of alleged discrimination relied upon by the claimant were all part of a continuing act culminating in termination of employment with effect from 9 May 2018.

(d) If the claimant has been discriminated against on the grounds of disability what compensation should be awarded.

(e) Whether the respondents were in breach of contract (in respect of notice pay) and if so what sum should be awarded to the claimant in that respect.

Documentation

7. The parties had helpfully liaised in providing a Joint Inventory of Productions paginated 1-450 (J1-450). Certain productions were produced in the course of the hearing and inserted (J198A(i)-(iii)).

The hearing

8. At the hearing evidence was given by the claimant; Simon Young, a former work colleague of the claimant; Tracey Whyte, Manager of Costa Coffee at Next Retail outlet from September 2017 having previously been Assistant Manager of a Costa Coffee outlet in Edinburgh for approximately 6 months. She had previous experience of 9 years as a Manager of a franchise Costa outlet at a motorway service station where she was employed for 23 years; Liam Reid, Area Manager for Costa Coffee since around January 2016 and previously Manager of a Costa outlet for 6 years; Scott Kennaway, Borders West Area Manager for Costa Coffee

having been in that position since approximately April 2019 and formerly Manager for approximately 6 years; Laura Crow, Area Manager for Costa Coffee since around April 2018 and prior to that being employed by Premier Inn in the role of Area Manager for 7 years.

9. Each of those witnesses produced witness statements as arranged at the preliminary hearing of 15 April 2019. The Tribunal took time to read the statements which were taken as read for the hearing.

10. From the productions lodged, relevant evidence led and admissions made the Tribunal were able to make findings in fact in relation to the issues. In that exercise certain rehearsal of the evidence is made.

Findings in Fact

11. The claimant had continuous employment with the respondent at the "Next Kirkcaldy" outlet of Costa Coffee (Costa Next) as a Barista in the period from 1 May 2015 until that employment was terminated with effect from 9 May 2018. His terms and conditions of employment stated that his hours were "16 per week" and that the normal working days were "2 per week" (J86/86A).

12. He is dyslexic. The school report from Millburn Academy identified him as being "severely dyslexic" with significant difficulties in reading, writing, spelling and maths. It was noted that his rate of reading was slow and he had spelling difficulties although the meaning of simple words was usually clear. His handwriting was legible but very slow (J282/283). The report from Fife College indicated that he had "indicators of a dyslexic nature for which he received additional support in high school". It was noted that he was "slow to read and to complete tasks and considered his handwriting untidy and not easy to read" (J268/272). An "adult checklist" from British Dyslexic Association (J273/274) indicated that the signs were consistent with the claimant displaying "moderate or severe dyslexia".

Interview

13. He was interviewed for the position of Barista at Costa Next by Liam Reid. There was dispute over what took place at the interview as regards any information given by the claimant about his dyslexia. The claimant's position was that he disclosed information about his dyslexia. The Application for Interview Form (J82/83) contained no information on dyslexia. In answer to the question "Do you require any specific adjustments to enable you to attend an interview and/or job experience session at any stage of the recruitment process?" The answer was "no".

14. The form completed at interview by Liam Reid in assessing the claimant as "average/good" (J77/81) contained no note or information that the claimant was dyslexic. His CV (J75/76) contained a personal statement; record of qualifications and previous experience and no information on his dyslexia.

15. The respondent's "Team Member Health Questionnaire" was recovered by the claimant as part of a data subject access request made of the respondent along with other documents requested (correspondence at J440/450). The form (J87/92) contained no information of dyslexia affecting the claimant. The relevant forms were partially completed with certain pages blank (J87A). In the correspondence on the data access request over March/May 2019 the blank pages were noted but the response from the respondent was that this was the "only documentation relating to health in your file albeit blank" (J450).

16. There was marked difference between the evidence of Liam Reid who interviewed the claimant from the evidence of the claimant. Mr Reid advised that he had not been aware of any issues with the claimant and dyslexia. A trial session was undertaken before employment commenced which the claimant completed successfully. Mr Reid stated he made no special support arrangements for the claimant due to any learning difficulties and he did not ask any other member of staff to provide special support for the claimant.

17. On the other hand the claimant stated that he advised Mr Reid as well as two other employees he met that day namely Dillan Green and Keith (surname unknown) that he had dyslexia and there was a discussion as to what help could be given to him at work. He also stated that Mr Reid had helped him fill out the appropriate forms.

18. In cross examination the claimant did not appear as definitive on the issue of whether he told Liam Reid or Dillan Green or "Keith" of his dyslexia. He indicated in answer to questions that at interview he "think did mention but not sure" and then indicated he was more certain. He indicated that he had told Dillan Green and Keith at the trial shift of his dyslexia but there was no evidence from those individuals.

19. Simon Young's position was that Mr Reid had told him that "Joshua had learning difficulties arising from dyslexia" and that he was asked to provide additional support which Mr Reid denied.

20. In a question to Mr Reid from Mrs Watson in cross examination he denied any recollection of her explaining that her son was dyslexic prior to interview. Mrs Watson gave no evidence that she had made that position clear. He also denied spelling any words for the claimant under reference to the "candidate review form" (J85). He indicated that the claimant's spelling was never an issue within the job he had to undertake and that he "performed to quite a high level". He indicated that many applicants for the Barista job had poor spelling or writing ability and he had no particular reason to question the review form completed by the claimant. His position was that he "did not know he was dyslexic".

Barista Skills Training Programme

21. Part of the training for a Barista was to complete Costa training manuals. It was explained by Mr Reid that those manuals might be completed within a 3 month period at which time the employee would be asked to demonstrate how to make the various drinks on offer and perform the till function at which time he was "fully

trained". It would take about 28 days to perform the first part of the exercise on matters such as hygiene and health and safety. However the time for completion of the manuals was variable depending on the staffing at the store and how busy staff members became. That might prevent completion of the books within the 3 month period. He denied there was any assistance given to the claimant by him in the completion of those manuals because of any issue of dyslexia. If there was assistance given by others then Mr Reid was unaware of that assistance being given.

22. Mr Kennaway was also asked about the completion of these training manuals and he also indicated that the first part would be completed in about 28 days and as a "rough guide" completion might take 3 months but it was not unusual to find that completion took longer than that. He was not surprised to find that the claimant's Completion Certificate was dated 1 November 2015 (J94c) as it was very common to find that the training manuals were completed over a lengthy period. It was not an indication that the claimant required extra time. He did not consider it was an indication that there was an underlying problem.

23. The position of Mr Young was that he assisted the claimant in reading these manuals and scribing for the claimant.

24. It was not possible for the training manuals themselves to be scrutinised as they had been disposed of after the termination of the claimant's employment. This was done on the initiative of the Assistant Manager and a "Barista Maestro" as they were having a "clear out" of the back shop area and did not consider the books were further required.

Performance Review Meetings between claimant and Mr Reid

25. The first performance review with the claimant took place on 7 July 2015 and notes were taken of that meeting (J93/94). At that time the claimant is noted in answer to the questions "How's it going? How do you feel about your role? Is it clear?" that he feels "it's going fine", has no concerns, is "enjoying it" and "integrating more with

the team". In answer to the question if he had any needs to be "better than you are?" he stated "don't need anything".

26. It is clear that Mr Reid at that point has certain concerns with the claimant's performance such as not cleaning tables quickly enough, spending too long in the kitchen and was taking staff beverages at inappropriate times. However he notes that the claimant was keen and so that progress could be monitored weekly "1-2-1's" would be arranged. Reference is made to more support on the training books but no reference is made of dyslexia or that the claimant has any underlying issue which affected his performance.

27. Notes of a further meeting of 26 September 2015 (J94) indicates that the claimant would like to progress more and that he is "being told more than one thing by several people – feels people are having a go". He is noted as being late for work; not carrying a name badge after being spoken to; not listening to staff; and there is little improvement in the floor role. It was stated that he should "come in with a more positive attitude" and his communication could be more positive and that he would be placed on "performance review from now on until there is a significant improvement". Again there is no mention of dyslexia or any note which would indicate that there was any underlying issue affecting the performance of the claimant.

28. Thereafter the claimant completed his training manuals and obtained a Certificate that he has completed the Barista Skills Training Programme (J94c). A further meeting is noted with Mr Reid on 13 November 2015 (J95/96). In that discussion the claimant is pleased at his progress and his goal is to "get better and faster on machine". He is noted as having a more "positive attitude". At this point he wishes to learn the Christmas drinks. It is stated that he needs to "check the rota more – 1 hour late Thursday" and "been previously spoken to about lateness – needs to improve". Again there is no mention of dyslexia or underlying issue affecting his work.

29. Mr Reid explained that at no time in those discussions or at another time did the claimant approach him due to any issues with dyslexia. His main goal seemed to be to make coffee quicker than anyone else, that he had had enthusiasm for this and so he was used more frequently in that capacity. Nothing in the way that the claimant worked alerted him to the fact that he may have dyslexia. The claimant appeared to have no difficulty in carrying out duties which involved operating the tills.

30. Mr Reid also advised that during the early part of the claimant's employment there were problems relating to his timekeeping and the claimant would be "frequently late for work" but this was dealt with informally and in his time as manager the claimant's timekeeping improved.

31. From January 2016 a new system allowing employees to clock in using a laptop in the office was utilised. From that time there was no reason why an employee should have problems logging in at the correct time.

Performance Reports between claimant and Nadine Green

32. Nadine Green was Manager of the claimant from early 2016. She had a meeting with the claimant on 4 March 2016 on personal development and at that time the claimant was noted as "really enjoying" the job and found the team "really good". It was felt that he could spend less time "standing in the kitchen" but "look for things to do". There were no issues of dyslexia noted. There were no issues of lateness at that time.(J96/97)

Incidents of lateness recorded with Nadine Green

33. However on 9 March 2017 Nadine Green had a discussion with the claimant about his lateness at work. A note of that meeting (J98/99) advises that the claimant had been "late for shifts on a number of occasions" which he stated was "due to college". It was noted he was "late yesterday" because he had to return home from college to get his "work stuff". He was advised to tell his Manager if he knew

he was going to be late because of any college commitments rather than simply come in late.

34. A further discussion (undated) is noted with the claimant wherein he is stated to be "late for work/slept in" and was asked whether that was acceptable to which he indicates "definitely not acceptable" and that would not happen again. (J100) To ensure it would not happen again he was going to "set alarm, make sure phone is on loud". He was advised if this continues he would receive "letter of concern/investigation/dismissal". There is no indication in this note or in the previous note of 9 March 2017 of the claimant indicating that problems with timekeeping were due to dyslexia or any other underlying issue.

35. An investigation took place between the claimant and Nadine Green in respect of the claimant's lateness for work on 13 April 2017. On that occasion notes were taken and signed for by the claimant (J101/103). Reference is made to the conversation of 9 March 2017 and since then he had been 2 hours late on Friday 24 March 2017. He indicated that he had tried to find cover but there was some miscommunication. He advised he had slept in on Saturday and "messed up but no excuse". He was advised that he would be receiving a letter of concern due to being late. He recognised that he had been responsible for the lateness on that weekend and that he would not be late for shifts again. No reference was made to the claimant having dyslexia or there being any underlying issue which would cause him to be late for work.

36. Around September 2017 Tracey Whyte became Manager of Costa Next in place of Nadine Green.

Incidents of lateness/failure to attend with Tracey Whyte

37. On 10 November 2017 an investigation took place with the claimant in relation to failure to attend a shift on 9 November 2017. Notes of this investigation took place with the claimant signing for the notes (J106/110a). This matter concerned an allegation that the claimant had swapped a shift with the Assistant Manager

"Jason" but had then failed to attend the shift without informing Tracey Whyte that he was unable to attend. The discussion indicates that the claimant did not accept that he had agreed to a swap without condition. He maintained that he had conditions namely that he would get the following day off because his cat had recently been put down and he had issues to attend to with his car. The investigation finished with the claimant being advised that Tracey Whyte would require to investigate further with the Assistant Manager "Jason". The claimant was then issued with a "letter of concern" on 22 November 2017 which indicated that Tracey Whyte considered he had accepted a shift swap but then failed to turn up and that if a matter of a similar nature occurred then disciplinary action would be taken (J112). The investigation notes taken at the time show no reference to the claimant maintaining that any confusion over this swift shift swap related to his dyslexia or that there was any underlying reason to be confused as to the timing of a shift or failure to advise that he would not be attending.

38. Further notes indicate that the claimant was late for his shift on 26 December 2017 by 15 minutes and then again on 27 December 2017 by 10 minutes. The note of these matters (J114) indicates that the reason for lateness was because "the car park was busy".

39. A further note of 28 December 2017 advised that the claimant was scheduled to start a shift at 3 pm that day but that his actual start time was 5.39 pm. On that occasion he called to say that he "couldn't make his 3 o'clock shift as his parents were away, and he had to watch his gran and she took ill and didn't want to leave her". His parents were not to return to the house until later that day (J114/115). A further note indicated that on 2 January 2018 the claimant was late for his shift by 4 minutes and Tracey Whyte records "I said to Josh you're late he said ah ken sorry".

40. Issues of lateness including the foregoing led to an investigation meeting with the claimant on 2 January 2018 at 2.55 pm. At that time Tracey Whyte raised issues of lateness from 26 November 2017 through to 2 January 2018. The issues concerned lateness on 26 November 2017; 28 November 2017; 3 December 2017;

27 December 2017; 28 December 2017; 2 January 2018. The reasons given included alarm did not go off; police stopped him for speeding; requiring to be with gran; couldn't get space to park. No mention was made of any reason for lateness being due to dyslexia. Tracey Whyte is recorded as asking the claimant "Is there anything we can do to help you get to work on time?" to which the claimant responds "no". He was advised that if the matter was to go to discipline then he would receive a further letter. The claimant asked at that time that he needed "more hours" to which he was told that he needed to be "reliable and you're not". The investigation ends with the claimant indicating "I don't think it's fair you telling me I'm always late – it's not my fault" (J117/121).

41. Tracey Whyte was on leave in January. In her absence the claimant was noted as being late on 12 January; 14 January; 16 January and 17 January 2018 by a few minutes on each occasion. The reasons noted were "car not working" and "escalator not working" or "no reason" (J128). Tracey Whyte prepared an investigation report on these incidents of lateness. She considered that despite speaking to the claimant about those matters there had been no improvement in his timekeeping (J129/130) and by letter of 31 January 2018 he was advised that he required to attend a disciplinary hearing in relation to "allegations of gross misconduct". The date of the hearing was to be 7 February 2018 and the hearing to be taken by Alan Leishman. The purpose of the hearing was to discuss allegations of lateness over the period 26 November 2017 to 2 January 2018.

Disciplinary hearing with Alan Leishman

42. The disciplinary hearing with Alan Leishman and the claimant took place on 7 February 2018. Notes were taken of that meeting (J136/148). An outcome report was prepared by Mr Leishman (J149/150). The claimant was taken through the incidents of lateness that had taken place. The meeting commenced with Mr Leishman asking "any issues with timekeeping" to which the claimant responded "no over last couple of months let slip and completely my fault". He made explanation in respect of the various incidents. The claimant in the course of this hearing raises other issues that he had concerning his relationship with Tracey

Whyte being essentially that he had fallen out with Tracey Whyte over "not doing what I was told" and the way that she had spoken to him on that occasion. Also he stated that he was working insufficient hours and that the previous Manager had asked him to go across to the other store but he was "happy here" and then Tracey Whyte had told her that his hours were cut to 12. He stated that he had gone to speak to Tracey Whyte about getting a full time position but "she employed 3 other people" and this was done shortly after Tracey Whyte commenced as Manager. He also indicated that he had fallen out with Tracey and that she was "going to discipline me for not taking the bins out". He also complained that he had to stand in the queue to purchase food and then found out that another person could simply pay on the "second machine". He felt that Tracey Whyte was not being fair with him. In the course of the hearing the claimant made no mention of dyslexia or any other underlying reason for being late or that any difficulties with Tracey White were on account of dyslexia.

43. The disciplinary outcome report prepared by Mr Leishman (J149/150) summarises the position on lateness and the reasons given. There is also reference to the complaint made by the claimant about hours and that the claimant feels he has been "treated different as previously asked for more hours and hasn't been given any which I did ask if he'd consider someone for more shifts that was being late on frequent occasions to which Josh replied probably not". That hearing resulted in the claimant receiving a final written warning in a letter of 18 February 2018 giving the reason as "Timekeeping" and that the improvement required was for him to attend work on time and be ready to start work at the "starting time". He was advised that any further incidents were likely to lead to further disciplinary action which could result in his dismissal (J151).

Further Lateness

44. Further to the final written warning incidents of lateness occurred with the claimant on 13 March 2018 (the claimant advised he had misunderstood the time his shift started); 3 April 2018 (flat battery on car and he "couldn't help it if his battery was flat"); 14 April 2018 (due to commence at 11 am and arrived 11.26 - "needed to

look after my nan"-had to "stay in the house until mum and dad were in") The notes of the discussion with the claimant on these matters were produced. No mention is made of dyslexia. (J152/156).

45. An investigation report was prepared by Tracey Whyte on these matters (J159) and the claimant was again required to attend a disciplinary hearing in relation to "allegations of gross misconduct". He was invited to this hearing by letter of 18 April 2018 which indicated that the purpose of the hearing was to discuss allegations of "repeated lateness for scheduled shifts" (J160).

46. The claimant then submitted a Statement for Fitness for Work which signed him off work with "stress" between 20/27 April 2018 (J161). A further Statement for Fitness for Work was submitted covering the period to 3 May 2018 indicating the claimant was unfit for work due to "stress related illness" (J166). The disciplinary hearing was rescheduled for 4 May 2018. A further Statement was submitted for the period to 9 May 2018 again citing "stress related illness" (J169). The disciplinary hearing took place in his absence on 4 May 2018 and by letter of that date the claimant was advised that his employment was terminated due to repeated lateness and the failure to improve punctuality since the previous disciplinary action(J170).

Appeal

47. The claimant appealed against that decision by email of 14 May 2018. He stated that he had been "harassed at work by my Manager and even during sick leave I was contacted and harassed on 3 occasions" which added to his stress. He stated that he was told by another Store Manager that he did not need to attend work or any other work related meeting as this would be rescheduled for his return. He also discussed the possibility of a move to another store. His intention was to request a transfer on return as he felt that the current Manager had actively stopped him from progressing. He also stated that members of the team had been asked to treat him differently regards "logging staff arrivals" and he had not been

allowed the benefit of the same Costa employee discounts as his colleagues. He indicated that dismissal while off with stress was unfair (JI172).

48. An appeal hearing was arranged with Laura Crow Area Manager for 29 May 2018. Notes were taken of that meeting. Simon Young accompanied the claimant. The notes were signed by the parties (J175/194). The appeal covered the issue of the lateness of the claimant; that he felt it was unfair that he was dismissed when off sick; that he had complaints about Tracey Whyte's treatment of him. However none of those matters were stated as being due to him being dyslexic.

49. There is mention of the claimant's dyslexia within these notes (J185). In the appeal the claimant points up the different wording used in the letters to him regarding disciplinary hearings as between "gross misconduct" and "misconduct". He refers to the disciplinary procedure which he has been "reading up on" and that lateness should not be characterised as "gross misconduct". This exchange is noted as:-

> "J – reading up on it. Been told 1 disc, gross misconduct, misconduct – different – gross – stealing etc not lateness.
>
> L – date on that? Allan disciplinary? Why not raise at time. Not dismissed final written.
>
> J – didn't notice 14 pages, dyslexic.
>
> L – showed family. Yes you weren't dismissed wrong wording put in it. Conduct.
>
> J – why ask to come in, Fired without me. Gross misconduct on notes, misconduct"

50. This exchange related to the claimant considering the disciplinary procedure against the letters he had received and it being maintained that he should not have

been dismissed for reasons other than gross misconduct which in terms of the procedure would not include lateness. No other discussion took place on the appellant's statement that he was dyslexic.

51. Ms Crow made a note of the appeal hearing (194a-d). As part of the appeal it was noted that the claimant had said that "his lateness under his SM (Store Manager) was caused by work stress, but LC pointed out that his lateness predated his SM's arrival".

52. By letter of 1 June 2018 the claimant was advised that his appeal was unsuccessful and the reason for dismissal was upheld (J196). Laura Crow prepared a separate appeal outcome report which gave her reasons for upholding the decision to dismiss being essentially that there had been incidents of lateness following a final written warning for the same reason. (J197/198)

Disciplinary hearing of 4 May 2018 leading to dismissal

53. Mr Kennaway as a Store Manager from a different area had no knowledge of the claimant prior to taking the decision to dismiss. He had never met with him. In cross examination he stated that the only evidence he had prior to making a decision to dismiss was the final written warning and the outcome report of Tracey Whyte of 18 April 2018 (JP150). He had not seen the notes of the investigation into the lateness of the claimant on 13 March 2018 and other investigation notes at J152/158. Accordingly he had no knowledge of the reasons given by the claimant for lateness. He noted that certain investigation notes (J153) had not been signed by the claimant and considered that he should have had all these notes as part of his consideration of the matter. He accepted that he had not "followed a great process" and had "learned a lot from this" and "freely admit that process not fair". He was not aware that the letter of initial invite to the disciplinary hearing (J160) advised that the matter related to allegations of "gross misconduct" and he would have wished to clarify that matter prior to the hearing. His decision was effectively based on the fact that there had been a final written warning; a report which indicated the claimant had been late thereafter; and there was no improvement.

As the claimant was not present there was "no contest". He had reflected on the decision made and indicated that he "could have done better". He noted (J97c) that the respondent's "Line Manager disciplinary process" advised that a "one off act of gross misconduct" would be met with "summary dismissal" (no notice pay) whereas dismissal with notice would ensue in respect of dismissal arising out of a number of warnings for the same offence.

Clocking in Procedure

54. The clocking in procedure for employees at Costa Next store was for employees to enter their employee number into a computer which would register when the employee "clocked in". The same process was involved in "clocking out". Tracey Whyte advised that when she commenced work as a Manager the process of clocking in and out was lax and she tightened that during her first week as a Manager. There was then an improvement. Those coming in late could not clock in as if they were on time. The laptop used for this purpose was not frequently used and so there was no queue for those waiting to clock in and in any event shifts started at staggered times. The claimant's timekeeping was not good and Tracey Whyte had discussions with the claimant about timekeeping from the time she took over as manager but not until November 2017 had she required to take matters up more formally with him in an effort to improve the position as it started to affect the needs of the business. It came to the point when she did not consider the excuses that were being given were good enough.

55. She also confirmed that Jason Waite and Angela Leamy were 2 Assistant Managers when she arrived but one had to leave as the store was not big enough for 2 Assistant Managers. Jason Waite decided to go to an outlet in Dunfermline.

56. There was an allegation made in cross examination of Tracey Whyte that she had deliberately logged the claimant in late. The tribunal could find no basis for that allegation to be made. It was not part of the witness statement of the claimant. The claimant had never alleged in the course of any informal meetings, investigation meetings, disciplinary hearing or appeal hearing that evidence of

lateness had been fabricated deliberately by Tracey Whyte or anyone else. He never denied being late.

Opportunity for the claimant to train as a Barista Maestro

57. Prior to Tracey Whyte taking on the position of Manager at Costa Next the claimant was aware that the previous Manager Nadine Green was taking on staff at a nearby outlet in Kirkcaldy. He stated that he was offered a position by Nadine Green but after discussion with her he considered he may have more prospect of training to be a Barista Maestro if he stayed at Costa Next.

58. In the discussion with Alan Leishman in February 2018 relative to the final written warning (J136/148) he did advise (J146) that he knew he had "messed up, I've been here for 3 years now I wanted to do BM. I've jeopardised that as timekeeping is important, I've let that slip".

59. The claimant acknowledged in evidence that a Barista Maestro would have some responsibility for opening the premises and that timekeeping was of importance in that respect.

Moves to other outlets

60. The claimant also advised that he had considered taking other shifts at a Glenrothes outlet but he thought that Tracey Whyte had "warned them off". The Tribunal considered this was based on suspicion only and was speculation on the part of the claimant who "heard information might have been passed on. Work colleague told me that might have been the case. No doubt contact". No finding could be made on that evidence.

61. Separately the claimant stated he had been prevented by Mrs Whyte from obtaining a job at Costa@Odeon in Dunfermline. Again the Tribunal considered the suggestion was speculative in nature. The reason given that the claimant did not get a response after handing in his CV was because "the person spoken to

was a friend of Pam Hynd being the notetaker from my disciplinary in February". No finding could be based on that evidence which in any event did not appear to involve Mrs Whyte.

Claimant's Hours of Work

62. The complaint made by the claimant in this respect was that he had his hours cut to 12 hours per week. His initiating contract stated that he would be working 16 hours per week (J86/86a) over 2 days per week. His position was that contracted hours were cut to 12. However it seems he rarely worked that number of hours as he was keen to work more hours and "most weeks got 24 hours" and when Mrs Green was in charge "34 hours for a couple of months". He then commenced attending college on his welding course Monday - Thursday in each week and it was arranged with Nadine Green that he could work shifts after college.

63. Mrs Whyte's evidence was that when she looked at the HR system online the claimant's hours were put at "12 hours". However she did not cut the claimant's hours. She rostered the hours necessary to cover the shifts. That chimed with the claimant's evidence that he was often asked to work additional shifts by Mrs Whyte. The payslips produced (J199/204) suggest on an analysis of pay at the rate of £7.70 per hour (rate specified in claimant schedule of loss at J61/62) that for the period to 14 December 2017 the claimant worked an average of 25.25 hours per week; for the period to 18 January 2018 an average of 29.65 hours per week; for the period to 15 February 2018 an average of 25.72 hours per week; for the period to 15 March 2018 an average of 22.86 hours per week; and for the period to 19 April 2018 an average of 21.26 hours per week. The Tribunal in light of this evidence could not find that the claimant was singled out to have his hours of work cut. Indeed there seemed to be no evidence of any cut in hours given the pay slip information backed by the claimant's position that he was asked to work additional hours and usually accepted as he was keen to do so.

Incident with Tracey Whyte and emptying of bins

64. The claimant and Mrs Whyte had a difficult day which was recorded (undated) in a note by Mrs Whyte (J132/134). This appeared to initiate when the claimant came in at 11.30 am and was asked by the Assistant Manager Angela Leamy if he could start earlier as the shop was very busy. He said he could not do so as he was going "for a fag". Later it was agreed that he could have his usual break. He wanted to take 25 minutes and not the allowance of 30 minutes so he could "have "fag break later". Mrs Whyte refused. Mrs Whyte's position was that if he had cooperated with Angie then he may well have had a cigarette break but she was not inclined to allow that given he had not been cooperative. This became a point of friction. He was to finish at 7.30 that evening. He was consistently denied a cigarette break and Mrs Whyte gave him jobs to do. About 7.20/7.24 she advised that he could take the rubbish out and at the same time have a cigarette break. He refused to take the rubbish out and complained that Mrs Whyte had been "unfair to him all day". She indicated that she would wish to " deal with him at the next shift". According to her evidence the claimant "threw the keys at me" at the end of the day, being the keys for the back door.

65. There was no disciplinary action or other action taken in respect of the incident. Mrs Whyte explained that the claimant had been upset about not getting a cigarette break and that the incident over the bins was "heat of the moment" and perhaps both were "a bit stressed that day". The claimant stated that Mrs Whyte had said to him that "he would be lucky if he had a job after this". The incident apparently took place "close to the time his employment was terminated". Mrs Whyte denied making that comment and indicated that the following day each had apologised to the other for the friction.

Staff Discounts

66. Mrs Whyte's position on discounts was that staff were entitled to a 25% staff discount on Costa items when they were not working and 50% discount during a lunch break when they were working provided the shift was for 6 hours or more.

More often than not the claimant would not qualify for the 50% discount. She advised that she considered this to be the proper operation of discount which she had operated in the Edinburgh outlet.

67. Prior to her arrival she was aware that staff were taking "out of date food free" and that the discount of 50% was "more relaxed" meaning it was not enforced to lunch break if an individual was working 6 hours or more.

68. So far as drinks were concerned team members on duty were able to consume any "primo drinks from the menu board" provided consumption was reasonable.

69. The claimant raised an issue about these discounts as he did not think they were being fairly applied. The respondent's policy on discount (J74q) indicates that when on shift a team member could have any "menu board drinks free of charge (primo size only) …". In relation to food it stated:-

> "When you take your break and throughout the day when you are scheduled to work there is 50% discount on all other drinks and the cost of food in your store when purchased using your Whitbread privilege card; all which must be paid for prior to consumption"

70. That conflicted with the advice given by Mrs Whyte that the 50% discount only operated if the shift was longer than 6 hours.

71. In a separate section of the handbook (J74i) it was stated that using the Whitbread privilege card meant a 25% discount on all purchases made in coffee shops (whether working or not).

72. There was disquiet over the operation of the discount. There was produced a text dated 5 March 2018 (J198a(i)-(iii)) from a team member indicating:-

"hey team so there's been a lot of talk about this discount and staff drinks issue. I looked through the policy and it states the following so can all staff follow these

rules and if anyone questions it you have the right to take this policy out and show them okies x z".

73. The "staff consumption" rules were attached and again indicated that all "team members are entitled to a 50% discount on the eat in price for all food/bottled drinks for personal consumption on any rota'd day of work". It also stated that all primo drinks were given free of charge whilst on duty; and that Costa team members were entitled to a 25% discount on a purchase made on a non-working day (198a(ii)). There was also produced a "rewards and benefits" page (198a(iii)). This confirmed the 50% discount on food without mention of length of shift involved.

74. The evidence was that the policy rules did not indicate it was necessary to work more than 6 hours before the 50% discount applied. At the same time the policy was applied to all team members and the claimant was not singled out for special treatment in this respect. It was clear from the text (J198) that all team members were affected by the operation of the discount policy and that the author of the text wished to make it clear to all team members the rules around discount which seemed to differ from that operated by Mrs Whyte.

Claimant's purchase of breakfast bap

75. The claimant advised that on one occasion he selected a breakfast bap for lunch and was told he should have eaten breakfast before work started so was only allowed 25% discount and not 50% discount. In cross examination he stated that he had "gone into work early to get breakfast – 10 minutes before start – told not get 50% as not started shift and only get 25%". As indicated there was confusion over the policy. From the written terms it would seem that the appellant may have been entitled to the 50% discount on food purchased because he was on the rota to work that day even though he had not commenced his shift. It is not crystal clear however as the Policy at J74i suggests the 50% discount applies if the purchase is for a break during a shift and the claimant's evidence was that he had wanted to have his "bap" prior to commencing work rather than during the shift.

76. In any event it was not found by the Tribunal that the claimant was singled out in this respect but that Mrs Whyte applied her perhaps erroneous understanding of the Policy in this respect to all staff.

Comment made by Tracey Whyte prior to disciplinary hearing

77. The claimant stated in his witness statement that when Mrs Whyte phoned him about the disciplinary hearing to be held on 4 May 2108 she told him that she would make sure he would be fired. However in evidence the claimant's position was simply that the conversation "felt like that" rather than any direct statement by Mrs Whyte that she would make sure he was fired.

Fairness of Appeal.

78. In his witness statement the claimant advised that he ascertained around 18 May 2018 that his Costa training manuals had been disposed of. While he stated that he did not consider the appeal got across what he wanted to say as "Laura Crow would only cover what was said in the appeal letter" the appeal notes indicate that he felt he had a fair hearing (J189). He states in his witness statement that "I said that the appeal seemed unfair as my Costa handbooks had already been binned and the outcome already decided and so it was no surprise to Simon or myself when I received the outcome report to dismiss me without notice". There is nothing in the appeal notes which indicate the appellant or Mr Young raised the issue of the Costa handbooks being "binned" or that the appeal was predetermined because of that. There is simply no reference to these handbooks at that time.

Failure to allow claimant to go on other shifts

79. The claimant's position in his witness statement was that after "Tracey Whyte cut my hours I was constantly going across to the new store to ask if they needed extra staff, unfortunately, they were fully staffed". However his position in evidence was slightly different in that he indicated that he was told he could not do other

shifts until his performance improved. He stated he understood that he could not simply work at other Costa outlets without the consent of Tracey Whyte. His witness statement seemed clear in indicating that it was because other shops were fully staffed that no other work was available.

Grievance Procedure

80. No grievance was raised by the claimant in respect of his complaints that he was treated badly and on account of his dyslexia by Mrs Whyte. He advised that he knew if he had a grievance at work he could go to the Area Manager. He stated that was not possible giving various reasons in evidence including that the wrong name of the Area Manager was on a piece of paper in the rest room which meant he was unable to contact an Area Manager; he knew the Area Manager but he didn't know how to make contact; he did not understand what HR did; friends told him he needed to go to the Area Manager but he did not have any telephone number; he did not want to go to his Area Manager as that would simply make matters worse; all the Area Managers "were changing"; and "did not know how to raise a grievance". Simon Young indicated that although he saw the claimant being badly treated he did not feel he could assist the claimant in raising a grievance because no contact details for the current Area Manager had been given; he could not raise a grievance on behalf of the claimant; he thought the claimant's father had phoned HR.

81. Separately he alleged that he had told Tracey Whyte that the claimant was dyslexic but that she said she "didn't care". This was a conversation only between the two of them. Mrs Whyte denied any such conversation. He acknowledged that that was a serious issue and that Mrs Whyte should be disciplined if that was the case. He felt he could not do anything as it was "not my complaint" and he could "not raise it as it did not impinge on my rights". He saw other differences in treatment of the claimant but took no steps himself to assist the claimant in raising the issue as a grievance. He was referred to the typewritten note of the appeal hearing (J194a-d) and the paragraph (13) which indicated that the claimant had

"mentioned he had phoned Costa's HR Department to make a grievance against his SM". Mr Young did not know when the claimant had done that.

Comments of Tracey Whyte regarding breaks

82. It was alleged by the claimant that at various points after December 2017 he was refused breaks by Tracey Whyte even after 6 hours work accompanied by comments such as "You don't deserve a break"; "You were signed in late so you don't get a break"; "You've not worked hard enough to get a break"; and "No means no". The Tribunal found no evidence to indicate that the claimant had been denied his lawful breaks.

Shift Changes

83. The claimant alleged that his shift rota or hours to be worked "kept changing including last minute or even on shift changes, it was virtually impossible for me to be on time or even know exactly what my shift rota or hours were". There was no evidence that there was any sudden and unpredicted change of shift for the claimant. In cross examination he advised that shift rotas were made in advance. Any extra or additional shifts to cover for others were by consent.

Claimant being kept in the queue for purchases

84. The claimant maintained that he was required to join the customer queue when he wished to make a purchase and that he was singled out in this respect. Mrs Whyte's position was that if staff wished to buy food from the store then if they were on their lunch break they would require to queue as a customer. That applied to all and she also did the same. It was not the case that there was one till in use for customers and the other could be used for staff. Her position was that that "did not happen when I was there". It was never the case that people would laugh at the claimant because he had to queue.

85. The Tribunal were unable to make a finding that the claimant was singled out for queuing to purchase foodstuffs as distinct from any other member of staff.

Incidents with Customers

86. The claimant advised that he was often told off by Mrs Whyte so that he would be made to look like a "complete idiot". She would ask him to re-mop the "entire floor or wipe down all the tables again if a crumb was found" On one occasion he states that Mrs Whyte shouted at him over "not wiping down a table quickly enough, she did this in front of a man and his family" to the claimant's embarrassment. This was not a matter that was put to Mrs Whyte in cross examination. Her statement indicated that she would tell the claimant if he was not performing a job properly but did not treat him differently from any other member of staff. She did not shout at him in front of customers. She believed she had a good relationship with the claimant. Again the Tribunal were unable to make a finding that the claimant had been shouted at in front of customers to his embarrassment or made to look like a "complete idiot"

Request to work additional hours

87. The claimant spoke of a call that he received from Mrs Whyte when he was "out with his friends". He was in his car and he was told that he needed to "come in and cover for an hour and if I didn't "there would be consequences"". He drove from Edinburgh to Costa Next and went into work while his friends waited in the car outside. The Tribunal's view was that the claimant was prepared to work additional hours if requested and there was no threat on this occasion of "consequences". This was not a matter put to Mrs Whyte in evidence.

Knowledge of Disability

88. From the evidence an important finding in fact was what knowledge the respondent had of the claimant's dyslexia at the material time.

89. As noted there was competing evidence in this respect. The claimant's position was that he had told Liam Reid when interviewed and that Liam Reid had made particular arrangements for him as a consequence of being told that he was dyslexic. In particular there was an assertion that Mr Reid had taken a note at interview stage that the claimant was dyslexic and also that he had arranged for help for the claimant in the completion of the Costa training books. The evidence from Mr Reid was that he had not been told of the claimant's dyslexia and made no such arrangements.

90. Not all the records of the interview were recovered under the subject access request made by the claimant. In particular the form at J87a was blank and given its emphasis on health conditions it might have been expected that form would have been completed. It was possible therefore that there was a "missing" document from the interview process. Also the interview took place some time ago and Mr Reid may not have had any particular recollection of the interview process with the claimant.

91. Additionally the Costa training books could not be examined to ascertain if it was apparent assistance had been given to the claimant in their completion because they had been "binned" around the time of his dismissal.

92. The inference from those matters could be that there was evidence of the respondent's knowledge of the claimant's disability but that evidence had been removed.

93. On the issue of the training manuals or books the Tribunal were able to discount the suggestion or inference that the Costa training books had been deliberately destroyed so that there would be no evidence of their knowledge of the claimant's dyslexia by examination of those books. The evidence on the Costa training books was to the effect that the Assistant Manager and a colleague (significantly not by Tracey Whyte or on her instruction against whom the complaints of discrimination were being made) "binned" the books in a clear out after the claimant had been dismissed but prior to the appeal. It was a "conspiracy too far" for the Tribunal to

believe that at that time the staff would consider that the claimant would bring a complaint of disability discrimination against the respondent to the Tribunal; that part of that assessment would concern whether the respondent had knowledge of the claimant's dyslexia being the disability upon which he would rely; and in order to prevent the respondent being fixed with that knowledge it was determined that the books should be "binned" so as to close off that line of enquiry. The Tribunal considered that was not probable or likely and that the explanation given that the books were "binned" as part of a clear out without any malice was accepted.

94. It was also the view of the Tribunal looking to the terms of the correspondence around the subject access request that all paperwork had been disclosed and that there was no concealment of any part of the documents completed at interview process.

95. However given the conflict on the evidence regarding the interview the Tribunal considered the whole evidence in coming to a view as to what knowledge the respondent had, or could reasonably be expected to have had, that the claimant was dyslexic. In the event the Tribunal on the balance of the evidence came to the view that the claimant had not disclosed to the respondent that he was dyslexic and that by the time of dismissal they did not know and could not have been reasonably expected to know of his disability. The Tribunal reached that view on the basis that:-

    (a) In the application for interview (J83) the question is asked whether any specific adjustments are required to enable the claimant to attend an interview and/or job experience session at any stage of the recruitment process and the answer is "no". The "disability pleadings" taken as the Disability Impact Statement contains detailed background and adverse effects of the claimant's disability. It states that he struggles with daily organisation and life situations; never posting on social media as his spelling is so bad; struggling to understand forms and documents; needing extra time to complete any test or exam; being unable to answer questions under pressure;

starting to panic and hopeless at being put on the spot; not being able to be given a verbal list of tasks as struggling to remember any of them; struggling to concentrate; when in new and unfamiliar situations his brain feels jumbled; avoiding verbal communication if nervous due to stammering over words. It might be expected that those impairments would have led to a request for some adjustments to be made at interview particularly where there was likely to be an unfamiliar situation and the claimant might well be nervous all of which would add to his difficulties. Also the job experience session may require some reading or writing. The denial that the claimant might need some adjustment on account of his dyslexia in the application for interview favoured non-disclosure at interview stage.

(b) There was nothing in the interview notes taken by "Liam/Keith" (J77/81) which would suggest that the claimant disclosed he had dyslexia. While the form completed by the claimant (J85) contains spelling errors it would not be an obvious predictor that the claimant was dyslexic. Neither is there any indication on the first page of the health questionnaire (J87) of any disability of the claimant.

(c) The first review form with the claimant (J93) indicates that he has no requirements and feels that the job is going well. There is no mention of dyslexia and neither is there any mention of the disability in the subsequent review form of 26 September 2015 (J94) albeit there are doubts expressed about the claimant's attitude and that he would be placed on "performance review" until there was a significant improvement. Neither is there any mention of dyslexia in the review of 13 November 2015 with Mr Reid (J95). Significantly there is mention of the claimant's lateness and that he has been spoken to about this but no indication was given that dyslexia affects him such that he might be late for work or indeed affects him on any other aspect of his work.

(d) A similar situation exists in respect of the notes of meeting with Nadine Green on 4 March 2016 (J96/97). No mention is made of dyslexia. When Nadine Green takes issue with the claimant over his lateness in the meeting of 9 March 2017 (J98/99) and the subsequent discussion over lateness on 24 March 2017 and subsequent days (as noted on 13 April 2017 – J101/103) there is no mention of the claimant having dyslexia and that being a reason why he might be late. Neither is there anything stated in the notes taken of the lateness incidents on 6 and 10 November 2017 when Tracey Whyte takes issue with the lateness of the claimant (106/110a). He is given a letter of concern about this issue of lateness on 22 November 2017 (J112). He makes no representation that he has a disability or that this disability causes him to be late.

(e) The note of the meeting of 2 January 2018 in respect of further incidents of lateness contain no information that the claimant has dyslexia and that is likely to cause him to be late or affect his work performance in any other way (J117/119).

(f) The same is true of notes of further lateness of the claimant in January (J128). At the disciplinary hearing of 7 February 2018 he is asked if there are any issues with timekeeping and states “no over last couple of months let slip and completely my fault”. He then makes reference to the reasons for lateness on various occasions and is given a final written warning. There is nothing in the notes of the hearing with Mr Leishman (J136/148) which would indicate that the claimant put forward he was dyslexic or that formed a reason why he might be late. He makes no appeal against the final written warning dated 18 February 2018 although advised that he could. He makes no representation that dyslexia is a root cause of the issues.

(g) Further lateness is then documented over March/April 2018 and a report completed by Mrs Whyte. There is no reference to any

dyslexia within these notes or report completed by Mrs Whyte (J152/160).

(h) His Statement of Fitness to work contains no reference to his dyslexia causing him anxiety or stress or that he has dyslexia and that this might be some reason to explain or highlight that the claimant might be susceptible to the condition of anxiety and stress.

(i) Simon Young maintained that he had told Tracey Whyte that the claimant was dyslexic and got the reply that she "didn't care". He maintained that Tracey Whyte had taken away all the support that had been given to the claimant by other Managers who did know that he was dyslexic. Effectively he was alleging that Mrs Whyte made sure that the claimant was disadvantaged knowing that he was dyslexic. Mr Young accompanied the claimant to the appeal hearing and there was never any suggestion by him or by the claimant that Mrs Whyte was treating the claimant badly because he was dyslexic; or that she knew he was dyslexic and had said she did "not care"; that formed a reason why he might be slower than others; or why he might give an impression of a less than positive attitude; or was a reason for lateness. The only reference to the claimant's dyslexia comes at this hearing when there is reference to the disciplinary code and the difference between "gross misconduct" and "misconduct" The claimant's position is that he has been "reading up on this". When he is asked if that was not something he should have mentioned before he states that he had difficulty reading the document as he was "dyslexic". That is the only reference in any of the documentation over many meetings with the claimant from interview through to appeal being a space of approximately 3 years.

96. The Tribunal concluded that the weight of evidence was to the effect that the respondent had not been advised of the claimant's dyslexia prior to the mention of dyslexia in the appeal hearing of 29 May 2018. The Tribunal then accepted the

evidence that Liam Reid, Alan Leishman, Scott Kennaway and Tracey Whyte did not know of the appellant's dyslexia and could not have been reasonably expected to know.

97. The Tribunal was bolstered in this view by the lack of any grievance being raised by the claimant that he had disclosed his dyslexia and was being treated unfairly because of that disability. The Tribunal considered that if it was the case that Mrs Whyte had been told of the claimant's dyslexia but the response was that she "did not care" or that she was picking on the claimant because of his dyslexia that would have led to a grievance. It did not accept that the claimant was as hamstrung as he claimed to be in taking out a grievance. His evidence was unsatisfactory in that respect. Mr Young in his evidence showed himself to be of some ability and would certainly have had the wherewithal to progress a grievance if it had been the case that Mrs Whyte was well aware of the claimant's dyslexia but the claimant suffered continual disadvantage as a consequence particularly if Mrs Whyte told him she did "not care" whether the claimant was dyslexic or not.

Events after Termination

98. After termination of the claimant's employment he secured part-time employment at a franchise Costa store in Kirkcaldy. He commenced work there from 28 May 2018. The schedule of loss produced (J61/62) gives no information on present rate of pay

99. As noted the claimant's pay slips for work with the respondent were produced (J199/204). Those showed (excluding the final pay slip which included sick pay and holiday pay) earnings over a period of 20 weeks of £3842.20 gross and £3786.12 net. That put average weekly earnings at £192.11 gross and £189.31 net.

100. The claimant advised that he has been successful in an application for PIP but no details were given of the amount of benefit to be received.

101. He made a claim for injury to feeling to be assessed by the Tribunal. It was stated in his schedule of loss (J61/62) that this should be comparable with the upper range of the middle band of the Vento scale given the campaign of discrimination which "began when Tracey Whyte took over as Manager at Costa Next in December 2018(sic) and continued shift to shift right up to his dismissal and on to his appeal at the end of May 2018". It was stated the upper range of the Vento middle band was correct in that the bullying, harassment and victimisation the claimant suffered was "insensitive targeted discrimination" to "deliberately cause humiliation and embarrassment and ultimately used to destroy the confidence of a young person who has already struggled through life and the trials and tribulations that his dyslexia causes in everyday tasks". There was also a sum sought for personal injury due to the discrimination as the claimant had suffered anxiety and panic attacks, developed IBS, digestive and bowel problems affecting his stomach and back for which he had been prescribed medication and referred to mental health facilities in Fife. He had not been able to socialise.

102. It was also maintained in relation to the Costa training books that the claimant had been discriminated against because due to his dyslexia it would take far longer for him to complete training books at a franchise to obtain his Barista status.

Submissions

103. Each party lodged written submissions for which the Tribunal were grateful. No disrespect is intended in making a short summary of these submissions.

For the claimant

104. It was stated by the claimant that shortly after Mrs Whyte's arrival as Store Manager the investigation over "shift swap communication" should not have arisen as Mr Jason Waite had the authority to deal with that as Shift Manager. Accordingly the letter of concern dated 22 November 2017 should not have arisen and that established a "state of affairs" which continued through to dismissal. Reference was made to **Hale v Brighton and Sussex University Hospital NHS**

Trust UKEAT/0342/16/LA as authority for the proposition that the respondent had created a state of affairs that would continue until conclusion of the disciplinary process.

105. It was maintained that the disability discrimination and mistreatment was a continuous strained and relentless abuse of a young man made vulnerable by his own severe dyslexia and the difficulties that brought to him on a day to day basis. The common personality was Mrs Whyte from the time she took over as Manager to the dismissal and appeal. **Southern Cross Health Care v Owolabi UKEAT/0056/11** was stated to be authority for the proposition that where allegations are linked by a common personality they do not stand in isolation. See also **Veolia Environmental Services UK v Gumbs UKEAT/0487/12.** The incidents should be seen as a continuing series of events until dismissal and no time bar arose.

106. It was stated that the claimant's lateness arose from Mrs Whyte's discriminatory alterations of the clocking in system; discriminatory hours; shift swaps; last minute changes; and discriminatory rules for the claimant in not allowing Shift Managers to manage him. That increased his stress and the difficulties associated with dyslexia as noted by Dyslexia Scotland. Reliance was placed on the material produced at J273/2780,J289/292, J293/301.

107. As it was stated in **City of York Council v Grosset** [2018] EWCA a dismissal can amount to unfavourable treatment because of something arising in consequence of disability under section 15 of the Equality Act 2010 even if the employer did not know that the disability caused the misconduct.

108. It was maintained that Mr Reid and another member of management knew of the claimant's dyslexia as he received help and support at interview and from the reports on the claimant's progress. That was added to by the length of time it took the claimant to complete his trio of handbooks. That had taken significantly longer than the respondent's own deadlines. Mr Reid had not been able to deny that the

claimant had additional help from Simon Young, Mr Dillan Green and Miss Alex Seath.

109. It was also stated that Mr Reid was unable to remember a conversation between himself and Mrs Watson regarding the claimant's dyslexia.

110. It was maintained that the claimant was put at substantial disadvantage by lack of support received and with written instructions being given out for drinks recipes. It was stated that Tracey Whyte was told by Simon Young of the claimant's dyslexia and was told "I don't care".

111. Reference was made to **Kumulchew v Starbucks Coffee** 2301217/17 which indicated that procedural failings identified by a Tribunal are relevant to any disciplinary investigation and may cause someone with dyslexia significant problems and undermine the fairness of the whole process.

112. In respect of discrimination arising from disability it was indicated that the claimant was prevented from being able to train as a Barista Maestro and that the claimant needed significant support which was offered by Mr Simon Young. This also included the unfavourable treatment by Mr Scott Kennaway in being disciplined and then dismissed.

113. As regards direct discrimination it was maintained that Mrs Whyte treated the claimant less favourably than anyone else in the store. The claimant was singled out continuously due to his severe dyslexia. His hours were cut and he had to try and make up his hours. He was singled out by being forced to accept less favourable terms and conditions than other staff members. He was denied the opportunity to promote himself and receive financial bonus.

114. As regards indirect discrimination issues arose around the policy of discounts on food and drink. The claimant was not able to benefit from the same discounts as others.

115. In relation to harassment Mrs Whyte abused her power to belittle the claimant. This was nothing short of bullying and degrading treatment. That put him under extra stress and anxiety. Mrs Whyte did not believe his reasons for being late. She regarded reasons such as the claimant's grandmother being unwell as "silly excuses".

116. Additionally the claimant was victimised by trying to raise a grievance and in response the treatment was even worse.

117. The apology from Mr Kennaway that there were failures in the disciplinary process only highlighted that the claimant had been let down through investigation, disciplinary dismissal and appeal process.

118. Miss Crow had been told at appeal that the appellant was dyslexic. In terms of **Baldeh v Churches Housing Association of Dudley and District Limited** UKEAT/0290/18/JOJ it was held that a dismissal could be discriminatory even when an employer did not know about an employee's disability at the time of dismissal, but was told at the appeal hearing.

For the respondent

119. The respondent submitted that while the claim of unfair dismissal had held to be out of time the claim of discrimination was allowed to proceed. In terms of the Judgment on the preliminary hearing it was held by Judge Kemp that the "act which was material for that purpose was the decision to dismiss taken on 4 May 2018 and set out in a letter of that date".

120. Subsequently the claimant had expanded his claim to include a large number of allegations prior to 4 May 2018. This led to a distinct issue on time bar. It was submitted that the alleged acts of discrimination (which were denied) were unconnected and did not amount to an "ongoing situation or a continuing state of affairs". It was submitted there was no connection between the various acts of alleged discrimination and so time bar applied.

121. In relation to direct discrimination it was submitted that the claimant required to show he was treated less favourably than a real or hypothetical comparator. The Tribunal required to compare like with like. The reason for dismissal in this case was the claimant's history of attending work late. He had a series of warnings culminating in a final written warning. No incident of lateness was challenged. No appeals were made in respect of the final written warning. It was never disputed that the claimant was late. Tracey Whyte played no part in the disciplinary procedures that led to dismissal. The criticism made seemed to revolve around procedural issues which might be significant in an unfair dismissal claim but not in one of discrimination.

122. The hypothetical comparator sharing the claimant's record of lateness would have been dismissed in these circumstances. Mr Kennaway was unaware of the claimant's disability. The claimant did not raise disability as a factor in his appeal hearing as a reason for being late. He had not shown a prima facie case of discrimination relating to dismissal.

123. So far as other alleged issues of direct discrimination were concerned there was no evidence to show that Mrs Whyte would never waste her time training the claimant to be a Barista Maestro. She denied that but in any event the claimant accepted that an employee with a poor record of lateness is unlikely to be considered for the role of BM as one of the primary requirements was to open the store. He admitted to Mr Leishman that he had "messed up" and that his desire to become a BM had been jeopardised by the lateness.

124. There was no evidence that hours were being cut. There might have been confusion over contractual hours but it appears the claimant was working considerably more hours than his contractual hours.

125. The assertion that Tracey Whyte logged in the claimant late when he was in fact on time was without substance. The responsibility to clock in lay with the employee. The claimant challenges none of the instances of lateness in the sense

of saying that he was in time but Tracey Whyte had manipulated the position to show that he was late.

126. Neither was the suggestion that Mrs Whyte had asked staff members to alter his start time well founded. Time was recorded personally on the laptop and there was no mechanism for another member to alter that. He claimant never made that suggestion until he comes to the Tribunal.

127. The suggestion that the claimant was prevented from taking up a post at the Costa shop in Odeon Dunfermline was without evidence. There is no evidence that Mrs Whyte blocked this. Similarly neither was there any policy preventing the claimant from working at other stores or that Mrs Whyte blocked him in that respect.

128. In relation to indirect discrimination the claimant set out 7 alleged instances of indirect discrimination. That did not include dismissal and no PCP was identified in relation to dismissal. Even if there were a PCP the dismissal of the claimant would amount to a proportionate means to a legitimate aim, namely that the application of the disciplinary procedure for persistent lateness was a proportionate means of achieving proper workplace discipline and prompt attendance at work.

129. In all other respects no policy, criterion or practice was outlined. It was submitted there was no disadvantage to the claimant alone of applying a discount policy wrongly. It applied to all and the claimant was not singled out.

130. Neither had the claimant been able to suggest that instances of lateness were caused or contributed to by his disability. He did not raise this at the disciplinary hearing with Mr Leishman or the appeal hearing with Miss Crow. Consistently he gave explanations for his lateness that had nothing to do with his disability.

131. It was possible to construct a policy, criterion or practice that staff should not be allowed to help out at other stores without their Manager's consent. But there was

no evidence that this could disadvantage the claimant because of his disability or that it would disadvantage others sharing the claimant's disability.

132. It was suggested by the claimant that he could not raise a grievance because the Policy Guide was in a written form and that disadvantaged him. It was not suggested there was no other source of information for example contacting another Manager or HR. There were clearly other mechanisms to obtain information on how to raise a grievance and he was not put at a particular disadvantage.

133. It is alleged by the claimant that Mrs Whyte contacted him on 20 April 2018 regarding the disciplinary hearing and indicated that she would make sure he was dismissed. The hearing was to be chaired by Mr Kennaway. She was not involved in the hearing or the decision to be made. In any event there was nothing that could be regarded as a PCP.

134. The Training Handbooks were destroyed for the claimant's training. This was a one off act by a member of staff at the store and done without the knowledge of Mrs Whyte. It did not amount to a PCP. Even if it did there was nothing which would put persons with whom the claimant shares his disability at a particular disadvantage compared to others.

135. In relation to discrimination arising from disability it was necessary to decide whether the respondent had knowledge of the claimant's disability. It was maintained that the respondent did not know that and so this claim would not be well founded.

136. If that was not the case then each of the 16 allegations of discrimination arising from disability were dealt with and reasons given as to why they should not be successful.

137. It was alleged that there was a failure to make reasonable adjustments. Again it was submitted that the respondent did not have the requisite knowledge of the claimant's disability and so these claims should not succeed.

138. If that was not the case then the claimant identified alleged failures at J50/51. Again it was maintained that none of these instances were well founded.

139. So far as the 10 incidents of harassment were concerned at J54/55 there was no evidence that these had actually occurred.

140. There was no evidence to show that the claimant was refused breaks.

141. So far as the incident regarding the "bins" was concerned it was confirmed by the claimant that he did have a 30 minute break at lunch time. The claimant's position was he wanted a further short break to smoke a cigarette which was denied but there was no obligation to grant that break.

142. It was denied that Mrs Whyte warned the claimant about his inability to carry out tasks and that there would be "consequences". It was not the case that she shouted at the claimant in front of customers. There was nothing to support that version of events.

143. It was denied that the claimant was compelled to work when he was out with friends. That was a matter of choice.

144. It was also denied that the claimant was forced to work short notice or that shift times were swapped or altered suddenly to confuse him.

145. There was confusion over the correct policy in relation to the application of staff discounts. However Mrs Whyte applied the policy she thought was in place to all the staff. A note of the discussion about discounts appears (J157/158) and that confirmed her understanding of the position and that it applied to all.

146. The complaint that the claimant had to queue with customers to pay for food and was singled out in that respect was not well founded. All other staff required to do the same thing.

147. It was alleged that Mrs Whyte gave the claimant a handwritten note saying "If you are late again then no matter what the excuse you tell me you will be investigated and disciplined". This appeared at J153. This was issued after a second incident of lateness following the final written warning. It was submitted this was a reasonable warning to the claimant given the circumstances. The claimant should know what was at stake.

148. It was stated that the use of the words "gross misconduct" in communication regarding the final disciplinary hearing was harassment. It was conceded that this should have been characterised as misconduct and not gross misconduct but this was a mistake and not a deliberate act. It did not relate to the claimant's disability.

149. There was no evidence of victimisation given the statutory provisions on victimisation. The claimant had not done any of the protected acts listed in section 27(2) of the Equality Act 2010.

Conclusions

Time Bar

150. It was maintained that time bar would operate in respect of the various complaints made by the claimant. The only complaint that had been found to be in time was the complaint that the claimant had been discriminated against because of his disability by dismissal. None of the preceding acts had been in play at the time of the preliminary hearing on time bar and so there was no decision which allowed in the complaints which had arisen in the time that Tracey Whyte had been Manager of the Costa outlet. It was maintained that those complaints formed single acts none of which were in time and that the Tribunal had no jurisdiction to consider these complaints.

151. It is the case that where there are a series of distinct acts the time limit begins to run when each act is completed. However if there is continuing discrimination time only begins to run when the last act is completed. This can sometimes be a difficult distinction to make in practice. In this case the assertion by the claimant was that he had suffered a series of discriminatory acts at the hands of Tracey Whyte his Manager from September 2017 culminating in his dismissal. His position was that he had been picked on because of his dyslexia and made to feel humiliated, bullied, harassed, and victimised. It was maintained that he was targeted because of his dyslexia in the workplace until dismissal.

152. In those circumstances the Tribunal considered that the complaints raised were of continuing acts leading to the final act of dismissal and accordingly the complaints were in time and that the Tribunal had jurisdiction to consider the matter. It was appreciated that Tracey Whyte had not made the final decision to dismiss but essentially it was the claimant's case that she had engineered that position so that he could be dismissed. Those circumstances were sufficient for the Tribunal to conclude that the case being made for the claimant was of a series of continuing acts and that time only began to run when the last act (dismissal) was completed. Given that the decision of Judge Kemp was that the Tribunal had jurisdiction to consider that last act then the Tribunal had jurisdiction.

153. It is a separate question of course as to whether or not the complaint of disability discrimination in respect of any of these acts is made out as distinct from the Tribunal's ability to have jurisdiction to determine the issue.

The claimant's disability

154. The respondent accepted that the claimant had a disability in that he had dyslexia. The Tribunal required to consider the impact of that disability and its effect on the claimant's abilities with particular reference as to whether he could be punctual in attending his work. The Tribunal found there was no evidence to show that the claimant was prevented him from being punctual at work due to his dyslexia.

155. It is accepted that those with dyslexia can have difficulty with timekeeping (Dyslexia Scotland information - J293/297) and that this can be a common effect. However it would not appear to be the case from the information provided on dyslexia within the Joint Inventory of Productions that any individual with dyslexia will not be able to manage time. It is not suggested that this is an inherent problem but that it may be associated with dyslexia. The Tribunal did not consider that it had been shown that the claimant's problems with timekeeping were due to his dyslexia or that they could make that inference. The Tribunal considered that was not made out because:-

(1) The school reports contained information about the difficulties of the claimant in reading and writing but contained no indication that he was constantly late for school or his timekeeping was poor as a consequence of dyslexia.

(2) The Disability Impact Statement accepted at the earlier preliminary hearing as prepared by Mrs Watson contains no indication that the claimant's dyslexia caused him a problem with timekeeping and that his abilities were affected in this way.

(3) In evidence to the Tribunal when asked of the impact of his dyslexia the claimant indicated that he had difficulties in reading and writing and with numeracy. He indicated that it took time for him to read matters through but if he had time and was not rushed then he could manage albeit "if came across a word I do not know may get stuck and jumbled". He did not maintain in his evidence that he had problems with timekeeping.

(4) There was no medical evidence to indicate that the claimant's dyslexia meant that he was unable to keep time.

(5) The Fife College "Personal Learning Support Plan" (J268/272) discloses that information was sought from the claimant as to the

effects of his dyslexia. The claimant indicated that he was slow to read and to complete tasks; his handwriting was untidy; he found putting thoughts into writing difficult and would miss out words if he could not spell them. He states that he is more confident if he can use a PC to produce written work with a spellchecker; he was unsure if he needed support from an assistant in class but accepted that he "probably needs this" and that so far as practical subjects were concerned felt he managed well but was a "bit of a perfectionist" which can cause him to spend extra time to complete practical tasks. There is nothing within the information provided by the claimant to assist the College deal with his dyslexia to the effect that he will have problems in timekeeping for example getting to his classes in time.

(6) The information from the NHS website on dyslexia (J275a-d) indicates that "some people with dyslexia also have other problems not directly connected to reading or writing" and that can include "poor organisation and time management". The information does not indicate that all people with dyslexia will have problems with timekeeping.

(7) Whenever the claimant was questioned about why he was late for work he never indicated that he had a difficulty in timekeeping because of dyslexia. He gave reasons why he was late in respect of his car; flat battery; escalator not working; grandmother ill; and the like.

(8) In the hearing leading to the final written warning he does not put his lateness down to his dyslexia. He does not appeal that warning on the basis that being late is an issue associated with his disability.

(9) In the course of the Tribunal he never indicated in evidence that any reason for his lateness was associated with his dyslexia. His position was that his reasons for being late were sound and should have been

accepted as not being his fault. He put lateness down to the fact that his car did break down; he was stopped for speeding; his grandmother was ill and so it was unfair to take him to task over his lateness rather than he was being discriminated against because he could not help but be late due to his condition.

(10) At the appeal he indicates that he had difficulty reading a document due to his dyslexia. There is no indication in that hearing against dismissal that his lateness was caused by his dyslexia and that his abilities in that respect were affected.

Direct Discrimination

156. Section 13(1) of the Equality Act 2010 provides that an employer directly discriminates against a person if:-

- It treats that person less favourably than it treats or would treat others, and
- The difference in treatment is because of the protected characteristic

157. A complaint of direct discrimination succeeds where a Tribunal finds that protected characteristic was the reason for the claimant's less favourable treatment. Essentially that would involve an enquiry as to why the respondent acted as they did, which question once answered will usually show whether there has been any unlawful discrimination. To be satisfied as to whether or not discriminatory treatment was "because of" a protected characteristic is to focus on the reason why, in factual terms, the employer acted as it did.

158. The claimant makes 6 complaints of direct discrimination within the "Summary of Complaints" and makes 7 complaints including the complaint discussed at the preliminary hearing of dismissal because of disability.

Dismissal

159. The Tribunal's view was that the dismissal was caused because of continued lateness by the claimant and not because he was dyslexic.

160. This was an issue which had dogged the claimant since he commenced work with the respondent. The issue had been raised by his original Manager Liam Reid and then with Mrs Nadine Green and culminated in a series of late attendances with Tracey Whyte. The Tribunal accepted that none of those individuals had knowledge of the claimant's disability. It accepted that the dismissing officer Scott Kennaway had no knowledge of the claimant's disability. The reason for dismissal related to consistent late timekeeping.

161. In an application of unfair dismissal to the Tribunal that may or may not have been a fair dismissal. There were issues raised as to the process which was followed; the question of whether a disciplinary hearing should have been held while the claimant was signed off with stress; whether Mr Kennaway had full reasons for lateness before him when he came to a decision. All these matters may have affected the fairness of the dismissal but the Tribunal did not accept that the claimant was dismissed because he had dyslexia.

Training for Barista Maestro

162. It was maintained that the claimant was not trained to be a Barista Maestro because of his dyslexia. The Tribunal did not accept that proposition. The claimant had a poor timekeeping record. A Barista Maestro required to open up the premises. Until such time as his timekeeping improved it was not felt that he could be promoted to that post. The claimant recognised this within the notes of the meeting produced. He accepted that there were reasons why he was not being promoted to that post. No issue of dyslexia arose as a reason as to why he was not being promoted.

Hours of work

163. It was claimed the claimant's hours were cut because the claimant was dyslexic. There was confusion over hours of work for the claimant. The contract produced specified 16 hours. Mrs Whyte position was that when she checked the online HR file his hours were stated to be 12 hours per week His claim was that he had been told 20 hours and there was a "note on his file". However there was never any note produced to demonstrate he was contracted to work 20 hours. No finding could be made that he had been promised 20 hours. Neither was it established that his hours were cut to 12. Indeed as explained it appeared that the claimant worked a good number of hours in excess of 12 or 16 or 20 on a regular basis. There was no factual basis to this claim and so could not be caused by disability.

Claimant deliberately logged in late

164. The allegation that Tracey Whyte logged the claimant into work late when he was actually on time was unfounded. There was no factual basis that this happened and so there could be no claim that it happened because of disability.

Tracey Whyte told staff not to alter arrival time

165. The claimant maintained that in January 2018 Tracey Whyte asked other members of staff not to alter the claimant's arrival time. He claimed that the Barista Maestro who she instructed to do this apologised to him saying that Tracey Whyte had told her not to move or alter any of his sign in times. That was correct. However the Tribunal did not accept that the reason for these requests was because the claimant was disabled. It was because he had been late and Mrs Whyte wished to check his arrival time when she was not there. In any event the Tribunal would have had difficulty in establishing that there was any less favourable treatment caused by a Manager asking other members of staff to note when an employee arrived for work and not to alter any of that individual's sign in times.

Denied work in Dunfermline

166. It was maintained that the claimant was denied the opportunity to work in Dunfermline in December 2017. It was maintained this move was blocked by Tracey Whyte. As explained in the factual findings there was no evidence upon which the Tribunal could make a finding that this had happened.

Shifts at other stores blocked

167. In February 2018 it was maintained that Tracey Whyte had spoken to the Manager at Glenrothes about the claimant's disciplinary and final written warning which potentially blocked any move to another Costa store. The evidence from the claimant was not that the move had been blocked because he had a disability but because he had a poor disciplinary record. In any event the evidence for the Tribunal was to the effect that Mrs Whyte had work for the claimant in her own outlet and there was no need for him to work in another store. There was no evidence that any restriction on the claimant to work elsewhere was because of his disability.

Discrimination arising from Disability

168. The claimant makes 16 different claims of discrimination arising from disability.

169. Section 15 of the Equality Act 2010 states that a person (A) discriminates against a disabled person (B) if:-

- A treats B unfavourably because of something arising in consequence of B's disability, and

- A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

170. Section 15(2) goes on to state that the foregoing 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. In other words the section does not apply if the employer can establish that it was unaware that the claimant was disabled.

171. In this type of complaint the discriminatory treatment must be as a result of something arising in consequence of the claimant's disability, not the claimant's disability itself. None of the complaints narrated under this head indicate that the consequence of the disability for the claimant was late timekeeping and thus his dismissal was discriminatory because it was something which arose out of the disability itself (rather than he being dismissed because he was dyslexic). Even if that was a ground of complaint made by the claimant and mischaracterised as being "direct discrimination" the Tribunal made a finding that the respondent did not know and could not reasonably be expected to know of his disability at dismissal. Thus the actings of those involved could not have been discriminatory because of something arising from disability.

172. Additionally the Tribunal found no evidence that late timekeeping was a consequence of the appellant's dyslexia. As narrated the evidence did not support such a finding. Indeed there was no evidence from the claimant that late timekeeping was a consequence of his dyslexia.

173. While the claimant indicated at the appeal that he was dyslexic that was clearly a reference to his ability to read a document. Laura Crow therefore had knowledge of the claimant's claim he was dyslexic but the Tribunal did not consider that she refused the appeal because of something arising from that disability but because he had been late on a number of occasions. There was nothing stated by the claimant to the effect that the reason for his lateness was dyslexia either then or in his evidence to the Tribunal.

174. Fifteen of the complaints narrated as discrimination arising from disability relate to the treatment received by the claimant from Tracey Whyte.

175. The Tribunal did not accept that she knew of the claimant's disability. The Tribunal did not consider that the claim of discrimination arising from disability could stand given that the incidents occurred at a time when the respondent had no knowledge of the disability. In any event the Tribunal could not consider that the instances given were factually well founded in relation to the behaviour of Tracey Whyte towards the claimant or necessarily be unfavourable treatment.

176. The only allegation made at a time when the respondent would have knowledge of dyslexia is stated at (paragraph16 – J52) wherein it is stated that at the appeal the claimant "felt unable to get what he wanted to say across as Laura Crow would only cover what was said in the appeal letter. Joshua was informed that most of what he was saying was irrelevant as it was more related to a grievance and as he was no longer an employee this couldn't now be raised. Joshua was getting his words mixed and was struggling due to the stress he felt under, Joshua was not allowed to explain how the two were related e.g. not logging him in even if he was there on time, last minute shift changes, or less than an hour short notice shifts".

177. There are a number of factual inaccuracies in this statement. The appeal notes do not denote that the claimant was unable to get across what he wanted to say at the appeal. Indeed the appeal notes that he feels he has had that opportunity (J189). The evidence from the claimant to the Tribunal showed that he was well able to put his case. He was accompanied by Mr Simon Young who showed himself at the Tribunal to be perfectly willing to stand by the claimant and articulate matters on his behalf. The fact that the claimant had a dispute with Tracey Whyte on such issues as drinks and food suggested to the Tribunal that he was someone who was well able to stand his ground. The appeal notes do not indicate that the claimant was struggling to get his words out due to the stress involved or make any explanation as to his lateness. In any event the issue at appeal was dismissal due to being late and he had ample opportunity to make his explanation in that respect. As indicated he made no link between dyslexia and lateness. The difficulties articulated only related to the fact that he could not read a document. There was no ground for maintaining that even though the claimant was known to be dyslexic

at appeal he was discriminated against by the respondent at that time for the reasons enunciated.

Victimisation

178. There are 4 complaints made of victimisation. In terms of section 27 of the Equality Act 2010 a person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act or

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

179. "Protected act" is defined as:-

(a) bringing proceedings under this Act

(b) giving evidence or information in connection with proceedings under this Act

(c) doing any other thing for the purpose of or in connection with this act

(d) making an allegation (whether or not express) that A or another person has contravened this Act

180. None of the matters narrated as victimisation would fall within the category of a "protected act". There was no allegation by the appellant in the course of his employment that he would be bringing proceedings under the Equality Act 2010; giving evidence or information in connection with proceedings under the Act; do any other thing for the purpose of or in connection with the Act; or making any allegation that the Equality Act 2010 had been contravened. There is no evidence that he could then have been subject to a detriment because he had made such an allegation.

Harassment

181. Harassment occurs when a person (A) engages in unwanted conduct related to a relevant protected characteristic – section 26(1)(a) of the Equality Act 2010; and 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 – section 26(1)(b).

182. The unwanted conduct has to relate to a relevant protected characteristic (disability in this case).

183. Accordingly the 3 essential elements of an harassment claim are:-

- unwanted conduct
- that has the proscribed purpose or effect, and
- which relates to a relevant protected characteristic

184. The EHRC Employment Code indicates that "unwanted" does not mean that express objection is made to the conduct. It simply needs to be "unwelcome" or "uninvited".

185. There are 10 allegations of harassment.

186. It is alleged that from December 2017 onwards the claimant was not allowed to take a break even after 6 hours for work and was told "You don't deserve a break" or "You were signed in late so you don't get a break" or "You have not worked hard enough to get a break"; and "No means no". The allegation is that Tracey Whyte abused her power by illegally preventing the claimant from taking breaks. There was no foundation in fact for these allegations. The evidence was that breaks were allowed by the Manager. There was one occasion where there was an issue over breaks with the claimant leading to a dispute at the end of the day as to whether the bins were to be taken out by the claimant or not. That dispute seemed

to relate as to whether or not the claimant would be allowed out in the afternoon of his shift for a cigarette for 5 minutes or so which was denied. There was no entitlement to a cigarette break. There was no evidence from which the Tribunal could make a finding that the claimant was denied breaks.

187. There was a separate allegation made in relation to the incident involving the claimant taking out bins. There was nothing in this allegation which related to the claimant's disability. It formed a dispute between the claimant and the Manager. There was nothing in this incident which would suggest that the conduct was related to the claimant's dyslexia. Tracey Whyte had no knowledge of that disability. There was nothing said which would indicate that there was unwanted conduct related to the disability.

188. It was alleged that from February 2018 onwards if the claimant did not perform a task properly he would be told to do it again. It was stated that whenever the claimant got anything wrong the Manager would say "There will be consequences". The claimant found himself apologising. There was no fact or foundation for this allegation and nothing to suggest it was related to the claimant's disability.

189. It was maintained that in February 2018 that Tracey Whyte shouted at the claimant over his inability to wipe down a table quickly enough and that she did this in front of customers. There was no evidence that this conduct related to the claimant's dyslexia. There was no evidence that the claimant's dyslexia would cause him not to be able to wipe down a table or that the Manager was taking it out on the claimant because of his dyslexia when she did not know of his dyslexia.

190. An allegation was made that in February/March 2018 Tracey Whyte contacted the claimant to say that he needed to come in and cover a shift and if he didn't "there would be consequences". There was no factual foundation for that comment being made or how it could relate to the claimant's dyslexia.

191. It was alleged that from February/March 2018 onwards the claimant would be contacted by Tracey Whyte at short notice to cover shifts. She would say that "it

was up to him but if Joshua didn't come in she would say "if you want more hours you have to prove yourself" or "there would be consequences"" It was stated that when he arrived for the shift he would then be told he was late as she was expecting him in before then. None of these matters were held to be founded in fact or due to the claimant having a disability.

192. It was stated that in March 2018 the Manager told the claimant he could no longer get a staff discount at the start of his shift as it was "at the Manager's discretion and she knew historically he would just go along with it". That was not founded in fact. The findings on staff discount are referred to. The Tribunal did not find he was not told staff discount was at the Manager's discretion. The application of discount applied to all and was not related to disability.

193. It was stated that the Manager made the claimant queue for his lunch when the queue was so long it was backed out of the store and this was a "joke at his expense. Others were allowed to put the lunch through on a less busy till". This was not held to be founded in fact. The claimant was told to stand in a queue to get his lunch. So were other members of staff. He was not singled out. It was not a "joke at his expense" The conduct could not be seen to be related to the claimant's disability.

194. It was stated that on 3 April 2018 the Manageress told the claimant that he was late even though he thought he was on time and that he needed to get his car battery fixed. It was claimed that he had cut his hours down to 12 and that he could not purchase a car battery and stopped him getting shifts at other stores to which Mrs Whyte said "Yes I have". There was no evidence to suggest these matters were well founded. The findings deal with hours of work and shifts at other stores. In any event the conduct or comments were not related to the claimant's disability.

195. It was alleged that the handwritten notes made by Tracey Whyte were untrue when it stated "If you are late again then no matter what excuse you tell me you will be

investigated and disciplined". It was stated that Tracey Whyte said "I will make sure that you never work for Costa again". That was not founded in fact.

196. It was stated that within days of his grandmother being unwell the claimant had received a communication stating "gross misconduct". The claimant did not fully understand what that meant until discussing it with his parents. The "Manageress then phoned stating he had to attend the disciplinary hearing and the sick note made no difference to him getting fired". The claimant asked if he could move to another store. It is not clear how these issues were to relate to the claimant's disability. The claimant had been signed off with stress. There was no mention of dyslexia. The evidence from the witnesses was that there had been a consultation with HR about holding a disciplinary hearing if someone was signed off with stress to which the advice was that unless the "fit note" indicated that the person was too unwell to attend such a hearing then it could proceed. There was no evidence the conduct related to disability.

Duty to make Reasonable Adjustments

197. Section 20 of the Equality Act 2010 states that the duty to make adjustments comprises 3 requirements:-

- A requirement, where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage

- A requirement to take steps as are reasonable to have to take to avoid the disadvantage of a physical feature if that puts a disabled person at a substantial disadvantage. There is no such case here.

- A requirement to take steps as are reasonable to take to provide an auxiliary aid for a disabled person if he is at a substantial disadvantage without that aid. There is no such case here.

198. The duty to take reasonable adjustments applies to an employer. An employer will discriminate against a disabled person if it fails to comply with those duties.

199. Paragraph 20 of Schedule 8 to the Equality Act 2010 advises that there is no duty to make reasonable adjustments if "A does not know and could not reasonably be expected to know that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement".

200. There is a finding by the Tribunal that his Managers from Liam Reid through to Tracey Whyte did not know that he was disabled. The absence of that knowledge would mean that there is no claim under section 20 of the Equality Act 2010.

201. It was not found that the Manager Liam Reid knew of the disability and put in place adjustments to assist the claimant. Neither is it found to be the case that Tracey Whyte removed these adjustments and that she "ridiculed or made fun of" these adjustments. Neither were the Tribunal able to make a finding that the Manageress Tracey Whyte had been told of the claimant's learning difficulties and replied "I don't care" choosing to ignore adjustments that had been put in place.

202. Significantly there was no claim made that a reasonable adjustment for the claimant would have been to discuss his working arrangements given that his disability caused him to be late.

203. While knowledge of a disability places a burden on employers to make reasonable enquiries based on the information given to them there was no information given by the claimant about his dyslexia and in particular that it caused him to be late.

Indirect Discrimination

204. The first stage in showing that indirect discrimination has occurred is for a claimant to demonstrate that a provision, criterion or practice (PCP) has been "applied" to him or her – section 19(1) of the Equality Act 2010. An employee must identify the

PCP capable of supporting his or her case. The words "provision, criterion or practice" are not defined by the Equality Act. The EHRC Employment Code advises that "provision, criterion or practice" covers a wide range of conduct and should be construed widely as to include "any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions". However a claimant has to identify the PCP with precision otherwise the claim will fail.

205. It is also necessary for a claimant to show that the alleged discriminator applies a PCP to him or her which he applies, or would apply, equally to persons with whom the claimant does not share the relevant protected characteristic (the comparator group) – section 19(2)(a) of the Equality Act 2010. So the claimant needs to show the PCP was actually applied to him and to identify the time when it was applied because the claimant has to show that its application caused him or her to suffer a particular disadvantage – section 19(2)(c). That is relevant when considering the situation of other people who share the relevant protected characteristic (including hypothetical people) who will also need to have been shown to have been put at a disadvantage at the same time (protected group) – section 19(2)(b).

206. The purpose of indirect discrimination legislation is to challenge those employment practices that, while ostensibly applied in a neutral way, nonetheless have a greater disadvantageous effect on one protected group than on other people.

207. There are 7 complaints of indirect discrimination made by the claimant.

208. It was stated that all longstanding members of staff had been given the opportunity to train to become a Barista Maestro should they so wish but as a result of discrimination Joshua missed out on the opportunity of promotion. There is no PCP identified. It may be that the claimant's PCP is that all longstanding members of staff are allowed to train to become a Barista Maestro. That policy did not disadvantage the claimant or put those who shared his disability at a disadvantage.

209. The claimant states that Tracey Whyte advised him of the new Costa policy "knowing he would never be able to read them as he is dyslexic". As a result of this he missed out on various staff discounts including 25% and 50% off food and beverages. It is not clear what the PCP is in this case. It is not clear how he was put at a disadvantage compared with others given that as found all others appeared to be subject to the same policy in relation to staff discounts. There clearly was an issue over staff discounts amongst the employees at this outlet. It seems clear from the text that the policy was being applied to all in a mistaken way. There is no indirect discrimination established.

210. It was stated that in December 2017/January 2018 Tracey Whyte informed "Joshua in front of other staff members that all staff lateness in our store now needed to be recorded. She told Joshua that he didn't need to read it and just to sign it as it was busy in store. As a result of this he was denied the opportunities available as stated in the Costa own team members' handbook". The PCP could be said to be that lateness required to be recorded for all staff members. However given the failure to evidence a link between dyslexia and lateness (as discussed above) it would not be possible to show how the claimant was disadvantaged in this respect compared to others. The application of a policy to record lateness would be legitimate to operate the store effectively.

211. It is stated that end February onwards Tracey Whyte told "Joshua with other staff members present that it was not Costa policy to help out with shifts for other local stores without her consent. Tracey Whyte then informed the Managers Joshua was under disciplinary, final written notice. As a result of this he was denied the opportunity to cover shift for other local stores". The PCP would be that it was not Costa policy to allow staff to help out at other stores without the Manager's consent. There was no evidence that would disadvantage the claimant because of his disability or disadvantage others sharing the claimant's disability. The policy would ensure that there were sufficient staff to cover the Costa Next outlet.

212. It was stated that the process to raise a grievance was either to speak to the Manager or to read the "Store People Policy Guide". As a result of this the

claimant was not able to read and understand the document or locate it and so not able to make a grievance. The claim therefore would be that the PCP was to have the method of raising a grievance in writing. It would be claimed that would put a person with dyslexia at a disadvantage. In the evidence there were various reasons given why the claimant could not raise a grievance. It was not stated that he did not know the way in which a grievance could be raised. The evidence suggested that there was out of date information as to the phone number of the Area Manager or that the Area Managers kept changing. The claimant's position and the position of Simon Young was that in terms of the policy Simon Young could not raise a grievance on someone else's behalf. So the evidence was not to the effect that the claimant could not find out the information. The position appeared to be that he had found out how to do this but there were other obstacles in his way. The Tribunal's view was that there were rather flimsy reasons being given by the claimant and Mr Young as to why he did not raise a grievance rather than he had been denied the opportunity to know how to raise a grievance because he could not read the policy. The Tribunal did not consider that he was being put at a particular disadvantage because the method of raising a grievance was in written form. His position was that there were those around him who could help if he struggled (his family and colleagues) with words. The evidence was that he was slow in reading but not that he was unable to do so.

213. It is alleged that Tracey Whyte contacted the claimant on 20 April 2018 to make sure he had received her letter and "that he was being fired for gross misconduct". It was also stated that a "sickness note made no difference to this process". Accordingly the claimant believed "he would be fired for gross misconduct with no opportunity to be represented or to state his case against such action". The letter of 28 April 2018 was to invite him to a disciplinary hearing. The Tribunal did not find that Mrs Whyte told the claimant he was being fired for gross misconduct. If the PCP is intended to be that employees off sick would still require to attend a disciplinary hearing then it seemed to be a policy that applied to all employees. It would not seem to disadvantage the claimant in particular because he had dyslexia.

214. It is stated that on 29 May 2008 “Joshua and his representative are informed at appeal that the Costa employee handbooks were company property to keep or destroy as they wished”. Accordingly given they were destroyed prior to appeal that would mean that the claimant would require to complete the whole Costa training handbooks again in order to be reinstated and to continue working. It is the case that handbooks were disposed of prior to the appeal. As indicated this was done by a member of staff at the store without instruction from Tracey Whyte. It is not the case that for the claimant to be reinstated he would require to have gone through that training process again because he had the certificate indicating that he had completed the training and so the disadvantage asserted would not come about. It could be that at a Costa Franchise the certificate would not be accepted and so the books would require to be redone but there was no evidence from the claimant that this had caused him any particular disadvantage.

215. In all the circumstances the Tribunal were unable to uphold any of the claims of discrimination under sections 13,15,19, 20,26 or 27 of the Equality Act 2010.

Breach of contract

216. If an employee is dismissed with no notice or inadequate notice in circumstances which do not entitle the employer to dismiss summarily, this will amount to a wrongful dismissal and the employee will be entitled to claim damages in respect of contractual notice period. The measure of damages in a wrongful dismissal claim will be limited to the employee’s losses occurring between the period between dismissal and the point at which the contract could lawfully have been brought to an end i.e. the contractual notice period.

217. The statement of terms for the claimant (J86, 86A) advises that the notice period should be one week for each year of service (up to the maximum of 12 weeks) and that termination without notice applies “if you are dismissed for gross misconduct”.

218. In this case the claimant was not dismissed for gross misconduct but "misconduct" and so in terms of his contract it would appear that there has been a breach which would entitle him to his notice pay.

219. The "Line Manager Disciplinary Process" for the respondent (J97c) advised that a disciplinary option of summary dismissal (no notice pay) was appropriate for a "one off act of gross misconduct". However "misconduct issues" would be a dismissal "with notice" if "already a number of warnings on file for same offence".

220. Accordingly it appears the dismissal by the claimant for misconduct should have been "with notice" in terms of the contract that he had and the Line Manager's guidance on disciplinary process which was in line with the contract. If that is right then the claimant would be entitled to his notice pay.

221. However the jurisdiction of the Tribunal to consider breach of contract claims is given by the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 which states that such claim must be presented to the Tribunal within 3 months of the effective date of termination unless that was not "reasonably practicable". In this case the effective date of termination has been decided as 9 May 2018 and the claim which included the claim for notice pay was not presented within the 3 month period. The claimant then comes up against the same problem as in the clam of unfair dismissal.

222. The note of the preliminary hearing (case management discussion) of 16 April 2019 indicated that the breach of contract claim would require to be determined at the final hearing and was not met by any response that time bar would operate. There was no submission or reference to time bar from either party made at the hearing. But time bar goes to jurisdiction of a Tribunal to hear a claim and case law states it cannot be waived or deemed to be waived by the parties or the Tribunal. If it is not raised as an issue a Tribunal must still address it. The relevant provision on time bar is in the same terms as considered by Judge Kemp in his decision that the claim of unfair dismissal could not be heard as the claimant had not established that it was "not reasonably practicable" to have lodged the claim in

time. The Tribunal follow that decision as there is no reason to consider any other circumstance prevailed than that given in the earlier hearing on the same issue. There is no provision in these Regulations that it would be "just and equitable" to extend time. Accordingly while the civil Sheriff Court may have jurisdiction to hear such a claim as it is not restricted by the same time bar provision the Tribunal has no jurisdiction.

Date of Judgement: 18th September 2019
Employment Judge: J Young
Date Entered in Register: 25th September 2019
And Copied to Parties