EMPLOYMENT TRIBUNALS

Claimant:	**Miss M Budding**
Respondents:	**1. Boots UK Limited**
	2. Miss A Black
Heard by CVP:	**26 to 30 May 2021**
Before:	**Employment Judge Rogerson**
Members:	**Mr G Corbett**
	Mr T Downes

Representation

Claimant:	Mr L Bronze, Counsel
Respondent:	Mr T Walker, Counsel

RESERVED JUDGMENT

1 All complaints of disability discrimination (failure to make reasonable adjustments, direct disability discrimination and harassment related to disability) fail and are dismissed.

2 The complaint of victimisation fails and is dismissed.

3 The complaint of wrongful dismissal fails and is dismissed.

REASONS

Issues

1. The following complaints and issues were to be determined at this hearing identifying the applicable law for each complaint.

Disability discrimination

2. It is accepted that at the material time, the claimant was a disabled person by reason of her epilepsy. The material time for the purposes of the disability discrimination complaints is 17 July 2019 until dismissal on 17 March 2020.

Direct discrimination (Section 13 Equality Act 2010)

3. The claimant alleges R1 and R2 treated her less favourably on the grounds of her disability by committing the following acts or failures to act:

3.1 Failing to provide Estee Lauder training on 4 November 2019.

3.2 Failure to provide new make-up brushes.

3.3 Failure to offer rewards in the form of vouchers and gift cards.

3.4 Failing to allow the claimant to talk to other brands to learn about them to better advice to customers.

3.5 Failure to inform the claimant of positive customer feedback promptly.

3.6 Failure to promptly deal with the claimant's grievance.

3.7 Setting fixed breaks for the claimant on her return to work from 5 December 2019.

Disability Related Harassment (Section 26 Equality Act 2010)

4. The claimant alleges R1 and R2 engaged in unwanted conduct related to her disability in the following ways.

4.1 R2 referring to the claimant as "arsy and snappy" in an Occupational Health referral dated 13 March 2020.

4.2 R1(Miss Cook) and R2 asking for repeated proof of epilepsy and Ms Cook saying to the claimant "well it's your fault you've got epilepsy".

4.3 R1(Miss Cook) ignoring the grievance for over a month (from 26 September 2019 to 16 October 2019).

4.4 R1 and R2 leaving the claimant's product allowance until the last minute.

4.5 R1(Miss Cook) and R2 not reporting the claimant's seizures in the accident book.

4.6 R2 making the claimant feel humiliated when the claimant had come around from a seizure in the men's toilet when she said: "you're joking".

4.7 The claimant repeatedly asking R2 for brushes and being told "oh they're probably in the cleaning cupboard".

4.8 R1(Ms Gillings) making the claimant wait in a room from 10.45 until 2pm with no toilet break, no water, no food before being suspended on 7 February 2020.

4.9 R2 failing to reward the claimant promptly and only with bonus points, not vouchers or gifts.

4.10 R2 repeatedly calling the claimant into the office for a "chat" when the claimant was on a break/ trying to eat food to discuss various conduct issues.

4.11 R2 telling claimant her new uniform was in a cleaning cupboard with mop and bucket when the claimant asked for a new uniform

4.12 R2 failing to organise Occupational Heath referrals promptly.

5. If that conduct occurred was the conduct unwanted conduct related to the claimant's disability?

6. If so, did that conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

7. In deciding whether the conduct has that effect each of the following factors must be considered:

    (a) The perception of the claimant (section 26(4)(a);

    (b) The other circumstances of the case;(section 26(4)(b):

    (c) Whether it is reasonable for the conduct to have that effect (section 24(4)(c).

Failure to make Reasonable Adjustments Section 20 and 21 Equality Act 2010

8. In further and better particulars provided by the claimant on 22 September 2020 (pages 53 to 56 in the bundle) the claimant did not identify the provision, criterion or practice applied by R1 that put the claimant as a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. This is the requirement under section 20(3) Equality Act 2010 the claimant relies upon to allege that the respondent failed in its duty to her to make reasonable adjustments.

9. At this hearing Mr Bronze agreed that was the position and sought to rely on the following PCPs:

    9.1 The requirement for the claimant to work set shifts with a fixed end time of 7.15 pm.

    9.2 The requirement for employees to have fixed break times and/or take a one-hour break or two 30- minute breaks.

    9.3 Not allowing the claimant to have water at her workstation on the shop floor.

10. For the first 2 PCP's it was agreed the claimant had not worked any shift ending at 7.15pm and that she was allocated fixed protected breaks on her return to work on 5 December 2019. For the third PCP it was agreed that R1 applied a practice to all its Boots Beauty Specialists ("BBS") of not allowing them to have water at their workstations on the shop floor. It is the respondent's case that an exception was made for the claimant as a reasonable adjustment before she returned to work on 5 December 2019.

11. It was explained to Mr Bronze that if the PCP's were in fact reasonable adjustments made for the claimant as a disabled person the claimant was being treated more favourably in relation to those matters than non-disabled BBS's. It was for the claimant to prove the necessary facts to establish a prima facie case, that the requirements of section 20(3) Equality Act 2010(EQA 2010) and section 21(EQA 2010) were breached for liability to be established.

12. Despite identifying these difficulties at the beginning and at the end of the hearing Mr Bronze confirmed he was still instructed to continue to pursue the complaint of a failure to make reasonable adjustments.

Victimisation

13. It is accepted that the claimant did a protected act by raising a grievance alleging disability discrimination which was received by the respondent on 27 September 2019. The issue was whether the first respondent had subjected the claimant to a detriment by dismissing her on 17 March 2020 because she had done that protected act on 27 September 2019.

14. Was the decision maker (Mrs N Arthur) subconsciously or consciously materially influenced to a significant extent by the grievance when she dismissed the claimant?

Wrongful dismissal

15. Did the claimant commit a repudiatory breach of her contract by committing acts of gross misconduct which would entitle the respondent to summarily dismiss the claimant? It is for the respondent to prove this on the balance of probabilities.

16. If the respondent was not entitled to summarily dismiss the claimant it is agreed, the claimant is entitled to four week's pay (notice pay) as damages for breach of contract.

Jurisdiction

17. The claim was received on 26 June 2020. Any act predating 15 March 2020 is out of time unless the claimant can rely on section 123(3)(a) and it is conduct extending over a period to be treated as done at the end of the period (course of continuing conduct) or the claimant has shown just and equitable grounds for extending time.

18. The claimant has not adduced any evidence to support a just and equitable extension of time and relies upon section 123(3)(a) to argue that the pre-dismissal out of time discrimination allegations are part of conduct extending over a period ending with the dismissal on 17 March 2020.

Assessment of Credibility

19. The parties agreed the claimant and her witness would give evidence first and then the respondent witnesses. We also saw documents from an agreed bundle of documents. Where the Tribunal had to resolve disputed facts based on our assessment of the credibility of the evidence, we preferred the respondent's witness evidence to the claimant's witness evidence.

20. The respondent's witnesses gave their evidence in a more straightforward and open way and their evidence was corroborated by the contemporaneous documentary evidence. The claimant was extremely dismissive of that contemporaneous documentary evidence accusing the respondent's witnesses of dishonesty, incompetence and unprofessionalism. She alleged the respondent's witnesses had fabricated that evidence and that they were lying. We did not agree. On the contrary we found her evidence did not withstand scrutiny under cross examination and was not supported by the reliable contemporaneous documentary evidence. Overall, we found the claimant's recollection of events was less reliable and less credible. We will set out in our findings how we resolved each of the factual disputes in this case to support out assessment of credibility.

Burden of proof

21. For the discrimination complaints it was for the claimant to establish a prima facie case of unlawful discrimination contrary to sections 13, 20 and 21, 26 and 27 of the EQA 2010 before the burden of proof shifted to the respondents to provide a non-discriminatory explanation for that treatment (section 136 'EQA 2010'). For the wrongful dismissal complaint, it was for the employer (R1) to prove on the balance of probabilities that the claimant had committed the misconduct which was sufficiently serious for the employer to treat it as a repudiatory breach of contract which entitled the employer to summarily dismiss the claimant.

Assessment of witness credibility

22. The parties agreed the claimant and her witness would give their evidence first. We also saw documents from an agreed bundle of documents. Where the Tribunal had to resolve disputed facts based on an assessment of the credibility of the evidence, we preferred the respondent's witness evidence to the claimant's witness evidence. The respondent's witnesses gave their evidence in a more straightforward and open way and that evidence was corroborated by the contemporaneous documentary evidence. The claimant was extremely dismissive of the value of the contemporaneous documentary evidence accusing the respondent's witnesses of dishonesty, incompetence and unprofessionalism. She alleged the respondent's witnesses had lied and that evidence was fabricated. We did not agree. We found it was the claimant's evidence which did not withstand scrutiny under cross examination and her evidence was not supported by the contemporaneous documents. Overall, we found the claimant's recollection of events was less reliable and less credible. We will set out in our findings how we resolved each of the factual disputes in this case to support out assessment of credibility.

23. To make these reasons easier to follow the Tribunal have identified the main complaints that are linked ending with the dismissal which would need to be in time for the out of time to be considered as conduct extending over a period. Then at the end separately dealt with the alleged one-off acts or omissions and a summary of conclusions.

Findings of fact

24. The Tribunal heard evidence for the claimant from the claimant and from her union representative Mrs S Savage (USDAW). For the respondents we heard evidence from: Miss A Black (Assistant Manager, Miss K Cook (Store Manager), Mrs C Atkin (Store Manager), Mrs J Poskitt (Store Manager), Mrs N Arthur (Store Manager).

25. The claimant was employed by Boots UK Limited **'**R1' as a Boots Beauty Specialist (BBS) at its store, located in the St Stephen's shopping centre in Hull. Her employment began on 1 May 2019 and ended with her summary dismissal on 17 March 2020.

Contract of Employment/Policies and Procedures

26. The claimant was employed to work 20 hours per week. Her contract of employment provided that the days and hours she worked could be "variable", depending on the business needs and operational requirements and that she would be given reasonable notice of any changes. The contract also provides for 4 weeks' notice of termination to be given by the employer, reserving the right to summarily dismiss without notice in cases of gross misconduct. The contract requires that "*all employee conform to the standards of behaviour and performance set"* by the respondent and refers employees to the grievance policies and disciplinary policy and explains how all policies can be accessed on the intranet.

27. The respondent also has a detailed 'Dignity at Work' policy which is regularly reviewed and updated. The last review and update of the policy took place in March 2020. The policy identifies what "Equality of Opportunity" means to R1, identifying the protected characteristics and the types of unlawful discrimination under the Equality Act 2010. It identifies that the employer and employees have responsibility to ensure they comply with the policy and understand their legal obligations. The policy also ensures employees have a way of raising complaints and commits to regularly monitoring the outcome of complaints to ensure compliance. The

managers that gave evidence at this hearing confirmed they had received training on the policies which was updated regularly. They demonstrated an understanding of the policies and of their obligations as manager to prevent discrimination occurring in the workplace.

Knowledge of disability

28. Miss Cook was the temporary Store Manager covering Mrs Atkins maternity leave from 11 February 2019 to 25 October 2019. Miss Black was the Assistant Store Manager from May 2019 and is the second respondent (R2). As the Assistant Store Manager Miss Black managed the claimant and 32 other staff who were based at the store in Hull.

29. On 29 June 2019, the claimant commenced a period of sickness absence returning to work on 2 July 2019. Miss Black conducted a return to work meeting using a proforma form (pages 185 to 187). This was completed contemporaneously and records the discussion between the claimant and Miss Black signed by both to confirm the accuracy of the record. During the meeting, the claimant confirmed she was due to have a medical examination to check for a brain tumour on 19 July 2019. The claimant raised the possibility of a diagnosis of epilepsy. Miss Black asked the claimant to provide her with a guidance letter from the specialist after the assessment to help her to support the claimant at work. Miss Black intended to use the guidance for managers and for First Aiders and recorded her intention in the record.

30. It was clear from our reading of the document that this was a supportive meeting. As the claimant's manager and designated First Aider, Miss Black had a vested interest in finding out as much information as she could about the disability from the claimant and any other source. Ms Black spoke with the claimant about how seizure activity affected her so she could recognise the signs and assist if it happened at work. Miss Black already had some experience because another member of staff at the store had been diagnosed with epilepsy five years previously and had also suffered with seizures at work. Miss Black and Mrs Atkins had direct experience having provided support to that member of staff when she had experienced a seizure at work but recognised that each person can be affected in different ways and may have different triggers for seizure activity.

31. On 19 July 2019, the claimant attended her appointment with the specialist. He provided a guidance letter for Miss Black which refers to a "diagnosis of probable epilepsy". It identifies the triggers for seizure activity are "*stress, anxiety, sleep deprivation and heat*". The letter recommends that "*when the claimant becomes hot, she does find that she would have seizure activity. We have advised her, that if possible, she should have regular breaks where she can have some fresh air and drink some water*".

32. Miss Black accepted that diagnosis and the advice. On the back of the letter she wrote that the claimant "*was to have two split breaks and can come for water when needed. Permission to leave shop floor for drink or fresh water when needed*". This was consistent with the claimant's evidence that Miss Black was supportive when she found out about the claimant's epilepsy. The claimant made no complaints about Miss Black or Miss Cook until her grievance in September 2019.

33. The claimant now alleges (allegation 4.2) that Miss Cook and Miss Black subjected her to unwanted conduct related to her disability because they asked for "*repeated proof of epilepsy*". Miss Black and Miss Cook accepted the epilepsy diagnosis and

did not question it. After diagnosis Miss Black sought guidance about how the claimant could be supported with the epilepsy in the workplace if she had a seizure. The question mark (if any was raised) came from the specialist who refers to it as 'probable epilepsy'. The respondent already had 5 years of experience of supporting another employee in the store with this condition and there was no evidence to support any inference that R1 or R2 had formed a negative view about epilepsy or had demonstrated a negative attitude towards employees with epilepsy. Miss Black spoke to the claimant and produced some typed guidance notes based on the information she had gathered. The claimant suggests this document is fabricated and that Miss Black made it all up. There was no reason for Miss Black to 'make up it up'. She had indicated her intention to gather this information at the earlier return to work meeting. The notes she prepared served no other purpose and were not made up by Miss Black for the purposes of these proceedings.

34. The claimant also alleges that on one occasion she had a seizure at work and when she came out of the seizure, she found herself in the men's toilets. She did not discuss this with Miss Black at the time it happened in order to bring it to her attention. Miss Black was having lunch when she overheard the claimant joking about the incident with another colleague. She was shocked to hear this and said: "your joking" asking the claimant if she had hurt herself. The claimant confirmed she was fine and was not injured and Miss Black left it at that. The context in which the comment was made was important. The claimant was laughing about this with a colleague treating it as humorous. Miss Blacks was not sharing in with laughter. She expressed concern about the claimant to check she was not injured. There was no history of treatment from which any adverse inference could be drawn that Miss Black was either not taking the claimant's disability seriously or had previously adopted a jokey or dismissive attitude to the claimant having a seizure. On the contrary from the outset she took the risk of seizures at work very seriously and was proactive in seeking information so she would be ready to support the claimant at work.

<u>Change of finish time to 7.15pm</u>

35. On 10 September 2019, Miss Cook sent the claimant a text message attaching the rota for 4 weeks commencing Sunday 8 September 2019. In September 2019 the rotas were sent by text by December 2019 a new electronic system replaced the text notification system.

36. Before the claimant received that rota, she had already sent a text message to Miss Cook to let her know she could not work on the 19 September 2019 or 30 September 2019 because of doctors/hospital appointments. Miss Cook did not rota the claimant to work those dates. There was friendly exchange of text messages demonstrating a supportive attitude accommodating medical appointments relating to the claimant's disability.

37. The claimant was rostered to work Wednesday 11 September 2019 9.30am to 5.30pm; Friday 13 September 11.15am to 7.15pm, and Saturday 14 September 2019 8.30 to 4.30pm. Miss Cook had for the first time changed the 11 am -7pm shift to 11.15 to 7.15pm. The store closed at 7pm but she felt a 7.15pm finish would help better serve customer needs and help better manage the store at this busy time.

38. The claimant did not raise any issues with the rota on 11 September 2019. On 13 September 2019, she was due to work the adjusted shift of 11.15am to 7.15pm. She had some notice of the change but did not say anything to any of her managers

during the shift. She finished her shift at 7pm and was about to leave the store when Miss Cook asked her why she was leaving before her finish time of 7.15pm. The claimant told Miss Cook she had a bus to catch and left without any further explanation.

39. In her witness statement the claimant suggests she was taken by surprise by the requirement on the 13 September 2019, which the text messages show was not true. Whilst it is true that very short notice of the change was given to all the BBS's the claimant had the opportunity to speak to Miss Cook in the days preceding her shift on 13 September 2019 to explain why she could not work to 7.15 pm. The previous friendly text exchanges indicate there was flexibility when problems were raised with Miss Cook. On those undisputed facts it was clear the claimant did not work until 7.15 pm on 13 September 2019 and the only difficulty she identified that day was she had a bus to catch not how that caused any difficulties related to her epilepsy. There was no other occasion when the claimant was asked to work until 7.15pm.

40. On 19 September 2019 wrote to Miss Black explaining why she could not work until 7.15pm. She explained her bus left at 7.10pm and if she missed that bus, she would not get home until after 8pm which was when she had to take her epilepsy medication with food. She complained about the short notice suggesting that 4 weeks' notice should be given if any change to her hours of work were to be made.

41. On 24 September 2019 the claimant rang the store to speak to Miss Black. Miss Black was unavailable. She spoke to Miss Cook, who was not aware of the letter. Miss Cook asked some questions to try to better understand the situation. She suggested the claimant speak to Miss Black to find a solution. In response the claimant said: "*you don't care*".

42. The claimant alleges (allegation 4.2) that Miss Cook response to that was *"it's not my fault you have epilepsy*". Miss Cook denied making the comment. She recalls that the claimant was angry and abusive in the telephone call. She was so concerned about the claimant's behaviour that she contacted the HR (People Point) helpline for advice. The helpline summary records when the call was made, who made the call, what was said what advice was given. Miss Cook also made her own a detailed handwritten note (pages 113 to 115) recording the claimant's comment of "*you don't care*" and her response of "*No. it's not my fault where you live. We need to check this*."

43. We preferred Miss Cook's evidence which was supported by the contemporaneous documentary evidence. When Miss Cook prepared this note in September 2019, she could not have known these proceedings were contemplated. She was making this record and was seeking HR advice because she was concerned about the claimant's behaviour.

44. When these contemporaneous documents and the HR records were put to the claimant to suggest her recollection of the call may be mistaken, she was adamant she was right, suggesting these documents had been fabricated by Miss Cook and HR. That was a theme running through the claimant's evidence. She was dismissive and accused managers of incompetence and unprofessionalism irrespective of the strength of any evidence she was shown. There was no reason why an independent HR adviser would fabricate records for the purpose of these proceedings. The HR records were independently to record interactions between managers and HR. If a further situation arose and another call was made that call history was available. The claimant has gone to great lengths to attack everyone

and anyone involved rather than taking a step back and considering whether she might simply be mistaken

45. At the end of the call on 24 September 2019, the claimant told Miss Cook she would be ringing in sick the next day which is what she did and remained absent from work until 5 December 2019.

Grievance

46. The claimant sent in a grievance letter dated 24 September which was received at the store on 27 September 2019 (page 194). In that grievance the claimant complains of "*victimisation due to her epilepsy*" because of the 7.15pm finish. She also raised concerns about an 8.30am starts if she was required to use public transport. She said she would need to get up at 5am to get ready for work and travel in, depriving her of sleep which could then cause seizures. She explained she could work 8.30am on certain days when she could get a lift into work. She complained the respondent had failed to make reasonable adjustments for her epilepsy. It is accepted that this letter is a protected act by the claimant under section 27(2) Equality Act 2010 because the claimant is making express allegations that the respondent has contravened the Equality Act 2010 by victimising her and by failing to make reasonable adjustments.

47. By a letter dated 1 October 2019 Miss Cook acknowledged the grievance letter. She informed the claimant that because the grievance had referred to Miss Cook and to Miss Black, a different manager would have to be appointed to deal with the grievance. She requested the claimant's consent to obtain Occupational Health advice in line with the respondent's Absence Management procedures.

48. For the claimant's complaint of harassment related to disability (allegations 3.5 and 4.3) the asserted facts are that the respondent failed to deal with her grievance by ignoring it for over a month. Those asserted facts were untrue. The claimant's grievance was not ignored it was acknowledged within four days of receipt. In the claimant's witness statement, she asserts that because she had not had any response, she was forced to chase the grievance on 15 October 2019. Her statement does not refer to the email she sent Miss Cook on 7 October 2019 consenting to the Occupational Health referral. Only in cross-examination did the claimant eventually accept that she had received a response to her grievance on 1 October 2019. The claimant then sought to change her complaint from the pleaded 'no grievance response' to an 'inadequate grievance response'. Rather than admit a mistake and withdraw that complaint the claimant continued to pursue this allegation unsupported by her own email (contemporaneous document).

49. Miss Poskitt was the independent manager appointed to hear the claimant's grievance. She carried out a thorough and fair investigation of the claimant's grievance within a reasonable time frame given the claimant sickness absence. Mis Poskitt held a grievance meeting with the claimant on 14 November. She conducted investigation meetings with Miss Cook and Miss Black. She provided the claimant with a grievance outcome at a meeting on 25 November 2019 (pages 229 to 239). She found that the rota situation and the short notice changes could have been handled better. She noted there was a new electronic system in place which should sort out the problem and provide more notice of the shifts allowing more time for any problems to be identified and resolved. Miss Poskitt found that there had been a communication problem between the claimant and her managers. As a result, managers were unaware of any difficulties the claimant had when the rotas were prepared. Miss Poskitt suggested that the claimant and her managers sit down and

discuss it so managers could have a better understanding of the claimant's epilepsy and its effects when making management decisions. The claimant agreed to resolve her grievance by having a mediation meeting with Miss Cook, Miss Black and Mrs Atkins.

Agreed Reasonable Adjustments

50. Mrs Atkins had returned to work from maternity leave. She recalled that the mediation went 'really well'. The claimant told her about the shift times/days that she had difficulties with and raised her concern that if she did not have regular breaks she was at greater risk of seizures because she could not eat regularly. Mrs Atkins made sure the rotas included protected breaks for the claimant at regular intervals by splitting up the working time with break time, into as equal parts as possible. The claimant had also told Mrs Atkins that she wanted to work Thursday, Friday and Saturday. Mrs Atkins agreed to that request. It was also agreed the claimant could have water at her workstation on the shop floor and could (as previously agreed) go outside for fresh air whenever she needed to. Mrs Atkins agreed all the requested adjustments at this meeting before the claimant's return to work.

51. The claimant complaint in these proceedings is that she did not want fixed breaks. The practice applied to BBS was that scheduled breaks could be changed or delayed if a customer needed to be served or if a colleague had been delayed taking a break having a knock-on effect on the next break. This meant the claimant could not eat food at regular intervals putting her at risk of a seizure. The fixed breaks or protected breaks gave the claimant certainty knowing that she could have an uninterrupted fixed break enabling her to eat and have a rest. If the claimant had not requested 'fixed' breaks Mrs Atkins would have had no reason to organise them in the way she did solely for the claimant who was more favourably treated than her non-disabled BBS colleagues.

52. It was not clear to the Tribunal what further steps the respondent could have taken after agreeing all the adjustments the claimant requested (the days and shifts the claimant worked, protected breaks, access to water at the workstation and permission to take fresh air breaks, as and when required). The respondent had taken all reasonable steps to avoid any of the substantial disadvantages the claimant had identified to the respondent before she returned to work. The claimant has not proved a prima facie case of a failure to make reasonable adjustments contrary to sections 20(3) and 21 Equality Act 2010. The claimant was being treated more favourably as a disabled person in relation to each of the matters she complains about.

Claimant's conduct/behaviour issues prior to dismissal

53. The claimant returned to work on 5 December 2019. A return to work was completed by Miss Black confirming the agreed adjustments would be reviewed and monitored. The return to work was signed by the claimant.

54. Miss Black also completed a risk assessment identifying all the possible locations the claimant might be in at work so that the appropriate measures were agreed and put in place to protect the claimant. The claimant says that this is another fabricated document because she had not signed the risk assessment. While the claimant did not sign it (and the form does not provide a space for her signature) that did not mean the detailed information contained in the assessment was fabricated by Miss Black for the purposes of these proceedings. Miss Black was following

Occupational Health Advice which had recommended a risk assessment. The risk assessment was not fabricated by Miss Black.

55. When the claimant returned to work concerns were raised about the claimant's behaviour at work. The first incident took place on 28 December 2019 (pages 241 to 242) when the claimant was disrespectful and rude to Miss Black in a morning team meeting. Miss Black made a detailed record of that informal discussion which was witnessed by another manager. It records that during the morning meeting Miss Black had given an instruction to the BBS's which included temporary staff recruited for the busy Christmas period. The claimant's response to the instruction was "*it's so boring such a waste of time"*. Miss Black spoke to the claimant after the meeting. The claimant explained she was "*tired and arsy*" because the meeting was in the morning. Miss Black said she could look again at the 8.30am start which had been agreed with the claimant on the days she was able to get a lift to work, but told the claimant that did not excuse her behaviour in front of her colleagues and her manager. Miss Black confirmed that even if the claimant had held that about a manager's instruction it was not appropriate for her to voice it in that forum in the way she did.

56. The claimant denies using the word 'arsy' and accuses Miss Black of being unprofessional and incompetent. We disagree and found the record of the discussion is an accurate record of the measured way in which Miss Black informally raised her concerns about the claimant's behaviour. The claimant had used the word 'arsy'. If that was not the word the claimant used there was no other reason why Miss Black would note that word in her contemporaneous note of the discussion.

57. The second incident that occurred was on 11 January 2020 (see page 244 for the record of the documented conversation with the claimant signed by the claimant). This was a discussion between the claimant and Miss Black witnessed by another manager. The claimant was warned her behaviour had fallen below the expected standard of behaviour in front of colleagues and customers. The claimant was reminded of the expected standards of behaviour and was warned that if there were any further issues they may be dealt with by way of a formal process.

58. The third incident was on 16 January 2020 and related to the way the claimant had spoken to another manager (E) in the canteen complaining about the state of the toilets. This incident had been witnessed by a colleague who then made the complaint about the claimant's behaviour. This colleague described the claimant's angry outburst at (E) which had stunned the canteen into silence. An investigation was conducted. The manager (E) and other witnesses corroborated the complainants account. When interviewed, the claimant accepted she complained about the state of the toilets but denied any angry outburst. At this hearing the claimant's evidence changed she denied that she had complained about the state of the toilets and said she "*politely alerted the manager E that there was no toilet roll in the toilets in case someone else was caught short*". The claimant's account was internally and externally inconsistent with the contemporaneous record of the interview notes signed by the claimant and the others supporting the complaint made.

59. It is the claimant's case that every time these 'chats' took place the claimant was being pulled up unfairly on trivial matters (see allegation 4.10). The claimant alleges Miss Black was repeatedly calling the claimant into the office for a "chat" when the claimant was on a break/ trying to eat food to discuss various conduct issues. The

claimant has not adduced any evidence to show the timing of these "chats" corresponded to her break times. The contemporaneous notes of each discussion confirm the matter raised was sufficiently serious for the manager to document it. Miss Black had reasonably formed the view the claimant's conduct was inappropriate and breached the expected acceptable standard of conduct in the workplace. The Tribunal does not accept the claimant's assertion that these records have also been fabricated. On at least three occasions prior to the claimant's dismissal, she had been informally warned that her behaviour fell below the expected standards and that repetition may result in formal action.

Disciplinary proceedings

60. On 6 February 2020 another colleague(A) made a complaint that the claimant was abusive and confrontational. She identified that 2 other colleagues (A) and (B) had witnessed the incident. (A) was interviewed by Miss Gillings, Assistant Manager. (A) was able to provide a detailed account of the event in answer to an open question asking (A) to explain what had happened. (A) described how Mrs Atkins had asked for a promotional pop up stand for a cancer awareness event to be put up in the store and the claimant was assisting another colleague (C) with that task. (A) reported that the claimant ripped the stand in anger and had said "*I aren't fucking putting this up, it's a waste of my time"*. The claimant took the pop-up stand to the loading area, threw it on top of some excess delivery and said: "*I aren't fucking putting this up, we don't need it up"*. When (A) told the claimant that Mrs Atkins wanted the stand putting out, the claimant responded with "*she can fucking put it up herself then can't she*" and stormed off. The other witness to the incident (B) provided a statement which corroborated (A)'s account. (C) confirmed she had heard the claimant use the 'F' word but did not know the context in which the word was used.

61. An investigatory interview was conducted with the claimant on 6 February 2020. It started at 15:20 and finished at 15:59 lasting 39 minutes. Miss Gillings put (A)'s statement to the claimant who was very angry that (A) had made the complaint about her. The claimant denied 'ripping up' the stand but admitted pulling a part out. It is important to note that (A) did not allege the claimant had 'ripped it up' she had alleged it was ripped in anger. Despite seeing A's interview notes during the internal process and at this hearing the claimant has continued to misrepresent the allegation made by (A). The claimant denied swearing or making any reference at all to Mrs Atkins. During the interview Miss Gillings explained why this sort of language was not appropriate in the workplace. On three separate occasions during the interview the claimant denied swearing.

62. Ms Gillings was concerned about the claimant's reaction during the interview to the complainant (A) and was worried the claimant might confront (A). She wanted to ensure their paths did not cross while they were both at work to avoid any confrontation during the investigation. During the interview on 6 February 2019, the claimant informed Ms Gillings that she had a seizure that morning and had fallen on the stairs, bruised her knee and banged her head. She said that that had happened at about 9.30am but had not reported it to any of her managers and confirmed she was reporting it for the first time. Ms Gillings reported it in the accident record on 6 February 2021 (see page 120). The claimant's complaint (allegation 4.5) is that Ms Cook and Miss Black subjected her to unwanted conduct related to her disability by not reporting the claimant's seizures in the accident book. We agreed with Mr Walker submission point that seizures of themselves did not amount to accidents which the respondent was required to record in an accident

report. On the claimant's evidence she had only one accident at work during seizure activity which she reported to Miss Gillings on 6 February 2020 and that accident was recorded as an accident at work. It is difficult to see how Miss Black or Miss Cook could be subjecting the claimant to unwanted conduct relating to her disability when no accidents at work had been reported to them for them to record.

63. The claimant had a second investigatory interview on 7 February which started at 11.53 and finished at 12.11 lasting 18 minutes. At this second interview the claimant was shown the statements of B and C. The claimant denied she had sworn until she was asked to explain why all three statements confirmed she had sworn. Only then did the claimant admit: "*I may have sworn but it wasn't anyone or about anyone, prove it that I've sworn*". The claimant did not give truthful answers at the first opportunity she had and her 'partial admission' was accompanied by a '*prove it*' comment demonstrating a lack of insight on her part.

64. The interview was adjourned at 12.11 and reconvened at 13.02 running until 13.18pm. The second part of the interview lasted 16 minutes. Each page of interview note was signed by the claimant to confirm the record was accurate. From those facts it was clear the claimant was not kept in a room from 10.45am until 2pm as alleged (allegation 4.8). The start and finish times do not support the allegation made but the claimant that has continued to pursue this allegation unsupported by the undisputed contemporaneous evidence.

65. On 7 February 2020 the claimant was suspended on full pay for two allegations: confrontational language in front of colleagues and potential customers: and confrontational behaviour towards colleagues during the investigation. The allegations were identified as potential gross misconduct which could (if proven) result in summary dismissal. The suspension letter confirmed the claimant was suspended on full pay but was "*required to cooperate and remain available to attend any meetings as appropriate during normal working hours throughout the suspension*". The claimant was paid her full pay during suspension. The claimant was invited to a disciplinary hearing and provided with a disciplinary pack including the evidence gathered, the relevant policies and procedures and standards of expected conduct.

66. Miss Poskitt conducted the disciplinary hearing on 20 February. The claimant was accompanied by Miss Savage, her Trade Union representative. The claimant denied the allegations. Miss Poskitt clarified the allegation of confrontational behaviour related to the claimant's reaction to finding out (A) had complained about her which had given Ms Gillings some cause for concern for (A). The claimant's responded to that clarification by stating that if Ms Gillings had formed that view it was her problem. Miss Poskitt decided to adjourn the hearing to interview Ms Gillings and the note taker in relation to the second allegation.

67. After conducting those investigations Miss Poskitt attempted to rearrange the disciplinary hearing to conclude it by trying to find a date suitable for the claimant and her representative before her holiday leave. The claimant's representative provided limited availability and an earlier hearing had been postponed because of her unavailability. Miss Poskitt was unable to arrange a date suiting her availability but agreed a date and time suitable for the claimant and her representative. She therefore arranged for the hearing to be completed by another manager, Mrs N Arthur.

68. Miss Poskitt agreed the date and time with the claimant and sent an invitation by post and recorded delivery confirming the reconvened disciplinary hearing was to

take place on 16 March 2020 at 10.30 am at the Hull Store. The letter warned the claimant the hearing might proceed in her absence if she did not attend "*as you were unable to attend the original meeting on 5 March you have advised me that you will be unable to attend a further scheduled meeting on 13 March, you should be aware if you do not attend this rearranged meeting a decision will be taken in your absence*." The letter also provided a contact telephone number for Mrs Arthur and the further evidence gathered in the investigation conducted by Miss Poskitt.

69. Miss Savage understood the disciplinary hearing was arranged around her availability and had agreed 16 March 2020 at 10.30am was suitable for her. It was the union policy to leave the individual member to make arrangements for the disciplinary hearing directly with the employer. She did not know the claimant had any difficulty getting to the hearing. Miss Savage did not know why the hearing was cancelled by the claimant. She just received a message from the claimant on the day of the hearing saying it was not going ahead. Although that was the evidence she gave at this hearing, in her witness statement Ms Savage suggests the respondent was at fault for holding the disciplinary hearing when the claimant could not attend.

70. The reason the claimant did not attend the hearing was because her father could not give her a lift in because he had an important job he could not afford to miss. The location of the hearing was the store in Hull city centre. The claimant could have used public transport to get to the hearing. The claimant could not explain why she did not use public transport to get to the hearing when she was being paid during her suspension and was required to make every effort to attend.

71. The disciplinary hearing was conducted by Mrs Arthur. She is a store manager from outside the area. She travelled to Hull for the hearing having set aside the day for it. In advance of the hearing she read all the documents in the disciplinary pack. The hearing was due to start at 10.30. The claimant did not attend. Mrs. Arthur waited until 10.45am and then contacted the claimant leaving a voicemail message. She then contacted the HR helpline for some advice. They suggested she ring the claimant again and delay the hearing to allow the claimant more time to attend. She rang the claimant again at 11 o'clock and left another message. At 11.16 the claimant returned her calls. Mrs Arthur describes how the claimant was very rude and abusive to her during this phone-call.

72. Mrs Arthurs account of the claimant's behaviour in the call is supported by a message the claimant sent to a former colleague about that telephone call later the same day (page 152). The part of the message referring to the call states "*I got a phone call from some clever cunt manager yesterday morning saying you've got 20 minutes to get here or I'm doing the meeting without you. I was like you fucking cheeky cow, I didn't even know it was happening and they know full well I can't get anywhere cos I had to hand my licence in when I got epilepsy so I was saying to her you not even told me about this meeting and you're doing this on purpose cos you know I can't get there. She was so rude kept talking over me and saying I'd signed for the letter. I've got the fucking card. So I've got the fucking card from postman saying I wasn't in to sign because I was at hospital and they knew that so in the end* ***I told her to shut her fucking mouth and stop getting clever and I'll see them in court".***

73. Mrs Arthur proceeded with the disciplinary hearing in the claimant's absence and dismissed the claimant. Her detailed rationale is set out in the dismissal letter at

page 334 to 337 in the bundle. The first part of the letter refers to the telephone conversation Mrs Arthur had with the claimant and states as follows:

> "*your meeting was due to take place at 10.30am at Boots St Stephens with myself and Kay Young as note taker. This was communicated to you via letter format on 12 March 2020 both signed for and GPO post as per Boots guidelines.*
>
> *I rang you at 10.45 and left you a message asking for your whereabouts as you were late for the meeting and explaining I was expecting to see you and asked for a call back or if you were running late I would wait until 12 pm for you to attend. I repeated this call at 11.01am to leave you a further message asking you to ring me and again explaining I would wait until 12pm and then I would hold the meeting in your absence. You returned the call at 11.16am and claimed you'd not received the letter. I explained you'd been posted two copies both signed for and GPO post as per Boots guidelines. You said you'd not received either of them and that the date was not convenient for you and you could not attend. I explained that the letter was in front of me and we'd given you ample opportunity to attend a meeting and that the situation needed resolving. I also said you had until 12pm to attend the meeting or start making your way to the meeting and I was willing to wait for you but you argued and raised your voice saying you couldn't get there and I was being rude and unfair. After a number of exchanges with me calmly explaining that I would wait and that we had followed guidelines sending out both signed for and GPO post as per Boots guidelines you still continued to argue with me you would not attend. You accused me of being rude and not understanding, even though I offered to wait past the 12pm for your attendance. You finished the call with an accusation of "sack me and I'll take you to court" and then hung the phone up. I ensured through the telephone call that Kay captured notes of the transcript".*
>
> The Tribunal accepted that part of the letter accurately reflects the calls made to the claimant on the day. The letter continues:
>
> *"You were suspended on the grounds of alleged gross misconduct "alleged inappropriate language in front of a colleague and potential customers". Alleged confrontational behaviour towards a colleague during an investigation". Within the documents there are numerous statements confirming they heard the use of inappropriate language in the stock room which is also adjacent and in ear shot of your sales floor, where customers potentially were. You state yourself on page 3 of 15 on the notes dated 20/2/20 you said: "fucking hell". You suggest this is not aimed at anyone however this is still inappropriate language to use in the workplace.*
>
> *I made a note to refer to and question you on the dignity at work policy which is applicable on Boots Live and there for all colleagues to read. It's a policy laying out guidelines specifically stating … "we expect our colleagues to treat each other with dignity and respect. We are responsible for creating a culture of good working relationships". It further states that we "challenge inappropriate respectfully and report if necessary". Using the inappropriate language listed above directly opposes the first statement. Your subsequent investigation on 6 February 2020 falls into the second statement of challenging behaviour under our*

gross misconduct guidelines of inappropriate language and confrontational behaviour. As you did not attend the meeting you didn't have any mitigation circumstances to bring to me. I considered all the evidence before me and have decided your actions resulted in a serious breach of our rules, which is considered to be an act of gross misconduct. It was therefore my decision to summarily dismiss you from Boots with immediate effect in your absence".

Conclusions on Dismissal/Wrongful Dismissal Complaint

74. We have set out the letter in full because Mrs Arthur relies on it to explain her rationale for dismissing the claimant. We accepted those are the reasons why Mrs Arthur found the allegations proven and why she treated it as a serious breach of the rules and gross misconduct. Mrs Arthur was in no way whatsoever influenced by the claimant's disability or anything relating to her disability or the grievance she raised in September 2019 in making her decision to dismiss the claimant. The only reason she dismissed the claimant was because she found the 2 allegations of misconduct were proven.

75. The respondent must prove to the Tribunal on the balance of probabilities not only that the claimant had committed the alleged misconduct but also that it was sufficiently serious for the respondent to treat it as gross misconduct. We had the benefit at this hearing of not only considering the evidence Mrs Arthur had before her but the other evidence the respondent relies upon at this hearing to defend the wrongful dismissal complaint. We have found a previous history of conduct and behaviour of a similar type to the conduct under consideration at dismissal and a history of the claimant's behaviour in a phone call with Miss Cook in September 2019 and then Mrs Arthur on 16 March 2020. The respondent sets out clearly the standards of conduct it expects from its employees in the workplace so that all employees know what is acceptable and what is not acceptable behaviour. The claimant was reminded of those standards on 11 January 2020 shortly before her misconduct in February 2020. The allegations made against the claimant were made by different managers and different colleagues over her employment. All felt sufficiently concerned to make a complaint. The respondent has proved the claimant spoke to her managers in an unprofessional rude and disrespectful manner. While the claimant does not agree with the standards of acceptable conduct and behaviour in the workplace set by the employer or accept her behaviour might reasonably offend her colleagues, the standards that are set are as Mrs Arthur found about creating "*a culture of good working relationships and treating each other with dignity and respect"* . In a customer facing role those are not unusual or unexpected. The respondent has proved to the Tribunal the claimant's conduct was sufficiently serious for the respondent to treat it as a repudiatory breach of contract which entitled the respondent to dismiss without notice. The claimant is not therefore entitled to any pay in lieu of notice.

76. For the sake of completeness, the claimant has referred to a new employee recruited after her dismissal (X) to suggest her dismissal was predetermined. The dates of X's appointment follow the dismissal of another BBS who was dismissed before the claimant. X was the replacement for that other colleague not for the claimant. The respondent provided supporting contemporaneous evidence of the relevant dates of dismissal and appointment which we accepted.

Conclusions on Jurisdiction Issue

77. The claim was received on 26 June 2020. Any act predating 15 March 2020 is out of time unless the claimant can rely on section 123(3)(a) and it is conduct extending over a period to be treated as done at the end of the period (course of continuing conduct) or the claimant has shown just and equitable grounds for extending time.

78. The difficulty for the claimant based on our findings of fact and conclusions is that the dismissal on 16 March 2020 was not an act of disability discrimination or victimisation. It cannot there be relied upon to argue any conduct before then was part of a continuing act ending with dismissal. All the complaints of disability discrimination before 16 March 2020 were presented out of time and the Tribunal has no jurisdiction and they are dismissed.

Other Allegations of Direct Disability Discrimination and Disability Related Harassment

79. Given they are out of time and the Tribunal has no jurisdiction that is the end of the matter. However, and again for the sake of completeness and having heard evidence about each of these allegations we deal briefly with our findings of fact in relation to them.

79.1 (Allegation 3.1). Failing to provide Estee Lauder training on 4 November 2019. The claimant was absent from work due to sickness on 4 November 2019 and as a result was unable to attend the training on 4 November 2019. Training dates were fixed by Estee Lauder and not by R1. A hypothetical comparator in the same material circumstances without the protected characteristic would also have been not attending the training. The claimant was not less favourably treated because of her epilepsy.

79.2 (Allegations 3.2 and 4.7). Failure to provide make up brushes. The first set of makeup brushes the claimant says the respondent failed to provide are the brushes provided for those staff that attended the Estee Lauder training in November 2019 for the practical training. The claimant did not attend the training and that was the reason why brushes were not provided. The respondent does however provide its own branded make-up brushes to BBS. If those brushes need to be replaced the BBS can request new brushes. The manager will use the store's stock and put a credit note in the till. The claimant was not treated less favourably on the grounds of disability or subjected to unwanted conduct related to the claimant's disability.

79.3 (Allegation 3.3 and 4.9) R1 rewards its staff by way of Boots Advantage Points instead of gifts and vouchers. Boots Advantage Points can be used to purchase products sold in the store or online. Employees were not given gifts or vouchers as a reward except in exceptional circumstances, for example long service as part of a leaving gift. The claimant was not treated less favourably on the grounds of disability or subjected to unwanted conduct related to her disability.

79.4 (Allegation 3.4) Failing to let the claimant talk to other brands about their product. The claimant complains that the respondents should have allowed her time with other brands in the store instead of asking her to carry out stock taking or cleaning functions for R1. It was not unreasonable or discriminatory for the respondent to expect its employees to perform tasks that benefit the respondent before the franchised brand. This was not less favourable treatment on the grounds of her disability.

79.5 (Allegation 3.5) R2 failing to promptly inform the claimant of positive customer. The claimant identified an occasion when a customer who had said she had provided some positive feedback re-visited the store and asked if she had received the feedback. The claimant later queried this with Miss Black, who immediately credited Advantage Points to the claimant's Boots card in order to reward her, without checking whether that feedback had been received. This was not less favourable treatment on the grounds of her disability or unwanted conduct related to disability.

79.6 Allegations 3.6 and 4.3: the respondent's failure to promptly deal with the grievance (see paragraph 41 for our findings of fact). The claimant has not proved the necessary facts to support the allegation made. The claimant was not treated less favourably on the grounds of disability or subjected unwanted conduct related to the claimant's disability.

79.7 Allegation 3.7: setting fixed breaks for the claimant on her return to work from 5 December 2019). We found the protected breaks were a reasonable adjustment made for the claimant. The claimant was not less favourably treated because of her disability.

79.8 Allegation 4.1: R2's use of the word 'arsy' in a referral seeking advice from Occupational Health on 13 March 2020 (see page 377 of the bundle). Miss Black asked some specific questions including "*is the colleague able to work safely and be around customers and colleagues as previously stated that her condition makes her "arsy and snappy*". It was not unreasonable conduct for an employer in a referral to Occupational Heath to use the employee words to describe how they presented instead of using a different word which might give a different meaning. The word *"arsy"* was put in quotation marks. The Occupational Health Advisor would have understood the purpose of the question and why the manager was using the terminology to explain the conduct to better understand the effects of the disability and whether the behaviour exhibited might have any impact on customers and colleagues. This was not unwanted conduct related to disability and given the context cannot in our view reasonably be perceived as having the effect of violating the claimant's dignity or creating a hostile degrading or humiliating environment for the claimant.

79.9 Allegation 4.2: R1 and R2 asking for repeated proof of epilepsy and Miss Cook saying to the claimant "well it's your fault you've got epilepsy". Our findings of fact paragraph 32 41 and 42 do not support the allegation made. The claimant has not proved the necessary facts to establish disability related harassment.

79.10 Allegation 4.4: R1 and R2 leaving the claimant's product allowance to the last minute. The claimant does not provide any dates for this allegation and has not proved the necessary facts to establish a prima facie case of disability related harassment.

79.11 Allegation 4.5 R1 and R2 not reporting the claimant's seizures in the accident book. The claimant has not proved the necessary facts to support the allegation made to establish a prima facie case disability related harassment.

79.12 Allegation 4.6 R2 making the comment 'your joking' (see paragraph 34 for our findings of fact). The claimant has not proved the necessary facts to support the allegation made to establish a prima facie case disability related harassment.

79.13 Allegation 4.8 R1 making the claimant wait in a room from 10.45 until 2pm with no toilet break water or food. See our findings of fact 63. The claimant has not proved the necessary facts to establish disability related harassment.

79.14 Allegation 4.10: repeatedly called into the office for a chat. See our findings of fact paragraph 58. The claimant has not proved the necessary facts to support the allegation made to establish a prima facie case disability related harassment.

79.15 Allegation 4.11: R2 telling the claimant to get new uniform from the cleaning cupboard. Miss Black confirmed the store cupboard is where all uniforms were located. If the claimant or any other BBS requested a new uniform, Miss Black would have asked them to go to the store cupboard to get it. The claimant repeatedly referred to the store cupboard as a 'cleaning cupboard' to suggest it was humiliating because cleaning supplies were also located in there as well as uniforms. The claimant has not proved the necessary facts to support the allegation made to establish a prima facie case disability related harassment.

79.16 Allegation 4.12: R2 failing to organise OH referrals. The chronology in relation to OH referrals is clear from the contemporaneous documents. Miss Cook requested the claimant's consent for first referral on 1 October 2019 (see page 195). On 7 October the claimant agreed to the referral. Miss Cook went on holiday and passed this to Miss Black who made the Occupational Health referral on 12 October 2019 (page 202-203). A telephone assessment was conducted by Occupational Heath on 18 October 2019 (page 198-202). There was no delay in organising the referral by either Miss Black or Miss Cook. The claimant has not proved the necessary facts to support the allegation made to establish a prima facie case disability related harassment.

Conclusions

80. For the complaint of a failure to make reasonable adjustments we repeat at the end of these reasons, the points we made at the beginning see paragraphs 10-12 supported by our findings at paragraph 50-52. The claimant has not proved facts from which the Tribunal could conclude there has been a breach of section 20(3) and section 21 Equality 2010 to support a prima facie case of a failure to make reasonable adjustments and those complaints fail and are dismissed.

81. For the complaint that the dismissal was an act of victimisation contrary to section 27 Equality Act 201 we refer to our findings and our conclusion at paragraph 74 that Mrs Arthur was in no way whatsoever influenced by the claimant's disability or the grievance raised in September 2019.The only reason why she dismissed the claimant was because she found the allegations were proven and the claimant had committed gross misconduct. The complaint of victimisation therefore fails and is dismissed.

82. For the wrongful dismissal the respondent has proved on the balance of probabilities that the claimant's had committed the misconduct and it was sufficiently serious misconduct for it to be treated as a repudiatory breach of contract which entitled the first respondent to dismiss without notice. The complaint of wrongful dismissal therefore fails and is dismissed.

83. All the complaints of direct disability discrimination and disability related harassment the complaints were out of time and are dismissed for that reason and would have failed and been dismissed in any event because the claimant failed to prove a prima facie case of disability discrimination. Those complaints also fail and are dismissed.

Employment Judge Rogerson

17 July 2021