



EMPLOYMENT TRIBUNALS

Claimant: Mr N Ashby

Respondent: T J Morris Limited T/A Home Bargains

AT A FINAL HEARING

Heard: Remotely, by CVP **On:** 26, 28, 29 April and 3 and 4 May 2021,

Before: Employment Judge Clark
Mrs F French
Mr J Hill

Representation

For the claimant: Mr N Ashby in person
For the respondent: Mr B Williams of Counsel

JUDGMENT

The unanimous decision of the tribunal is that: -

1. The claim of unfair dismissal **fails and is dismissed.**
2. The claim of disability discrimination **fails and is dismissed**

REASONS

1. Introduction

1.1 In April 2019, Nicholas Ashby resigned from his position of Store Supervisor at the Skegness branch of Home Bargains. It followed the arrival of Mr Steve Carter, first briefly as relief manager of the store and then about a year later as the area manager. The central

question in this case is whether, as the claimant says, Mr Carter's actions led to acts of discrimination and breached the implied term of trust and confidence or, as the respondent says, that Mr Carter was taking steps to bring a store into line with the various standards and systems expected of the company.

2. Preliminary Issues

2.1 We dealt with an application by the claimant to absent himself from the proceedings during the time the respondent's witnesses would be giving evidence. This was a proposal from his GP who was concerned that the experience might lead to a deterioration in his mental health. We were most concerned about this situation from various perspectives. We were concerned to ensure the proceedings were adjusted where appropriate to ensure Mr Ashby was able to play a part. Equally, as the claimant was representing himself and there would be no one to put questions or observe proceedings we were concerned about the practicality and fairness. We explored the factors behind this and whether alternatives could be put in place to deal with his need for adjustments without undermining the process. We did consider putting written questions to the witnesses on his behalf but were concerned that even this would lead to other concerns. In the end, it emerged the GP had wrongly assumed Mr Ashby would be physically present in the court room. Mr Ashby explained that the process of conducting the case over CVP removed some of the stress and he could put his questions and chose whether or not to observe the witnesses on the video link.

2.2 On day three, we granted Mr Ashby a request to adjourn as he felt unable to continue after spending the morning putting questions the respondent's first witness. This was a task he had done well with apparent confidence. The hearing continued on day 4. We were able to conclude the participation of the parties and reach a decision which we attempted to deliver *ex tempore*. It became clear that Mr Ashby was not dealing with the outcome very well and we agreed to provide full written reasons.

3. The Substantive Issues

3.1 The claims are brought as claims of constructive unfair dismissal under s. 98 of the Employment Rights Act 1996 ("the 1996 Act") and disability discrimination under the Equality Act 2010 ("The 2010 Act") in the form of unfavourable treatment because of something arising in consequence of a disability under section 15 of the 2010 Act.

3.2 The disability in question at the material time is Anxiety and Depression which is not in issue.

3.3 The issues were canvassed at a preliminary hearing, coincidentally before me, in November 2019 and again before Judge Butler where the issues were further defined. The result has been an agreed list of issues which we adopt and set out as the appendix to this judgment.

4. Evidence

4.1 We have heard from Mr Ashby himself. He did not call any witnesses but did make reference to the contemporaneous witness statements provided by colleagues during the internal procedures. Clearly that is not evidence before us and has not been tested but we had regard to it. One feature of this case is that it is said some of the other junior managers shared with Mr Ashby the negative views of Mr Carter and his management style and they say as much. On the other hand, all but one member of the management team was found to be complicit in the security and other system breaches that are at the heart of this case and resigned before facing a disciplinary hearing. Consequently, the hearsay views of the absent witnesses need to be treated with even more caution than would ordinarily be the case and carry very little weight.

4.2 For the respondent we have heard from Chris Clare, Employee Relations Adviser; Glenn Lowe, Assistant Store Manager, Shannon Gutteridge, Assistant Manager, and Steve Carter, Area Manager.

4.3 All witnesses adopted written witness statements by oath or affirmation.

4.4 We received a small bundle running to 288 pages.

4.5 Both parties made oral closing submissions.

5. Facts

5.1 It is not the Tribunal's purpose to resolve each and every last dispute of fact between the parties. Our focus is to make such findings of fact as are necessary to answer the issues in the claim before us and to put them in their proper context. On that basis, and on the balance of probabilities, we make the following findings of fact.

5.2 The respondent is a national high street retail business trading as Home Bargains.

5.3 It has a local management structure typical of retail businesses with store supervisors, assistant managers, managers and area managers. They are supported by a central HR department.

5.4 The claimant commenced employment in June 2008. He was employed as a Store Supervisor at the material time. He has suffered with anxiety and depression for some time, and experienced a breakdown following the death of his mother in 2016. The respondent has been aware of his health and its effects. His disability status is not in dispute.

5.5 Mr Ashby was regarded as a good worker. In 2015 he received an award for customer service. In 2017 he undertook a two-week inhouse training course to be assessed as suitable for an assistant manager post. We find this training focused on the respondent's standards, policies and procedures of store management including security and staffing matters. We find these are expected to be rigorously and consistently applied across the country. We find the claimant fully understood these procedures as is evidenced in the fact he passed the training course.

5.6 He describes his pride in these and other work achievements as being a positive factor contributing to his mental well-being.

5.7 In late 2017, the Manager of the store at which he worked in Skegness, was dismissed for gross misconduct. We do not know the circumstances. Steve Carter was temporarily appointed as a relief manager before the new permanent Manager shortly afterwards. That person was Tom Watson. About a year later, in September 2018, Mr Carter was promoted to Area Manager responsible for a patch including the Skegness store.

5.8 The claimant says the staff understood Mr Carter was some sort of "fixer", whose management style was described as firm and able to restore order. Whether those labels are correct or not, we find Mr Carter was someone who sought to comply with the various standards, policies and procedures expected by the respondent. As a relief manager, we find he saw lots of different stores over a short space of time and became attuned to spotting the local variances and deviations to the expected national standards and practices. Similarly, he would rarely be acting as relief manager long enough to be drawn into local cultures and habits that might evolve over time. We find his model of working was simply to apply the expected management systems by the book. We have no doubt that doing so would potentially bring him into conflict with local cultures and practices and could give rise to tensions. The claimant's first encounter with him involved criticism of the store to an extent that the possibility of an improvement notice was contemplated. Understandably, it left the claimant with a negative view of Mr Carter which was only reinforced when other staff shared their similar experiences of being pulled up on their work.

5.9 One aspect on the periphery of this case is an allegation that the claimant's data rights were breached by him being added to a store manager's WhatsApp group against his will. We heard little evidence of this save that the claimant agreed he understood how WhatsApp worked, used it and that he had sent messages on it. There is nothing to suggest anything about this was done contrary to the claimant's wishes, that he objected, that he was prevented from leaving the group or any further relevance to the issues in this case. The person adding him to the group must have already had his number. This matter appears nowhere else in the contemporaneous reasons for the employer's subsequent actions or Mr Ashby's ultimate decision to resign. In short, we can see nothing that could be said to be improper in this.

5.10 The employer's standards, policies and practices engage with all areas one would expect of retail activity. Some deal with more grave matters than others. It might be said at one end are matters such as store layout and presentation of stock. Other matters prescribed in the policies and procedures include pricing systems and staffing rules such as the clocking systems and operation of breaks during a shift. At the more serious end are procedures intended to secure staff safety and asset security, particularly in the context of theft of stock.

5.11 We find it was purely a matter of chance that in January 2018, in his relatively new role as area manager, Mr Carter happened to discover what would become the basis of a wholesale disciplinary investigation into the Skegness store management team. Whilst on a store visit to Skegness, he was occupied with reviewing the new year discount pricing and, in particular, the application of the daily discounts. He was concerned they did not seem to be applied fully or correctly. He wanted to find out who had been performing the daily price change and viewed the previous day's CCTV. He observed a store supervisor, Diane Bohen, undertake the task but not finish it. He noted she was still wearing her coat and that she soon broke off from the task and walked out of the store and into the delivery area, leaving the cash office door unlocked and the warehouse door wide open.

5.12 We accept, and the claimant does not dispute, that this is an extremely serious security breach.

5.13 Theft is a major concern for retailers generally. Violent theft even more so. The respondent has various systems in place to minimise this risk. We accept this is more than a hypothetical risk and find the Skegness store had itself recently suffered a till grab. It has a written security policy. There is no dispute that the effect of the policy and procedure was

that the cash office should never be left unlocked, that warehouse doors should not be used as a general entrance or exit and should only be used by the store management when they are sure who is on the other side, in effect for deliveries. They should never be left open. Two members of staff including at least one in a management role, should open up and close the store. In the extreme circumstances when that was not possible, there was a default plan in place of contacting the loss prevention office in Liverpool who could remotely supervise via CCTV. We accept this is an extreme solution and not the normal plan. We do not accept the claimant's suggestion that this does not remove the risk. First, as we say, this is an extreme measure to be used in unforeseen circumstances only. Secondly, we find the involvement of the remote loss prevention team watching all CCTV would have as many advantages over the physical attendance of a second worker as there might be disadvantages. There would be no more delay in contacting any emergency services in the case of an incident than would be the case where two workers were physically in attendance.

5.14 There are other policies and procedures expected to be applied in all stores which have relevance to this case and are related to these security issues. They are in respect of policies prohibiting smoking on the premises including in any loading area or yard. That in turn links with the clocking procedures which make it clear that staff who smoke are to do so during allotted and unpaid breaks. It goes without saying that they are not permitted to take additional breaks during a shift whether for the purpose of smoking or otherwise.

5.15 We accept Mr Carter was gravely concerned about this obvious breach. He did not know if this was an isolated incident or indicative of a wholesale problem at the store. He decided to view more CCTV and, in his words, did not have to look for long before viewing other members of management also breaching procedure in the same way by leaving doors open to go out to the back of the store for a smoke. We accept he decided then that a full investigation was required. In fact, further analysis of CCTV showed almost every member of the store's management including the claimant was involved in security breaches and leaving the shop area unsecure. The only exception was Luka Green. The claimant was also discovered to be opening the store on his own in breach of the security policy. The times of the security breaches were then compared to the clock records and demonstrated that what appeared to be regular breaks were not only leading to a breach of the security procedures but they were being taken on company time and clearly involved smoking on company premises.

5.16 Mr Carter appointed Sharon Gutteridge to undertake a preliminary investigation. She is the store manager of the Boston store. We find she too reviewed the CCTV, clock records and interviewed the management team except for Mr Watson. His investigation was undertaken by Mr Carter as Mr Watson was the same level of manager as Ms Gutteridge.

5.17 We find there is nothing to this point in the evidence that shows this investigation was in any way targeted at Mr Ashby or designed to lead to his dismissal. There is nothing in the evidence to lead us to doubt that the concerns about the application of the security and other policies was the genuine reason for the investigation. Whether Mr Carter was a hard manager to work with or not, and whether he welcomed the discovery of problems in this management team or not, it is beyond doubt that there were problems justifying further investigation and that they were the reason for it.

5.18 Similarly, much emphasis was put on the fact the CCTV is not before the tribunal and Mr Ashby's submission was therefore that the employer could not "prove" he had committed these breaches. We reject that contention, principally because the other evidence shows Mr Ashby did not dispute these breaches and, in any event, the detail and repeated references to it in the contemporary documentation convinces us that this is what was shown. We note the CCTV would have been available for Mr Ashby to view during the disciplinary process but he resigned rather than engage with it.

5.19 Mrs Gutteridge set up investigation meetings with the management team save for Luka Green.

5.20 Mr Ashby was interviewed first on 28 January 2018. It seems the reason for speaking with him first was a recognition of his relatively fragile mental health and a desire not to leave him to wonder what was happening. He was not suspended at any time. None of the management team were suspended save for Mr Greenhalgh who faced an additional serious allegation of gross misconduct to which we return below. The notes taken of the brief interview are signed by Mr Ashby on each page as an accurate summary of the discussion. During the interview a number of significant comments were made that we find would inform the respondent's next steps. First, in respect of his own concessions he: -

- a) Accepted being trained in the management systems and accurately summarised the security policy including the opening and closing procedure.
- b) Stated that despite that, only one person opens if they are the only person on the rota.

- c) Agreed he had not raised concerns about it but assumed it was ok.
- d) Knew that office doors had to be locked at all times. When asked if that happened he replied “I’d like to think with me but have probably been some instances where it has not hasn’t”. When asked if it was common for the door to be unlocked he answered, “it has happened”.
- e) Described the correct security procedure with the warehouse door but accepted that it sometimes was not followed. He described this as “a lapse on us all”.
- f) Demonstrated knowledge of the system for taking breaks, that one had to clock out but that he did not always clock out. When asked why he gave answers implicating the Manager Tom Watson not enforcing the policy, condoning it or sometimes encouraging him to take a break without clocking out and that almost all managers do it.
- g) Answered the question why he had a disregard for company policy that “he was following everyone else. Taking advantage”.
- h) Declined the opportunity to add anything else.

5.21 We also note the points he does not say during this interview as appear to be relevant to the allegations now put before the tribunal. They are: -

- a) That he had any permission to take additional breaks and/or unpaid breaks as a result of any sort of adjustment for his mental health.
- b) That he disputed the allegations or that he wanted to see the CCTV footage showing him breaching the policy.
- c) That the investigation was a malicious attempt by Mr Carter to get rid of him.

5.22 At the conclusion of the interview, Mrs Gutteridge informed Mr Ashby that she believed there was a disciplinary case to answer and that the matter would be referred to a disciplinary hearing.

5.23 Although the notes were signed confirming their accuracy, Mr Ashby now maintains that they contain subtle errors altering the apparent meaning of what was said. Two specific examples are given in the context of the employer viewing CCTV and what it may have seen and concluded itself. Where the notes say “I’d like to think with me but have probably been some instances where it hasn’t”, Mr Ashby says he actually said

“I’d like to think with me but you have probably seen some instances where it hasn’t”.

5.24 Similarly, where the notes say “it’s a lapse on us all”. Mr Ashby says he actually said

“Well, if you’ve seen the CCTV, it’s a lapse on us all”.

5.25 We do not need to determine which version is accurate for two reasons (over and above the fact that he signed them to confirm they were accurate at the time). First, in the context of the investigation, either version conveys the same essential point. Secondly, the note takers ability to capture the essence of the exchange is maintained and there is nothing to support a contention that his words were being twisted for a purpose. We would also add that had the matter reached the intended disciplinary hearing, the accuracy may or may not have been challenged at that stage. What is important for present purposes is whether the notes as they stand, signed as accurate by Mr Ashby, provide a reasonable and proper cause for the employer embarking on the disciplinary action against the claimant that would follow. We are satisfied that they do.

5.26 We reject Mr Ashby's contention that he gave answers as he did only to rush the interview along as he just wanted to get out of it. We have no doubt it was uncomfortable to be pulled up on breaches and that he did want it to be over quickly but we are not satisfied there is a basis to undermine the reliability or fairness of the answers given. Moreover, after his interview was concluded he remained to discuss other matters with Mrs Gutteridge including further allegations of security and other breaches committed by other members of the management team that he had not told her during the interview. He mentioned that one of the lead sales (the first level of management) a relatively new employee called Tracey Dales was upset at being shown pornography by two other managers, Mr Torgoose and Mr Greenhalgh. This was apparently displayed on one of their phones on the public shop floor area. That matter was subsequently investigated and the two managers resigned rather than face the disciplinary action that was promptly commenced.

5.27 On the evening of the first investigation interview, Mr Ashby sent an email to Mr Carter. It dealt with one point in substance, that is the fact that he had been rostered to open up on his own by his manager and, indirectly at least, the area manager. The result was that he was now accused of security breaches. We find he told Mr Carter in this email that he had challenged Mr Watson about this previously and been told it was ok. We find his complaint was, principally, that he faced disciplinary action for doing what he had been told to do although if read carefully, it does refer to the risk he had been exposed to in opening up on his own. We find Mr Ashby did not receive a reply to that email. That was because Mr Carter was not investigating the allegations. We do find, however, that he discussed the content of this email with Mrs Gutteridge and it played a pivotal part in the later decision that Mr Ashby should not face disciplinary action in respect of that particular security breach. A

further significant aspect of this email is what else it does not say. It has been billed before us as an opportunity Mr Ashby had to reflect on the interview earlier that day. As such, it was an opportunity to raise any other issues, defence or explanation, particularly those that are now put to us in these proceedings. It does not.

5.28 Unfortunately, for Mr Ashby, the investigation was continuing over the coming days which included ongoing analysis of CCTV. Despite the content of his interview on 28 January, in particular his acknowledgment of the correct procedures and that he had committed various breaches of company policy, he continued to commit further breaches in the days that followed. He was seen on a number of occasions on 31 January 2019 taking breaks without clocking out and in some cases smoking. As a result, he was invited to a further investigation meeting that would be held on 9 February 2019.

5.29 On 2 February 2019 Mr Carter conducted Mr Watson's investigatory interview. Mr Watson accepted he had committed various serious security breaches and allowed others to occur. He resigned with immediate effect rather than face the disciplinary process. Mr Ashby is critical of Mr Carter for not pressing two points in this interview with Mr Watson which he says have prejudiced his position. The first was his concern about being rostered on his own to open up. The other was in respect of an alleged agreement recorded in writing that permitted him to take additional breaks. As to his concerns about opening up on his own, these focused on how the rota was prepared, and not the safety concerns that it has more recently evolved into. He felt the store manager, and indirectly the area manager, must have been aware that rostering a single employee to open up meant there was a breach of the security policy as they were responsible for the roster. A dispute arose whether Mr Ashby had raised these concerns with Mr Watson. The respondent says it looked into it and found no record of this. Mr Ashby asks what more could he have done. He says he had followed the code of conduct which simply required him to report any concerns to his store manager. Mr Ashby says the response from Mr Watson was that he was told to work what was being asked of him and get on with it. We find this area of dispute is largely irrelevant. We would be prepared to accept there was some discussion between the claimant and Mr Watson about the rota but, in view of Mr Ashby's other breaches of security that it was not, on balance, in the nature of the complaint it is now painted as and certainly not something he was concerned enough about to take anywhere else. The irrelevance arises from the fact that whatever complaints had or had not been raised, his underlying point was accepted. In essence, he was at a very junior level of management and could not influence the rota. If his

superiors were rostering staff to open up on their own, whilst that was still clearly a breach of the security procedures, the responsibility for it rested with those senior managers and not Mr Ashby. Consequently, this aspect of the allegations of security breach were not pursued against him beyond the initial investigation. Mr Carter accepts he did not press this point with Mr Watson but, equally, we find Mr Watson accepted his responsibility for the security breaches and it was not necessary.

5.30 We do not accept the area manager has more than a strategic level of oversight of store rotas and it did not rest with him to scrutinise the week to week rotas in the level suggested by Mr Ashby.

5.31 As to the alleged adjustment permitting additional breaks to relieve his anxiety which was apparently noted in the notes of a meeting between the claimant and Mr Watson, this was simply never raised by him. The nature, content and effect of this apparent adjustment permitting the breaks has varied over each account and perhaps most significantly, to the extent that it is now relied on to exculpate the claimant from any responsibility, it was never raised with the employer. Mr Ashby's explanation did not hold water. In short, it was that he should not have to raise any defence to the allegations but instead that the employer would have discovered it if they had undertaken a thorough investigation. We do not agree that the investigation was not thorough or reasonable particularly having regard to the admissions given. The high point of this matter is that Mr Ashby has obtained an informal and undated statement from Mr Torgoose who describes Mr Ashby being permitted to take extra breaks as long as he obtained permission in advance. It says nothing about not clocking out or relaxing the security or no-smoking rules. It does not support the contention that there was a reasonable adjustment in place relevant to the issues in this case. We do accept there was some awareness of Mr Ashby's health and that the managers were flexible in rostering and taking breaks to accommodate matters such as clinic appointments. We do not accept that flexibility extended to not requiring him to clock off when taking breaks

5.32 On 6 February 2019, Mr Ashby confronted Mr Carter in the staff canteen in a distressed state. This followed discussions the previous day between Mr Ashby and two of his management colleagues, Ms Battey and Ms Bohan. They had both conveyed how upset they felt about their situation at the hands of Mr Carter. Mr Ashby's evidence is that in a distressed state himself, he accused Mr Carter of being a bully and harassing him and his colleagues. Mr Carter is alleged to have said words to the effect of "be careful what you say, these are serious allegations you are making" in the presence of a visiting manager from the

Lincoln store. We accept Mr Ashby confronted him and was distressed when doing so. On balance, we found Mr Ashby's assessment and interpretation of situations, particularly intense situations as this must have been, to be such that we cannot be confident in their accuracy. What Mr Ashby says he said has varied. We do not accept Mr Carter's response was threatening and seems to be in line with what might be expected in such an emotionally charged situation.

5.33 Mr Ashby took two days off sick on 7 and 8 February 2019.

5.34 The focus of Mr Ashby's questioning on the events of 6 February was in the relationship to his sickness absence and the failure of Mr Carter to conduct a return to work interview. We do not accept that was Mr Carter's responsibility to conduct but we do accept no such interview was conducted when it ought to have been. The store was in a state of flux with a diminishing management covered by temporary managers from other stores and Mr Carter accepted that there was a failing in conducting the interview on the claimant's first day back on 9 February. Equally, if there were other more senior managers in store that day, there does not seem to have been any concern raised by the claimant that he had not been subject to such a procedure. In fact, early on that day, at around 10 am, he attended the second investigatory interview with Mrs Gutteridge. We are satisfied Mrs Gutteridge was given no cause for concern about Mr Ashby's health or ability to participate in that meeting. We accept Mrs Gutteridge's recollection that he was not in a distressed state during that meeting. We find had that been the case the meeting would have been suspended and the record noted that fact. Similarly, he discussed further matters with Mrs Gutteridge after his own interview. During the interview itself, his mental health was raised and discussed briefly but in the context of whether he was healthy enough to be at work to which he answered being at work was his saving grace.

5.35 At this meeting his further breaches were put to him. He was asked again if he understood the procedure for breaks and answered, "not paid for smoking breaks". We highlight that initial exchange because it was Mr Ashby who described the breaks as smoking breaks, the question having been put in terms of "breaks" generally. We raise this as it was a regular feature of his evidence that he clearly felt strongly about that he was offended by the employer's characterisation of breaks as smoking breaks. We understood this to be an attempt to link his need for breaks to his anxiety. We did not accept his evidence. Not only has the employer not apparently focused on smoking breaks, but even if it had Mr Ashby has

accepted smoking when he did take these breaks. Not only were there breaches of security and clocking procedures, but smoking was also not permitted on any of the store premises.

5.36 Mr Ashby explained his further breaches as taking smoking breaks to calm his nerves in the present circumstances and that he had done it without thinking. The investigator checked on his health and Mr Ashby confirmed he felt fit for work and that work was his saving grace helping him with his depression. He was told this would form part of the referral to disciplinary hearing.

5.37 We do not accept Mr Carter was orchestrating this disciplinary process from behind the scenes beyond the legitimate steps he was entitled to contribute as area manager, such as forwarding the results of his CCTV analysis and forwarding Mr Ashby's emails.

5.38 On 12 Feb 2019, Mr Ashby suffered a panic attack at home. He collapsed and was taken to hospital. He broke down when visiting his GP on 13 February and began a period of sick leave and in fact would never return to work.

5.39 We note the surrounding context goes beyond his own disciplinary matters. He has enjoyed working in a stable management team for many years. He was close to his manager and very close to his junior management colleagues. It was clear they had all organised their work by their standards and systems and not necessarily those expected of the employer. Through February and up to 1 March, Mr Ashby would learn at various times they had all left the business, mistakenly believing them to have been dismissed. In fact, they would all resign rather than face disciplinary action. For those reasons we find the prospect of returning to work preyed on his thoughts as it would be a return to a very different working environment.

5.40 On 14 February Mr Ashby lodged a formal written grievance (208-212). It does not advance the case that is now before us beyond the general assertion that he felt bullied by Mr Carter. In this case, the claimant has not been able to explain to us why the factual matters now alleged were not uppermost in the claimant's mind at the time of the grievance. We have to conclude they were not genuinely matters that were influencing his decisions at the time. Indeed, much of his evidence in explanation referred to periods of reflection after his resignation. We have therefore been particularly careful to understand what was influencing his decision making before his resignation. The best evidence of that is what was written at the time.

5.41 The grievance was acknowledged by Mr Clare of HR on 24/3/2019. The respondent has a grievance policy which makes clear that where a grievance arises within a disciplinary process, it will either be considered as part of that process or after it, depending on its relevance to the disciplinary issues. Mr Clare communicated this policy to the claimant and his view that the grievance related to the disciplinary matters. He was reinforced in this view by the fact that the claimant's grievance concluded with the sentence: -

"I am not writing this grievance as a response to my own disciplinary but I do want it to act as a defence".

5.42 In the course of evidence, Mr Ashby accepted that considering all matters together was a reasonable step in line with the policy and that, in fact, he agreed with it.

5.43 In late February into early March, Mr Ashby was in contact with Mr Clare of HR regularly. We find the content and tone of Mr Clare's engagement with the claimant was matter of fact but supportive and sensitive to his situation. He resolved an issue with the claimants SSP. Mr Ashby was clearly appreciative of his role.

5.44 The disciplinary allegations against Mr Ashby were set out in writing in a disciplinary invite letter sent to the claimant on 13 March 2019. The allegations were set out as follows: -

Dereliction of duties and Breach of Security Procedure.

It is alleged that, in store on multiple occasions you have left the Warehouse door and the Office door open and unlocked. Your actions in this regard have the potential to breach the Security Procedure.

Unauthorised breaks

It is alleged that you have taken unauthorised breaks at 10.00, 13.22 and 14.07 on 13 January 2019 and at 17.20 on 28 January 2019. You failed to clock out for these breaks and your actions have the potential to breach the expectations as set out within the Staff Handbook.

Breach of trust and confidence:

Your actions have the potential to breach the trust and confidence that the Company place in you to carry out your role. Your actions have the potential to undermine your contract of employment and could leave the Company without trust and confidence in your behaviour.

5.45 Whilst the third allegation is better described as a consequence of the other two sets of allegations being proved rather than a discrete allegation of wrongdoing in itself, we are satisfied that the claimant was clear of the nature of the disciplinary allegations he faced. It is clear there is no allegation in respect of opening up the store on his own.

5.46 The letter made clear that the matters subsequently raised by the claimant, in particular his concerns about the area manager, would be considered as part of the process. It is equally clear to us that Mr Ashby understood he faced allegations with the potential to end his employment, that he knew he had committed the security and clock breaches that were alleged and it was clearly a source of anxiety.

5.47 The hearing was scheduled for 27 March 2019. Mr Ashby sought to postpone the date of the hearing so that he could arrange trade union representation. Mr Clare immediately agreed and plans were made for a new date. Other arrangements were made to support Mr Ashby in particular that Steve Carter was not present at the store in any future meetings taking place there.

5.48 In the meantime, a new area of conflict emerged between the claimant and one of the remaining managers, Tracey Dales. The result of this would lead the claimant to make two allegations. One of harassment and bullying by her and a disparity in the employer's response, disciplining him but not her. The other that the outcome of his disciplinary hearing had been predetermined and that he would be demoted.

5.49 The exact details behind this are not particularly clear and rely on multiple hearsay. We prefer to rely on what little first-hand evidence we have but some aspects in the contemporary documentation show some consistency.

5.50 On or around 18 March 2019 a conversation took place between Tracey Dales and Ms Battey concerning Mr Ashby's disciplinary in the coming week. We have been presented with multiple hearsay in circumstances where the truth of the content of any conversation between these individuals cannot be assessed with any degree of confidence. It is said to be a message passed on to the claimant by Ms Battey of what she was told by Ms Dales about what Ms Dales had learned from Mr Glenn Lowe, a temporary cover manager for the Skegness store normally based at the Scunthorpe store. The essence was that the claimant would not be coming back as store supervisor. In itself is not clear whether that is said to amount to an indication of a future demotion or dismissal but Mr Ashby interpreted it as a demotion. We have seen text messages which leads us to conclude Ms Dales did have a conversation with Ms Battey in which she expressed some view about the claimant not returning as supervisor based on what Glenn [Lowe] is said to have said. However, we have considerable doubt about the accuracy of what was said, the context, the source or whether she actually had any conversation with Mr Lowe or whether she was herself conveying some sort of rumour about what someone else thinks Mr Lowe's view may have been. We did receive credible evidence of rumours amongst the staff and evidence of staff sharing their circumstances with others with the result that others acted on it as if it was fact. As to this particular allegation, it is not consistently relayed and there is some suggestion elsewhere that the source is described as Brett, the temporary manager, and not Mr Lowe. However, Mr Lowe is the only person we have heard from directly in this matter. He denies any such

conversation or ever saying anything which could possibly have been misconstrued as such. He explains his limited knowledge of, and lack of involvement in, the disciplinary process. We have no reason to question his evidence which we accept. Whatever Mr Ashby was told through multiple hands, and whatever effect it had on his decision making, we do not accept this was an act for which the respondent could be responsible.

5.51 There is then a further event which occurs around the same time involving Mr Ashby and Ms Dales. It is not clear the extent to which both events are related but they occur around the same time. On 23 March Ms Dales contacted Mr Carter to raise a complaint. She says she has been bullied by Mr Ashby and Ms Battey into making a grievance about Mr Carter. She is said to have refused and suffered aggressive response for doing so. That much was conveyed by Mr Carter in an email to HR dated 22 March. Other contemporaneous text messages at this time suggest Ms Dales was previously supportive of the claimant and intended to convey to him what she had heard about demotion. Something else clearly changed that and something else clearly happened between them as we have seen part of a text message sent on or around 23 March 2019 saying: -

....Screaming down the phone telling me you've shown her all the texts iv sent you and saying I said I wasn't going to tell you well she's covering her back and I stuck up for her to, now you've both stabbed me in the back.

5.52 And later (as it was written)

Well hope your pockets are deep. Steve told me what you've said about me. John's solicitors are on it now and I'll see you in court I've told head office it a civil matter now and I won't be putting a grow Grievance in you will be paying court cost good luck !!!

5.53 This text is said to be an act of bullying and harassment. Mr Ashby raises a complaint with HR. He said (as written)

I am making a formal complaint regarding the issue i reported to you last week. i am refering to the conversation between Tracey Dales, lead sales and Brett, acting manager for Skegness. Tracey Dales leaked the context of this conversation to another colleague. She also leaked the context of this conversation in a text message. i am now deeply concerned about the repercussions from my report to you.

On Friday 23rd March 2019 i received a text message from Tracey Dales. She states Steve Carter has shared information with her about my complaint. As a consequence of him sharing this with her and him refering to me, she has threatened me with legal proceedings. myself and other former colleagues have previously raised issues of sensitive information being shared.

i am attaching a copy of the text from Tracey sent on Friday 23rd. i am greatly concerned about personal, sensitive information being shared and then leaked. My confidence is at an all time low. i have been away from work since February yet harrasment, bullying and victimisation issues continue. i have had to block Tracey Dales on all social media. i no longer respond to text messages or telephone calls from Tracey.

i am very worried and extremely sad about this escalating situation. i would like to ask you to investige this matter. I trust this complaint and its contents will remain confidential.

5.54 Mr Ashby says the respondent failed to deal with it when he raised it as a further complaint. In evidence the case was put that this was clear bullying and harassment on its face and should have led to Ms Dales immediate disciplinary process for gross misconduct.

None of the witnesses to whom this was put agreed. We agree with the general thrust of their response that it would depend on the context, part of which was what it was that Mr Ashby and Ms Bohan had themselves said and done to Ms Dales to prompt her threat of legal action. As it stood as an unresolved issue, however, we find it was neither ignored by the respondent nor that it failed to deal with it. In the first instance, Mr Clare made clear on 25 March in a typically supportive tone that it would form part of the surrounding circumstances considered at the disciplinary hearing. We find his intention was that as the disciplinary hearing was believed to be imminent, Mr Davis who was chairing that hearing would also be charged with considering whether this had any bearing on Mr Ashby's disciplinary allegations and, potentially, whether it warranted any disciplinary response in itself.

5.55 On 26 March, the claimant messaged Mr Clare to say he would not be telephoning the store. Mr Clare agreed that he could be excused from making contact with the Skegness store and that he should send his fit notes to HR directly.

5.56 On 25 March Mr Ashby visited his GP. On 27 March he suffered a further anxiety attack. Further supportive emails followed between him and Mr Clare in HR.

5.57 On 28 March Mr Ashby asked for his hearing to be postponed until further notice due to his health. Again, Mr Clare confirmed any meetings can be postponed until he was fit to attend. On 4 April, Mr Ashby proposed to Mr Clare that the disciplinary hearings went ahead at the Grimsby store. Again, Mr Clare agreed in supportive tone.

5.58 On 6 April 2019, Mr Ashby resigned with immediate effect. The resignation letter says, as written: -

I have lost trust and confidence in the company. The company have a duty of care to all employees. The company also have a duty to their employees to abide by the health and safety at work act. I have not been protected by policies and procedures and these have been continuously breached. I have evidence that proves the company put my health and safety in jeopardy on many occasions. Management rotas are authorised by the area manager before being worked. This is clearly stated on hard copies of management rotas. Rotas are displayed 2 weeks in advance before being worked on mgt notice boards. My manager instructed me to open the store alone on many occasions. My objections were ignored, i was told to comply to rotas the area manager was authorising.

On Monday 18th March I was informed that my disciplinary outcome has been pre-determined by the company. A conversation took place between senior managers in the stores office and the content was leaked to me. After the evidence had been sent to me I received a number of threatening text messages. I was being constantly harassed and threatened. This is clearly a breach of the bullying and harassment policy. I am currently on sick with work related stress after a mental breakdown caused by issues at work.

After nearly 10 years of service I am giving notice to end my employment with IMMEDIATE effect. Many, many other issues have determined my decision. I consider myself constructively dismissed.

5.59 On 7 April 2019, the claimant wrote a follow up email saying essentially the same thing with slightly different emphasis. It states: -

I was rotad to open the store alone on numerous occasions. I have management/staff rotas to prove. It states on rotas they're authorised by the area manager. A few examples Thursday 13th September 2018, Thursday 4th October 2018, Thursday 25th October 2018 , Thursday 17th January 2019 & Thursday 14th February 2019. I expressed my worries & concerns but they were dismissed by my manager. He reminded me rotas are authorised by the area manager before being worked. Every occasion i was made to open the store alone I suffered with high anxiety. I felt frightened, distressed, vulnerable and extremely nervous. I have meeting notes that asked me about opening the store alone 28/01/2019. I emailed Steve Carter (area manager) as he was aware of me opening the store alone. The email i sent was on 28th January @ 23.31. I had NO REPLY.

On 18th March 2019 a discussion and its contents were leaked to me. The discussion refers to my disciplinary being pre-determined. I am off sick due to work related stress. This was very upsetting and i lost sleep and couldn't concentrate because of worry. I continued to receive threatening text messages from the colleague who leaked the conversation. I felt harrassed and bullied but i did not feel the company were supporting me. This incident made things worse for me and my prospects for returning to work. Since being signed off work i have had to go back on medication, anti depressant drugs. I was bullied, harrassed and threatened by a former colleague. The colleague has indicated sensitive, private information about me has been shared.

My mental health has deteriorated further since my last working day. since my initial grievance was reported matters at work have escalated and got worse. I no longer felt comfortable to ring the store i worked at. I do not feel my feelings have been considered or understood by the company.

5.60 Later on 7 April, he repeated the first email sending it to Chris Clare again in HR.

5.61 At some point in May, Tracey Dales' employment was terminated on the grounds she had not satisfactorily passed her probation period.

6. Discussion and Conclusions

6.1 There are two causes of action put before us. Disability discrimination under s.15 of the Equality Act 2010 and constructive unfair dismissal under sections 95(1)(c) and 98 of the Employment Rights act 1996. Under both, the claimant carries the legal burden of establishing that his resignation amounts to a dismissal in law, and establishing a prima facie case that being subject to the disciplinary process was because of something arising in consequence of his disability, namely "a need to take more frequent or extended breaks".

6.2 The claims sit against a significant event in January 2019 when the area manager discovers by chance what turns out to be a wholesale failure on the local store management to comply with very serious national policies and practices in respect of store security (affecting both assets and staff wellbeing), clocking procedures and the no-smoking policy. There is undoubtedly a serious issue to warrant investigation and there is nothing in that and the disciplinary process that follows which can be said to be without reasonable and proper cause. The potential seriousness is not in dispute and is reflected in the fact that all but one of the management team left their employment. Mr Ashby's argument that there is no evidence to prove he was guilty is not relevant to the issues before us. What is relevant is whether there was reasonable and proper cause to take the steps that were taken.

6.3 We also find Mr Ashby was complicit in these practices and was sufficiently trained and experienced to know what was happening was wrong. It may be said he and others were

falling in line with a very lax store manager not applying the procedure expected but, in most respects, he nonetheless retained responsibility for his own actions. That is not so in all matters of concern to the employer. One in particular concern of opening up alone was felt to be something he was not accountable for. The reasonableness of the respondent's approach to this major state of affairs is reflected in the fact that where he was not accountable for the breach, he was not subject to any disciplinary action.

6.4 Out of that background have emerged various complaints by the claimant: -

- a) His relationship with Steve Carter, area manager
- b) Consent by his store manager to take breaks apparently noted in writing as some form of adjustment to reflect his disability of depression and anxiety and other decisions of the store manager which puts the claimant in the position whereby he committed security breaches and found himself facing disciplinary allegations.
- c) The interface between the grievance and the disciplinary processes
- d) The relationship with other colleagues, in particular Tracey Dales and whether she bullied and harassed him, whether she was treated differently to him and whether she was involved in discussing a predetermined outcome to his disciplinary.
- e) The case has also evolved to include other matters which do not have the flavour of matters arising out of this state of affairs but more as afterthoughts including that the claimant's data security was breached by including him in a store whatsapp group.

6.5 Summarising our findings in a single paragraph, there was an abundance of evidence to demonstrate reasonable and proper cause for the respondent taking the actions it did take. Conversely, there were substantial and material gaps in the evidence for us to be able to conclude some of the earlier and wider allegations relied on by Mr Ashby as being made out as a fact.

6.6 Against that summary we turn to the discrimination claim. Section 15 of the Equality Act 2010 provides: -

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

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

6.7 In this case the potential defences of lack of knowledge of disability or justification are not engaged.

6.8 The employment tribunals approach to the question of causation is meant to be simple, pragmatic and common sensical. We have to ask ourselves what, out of the whole complex of facts before us, what was the effective and predominant cause or the real effective cause of the act complained of. It is enough if the something plays a material but minor part of the motivation for the unfavourable treatment.

6.9 We turn to apply the facts and law. The first question is disability. There is no dispute the claimant was disabled at the material time by virtue of a mental impairment (his depression and anxiety)

6.10 The next question is whether he was treated unfavourably. There is no dispute in this case that he was subject to the disciplinary investigation and subsequent disciplinary process albeit resigning before the actual disciplinary hearing.

6.11 The next question engages with the something arising. This is the focus of this claim. The claimant says that his disability meant he needed to take more frequent or extended breaks during the working day. In terms of evidence, we have nothing before us to substantiate that and that alone must mean the claim must fail.

6.12 However, we can see the attraction from a laypersons assessment that someone who might face panic or anxiety in certain situations may need to take time out occasionally which might manifest in breaks being taken at short notice, if not more frequent or for extended periods. However, even taking this approach to the evidence, we have concluded it does not assist Mr Ashby's claim. This disciplinary action was not about the breaks per se nor the duration of the breaks taken, it was about the failure to clock out when taking breaks and the failure to maintain associated security procedures at the store. Indeed, there is evidence before us from both the informal statement of Mr Torgoose and Mrs Gutteridge's own evidence of the ability for managers to take breaks which goes to support the claimant's contention that there was some accommodation give to him to take more or longer breaks. Mr Watson was more likely than not part of that accommodation.

6.13 But that only goes so far. Mrs Gutteridge's concession was subject to those breaks being subject to clocking out and, we infer, in consultation with colleagues on the

management team. Nothing in Mr Ashby's claim, or Mr Torgooses' informal statement suggest that the accommodation given to the claimant in respect of breaks excused him from clocking out or from complying with security procedures. Consequently, even if we do take a relaxed approach to the evidence of proving the need for breaks arises in consequence of Mr Ashby's disability, the need for breaks is not a material causal link to the unfavourable treatment.

6.14 It is clear to us that the reason for that disciplinary action was the security and clocking breaches. And this claim fails for that reason.

6.15 We then turn to the claim of unfair dismissal. Section 95(1)(c) provides: -

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) F1 . . . , only if) —

(a)...

(b)...

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

6.16 We have not been addressed on case law in particular but have directed ourselves to the leading authorities, in particular Western Excavating v Sharpe, Mahmud v BCCI on the implied term of trust and confidence that an "Employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously undermine trust and confidence". To London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493 on the meaning of a "last straw" event and to Kaur v Leeds Teaching Hospital [2018] EWCA Civ 978 on the approach to take in last straw cases.

6.17 The approach in Kaur essentially requires us to reverse the sequence of the alleged events said to breach the implied term as they appear in the list of issues although some are not specific incidents but are said to convey a general state of affairs. They must either amount to a breach in their own right or, if not a breach, they must nevertheless add something to the mix of matters said to amount to a breach.

6.18 The most proximate group of matters next before the resignation relate to a number of matters concerning Tracey Dales. First is (n) "That a visiting manager shared information about him with Tracey Dales indicating that his grievance (list of issues should be disciplinary) had already been pre-determined and Miss Dales passing this onto Beverley Batty to pass on

to him”. We do not accept that the claimant has established conduct by the employer or that could be attributed to the employer. Further, we are not convinced it is in the nature of something which adds to the cumulative picture of alleged breaching events in the Omilaju sense.

6.19 Related to this is **(i)** “ being subject to a series of threatening texts from Tracey Dales on 22 March 2019”. Again, we are not satisfied these are acts of the employer. The attack on employer’s conduct has to be based on how it responds to that matter and we have determined elsewhere that it did not ignore the matter, that there was reasonable and proper cause for including it in the disciplinary hearing in the first instance, not least because it was relevant and may have been unreasonable to exclude it. In any event, we are not able to determine they were threatening in the sense relied on without the wider context, part of which potentially inculcates the claimant in some conduct together with Bev Battey.

6.20 Related to it is the allegation at **(k)** “That Tracey Dales was allowed to remain in employment for a number of weeks prior to her resignation”. In this allegation there is no conduct likely to undermine trust and confidence and, as we have already indicated, even if there was in the decision to deal with the relevance of the allegation in the disciplinary hearing there was reasonable and proper cause for that. This is not a case of inconsistent treatment in the true sense and there was insufficient time to do anything of substance before the disciplinary hearing and the respondent could have been criticised for not allowing Mr Ashby to raise this and other similar issues at his disciplinary hearing.

6.21 The final allegation in this group is **(j)** “Failing to resolve his complaint to Chris Clare in HR (on 19 March 2019) about Tracey Dales’ behaviour within a reasonable period”. We do not accept that the respondent failed to resolve it within a reasonable period. Between the issue being raised in late March and the resignation occurring about two weeks later it was reasonably expected that the disciplinary hearing would be heard and the surrounding context and policies gives the decision to consider it in the context of the disciplinary process ought not be likely to seriously undermine trust and confidence and, in any event, establishes a reasonable and proper cause such that it does not amount to a breach in its own right.

6.22 It follows that the most proximate group of events in time have been rejected and the principles of Kaur require us to consider those next before in time albeit the prospect of intervening affirmation becomes a prospect for anything found to be a breach of the implied term.

6.23 The next matters relate to the grievance and complaints. The first of which is allegation **(m)** “Refusing to consider the Claimant’s grievance separately to the disciplinary allegations”. This arises in the period between 14 February and the end of March. During the course of the evidence Mr Ashby conceded that this was a reasonable step and was in line with the employer’s policy. It cannot therefore amount to a breach of the implied term of trust and confidence. That is a significant concession as it has implications for other alleged conduct.

6.24 Related to this is **(h)** “Failing to resolve his grievance (submitted on 14 February 2019) within a reasonable period”. We simply do not see how that can be maintained after it was accepted it was reasonable to form part of the disciplinary procedure, in the first instance at least. In any event, we conclude that was a step that falls short of being likely to undermine trust and confidence.

6.25 Another very similar allegation is **(d)** “Respondent’s alleged failure to act appropriately & consistently to breaches in policy/procedure by Tracy Dales”. We simply do not accept Mr Ashby has made this out in fact. The issues were not ignored and were there to be engaged with. This forms part of the distinction between complaints and grievances and the policy position of dealing with disciplinary before or alongside grievances, and not delaying them.

6.26 We then turn to the next group of matters which concern the handling of the investigation process and arise in a similar process between 28 January and the resignation. The first is **(e)** “Respondent’s alleged failure to provide any evidence to alleged breaches in procedure leading to disciplinary proceedings (CCTV)”. This allegation was not made out. There was evidence available. Mr Ashby had not disputed the allegations in fact or requested to see it at the time. When it was requested, he was informed he could see it. We are satisfied that the respondent was entitled to understand the claimant’s responses to the allegations to be that he was not denying them. Even the later emails and grievance do not undermine the basis for that understanding. We accept allegations of misconduct are always likely to seriously undermine trust and confidence, but we are satisfied that the respondent had reasonable and proper cause for taking the action it did. Any objective assessment of breach has to be seen in the context of a wholesale problem in the management team together with the context of reasonable measures being taken in individual cases. In any event, we are not satisfied this formed part of the reason to resign

6.27 Related to this is the allegation **(f)** Subjecting him to a disciplinary allegation of breaching security procedures when it was his manager and area manager that rostered him to work in that way. Again this has not been made out. The initial investigation was with reasonable and proper cause. No disciplinary action followed in this respect. This cannot contribute to a breach of the implied term of trust and confidence.

6.28 A similar allegation exists at **(g)** Subjecting him to a disciplinary allegation of taking unauthorised breaks when his manager had previously given written authorisation to take additional / extended breaks as an adjustment for his impairment. This is not made out. As we have already said, the Discipline was focused on clocking and security breach and to a lesser extent the initial concerns included smoking on premises. The issue was not about the fact of taking additional breaks per se. Much of the claimant's case unravels in this respect as it severs the causal between the conduct and the disability and, as we have set out, explains the reason why the disability claim failed also. There was no evidence of authorisation before the employer. The fact that we were prepared to infer some discussion does not alter fact that this was not the reason for the employer's action and, over and above all of that, the claimant did not raise this with the initial investigation, continued to take the breaks without clocking out afterwards and did not wait to put this position to the employer during the disciplinary process.

6.29 As we move to the other matters alleged to form a breach of contract they become older and even less specific. The first of this next group of allegations is at allegation **(a)** failure to comply with store security policy and work overload. We have not been taken to anything in evidence or submissions concerning work overload. Insofar as this allegation engages with the "Health and safety risk" associated with opening the store on his own, the issue of security breach arose at the outset of the investigation. There was reasonable and proper cause for the employer exploring that. When the circumstances of the roster were known, the employer dropped this allegation as a disciplinary matter.

6.30 We have, however, considered an underlying issue that remains. That is the extent being rostered to work alone in itself potentially gave rise to a breach of the implied term. This did feature in the claimant's stated reasons for resigning although we are not satisfied that can be genuine against the history. Putting that to one side, we would be satisfied that the way a roster is produced if it did put an employee in the position of opening up on his own could amount to conduct likely to undermine trust and confidence. However, Mr Ashby's case is that this had been in place for so long without prompting the complaint that the claimant

now alleges that we have to conclude that any breach that could have arisen from that state of affairs had been waived and the contract affirmed long before the resignation. It had lasted for a long time, throughout the previous year and even though we might accept some discussion between Mr Ashby and Mr Watson about this practice, we do not accept that this was raised as a complaint. They too got on well, there was nothing to prevent Mr Ashby raising concerns he genuinely felt with Mr Watson again or going higher. The fact Mr Watson's explanation was accepted by Mr Ashby and the practice continued without it being raised anywhere else supports a conclusion that it was not genuinely viewed as the health and safety breach risk by the claimant at the time and, if he did, he affirmed the contract by his continued performance and acquiescence in that breach. It falls into the same nature of allegations that have grown somewhat in significance as the resignation decision was made but the facts do not support it being the breach that is now advanced.

6.31 Moreover, the practice had ceased in January when it was discovered by Mr Carter and the investigation commenced. The claimant knew of the employer's view that this was not appropriate and must have been aware this was not going to happen in the future if he returned to work. Whilst an employer cannot undo a breach that has already occurred, the actions of the employee and the time elapsed lead us to conclude this was not a true reason for resignation. Any breach there might have been had been long since affirmed.

6.32 We then go back further in time in allegation **(c)** Breach of company policies and procedures (harassment and bullying at work policy, code of conduct policy and diversity and equality policy). These have never been developed into anything more specific. We are simply not satisfied the allegations have been made out.

6.33 Related to this is **(b)** Bullying and harassment by Steve Carter (the Area Manager) and Tracey Dales. We have not found this to be made out in either case.

6.34 The final matter is allegation **(L)** "Breach of GDPR by sharing the Claimant's personal mobile number without permission for business WhatsApp group". This allegation stands out as being entirely unrelated to anything else in the relevant chronology. We cannot even be sure when the issue was said to have arisen. What we can be sure of is that there is absolutely nothing in the conduct of the employer related to this which could give rise to conduct likely to undermine trust and confidence. Sadly, the fact this allegation has been made reflects on the overall impression of what was actually on Mr Ashby's mind and is not mentioned at all in the run up to his resignation. Not only is there no breach but we do not

accept he resigned because of. In any event, whilst we can't identify the exact date, there is no dispute it is historical and must result in an inference being drawn that any breach it might be capable of amounting to had been waived and the contract affirmed.

7. Conclusion

7.1 The claims fail but we wanted to conclude with three observations.

7.2 First, we have to decide claims on the evidence adduced and the relevant legal tests. That they might fail does not diminish the subjective human experience that leads to the claim being brought in the first place. We hope Mr Ashby will understand we have not rejected his genuine subjective feelings about what was happening at the time.

7.3 Secondly, conducting litigation on one's own is emotionally demanding for anyone whatever their disability status and it has clearly been so at times for Mr Ashby. Nevertheless, we wanted to acknowledge and give credit to his ability to put his case and advance the arguments he did have which he did more competently than he may give himself credit for.

7.4 Finally, we note his observations during his closing submissions that he was now in a positive working environment with a new employer and that, to quote, "maybe things happen for a reason and maybe it was meant to be as he is happy now". There is a value in this matter being something in his past and we hope although his legal claims have not succeeded, concluding the process will now allow him to move forward positively.

EMPLOYMENT JUDGE R Clark
DATE 6 August 2021

JUDGMENT SENT TO THE PARTIES ON

17 August 2021
.....

AND ENTERED IN THE REGISTER
.....

FOR SECRETARY OF THE TRIBUNALS

APPENDIX – Agreed list of issues

Constructive Unfair Dismissal

1. Did the Respondent act in a way which was or was likely to damage or destroy the trust and confidence which exists between employer and employee:
 - a. Respondent's alleged failure to comply with store security policy and work overload
 - b. Bullying and harassment by Steve Carter (the Area Manager) and Tracey Dales
 - c. Breach of company policies and procedures (harassment and bullying at work policy, code of conduct policy and diversity and equality policy)
 - d. Respondents alleged failure to act appropriately & consistently to breaches in policy/procedure by Tracy Dales
 - e. Respondent's alleged failure to provide any evidence to alleged breaches in procedure leading to disciplinary proceedings
 - f. Subjecting C to a disciplinary allegation of breaching security procedures when it was his manager and area manager that rostered him to work in that way;
 - g. Subjecting him to a disciplinary allegation of taking unauthorised breaks when his manager had previously given written authorisation to take additional / extended breaks as an adjustment for his impairment
 - h. Failing to resolve his grievance (submitted on 14 February 2019) within a reasonable period
 - i. Him being subject to a series of threatening texts from Tracey Dales on 22 March 2019
 - j. Failing to resolve his complaint to Chris Clare in HR (on 19 March 2019) about Tracey Dales' behaviour within a reasonable period
 - k. That Tracey Dales was allowed to remain in employment for a number of weeks prior to her resignation
 - l. Breach of GDPR by sharing the Claimant's personal mobile number without permission for business WhatsApp group
 - m. Refusing to consider the Claimant's grievance separately to the disciplinary allegations
 - n. That a visiting manager shared information about him with Tracey Dales indicating that his grievance had already been pre-determined and Miss Dales passing this onto Beverley Batty to pass on to him

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2. If so, did any such act or omission (alone or cumulatively) of the Respondent amount to a repudiatory breach of the Trust and Confidence Term?
3. If so, did the Claimant resign in response to all or some of those breaches and not for some other unconnected reason?
4. Did the Claimant by his conduct waive any of such breach and treat his contract of employment as continuing?
5. Did the Claimant delay for too long before resigning in response to any breach that he might establish, such that he ought properly to be deemed to have waived the breach and affirmed his employment contract?
6. If the Claimant was constructively dismissed, was that dismissal unfair, having regard to section 98(4) ERA 1996?

Disability

7. It is accepted that the Claimant was a disabled person at the material time by virtue of anxiety and depression.
8. Did the Respondent have knowledge of the Claimant's disability (either expressly or impliedly) at the material time?

Discrimination arising from disability

9. The something arising in consequence of the Claimant's disability is the need to take more frequent and/or extended rest breaks during the working day (which was previously authorised in writing)
10. Did the Respondent treat the Claimant unfavourably by subjecting him to a disciplinary process?
11. Can the Respondent show that that treatment was a proportionate means of achieving a legitimate aim within the meaning of section 15(1)(b) of the EqA 2010?

Time Limits

Case number: 2406083/2019

12. Did the Claimant bring the claim within three months of the alleged discriminatory act(s) or omission(s) (taking into account any extension during the Acas early conciliation period)?

13. If not, is it just and equitable to extend time?