Case Number: 3321915/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr G Ojiako	v	H & M Hennes & Mauritz UK Limited

Heard at: Watford **On**: 22-25 November 2021

Before: Employment Judge Hyams **Members:** Ms E Davey
Mr D Sutton

Representation:

For the claimant: In person
For the respondent: Mr Jeffery Jupp, of counsel

UNANIMOUS RESERVED JUDGMENT

1. The claimant's claim of a breach of section 15 of the Equality Act 2010 ("EqA 2010") does not succeed and is dismissed.

2. The claimant's claim of a failure to make reasonable adjustments within the meaning section 20 of the EqA 2010, does not succeed and is dismissed.

3. The claimant's claim of harassment within the meaning of section 26 of the EqA 2010 does not succeed and is dismissed.

3. The claimant's claim of constructive dismissal within the meaning of section 39(7)(b) of the EqA 2010 does not succeed and is dismissed.

5. The claimant's claim of wrongful dismissal does not succeed and is dismissed.

6. The claimant is entitled to accrued unpaid holiday pay in the sum of £27.62.

7. The claimant is entitled to wages for the period from 19 April to 3 May 2019 inclusive.

REASONS

Introduction; the claim and the parties

1 The respondent is a large clothing retailer, with a number of stores around the country. The claimant worked for the respondent as a part-time sales advisor at the respondent's Harrow store under a contract of employment.

2 The claimant started working for the respondent on 3 July 2018. On 4 April 2019, he wrote a resignation letter, giving notice to 3 May 2019. On 18 April 2019, he was subjected to a disciplinary hearing because of conduct of his on 1 and 2 March 2019. Before that hearing, the claimant sought to put before the decision-maker among other things his letter of resignation. The decision-maker, Ms Eman Abdi, apparently without asking what was in the documents that the claimant wanted her to take into account, refused even to read them. She did so because (1) they had not been sent to the respondent at least 24 hours in advance of the hearing, and (2) the requiring the claimant to attend the hearing had required him to send any documents on which he intended to rely at the hearing to the respondent at least 24 hours in advance of the hearing. The claimant did not then explain that he wanted to resign and the hearing went ahead. At the end of it, the claimant was dismissed summarily.

3 The claimant appealed against his summary dismissal. The outcome that he sought was that his resignation took effect instead of his summary dismissal. The appeal was heard by Mr Mark Stott. He held a hearing on 24 May 2019, but after the hearing he conducted some inquiries and he did not send the outcome letter until 16 July 2019. Mr Stott allowed the claimant's appeal on the basis that the claimant's resignation letter dated 4 April 2019 took effect instead of his summary dismissal.

4 By a claim form presented on 29 August 2019, the claimant claimed disability discrimination. Implicitly, that was principally a claim that the claimant's dismissal was discrimination within the meaning of section 15 of the Equality Act 2010 ("EqA 2010"), contrary to section 39 of that Act. The details of the claim were not such as to enable a determination of the precise nature of the claim of disability discrimination, and that claim was later framed in a number of ways, to which we refer below. While the claimant also claimed in the claim form that he had been dismissed unfairly (and he did that simply by ticking the box in section 8 of the form for unfair dismissal), he did not press that claim because he had less than two years' continuous employment when he was dismissed.

5 The claimant approached ACAS for early conciliation on 26 July 2019 and the ACAS certificate was issued on 26 August 2019. In those circumstances, the

claimant's claim was out of time in respect of any event which occurred before 27 April 2019.

6 By the time of the hearing before us, it was accepted by the respondent that the claimant was disabled by reason of dyspraxia, and that at all material times, the respondent knew that the claimant had dyspraxia. The respondent made no admissions about the knowledge of the impact of that disability on the claimant that the respondent had, or could reasonably have been expected to have had, while the claimant was employed by the respondent.

7 There was a preliminary hearing before Employment Judge ("EJ") Hyams on 15 May 2020. The purpose of the hearing was to clarify the issues and make appropriate case management orders to get the case to trial, but the parties were in agreement at that time that there should be a preliminary hearing to decide whether the claim was out of time. EJ Hyams agreed with that proposal at that hearing, but when writing his record of the hearing and reviewing the factual basis for the claims came to the view that it would not after all be a sensible use of the parties' and the tribunal's time and resources for such a hearing to occur. He stated that in a case management summary which was sent by the tribunal to the parties on 20 May 2020, giving the parties an opportunity to respond to that changed view. They did so, and agreed that there should not be a preliminary hearing to decide the time issue, and that it should instead be decided at the trial, after all relevant findings of fact had been made.

8 The reason for that change of view of EJ Hyams was related to some difficult issues arising in the law of contract, which EJ Hyams stated in detail in the case management summary sent to the parties on 20 May 2020.

9 Unfortunately, even the issues in the claims of breaches of the EqA 2010 were not finally determined until we were hearing closing submissions. That was a result of three things. The first was that (1) the claimant was being assisted by pro bono legal advisers who changed from time to time, (2) at the trial the claimant was not represented but needed to seek advice on legal issues, and (3) he was able to do so reliably only in overnight breaks in the hearing. The second reason why the issues in the claims of breaches of the EqA 2010 were not finally determined until we were hearing closing submissions was that, as with many cases in which the claimant was dismissed and claims discrimination within the meaning of the EqA 2010, the claim was about a number of things other than the dismissal, when claims about those other things would, plainly, not have been made if the claimant had not been dismissed. Those claims were about what happened before the dismissal and in part were about things that led to the dismissal. They were, as can be seen from what we say in paragraphs 2-5 above, all out of time unless time was extended for making the claim in question. In so far as the claims were about events preceding the claimant's dismissal, the factual material on which they were based was relevant to the question whether the dismissal was contrary to section 15 of the EqA 2010, so that if the claim of a

discriminatory dismissal succeeded then the success of the other claims was highly likely to lead to no additional compensation.

10 The third reason why the list of issues was not agreed until the end of the hearing before us was that the parties had before the hearing started sought to agree a list of issues, but the claimant did not agree it in full and was plainly unable to discuss the issues with us meaningfully during the hearing. As a result, EJ Hyams had encouraged him on the first day of the hearing to focus on the issues relating to his dismissal, which he had agreed to do, but then at the point of hearing submissions, we realised that the list of issues which was then being used by Mr Jupp (to whom we were very grateful for his considerable assistance, including that which he gave to the claimant as an unrepresented litigant) did not include one claim which, if it were in time, was arguable.

11 That additional claim was of a breach of section 15 of the EqA 2010 in regard to a set of circumstances which was already the subject of a claim of harassment within the meaning of section 26 of that Act, both of which claims were made considerably out of time. We therefore permitted the claimant to advance that additional claim of a breach of section 15, on the basis that

11.1 it was included in a list of issues which had been proposed on behalf of the claimant during 2020, so that the respondent had been aware of it long in advance of the hearing,

11.2 all of the evidence which could be material to it was already before us, and

11.3 if it were well-founded on the facts, then we would have to decide whether it was just and equitable to extend time for making it.

12 The parties agreed that the claimant had not been paid accrued holiday pay for the period from 19 April to 3 May 2019 inclusive (which, it was agreed, was in the sum of £27.62), and it appeared (it was not clear) that the claimant had not been paid backdated wages for that period. Mr Stott had said nothing about that in his appeal outcome letter of 16 July 2019, and had assumed that the claimant would be paid such money as he was owed as a result of the (as he understood it) agreed postponement of the date of termination of the claimant's employment with the respondent from 18 April to 3 May 2019.

13 In what follows, we first state the issues as they stood by the close of submissions. We then refer to (and in some cases set out) the relevant statutory provisions and case law. We then state our findings of fact. We then, finally, state our conclusions.

The issues

Introduction

14 The claims were about three factual situations. The first claim concerned things which the claimant claimed had been said to him in February 2019. It was denied that those things were in fact said, but it was also the respondent's case that if they were said then they did not breach the EqA 2010. The second and third claims concerned factual situations which were agreed. We state the issues below by reference to (1) the factual situations in relation to which they all arose and (2) the ways in which it was claimed there had in those situations been a breach a legal obligation (predominantly arising under the EqA 2010).

The claimed events of February 2019

15 It was the claimant's case that the manager of the respondent's Harrow store, Ms Madalina Faifer, in February 2019 when he asked her for feedback on his performance, said that he was "slow" and criticised him for leaving what the respondent called "dumps" in every section of the store for which he was responsible. Such a "dump" was a piece of merchandise which was not in its correct place. Such "dumps" were usually made by customers who put down a piece of merchandise that they had carried around with them and then decided not to buy and put into a place other than the piece of merchandise's proper location. The respondent denied that Ms Faifer said those things to the claimant. It was the claimant's case that in saying those alleged things, Ms Faifer had

15.1 harassed him within the meaning of section 26 of the EqA 2010 and/or

15.2 breached section 15 of that Act by treating him unfavourably because of something arising in consequence of his dyspraxia, in the circumstances that that treatment was not a proportionate means of achieving a legitimate aim.

16 The claim of a breach of section 15 needs no further elaboration. For the claim of harassment to succeed, it was necessary for the claimant to satisfy us that the conduct of Ms Faifer (assuming that we found it occurred)

16.1 was unwanted,

16.2 was related to the claimant's disability of dyspraxia, and

16.3 either was done for the purpose of "violating [the claimant's] dignity", or creating for him "an intimidating, hostile, degrading, humiliating or offensive environment", or,

16.4 if it was not done for that purpose, applying section 26(4) of the EqA 2010 (which we set out in paragraph 34 below), had that effect.

The disciplinary investigation meeting and the disciplinary hearing

17 It was not in dispute that the claimant did things on 1 and 2 March 2019 (about which we make findings of fact below) which led to him being the subject of a disciplinary investigation and then being dismissed. The claimant was interviewed by Ms Yaldama Aminullahsirat on 4 April 2019 in the course of that investigation, and on 18 April 2019, as we say in paragraph 2 above, Ms Abdi conducted the disciplinary hearing at the end of which the claimant was dismissed.

18 It was the claimant's case that the respondent had failed to make reasonable adjustments within the meaning of section 20 of the EqA 2010 during the course of those meetings in the following ways:

18.1 failing to warn him in advance of the meeting of 4 April 2019 that the meeting was going to take place, and

18.2 failing to offer him an opportunity to take a break during either that meeting or the disciplinary hearing of 18 April 2019.

19 The respondent accepted that it had a provision, criterion or practice ("PCP") within the meaning of section 20(3) of the EqA 2010 in the form of holding investigation meetings without informing employees in advance that the meeting was going to take place. It also accepted that it had a PCP of not offering a break to employees during any investigatory meeting or disciplinary hearing, so that unless there was a natural break in the meeting or hearing, or one was wanted by the person conducting the hearing, the employee had to ask for a break.

20 The questions for us accordingly in regard to those claims of breaches of section 20(3) of the EqA 2010 were these.

20.1 Did either of those PCPs put the claimant at a substantial disadvantage (within the meaning of section 212(1) of the EqA 2010, i.e. a disadvantage which was more than minor or trivial) in comparison with persons who are not disabled?

20.2 If so, did the respondent know, or (applying paragraph 20 of Schedule 8 of the EqA 2010) could it reasonably have been expected to know, that the claimant was likely by reason of his dyspraxia to be put at that disadvantage?

20.3 If so, was there a failure by the respondent to take a reasonable step within the meaning of section 20(3) through either

20.3.1 failing to warn the claimant that there was going to be an investigatory meeting on 4 April 2019, or (as the case may be)

20.3.2 failing during either that meeting or the disciplinary hearing of 18 April 2019 to offer the claimant an opportunity to take a break?

20.4 If there was such a failure, was it just and equitable to extend time under section 123(1)(b) of the EqA 2010 in respect of the claim that there was such a failure?

The claimant's dismissal

21 It being agreed that the claimant's dismissal was unfavourable treatment of him:

21.1 Was that dismissal because of something arising from his dyspraxia?

21.2 If so, was the claimant's dismissal a proportionate means of achieving a legitimate aim?

22 It was the claimant's case that the "something" for which he dismissed was

22.1 the volume, speed and pitch of his voice, and

22.2 his emotional reaction to his colleagues when learning of the fact that he had been removed from the Harrow store's rota so that he was not required to work on 1 March 2019, as expressed both on 1 March 2019 and 2 March 2019.

23 It was the respondent's case that the claimant's dismissal was not for something arising in consequence of his disability of dyspraxia. Rather, it was the respondent's case, the claimant was dismissed because of conduct on 1 and 2 March 2019 in the form of verbal aggression towards his colleagues, including Ms Faifer, on those days, and that that conduct did not arise in consequence of his dyspraxia.

24 If, however, the claimant's dismissal was for something arising in consequence of his dyspraxia, then, it was the respondent's case, the claimant's dismissal was a proportionate means of achieving the legitimate aim of

24.1 upholding its values and the standards of conduct of members of its staff; and

24.2 protecting the claimant's colleagues, and in particular Ms Faifer, from an employee who had been abusive towards her and of whom she was fearful.

The impact of Mr Stott's allowing of the claimant's appeal in the manner in which he did so

25 Several issues arose as a result of Mr Stott allowing the claimant's appeal on 16 July 2019 by treating the claimant at the claimant's request as having resigned with the last day of his employment being 3 May 2019. The first issue was whether as far as the law of contract was concerned that meant that the claimant's contract of employment ended 3 May 2019, and, if it did not so, whether it instead ended on 16 July 2019.

26 The second issue which arose from the fact that Mr Stott allowed the claimant's appeal was whether the claimant, who was now by agreement treated as having resigned, was dismissed constructively, i.e. within the meaning of section 39(7)(b) of the EqA 2010, in the circumstances. The claimant could have been so dismissed only if he was properly to be regarded as having resigned in response to conduct on the part of the respondent which constituted a breach of the implied term of trust and confidence, and

26.1 the conduct constituting that breach (which could include an accumulation of conduct) was at least in part discriminatory within the meaning (here) of section 15 and/or 20 of the EqA 2010, and

26.2 applying paragraphs 68 and 69 of the judgment of Cavanagh J in *De Lacey v Wechseln Ltd (t/a The Andrew Hill Salon* [2021] IRLR 547, that discriminatory conduct "materially influenced the conduct that amounted to" that breach of the implied term of trust and confidence.

27 Given that the claimant's letter of resignation was written by him before the investigatory meeting conducted by Ms Aminullahsirat on 4 April 2019, it was the respondent's case that the claimant could rely in claiming that he had been dismissed within the meaning of section 39(7)(b) of the EqA 2010 only on conduct which occurred before then. That meant, it was the respondent's case, that the claimant could rely on only the conduct about which he complained as having occurred in February 2019 to which we refer in paragraph 15 above.

Relevant law

Disability discrimination

Discrimination within the meaning of section 15 of the EqA 2010

28 Section 15 of the EqA 2010 provides this:

"(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."

29 Paragraph 31 of the judgment of the EAT in *Pnaiser v NHS England* [2016] IRLR 170 provided very helpful guidance to us on the application of section 15, and we applied that guidance.

30 We referred ourselves to the following helpful summary of the applicable principles in paragraph L[377.01] of *Harvey of Industrial Relations and Employment Law*: concerning the question whether any unfavourable treatment "is a proportionate means of achieving a legitimate aim":

> "The EAT in *Hensman v Ministry of Defence* UKEAT/0067/14/DM, [2014] EqLR 670 applied the justification test as described in *Hardy and Hansons Plc v Lax* [2005] EWCA Civ 846, [2005] IRLR 726, [2005] ICR 1565 to a claim of discrimination under EqA 2010 s 15. Singh J held that when assessing proportionality, while an ET must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. (Applied *Monmouthshire County Council v Harris* UKEAT/0010/15 (23 October 2015, unreported)). As stated expressly in the EAT judgment in *City of York Council v Grosset* UKEAT/0015/16 (1 November 2016, unreported), the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the ET was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the ET. The Court of Appeal in *Grosset* ([2018] EWCA Civ 1105, [2018] IRLR 746) upheld this reasoning, underlining that 'the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment'."

<u>The law relating to reasonable adjustments: section 20 of the EqA 2010</u>

31 Section 20 provides so far as relevant:

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

32 In *Matuszowicz v Kingston Upon Hull City Council* [2009] EWCA Civ 22, [2009] IRLR 288, the Court of Appeal held that time begins to run for the purpose of making a claim of a failure to make a reasonable adjustment when a decision is made not to make the adjustment or, when no such decision is made, from the time when, if it were to be made, the adjustment could reasonably have been expected to be made.

33 In *Smith v Churchill Stairlifts plc* [2005] EWCA Civ 1220, [2006] ICR 524, the Court of Appeal held that the question whether a step was a reasonable one within the meaning of (now) section 20 of the EqA 2010 to take is for the tribunal to decide, and not the employer, so that the "range of reasonable responses of a reasonable employer" test which applies in deciding the fairness of dismissals within the meaning of section 98(4) of the Employment Rights Act 1996 ("ERA 1996") does not apply in applying section 20 of the EqA 2010.

Section 26 of the EqA 2010

34 Section 26 of the EqA 2010 provides:

"(1) A person (A) harasses another (B) if–

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of–

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account–

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

35 The provisions of section 26 of the EqA 2010 have been considered by appellate courts on a number of occasions in helpful ways, including (1) by the EAT in *Richmond Pharmacology v Dhaliwal* [2009] ICR 724 and (2) by the Court of Appeal in *Land Registry v Grant (Equality and Human Rights Commission intervening)* [2011] ICR 1390, where Elias LJ said in relation to the claimed harassment in that case:

> "[The claimed] effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

36 In paragraph 22 of *Dhaliwal*, the EAT (Underhill P presiding) said this:

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

37 In *Betsi Cadwaladr University Health Board v Hughes* (unreported; UKEAT/0179/13/JOJ, 28 February 2014), the EAT (Langstaff P presiding) said this in paragraphs 12 and 13 of its judgment having just set out paragraph 22 of the judgment in *Dhaliwal*:

> '12. We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.

> 13. It was agreed, too, that context was very important in determining the question of environment and effect. Thus, as Elias LJ said in *Grant*, context is important. As this Tribunal said, in *Warby v Wunda Group plc*, UKEAT 0434/11, 27 January 2012:
>
> > "…we accept that the cases require a Tribunal to have regard to context. Words that are hostile may contain a reference to a particular characteristic of the person to whom and against whom they are spoken. Generally a Tribunal might conclude that in consequence the words themselves are that upon which there must be focus and that they are discriminatory, but a Tribunal, in our view, is not obliged to do so. The words are to be seen in context;".'

38 *Dhaliwal* is authority for the proposition that the intent of the impugned conduct is relevant. That was said at the end of paragraph 15 of the EAT's judgment in that case.

The law of contract and the effect of a successful appeal

39 The most recent, authoritative, and clear authority on the impact of the allowing of an appeal of an employee against his or her dismissal is that of the Court of Appeal in *Folkestone Nursing Home Ltd v Patel* [2019] ICR 273. There, Sales LJ as he then was (with whose judgment Ryder and McFarlane LJJ agreed) said this:

> "26. I consider that the short answer to this ground of appeal is that it is clearly implicit in a term in an employment contract conferring a contractual right to appeal against disciplinary action taking the form of dismissal that, if an appeal is lodged, pursued to its conclusion and is successful, the effect is that both employer and employee are bound to treat the employment relationship as having remained in existence throughout. This is not a matter of implying terms, but simply the meaning to be given to the words of the relevant contract, reading them objectively."

40 The judge continued:

> "27. By including a contractual right of appeal in the employment contract, the employer makes available to the employee a facility to seek to overturn the disciplinary decision made against him and to have the dismissal treated as being of no effect. If the appeal is successful, then subject to any other contractual provisions, the employee is entitled to be treated as having never been dismissed, to be paid all back pay and to have the benefit of all other terms of his contract of employment through the relevant period and into the future. Those terms include the usual implied duty of an employer to maintain trust and confidence.

> 28. Conversely, if the employee exercises his right of appeal under the contract and does not withdraw the appeal before its conclusion, it is obvious on an objective basis that he is seeking to be restored to his employment and is asking and agreeing (if successful) to be treated as continuing to be employed under his contract of employment for the interim period since his previous dismissal and continuing into the future, so that that dismissal is treated as having no effect. It is not a reasonable or correct interpretation of the term conferring a right of appeal that a successful appeal results in the employee having an option whether to return to work or not.
>
> 29. If an appeal is brought pursuant to such a term and is successful, the employer is contractually bound to treat the previous dismissal as having no effect and the employee is bound in the same way. That is inherent in the very concept of an appeal in respect of a disciplinary dismissal.
>
> 30. An employment contract involves significant obligations on each side, and each party has a clear interest in knowing where they stand in relation to the contract and those obligations, as to whether they exist or not: see *Geys v Société Générale, London Branch* [2013] ICR 117; [2013] 1 AC 523, paras 57–59 per Baroness Hale of Richmond JSC. If a contractual appeal is brought against a dismissal for disciplinary reasons, a reasonable person in the shoes of the employee will expect his full contractual rights and employment relationship to be restored without more as soon as he is notified that his appeal has been successful. He would not think that any further action by him was required, in terms of saying that he agrees that this is the effect. He has asked for that to happen by the very act of appealing. Similarly, a reasonable person in the shoes of the employer will understand that this is the effect of a successful appeal as soon as the parties are notified of the outcome of the appeal, without any question of a further round of debate about whether the employee is prepared to accept this or not. The reason is the same: the employee has already asked for that to be the outcome by the very act of appealing."

41 The rest of the judgment of Sales LJ is also material. In paragraph 42, he set out a passage of the judgment of Mummery LJ in *Roberts v West Coast Trains Ltd* [2005] ICR 254, where Mummery LJ referred to the fact that the employee in that case had made a claim of unfair dismissal before his appeal against his dismissal was allowed as being "legally irrelevant", on the basis that the allowing of the appeal meant that the claimant could not press that claim. The factual situation in *Patel* is in some respects parallel to that of this case, as the employee in that case did not return to work after his successful appeal.

42 What was said by Sales LJ in paragraph 43 showed the impact of the allowing of the appeal in that case:

> "In our case, the employee lodged an appeal and did not withdraw it before it was found to be successful, even though that happened after he had lodged his claim with the tribunal. According to the analysis of Mummery LJ, in line with the view of Elias J, the success of the appeal means that the employee's employment contract was treated as continuing down to that point, with no dismissal. In line with Mummery LJ's indication in *Roberts's* case, para 25, the success of the appeal in the present case did not constitute an offer which the employee could accept or reject. Similarly, in my view, the employee's success on his appeal did not give rise to an option for him to continue with the employment or not. When his appeal was successful, the employee was bound by the result to the same extent as the employer."

43 Sales LJ said specifically that the fact that an employee might appeal otherwise than with a view to obtaining reinstatement, for example with a view simply to clearing his or her name, does not affect the impact of the allowing of the appeal. As Sales LJ said in paragraph 32 of his judgment:

> "[I]n my view these other possible reasons why an employee might wish to invoke a contractual appeal process are collateral to the object of having such a process included in the contract of employment. That object is, that the employee is contractually entitled to ask the employer to reopen its previous decision to dismiss and to substitute a decision that there should not be a dismissal. Where a contractual appeal is brought, that is the obvious purpose of the appeal, judging the matter objectively. The fact that an employee might have other motives for seeking to appeal does not affect the interpretation of the contract."

What constitutes a dismissal within the meaning of section 39(7)(b) of the EqA 2010

44 Section 39(2)(c) of the EqA 2010 read with section 39(7)(b) of that Act is so far as relevant in like terms to section 95(1)(c) of the ERA 1996, which is the current version of the provision that was the subject of the determination of the Court of Appeal in *Western Excavating v Sharp* [1978] ICR 761. Section 95(1)(c) provides:

> "For the purposes of this Part an employee is dismissed by his employer if ... 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."

45 The meaning of what is now section 95(1)(c) was clarified by Lord Denning MR in *Western Excavating v Sharp* in this way (at 769A-C):

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

46 The term of the contract on which the claimant had to rely here was the implied term of trust and confidence which is an obligation not, without reasonable and proper cause, to act in a way which is calculated or likely seriously to damage or to destroy the relationship of trust and confidence that exists, or should exist, between employer and employee as employer and employee.

Time limits and the possibility or otherwise of them being extended

47 In *Adedeji v University Hospitals Birmingham NHS Trust* [2021] EWCA Civ 23, at paragraph 37, Underhill LJ said that the "best approach" for a tribunal in considering the exercise of the discretion under section 123(1)(b) of the EqA 2010 is to "assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular… the length of, and the reasons for, the delay". However, it remains the case that the claimant must satisfy the tribunal that an extension of time should be granted. We found the following paragraph in *Harvey on Industrial Relations and Employment Law ("Harvey*") (PI[280]) to be a helpful summary of the case law in this regard:

> "The Court of Appeal in *Chief Constable of Lincolnshire Police v Caston* [2009] EWCA Civ 1298, [2010] IRLR 327 (at [26] per Wall LJ) held that 'Plainly, the burden of persuading the ET to exercise its discretion to extend time is on the claimant (she, after all, is seeking the exercise of the discretion in her favour)' and in the same case Sedley LJ described (at [31]) that 'there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them'. However, as the EAT noted in *Abertawe Bro Morgannwg University Local Health Board v Morgan* UKEAT/0320/15 (18 February 2016, unreported) per HHJ Shanks at [25]), the burden is one of persuasion, it is not a burden of proof or evidence, as such. In *Rathakrishnan v Pizza Express (Restaurants) Ltd* [2016] IRLR 278 at [9] the EAT, HHJ Peter Clark, identified a proposition which would seem

to follow from this burden of persuasion that 'if the claimant advances no case to support an extension of time, plainly, he is not entitled to one'."

The evidence which we heard

48 We heard oral evidence from the claimant on his own behalf and, on behalf of the respondent, from Ms Abdi, Ms Faiser and Mr Stott. We had before us a bundle containing 599 pages. Having heard that evidence and read the pages in that bundle to which we were referred, we made the following findings of fact.

Our findings of fact

49 The claimant started to work for the respondent after informing the person acting on behalf of the respondent as its recruiter (Eavan McFall) of his dyspraxia in an email sent on 25 June 2018. There was a copy of the email at pages 88-89, i.e. pages 88-89 of the hearing bundle (any reference to a page below being, unless otherwise stated, a reference to a page of that bundle). The relevant passage in the email was this:

> "Kindly, find below a summary of my learning disability and how it affects me:
>
> George has dyspraxia. This affects his writing when required to transfer complex thinking into fluent and readable text. This also affects his speed of reading and ordering of his ideas. He finds it hard to organise information quickly, in his head, especially under timed conditions. The greater the requirement for speed the more likely he is to make errors. George has a weak working memory and this further hampers his organisation of ideas under timed conditions. Prolonged writing tasks can make George tired, which effects his working memory and motivation. Time management, stress management, planning and fine motor skills are also areas of difficulty for George. George [requires] 25% extra time for exams and timed assessments."

50 That passage was taken from (but was not the whole of) a document of which there was a copy at pages B68-B69. That document was created while the claimant was a student at Brunel University London and was headed "Support Profile". In the document, the "Support Recommended" included the conferring of 25% extra time (and although it was not stated expressly, that extra time was implicitly intended to be given for timed assessments) and rest breaks of ten minutes per hour.

51 That document was apparently based on the content of a report of an educational psychologist by the name of Dr Tim Harper, of Tim Harper Associates, of an assessment of the claimant's special educational needs which was carried out on 28 January 2016. The claimant was then in the third year of a

four-year degree course. The report was at pages 57-67. A letter from Dr Harper dated 21 July 2021 was put before us, but it in our judgment it added nothing material.

52 Neither of the two documents referred to in the two preceding paragraphs above was put before the respondent until after these proceedings had begun.

53 Ms Faifer's evidence as stated in her witness statement about the relevant events of February to April 2019 was as follows.

> '5. I have been told by H&M's solicitor that George says as part of his claim that he told me that he had dyspraxia during a conversation in August 2018 and that during the conversation in August 2018, he asked for adjustments to be made. I am aware that Mawena Mensah has said that the management team was aware of George's disability (see page 272).
>
> 6. George did not tell me that he had dyspraxia and we never had any conversation whereby George requested any adjustments to any of his working conditions. I was informed that George had dyspraxia in April 2019. This surprised me and I was not aware of this before this time.
>
> 7. I have been told by H&M's solicitor that George says he asked me whether he could have rest breaks and extra time to complete tasks. Again, this is not true and at no stage did George say to me that he needed to take extra rest breaks or extra time to complete tasks. In any event, such a request would not make sense as George was not timed in his work.
>
> 8. I have been told by H&M's solicitor that George says I told him he had to complete his tasks within allotted time periods and in a timely manner. I never put George under pressure to complete his work in a certain time frame and I never told George he had a set period of time to complete a certain task. However, he did work at slower pace in comparison to other members of the team. I did set deadlines to the team when appropriate. For example, I would ask the team to complete the store tidy up within 30 minutes. This was to ensure all staff could go home on time at 6:30pm. George never once raised a concern about this. Again, I never once set a specific deadline for George to work towards in relation to his duties and the suggestion that I did is simply not true.
>
> 9. I have been told by H&M's solicitor that George says I told him in February 2019 that he was "slow'' and "leaving dumps" in every section. I do not recall George ever asking me for feedback. This would be very unusual and George would usually receive feedback from his line managers, not me.

10. I did encourage George to work at quicker pace but I do not believe that I called George slow. George struggled to complete tasks at the same speed as other members of the team and was underperforming. I do recall colleagues being frustrated by this given it created more work for them to do. However, I never had a conversation with George where I suggested that he would be disciplined or placed on a performance process because of his pace of work. I was simply trying to encourage to speed up his work. Simply calling George slow would be unhelpful and I would not consider it constructive feedback. If I had a significant concern about George's performance, I would have met with him formally to discuss this and record my comments - a similar process to what I did on 27 November 2018 and 8 January 2019 (see pages 98 to 100).

11. I believe the reference to leaving dumps is a criticism in relation to placing items in the wrong place. For instance, a shirt should be returned to correct rail. I do not recall telling George that he was leaving dumps in February 2019. I probably would have told the team the importance of returning clothes to correct places to ensure the store was presentable to customers.

12. On 1 March 2019, George knocked on the door of the administration office. I was having lunch at the time and looking at the computer. George started to shout at me about his rota. I tried to speak to George and tell him to discuss the matter with Bianca. As I was speaking, George turned his back and walked down the corridor.

13. Following my break, I went downstairs, and Bianca and other members of staff told me that George had shouted at Bianca. I told Bianca I would meet with George to discuss what had happened. I also asked staff who had witnessed George's behaviour to make short statements about what they had seen given I considered this to be a serious disciplinary issue.

14. On 2 March 2019, I paged George to attend the administration office. He did not respond to my request or leave me a message to explain why he could not attend. I eventually approached George and asked him to meet with me after he had served a certain customer. He gave me an aggressive response and told me that he had "heard me".

15. I was expecting a civil conversation and I asked George to sit down and tell me what happened. However, George did not make eye contact and his behaviour turned aggressive. He denied he shouted at Bianca and then started shouting at me, gesticulating with his hands and pointing at me. He brought his chair very close to where I was sitting. When I tried to speak, he kept shouting over me and interrupting me. I tried to question George as to why he had an aggressive attitude. He said that he was not aggressive and it was not like he was beating me. I felt

incredibly threatened and I began to shake and lose my breath. I realised I was on the verge of a panic attack.

16. I explained to George that I was not feeling well and asked him to call for help. I then ran to toilet for space to breathe and splashed water over my face. A colleague then came over to check that I was OK and gave me some water to drink. When I saw George, he was sitting on his phone.

17. I tried to continue the conversation but George continued to shout. I therefore decided to end the conversation and contacted human resources for support. I explained I could not tolerate George's behaviour. (See pages 113 and 114)

18. After 2 March 2019, I was scared of George. I was aware that he was spreading rumours about me and staff members through the store but I actively avoided him. (see page 139)

19. On 3 April 2019, I had a meeting with George about his payslips. The meeting again was hostile and my working relationship with George was evidently poor. He told me he can exist in the store without speaking to me. I told him I was the store manager and such an attitude was not appropriate.

20. To me, George's actions were clearly gross misconduct. It was the worst I have ever been treated in my job. I certainly would not have been able to work with George moving forward. I was incredibly worried by George's conduct and I broke down crying on several occasions and explained to colleagues and human resources that I was concerned about my safety at work. I would have quit my job if I was required to continue working with George.'

54 There were hand-written documents on forms headed "Witness Statement" at pages 103-112. They included ones written by Ms Faifer, Ms Saskia Dawes and Ms Bianca Enasescu, and Mr Adrian Kaminski. Those statements were all written on 2 March 2019 and were consistent with the passage from Ms Faifer's witness which we have set out in the preceding paragraph above. We saw that on page 109 Ms Dawes had written that on 1 March 2019

54.1 the claimant was "angry and aggressive with his hands gesture",

54.2 "Customers was staring at us and other staff members Hannah and daisy were staring from the tills",

54.3 "I felt uncomfortable and he wouldn't even let bianca speak", and

54.4 “He left the store and said I will waste your time if you waste mine, aggressive tone of voice”.

55 On page 110, Ms Dawes had written this:

> ‘On Saturday I was called to admin office to speak about the incident that happened yesterday Friday. George was still angry and didnt apologise to management. He didnt say bianca was there with me, he didnt say he was shouting he said he was speaking but he was shouting. When Madalina approached him from the till to ask to speak with him he was aggressive in his tone of voice, “I heard you”.’

56 The pages of the bundle to which Ms Faifer referred in paragraph 17 of her witness statement consisted of an email to a colleague by the name of Ms Charlotte Allsopp sent by Ms Faifer on 3 March 2019. In the email, Ms Faifer described the events of the previous two days. The email was at pages 113-114 and its content was completely consistent with Ms Faifer’s witness statement evidence.

57 The claimant had written several documents in support of his appeal against his dismissal. They were headed “Appellant’s Statement 1” and “Appellant’s Statement 2” and were at pages 44-47. The first was about what had happened on 1 March 2019 and the second was about what had happened on 2 March 2019. Those statements in large part corroborated Ms Faifer’s evidence about what had happened on those days. For example, in the first of those statements, at page 44, the claimant wrote that he was “shouting out loud and frustrated” when he was on the shop floor. He also wrote this (on the same page; we have added emphasis by underlining):

> ‘Also, I said “if you waste my time, I will waste your time too” while speaking to Bianca and walked out of the store because I thought I heard her saying I should go home saying “I will waste your time too” <u>and throughout the whole conversation I remained angry, loud and frustrated while speaking to Bianca and didn’t listen to whatever she was saying</u>. I was never aggressive at any point as this word is used a lot in all seven witness statement and I feel it’s a defamation of my character. I maintained my distance away from Saskia and Bianca, while speaking and don’t see how I would have come across as been [sic] aggressive because of my loud, frustrated and angry way of speaking.’

58 As indicated in paragraph 22.2 above, the claimant’s anger was caused by arriving at work on 1 March 2019 and finding that he was not on that day’s rota. The claimant’s description in Appellant Statement 1 of the events of that day started in this way:

> "On the 1/3/2019 I came into work for my shift 3:30pm – 7:30pm and on my way to the staff room my colleague Madalina (Sales Advisor [sic]) said I wasn't supposed to be working and I replied saying according to the rota that was sent to me by Hamza (Sales Advisor) a week ago, while I was sick I was supposed to be working that shift. I went upstairs dropped my stuff and while checking the rota, I saw that I was cancelled off on the rota and asked Daisy and Saskia (Both Sales Advisor) who were off to the shop floor why I was cancelled off the rota without notice and they replied saying I should go speak to Madalina (Store Manager) as she was in the office".

59 Almost the whole of the claimant's Appellant Statement 2 bears repeating here. It was so far as relevant in these terms (at page 46; with emphasis by underlining added by us):

> 'Madalina (Store Manager) paged for me to come to the fitting room but as I was serving a customer and couldn't go and see her. Madalina (Store Manager) approached me at the tills while serving a customer and interrupting the conversation I was having with the customer saying I should come to the office and I responded saying I would come to the admin office after serving the customer which I did. I went to the office and Madalina (Store Manager) asked me what happened on 1 March 2019 I explained what happened and she said customers complained about my behaviour I apologised for my behaviour and Madalina (Store Manager) never apologised for not notifying me of the change in the rota but said that the rota can be changed according to the needs of the business as it was my responsibility to check the rota regularly and I said that its unreasonable for the management not to notify me of this change in my rota. Madalina (Store Manager) said in the past that she has informed Adrian (Sales Advisor) of the change in his rota and since I was at work on Wednesday 27 February checking the rota as Bianca (Department Manager) told her that I should have seen the change in the rota. Madalina (Store Manager) comment got me as I felt disrespected by it before she could call me while I was on holiday to come in and cover a shift but not call me when she has changed my rota and I said to her since I was sick the week before Wednesday 27 February how was I supposed to know the rota changed on my first day back as I already asked my colleague Hamza (Sales Advisor) to send me a picture of the week 25 February so that I can plan ahead when I was fit and able work again as I had chest infection and flu. Also complained about Madalina (Store Manager) mannerism over the phone while I called in sick on the 21 February as Madalina was rude and shouted over the phone saying "who was this" meanwhile, I already introduced myself as I knew that it was the first thing to do every time you call into the store sick then told Madalina I was sick and had chest infection and a flu but she demanded that I come into the store at 3:00pm but I responded saying I was unwell and will bring my sick note but she pestering me on phone telling me about the company policy and her tone was voice was very harsh and unpathetic

towards me after she finished I said I will try and come into the store but I didn't as I wasn't still feeling any better until the Wednesday 27 February when I came back to work with my sick note. Madalina (Store Manager) then said I was shouting at her meanwhile throughout the conversation she was rude and shouting towards me saying I am threatening her and I was very frustrated by her choice of words and asked her that she should explain what I said that was threatening and I said it was not like am hitting you as I am having a conversation with you then Madalina (Store Manager) started having a panic attack as I was aware of that she had two panic attacks before speaking to my colleague, I stayed calm asking her if I should call the ambulance still seated 5 metres away from her throughout the conversation and she said no she would call her husband and was crying then she paged for Bianca (Department Manager) who came in asking me what happened and I responded saying that I didn't know as I was asking her what I said that made her feel threatened then my colleague Hamza (Sales Advisor) gave Madalina (Store Manager) water asking me if I hit her and I was like why would I hit my manager and went to the toilet came back meeting me in the staff kitchen and Madalina said should go back into the office which I did but requested but insisted that she calls Saskia (Sales Advisor) to give an account of what happened on the 2 March 2019 while I was on the shop floor. Saskia (Sales Advisor) gave her account of the incident and I didn't agree to the fact that she said I wasn't speaking to her at all but to Bianca (Department Manager). I said okay and requested that I go to the shop floor to continue my task of the day asking Madalina (Store Manager) to give me the HR details as I wanted to make a complaint about how I was treated when I called in sick and her choice of words when speaking to me about the incident between me, Bianca and Saskia on the shop floor dated 1 March 2018.'

60 The claimant acknowledged during cross-examination that he was working on 27 February 2019 and had looked at the rota on that day, so that he could have seen that it had changed so that he was not now working on 1 March 2019. He told us that he had looked at the following week's rota, and not the rota for the current week, which was why he had not seen that his intended shift on 1 March 2019 was now cancelled.

61 The claimant's conversation with Ms Faifer of 3 April 2019 was recorded by him without her knowing. The claimant had sent the recording to the respondent's solicitors, who had had it transcribed. The transcript was at pages 115-141. Its start showed that the claimant had asked to see Ms Faifer about a change to his contracted hours: which it appeared from what was said on page 116 was a reduction in his contracted hours. On page 118 what was recorded was the claimant saying "I don't know why Andrea's here because ..." and then there was this recorded on page 119:

"[Claimant] And I'm going to report to HR about this because this is not right. Andrea cannot be here when I'm discussing my personal issues because when she's discussing her personal issues no one else is here.

[Ms Faifer]: That's fine, George, (overspeaking) -
[Claimant]: You have to ask me, it's only polite for you to do that.

[Ms Faifer]: That's fine. We had -

[Claimant]: That's fine.

[Ms Faifer]: I think we had enough issues between me and you -

[Claimant]: That's fine.

[Ms Faifer]: - and then I called her in here just to be the witness.

[Claimant]: You're supposed to ask -

[Ms Faifer]: So (overspeaking)-

[Claimant]: That's the polite thing to do, is to ask ...

[Ms Faifer]: (Inaudible 00:05:44) -

[Claimant]: Because I'm not discussing anything on the shop floor with you. This is my personal problem, I'm discussing with you -

[Ms Faifer]: But this is not a personal problem, George.

[Claimant]: It is a personal problem. For me to ask you about things that relate to me it's personal. You have to tell me that Andrea's going to be here, it's only polite you do that.

[Ms Faifer]: Andrea (overspeaking)-

[Claimant]: But anyway I'm still going to speak to HR. That's fine."

62 The conversation continued for much longer than one would have expected if it was just about a change in the claimant's hours. At page 122 Ms Faifer tried to end the conversation. The claimant then brought up an issue with his previous payslips. Ms Faifer went through them with him. At page 135, about 28 minutes into the conversation, the claimant brought up the issue of payment for 1 March 2019. Ms Faifer said then (pages 135-136):

"This is the day when you came into the store and you worked the shift and then you didn't come to the shift that was changed."

63 The claimant then said: "So whose fault was the absence?" Ms Faifer said that they were not talking about that and the claimant said he was "going to speak to HR about that" and Ms Faifer said: "That's fine, George, you will have a meeting anyway". The conversation then continued for a further seven minutes, with Ms Faifer pointing out that she had not received an apology from the claimant for his behaviour on 1 and 2 March 2019, and with him saying that she owed him an apology "too" and clearly refusing to give an apology unless she gave one too. At pages 138-139 there was this exchange:

[Claimant]: For an apology to come you have to understand that you have to give it too because you were wrong, you were wrong in that situation. If you [accept] you are wrong then we can move from it. Because you keep going around saying that I don't talk to you anymore again, it's not like ... I can exist in this store without talking to you but I'm not happy about it because it's -

[Ms Faifer]: I am the store manager and if -

[Claimant]: - a situation that you caused (overspeaking)-

[Ms Faifer]: - this is a hostile environment for me, I need to take it further.

[Claimant]: Yeah, but you caused the situation for it to happen.

[Ms Faifer]: (Overspeaking) for the fact that how you present yourself in front of me and in front -

[Claimant]: I don't think we are going to move any forward like this because it's been over a month now since that situation happened.

[Ms Faifer]: No, but you're still going to have a discussion with someone else -

[Claimant]: Yeah, I'm waiting for that (inaudible 00:32:27) to come, please, I'm waiting for that (overspeaking) to come.

[Ms Faifer]: - because, you know what, George, because your behaviour in that time towards Bianca, towards myself, towards other members of staff, then in the following day still saying attitude, spreading rumours into the store -

[Claimant]: Thank you.

[Ms Faifer]: - which is ... This is actually ... The people came to say it, that was not nice, George -

[Claimant]: Thank you.

[Ms Faifer]: - and I give you now (inaudible 00:32:49) the very last moment because we need to have a civilised collaboration into here. We are here to do the job".

64 In the circumstances, we accepted the passage of Ms Faifer's witness statement that we have set out in paragraph 53 above with the reservations stated in paragraph 82 below.

65 After his meeting with Ms Faifer on 3 April 2019, the claimant wrote the text of what he intended to be his resignation letter. The letter was at page 231. It was dated 4 April 2019 and was in these terms:

> "With this letter, I hereby announce my resignation from the position of Sales Advisor for Hennes and Mauritz UK effective 3 May,2019.
>
> It has been a pleasure working with the entire Hennes and Mauritz 789 store team over the past 11 months. I would like to thank you Hennes and Mauritz for providing me with the opportunity and for supporting my professional development.
>
> I am resigning because of the victimisation faced based on my disability and unprofessionalism from Madalina Store Manager.
>
> You have my full commitment to ensuring a smooth transition. Please let me know how I can be of assistance."

66 The claimant was interviewed on 4 April 2019 by Ms Aminullahsirat. The claimant recorded that meeting too. The transcript of it was at pages 156-199. The claimant said to us (and we accepted) that although Ms Aminullahsirat did not offer him a break during that meeting, he did not need one as she was empathetic towards him.

67 The claimant told us (and we accepted) that he had decided to resign before Ms Aminullahsirat interviewed him. He said (as noted by EJ Hyams):

> "My resignation was as a result of the meeting of 3 April; I concluded from it that I could not work with her [i.e. Ms Faifer] again."

68 The claimant was required to attend a disciplinary hearing on 18 April 2019, to be conducted by Ms Abdi. The letter stating that was at page 200 and was dated 12 April 2019. It included these words:

> "If there are any further documents or witness statements you wish to be considered at the hearing, please provide copies as soon as possible and at least 24 hours before the meeting. If you do not have these documents or witness statements, please provide details so that they can be obtained."

69 As we say in paragraph 2 above, at the start of the hearing of 18 April 2019, the claimant sought to put before Ms Abdi several documents, including his letter of resignation. She refused to look at them because of the words in the letter of 12 April 2019 which we have set out at the end of the preceding paragraph above.

70 At the end of the hearing of 18 April 2019, Ms Abdi on behalf of the respondent dismissed the claimant with immediate effect on the basis that he had committed gross misconduct. The meeting went on (we saw from the handwritten notes at pages 201-228) from 15:25 to 18:17. There was one break during that period. It started (we saw from page 204) at 15:40, when Ms Abdi went to check the claimant's HR file at the Harrow store. It looked as if the break was for 20 minutes. Accordingly, the meeting went on for a further 2 hours 17 minutes without a break. The claimant did not ask for one. After the meeting had ended at 18:17, Ms Abdi took time to think about the matter. She resumed the meeting at 19:56 and informed the claimant that he was being dismissed for gross misconduct. That decision was "Based on the evidence found on the 7 witness statements and based on the fact you have admitted that you were shouting & behaving in an unprofessional & angry manner in front of customers and to your store manager Madalina".

71 A letter recording that decision was sent to the claimant on 23 April 2019 (page 229).

72 The claimant appealed that decision and (as we say above) Mr Mark Stott heard the appeal. On 20 May 2019 Mr Stott sent the claimant the email at pages 250-251, in which, among other things, Mr Stott wrote this:

> "Please correct me if i am wrong but from speaking to you the other day you mentioned that you did not wish to appeal the decision to terminate your employment, rather that you were unhappy about certain aspects of how the process had gone, you mentioned that you were also unhappy about how you had been treated by your SM and how this had been followed up. These were the reasons for proceeding with a grievance. If you do in fact wish to appeal the decision then we will deal with this as an appeal."

73 In response to that request for clarification, the claimant said this in his email of 22 May 2019 at page 250:

> "I wish to appeal the dismissal because I wanted to resign after a formal grievance have been made against Madalina and the necessary action

taken against her but since I was dismissed prior to that happening I am appealing that my resignation letter be accepted rather than me been [sic] dismissed and am happy not working for H&M anymore. I explained this over the phone but maybe I wasn't clear enough. I want this to be dealt with as an appeal and also necessary actions taken against Madalina for her unprofessional conduct."

74 Mr Stott's decision to allow the appeal was communicated in a letter to the claimant dated 16 July 2019. That letter was at pages 280-284. On the first page of it, Mr Stott said this:

> "I asked you at the meeting what you felt would be a satisfactory resolution to your grievance and you explained that you would like the decision to dismiss you overturned and your resignation accepted in its place. You also told me that you expect your previous store manager, Madalina to receive formal action based on how she treat you when working with her."

75 Mr Stott's conclusions were stated on page 284. Most of the contents of that page were relevant here; they were as follows.

> "Having carefully considered your appeal grounds and the evidence available, my conclusion is that I Uphold your appeal. This decision is based on two factors: (1) because your disability was not taken into consideration at any stage in the formal process, and, (2) the decision to dismiss you was not within the bands of what I would consider a reasonable sanction based on the evidence gathered. The decision to Dismiss you from H&M will be overturned and as per your request, and your resignation accepted In Its place.
>
> There have clearly been opportunities within the formal process to improve, your disability should have been taken into consideration and adjustments made to ensure fairness. Clear Feedback and recommendations have been shared with the area team & central employee relations team to ensure that this does not occur again and so that policies and expected ways of working can be reinforced.
>
> One of your expectations was that your previous store manager Madalina receives formal disciplinary action based on how you were treated whilst in store. Whilst there have clearly been opportunities to support your performance in a better way, I do not accept that Madalina has discriminated against you. Your main issue with Madalina relates to the feedback that she gives you. Any adjustments made for an employee would never exempt them from receiving feedback from any member of the store mgmt. team.
>
> Although I am taking the decision to overturn your dismissal from H&M, this should not be taken as an indication that your conduct on 1st March is in any

way acceptable. Your conduct on 1st March fell below what H&M considers reasonable in any circumstances, and it is right that this was followed up formally.

One other points that I would like to address. I accept that It is unreasonable for store mgmt. to change timesheets and not give notice. I have therefore given feedback to the store mgmt. team to ensure that this does not happen going forward, I have also made the area team aware of this practise so that they can clarify the expectation across the area.

Finally, I would like to take the opportunity to thank you for your service whilst you were employed by H&M. During our meeting you informed me that you had started another job which you enjoyed, I would like to wish you success for the future."

76 The claimant's only justification for making his claim late was stated in the document at pages 39-43, which was sent to the tribunal. It was that (see page 40) he had said during the appeal meeting with Mr Stott on 24 May 2019 "that [he] would be seeking compensation if [he was eligible] once a positive outcome was made on [his] case and would be seeking legal help if needed." He continued:

"At this meeting I wasn't told or advised of any time limits regarding my case, hence I was unaware of the 3 months time limit starting from the date of the act to which the complaint relates to."

77 The claimant then wrote:

"On 16 July 2019 I received the outcome of my appeal. That is to say, a mere day before the time limit was up. H&M would have known this. I cannot believe for one minute that H&M did not know at the time that my time for filing was going to be very tight. It was therefore a deliberate intention of the Respondent to wait right up to the last minute to give me the appeal outcome."

78 The claimant wrote too on the same page (page 40):

'On 24 July 2019 I attended an event for Refugees as I am a Refugee. The event was organised by DLA Piper in conjunction with the Refugees Council titled "*Know Your Rights*" and I happened to speak to a solicitor regarding my case and how H&M had taken a long time to respond to me regarding the outcome of my Appeal and she said I must contact ACAS as my case might be out of time as there is a 3 month time limit with case like this.

I did research around the work ACAS do to help me understand how they can help me with my case.'

79 The claimant then presented an ET1 form on 7 August 2019 but withdrew it. He then presented the ET1 form for the claims that we heard on (see paragraph 5 above) 29 August 2019.

80 Mr Stott's oral evidence was (emphatically) that he had not delayed in sending the appeal outcome letter with a view to causing any claim that the claimant might make to be out of time. Rather, he said, the delays were primarily the result of holidays. He would, in the normal course of events, he said, consider a four-week period from the hearing of the appeal to sending the outcome letter to be normal and acceptable. We accepted that evidence of Mr Stott, not least because it was clear from documents in the bundle that he had made inquiries of relevant staff (including Ms Faifer), after the hearing.

Our conclusions on the claimant's claims

81 We can now state our conclusions on the claimant's claims.

The claim of harassment because of what Ms Faifer told the claimant in February 2019

82 We concluded that Ms Faifer did say words to the effect that the claimant was slow and that she did indeed criticise him for leaving "dumps". However, what she said then was in our judgment not done for the purpose of "violating [the claimant's] dignity", or creating for him "an intimidating, hostile, degrading, humiliating or offensive environment", and, applying *Betsi Cadwaladr University Health Board v Hughes*, it did not have that effect. Thus, the claim of harassment within the meaning of section 26 of the EqA 2010 failed.

The claim that what Ms Faifer said to the claimant in February 2019 about being slow and leaving dumps was a breach of section 15 of the EqA 2010

83 We concluded that what Ms Faifer said to the claimant during February 2019 as determined by us in the preceding paragraph above was not a breach of section 15 of the EqA 2010. Subjecting the claimant to capability proceedings for being slow and leaving dumps would have been such unfavourable treatment, but just telling him that he was slow and criticising him for leaving dumps was in our judgment not unfavourable treatment within the meaning of section 15(1) of the EqA 2010. Alternatively, it was a proportionate means of achieving the legitimate aim of keeping the shop floor tidy.

The claim that the claimant's dismissal was of a breach of section 15 of the EqA 2010

84 We concluded that the claimant was dismissed for conduct which, objectively viewed, was aggressive, and that he had lost his temper on 1 March 2019. There

was no evidence before us from which we could conclude that that conduct arose from the claimant's disability of dyspraxia. Thus, the claim that the claimant's dismissal was discrimination within the meaning of section 15 of the EqA 2010 failed.

The date when the claimant's contract of employment ended

85 We did not see *Patel* as precluding us from arriving at the conclusion that the claimant and the respondent were able validly (as far as the law of contract was concerned) to agree that as part and parcel of the decision to allow the claimant's appeal, his employment ended on 3 May 2019 by the taking effect of his resignation in his letter dated 4 April 2019.

86 That meant that the claimant was entitled to holiday pay and wages in respect of the period from 19 April to 3 May 2019 inclusive. The holiday pay claim was (as we say in paragraph 12 above) agreed to be for £27.62. The wages claim was not quantified, and in case it had not been paid, we determined that the claimant should have judgment for such sum as was payable in respect of the period from 19 April to 3 May 2019 inclusive. If that sum has been paid then the judgment which we have given above will have been satisfied. We have assumed that if that sum has not been paid then it will be capable of being determined by agreement and that a further hearing will not be required. We have therefore vacated the provisional remedy day of 18 February 2022. If a determination is after all required then the parties must let the tribunal know accordingly.

The claim of a breach of section 20(3) of the EqA 2010

87 We did not see any evidence to support the proposition that the claimant was put at a substantial disadvantage (within the meaning of section 212(1) of the EqA 2010) by his dyspraxia in comparison with persons who are not disabled in regard to responding to investigatory meetings without advance warning of those meetings. In addition, we concluded that the claimant's dyspraxia was not such as to cause him such difficulty with understanding what he was being asked and responding meaningfully to it as to justify an adjustment in the form of warning him of such meetings. Thus we concluded that there was no failure to make a reasonable adjustment within the meaning of section 20(3) of the EqA 2010 through the failure to warn the claimant in advance of the investigation meeting of 4 April 2019 carried out by Ms Aminullahsirat that she was going to have that meeting with him.

88 However, we concluded that the respondent could reasonably have been expected to know that the claimant needed to be offered a break of 10 minutes every hour during any formal meeting with him. We came to that conclusion on the basis that the respondent could reasonably have been expected to ask the claimant about the impact on him of his dyspraxia, and although it would then have been told only what we have set out in paragraph 50 above, and although

that was aimed at academic assessments, we concluded that the respondent could reasonably have been expected to discern from that information that it should offer the claimant a break of 10 minutes in every hour of any formal meeting with him, and not merely to give the claimant a break only if he asked for one.

89 Given our conclusion in paragraph 66 above about the investigation meeting of 4 April 2019, we saw no failure to make a reasonable adjustment during that meeting by the failure to offer the claimant a break of 10 minutes every hour.

90 However, we concluded that the fact that Ms Abdi did not offer the claimant a break during the disciplinary hearing of 18 April 2019 meant that there was here a failure to take a reasonable step within the meaning of section 20(3) of the EqA 2010.

91 However, the claimant's claim about the failure to give him 10 minute rest breaks concerned the meetings of 4 and 18 April 2019, and he did not make his claim until 29 August 2019, in the circumstance that he approached ACAS only on 26 July 2019, by which time the three-month time limit for complaining about the meeting of 18 April 2019 had expired. The claim was accordingly made six weeks outside the primary time limit of three months.

92 The fact that the claimant was waiting for the outcome of his appeal was in our judgment not a good reason for the delay and was not such as to make it just and equitable to extend time for making the claim. Accordingly, the claim of a breach of section 20 of the EqA 2010 was out of time and was outside the jurisdiction of the tribunal.

The claim of "constructive" dismissal within the meaning of section 39(7)(b) of the EqA 2010

93 The claimant resigned (see paragraph 67 above) only because of the conduct of Ms Faifer. We concluded that by that the claimant meant what she had done on 1 and 2 March and 3 April 2019. We did not see her conduct as we have found it to be on those days as constituting a breach of the implied term of trust confidence. Thus, the claimant was not dismissed within the meaning of section 39(7)(b) of the EqA 2010.

94 In addition and in any event, if the claimant had in fact resigned to any extent in response to the conduct of Ms Faifer in February 2019 in the form of calling him slow and criticising him for leaving "dumps", the claim of dismissal within the meaning of section 39(7)(b) of the EqA 2010 would have failed because we concluded that in saying those things Ms Faifer did not discriminate against the claimant within the meaning of section 15 of that Act or harass him within the meaning of section 26 of that Act.

In conclusion

95 For all of the above reasons, the claimant's claims succeeded only to the extent stated in paragraphs 6 and 7 of our above judgment. The rest of the claimant's claims did not succeed and were dismissed.

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Employment Judge Hyams

Date: 6 December 2021

SENT TO THE PARTIES ON

14/1/2022

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FOR THE TRIBUNAL OFFICE