EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MS M DEARDEN	**V**	**SAINSBURY'S SUPERMARKETS LIMITED**

HELD AT ABERYSTWYTH **ON: 12, 13, 14 & 16 JUNE 2023**

BEFORE: EMPLOYMENT JUDGE S POVEY
MRS L BISHOP
MR P COLLIER

REPRESENTATION:
FOR THE CLAIMANT: **IN PERSON**
FOR THE RESPONDENT: **MR WINSPEAR (COUNSEL)**

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claim of unfair dismissal is not made out and is dismissed.

2. The claim of automatic unfair dismissal is not made out and is dismissed.

3. The claim of discrimination arising from disability is not made out and is dismissed.

4. The claim of breaches of the duty to make reasonable adjustments is not made out and is dismissed.

REASONS

Background

1. At the culmination of the hearing of these claims, and following deliberations, the Tribunal provided its judgment and reasons orally to the parties on the afternoon of 16 June 2023.

2. On 17 June 2023, the Claimant made a request for a transcript of the Tribunal's reasons. This is that transcript.

Introduction

3. These are claims brought by Michelle Dearden (hereafter referred to as the Claimant) against her former employer, Sainsbury's Supermarket Limited (hereafter referred to as the Respondent).

4. The decision of the Tribunal is unanimous. Although it is the Employment Judge providing the decision and reasons, it is the decision of all of us and has been contributed to by all members of Tribunal.

5. We set out the procedural background to the claim first. The Claimant began ACAS Early Conciliation on 17 January 2021 until 28 February 2021. She presented her claims (in form ET1) to the Tribunal on 23 March 2021. The Respondent responded to the claims in form ET3 and resisted all the claims in their entirety.

6. The Tribunal conducted Case Management Hearings on 14 January 2022 (Judge Ryan) and on 20 April 2022 (Judge Fowell), in the course of which a List of Issues for the Tribunal to decide was agreed.

7. In addition, at the hearing on 20 April 2022, Judge Fowell dismissed the Claimant's application to amend her claim to include complaints of detriment and dismissal for raising health and safety issues (at [50] – [51] of the Bundle).

The Final Hearing

8. The final hearing was conducted in person at the Aberystwyth Justice Centre on 12, 13 & 14 June 2023. The Tribunal deliberated on 15 June 2023 and gave its oral decision and reasons to the parties on 16 June 2023.

9. During the course of the hearing, we heard oral evidence from the Claimant and for the Respondent, we heard from:

    9.1. Clare Jenkins (Customer & Trading Manager, who managed the Claimant's relevant period of ill-health absence)

    9.2. Alun Grabham (Lampeter Store Manager, the dismissing officer & a person to whom the Claimant claimed to have made a protected disclosure)

    9.3. Matthew Clarke (Swansea Store Manager & the appeal officer)

9.4. Chris Lewis (Customer & Trading Manager, a person to whom the Claimant claimed to have made a protected disclosure).

10. Alwyn Jenkins (Customer Service Colleague and a person to whom the Claimant similarly claimed to have made a protected disclosure) also provided a witness statement but the Claimant indicated that she had no questions for him. As such, he was not called to give evidence and his witness statement was accepted by the Tribunal as unchallenged.

11. The Claimant also relied upon witness statements from Rachelle Dearden (her daughter), Theresa Kennard (a friend & former colleague), Claire Holdstock (a friend), Nicola Kelly (a friend) & Toni Simett (a friend & former colleague), The Respondent had no questions for any of the Claimant's witnesses, they were not called to give evidence and their respective statements were accepted by the Tribunal as unchallenged.

12. Each witness we heard from provided and adopted their witness statement. We also had sight of a paginated file of documents ('the Bundle') and, following the Case Management Order of Judge Povey of 5 June 2023, a supplementary file of documents ('the Supplementary Bundle'). The Tribunal also received oral submissions from Mr Winspear for the Respondent and from the Claimant.

13. The Claimant is a litigant in person, conducting these proceedings without legal assistance or support. She also has a number of health conditions, including autism. The Tribunal had regard to the Claimant's health conditions and their effects on her in how it managed the hearing, including affording the Claimant more time to process and answer questions put to her when giving evidence. In addition, we explained the Tribunal's processes and procedures to the Claimant, checked her understanding, encouraged her to ask questions and gave her guidance throughout. We were satisfied that the Claimant was able to fully engage in the process and present her claims to the best of her abilities.

14. The Tribunal were grateful to the Claimant and Mr Winspear for the assistance they have provided and the work they have undoubtedly undertaken, both before and during the hearing. We were grateful to all the witnesses (including the Claimant) who attended and answered the questions asked of them to the best of their recollections. Finally, we were also grateful to Ms Kabir from Advocacy West Wales who has supported and assisted the Claimant throughout the hearing.

15. At outset of hearing, we checked with the parties that the issues as agreed earlier in the management of this case remained the issues we

were required to determine. From that, it was clear that these claims focus on alleged events between April and October 2020.

Background

16. So far as relevant to those issues, the Claimant was employed as a Customer Assistant by the Respondent at its Lampeter store, from September 2012 until her dismissal with immediate effect on 21 October 2020. It was not in dispute that on 17 December 2019, the Claimant had been issued with a final written warning by reason of her absences from work. In accordance with the Respondent's disciplinary policy, that final written warning remained live for a period 12 months.

17. In March 2020, the country went into lockdown in reaction to the Covid-19 pandemic. However, supermarkets remained open, subject to measures being put into place to reduce the risks of the infection spreading. Those included social distancing, limits on numbers of customers, provision of hand sanitizer, the use of screens and the use of face masks.

18. It was not in dispute that on 1 April 2020, the Claimant raised with Alun Grabham that the distance between employees working on the Respondent's tills and customers packing their shopping was less than two metres. We did not understand it to be in dispute that Mr Grabham spoke to his superiors about the matter and was informed that stores were to try and maintain two metre distancing where appropriate, which was in accordance with guidance in force at the time (that businesses were to use all reasonable measures to maintain two metre distancing).

19. Given the size and layout of the Lampeter store, it was not considered reasonable by the Respondent to take steps to extend the distance at the tills. In addition, it was not in dispute that the Respondent had implemented other measures into its stores, including Lampeter, which included the installation of protective screens, the mandatory use of face masks, limiting the number of customers allowed in the store, using floor tape to encourage two metre distancing, the use & availability of hand sanitiser, additional store cleaning and staff training.

20. Mr Grabham relayed that information to the Claimant, who said she would escalate matters via her trade union. However, the Claimant accepts that she neither escalated the matter further with her trade union nor asked the Respondent to make any adjustments, reasonable or otherwise, to her working environment at that time.

21. On 12 May 2020, the Claimant went on sick leave. She did not return to work and was dismissed with effect from 21 October 2020. Her first GP fit note was dated 26 May 2020 and recorded that the Claimant was not fit for work by reason of anxiety with depression. Such fit notes were issued on a monthly basis for the Claimant in the same terms.

22. In addition, the Claimant's GP consistently reported in the fit notes the opinion that there were no workplace adjustments (whether a phased return to work, amended duties, altered hours or workplace alterations) that would benefit the Claimant.

23. In accordance with the Respondent's absence management policy, a number of meetings took place with the Claimant, conducted by Clare Jenkins. We return to the nature and content of those meetings in due course. An Occupational Health ('OH') report was commissioned by the Respondent and provided to the Claimant and the Respondent on or around 8 October 2020 (albeit the report was dated 6 October 2020).

24. On 21 October 2020, Mr Grabham conducted what was known as a final Absence Review Meeting ('ARM') with the Claimant, at the conclusion of which he confirmed his decision to dismiss the Claimant by reason of ill-health capability with immediate effect (although the Claimant received payment in lieu of notice).

25. The Claimant appealed the decision to dismiss her. The appeal was heard by Matthew Clarke on 19 November 2020 and by a letter dated 23 November 2020, he upheld the Respondent's decision to dismiss the Claimant.

26. The Claimant alleged that she was disabled at the relevant time by reason of anxiety and depression. That was conceded by the Respondent.

27. We consider the substantive claims in turn. We have structured our analysis and decision making on the List of Issues. We have not set out the law in these reasons as we did not understand the applicable legal provisions to be materially in dispute.

The Claims

28. The Claimant claims (and the Respondent denies) the following complaints:

    28.1. Ordinary unfair dismissal

    28.2. Automatic unfair dismissal (for making protected disclosures)

28.3. Discrimination arising from disability, the detriment being her dismissal

28.4. Failure to make reasonable adjustments.

The Unfair Dismissal Claims

The Reason for Dismissal

29. The Respondent says that it dismissed the Claimant by reason of capability, arising from her ill-health, which is, by virtue of section 98 of the Employment Rights Act 1996, a potentially fair reason for dismissal.

30. The Claimant suggested that she may have been dismissed for making protected disclosures (namely, raising the issue about the distance between the cashier and customer packing area at the tills).

31. The Tribunal found that reason for dismissal was capability. This is because of extensive documentary evidence, supported by witness testimony. There was consistent evidence of the Respondent seeking to manage the Claimant's absences by reference to their long-term ill health policy, which concluded with the final ARM conducted by Mr Grabham. In the invitation letter of 19 October 2020 to that final ARM, the Claimant was warned that a potential outcome of the meeting was dismissal for capability. In the minutes of the final ARM on 21 October 2020, all of the discussion between the Claimant and Mr Grabham related to her current fitness for work and the likelihood of when, if at all, she would be well enough to return to work. Mr Grabham informed the Claimant at the conclusion of the meeting that she was being dismissed on grounds of capability. That decision and those reasons were then confirmed to the Claimant in writing. It is abundantly clear that the reason for the Claimant's dismissal was the fact that she was incapable of returning to work because of her ill-health.

32. Indeed, the Claimant did not then, and does not now. suggest that she was anything other than very ill at that time. Her GP confirmed that she was unfit for work throughout the relevant period and no adjustments could facilitate her return to work. The Claimant's GP continued to be of that view until at least the end of June 2021, which is the latest of the fit notes in evidence, a further eight months after the Claimant's dismissal.

33. The OH doctor was of the view in the report of 6 October 2020 that the Claimant was unfit for work and was unable to predict when she would be fit again.

34. The Claimant's own estimate to Mr Grabham at the final ARM was that it could be between 12-18 months before she would be able to access treatment and without that treatment she would, in her own mind, remain unfit for work (and even then, the Claimant herself was unsure that such treatment would be effective).

35. In addition, there was no evidence whatsoever that the reason for dismissal had anything to do with the Claimant raising issues with the distances at the tills.

36. As such, the Tribunal had no hesitation in finding that reason for the Claimant's dismissal was capability arising from her ill-health absence.

37. That finding has two consequences. First, as capability is a potentially fair reason for dismissal, we must go on to consider whether the decision to dismiss the Claimant because of capability was substantively and procedurally fair. Second, the Claimant's claim of automatic unfair dismissal for making protected disclosures must fail.

Substantive Fairness

38. When considering whether the decision to dismiss was substantively fair, we must examine whether the Respondent could have been expected to wait any longer for the Claimant to return to work.

39. Secondly, a fair procedure is essential. This requires, in particular:

    39.1. Consultation with the Claimant;

    39.2. A thorough medical investigation (to establish the nature of the illness or injury and its prognosis), and

    39.3. Consideration of any other options short of dismissal

40. Finally we remind ourselves that the test is whether dismissal was within a range of reasonable responses available to the Respondent, having regard to the facts of the case. It is not for the Tribunal to substitute its own view but to ask whether a reasonable employer, faced with the circumstances which faced the Respondent, would have been entitled to dismiss the Claimant.

41. In this case, three factual issues in particular required resolution by us:

    41.1. The nature and content of the meetings held between the Claimant and Clare Jenkins between July and October 2020;

    41.2. Whether the Claimant was invited in writing to all those meetings and, if not, what the consequences of that was; and

41.3. Whether the Claimant asked to be dismissed.

The ARMs

42. Under the Respondent's ill-health policy, there must be a minimum of three ARMs before matters can be escalated to a final ARM, where sanctions can be considered, including dismissal.

43. One aspect of the Claimant's case, as we understood it, was that she only ever had two ARMs prior to her case being escalated to the final ARM with Mr Grabham.

44. In addition, the policy also states that employees will be provided with a written invitation to each ARM. It was not in dispute that the meetings between the Claimant and Ms Jenkins on 6 July 2020 and 1 September 2020 were ARMs to which the Claimant received written invitations.

45. On 5 October 2020, the Claimant came to the Lampeter store and was given flowers by Ms Jenkins for her birthday. The Claimant's electronic employee file records that this was an ARM, where there was a discussion about capability and the Claimant said she was still not capable of fulfilling her role. In her oral evidence, the Claimant said that she could not recall what was said at the meeting on 5 October 2020 but that as there had been no formal invitation, she did not consider it to be an ARM. The Respondent does not dispute that it did not send the Claimant a written invitation to this meeting.

46. The meeting between the Claimant and Ms Jenkins on 8 October 2020 was also purported by the Respondent to be an ARM, which followed from the receipt of the OH report. Notes made by Ms Jenkins recorded the Claimant saying that it would be in her and the Respondent's best interests to be dismissed. However, the Claimant alleged she was asked to initial a blank pro forma document before it was filled in by Ms Jenkins. Whilst Ms Jenkins did not concede that to be the case, it was again not in dispute that there was no formal written invitation to the meeting on 8 October 2020.

47. The Tribunal concluded that there were four ARMs (on 6 July, 1 September, 5 & 8 October 2020), albeit two were not accompanied by formal invitation (the 5 & 8 October ARMs) As defined by the Respondent's policy (at [86] of the Bundle, from the September 2020 policy), the purpose of an ARM included:

47.1. Discussing how an employee's symptoms of their health condition affected their ability to do their job;

47.2. When the employee believed they would be able to return to work;

47.3. Whether there are any adjustments that could be made to support a return to work;

47.4. Consideration of any medical evidence including any OH referral; and

47.5. Arrangements for further communications and further meetings if appropriate.

48. The above were precisely what was covered in all four meetings. As such, the Respondent was entitled to conclude that it had conducted four ARMs (notwithstanding the lack of formal invitation).

49. In addition, there was no evidence that, at the time, the Claimant was of the view that there had only been two ARMs. When the ARMs were discussed at the meeting with Mr Grabham on 21 October 2020, the Claimant never raised any objection to the status or standing of those meetings (see [324] of the Bundle)

50. Did the lack of written invitation invalidate the two October meetings as ARMs? Quite simply, no. In our judgement, it is the purpose of the meetings that matters. The evidence showed that all four meetings were conducted in a manner which was wholly consistent with what they purported to be, namely ARMs.

51. By way of analogy, if the Respondent had sent written invites to the ARMs to the Claimant but then conducted a meeting which had nothing to do with her ill-health, when she expected to return to work, what adjustments could be made, what medical evidence could be obtained and what further communications and meetings should take place, they would not be ARMs, even though a letter inviting the Claimant to an ARM had been issued.

52. In addition, there was evidence of the Claimant being aware of the purpose of the meeting on 8 October 2020 by reference to the text messages between herself and Ms Jenkins which were in the Bundle. For example, arrangements were made by text messages for the Claimant to meet with Ms Jenkins on 8 October 2020 to pick up the OH report and, in the Claimant's words "*find out what the company wants to do next"* (at [543] of the Bundle).

<u>Did the Claimant ask the Respondent to dismiss her?</u>

53. Despite the Claimant's assertion to the Tribunal that she made no such request, the evidence of her asking to be dismissed was compelling. It

began with a note made by Ms Jenkins following the meeting with the Claimant on 8 October 2020, as follows (at [256] of the Bundle):

> Michelle believed that dismissal due to capability may be the best option for both herself and the company.

54. Those notes were signed or initialled by both Ms Jenkins and the Claimant. However, as noted earlier, the Claimant alleged in the course of the Tribunal hearing that at the meeting with Ms Jenkins on 8 October 2020, she was asked by Ms Jenkins to initial a blank form, the implication being that Ms Jenkins then completed the form in a manner that suited her and presented it as if it had been agreed to by the Claimant as an accurate record. In respect of that allegation, we noted the following:

    54.1. When this was put to Ms Jenkins in cross-examination, she said that she could not recall what had happened given the time that had passed, that it may have been something she could have done but that whether or not the form was signed was irrelevant as it was a simply a note of what had been discussed.

    54.2. There were other ARM records, the contents of which the Claimant did not contest, which had not been signed or initialled by her, as Ms Jenkins had completed the notes after the meeting had concluded.

    54.3. Most of what was recorded by Ms Jenkins as happening at the meeting on 8 October 2020 was not disputed by the Claimant.

    54.4. The Claimant did not raise in her witness statement that she had been asked by Ms Jenkins to sign or initial a blank form at the 8 October 2020 meeting, despite discussing the meeting of 8 October 2020 at Paragraph 13 and including other allegations against Ms Jenkins.

55. The issue for the Tribunal was whether or not the Claimant told the Respondent that she wanted to be dismissed. The Claimant claims that Ms Jenkins effectively had it in for her, ever since issuing the Claimant with her final written warning in 2019 and wanted to get her out of the business. The Claimant may think that now but it is an allegation which is wholly unsupported by the evidence, which showed Ms Jenkins maintaining regular, supportive contact with the Claimant and it is also at odds with the Claimant's own conduct at the time, wherein she was thanking Ms Jenkins for her support.

56. More importantly, there was other evidence, independent of both Ms Jenkins and the meeting of 8 October 2020, which was consistent with

the Claimant telling Ms Jenkins that she wished to be dismissed, as follows.

57. In a text exchange with Ms Jenkins on 16 October 2020, after Ms Jenkins had told the Claimant that Mr Grabham was arranging the final ARM for the following week, the Claimant texted the following to Ms Jenkins (at [542] of the Bundle):

> Thank you I will message Peter [the Claimant's union representative]. Please could you confirm if I am given notice or if this will be my final payday

58. Ms Jenkins replied as follows:

> You will get a PILON [payment in lieu of notice] payment Alun [Grabham] has the details ready for the meeting

59. The Claimant asked what that meant and referred to having to get her finances sorted. Ms Jenkins then told the Claimant that "*it's a payment you get when you leave so you will get normal pay on Friday and then an additional one off payment.*" The Claimant thanked Ms Jenkins for the clarification and added "*don't know why but dreading the meeting even though I know it has to be done*."

60. On any reading of that text exchange, it corroborates and supports Ms Jenkins' record that the Claimant had, on 8 October 2020, asked to be dismissed. In the text exchange of 16 October 2020, the Claimant was clearly making enquiries about the financial arrangements and consequences of being dismissed and doing so on the basis that the same had been agreed upon. That text exchange, written at the time, is highly supportive of the Respondent's claim that the Claimant asked to be dismissed on grounds of capability arising from her ill-health.

61. At the final ARM on 21 October 2020, it was not in dispute that Mr Grabham asked the Claimant about anything she would like the Respondent to consider regarding redeployment, to which the Claimant answered (at [326] of the Bundle):

> I can't honestly say that I am capable of playing shop. It's not good for either the company or for me.

62. In her oral evidence, the Claimant confirmed that "*playing shop*" meant her job with the Respondent. Her language was highly reminiscent of what Ms Jenkins recorded as the Claimant saying at the meeting on 8 October 2020, with reference to what was good for both the Claimant and for the Respondent.

63. At the appeal hearing on 9 November 2020, it was not in dispute that the Claimant agreed with Matthew Clarke that the decision by Mr Grabham

to be dismissed on grounds of capability was the correct one for her at the time. It was similarly not in dispute that the following exchange took place (at [339] of the Bundle):

> MC: Clare [Jenkins] who completed the absence review meetings stated you were clear in believing that the best option for you at that time was dismissal due to ill health capability as you were unable to sort out your finances whilst receiving company sick pay. Would that be correct?
>
> MD: Yes that's correct

64. The Claimant is recorded as then going on to talk about her finances before Mr Clarke asked her if there was anything else she wished to add, to which the Claimant referred to her mental health, said that she shouldn't have been working and that she was feeling more stable.

65. The Claimant now says that when she answered "*Yes, that's correct*," she was agreeing that Ms Jenkins had made that statement (about the Claimant wanting to be dismissed) but she was not agreeing about the content of that statement.

66. With respect to the Claimant, that is simply not plausible or sustainable on any reading of the exchange. The Claimant is clearly and unambiguously agreeing that she told Ms Jenkins that she wanted to be dismissed on grounds of ill-health capability. The fact that, when given the opportunity to add anything else, the Claimant does not then set out why and how she disagrees with what Ms Jenkins said is both telling and consistent with the ordinary interpretation of that exchange.

67. We also reach that conclusion notwithstanding the Claimant's neurodiversity. There was nothing in that exchange or the evidence more generally to suggest that the Claimant did not understand what was being said, was not able to communicate her own thoughts and feelings or had in any way been misunderstood.

68. Rather, the exchange with Mr Clarke was also wholly consistent with all the other evidence we have detailed.

69. There was also Mr Grabham's evidence that he only put the Claimant forward for a final ARM because she had asked to be dismissed. He explained that normally the Respondent would wait at least six months from the date of first absence before contemplating a final ARM. This was also consistent with the manner in which the Respondent had managed the Claimant's absence up until the ARM on 8 October 2020. The first ARM had been in July, the second in September. Matters were accelerated only after the 8 October 2020 ARM. This was indicative and supportive of the Claimant concluding that dismissal would be in both her own and the Respondent's best interests.

70. We were also taken to an entry in the Claimant's electronic employment file, where, following the ARM on 8 October 2020 and prior to the final ARM on 21 October 2020, there was evidence of the Respondent being particularly concerned to ensure that the Claimant had representation at the final ARM. This, we were told, was a reflection of the Respondent's concerns, mindful of the Claimant's mental health, that she fully understood and appreciated the implications of her request to be dismissed. When weighed alongside the other compelling evidence we have described, we found that explanation to be similarly consistent and compelling.

71. There was another contemporaneous entry in the Claimant's electronic file which we noted (at [351] – [352] of the Bundle). Dated 9 October 2020 (i.e. the day after the ARM on 8 October 2020), it records that at the ARM on 8 October 2020 the Claimant "*asked…to set the ball rolling for capability"*. We understood that to mean that the Claimant had asked for the process to begin for her dismissal on grounds of capability. The note went on to record the Claimant's reasons for that request and included that the Claimant did not believe she would be fit for work "*for the foreseeable"*, that she did not feel able to return to work and she wanted to be able to apply for benefits and seek help financially, all of which was wholly consistent with Ms Jenkins' notes of the ARM on 8 October 2020 and consistent with what others were told by the Claimant in the course of the capability dismissal process.

72. However, we feel compelled to add a further important observation. Even if the Claimant had not asked to be dismissed on grounds of capability, it would still have been substantively fair for the Respondent to dismiss her, in light of:

    72.1. The medical evidence;

    72.2. The opinions of the Claimant, her GP and the OH doctor that no adjustments were possible to facilitate her return to work;

    72.3. The likely timescales before the Claimant could access appropriate treatment; and

    72.4. The lack of certainty that such treatment would even be effective.

73. The Respondent informed itself of the Claimant's condition, the Claimant was clear that she was unfit for work and no adjustments could facilitate her return to work, which was confirmed by med evidence. Both the Claimant and the OH doctor were clear and consistent in their respective views that the Claimant was unlikely to be fit for work for the foreseeable future.

74. There was the final written warning in place as well, although the Tribunal was of view that even without that, the Respondent had been entitled to dismiss given the consistent and clear evidence being presented to it from May to October 2020. In addition, though of less importance to the issue of substantive fairness, the Claimant was asking to be dismissed.

75. For those reasons, dismissal was well within the range of reasonable responses available to the Respondent and the decision to dismiss was substantively fair.

Procedural Fairness

76. By a letter dated 19 October 2020, the Claimant was invited to the final ARM on 21 October 2020 (at [320] of the Bundle). That letter explained why she was being invited, it made her aware that dismissal may be an option, it told her that she could be accompanied to the meeting, it provided her with the evidence in support and told her that she could provide her own information during or before the meeting.

77. The accuracy of the notes of the final ARM of 21 October 2020 between the Claimant and Mr Grabham were not in dispute (they start at [323] of the Bundle). From reading those notes, it was clear to the Tribunal that the Claimant was given the opportunity to participate and present her case and was accompanied by her union representative. The meeting lasted nearly an hour.

78. In addition, Mr Grabham had not previously been involved in managing the Claimant's day to day absences. The Claimant was given a written decision with reasons (at [330] of the Bundle) and afforded a right of appeal which she exercised.

79. Mr Clarke (who conducted the appeal) was not previously involved in the decision to dismiss the Claimant or in the management of her ill-health absences. The Claimant was similarly informed ahead of the appeal hearing on 19 November 2020 that she could bring a union representative to the hearing. The Respondent held an appeal hearing which the Claimant attended. Mr Clarke took everything into account and reached his own decision. He provided the Claimant with a written outcome with reasons.

80. Looked at in the round, the Tribunal found that the decision-making processes undertaken by the Respondent in deciding to the dismiss the Claimant were procedurally fair.

81. For those reasons, the Claimant was dismissed by reason of capability and the decision to dismiss her was fair. It follows that her claim for unfair dismissal is not made out and is dismissed.

Automatic Unfair Dismissal & Protected Disclosures (Whistleblowing)

82. The Claimant claimed that she had made three protected disclosures and that was why the Respondent dismissed her.

83. As explained, we have found that the reason for dismissal was capability. The Claimant was not dismissed because she raised the issue with the distance between the tills. It follows that she was not dismissed for making protected disclosures. She was dismissed for capability. Her automatic unfair dismissal claim is therefore not made out and is dismissed.

84. However, for the sake of completeness, we have considered whether the Claimant made any protected disclosures, although we again reiterate that this does not change the fact that, even if she did make a protected disclosure, the Claimant was not dismissed as a result[1].

The First Alleged Protected Disclosure

85. On 1st April 2020, the Claimant disclosed to the Respondent's employee, Mr Grabham, that the distance between employees working on the Respondent's tills and customers packing their shopping was less than two metres. The Claimant alleged that that disclosure tended to show that there had been and was likely to be a breach of health and safety because a two-metre distance was the minimum acceptable for preventing the spread of the Covid-19 virus.

86. It was not in dispute that the Claimant made that disclosure to Mr Grabham or that the distance between employees working on the tills and where customers did their packing was less than two metres. The Tribunal was in no doubt that the Claimant believed now that it tended to show the health or safety of any individual had been, was being or was likely to be endangered.

87. Did she hold that belief at the time? The Claimant went on sick leave on 12 May 2020. Her first fit note was dated 26 May 2020. On 26 May 2020, the Claimant's GP recorded in her medical records that the Claimant reported "*struggling at work because of Covid-19 and she does not like the tills"* (at [513] of the Bundle). That entry was consistent with the Claimant's evidence that the issue with the tills at work, in particular, heightened her anxiety. There was, therefore, evidence of the Claimant

[1] The alleged protected disclosures are at [47] – [48] of the Bundle.

being concerned and anxious about the tills at the time and the Tribunal was able to find that the Claimant held the belief that the tills were endangering or likely to endanger health or safety.

88. However, the Respondent did take the Claimant's disclosure seriously, Mr Grabham took advice on it and passed on what he had been advised about the application of the guidelines in place at that time (being two metres distance, where reasonable) and that other factors like screens, face masks, hand sanitizer, staff training and social distancing elsewhere in the store were relevant to managing the risks. At the time, the Claimant did not escalate any concerns via her union nor did she ask for any adjustments, reasonable or otherwise.

89. The Tribunal accepts that the Claimant believed that she was raising a health and safety issue but that belief was not reasonably held, when weighed against the guidance in force at the time, the measures the Respondent had implemented in the Lampeter store and the information obtained by and shared with her by Mr Grabham.

90. For those reasons, whilst it was a disclosure, it was not a protected disclosure.

The Second Alleged Protected Disclosure

91. On the 2nd April 2020, at 16.21, via an electronic message sent to the Respondent's employee Mr Christopher Lewis, the Claimant claimed to have disclosed information tending to show the same health and safety concern as set out above (i.e. regarding the distance at the tills).

92. The text message in question was in the Bundle (at [577]). On any reading of that text, the Claimant did not disclose to Mr Lewis the same information that she had disclosed to Mr Grabham on 1 April 2020. Whilst she referred in the text to being concerned about catching Covid-19 at work, it contained insufficient detail to constitute a disclosure of information regarding her concerns about the distance between the cashier and the bagging area at the tills.

93. As an issue of fact, that alleged disclosure was not made and there was, by extension, no protected disclosure.

The Third Alleged Protected Disclosure

94. On a date unknown in April 2020, the Claimant alleged that she spoke to fellow employee, Mr Alwyn Jenkins and disclosed the same information as set out above. She did so, she alleged, in the expectation that Mr Jenkins would state her concern at a staff meeting known by the title; "Great Place to Work Meeting".

95. In his witness statement, Mr Jenkins could not recall the Claimant raising the issue of the tills with him. In addition, he said that the Great Place to Work Meetings were not taking place at that time because of lockdown.

96. The Claimant did not challenge Mr Jenkins' evidence. The Claimant does not refer to it in her witness statement and there is no other evidence to support her allegation. On balance, we were unable to find that the Claimant made any disclosure to Mr Jenkins as claimed.

97. As such, there was, again, no protected disclosure.

98. But we reiterate that all of this is academic as we have found that the Respondent dismissed the Claimant because of capability, not because of her concerns about the tills or about any other aspect of how the Respondent managed the store during the pandemic.

The Disability Claims

99. It was not in dispute that the Claimant was disabled at the relevant time, as defined by the Equality Act 2010, by reason of anxiety and depression.

100. The Claimant pursued two complaints against the Respondent on grounds of disability discrimination:

    100.1. Discrimination arising from disability (section 15 of the Equality Act 2010); and

    100.2. Breach of the duty to make reasonable adjustments (sections 20 & 21 of the Equality Act 2010).

Discrimination Arising From Disability

101. The Claimant alleged that she was treated unfavourably by the Respondent in dismissing her, that something arising in consequence of her disability was her sickness absence during 2020 and that the Respondent dismissed her because of that sickness absence.

102. All of those factors are either not in dispute or are consistent with our earlier findings on the unfair dismissal claims.

103. The Claimant was disabled by reason of anxiety and depression. The GP fit notes recorded the Claimant as unfit for work by reason of anxiety with depression. The Claimant was dismissed because of her sickness absence during 2020.

104. However, and as entitled by law, the Respondent relies upon the so-called justification defence, namely that the Claimant's dismissal was a proportionate means of achieving a legitimate aim (per section 15(2) of the Equality Act 2010).

105. The Respondent says that the legitimate aims it was pursuing were the following:

    105.1. Encouraging attendance at work; and

    105.2. Maintaining customer service levels.

106. We did not understand those legitimate aims to be in dispute but in any event, they are clearly legitimate aims for a supermarket or any business, especially in retail.

107. The Tribunal repeats its findings on the unfair dismissal claims. There was no prospect that the Claimant would return to work within a reasonable period of time. There were no adjustments being proposed by the Claimant, her GP or the OH doctor that would have enabled her to return to work sooner. The Claimant was telling the Respondent that she would not be fit for work until she accessed treatment and that such treatment was unlikely to be available for a further 12 – 18 months. Even then, it was unclear that the treatment the Claimant was waiting for would be successful (in that it would enable the Claimant to return to work). The Claimant had been off sick for five months, was subject to a final written warning and was asking to be dismissed.

108. There was, in our judgement and when faced with those circumstances, nothing, whether less discriminatory or otherwise, that the Respondent could have done to reasonably achieve its legitimate aims in respect of the Claimant.

109. In addition, proposals that the Claimant made to Mr Clarke on appeal (coming in at quieter times and relocating to London) were, in reality, not realistic. None of them changed the underlying issues, namely that the Claimant needed to access treatment before she had any chance of being able to return to work and that treatment, she was telling the Respondent, was unlikely to be accessed for 12-18 months nor was it guaranteed to be successful.

110. In addition, the Respondent was entitled to reject the proposal of a career break (again, made by the Claimant to Mr Clarke at the appeal hearing on 19 November 2020). It was proportionate to have a policy where career breaks are only available where defined time periods are available (as the Respondent did). On the Claimant's own case, and as

supported by the medical evidence, it was simply not possible to define how long she would be absent.

111. For all those reasons, we find that the decision to dismiss the Claimant for her absences and long-term ill-health was a proportionate means of achieving the Respondent's identified legitimate aims. In simple terms, there was nothing else the Respondent could have reasonably done in the face of the information it was receiving from the Claimant, from her GP and from the OH doctor.

112. Although not pursued with any vigour by the Respondent. it was arguable that there was in reality no unfavourable treatment, since the Claimant asked the Respondent to dismiss her and confirmed on appeal to Mr Clarke that that was what she had requested. We found force in Mr Winspear's submission that it is difficult to see how the Respondent, in acceding to the Claimant's own request to be dismissed, could have been acting in a discriminatory way.

Reasonable Adjustments

113. The Claimant also claimed that the Respondent was in breach of its duty to make reasonable adjustments. She alleged that two provision, criterion or practices ('PCPs') operated by the Respondent had put her at substantial disadvantage. The alleged PCPs were as follows (at [37] of the Bundle):

    113.1. That employees give a certain return to work date to avoid dismissal; and

    113.2. That employees not be absent from work for more than six months.

114. Did the Respondent operate those PCPs as claimed? There was nothing in any of the Respondent's policies that supported the existence of those PCPs and the Claimant did not take us to any section in the policies or elsewhere in the Bundle.

115. However, the test is not just whether the PCPs exist within a policy. The question is whether they were provisions, criterion or practices operated by the Respondent and applied to the Claimant.

116. On the evidence we have seen and heard, the answer must be a resounding no. Just because one thing follows another, it does not necessarily mean that the latter was caused by the former. With respect, the Claimant has assumed that because she was dismissed within six months of going on sick leave, that must mean there is a PCP in place to that effect. But there is no evidence to support that. In fact, on Mr

Grabham's evidence, the Respondent only put the Claimant forward for her final ARM because she asked to be dismissed. The Respondent would normally wait at least six months before escalating to a final ARM and even then, dismissal is not inevitable.

117. Similarly, the Claimant was unable to give a return-to-work date, was dismissed and has assumed, in our view incorrectly, that those two acts were linked and that they evidence the existence of a PCP. They do not.

118. There were no PCPs as claimed by the Claimant and so such PCPs were not applied to her in any way whatsoever. It follows that there was no duty on the Respondent to alleviate any substantial disadvantage caused to the Claimant by the application of those PCPs because they were never applied to her and no disadvantage arose. As there was no duty, there can be no breach of any duty.

119. Even if the Respondent did have those alleged PCPs and had applied them to the Claimant, the reasonable adjustments suggested by the Claimant[2] do not address what is at the heart of this case, namely:

    119.1. That the Claimant, her GP and the OH doctor were saying that the Claimant was not fit for work;

    119.2. The Claimant would not be fit to return to work until she accessed treatment;

    119.3. Any treatment was unlikely to be accessed for at least 12-18 months;

    119.4. There were no guarantees that such treatment would be successful in rendering the Claimant fit for work; and

    119.5. In meantime, there were no adjustments, reasonable or otherwise, that could be put in place to facilitate the Claimant's return to work.

120. For all those reasons, the claims that the Respondent breached its duty to make reasonable adjustments is not made out and is dismissed.

Concluding Remarks

121. We feel it is necessary to comment on a number of allegations raised in the course of the hearing. We say these, we hope, for the benefit of the Claimant but also for those against whom the allegations were made.

[2] At [37] of the Bundle.

122. The Claimant appeared to allege that Mr Clarke had lied on oath when he confirmed that he had not known the Claimant prior to conducting her appeal against the dismissal. He did not dispute that his previous time working at the Lampeter store may have overlapped with the start of the Claimant's employment in 2012. That fact appeared to be the basis of the allegation of perjury.

123. As explained at the time to the Claimant, there was simply no evidence whatsoever that Mr Clarke lied on oath. He did not know the Claimant prior to the appeal. That is wholly consistent with also having worked in the same store as the Claimant some eight years earlier. To know someone is different from having met and worked with someone. More importantly, the context of the evidence was key. It was Mr Clarke confirming that he had no prior knowledge of the Claimant's employment history nor had he been in any way involved in her line management or the decision to dismiss her. He was, as far as the appeal was concerned, stating his independence.

124. The Claimant also alleged in her oral submissions that the Respondent had prevented her from relying on evidence and had sabotaged the Tribunal process. As also explained at the time, any disagreement about what evidence could be included and relied upon is ultimately a decision for the Tribunal, not the parties. Indeed, the Employment Judge himself was called upon to decide the Claimant's request to include certain documents and, as explained in his order of 5 June 2023, he allowed some documents into evidence and refused others.

125. Again, there was no evidence of any untoward behaviour by the Respondent or their legal team in the course of these proceedings.

126. Finally, the Claimant also alleged that Ms Jenkins specifically, and the Respondent more generally, were intent on removing her from the business and that once she went on sick leave in May 2020, her fate was sealed. Again, the Claimant may believe that but the evidence, as we have detailed in this judgment, reveals a different picture. The Respondent was supportive, understanding, patient and professional in how it managed the Claimant's absence. There was no pre-judgement, no agenda and no intent to remove her. Rather, the Respondent had proper, considered regard to what the Claimant was telling them and what the medical evidence was telling them.

127. The manner and circumstances of how the Claimant's employment ended with the Respondent is not what any of the parties would have wished for. In her own words, the Claimant was very ill and continues to struggle with her health. The Tribunal has every sympathy for her and for the challenges she faces in her life. But not only does the evidence show that the Respondent acted wholly lawfully in dismissing her and did not

discriminate against her as claimed, it also shows an employer who was doing everything they could to maintain the Claimant's employment.

128. The fact that it was simply not possible to do so was regrettable to all but was not because of any unlawful, discriminatory or untoward actions or behaviour on the part of the Respondent or its staff.

EMPLOYMENT JUDGE S POVEY

Dated: 28 June 2023

Order posted to the parties on
13 July 2023

For Secretary of the Tribunals
Mr N Roche