EMPLOYMENT TRIBUNALS

Claimant: ABC

Respondent: John Lewis plc

Heard at: Watford Employment Tribunal (in public; by video)

On: **6 to 10 September 2021**

Before: Employment Judge Quill; Ms S Johnstone; Mr P English

Appearances
For the claimant: Mr D Gray-Jones, counsel
For the respondent: Mr G Graham, counsel

JUDGMENT

1. The Respondent contravened section 39(2) EQA because there was disability discrimination within the meaning of section 15 the Equality Act 2010 ("EQA") by removing the Claimant from the Respondent's Team Leader Training Programme, and it is just and equitable grant an extension of time for presenting the complaint.

2. The other allegations of disability discrimination contrary to either section 15 or 21 EQA are not successful. In other words, the remaining complaints under EQA are all dismissed.

3. The unfair dismissal claim is not well founded and is dismissed. In other words, it is our decision that the dismissal was not unfair.

REASONS

Introduction

1. We gave our judgment orally on 10 September 2021. At the time, there was no request for written reasons. There was, however, a request that we delay sending out the judgment in order for a Rule 50 application to be made in writing.

2. At the time, we fixed a remedy hearing, which unfortunately had to be postponed because one of the panel members became unavailable.

3. Reasons were subsequently requested and this judgment is therefore being

supplied with reasons. The Rule 50 application will be dealt with in a separate document.

The Hearing

4. This hearing was conducted fully remotely by video. We had a bundle of approximately 1368 pages and in addition we had two short video clips which we viewed during our pre-reading.

5. We had four written statements, one from the claimant and one from each of the respondent's three witnesses who were: RELEVANT MANAGER (Deputy Branch Manager); Mr Burt (Branch Manager and the dismissing officer) and Ms Mihell (a Manager in the Appeals Office and the person who dealt with the appeal in this case).

6. In addition, we granted the claimant's application for her father to give oral evidence without a witness statement. We did this on the basis that he was only permitted to give evidence in chief about the two specific points identified by the claimant's counsel during the application and also on the basis that the time allocation for his evidence would be taken from the time that would otherwise have been available for the claimant's representative to cross-examine the respondent's witnesses.

7. After our pre-reading, the claimant commenced her evidence on the afternoon of day 1 and completed it before lunch on day 2. The claimant's father gave evidence straight after lunch on day 2 and the respondent's witnesses started later that day and their evidence concluded at the end of day 3. At the start of day 4 we had oral submissions from both sides.

The List of Issues

8. There was an agreed list of issues starting at page 103 of the bundle. This hearing was for liability only and therefore the remedy section, section 6 of that list of issues, was not needed for this hearing. In addition, the respondent confirmed at the outset of this hearing that it had previously written to the Tribunal (in a document included in the bundle), conceding disability and therefore s.2 of the list of issues also did not need to be dealt with by this panel.

9. At paragraph 4.1 of the list of issues there were five alleged PCPs and during submissions it was confirmed that no argument was being put forward by the claimant in relation to item 4.1(c). At item 3.1 of the list of issues there was a list, (a) through to (h) of alleged unfavourable treatment arising from disability and the same list of items was replicated at 4.3 of the list of issues, as being alleged substantial disadvantages because of the PCPs. It was confirmed that items (b) and (c) of this list should be read together so as to read "*raising the claimant's behaviour and inappropriately criticising the claimant's behaviour including in relation to the incident on 22 November 2019 in a meeting between the claimant and RELEVANT MANAGER on 24 January 2020*".

10. On day 1, the claimant's representative also provided a document which clarified which particular alleged disadvantages went with which alleged

PCP. Subject to that, the list of issues in the bundle was agreed to be correct and that is what we have used when making our decisions.

The facts

11. The claimant began working for the respondent in February 2016 as a retail assistant. She worked in the respondent's Waitrose branch at High Wycombe.

12. The claimant has autism and this is a fact that was known to the respondent from the start of her employment. As mentioned in the claimant's representative's submissions autism, including Asperger's syndrome, is a life-long developmental disability affecting how people communicate with others and sense the world around them. It is estimated that 1.1% of the people in the UK are on the autistic spectrum. That is a quote from the Equal Treatment Bench book. Each person with autism is affected differently. The effects on the claimant include struggling to process sensory information - such as sounds and smells - which can cause her to become very easily overwhelmed. This can lead her to having what she describes as an autism meltdown. An autism meltdown is an intense response to an overwhelming situation and causes the claimant to lose control of her behaviour. She usually expresses this verbally and physically by making a growling noise, swearing at herself or at her surroundings, biting her hand or banging her head wither with her hand or sometimes against walls. Amongst other things she uses earplugs to limit sounds as a coping mechanism. The claimant finds it difficult to interpret, understand and apply social rules. She is capable of socialising but she needs far more information and support than a neurotypical person. Without such support, there is an increased risk of her having a meltdown.

13. As a result of her ASD, the claimant has a tendency for self-harming as a method of expressing frustration. The claimant was prescribed fluoxetine from April 2014 and that was gradually reduced towards the end of 2019 to allow for a course in sertraline. Both of those medications are anti-depressants and they are prescribed to assist with anxiety and low mood caused by the difficulties of ASD. The medication does not eliminate the feelings of anxiety or low mood but does make it easier for the claimant to cope with them and to reduce the risk of a meltdown. The claimant was also prescribed propranolol in around October 2013 and that dosage was increased from 10mg to 40mg around December 2019. That medication is prescribed to assist the claimant with anxiety caused by the difficulties from ASD.

14. The managers who worked in the Waitrose branch in High Wycombe at around the start of the claimant's employment included, amongst others, Natalie Fenn and Sophie Fry who were still working for the respondent as of 2020 which was when the claimant's employment ended.

15. During 2017 the claimant made an application to Access to Work. After that referral to Access to Work had been made - but before it was implemented - a clinical case manager from the respondent's partnership health services team came to see the claimant in the branch. The claimant believed that this visit was inappropriate because it had not been announced in advance. One

of the symptoms of the claimant's condition is that she finds it difficult to deal with unexpected situations especially at short notice.

16. During the course of the meeting the claimant became frustrated. This was because she was being asked questions about her medication but she did not know the specific details of her medication because her family assist her with that.

17. During the course of the meeting, the claimant threw her keys and left the meeting. It was alleged by the clinical case manager (CCM) that the claimant had thrown the keys and that they had hit the clinical case manager in the face. The claimant's account is that she does not recollect the keys hitting the CCM in the face. She believed that she threw them onto the table.

18. The claimant was called to a disciplinary meeting, after an investigation, to discuss the allegations and she was accompanied by her father. That meeting took place on 31 May 2017. During the meeting the claimant pointed out that there were no witnesses to the incident and that colleagues had not seen a mark on the CCM's face. She said she had thrown the keys and did not see where they ended up as she had left the room quickly. Her father stated that as the claimant gets older she is able to better cope with anxiety.

19. The hearing manager asked what would have helped to stop the claimant's behaviour and the Claimant answered that if she had known the CCM was coming beforehand, then that would have helped. She also accused the CCM of having been "in her face" and said that she, the claimant, believed that she had acted quite well in all the circumstances. The hearing officer informed the claimant that no further action would be taken and this was confirmed by a letter dated 31 May 2017 which referred to adjustments which were to be implemented.

20. In around June 2017, as a result of assistance through Access to Work, several of the respondent's managers undertook autism and Asperger's awareness training. These included Sophie Fry, Natalie Fenn and Steven Bushell.

21. In around July 2017 (approximately), a Tailored Adjustments Plan, or TAP, was completed between the claimant and the respondent. This was on the respondent's standard pre-printed stationery. The pre-printed form is about 12 pages in total. There are two slightly different versions of this TAP in the bundle, one is from 142 through to 156 and one from 157 through to 166. There is nothing inherently suspicious about the fact that there is more than one version of such a document in existence. As stated in the document itself, there should be copies with the employee, with the employee's line manager and with Human Resources. In any event, the one that is most relevant to those proceedings is the one from 142 through to 156. In particular, our finding is that the list of suggested adjustments on pages 145 to 147 is what was agreed in around July 2017. It is this document which was subsequently retained in the branch in a secure place and which RELEVANT MANAGER was later able to inspect, in or around November 2019, after Ms Fry provided a copy to her.

22. The adjustments which were implemented as per the TAP included changes in the duties of the role and allowing the claimant to use earplugs at work

and making adjustments to her shift patterns and her breaks. Item 4 was to complete a risk assessment and put in place a buddy and a personal evacuation plan. This was done and the buddy was to be Sophie Fry. Sophie Fry remained as buddy for the remainder of the claimant's employment.

23. To the extent that part of the buddy's role was to assist with evacuation, it was acknowledged that the buddy would not always be on duty and therefore the floor manager might be required to assist when necessary if there was an evacuation (see page 315 of the bundle).

24. In fact, the role of buddy grew and Ms Fry was somebody who was available to the claimant as a point of contact regularly during her employment. Ms Fry was not always working on shift at the same time as the claimant, but typically she spent around 2 hours per day with the claimant on days when they were both working.

25. Another adjustment that was agreed in July 2017 was that staff would attend an Autism Awareness Course and that this was to be reviewed annually with the aim of ensuring that six employees in the branch had attended.

26. The training was completed in June 2017 and at least six people did attend then. The intention was for TAP to be reviewed again in June 2018. There is no evidence before us to suggest that it was reviewed in June 2018 and our finding is that is was not. If there had been a review it is likely that the TAP form itself would have been updated and/or that the respondent would have had records of a meeting with the claimant to discuss a review.

27. As written in the pre-printed parts of the TAP document it is intended to be a living document and to be updated and amended whenever necessary whether due to changes in the claimant's circumstances or the respondent's circumstances or for other relevant reasons. The document says that it is only to be shared with new line managers with the employee's permission. Our finding is that there were no further reviews or updates to the document after July 2017 prior to its being inspected by RELEVANT MANAGER in around November 2019.

28. For the first 12 months from July 2017, the respondent kept to the target of having six employees in branch who had had the autism awareness training. However, three of those employees left not long after June 2018. Of the three who remained one worked with the claimant occasionally but was usually on the night shift (and therefore not working at the same time as the Claimant). The other two were Ms Fry and Ms Fenn.

29. Around November 2018, RELEVANT MANAGER started as deputy store manager for the High Wycombe branch. She had worked at other branches of Waitrose previously but from November 2018 onwards she was full time in High Wycombe. Unlike her immediate predecessor deputy store manager for the High Wycombe branch, RELEVANT MANAGER had not had the autism awareness training. RELEVANT MANAGER did not review the claimant's TAP on joining the branch in November 2018. She did ask Ms Fry about the document at that time, and was aware that the TAP document did exist.

30. RELEVANT MANAGER had some conversations with the claimant around

the time she joined. The claimant did not inform RELEVANT MANAGER that any further adjustments were required. (We are not suggesting that it was the claimant's responsibility to notify the employer of a need for further adjustments, or to remind them to review the TAP; we are simply making a finding RELEVANT MANAGER was not informed by the claimant of any requested changes to the adjustments.) Ms Fry also informed RELEVANT MANAGER that she thought things were working well with the claimant at that time (ie the time when RELEVANT MANAGER joined the branch) and that she did not think that further adjustments were required at that stage.

31. In around June 2019, the claimant was accepted onto a team leader training programme. Team leader is a role which the respondent has at some of its stores, though not all. It is a role which is being gradually phased out. However, RELEVANT MANAGER was in favour of having team leaders and she got approval for them to be introduced for the first time to the High Wycombe branch. The role of team leader gives retail assistants the opportunity for increased responsibilities. It is not a formal promotion as such as and does not affect pay. Rather, what happens is that team leader roles are allocated amongst those working on a particular shift and the team leaders take responsibility for a particular activity &/or group of colleagues during that shift. It is potentially beneficial to employees as it could be seen as the first step towards management. At the very least, it gives employees the opportunity of experiencing some management responsibilities and enables them to see if it was something they would like to try to develop further.

32. During the claimant's employment there was an incident with an MFD, a Multi-Functional Device. The claimant accepts that she threw the device but the claimant does not accept that it was broken after she threw it. She did not see any evidence to that effect. Ms Fry spoke to the claimant about the MFD and asked her to be more careful in future because they were expensive. RELEVANT MANAGER did not speak to the claimant about the incident.

33. During the first 12 months that they worked together, RELEVANT MANAGER believed that she and the claimant had a reasonable working relationship. One of the adjustments for the claimant was that the claimant had a box containing items which she could use if she became stressed or if she believed she was in danger of a meltdown. In around April 2019, RELEVANT MANAGER bought a new box for the claimant and some additional items to go into it.

34. During the first 12 months or so after RELEVANT MANAGER moved to High Wycombe, she spent roughly 10 or 20 minutes per day with the claimant on days when they were both on shift together. The amount of time that she spent with the claimant increased starting from autumn 2019.

35. On or around 19 November 2019 it came to RELEVANT MANAGER's attention that the claimant had been self-harming. This was reported to her by a colleague who had been told about it by the claimant.

36. On Friday 22 November 2019 it was reported to RELEVANT MANAGER that the claimant had appeared to be upset and that it was unclear where the claimant was. RELEVANT MANAGER became concerned about this

because of the recent reports she had received about self-harm and she decided that it was important to try to find the claimant.

37. In due course, she was informed that the claimant was in the shower room at the branch. RELEVANT MANAGER went to that location. She spoke to the claimant to inform her that she was going to enter the shower room and she did so. She found the claimant sitting down with her knees in front of her. RELEVANT MANAGER crouched down in front of the claimant, facing her, so that RELEVANT MANAGER's knees were close to the claimant's knees. RELEVANT MANAGER spoke to the claimant for a while. RELEVANT MANAGER formed the view that the claimant was not self-harming at that time

38. RELEVANT MANAGER needed to use the lavatory and she told the claimant that she was going to go and do that and then come back. When she did come back after using the lavatory, the claimant had left the shower room. It is our finding that nothing that RELEVANT MANAGER did was intended to keep the claimant in the shower room against her will. We do accept the claimant's account of the incident to the extent that she believed that she felt trapped in the shower room by RELEVANT MANAGER's presence. However, we think that the claimant's recollection that she had to actively dodge around RELEVANT MANAGER in order to exit the shower room is mistaken and we accept, as per RELEVANT MANAGER's account, that RELEVANT MANAGER was not present at the time the claimant left the shower room.

39. Upon finding that the claimant was no longer in the shower room, RELEVANT MANAGER became concerned about the claimant's whereabouts and, in particular, when it was suggested to her that the claimant might have gone on to the roof. RELEVANT MANAGER therefore headed in that direction. When RELEVANT MANAGER was on the staircase, she found that the claimant was standing on the staircase and had not gone to the roof. RELEVANT MANAGER did not hold on to the claimant on the staircase or physically prevent the claimant form leaving the staircase. The claimant did, in fact, leave the staircase area and she went outside the building. Later on, she met her father outside the building. When the claimant left the building because this was around 5 o clock or so in November, it was already dark. The claimant's father took her home and RELEVANT MANAGER and the claimant's father subsequently had a telephone conversation.

40. It was as a result of this incident that RELEVANT MANAGER decided that she needed to review the TAP and that is what she did. She made a referral to Partnership Health Services (PHS). The referral form is pages 1310 and 1311 in the bundle. It states that consent for the referral had been given by the claimant's father rather than by the claimant and it asked for the claimant's father to be contacted by PHS in the first instance in order to make arrangements for an appointment to take place. The referral form stated that RELEVANT MANAGER wanted to gain an understanding, from an autistic specialist, how the branch could best support the claimant at work. The referral form suggested that the claimant's parents believed that a CCM, Clinical Case Manager, with autism specialism, was now available.

41. On 27 November 2019, the Regional Health Manager spoke to RELEVANT

MANAGER. RELEVANT MANAGER said that she now had the claimant's actual direct consent for the referral and that the claimant had said she wanted to be accompanied to the appointment by Ms Fry rather than by her father. The Regional Health Manager stated that she was not an autism specialist and that in fact PHS did not have any autism specialists. The Regional Health Manager was willing to go ahead with an appointment. The Regional Health Manager also informed RELEVANT MANAGER that if outside specialists were required then the Policy Team (the Respondent's internal HR advisers) could give further details about that. An appointment for 2 December was made.

42. As confirmed by the note of this conversation made by the Regional health Manager (of 27 November 2019 discussion), RELEVANT MANAGER was aware that the claimant had suffered a bereavement earlier in the year and also aware that the claimant was undergoing a change in medication. The information about the change in medication had been given to RELEVANT MANAGER by the claimant's father.

43. RELEVANT MANAGER, shortly after 27 November, formed the view (having spoken to the policy team, PPA), that having the claimant assessed by the Regional Health Manager was a pointless exercise since that person was not a specialist in autism and that therefore the appointment (even if accompanied by Ms Fry) would be an unnecessary burden for the claimant. Having spoken to PPA, RELEVANT MANAGER formed the view that the better course of action was to go back to Access to Work so that the TAP (which had been created and implemented with the assistance from Access to Work in 2017) could be reviewed. Furthermore, it was RELEVANT MANAGER's view - based on PPA advice - that if the claimant's medication was potentially going to cause for difficulties at work then the claimant's GP would be the best person to advise the claimant about that and, if necessary, advise the respondent.

44. Our finding is that a further conversation between the claimant's father and RELEVANT MANAGER took place. Their recollections differ about the precise details of what was said. RELEVANT MANAGER's firm belief is that conveyed all of the information in the previous paragraph to the claimant's father and that he understood and agreed with all of her proposed course of action. The claimant's father disagrees strongly with RELEVANT MANAGER's version of the conversation. In particular, his firm belief is that as far as he is concerned the PHS referral that had been made was still going to lead to an appointment, and that he was still waiting for a date for it in January 2020. We accept his recollection that he spoke to Ms Fry to ask Ms Fry about the appointment date while RELEVANT MANAGER was on annual leave. He would not have been chasing up Ms Fry about the appointment if he had clearly understood from RELEVANT MANAGER that she was proposing to cancel the appointment permanently (and that, by the end of the conversation, she was of the belied that he had agreed to this).

45. On 2 December 2019, RELEVANT MANAGER contacted the Regional health Manager and stated that the appointment was no longer required. RELEVANT MANAGER also made clear to the claimant that the 2 December appointment was not going to go ahead.

46. We are satisfied that it is RELEVANT MANAGER's honest opinion that she was sufficiently clear with the claimant's father that the appointment was not going to go ahead at all (as opposed to merely being deferred). However, we find that it was [ABC's father's] opinion that the referral was merely being put on hold rather than cancelled completely. We are told that the conversation perhaps took around 11 minutes. There are no detailed notes from the respondent made during or shortly after the call. It is entirely plausible that, during the telephone conversation, RELEVANT MANAGER mentioned that further outside specialist advice could be acquired in the future if necessary (as that wold have been consistent with what the Regional Health Manager told RELEVANT MANAGER). RELEVANT MANAGER might not have intended to give the impression that such specialist advice was something that was definitely going to be obtained by the Respondent, but she did not make it clear that the PHS referral was fully cancelled, and that specialist advice would only be obtained if the Respondent made a fresh decision in the future to obtain it.

47. We are satisfied that the claimant's father was given information that the planned course of action for the immediate future was to return to Access to Work for further advice. However, specific details of the proposed course of action were not put in writing to the claimant. It would have been reasonable for the respondent to make sure that information about these issues, was conveyed clearly and in writing to its employee. That would have been the case for any employee but particularly one with autism. Therefore, the fact that there is confusion about specifically what was discussed between RELEVANT MANAGER and the claimant's father, at the end of November and the start of December 2019, is the responsibility of the respondent and not the responsibility of the claimant or her father.

48. The claimant returned to work promptly after 22 November. At around the same time, she went on to the amended rota, which had previously been agreed between her and the respondent as something which would be in place for each pre-Christmas period.

49. Between 1 and 15 January 2020, RELEVANT MANAGER was on leave. On the day of her return, almost immediately on her arrival at the branch, the claimant approached her and asked for a meeting. RELEVANT MANAGER agreed to having a meeting with the claimant.

50. RELEVANT MANAGER produced a written agenda for the meeting and she supplied the written agenda to the claimant around 19 January 2020. This was a version of the document which appears at page 567 of the bundle. The meeting was scheduled for 24 January. One of the purposes of giving the agenda in writing to the claimant in advance of the meeting was so that the claimant could show it to her parents and potentially have one of the parents come to the meeting.

51. At the start of the meeting on 24 January, it appeared that the claimant had lost her copy of the agenda. The claimant wanted to carry on with the meeting with Sophie Fry present and did not want either of her parents to be called or for the meeting to be deferred to a later date so that they could attend. The meeting continued. At the outset, there was a discussion about whether the claimant was comfortable in the room, whether the lighting was ok etc and

whether she needed a pen and paper. It was noted that she had some notes on her phone ad she was able to refer to those during the meeting.

52. The meeting started by discussing the Access to Work referral, the claimant's role and the Tailored Adjustment Plan (TAP). There was a discussion about creating instead a Wellness Awareness Plan, a WAP. It was confirmed that the claimant would be reimbursed for some earplugs which she had bought out of her own pocket and that an Autism Awareness Course had been arranged and that RELEVANT MANAGER would be one of the people to go on it.

53. There was a discussion about the claimant having recently been provided with a daily list. This daily list set out what she was going to be doing throughout that particular day including listing her break times. The TAP was reviewed and discussed during the meeting and there was a discussion about particular duties which had been removed and which particular duties the claimant preferred.

54. In terms of next steps going forward, it was agreed that the daily list appeared to be working satisfactorily and therefore the list would continue. It was discussed that there was a plan to remove the claimant back on to tills (which she had temporarily not been doing during the busy pre-Christmas period). RELEVANT MANAGER made clear that this suggestion was for 30 minutes at a time but the claimant could have that reduced as a reasonable adjustment. The discussion then moved on to the Team Leader Course and RELEVANT MANAGER stated that it had been decided that the claimant would not immediately resume the Team Leader Course. She referred to the claimant's behaviour. RELEVANT MANAGER said that the claimant's behaviour had been more consistent since Christmas but that consistency needed to be maintained before the claimant would resume the course. The claimant mentioned that she could not control her behaviour and could get aggressive. RELEVANT MANAGER said that such aggressive behaviour would not be appropriate. RELEVANT MANAGER referred to the fact that she and other managers were going on to the Autism Course and that the plan was to create a structure to give the claimant the most chance of success and that she and Ms Fry would work with the claimant to put other steps in place.

55. During the meeting the claimant discussed the fact that she had not been able to have regular counselling recently because on her days off she had been going to the doctors. On learning that the claimant did not have a grievance counsellor and had not located a grievance counsellor, RELEVANT MANAGER asked the claimant if she would like the respondent to try to arrange this and the claimant said yes.

56. There was then a discussion about where the claimant would have her breaks. The Wellness Room and the Training Room were discussed as possible options depending on whether she was going to be eating food during the break or not.

57. Prior to the meeting, the proposal for the claimant to come off the Team Leader Course had been discussed by the Management Team as a whole and the Management Team as a whole had agreed it. This information was not given to the claimant during the meeting but we accept it had happened

before the meeting. Ms Fry, the claimant's buddy, was aware that this the Claimant being taken off the team leader course was going to happen. RELEVANT MANAGER did not, however, specifically discuss with Ms Fry - in advance of the 24 January meeting - that she was going to raise that particular point during the meeting with the claimant.

58. On 26 January 2020, RELEVANT MANAGER sent an email to 13 people who were Assistant Manager level at the branch. Not all of those assistant managers worked with the claimant regularly. For example, some of them work mainly on night shifts. Because of the respondent's shift system and because of the need to cover holiday absences etc, those people could potentially work with the claimant from time to time. The email was marked 'Confidential – addressee only'. It seems that on 27 January 2020 one of the addressees broke the confidentially requirement, and a copy of the email was sent to the claimant. A version of that 27 January email that is in the bundle, but the name of the person who sent it to her is blacked out.

59. RELEVANT MANAGER's 26 January 20202 email contained details of reasonable adjustments that were being implemented. RELEVANT MANAGER stressed the importance of the recipients making sure that they understood the adjustments and that they made them happen. They were told to speak to her if they needed to know anything more about the adjustments. Amongst other things the email referred to the Autism Awareness Course and stated that it was important for all the recipients of the email to make sure that they attended the course which was being arranged by Sophie Fry in conjunction with Access to Work.

60. Amongst other things the email informed the recipients of the need to make sure to create a daily list for the claimant and gave an example of a daily list and it confirmed that the claimant should only have 30 minutes at a time on tills. The email also stated that the claimant had been asked to stop eating and taking breaks in the general office and mentioned the places where she could take her breaks depending on whether she was or was not going to be eating food.

61. On 16 February 2020, there were interactions between the claimant and RELEVANT MANAGER. We have been provided with very brief - approximately two minutes each - video clips of two of these interactions. These clips are in colour and of reasonable quality but there is no sound.

62. Around 3pm or so on 16 February RELEVANT MANAGER was working in her office and she heard a loud noise, which she described as a scream. She believed she recognised that this was the claimant's voice. RELEVANT MANAGER went to the warehouse which is some distance away from her office, to see what the cause of the noise was. She found that the claimant was having some difficulty stacking some bread and she, RELEVANT MANAGER, assisted the claimant to stack the bread. RELEVANT MANAGER said that she thought that the claimant should try to avoid screaming as it was potentially alarming to other people. RELEVANT MANAGER said that if the claimant needed help she could ask either herself or Ms Fry for further assistance.

63. The claimant was due to finish her shift at 5pm. She was going to be collected by her father shortly after the end of her shift. Around 5pm, it became

apparent to her that she might be slightly late meeting her father because she wanted to clear up some cardboard which she had left on the shop floor before she left for the day. She therefore went to get her phone in order to send a text message to her father. She became annoyed because she could not unlock the phone straight away and she flung the phone and made a noise. RELEVANT MANAGER was in her office and again she heard the noise which she described as very loud. She came from her office to the warehouse to look into it. Ms Fry was also in the vicinity. By the time RELEVANT MANAGER reached the claimant, it seemed to RELEVANT MANAGER that the claimant was operating her phone successfully. RELEVANT MANAGER asked the claimant what the situation was and the claimant explained. Ms Fry told the claimant that she could leave straight away and that other people would clear up the cardboard from the shop floor. RELEVANT MANAGER mentioned that the claimant's shouting had not been appropriate.

64. Ms Fry and RELEVANT MANAGER have each made statements about what allegedly happened next as part of the internal investigation that followed. The CCTV clip also shows at least some of what happened next albeit, as we have said, without any audio.

65. RELEVANT MANAGER's account is that the claimant approached her rapidly and struck her forcefully with her right hand or fist to the left side of RELEVANT MANAGER's head. The evidence which RELEVANT MANAGER gave to the subsequent investigation was that she was in a great deal of pain immediately and that when she eventually drove home approximately two hours later, a colleague followed her in a car to check that she was ok. She subsequently received medical attention by being checked out at a hospital. The clinicians at the hospital said she had concussion and that she should refrain from work for some days. She did that for a few days and then afterwards she worked from home, returning to the branch approximately two weeks after the incident.

66. After the incident, the claimant sent some text messages which were part of the evidence which the disciplinary hearing officer had available to him and which were also in the bundle for this hearing. Our finding is that the description of these messages in the appeal officer's outcome letter (see page 1043 of bundle) is accurate. In these messages the claimant said that she had flipped and had hit RELEVANT MANAGER. She suggested that she regretted her actions but that this it had happened because RELEVANT MANAGER had been criticising her behaviour. In the messages, she also referred to the fact that she had been previously taken off the Team Leader Course.

67. The claimant was suspended from work on 17 February 2020. An investigation commenced. The investigating officer was Mark Slater. He interviewed numerous witness and their written statements are in the bundle. The claimant and Mr Slater had discussions by phone or in person on 25 February, 26 February, 12 March and 16 March 2020.

68. The disciplinary hearing took place on 22 May 2020. The handwritten notes are 45 pages and are in the bundle from 796 through to 840. The claimant and her father attended the meeting. The hearing officer was Mr Burt. The

same CCTV that we have was played. During the meeting it was viewed by the claimant's father at least. Amongst other things the claimant's father said that it was clear that there had been contact.

69. Following a break for deliberation Mr Burt reconvened the meeting and in due course during the meeting he informed the claimant and her father that her employment was being terminated.

70. A letter dated 22 May 2020, which is at page 841 in the bundle, was sent informing the claimant of the termination and that it was with immediate effect and it informed her of her right to appeal.

71. Other than stating that the dismissal reason was serious misconduct and inappropriate behaviour, the dismissal letter gives no detailed reasons for the dismissal. The letter was also accompanied by the meeting notes which contained little information about Mr Burt's specific thought processes.

72. It was clear to the claimant and her father that the alleged misconduct under discussion was the allegation that the claimant had struck RELEVANT MANAGER on 16 February 2020 shortly after 5pm. The claimant and her parents were told about the suspension by phone on 17 February and had no questions about the reasons for it. We do accept that the specific details of allegedly striking RELEVANT MANAGER were not expressly mentioned during the phone call to suspend the claimant or the subsequent follow up letter.

73. The alleged hitting of RELEVANT MANAGER was the subject which was covered in the statements taken by Mr Slater from other people; It was the subject discussed between the claimant and Mr Slater; it was the subject of the CCTV clip which was played and about which the Claimant's version was requested. The hitting of RELEVANT MANAGER was the subject of the text messages sent by the claimant in which she stated that she had hit RELEVANT MANAGER. Those messages were part of the pack of documents and were also the subject of questions put to the claimant. The evidence which the claimant supplied to the disciplinary hearing also included the letter dated 28 April 2020 from Dr Miles Johnson which was a letter prepared at the claimant's request. That letter also referred to an incident in February 2020 (though it did not specifically mention that the allegation was of striking RELEVANT MANAGER).

74. Our finding is that it was clear to the claimant and to her family that the allegation was that she had struck RELEVANT MANAGER. No suggestion to the contrary has been made, albeit during this hearing - as they are entitled to do - the claimant's side has criticised the lack of express wording in the letters calling the claimant to the disciplinary hearing and in the dismissal letter produced after the hearing.

75. We do accept that - although they are brief - Mr Burt's brief reasons were conveyed to the claimant during the hearing. These were that he was satisfied having heard what was said in the hearing, that there was not a dispute about whether or not the claimant had made contact with RELEVANT MANAGER, but rather the dispute was whether because of medical evidence and other information about autism supplied to him, and/or because of RELEVANT MANAGER's alleged provocation, he should decide not to

impose any disciplinary sanction or else to impose a sanction short of dismissal. Further, having read the notes of the hearing, we are satisfied that it was clear to the claimant and to her father that that was the topic being discussed, namely what decision the Respondent would make as a result of the contact made by the claimant with RELEVANT MANAGER on 16 February. Mr Burt made clear he had decided to dismiss the claimant because he had rejected the arguments that the Claimant and her father put forward as to why the claimant should not have any disciplinary sanction imposed upon her (or else that it should be short of dismissal).

76. Before the hearing Mr Burt had wanted further investigation to be done about the history between RELEVANT MANAGER and the claimant. He had asked for that because Mr Slater's initial investigation had revealed the part of the claimant's argument was that the way that RELEVANT MANAGER had treated her both on the day and previously had caused the 5pm incident. Mr Burt wanted the claimant and her father to have every opportunity to put forward their arguments as to why RELEVANT MANAGER's behaviour had been inappropriate and/or that RELEVANT MANAGER's behaviour did not take account of the claimant's autism. Mr Burt considered their arguments and assessed what had happened during the whole day including, but not limited to 5pm. He was of the view that the claimant had hit RELEVANT MANAGER and that this behaviour amounted to serious misconduct, namely assault of a colleague. He concluded that the claimant was guilty of serious misconduct and that - due to the seriousness of the misconduct - it was appropriate to dismiss the claimant. He reached this conclusion after having considered whether a lesser sanction was appropriate and having decided that it was not. He accepted that the striking of RELEVANT MANAGER, occurred while the claimant was having an autism meltdown. He also took into account specialist advice from the Business Disability Forum, pages 74 to 75 of the bundle. He also considered what adjustments had been put in place for the claimant.

77. After the dismissal, the claimant appealed. Because of the covid pandemic and the lockdown which commenced in March 2020, the decision was made that the appeal would be in writing rather than by way of a face to face meeting. More detailed appeal documents were submitted.

78. Following consideration of the appeal, the appeal officer, Ms Mihell sent a detailed response which is in the bundle. The best copy is 1042 through to 1050. The letter is dated 15 July 2020 and she responded to each of the claimant's 18 points of appeal.

79. Neither Mr Burt nor Ms Mihell had had any specific autism awareness training. They each took into account all of the evidence presented to them including the documents supplied to them by the claimant's father which (as well as documents specifically about the claimant) included general information from, for example, the National Autistic Society.

80. The claimant contacted Acas on 16 July 2020. The claim form was presented on 21 August 2020 which was less than a month after the Acas certificate was issued.

81. No specific reasons are included in the claimant's witness statement as to why the claim could not have been presented earlier. We do note that the

claimant was suffering a deterioration in her mental health after 16 February 2020 as confirmed in the letter on page 1204.

82. We also note that Acas was contacted one day after the appeal decision. The unfair dismissal claim was brought in time as are those parts of the discrimination claim which relates to the dismissal itself.

The law

83. We will now discuss the law which we take into account when making our decisions.

Time Limits for Equality Act complaints

84. Section 123 of Equality Act ("EqA") A 2010 deals with time limits. I am not going to read it out for present purposes.

> (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
>
> (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.

85. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304.

86. A failure to make adjustments is not necessarily a continuing act, as s123(3)(b) makes clear. Though if there are changes of circumstances, or fresh requests for adjustments to be made, those are things which need to be considered as part of the analysis about the date from which time begins to run.

87. The court of appeal in Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194 gave a useful overview of the law in relation to the time limits for reasonable adjustments claims, both in terms of when the duty arises and the date from which time starts to run. In addition, it also

gave useful guidance, generally, on just and equitable extensions of time under EQA not just in relation to reasonable adjustments claims specifically.

88. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. That being said, time limits are there for a reason and the default position is to enforce them unless there is a good reason to extend. However, that does not mean that the lack of a good reason for presenting the claim in time is fatal to the extension request. On the contrary, the lack of a good reason for presenting the claim in time is just one of the factors which a tribunal can take into account, and it might possibly be outweighed by other factors.

89. The Tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike s 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it is wrong to interpret it as if it contains such a list. A tribunal can consider the list of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion. The factors that may helpfully be considered include, but are not limited to: the length of, and the reasons for, the delay on the part of the claimant; the extent to which, because of the delay, the evidence is likely to be less cogent than if the action had been brought within the time limit specified in Section 123; the conduct of the respondent after the cause of action arose, including the extent (if any) to which it responded to requests for information or documents

90. Ultimately it is a balancing exercise, balancing the prejudice to the claimant if the extension is refused against the prejudice to the respondent if the extension is granted.

91. In relation to when time starts running for reasonable adjustment complaints we must ask ourselves when it should have become clear to the claimant that the respondent was not complying with its duty. Section 23 of the Act confirms that when the duty to comply with the reasonable adjustments first arises. However, times does not necessarily start to run form that particular date, it might start to run from a later date.

<u>Burden of Proof for Equality Act complaints</u>

92. Section 136 of the Equality Act deals with burden of proof and is applicable to all the Equality Act claims in this action, namely all the claims of harassment or victimisation which rely on the definitions in section 26 and 27.

93. Section 136 of EA 2010 states (in part)

> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

94. Section 136 requires a two stage approach:

    a. At the first stage the tribunal considers whether there are proven facts from which the tribunal could conclude, in the absence of an adequate explanation from the respondent, that the contravention has occurred. At this stage it would not be sufficient for the Claimant to simply prove that what she alleges happened did, in fact, happen. There has to be some evidential basis upon which the tribunal could reasonably infer that the proven facts did amount to a contravention. That being said, the tribunal can look at all the relevant facts and circumstances and make reasonable inferences where appropriate.

    b. If the Claimant succeeds at that first stage, then that means that the burden of proof has shifted to the respondent and that the claim must be upheld unless the respondent proves that the contravention did not occur.

95. Where we do not find, on the balance of probabilities (taking into account the evidence from both sides and drawing inferences where appropriate), that a particular alleged incident did happen then complaints based on that alleged incident fail. Section 136 does not require the Respondent to prove that alleged incidents did not happen.

<u>Discrimination arising from disability</u>

96. Section 15 EA 2010 states

> (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."

97. The elements that must be made out in order for the claimant to succeed in a S.15 claim are: there must be unfavourable treatment; there must be something that arises in consequence of the claimant's disability; the unfavourable treatment must be because of (in other words, caused by) the something that arises in consequence of the disability; the alleged discriminator cannot show at least one of the following. That the unfavourable treatment was a proportionate means of achieving a legitimate aim AND/OR that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability. (Lack of knowledge is not something that is argued in this case).

98. The word "unfavourably" in Section 15(1) EA 2010 is not separately defined by the legislation and must be interpreted consistently with case law and taking account of the Equality and Human Rights Commission's Code of Practice on Employment.

99. The section does not require the disabled person to show that her treatment was less favourable than that experienced by a comparator. The fact that a particular policy has been applied to a disabled person in circumstances in which the same policy would have been applied to a non-disabled person does not, in itself, mean that there has been no unfavourable treatment. In other words, a decision that adversely affects the Claimant could potentially still amount to treating the Claimant unfavourably even if the decision was based on a policy that was applied to other employees as well.

100. Dismissal can amount to unfavourable treatment, as could treatment which is much less disadvantageous to an employee than dismissal. However, it does not follow that there has been unfavourable treatment merely because a Claimant can prove that they genuinely believe that they should have had better treatment.

101. For section 15, the unfavourable treatment must be shown by the claimant to be because of something arising in consequence of her disability, as opposed to being because of the disability itself. If the treatment is because of the disability itself then that may potentially be a breach of another section of EA 2010 but the Claimant has not demonstrated a breach of section 15.

102. There is a need to consider two separate steps when considering causation. One is that the disability had the consequence of "something" (which is an objective test); the second is that the claimant was treated unfavourably because of that "something" (which requires consideration of the decision-maker's thought process and motivation, both conscious and subconscious).

103. When considering whether the claimant was treated unfavourably because of that "something", the "something" need not be the sole reason for the treatment, but it must be a significant, or more than trivial, reason. It does not matter if the employer was unaware that the "something" was connected to the person's disability.

104. In *Risby v London Borough of Waltham Forest EAT 0318/15* the EAT made clear that an indirect connection between the claimant's unfavourable treatment and the "something" that arises in consequence of the disability can be sufficient. The EAT decided that the employment tribunal had been wrong to reject the section 15 claim on the basis that an incident in which the employee lost his temper was unrelated to his disability. On the facts, an effective cause of the loss of temper had been the employer's decision to hold an event at a venue that was inaccessible to him because of his disability, that loss of temper led to his dismissal, and there was therefore a sufficient connection between the unfavourable treatment (his dismissal) and his disability for the purposes of section 15..

105. A complaint of discrimination arising from disability will not succeed if the Respondent is able to show that the unfavourable treatment was a proportionate means of achieving a legitimate aim. The aim relied upon should be legal, should not be discriminatory in itself and must represent a real, objective consideration. Business needs and economic efficiency may be legitimate aims, but simply demonstrating that one course of action was less costly than another may not be sufficient. In relation to proportionality, it is not necessary for the Respondent to go as far as proving that the course of action which it chose to follow was the only possible way of achieving the

legitimate aim. However, if less discriminatory measures could have been taken to achieve the same objective, then that might imply that the treatment was not proportionate.

106. It is necessary to carry out a balancing exercise which takes into account the importance (to the Respondent) of achieving the legitimate aim, and assesses the specific means adopted to pursue that aim, and balances that against the discriminatory effect of the treatment. It is unnecessary that the Respondent demonstrate that it had itself carried out the necessary balancing exercise. The tribunal carries out that exercise, based on the evidence presented at the tribunal hearing

107. If a Respondent employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for that Respondent to show that the treatment was a proportionate means of achieving a legitimate aim.

108. When considering what the Respondent knew (and/or what it "could not reasonably have been expected to know"), the relevant time is the time at which the (alleged) unfavourable treatment occurred. Naturally this might mean that different decisions on the Respondent's knowledge are reached in relation to different allegations of unfavourable treatment, including, for example, a decision to dismiss and a decision to reject an appeal.

109. As per In *City of York Council v Grosset 2018 ICR 1492, CA*, for section 15, it is not necessary for the claimant to prove that the employer did know that the disability caused the conduct in question.

110. In the case before us, there is no dispute that the employer was aware of the disability, or of the Claimant's position that her conduct on the day in question was something which arose from her disability.

Failure to make reasonable adjustments

111. Section 20 EA 2010 says, in part

> (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.
>
> …
>
> (7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

112. Section 21 EA 2010 says, in part

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

113. The expression "provision, criterion or practice" ("PCP") is not expressly defined in the legislation, but we must have regard to the guidance given by the Equality and Human Rights Commission's Code of Practice on Employment to the effect that the expression should be "construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions" and that it "may also include decisions to do something in the future" and even one-off or discretionary decisions.

114. The Claimant must clearly identify the PCPs to which it is asserted adjustments ought to have been made. The Tribunal must only consider those PCPs as identified by the claimant. See Secretary of State for Justice v Prospere EAT 0412/14.

115. When considering whether there has been a breach of Section 21, we must precisely identify the nature and extent of each disadvantage to which the claimant was allegedly subjected. Furthermore, we must consider whether there is a substantial disadvantage when the relevant (alleged) PCP is applied to the Claimant in comparison to when the same PCP is applied to persons who are not disabled.

116. The claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred that the duty may have been breached. If he does so, then we need to identify the step or steps, if any, which the Respondent could have taken to prevent the claimant suffering the disadvantage in question. If there appear to be such steps, the burden is on the Respondent to show that the disadvantage would not have been eliminated or reduced by the potential adjustment and/or that the adjustment was not a reasonable one for it to have had to make.

Unfair dismissal

117. Section 98 of ERA 1996 says (in part)

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
…

(b) relates to the conduct of the employee,
…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

118. The respondent bears the burden of proving, on a balance of probabilities, that the claimant was dismissed for the fair reason relied on, which is conduct in this case.

119. Where an employee is allegedly dismissed for conduct, it is sufficient that the employer to demonstrate that it honestly believed on reasonable grounds that the employee behaved in the way alleged. It is not necessary for the employer to prove to the tribunal that the employee did in fact – behave in that way. On the contrary, the tribunal must not substitute its opinion for that of the employer.

120. Proving that the dismissal reason falls within this category only requires the Respondent to prove that the set of opinions or beliefs which the dismissing officer held, which caused him to dismiss the claimant, were related to the Claimant's conduct. It is not necessary at this stage to prove that the alleged conduct should be given the label of "misconduct". Rather the issue of whether the alleged conduct in question justified dismissal falls to be considered at the next stage.

121. Provided the respondent does persuade us that the claimant was dismissed for a reason with the label of conduct, then the dismissal is potentially fair. That means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996. In considering this general reasonableness, we will take into account the respondent's size and administrative resources and we will decide whether the respondent acted reasonably or unreasonably in treating the capability (or the impossibility of completing the training programme, as the case may be) as a sufficient reason for dismissal.

122. In considering the question of reasonableness, we must analyse whether the respondent had a reasonable basis to believe that the Claimant committed the alleged conduct in question. We should also consider whether or not the

respondent carried out a reasonable process prior to making its decisions. In terms of the reasonableness of the sanction of dismissal itself, we must consider whether or not this particular respondent's decision to dismiss this particular employee fell within the band of reasonable responses in all the circumstances. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure by which that decision was reached. (Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23 CA).

123. It is not the role of this tribunal to assess the evidence and to decide whether the claimant should or should not have been dismissed. In other words, it is not our role to substitute our own decisions for the decisions made by the respondent.

124. The ACAS Code of Practice on Disciplinary and Grievance Procedures must be taken into account by the Employment Tribunal if it is relevant to a question arising during the proceedings. The ACAS Code sets out a procedure for potential conduct dismissals.

125. As requested by the Claimant, we have taken into account, Governing Body of Hastingsbury School v Clarke. The EAT, at paras 44 and 45, disagreed with the tribunal's assessment that the employer had been obliged to follow capability procedures, rather than conduct procedures, but upheld the unfair dismissal decision on other grounds. In particular, it accepted the tribunal had reached a legitimate decision when deciding that medical evidence ought to have been obtained to helps assess whether the Claimant's conduct had an underlying medical cause.

Interaction with EQA claims

126. The tests for deciding if an unfair dismissal is unfair, and for deciding if it amounts to a breach of EQA are different. Therefore it is not impossible, as a matter of logic, to reach conclusions that a dismissal was unfair, but not discriminatory, or vice versa.

127. However, where an employer has failed to take some reasonable step that it was required to take because of its obligations under the EQA, then that is a factor that a tribunal can take into account when analysing the fairness or otherwise of the dismissal under the Employment Rights Act. That being so, we must take care not to conflate the tests for whether a dismissal was a breach of the Equality Act with the tests for whether the dismissal was unfair contrary to the Employment Rights Act. For example, when considering (as we must do in accordance with Section 15 EQA) whether a dismissal was proportionate, we must perform our own balancing exercise, but when considering whether the dismissal was unfair, we must look at the employer's rationale. A dismissal which is discriminatory is not necessarily a dismissal which is unfair.

Analysis

Reasonable adjustments complaints

128. The respondent had the following PCPs and these were applied to the

claimant. (The numbers refer to the paragraphs in the list of issues)

4.1 (a) A PCP that autism awareness straining was not provided to all management or supervisory staff.

4.1 (b) A PCP said the claimant was not assigned a permanent buddy companion with autism awareness training for all the hours that she was at work.

4.1 (d) The requirements of the respondent's Team Leader Training Programme, although we have not been given specific information about the exact requirements

4.1 (e) The provisions of the respondent's Handbook relating to conduct.

129. It did not have a PCP (that was applied to the Claimant) which required staff to remain present and working on the shop floor until their assigned tasks were completed.

130. The list of disadvantages is as follows in paragraph 4.3 of the list of issues:

    a) Inappropriately attempting to restrain the Claimant on 22 November 2019;
    b) Inappropriately criticised by the Respondent's management team in relation to the incident on 22 November 2019;
    c) Raising the Claimant's behaviour in a meeting between the Claimant and RELEVANT MANAGER on 24 January 2020;
    d) Removing the Claimant from the Respondent's Team Leader Training Programme, the decision being notified to the Claimant on 24 January 2020;
    e) Sending an email to the Respondent's staff concerning the Claimant's removal from the Team Leader Training Programme dated 26th January 2020;
    f) RELEVANT MANAGER inappropriately confronting the Claimant on 16 February 2020;
    g) Suspending the Claimant and commencing a disciplinary investigation on or around 16 February 2020;
    h) Dismissing the Claimant on 22 May 2020."

131. We are considering the reasonable adjustments and the alleged disadvantages first because it is potentially relevant to our analysis under s.15 and whether or not the respondent has made out its defence that it was pursuing a legitimate aim by proportionate means.

132. So, analysing the reasonable adjustments claim following the numbering, in relation to disadvantage 4.3(a) Inappropriately attempting to restrain the claimant on 22 November 2019, our decision is that the claimant was not placed at this particular substantial disadvantage. There was no inappropriate attempt to restrain the claimant on 22 November 2019. On the facts we rejected the allegations that RELEVANT MANAGER attempted to keep the claimant on the shower room and we found that RELEVANT MANAGER had left the shower room in order to go to the toilet at the time that the claimant exited the shower room. It was not inappropriate for RELEVANT MANAGER to check if the claimant was ok and to check that she

was not self-harming by going (first) to the shower room and (later) to the staircase. We do not accept that RELEVANT MANAGER would have acted differently had all management and supervisory staff had autism awareness training and we do not accept that the respondent's reaction to the events of 22 November 2019 would have been significantly different if the claimant had had an assigned buddy on duty at the same time.

133. In relation to disadvantage 4.3(b) & (c) as amended, we do not accept that the claimant was placed at a substantial disadvantage by any of the PCPs by the fact that her behaviour was discussed in the meting of 24 January. We are not persuaded that the meeting would have been conducted differently if all the respondent's managers and supervisory staff had had autism awareness training. In relation to PCP 4.1(b), Ms Fry was present at the meeting so, regardless of the fact that the claimant did not always have a buddy available at all times when she was on duty, she did have her buddy available to her on this occasion. In relation to PCP 4.1(e), we do not think that that is relevant as the claimant was not being told specifically during the meeting that her conduct amounted to a contravention of the Handbook and/or that she would potentially face disciplinary action. The context of the meting as a whole was to update the claimant on various matters including the adjustments that were in place. The outcome of RELEVANT MANAGER's review of the TAP and the adjustments that would be in place going forward. The context of mentioning to the claimant that her behaviour had been inappropriate on occasions has to be seen in light of the fact the respondent was making clear that it acknowledged its obligations to the claimant to assist the claimant with her behaviour. It was not placing the entire onus on the claimant to improve her behaviour. It was not a substantial disadvantage for the claimant to be informed of what the expectations were and there was no suggestion in the meeting that the claimant had to comply with every single aspect of the respondent's Handbook without any adjustments being made to those contents to take account of her autism.

134. In relation to disadvantage 4.3(d), the alleged substantial disadvantage about the Team Leader Programme, this is best discussed alongside our analysis of the section 15 claim.

135. In relation to the disadvantage 4.3 (e), our finding is that the claimant was not placed at a substantial disadvantage by any of the PCPs by the fact that the respondent sent this email. We do not accept the email would not have been sent or that a different email would have been sent or to different people if all of the managers and supervisory staff had had autism awareness training. We also do not accept that the contents of the Employee Staff Handbook had any relevance to the email. Therefore, that PCP also did not place the claimant at any particular alleged disadvantage. There is no particular aspect of the Team Leader Training Course that is alleged to be part of a PCP which caused the email to be sent. We do not think that it was a disadvantage to the claimant that managers were informed about the fact that the claimant was no longer on the course. We will deal with other aspects of the email in more detail when discussing the alleged unfavourable treatment.

136. In relation to disadvantage 4.3(f), as far as the bread incident is concerned, around about 3pm, there was nothing inappropriate about RELEVANT MANAGER's encounter with the claimant and we do not accept that

RELEVANT MANAGER would have acted differently if all managers had had autism awareness training. She assisted the claimant to stack the bread and she informed the claimant that it was not appropriate to shout loudly or to scream and she also told the claimant that help was needed either from her herself or from her buddy, Ms Fry. Ms Fry was on duty at the time of the bread stacking incident and therefore the PCP suggesting that there should be a buddy on duty at all time that the claimant was on duty is not something that placed the claimant at a substantial disadvantage in relation to this particular incident. The contents of the employer's Staff Handbook did not place the claimant at a disadvantage in relation to RELEVANT MANAGER's comments about the bread. RELEVANT MANAGER's comments did not refer to the Staff Handbook but rather more generally referred to the expectations for the claimant's behaviour whilst she was at work. Again, the context was that the claimant had (in RELEVANT MANAGER's opinion) made a loud noise which sounded like a scream. A different word might be used other than scream but the noise was loud enough to attract RELEVANT MANAGER's attention while RELEVANT MANAGER was in her office which we were told was some considerable distance away. RELEVANT MANAGER made comments to the effect that screaming or making such loud noises was not inappropriate behaviour. She did not threaten disciplinary action. Similarly, at 5pm, RELEVANT MANAGER repeated what she had said earlier when – similarly – she had been in another part of the building and had had her attention drawn by a loud (in her opinion) "scream". It was not RELEVANT MANAGER seeking to "confront" the Claimant, but rather that she believed it necessary to investigate what had happened which had caused the Claimant to scream.

137. In relation to disadvantage 4.3(g), we do not accept the suggestion that had all managers and supervisory staff had autism awareness training then the claimant would not have been suspended or faced disciplinary action. In other words, she was not placed at that substantial disadvantage because of the PCP 4.1(a). Likewise, we also see no significance to the fact that the claimant did not have a buddy with her at all times on shift. Firstly, for the incident which led to the suspension, the buddy was present. However, disadvantage 4.3(g) is the alleged disadvantage form being suspended on 17 February 2020 and a disciplinary investigation commencing. At the time of the suspension the person who communicated the decision to the claimant was Natalie Fenn and Natalie Fenn was somebody who had had the autism awareness training albeit she was not the claimant's buddy. In terms of the alleged substantial disadvantage caused by the application of PCP 4.1(e) (the Staff Handbook), in relation to the suspension and the commencement of disciplinary proceedings and in relation to the dismissal, and in relation to the alleged substantial disadvantage about the interaction between RELEVANT MANAGER and the claimant at around 5pm in 16 February 2020, it is more appropriate for us to discuss those alleged disadvantages as part and parcel of our discussion of the unfavourable treatment allegations.

138. In terms of what we have mentioned above it therefore follows that from what we have said so far, the claimant was not placed at any substantial disadvantage as alleged. For completeness, we do make the following comments in relation to the suggested reasonable adjustments at 4.5(a) and 4.5(b). We do not think it would have been reasonable for the respondent to have had to go as far as the literal wording of 4.5(a). This is because there

was such a large number of staff who were potentially going to be in a management or supervisory role in connection with the claimant from time to time. The TAP in 2017 had suggested that there should be six people with the autism awareness training and did not specifically say that all of those 6 needed to be managers or supervisory staff.

139. It would have been reasonable for the respondent to have had to ensure that the managers and the supervisors who had significant or regular dealings with the claimant were people who had been on the autism awareness course. It would also have been reasonable for the respondent to have stuck to the spirit (at least) and potentially the letter of the TAP that was agreed in 2017. It would have been possible without great economic cost to an organisation of the size of the respondent to have ensured that further staff were trained at the High Wycombe branch after some of the original six had left that branch. RELEVANT MANAGER's immediate predecessor was somebody who had had the training and it would have been reasonable for the respondent to have had to make arrangements so that she, RELEVANT MANAGER, could have had that training within a reasonable period of time after starting in the branch in November 2018.

140. After attempts to arrange the training were commenced around November 2019 or early December 2019, it was completed by March 2020. From this we infer that, had the respondent sought to train RELEVANT MANAGER promptly from November 2018, it is likely that they would have been able to compete that by March 2019 at the latest.

141. In relation to adjustment 4.5(b), we do not accept that it would have been a required adjustment for the respondent to have had to ensure that the claimant had a buddy who was as well-suited as Sophie Fry on duty at all times when the claimant was on shift. That wold have required a large number of people to be able to act as the buddy so as to ensure that there was always going to be somebody available, taking account of holiday arrangements and – especially - unexpected absences such as sickness. We are not satisfied that it would have been practicable because the nature of the buddy arrangement is that it has to be somebody well known to the claimant and somebody that she trusts. The more people that are trained the more that the close relationship with the buddy is diluted. However, and in any event, such a claim would have been significantly out of time. The claimant was aware from around July 2017 that the respondent was allocating her one buddy and one buddy only and that that was Sophie Fry. The claimant was always aware from that point onwards (and so was her family) that the respondent was not contemplating providing additional buddies. Therefore, if the claimant wished to bring a claim in relation to the lack of additional buddies, then the time limit for doing so expired around October 2017 and therefore this claim is more than two and a half years out of time. We would not have thought it just and equitable to extend time for this matter in isolation in all the circumstances including the fact that the respondent had every reason to believe that the buddy arrangement with Sophie Fry was satisfactory to the claimant.

<u>Section 15 complaints</u>

142. The first alleged unfavourable treatment is 3.1(a) "inappropriately attempting

to restrain the claimant on 22 November 2019". For the reasons we have mentioned, we found that there was not an inappropriate attempt to restrain the claimant on 22 November 2019. The thing that caused RELEVANT MANAGER to enter the shower room and later to follow the claimant to the staircase was indeed caused by something arising from the claimant's disability, namely RELEVANT MANAGER's knowledge that the claimant had been self-harming in the days immediately prior to 22 November. We also accept that from the perspective of the claimant it was unfavourable treatment for RELEVANT MANAGER to speak to her in the shower room by crouching down in front of her and (later) to follow her to the staircase. However, RELEVANT MANAGER had a legitimate aim for doing these things, seeking to assure the safety and wellbeing of the claimant. What RELEVANT MANAGER did was a proportionate means of seeking to achieve the legitimate aim. Based on our findings she did not keep the claimant in the shower room against the claimant's will and, on the contrary, RELEVANT MANAGER left the shower room to go to the toilet. It was proportionate for RELEVANT MANAGER to go to the staircase given that she knew that the staircase potentially led to the roof and that she wanted to make sure that the claimant had not gone to the roof.

143. It is convenient for us to move straight to alleged unfavourable treatment 3.1(d) "removing the claimant from the respondent's Team Leader Training Programme, the decision being notified to the claimant on 24 January 2020".

144. Removing the claimant from the training programme was unfavourable treatment. Even on the respondent's case, that it was done to avoid unnecessary stress to the claimant, that would have been something arising from her disability. However, our finding is that - contrary to the respondent's position - the reason the claimant was removed from the Team Leader Training Programme was because the respondent's management team had concerns about her behaviour in the months leading up to 24 January 2020. The types of behaviour that were discussed included , amongst other things, what had happened on 22 November 2019 and, more generally, included instances of the claimant shouting or making noises that the claimant described as grunting noises. Those behaviours were things that were caused by the claimant's disability, namely autism. It is likely that some of the claimant's behaviour had other causes too, these might include, for example, bereavement: However, autism was a significant factor in the behaviour in question.

145. In removing the claimant from the Team Leader Programme, the respondent did have one or more of the legitimate aims itemised at 3.3 of the list of issues, including, in particular, operational effectiveness and efficiency of the respondent's business.

146. In her written statement for the internal investigation, RELEVANT MANAGER refers to being motivated by the fact that she thought that at the present time the claimant would not ever be signed off as team leader and that that was an important factor in the management team's decision to remove the claimant from the course.

147. The respondent has not persuaded us that what it did was proportionate. We do take into account , although it is not necessarily decisive in itself, that we

have rejected the respondent's main argument for the reason it took the claimant off the course. Important factors which we also take into account include the fact that there was no prior discussion with the claimant herself about the fact that the respondent was contemplating this action. Even if we assume in the respondent's favour that the arrangement was one that was envisaged to be temporary rather than permanent, and even if we assume in the respondent's favour that it was something that had been flagged up to the claimant's father in advance (and he accepts that it was mentioned to him as a possibility), when the matter was presented to the claimant on 24 January 2020 it was presented as a fait accompli that she would not resume the activities of the Team Leader Training Programme. The claimant was not asked to put forward alternative suggestions to coming off the course. The respondent. at the time it took the decision to take the claimant off the course, was not acting on the basis of medical advice that the claimant was unable to continue with the course. Nor had it obtained medical advice that she would have been able to continue with the course provided there were adjustments made. The referral to PHS had been cancelled in December and no further referral had been made since then.

148. We must weigh the discriminatory effects to the claimant of being removed from the course against the importance to the respondent of achieving its legitimate aim. We were not satisfied that there were no other reasonable means of proceedings. In particular, if, as was stated by RELEVANT MANAGER, certain aspects of the claimant's work were causing stress to the claimant then it might have been appropriate to consider whether adjustments to those other aspects of her work could have been made so that the claimant could successfully complete the modules for the Team Leader course.

149. Another thing that could potentially have been done - but was not - was to specify an exact date at which there would be a further review of whether the claimant was able to resume the course or not. Even as of 24 January 2020, it would not have been too late, for example, to have said to the claimant that the respondent was going to seek specialist advice form an outside autism expert about the claimant's ability to continue with the Team Leader Course (as well as doing other duties for the respondent). That is also something that was not done.

150. We accept that - before the meeting - the claimant was given a written agenda and the opportunity for her parents to attend the meeting. We also accept that after the meeting the claimant was given a copy of the meeting notes promptly. However, coming off the Team Leader Course was a significant issue and it is our view that clearer letters should have been sent to the claimant: a clearer letter before the meeting and a clearer letter after the meeting. A clear letter in advance would have given the claimant the opportunity to comment on alternative courses of action; a clear letter afterwards, would have given her the opportunity to know in precise terms exactly what had been decided and what actions she might take in order to facilitate a potential return to the Team Leader Course and give her an indication of when that might happen. It would also have set out the precise reasons for the Respondent taking the decision.

151. Since the claimant was notified on 24 January 2020 about the decision, time

starts to run from that date. The claim is therefore made out of time and we will discuss time limit at the end of our reasons.

152. The other complaint about this made about 24 January 2020 is the combination of what was originally 3.1(b) and 3.1(c) in the list of issues: the alleged unfavourable treatment that the claimant's behaviours were raised with her during the meeting, including the events of 22 November 2019. While we accept that this was unfavourable treatment and we accept that it is something arising from the claimant's disability, in all the circumstances we are satisfied that the respondent has persuaded us that it had a legitimate aim (operational effectiveness and efficiency) and that raising these matters with the claimant in the meeting of 24 January 2020 was a proportionate means of seeking to achieve that aim. Amongst other things the claimant was accompanied to the meeting by her buddy and she had been given a written agenda in advance of the meeting as well as the opportunity to be accompanied by her parents if she wished that. During the meeting the respondent discussed the things that it was putting in place to assist the claimant including payment for earplugs, and that managers would go on the autism awareness training. There were discussions about the daily list and and the arrangements for checkout duty.

153. A suggestion by the claimant's representative is that it would have been proportionate for the respondent simply to not mention at all the claimant's behaviour to her but we reject that argument. We do not ignore the fact that, at the time of this meeting, the respondent had failed to obtain specific specialist medical advice in relation to the claimant's recent behaviour. However, RELEVANT MANAGER had reviewed the contents of the 2017 TAP and she was in the process of updating that and , in our view, she was simply making the claimant aware of the expected standards of behaviour. That was not in itself disproportionate or unreasonable.

154. Ms Fry's evidence to the internal investigations was that she was satisfied that RELEVANT MANAGER had conducted the meeting appropriately and sensitively throughout. We are aware of course that Ms Fry is more junior to RELEVANT MANAGER and is an employee of the respondent. We also take account of the fact that she has not given live evidence to this tribunal. Nonetheless, we find that Ms Fry's hearsay account tips the balance in favour of RELEVANT MANAGER's evidence and against the claimant's contention that the meeting was held in an aggressive or inappropriate way.

155. In relation to unfavourable treatment 3.1(e), the email of 26 January, this was an email that was discussing the claimant and reasonable adjustments being made for the claimant and the need for managers to make themselves available to attend the Autism Awareness Course. RELEVANT MANAGER's reasons for sending the email therefore were something arising from the claimant's disability.

156. In terms of the identity of the recipients, from the claimant's point of view, this was a detriment to her because she did not think that all of these managers needed to have all of the information contained in the email. On that particular point we are satisfied that the respondent had a legitimate aim for sending it to these recipients including ensuring operational effectiveness and including ensuring that there were effective and reliable managers in the

respondent's business.

157. Sending the email to all of these recipients was proportionate. It was an email marked confidential and addressees only and its contents were in serious in tone and conveying information that managers, in particular these recipients, needed to have. They needed to know what adjustments were in place for the claimant in case they were on a shift which the claimant was working (albeit in some cases that would only rarely happened) and they also needed to be informed that they were required to be available for the autism training when it took place.

158. One of the claimant's arguments in fact in this litigation is that all managers and supervisory staff needed to have Autism Awareness Training. It follows in essence that was what the claimant was seeking was for all managers and supervisory staff to be aware of her particular needs as and when an issue might arise. In our view, this is what this email was conveying.

159. In relation to the specific contents to the extent that there is a paragraph which commences with the statement that the Claimant had been asked to stop eating and taking breaks in the general office, even if that is considered to be unfavourable treatment then that is not something that arises in consequence of the claimant's disability. We have not been persuaded by any evidence (and, in fact we have been provided with no evidence) that other staff were able to take their breaks and to eat in the general office or that the claimant was singled out for different treatment either because of something arising in consequence of her disability or for any other reason.

160. Furthermore, and in any event, the context of the whole paragraph is stating where the claimant was able to take her breaks, and to eat, and it was entirely appropriate for the respondent to make sure that its managers were aware of that information so that there were no misunderstanding about what had been agreed with the claimant if she spotted by a manager in a particular area during breaktime.

161. In relation to the specific information informing the managers that the claimant would not continue on the Team Leader Course, the respondent did have a legitimate aim in sharing that information with the other managers and doing so was proportionate. The managers needed to have at least a general awareness of which employees were doing the Team Leader Course as this could potentially impact on what the managers duties were when they were allocating shifts to particular employees.

162. The claimant also objects to the specific words being included after the hyphen, namely that there needed "to be consistent and continued improvement in acceptable behaviour". We accept that the inclusion of those words in the email was unfavourable treatment and that it was caused by something arising in consequence of the claimant's disability.

163. We reject the specific argument advanced by the claimant's side that the words carry an implication that there had been deliberate wrongdoing on the claimant's part or a suggestion that she was behaving inappropriately or badly as a matter of free choice as opposed to her actions being because of disability. The context of the email as a whole makes clear what adjustments are required for the claimant and why. This was a confidential email and the

context of the email was that the management team as a whole had taken a decision for the claimant to cease being on the Team Leader Course.

164. There was a legitimate aim in ensuring that other managers had this information. We accept of course that it is less vital for some other managers to have the information and it was, for example, RELEVANT MANAGER, Ms Fry and the claimant's more regular line managers who dealt with her on a day to day basis. However, it was clear to the managers that they were not supposed to disseminate the contents of this email to other people and we are satisfied that it was proportionate to inform other managers of the reasons that RELEVANT MANAGER had supplied to the claimant for removing the claimant from the Team Leader Course. Therefore, the inclusion of these particular words in the email was not in itself a breach of s.15.

165. We have commented already on the fact that our decision is to the effect that these words ("there needs to be consistent and continued improvement in acceptable behaviour") do in fact convey the respondent's genuine reasons (at the time) for removing the claimant form the Team Leader Course and that these reasons are contrary to the position advanced during this hearing.

166. Item 3.1(f) is the allegation that RELEVANT MANAGER inappropriately confronted the claimant on 16 February 2020 (and that this was unfavourable treatment). Our decision is that RELEVANT MANAGER did not confront the claimant on that day. We need not repeat the analysis we have already mentioned above in relation to what happened in relation to the bread stacking incident.

167. It was unfavourable treatment for the claimant to have been told that her behaviour was unacceptable at 3pm and again at 5pm. However, RELEVANT MANAGER had a legitimate aim on each of those occasions, namely ensuring operational effectiveness and efficiency of the respondent's business. What she said to the claimant was proportionate and appropriate to the circumstances. She did not use an inappropriate tone of voice and she did not use inappropriate body language. We reject the suggestion that she came close to the claimant or "got in [the claimant's] face". Furthermore, the overall context of the 5pm incident is that Mr Fry was also present and that between the two of them they told the claimant that the claimant should go home straight away and that the cardboard on the shop floor would be sorted out by other people. Great emphasis is placed by the claimant's representative on the fact that the specific words telling the claimant to go home, and that other people would sort out the mess, came from Ms Fry rather than from RELEVANT MANAGER. In our view, that is not significant. Nothing that RELEVANT MANAGER did contradicted anything that Ms Fry had said. Ms Fry gave the claimant very clear information about what – from the Respondent's point of view – the Claimant could and should do, and Ms Fry did that before the claimant struck RELEVANT MANAGER.

168. RELEVANT MANAGER's opinion was that the claimant's loud shouting about her phone had been inappropriate and it was proportionate for RELEVANT MANAGER to mention that to the claimant promptly and at the time of the incident while it was fresh in people's minds. It was not a threat, for example, to discipline the claimant. It was information to the claimant about the standards of behaviour that were required.

169. In relation to alleged unfavourable treatment 3.1(g), suspending the claimant and commencing disciplinary action on or around 16 February 2020, those things were unfavourable treatment. The immediate reason for these things happening was that there had been an allegation that the claimant had punched RELEVANT MANAGER The claimant has given different explanations at different times for what happened, including (i) that there was insufficient evidence that there was a punch; (ii) that managers were colluding to get their story straight; (iii) that the claimant was flailing her arms around with no intention of hitting anybody and the onus was on RELEVANT MANAGER to get out of the way.

170. We are satisfied that, at the time the respondent suspended the claimant and commenced the disciplinary investigation, its reasons for doing so were that it needed to get to the bottom of what had happened and it wanted to conduct a process that was fair and reasonable and that was appropriate to the circumstances. It was pursuing a legitimate aim and its actions in suspending the claimant and commencing the disciplinary action were proportionate.

171. In relation to 3.1(g), dismissing the claimant, for the purposes of the s.15 claim, we are satisfied that the claimant did in fact strike RELEVANT MANAGER and that she did so intentionally. She was some distance away and then walked deliberately towards RELEVANT MANAGER and deliberately punched her in the head. It is a red herring to attempt to analyse whether it was a punch with a clenched fist or with an open hand. Either way, it was with significant force and that that force was applied deliberately.

172. During the meeting before Mr Burt, the claimant's father placed emphasis on the importance of Mr Burt knowing specifically what RELEVANT MANAGER had said. The Claimant's father was arguing that telling the claimant about her behaviour was similar to telling somebody else not to (for example) have an epileptic fit. He also suggested that the claimant's fuse was shorter than it might have otherwise been because of changes to her medication.

173. It was also suggested by the claimant's father that a contributing factor to the incident might have been that the claimant misunderstood RELEVANT MANAGER's body language. However, the evidence shows that RELEVANT MANAGER was standing some significant distance away from the claimant and with her arms by her side.

174. Mr Burt asked the claimant about the text messages that she had sent which said that she had hit RELEVANT MANAGER. The claimant's position to Mr Burt was that she did not remember anything after becoming annoyed with her phone That was the position which she maintained during these tribunal proceedings and she was not challenged on it by the Respondent's counsel.

175. It was suggested by the claimant's father to Mr Burt that it was clear that, on 16 February 2020, the claimant had been exhibiting autistic behaviour including potentially flapping her arms. The respondent accepts that the punching incident occurred during the claimant having an autism meltdown. The tribunal proceeds on the assumption that the Respondent is correct. In other words, the basis that the punching would not have happened but for the claimant's autism.

176. The letter dated 28 April 2020 from Dr Myles Johnson (943) was taken into

account by Mr Burt and it has been taken into account by the tribunal as well. It states that the claimant was on a low dose of antidepressant medication at the time and that the low dose might have adversely affected her mood and behaviour. However, there is insufficient evidence for us to conclude that change in medication was the main cause of the punching or that the levels of medication was a significant contributory factor to the punching.

177. We note the NHS letter that included comments to the effect that the claimant had been bullied at work for a significant period of time prior to February 2020 and that that perhaps in conjunction with the medication might have been a factor in what they described as having happened in February 2020 (which we note did not refer to any punching).

178. There is no evidence about specifically what Dr Johnson was told about the February 2020 incident had involved, and we do not know if he was told that the Claimant had hit a manager. (As we have said, her position to Mr Burt was that she could not remember, and there were earlier occasions in which she implied that she had not done so at all, and/or that any contact was accidental). There is also no evidence that the medical experts were told that Ms Fry had told the claimant that she could go home or that she should go home and that other people would sort out the bread. There is no evidence before us that the medical experts were told that the claimant was not simply flailing her arms, or seeking to push somebody away from her but had, in fact, approached RELEVANT MANAGER from a distance and at speed in order to deliver the punch.

179. In considering whether the respondent had a legitimate aim, the suspension and the commencement of disciplinary action are different in nature to the dismissal. We take into account that after the disciplinary action had been commenced, and before the dismissal, it took three months to get to the disciplinary hearing stage. That is not ideal. However, it has to be seen in the context that there were several witnesses to interview and the lockdown caused by the pandemic (which started in the second half of March 2020), was having a significant effect on the UK as a whole and on the supermarket sector in particular. In those circumstances, the Respondent has persuade us that the duration of the suspension and the investigation was not disproportionate. We do not find that there was a failure to make reasonable adjustments in relation to the suspension or the investigation. For example, Mr Slater delivered copies of his interview questions to the claimant in advance of the meeting and the claimant was allowed to be accompanied by her father at meetings.

180. In relation to dismissal, it is suggested that it was not proportionate to dismiss without obtaining further medical evidence. We do not agree. The respondent did have medical evidence available to it at the time it took the decision to dismiss and Mr Burt took that medical evidence into account. The arguments presented to Mr Burt were not that the claimant had suffered some uncontrollable impulse for no reason other than the fact that she has autism (and was on a low dosage of medication). The specific arguments that were put to Mr Burt were that he was being asked to decide that (because of the claimant's autism and/or the change in medication), the outcome should be that that RELEVANT MANAGER's actions were found to be the cause of the incident (and that, therefore, the Claimant should not be penalised).

181. Mr Burt did look into what had happened and he did discuss in detail with the claimant and her father, the events of 16 February 2020 including whether the claimant had needed too make use of any of the adjustments earlier in the day. As mentioned, Mr Burt also asked Mr Slater to make further enquiries in relation to RELEVANT MANAGER and in relation to what her interactions with the claimant had been previously.

182. It was proportionate for the respondent (acting through Mr Burt) to make a decision without seeking further or additional medical advice. The claimant's side also had the opportunity to obtain and present medical evidence; they did so, and he took it into account.

183. It was argued that one reason that it was not proportionate to dismiss the claimant was that it might have been possible for the respondent instead to put some arrangements in place such that the claimant di not strike any other employees in the future. It was alleged that Mr Burt did not give sufficient consideration to this possibility. Mr Burt did consider whether there had been anything particularly unusual about the day in question and the evidence presented to him was that there had not been. Mr Burt took into account the fact that the claimant had an unblemished disciplinary record (*) and he also took into account the contents of his conversation with BDF.

    (*) Based on the claimant's own witness statement, there had been an incident in 2017 when she had thrown some keys after which the respondent had decided that there should be no further disciplinary action at the end of the disciplinary hearing.

184. There were already adjustments in place for the claimant such as the ability for her to leave the shop floor when needed and to go to her box of items. There were staff areas within the premises where she could in order go to away from the business of the shop floor. She did have a buddy and the buddy was present with her at the time of the incident when she punched RELEVANT MANAGER; in other words, making an arrangement that there was a buddy on shift at all times is not something that would have necessarily prevented a repeat of the incident of 16 February. Further, it has been our finding that RELEVANT MANAGER dd not do anything inappropriate or anything that inflamed the situation, and additional training to employees would not have necessarily prevented a repeat of the incident of 16 February. It would not have been reasonably practicable to give employees instructions to act differently to the way that RELEVANT MANAGER acted on 16 February. She, RELEVANT MANAGER, did not cause the incident.

185. At the time of making his decision Mr Burt was aware of his responsibilities under the Equality Act and he was aware that the claimant's behaviour could well be disability related. Indeed, he accepted that she was having an autism meltdown at the time. He was also aware that it could potentially be a breach of the Equality Act to dismiss the claimant for this disability related behaviour unless doing so was a proportionate means of achieving a legitimate aim.

186. His decision was made after taking account of the duty of care to other employees. It was his opinion that there could not be a sufficient likelihood that behaviour could be avoided in the future. This was an assessment which the employer made at the time and it is now for this tribunal to carry out its own exercise, balancing the legitimate aim against the discriminatory effect.

The decision (the balancing exercise) is not a matter that needed to be, or could have been, delegated to a medical expert.

187. There was no failure to make reasonable adjustments in relation to the dismissal decision. It would not have been a reasonable adjustment for the respondent to have decided that it was obliged to not suspend the claimant or not commence a disciplinary investigation or not dismiss.

188. Mr Burt was of course entitled to take into account the arguments that he heard during the meeting on 22 May 2020 as well as, for example, the contents of the text messages as sent by the claimant around 16 February 2020 (to the effect, according to the claimant in those messages, that it was RELEVANT MANAGER's behaviour that had caused the claimant to hit RELEVANT MANAGER, as opposed to an uncontrollable urge caused solely by the disability or change in medication). Mr Burt was entitled to conclude that contrary to the claimant's opinion RELEVANT MANAGER's behaviour had not been such that it had caused the incident and he was entitled to conclude that there was not a reasonable way of ensuring that the respondent's employees would be safeguarded in the future. We agree with his conclusions on these points.

189. The decision to dismiss was proportionate in all the circumstances. There was not an alternative course of action, that would have had less of an effect on the Claimant than dismissal, that would have achieved the legitimate aim.

Unfair Dismissal

190. We turn now to unfair dismissal. The reasons for the dismissal are as summed up in paragraphs 38 and 39 of Mr Burt's statement and as mentioned in our findings of fact, we find that those were his genuine reasons. He decided that the claimant had hit RELEVANT MANAGER and that this was an assault on a colleague. This reason (the claimant's punching of RELEVANT MANAGER) was one related to conduct. Therefore, it was potentially fair within the meaning of s.98 of the Employment Rights Act.

191. Mr Burt's genuine opinion was that the claimant had acted this way. Mr Burt's genuine opinion was that dismissing the claimant because of this conduct was the appropriate outcome and that was the reason he decided to dismiss the claimant.

192. Mr Burt's opinion was based on reasonable grounds. He had the evidence from RELEVANT MANAGER, including her account of what happened and that she had been to hospital afterwards. He also had evidence from Ms Fry who had been present. He had the messages sent by the claimant shortly after the incident.

193. Against this evidence there was not an outright denial by the claimant but rather a statement that she could not remember what had happened.

194. The evidence which we have just mentioned would, in itself, have provided reasonable grounds for Mr Burt's conclusions. Therefore, it is not necessary to say a lot more about the video other than that it does not contradict the evidence of Ms Fry or RELEVANT MANAGER. If anything, the video could potentially have been perceived by Mr Burt as contradicting the claimant's

account that RELEVANT MANAGER had been behaving aggressively or confronting the claimant. It certainly provides reasonable grounds to reject any contentions that there had been no contact, or that contact had been the result of RELEVANT MANAGER accidentally getting in the way of the Claimant's flailing arms.

195. We are satisfied that Mr Burt formed his belief after a reasonable investigation had been carried out. Amongst other things he took into account the suggestions that the claimant might, on 16 February 2020, have perceived RELEVANT MANAGER as being aggressive regardless of whether a person without the claimant's disabilities would have perceived RELEVANT MANAGER as being aggressive.

196. Mr Burt took into account the history of the dealings between RELEVANT MANAGER and the claimant and he took into account the medical evidence provided and the information from, amongst other sources, the National Autistic Society.

197. Mr Burt considered the adjustments that were in place . He expressed the view (in his witness statement) that potentially, the respondent had not necessarily stuck as closely to the TAP as perhaps it ought to have done. However, Mr Burt's decision to dismiss the claimant in light of his findings, was not outside the band of reasonable responses.

198. We do not find that there were any breaches of the Acas Code in relation to the communications with the claimant. It would certainly have been better practice for the respondent to have included in letters (for example, those inviting the claimant to the hearing and the dismissal outcome letter) a concise summary of the specific allegations, namely that she had allegedly punched or hit RELEVANT MANAGER. However, for the reasons mentioned above, we are satisfied that the claimant was well aware of what the allegations were. We do not have a copy in the bundle but we accept that Ms Slater provided details of his written questions to the claimant in advance of meeting with her. Further, the meeting notes with him and later with Mr Burt demonstrate that both the claimant and her father were aware of what particular incident was to be discussed. As mentioned, they put forward during the hearing with Mr Burt, a specific argument about how RELEVANT MANAGER had behaved immediately before the alleged punching, and gathered evidence to support there arguments in advance of the meeting with Mr Burt.

199. The appeal process was fair and reasonable. We acknowledge that neither Ms Mihell nor Mr Burt had had specific autism training but that did not prevent them from conducting a fair procedure, listening to the arguments and evidence presented to them and coming to decisions which were within the band of reasonable responses.

Time Limits

200. We deal now with the time limit in relation to item 3.1(d) from the list of issues.

201. It is appropriate to extend time on this occasion. The claimant has not given specific evidence of a particular reason for the delay. However, she has made submissions through her counsel, as she is entitled to do.

202. At page 1024, of the bundle there is a letter from Oxford NHS about the claimant's health in the period immediately following 16 February 2020 incident up to around 23 May 2020 or so. Her disability generally and a particular deterioration in her health mentioned in that letter are relevant factors for us to take into account.

203. Also, a relevant factor for us to take into account is the fact that she was going through a dismissal process and followed by an appeal. We do not think the delay by the respondent in conducting the dismissal and appeal process was unreasonable but, nonetheless, it is a fact that if the process had been completed sooner then the claimant might well have contacted Acas sooner. She contacted Acas the day after the appeal letter.

204. There is no evidence that the respondents suffered from prejudice as a result of the claimant's delay. RELEVANT MANAGER was going to be the main witness to the decision to remove the claimant from the respondent's Team Leader Programme. We were presented with no evidence that there were other additional witnesses that the respondent had wanted to call but had been prevented from calling as a result of the claimant not contacting Acas until after the time limit had elapsed. RELEVANT MANAGER, and indeed other people, did produce internal statements during February and March 2020 when the incident of 24 January 2020 were fresh in her mind and as far as we are aware, RELEVANT MANAGER had access to all the relevant documents at that time in February and March of 2020.

205. We find that there was unfavourable treatment contrary to s.15 and that the respondent had not shown us that it was justified and there would be a significant prejudice to the claimant if she lost the benefit of our finding to that effect and of any financial compensation or other remedy. Whereas the prejudice to the respondent of extending time is minimal. An extension does mean that it loses the benefit of its time limit defence and that is a prejudice in its own right. We are not oblivious to that but it is not a significant prejudice in all of the circumstances. We are satisfied that its defence against the complaint has not been compromised.

206. So, for those reasons, time is extended.

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Employment Judge Quill

Date: 07.12.21

Judgment sent to the parties on
10 December 2021
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For the Tribunal office