



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant and **Respondent**

Miss J Richards

Asda Stores Limited

Held at: Bodmin On: 21, 22, 23 August 2023 and 19, 20, 23, (with parties) 24,25,26 (Tribunal Deliberation) and 27 (Judgment) October 2023

**Before: Employment Judge Smail
Mrs C. Monaghan
Ms R. Clarke**

Appearances

Claimant: Miss T. Richards (daughter)
Respondent: Mr J. Heard (counsel)

JUDGMENT

1. The Claimant was unfairly constructively dismissed by the Respondent.
2. The claims under the Equality Act 2010 are dismissed.
3. There will be a 1-day remedy hearing in Bodmin on Monday 18 December 2023.
4. The Claimant will serve on the Respondent a revised Schedule of Loss, a witness statement in support including details of attempts if any to obtain alternative work, and if attempts are limited, the reason why, together with documents backing up the Schedule and the information, and details of any social security benefits claimed, all by 17 November 2023.
5. Any counter schedule or counter evidence from the Respondent to be served on the Claimant by 24 November 2023.

6. The Respondent to compile a remedy bundle, to file with the Tribunal and serve on the Claimant an electronic bundle by 30 November 2023, and to bring 5 paper copies to the Tribunal for use by the Tribunal on the day of the remedy hearing.

REASONS

1. By a claim form presented on 7 January 2022 the Claimant claimed disability and race discrimination. By a further claim form received by the Tribunal on 30 August 2022, the Claimant added a claim of constructive dismissal. That was treated as an amendment of the first claim.
2. The Claimant was employed by the Respondent between 25 April 1992 and 17 June 2022 as a Fresh Sales Assistant. She started employment in the West Midlands. She relocated to Cornwall in 2002 and started work at the St Austell store. In 2010 she transferred to the Newquay store where she stayed until the end of her employment. She resigned claiming constructive dismissal on 3 June 2022, purporting to give 12 weeks' notice which was subsequently cut short.
3. The case has had 4 preliminary hearings. The first on 20 September 2022 before E.J. Gray. The second on 17 November 2022 before E.J. Oliver. The third on 1 March 2023 before E.J. Bax and the last on 29 March 2023 before E.J. Christensen, who granted an amendment.
4. The list of issues we have worked to was purportedly agreed as being the state of the case at the end of the Preliminary Hearings. The Claimant was represented at that point by solicitors.

The List of Issues

1. Time limits

1.1 The first claim form for the discrimination complaints was presented on 7 January 2022. The claimant commenced the Early Conciliation process with ACAS on 3 November 2021 (Day A). The Early Conciliation Certificate was issued on 7 December 2021 (Day B). Accordingly, any act or omission which took place before 4 August 2021 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus

early conciliation extension) of the act or omission to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide: 1.2.4.1 Why were the complaints not made to the Tribunal in time? 1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Constructive unfair dismissal

2.1 The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence.

2.2 The breaches were as follows:

2.2.1 The grievance manager Mr Hart was not impartial, as he was part of a small group of managers in Cornwall;

2.2.2 The loss or (as claimed by the Respondent) misplacement of medical files and medical notes made by the HR manager in the access to work meeting;

2.2.3 Mr Hart failed to keep the Claimant up to date on the progress of her grievance.

2.2.4 The length of time it took to conclude the grievance process.

2.2.5 A statement from Delphi Jones was never provided to the Claimant.

2.2.6 The Claimant was not given statements in advance of the grievance hearings.

2.2.7 The appeal manager Mr Rawle was not impartial, as he was the Claimant's Newquay ex-store manager who had called her a troublemaker during an interview process to move stores in 2010.

2.2.8 Ms Sogrowiczuk threw meat on the warehouse floor in such a way as to publicly humiliate C - 15 May 2021.

2.2.9 As a result of C raising a grievance in August 2021, R said that she was to be investigated for gross misconduct in the form of aggressive behaviour towards Ms Sogrowiczuk on 13 May 2021. C says that this allegation against was not reported until 14 September 2021, i.e. after she had put in her grievance

2.2.10 R's failure to make reasonable adjustments.

2.2.11 Dissatisfaction with grievance process.

2.2.11 Delphi Jones took a video of C's property, including the front door and windows.

2.2.12 Leanne and Lorraine receiving support when making mistakes but C did not.

2.3 The Tribunal will need to decide:

2.3.1 Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

2.3.2 Whether it had reasonable and proper cause for doing so.

2.4 Did the Claimant resign because of the breach? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

2.5 Did the Claimant delay before resigning and affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

2.6 In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?

3. Disability

3.1 The Respondent accepts that the Claimant was disabled in relation to anxiety and depression (since 2015) and Dyslexia (since 2011)

4. Direct disability/race discrimination (Equality Act 2010 section 13)

4.1 The Claimant describes herself as Black British and disabled.

4.2 Did the Respondent do the following things? They are all examples of both disability and race discrimination unless indicated otherwise:

4.2.1 June to August 2020 - the Claimant responded to an email from the inclusion department giving information about her experiences with Bruce Small, nothing was done and she received a phone call from Gemma Brindle two months later where she repeated several times "people could change"

which the Claimant took to be referring to Mr Small;

4.2.2 24 April 2021 - while standing in the general office with Delphi Jones, the latter began shouting at the Claimant and telling her she was not going to book the holidays she had requested as there was no good reason, and shouting that the Claimant had requested 5 weekends in a row which was untrue - the Claimant had requested holiday to spend time with her terminally ill mother;

4.2.3 13 May 2021 - Delphi Jones told the Claimant she was not allowed to be accompanied by a union official or colleague for support during an unplanned meeting;

4.2.4 15 May 2021 - Richard Shephard gossiping and breaching confidentiality by talking about the Claimant to colleagues not in the leadership team.

4.2.5 Ms Sogrowiczuk threw meat on the warehouse floor in such a way as to publicly humiliate C.

4.2.6 15 May 2021 - Richard Shephard emailed about the Claimant being 1 hour late for work, after it had been agreed with Delphi Jones and Leanne two days before that she could start work an hour later than usual;

4.2.7 15 May 2021 - Richard Shephard approached the Claimant on the shop floor saying, "Don't think I don't know you sent an email to the GMB", he appeared angry and entered the Claimant's personal space during covid restrictions, he said "Stress! Stress, you don't know the meaning of stress, I am going to give you stress" and hissed the words so that the Claimant felt his spit on her face;

4.2.8 17 May 2021 - Delphi Jones came to the Claimant's house to post a letter through her door telling her to attend a meeting for being AWOL from work;

4.2.9 28 May 2021 - receipt of an email from Helen Coley while the Claimant was off sick telling the Claimant that she was being investigated, and it being suggested that Mr Jones from the GMB should pick her up and bring her to the store for an investigation;

4.2.10 3 August 2021 - Delphi Jones took a video of the Claimant's property, including the front door and windows;

~~4.2.11 8 September 2021 – Claire Diment and Camille Oldershaw spoke to the Claimant in a derogatory and dismissive manner at a welfare meeting;~~

~~4.2.12 A summary of the welfare meeting was placed on the Claimant's record which reported her as angry and aggressive (race only, and example of using the "angry black female" stereotype);~~
(2 allegations withdrawn by the Claimant).

4.2.13 14 December 2021 - Richard Shephard said in a statement that he had been advised by several people that the Claimant was "spoiling for a fight" (race only, an example of using the "angry black female" stereotype);

4.2.14 At no point approaching the Claimant to ask about her mood or well-being;

4.2.15 As a result of C raising a grievance in August 2021, R said that she was to be investigated for gross misconduct in the form of aggressive behaviour towards Ms Sogrowiczuk on 13 May 2021. C says that this allegation against was not reported until 14 September 2021 i.e. after she had put in her grievance;

4.2.16 The grievance manager Mr Hart was not impartial, as he was part of a small group of managers in Cornwall;

4.2.17 Failure to provide reasonable adjustments prevented C from securing promotions;

4.2.18 Leanne and Lorraine receiving support when making mistakes, but C did not.

4.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The Claimant relies upon a hypothetical comparator.

4.4 If so, was it because of race/disability?

4.5 Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to race/disability?

5. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

5.2 Summer 2020 - C gave Richard Shepherd her 2011 dyslexia report and he failed to act on it.

5.3 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

5.3.1 A high workload for employees in the Claimant's role;

5.3.2 A requirement to work with dates and numbers;

5.3.3 Application of the Respondent's standard grievance procedure.

5.4 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that:

5.4.1 High workload - the Claimant was unable to keep up with the workload due to her anxiety and depression, and this caused her additional anxiety;

5.4.2 Working with dates and numbers - the Claimant found this difficult due to her dyslexia;

5.4.3 Grievance procedure - the standard procedure involved being given statements at the start of a grievance hearing, and the Claimant required time to look at statements in advance of grievance hearings due to her dyslexia.

5.5 Did the Respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

5.6 What steps (the 'adjustments') could have been taken to avoid the disadvantage and when? The Claimant says that the Respondent failed to make adjustments recommended in three reports from the Dyslexia Association and a report from Access to Work. She says she would have been promoted if these aids had been put in place. She suggests:

5.6.1 Being provided with a voice recorder;

5.6.2 Being provided with speech software;

- 5.6.3 Instructions on audio tape;
- 5.6.4 Coloured paperwork overlay;
- 5.6.5 Reduced/flexible working;
- 5.6.6 A trained colleague for support;
- 5.6.7 Training for the management team;
- 5.6.8 Computer training;
- 5.6.9 Accessible training;
- 5.6.10 Adjusting the rules of the bonus scheme;
- 5.6.11 Providing statements in advance of grievance hearings.

5.7 Was it reasonable for the Respondent to have to take those steps and when?

5.8 Did the Respondent fail to take those steps?

6. Harassment related to race/disability (Equality Act 2010 s. 26)

6.1 Did the Respondent do the things set out in paragraph 4.2 above?

6.2 If so, was that unwanted conduct?

6.3 Did it relate to the Claimant's protected characteristic, namely race/disability?

6.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

6.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

7. Victimisation (Equality Act 2010 s. 27)

7.1 As a result of C raising a grievance in August 2021, R said that she was to be investigated for gross misconduct in the form of aggressive behaviour towards Ms Sogrowiczuk on 13 May 2021. C says that this allegation against was not reported until 14 September 2021 i.e. after she had put in her grievance (from 197 of 15 Dec; (2nd ET1 p.58).

7.2 By doing so, did the Respondent subject the Claimant to detriment?

7.3 If so, was it because the Claimant had done the protected acts?

8. Remedy

Unfair dismissal

8.1 The Claimant does not wish to be reinstated and/or re-engaged.

8.2 What basic award is payable to the Claimant, if any?

8.3 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

8.4 If there is a compensatory award, how much should it be? The Tribunal will decide:

8.4.1 What financial losses has the dismissal caused the Claimant?

8.4.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

8.4.3 If not, for what period of loss should the Claimant be compensated?

8.4.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

8.4.5 If so, should the Claimant's compensation be reduced? By how much?

8.4.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the Respondent or the Claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

Discrimination or victimisation

8.5 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

8.6 What financial losses has the discrimination caused the Claimant?

8.7 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

8.8 If not, for what period of loss should the Claimant be compensated for?

8.9 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

8.10 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

8.11 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

8.12 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

8.13 Should interest be awarded? How much?

5. At the Preliminary Hearing before Employment Judge Bax on 1 March 2023 the historical nature of some of the allegations in the claim form was dealt with. It was agreed to focus on allegations in 2020 and 2021 and have some of the remainder as background. E.J. Bax wrote:

‘70. On resumption it was confirmed that the Claimant was not pursuing the allegations from 2010 to 2016. Those allegations were withdrawn and dismissed upon that withdrawal. The parties agreed that questions of time limits for the 2020 to 2021 allegations were best dealt with at the final hearing when all of the evidence had been heard. The Claimant, as part of her constructive dismissal claim is relying on allegations of discrimination from 2020 and 2021. The significant change in the way the claim was framed in terms of removing the first set of allegations and that evidence will be heard about discrimination allegations as part of the constructive dismissal claim was a material change of circumstances and it was agreed that the preliminary issue no longer required determination at a preliminary hearing and it was better that questions of time limits were considered after hearing all of the evidence. All remaining issues as to time limits will be considered as part of the final hearing.

71. Although the allegations from 2010 to 2016 were withdrawn the Claimant may still refer to them as background to the extent that they are relevant. Those matters are as follows:

71.1 2010/11 – statement by Alan Crowe, “By choice he would not want my sort in his department”;

71.2 September 2010 – Rick Rawle told the Claimant in an interview before a move to the Newquay store that “you are now classed as a troublemaker”;

71.3 Being overlooked for promotion due to colour and disability;

71.4 19 November 2015 - In front of colleagues at the canteen in the Newquay store the Claimant was asked by Bruce Small while he held a newspaper with a picture of a larger black female who was naked, "do you look like this with no clothes on" (race only);

71.5 19 November 2015 – Bruce Small said that he "moved to Cornwall to get away from ethnic minorities", in the canteen at the Newquay store in the presence of colleagues (race only);

71.6 2015 – Bruce Small with colleagues Shaun McDonald and Josh, laughing loudly and speaking loudly in cultural accents to include Afro Caribbean and Asian - related to the result of the general election when UKIP his preferred party were not successful as he had been advising colleagues to vote for them to stop immigrants from entering the country (race only).'

6. At the full merits hearing we have heard evidence from the Claimant on behalf of herself; and on behalf of the Respondent, we heard from Richard Shepherd who at the relevant time was the store manager at Newquay; Robert Gerred-Hart, who was the store manager at Falmouth; Ms Gemma Brindle, a Senior HR officer; and we have read the statement of Claire Diment, HR. She was absent through illness from the hearing in October 2023. In the event, the allegations most directly impacting on her were withdrawn by the Claimant.

THE LAW

7. Race and disability are protected characteristics under section 9 of the Equality Act 2010. By subsection (1) race includes colour; nationality; and ethnic or national origins.
8. Direct discrimination is defined by section 13. An employer discriminates against another if because of a protected characteristic, the employer treats the employee less favourably than the employer treats or would treat others.
9. Harassment is defined by section 26 of the 2010 Act. An employer harasses an employee if the employer engages in unwanted conduct related to a relevant protected characteristic, and that conduct has the purpose or effect of violating the employee's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee. In deciding whether conduct has that effect, each of the following must be taken into account: (a) the perception of the victim; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect.
10. Victimisation is defined by section 27 of the 2010 Act. A person is victimised if he or she is subjected to a detriment because they have done a protected act. A protected act includes alleging what amounts to a breach of the Equality Act 2010.

11. Burden of proof is important in discrimination cases. By section 136 subsection (2) if there are facts from which the court could decide, in the absence of any other explanation, that the employer had contravened the provision concerned, the court must hold that the contravention occurred. By subsection (3), subsection (2) does not apply if the employer shows that the employer did not contravene the provision. What this means is that the employee must establish facts which amounts to a prima facie case of discrimination. If the employee does that, the burden transfers to the employer to show that discrimination played no role whatsoever in the relevant decision making: Igen v Wong [2005] IRLR 258 (CA).
12. The test for constructive unfair dismissal is essentially four-fold. (1) Did the employer breach the employee's contract of employment? (2) Was the breach sufficiently serious to justify resignation? (3) Did the employee in fact resign by reason of the breach? (4) did the employee delay the resignation for such a period that the tribunal must conclude on the balance of probabilities that the breach was waived?. (Western Excavating v Sharp [1978] IRLR 27 (CA)). The breach may be a single breach or a series of breaches culminating, indeed, in a last straw which of itself and need not be a breach. (London Borough of Waltham Forest v Omilaju [2005] IRLR 35 (CA)) Relevant terms of the contract of employment include the implied term of trust and confidence whereby an employer will not commit an act or omission designed or likely to destroy the relationship of trust and confidence between employer and employee, without reasonable cause. (Malik v BCCI [1997] IRLR 462 (HL)).

FINDINGS OF FACT ON THE ISSUES

7. The Claimant is a black woman. The Respondent accepts that the Claimant was disabled in relation to anxiety and depression (since 2015) and Dyslexia (since 2011). Notwithstanding an unsuccessful attempt at a late amendment at the beginning of the Respondent's case, and after the closure of the Claimant's case, knowledge is not in issue. The reasons for the rejection of the amendment were given at the time.
8. On 9 October 2010 the Dyslexia Awareness Information and Support initiative carried out a dyslexia screening test which showed a strong indication of dyslexia. The results of the test indicated that the Claimant would benefit from appropriate support.
9. There was an Access to Work Assessment done on 1 December 2010 in respect of dyslexia. The referral was from Jobcentre Plus. The Assessment was undertaken in ASDA with the knowledge of Mr Stoneman of ASDA HR. The Assessment recommended to assist with memory digital Dictaphone, Olympus Digital Recorder, and a Vocal Memory Aid. Training on how to use ASDA's SMART system should be undertaken in an accessible way such as with pictorial boards.
10. There was an assessment on 24 January 2011 by Anne Betteridge, Diploma in Adult Dyslexia Diagnosis and Support. The tests indicated dyslexia, the primary weakness was speed of processing and phonological awareness.

Spelling and writing would need support. A step-by-step crib sheet for sequential activities would be useful.

11. There was a substantial body of evidence relating to dyslexia in 2010 and 2011. There was none thereafter.
12. As to mental health: there is a letter from Penreath Ltd dated 9 December 2015 from a Community Development Worker, Black Asian and Minority Ethnic Mental Health, suggesting the Claimant's stress, depression and anxiety were at an all-time low. There was a reference to her GP recommending participation in a therapeutic walking group and a course of therapeutic counselling. There is a GP letter dated 24 July 2018 referring to episodes of poor mental health from August 2015 triggered by alleged abuse at work. There is a letter from Occupational Health to Bruce Small on 29 December 2015 suggesting the present absence was down to stress and anxiety. That would continue until present issues in the workplace had improved. There was a further letter from Occupational Health date 6 April 2016 recommending a stress risk assessment. It was addressed to Bruce Small notwithstanding he had left Newquay. Mr Shepherd the replacement manager says he never saw it and performed no risk assessment.
13. On 16 August 2021 the Psychological Services of PAM Wellbeing Limited, following a management referral, reported that the Claimant was experiencing symptoms of stress and low moods, which had negatively impacted her emotional well-being. An initial 6 sessions of telephone counselling were recommended. Should the Claimant return to work, there should be a work-based assessment to explore appropriate adjustments.

2015 Grievance

14. On 26 October 2015 the Claimant presented an earlier grievance to ASDA. The grievance was against the then store manager at Newquay, Bruce Small. The Grievance was investigated by Andrew Bateman, the Taunton General Store Manager. The allegations included allegations of racial discrimination. An allegation was upheld that Mr Small had not spoken to a colleague about whom the Claimant had raised issues. It was also upheld that Mr Small had thrown paper inappropriately in a staff meeting. In that staff meeting the Claimant said she wanted to be a GMB rep. It was not established that the paper had been thrown because the Claimant had invoked a trade union activity. It was also upheld that Mr Small did not attend a colleague's 50th birthday party despite insisting the Claimant attend. Alleged discriminatory remarks around Mr Small's apparent support for UKIP were rejected. Bruce Small was subjected to a disciplinary hearing from which he was given informal counselling in respect of inappropriate behaviour and role modelling. He was advised to distance himself from friendship and to develop leading, yet to be seen as an approachable manager. He was to undergo training; to embrace partnership with the GMB and undertake mediation with the Claimant. As we understand it, the mediation did not take place with Mr Small because he chose to move stores.

15. An appeal against the grievance outcome was held on 29 January 2016 by Steve Fletcher the General Store Manager of Melksham in Wiltshire. He overturned a finding, in support of the Claimant, to the effect that the Newquay Team needed training on dealing with calls and callbacks when a colleague was off sick. He also agreed with the Claimant that Mr Small should not have referenced the Claimant's weight in a conversation touching on looking in the mirror at home. Mr Fletcher accepted that Mr Small was talking about his own weight but recommended that he attend diversity training so as to be sensitive to the sensibilities of others. The Claimant had complained that Mr Small (apparently a UKIP supporter) laughed at what others were proposing to vote. Mr Fletcher upheld Miss Richards complaining about this. Mr Fletcher reversed the position on mimicking of a Northern accent. Whilst that was not aimed at Miss Richards personally, the practice of mimicking was not to be supported. Mr Fletcher supported mediation to facilitate the Claimant's return. Despite upholding a significant number of the appeal points, Mr Fletcher expressed the view that the Claimant had not been treated less favourably on the grounds of race or sex.
16. Standing back from the 2015 grievance and the 2016 grievance appeal, a significant number of the Claimant's concerns were upheld; the store manager had been subjected to a disciplinary process and subsequently he left the store without undertaking mediation.

The Claimant's day to day responsibilities

17. An Important part of the Claimant's role was marking down the cost of fresh products approaching sell-by date, removing and processing as waste products past their sell-by date, and restocking the shelves. A handheld electronic device would be used in performing this work. It had a number of functions including scanning products to monitor stock levels, establish what needed to be reduced in price and what removed to waste. It could reprice the markdown products. We are told, and accept, that there was a user-friendly guide to the device. Nowadays it is possible to download the same or similar functions to an app on a smartphone.
18. Mr Shepherd told us, and we accept, that there were no issues with the Claimant's performance on a day-to-day basis in her role, using the handheld electronic device. The Claimant does not establish that there was a high workload for her role in the sense that it was a struggle to achieve. She was not subjected to a substantial disadvantage in terms of workload. The Claimant could perform her work successfully. Whilst there was a requirement to work with dates and numbers (sell-by etc.), the Claimant did not struggle with performing her work with the handheld device or at all. There has been no performance management of the Claimant in her role.
19. The incident around 10 and 11 May 2021 concerning a failure to remove £85 of meat was an isolated incident and was not part of a pattern showing the Claimant struggled with the role. She did not.

Diversity in the Workplace 'Project'

20. On 12 June 2020 the Claimant told inclusion@asda.co.uk that she wanted to get involved in a project on Diversity in the workplace promoted internally. The GMB alerted her to it. Anthony Hemmerdinger distributed a message as the Executive Sponsor of the Ethnicity Colleague resource group asking for reflection on making the workforce diverse in this period of heightened awareness. The Tribunal takes Judicial notice that this was the time of George Floyd's murder and the toppling of the Colston statue. The Claimant applied citing a history of racial abuse at both Newquay and St Austell. A Diversity and Inclusion Manager, Katie Wynn, acknowledged the email including the references to a history of racial abuse and said she had duty of care to know about it. She referred the matter to Gemma Brindle of HR. Gemma Brindle did have a discussion with the Claimant on 26 June 2020. She noted the Claimant's interest in getting involved. Ms Brindle then contacted Penny Bartlett who was local HR to see, amongst other things, how the Claimant could get involved. Gemma Brindle left it with Penny Bartlett. The Claimant then says that the next she heard was a call out of the blue from Ms Brindle in September 2021 to the effect that people can change in a reference to Mr Small, advising her to let it go. Ms Brindle denied such a second conversation in September. She says she was on parental leave from September 2021 and did not say 'people can change' as that is not necessarily her view.
21. We accept Ms Brindle's evidence on this. She did not have a second call in September. Whether there was a call with another HR officer, we do not know. The allegation is aimed at Ms Brindle and we reject it. However, it is the case, on the balance of probability, that the Claimant was not involved in any local diversity project. It seems like a missed opportunity.

April 2021 attempted booking of holiday

22. The Claimant says this in her attachment to the Claim Form:

On April 13/4/21, Myself and Leanne (Fresh section Leader) entered the general office with regards to me booking my annual leave . Leanne is my section leader who authorities my annual leave for 2021/2022. A few weeks before I mentioned to all my colleagues on the fresh department I was due to book my holiday in a few weeks, but I would be waiting a few weeks to give them the opportunity to enter their dates.

Leanne looked through the dairy and it was noticed there was several dates which were available . Leanne was happy for me to book my annual leave as these dates were available for me to book. Information was written down as well as being entered on the staff annual leave book. Leanne discussed this with me, I was advised to also enter the information with all my dates on Asda computer online booking.

The following week I decided to look on the online booking system to see if I had received confirmation for my booking and was surprised to note all my booking were still pending.

On the 24/4/21, I was approached by D Jones (Assistant Manager) on the shop floor to come into office. On entering the office I was told by D Jones she was not authorising the annual leave which had been authorised by Leanne.

D Jones told me herself and Richard Shepherd (store Manager) will not be authorising none of the annual leave dates which I had booked and entered on the staff booking system.

I was deeply upset and disappointed as I had followed Asda policy regarding booking annual leave, I had also mentioned to all my colleagues individually I was due to book my leave to give them time to book their dates.

Richard Shepherd (Store manager for Asda Newquay) was aware and D Jones (Asda Newquay Deputy store manager) of the number of bereavements due to the coronavirus with

family members and friends .I felt disappointed as my leave had been authorised, I was going to spend quality time with my terminally ill mother which all my colleagues was aware of.

23. On 15 April 2021 Kelly Balloch, Section Leader, emailed Delphi Jones, Assistant Manager, asking her to have a quiet word with Leanne [Sogrowiczuk], also Section Leader, about booking colleagues holidays. Leanne had gone through the holiday diary and input holiday for the Claimant including 5 Saturdays which had the effect, said Kelly Balloch, of blocking off those weeks for those wishing to book a full week. The Claimant worked part-time, as we understand it, 6am to 12 noon, Tuesday, Wednesdays, Thursdays and Saturdays. By taking Saturdays off as holiday, that would give the Claimant a 4 day stay - Friday, Saturday, Sunday, Monday. This made a return trip to the West Midlands comfortable. The Claimant believed she had Leanne agree 10 April (already taken) Sat 8 May, Monday 21 June week, Sat 17 July, Sat 21 August, Sat 11 September, Sat 23 October, w/c Monday 13 December, Monday 28 March 2022, Saturday 29 January to 12 February.
24. Kelly Balloch objected that giving the Claimant Saturdays only precluded others from taking the week off, including Saturdays. Kelly Balloch could only afford one Fresh colleague off at a time. None of the holidays had been confirmed on the system.
25. The Claimant noticed her holidays had not been confirmed on the system. The desired procedure for booking holidays was to apply online and get approval online. Approval would be by batch. If any one of the proposed holidays were unacceptable, a further application was necessary. Delphi Jones spoke to the Claimant on 22 April 2021 and made a file note. We accept the file note as likely to reflect what was said. Incorrectly, Delphi Jones suggested the Claimant had booked 5 Saturdays in a row. She had not. Delphi Jones said the holidays were not approved and the Claimant was asked to resubmit dates, including a couple of Saturdays. Delphi Jones asked the Claimant to come back to her.
26. The Claimant neither in the attachment to the Claim Form, nor in her witness statement says that Delphi shouted at her. The Claimant does maintain that she needed all the Saturdays to visit her terminally ill mother in Birmingham utilizing the 4-day unit off work. It seems that no revised holiday request was submitted and therefore no holidays were approved.
27. We remind ourselves that the Claimant was absent from work from 16 May 2021 for 227 days until she left, having resigned.

12 May 2021 Meat Waste

28. On 12 May 2021 the section leader Leanne Sogrowiczuk discovered meat on the shelves which had gone out of date either that day or the day before, 11 May 2021. £85 worth of meat was wasted. It had not been marked down on previous days in order to try to sell it. Ms Sogrowiczuk removed it from the shop floor to the warehouse. She put it either on the waste cage or on the floor by it.

The Claimant had missed these sell-by dates. She acknowledged that and apologised for it. The Claimant suggested that part of the explanation was that she had been placed on the tills. That, however, was from 7am. Between 6 and 7am the Claimant would have been checking dates to markdown the price or remove to waste. This was a Wednesday. On, it seems, the Thursday, Ms Sogrowiczuk discussed the matter with the Claimant. This was an informal meeting. The Claimant maintains that she was told no longer to check the meat. Ms Sogrowiczuk refutes that but does recall the Claimant saying she would not check the meat further. Delphi Jones was brought into the meeting to support Ms Sogrowiczuk, the Claimant continued to insist she would no longer do the markdowns. Ms Jones also said that was not acceptable. Ms Sogrowiczuk pointed out this would require entire rota changes and would take time. Ms Jones and Ms Sogrowiczuk then signed a file note dated 13 May 2021, the Claimant refusing to sign, to the effect that the Claimant would be retrained on markdowns and date code checking procedures following a failure to check the dates on a bumper pack of meat leading to an £85 loss without markdowns.

29. On Saturday 15 May 2021 the Claimant arrived at work at 7am not 6am claiming she no longer had to do the markdowns, i.e. sell-by date checks, and so started an hour late. Ms Sogrowiczuk had phoned her at 6.17am to see where she was. The Claimant confirms that there had been an attempt to contact her. Mr Shepherd arrived to find the team behind on morning set up. He asked the Claimant why she had arrived at 7am not 6am and she told him that she was not doing markdowns anymore.
30. The Claimant had contacted the union about the matter on either the Thursday or the Friday. Mr Shepherd had learnt of that. He claims to have said to her that they would talk through her complaint to the GMB about being file noted in respect of missing markdowns. The Claimant alleges that he said 'Don't think I don't know what had been going on. I was in a meeting yesterday and was informed by the GMB that you have sent an email. We will talk about this later. He then informed me in a hostile voice 'stressed? You don't know what the meaning is of stress. But I'm going to give you stress, repeating the statement several times. In the issues the Claimant describes Mr Shepherd getting so close that she could feel his spit in her face.
31. In his email of 15 May 2021 at 08.18 to HR Mr Shepherd does record saying he will talk through the GMB complaint he then says of the Claimant

'At this point Jenny lost reason, raising her voice saying I'm causing her stress and would I like her to go home? Remaining calm I said to Jenny, no I would like you to help the team finish the markdown process. Jenny point blank refused as it is causing her stress. I explained to Jenny there would be even more stress if she kept refusing reasonable requests as we have set ways of doing things. Failing to comply with a reasonable request has its own policy.'

At which point the Claimant walked home.

32. Mr Shepherd predicted difficulties. He wanted support from HR.

'Not sure where you and Penny will want to go with this as in mediation etc but I've tried a few times to reason with Jenny about topics, but once her mind is made up... Plus this is what she does, we will have emails to the GMB and fabrications to events brought to the table that she will then truly believe happened until she gets her own way and the core principle of what she did wrong will be overlooked.

Although not ideal, I'd welcome the whole thing being investigated as I cant have this ongoing situation whereby a section Leader cant mention to Jenny she has done something remotely wrong without either letters going to the GMB or refusal to do anything other than what she wants. As she won't listen to me, I'm not sure how to proceed.'

33. Claire Diment of HR said she would discuss the matter with Penny Bartlett of HR and get back to him. She asked when the Claimant was next due to work. Mr Shepherd replied on 16 May 2021 to say she did not return on Saturday 15 and had not come to work on Sunday 17 May but was due in on 6am Saturday. He also wrote:

'We have deliberated next steps as I'm mindful of how it will be taken.

Ultimately the process is we attempt to call Jenny before sending an AWOL letter.

Historically the person that calls her today will not get a great response.

There is lots of history with this colleague. Unfortunately, you cannot simply have a conversation about anything performance related as they demand a rep and ultimately walk out.

Although not a great example it was Josh Higham & Bruce Small who tried to discuss her performance last time.

We refused some holiday last week too so trouble was brewing.

I would imagine a period of sick probably stress related then GMB mediation whilst appointing blame at either my Section leader, Delphi or myself.

The general consensus in the store is, oh well she has been spoiling for a fight the last few weeks. You kept her in check for a few years but this was bound to happen.

Penny could run Jenny's name via Dawn Gibson if you want an impartial view on the colleague.'

34. We know she never returned to work. She was signed off with sick notes with a variety of formulations of anxiety and depression, some notes referring to issues at work.

35. Ms Jones tried to reach the Claimant on the phone on Sunday 16 May without success. The Claimant did not attend on Sunday. An AWOL letter dated 16 May was hand delivered by Delphi Jones on 17 May 2021. She sent a sick note dated 17 May 2021 for anxiety and stress to her union who forwarded it to HR who in turn sent to Mr Shepherd on 19 May 2021.

36. Delphi Jones tried to contact the Claimant on 28 May 2021. Likewise on 7 June 2021 when she wanted to inform the Claimant that an occupational health appointment had been arranged for 11 June 2021. The Claimant did not attend on the basis of not feeling well enough. Ms Jones continued to try to make contact 21 June and 5 July and 15 July all without success. An attempt to hold a first welfare meeting on 28 July 2021 also failed. The Claimant said she was unavailable and said she did not want Delphi Jones involved. Ms Jones tried to contact by phone on 2 August 2021. Ms Jones prepared a letter dated 3 August 2021 stating there had been no contact with the Claimant since she left work and had not responded to any communications. They had been unable to have an occupational health report. The Claimant was asked to make contact for a first welfare meeting. The Claimant was informed that unless she made contact, they would make arrangements to review her continued employment based on the information they then had. This letter was hand delivered by Ms Jones. She videoed herself delivering the letter and this was seen on the Claimant's security system.
37. In the meantime, it seems that the GMB had agreed with ASDA that the issue of being 'file noted' for the meat would be investigated. The word grievance was used in respect of this. On 18 May 2021 the Claimant said she was not up to meetings for the time being. She was still unwell. A meeting was set up for 3 June 2021 with Mr Gerred-Hart at a store of the Claimant's choosing. The Union suggested her role would be one of being a key witness. The Claimant repeated her position that she remained unwell. Terry Jones of the GMB stated on 1 June that having spoken to Mr Gerred-Hart, she was free to withdraw the grievance if she wanted.
38. There was a first well-being meeting with HR on 19 August 2021. There was a second meeting on 8 September 2021. One on 8 October 2021 and another on 17 November 2021. The outcome letter from 17 November was dated 20 November 2021. The focus was on the need for a return to work. A counselling session was arranged for 21 December. ASDA wanted a work-based assessment with view to adjustments. Occupational Health would be asked about her fitness to work in the 'imminent' future. It was made clear that her future employment was at risk. On 25 January 2022 there was an invitation to a meeting to talk through an Occupational Health report. However, at the meeting on 1 February 2022, the Claimant did not give consent for an OH report to be disclosed. The Claimant was pushing for a copy of her personnel file. She would not give consent to management seeing the OH material until (a) she received the grievance outcome and (b) she got her file. In that situation, as Camille Oldershaw her section manager at Newquay wrote in a letter of 3 February 2022, management had done all that it could and would pass her case on for consideration of a capability dismissal.
39. The referral to capability was put on hold in an email dated 1 April 2022 from HR to the Claimant, HR referring to the upcoming grievance conclusion.

2021 Grievance

40. The Claimant submitted a grievance on 9 August 2021. The issues raised were the lack of confirmation of annual leave; the way in which management handled the out-of-date meat incident; the alleged agreement to vary the start time to 7am; the allegation that Mr Shepherd said he would cause her stress; Ms Jones taking an unauthorised video of her house.
41. 8 months after presenting her grievance, the Claimant received her outcome. The grievance was conducted by Mr Gerred-Hart, the General Store Manager in Falmouth.
42. Mr Gerred-Hart upheld the complaint that Delphine Jones had videoed the Claimant's property when delivering the letter of 3 August 2021. In respect of the attempt to book holiday, he found that the Claimant had not been led to believe that her holidays had been authorized, but did partially uphold the complaint in the sense that Ms Sogrowiczuk had penciled into the diary the Claimant's holiday requests outside the online process for booking holiday using the Claimant's OneAsda account, which required an application followed by management authorisation as appropriate. Otherwise, the complaints were rejected. There was a recommendation that the Claimant's conduct in respect of the wasted meat incident, in particular how she behaved with Ms Sogrowiczuk and Ms Jones on or about 13 May 2021 and with Mr Shepherd on or about 15 May 2021 should be investigated, i.e. to determine whether it was misconduct.
43. In respect of the holidays, Mr Gerred-Hart accepted what Ms Sogrowiczuk told him about the process of booking. Colleagues would put in the diary their wishes but that was subject to authorization on the electronic system. It seems that on this occasion Ms Sogrowiczuk placed the request online, having first given the Claimant a list of available dates. Ms Sogrowiczuk says she made it clear that the dates might not be authorized. Mr Gerred-Hart checked the holiday booking policy and noted that applications are meant to be made on the system where they are subject to management approval. The essence of Mr Gerred-Hart's finding is that the request was always subject to approval.
44. Mr Gerred-Hart found that the meeting in respect of the waste meat between the Claimant and Ms Sogrowiczuk and Ms Jones was not a formal disciplinary meeting carrying the right to representation. It was an informal meeting. It was disputed between the Claimant and Ms Sogrowiczuk as to whether the Claimant had asked for accompaniment. In the absence of Delphi Jones as corroboration, Mr Gerred-Hart said he could not determine the matter. He went on to recommend however that the Newquay store consider flexibility when asked by a colleague to have accompaniment.
45. As to whether Mr Shepherd had been abusive on 15 May 2021: Mr Gerred-Hart rejected that proposition. He noted that Mr Shepherd gave a very different account. There were no witnesses to the allegation. Anecdotal evidence after the encounter is supported by statements from Leanne and

Lorraine which speak to the Claimant's state of mind following the confusion over the start time that day. What we understand him to be saying was that the Claimant was in an emotional state such that her account could not be relied upon. He preferred Mr Shepherd's account.

46. The grievance was submitted on 9 August 2021. On 12 August 2021 Claire Diment of HR informed the Claimant that there was going to be a grievance meeting on 3 September 2021 with Mr Gerred-Hart the General Store Manager of Falmouth. That meeting took place over 3 hours. The Claimant attended with a support worker. The Claimant did not challenge the status of Mr Gerred-Hart to hear the grievance.
47. Lorraine Henshaw was interview by Mr Gerred-Hart on 14 September 2021. Ms Henshaw was a colleague at Newquay and was asked about what has been referred to as the waste mate incident and the Claimant's decision to start at 7am. That same date Leanne Sogrowiczuk was interviewed by Mr Gerred-Hart.
48. On 27 October 2021 Mr Gerred-Hart informed the Claimant's union rep, Helen Coley, that he had just returned from leave and had a number of further interviews before he could confirm findings. It had been incredibly difficult to schedule meetings due to absence, holidays and other diary constraints. He anticipated another 2 weeks before he could give his findings.
49. The Union wrote to him on 15 December 2021 saying it had been 7 weeks. They ask how much longer will the Claimant have to wait? They reminded him of the ACAS code of conduct which states that employers should deal with issues without unreasonable delay.
50. Mr Shepherd was interviewed on 14 December 2021, some 4 months after the presentation of the grievance. Mr Gerred-Hart suggested this was the first time they could get together to include also his notetaker. Mr Gerred-Hart gave a generalised explanation for the delay to include absences on leave.
51. Mr Gerred-Hart wanted to interview Ms Jones. She was off on long-term sick and eventually left the business. She was never interviewed.
52. Mr Gerred-Hart purported to send update letters over this period. The first is dated 28 December 2021 to the Claimant. He apologised for not being in touch with the Claimant directly. He had spoken to all relevant persons except one, who had been on long term sickness but was due to return to work on 12 January. He said he was very close to being able to give his findings.
53. On 17 January 2022 Mr Gerred-Hart informed the Claimant that the colleague was still off sick for at least another 2 weeks. The Claimant was thanked for her patience.

54. On 11 February 2022 Mr Gerred-Hart sought advice from HR on the problem that the colleague (Ms Jones) was off on long-term sick.
55. On 14 February 2022 the Claimant was informed that the colleague was still off ill. She was thanked for her patience.
56. The Claimant was informed of the outcome of the grievance on 5 April 2022, having been invited to the meeting as a reconvened grievance hearing on 29 March 2022.

Unsigned, untitled and undated statements of Delphine Jones and Leanne Sogrowiczuk

57. There are in the Respondent's disclosure 2 statements which do not bear the name of the maker, nor signed, nor dated. In the index to the bundle they are identified as statements of Delphi Jones and Leanne Sogrowiczuk. We find as a fact on the balance of probability that they were statements from those individuals. Mr Gerred-Hart said that he did not see them until these Tribunal proceedings. We accept that because when waiting for Ms Jones to return to work, he sought advice from HR what to do. He did not ask whether they could rely on these statements. He did not as a matter of fact rely on those statements. We accept that he did not see them before these Tribunal proceedings and so he was not able to share them with the Claimant.
58. That said, they were somewhere within the Respondent. It is a matter of speculation where. The Delphi Jones statement purports to provide a transcript of the conversation when she joined the Claimant and Ms Sogrowiczuk in the training room. It is as though recorded. The content is in line with the statement that Ms Sogrowiczuk provided to the grievance investigation. We approach the content with caution bearing in mind its provenance is not completely clear. As we say, the content corroborates Ms Sogrowiczuk's account to the grievance. The matters recorded include: (a) the Claimant objected to being given a file note; (b) that she would not sign or read anything without a rep; (c) Ms Jones described the event as an informal discussion involving performance counselling; (d) the Claimant claimed discrimination; (e) the Claimant claimed she had not been trained to perform date code checks since the process had changed a year before 'we never got any training; I've never seen those fancy pieces of paper'; Delphi said:

"I can sense that you are frustrated, so what we will do at this point is end the conversation for now. We'll meet up and resume this conversation when you're ready to sit and discuss this calmly.

I'll bring in copies of your training and then we will determine next steps. Before then, what we'll do is rebrief every colleague on Saturday morning, yourself included, to ensure that everyone understands the correct markdowns and waste process."

Delphi ended her account stating Jenny then left the room. Her tone and body language throughout the conversation was defensive and she kept pointing aggressively towards Leanne and myself.

59. We compare this with the file note made on 13 May 2021 which confirms that the Claimant was to be retrained on the correct markdowns and date code checking procedure.

Grievance Policy

60. The Claimant's was an individual colleague grievance as defined by the policy. We note that a key point mentioned in the grievance policy is that if the grievance is about bullying, harassment, a relationship breakdown, unfair treatment etc. it may be forwarded to a disciplinary hearing and the grievance investigation forms the basis of any disciplinary investigation. Further on the policy provides, If a grievance has been raised with malicious intent – that means without grounds or that false statements have been given - the disciplinary procedure can be used.
61. As to who may conduct a grievance, the policy provides: Any manager more senior than the colleague who raised the grievance and who's had the appropriate training can hear the grievance, as long as they're not implicated or connected to the allegations in any way.
62. Recommendations may be made: 'Where relevant (e.g. cases of bullying and harassment, relationship breakdown, unfair treatment) the hearing manager must also feedback to the relevant line manager, along with any recommendations, to make sure any corrective action happens e.g. mediation, re-training or changing the colleague's rota/shifts.'
63. As to how long a grievance should take, the policy provides: Managers should deal with issues quickly and shouldn't unreasonably delay investigations, meetings or confirmation of outcomes/actions.

Grievance Appeal

64. The Claimant appealed on 14 April 2022. She questioned Mr Gerred-Hart's independence. She asked why CCTV had not been viewed to back up their accounts of what happened. She waited 34 weeks for the outcome. A member of staff's statement was not included. She was treated differently from a member of staff who had made a similar mistake. The Claimant stated this was her first mistake in 30 years. The reasonable adjustments had not been mentioned in her grievance. Colleagues lied in their statements. Why did it take until December to interview store manager.
65. On 25 May 2022 the Claimant was informed that Mr Rick Rickard also known as Rawle, the St Austell General Store Manager, would hear the appeal.

Resignation

66. 9 days later she resigned by email dated 3 June 2022 giving 12 weeks' notice. She claimed her trust and confidence had been breached. She claimed breaches of procedure, namely the length of time the grievance had taken; and not all her points had been taken into account in the grievance; her personnel file had been lost; Delphi Jones filmed her home. She alleged

fabrication by the Newquay leadership team. Reasonable adjustments had never been put in place. The appeal manager Rick Rickard was not impartial; and she would never get a fair hearing. As a result of bringing the grievance her conduct would be subject to a disciplinary investigation, she claimed for gross misconduct.

67. The Respondent asked her whether she wanted time to reconsider her resignation. If she did not, she only had to give 2 weeks' notice under her contract, as hourly paid. She did not withdraw her resignation and so the notice was terminated early.

CONCLUSIONS

Discrimination, direct race and disability, harassment and victimisation

68. The inclusion initiative We have already observed that it seems a missed opportunity that there appears to have been no local initiative in which the Claimant could be or was involved. However, her claim is about words attributed to Gemma Brindle about Mr Small. We reject the allegation on the facts. Ms Brindle did not make those comments.
69. Ms Jones shouting at the Claimant about the holidays. There is an unfortunate aspect about the attempt to book holiday as Mr Gerred-Hart found, namely Leanne inputting the Claimant's request for holiday having already penciled it into the diary. The process should be that the employee applies on line and the manager responds to the application on line. We find that the Claimant's request was subject to approval by Ms Jones. Ms Jones told the Claimant she could not agree all but they should have a conversation, i.e. to come to an approved outcome. Ms Jones envisaged a couple of Saturdays out of the five future Saturdays requested. The problem with a Saturday was that any employee wanting a whole week off would want a Saturday, so Saturdays had to be shared around. We do understand the Claimant's point about the holiday policy making reference to first come, first served. The Respondent's position was based on sharing Saturdays which is also the busiest trading day. The claim as formulated in the issues is about Ms Jones shouting. We do not accept that. That allegation of shouting is neither in the Claimant's claim form nor in her witness statement. If the allegation should have been formulated as withdrawal of otherwise permitted holiday, we reject that on the facts. The procedure was always subject to managerial approval. That approval was not withheld as an act of discrimination or in breach of contract. The reasons for not giving approval were non-discriminatory.
70. Being told on 13 May 2021 that she could not have a representative at the meeting between the Claimant, Ms Jones and Ms Sogrowiczuk. The Claimant was told that. We accept this was not a disciplinary meeting. It was an informal counselling meeting about a performance matter. The Claimant was not entitled to have representation. Therefore, she was treated in the same way that any comparator would have been treated. While the

Claimant was a disabled person, she did not say she needed a rep as a reasonable adjustment on the basis that she needed assistance with understanding what the issue was about. She understood exactly what the issue was about.

71. 15 May 2021 Richard Shepherd allegedly gossiping and breaching confidentiality. The Claimant's turning up to work at 7am instead of at 6am and then leaving the store during the course of the working day was very public and colleagues would have known about it. Mr Shepherd had to organize cover for the work the Claimant would otherwise have done. He asked Lorraine Henshaw and Leanne Sogrowiczuk to do this. Mr Shepherd did write in his email of 16 May 2021 'The general consensus in the store is, oh well she has been spoiling for a fight the last few weeks. You kept her in check for a few years but this was bound to happen.' We accept what Mr Shepherd told us that he did not go round colleagues seeking support. He tries to shut down conversations about individual colleagues. What happened was they volunteered support to him having seen for themselves the Claimant's very public actions. Mr Shepherd did not gossip and breach confidentiality.
72. Ms Sogrowiczuk threw meat on the warehouse floor in such a way as to publicly humiliate the Claimant. There is no evidence that Ms Sogrowiczuk 'threw meat on the warehouse floor...to publicly humiliate the Claimant'. Ms Sogrowiczuk did place meat on the floor next to the waste cage. She did that because, as the Claimant accepts, she had missed to mark down on previous days 17 bumper packs of chicken to the value of £85 and had failed to remove them subsequently as past their sell-by date. The Claimant may have been embarrassed by this, but it was not down to Ms Sogrowiczuk throwing the meat.
73. Approval to start 1 hour late. The Respondent's managers did not inform the Claimant that she could start at 7am. On the contrary, Ms Jones and Ms Sogrowiczuk insisted that she attend work at 6am as usual. That is why Ms Sogrowiczuk rang her at 6.17am concerned for her well-being. We reject the Claimant's evidence on this. It is outweighed by the contemporary records of the Respondent.
74. Mr Shepherd allegedly said to the Claimant that he would cause her stress, hissing the words such that she felt the spit on her face. We have rejected this on the facts. The Claimant was in an emotional state and her recollection is not reliable. Mr Shepherd, who sent an email at the time about this incident, was calm and considered. We prefer his evidence.
75. 17 May 2021 Delphi Jones hand delivering an AWOL letter. The AWOL letter was appropriate. We do not find that the Respondent had to post it rather than hand deliver it. We do not see any less favourable or unfavourable treatment.

76. 28 May 2021 email from the GMB about an investigation. The Respondent on its own initiative, agreed by the GMB, wanted the file noting on the wasted meat investigated. She had raised complaint with the GMB. The Claimant stated she felt unwell and would not attend. The Claimant, it seems, was uncertain as to whether this was a disciplinary. It further seems that her complaint to the GMB was being treated as a grievance. Management and the Union were acting proactively. It may be, we do not know, that the Jones and Sogrowiczuk statements, were obtained in respect of that. Whatever the position, the initiative came to an end when the Claimant did not participate and became superceded by her own grievance on 9 August 2021. We reject that this was less favourable or unfavourable treatment. Management and the Union were acting proactively to address the issue of the file-noting which the Claimant had raised with her Union.
77. Delphi Jones videoing herself delivering a letter under the absence management policy. Unlike Mr Gerred-Hart, the Tribunal does not regard this as potentially unfavourable or less favourable treatment. Ms Jones was hand delivering correspondence, as before; she wanted proof of postage, the same as delivery companies. She was entitled to video herself delivering the letter.
78. Mr Shepherd stereotyping the Claimant. Miss Tiffany Richards carefully set out the Claimant's case in her submissions on this, referencing Mr Shepherd's descriptions of the Claimant:
1. Page 2 paragraph 5 line 2 "jenny was prickly" in her approach
 2. Page 4 Paragraph 12 3rd line from the bottom "Jenny was no shrinking violet"
 3. Page 6 paragraph 19 , Mr Shepherd talks of Delphie's good character having previously worked with her for 12 months and at his last store and would be surprised if Delphie shouted at Jenny. However, you at this time had worked with Miss Richards for 4 years and had not noted run ins but puts in his statement it was "jenny who lost her temper" despite not being present
 4. Page 6 Paragraph 20 in regards to the aggressive manner the meat was displayed on the floor last sentence Mr Shepherd states he cannot imagine Leanne doing this.
 5. Page 8 para 29 "as Jenny was a difficult colleague" despite his own admissions he had a good relationship with Miss Richards prior to 2021.
 6. Page 9, paragraph 33 "Jennys outburst came out of nowhere It felt premeditated" , followed by "jenny was brewing for a fight"
 7. Page 10 paragraph 40 Mr Shepherd gave an example of her being treated favourably than other by protecting Miss Richards against a previously known racist customer / Neighbour.

Brewing / Spoiling for a Fight comments

1. Paragraph 33 of Mr Shepherd's Witness Statement "I mentioned in a follow up email to Claire the following day, on 16 May 2021, that the consensus in store was that Jenny had been spoiling for a fight" (Confirmed in Management walk out emails that was given in discovery page 325 in the bundle)
2. Paragraph 31 of Mr Shepherd's Witness Statement "Lorraine had told me that Jenny was brewing for a fight and that there was an atmosphere in the department since then"
3. Page 432 , 7 paragraphs down RGH is in the index " I felt the conversation that had been had with Jenny may go further as several people said she had been spoiling for a fight for a couple of weeks"

Miss Richards makes a good point that when Mr Shepherd continued the ban of one of the Claimant's neighbours because of objectionable/racist behaviour, Mr Shepherd was wrong to say he was wrong to say he was treating her more favourably because he was doing his job. He did do his job in this regard.

In terms of describing the Claimant as recorded above, the fact is that is what Mr Shepherd believed about the Claimant. It is what he thinks. He claims he has a basis in fact for those beliefs. We reject the suggestion that he has stereotyped the Claimant because she is black. He has described her as he finds her. The Claimant has not proved that an actual or hypothetical comparator would have been treated differently.

79. At no point approaching the Claimant to ask about her mood or wellbeing. We reject this proposition. We have documented above the substantial steps taken by the Respondent under its absence management policy, including referral to Occupational Health including psychological services. For example, counselling was provided.
80. At the conclusion of the grievance Mr Gerred-Hart recommended that management investigate the Claimant's behaviour in the meeting with Ms Jones and Ms Sogrowiczuk on 13 May 2021 and in store on 15 May 2021. In terms of discrimination, the Claimant alleges that this is direct discrimination, harassment and victimisation. This recommendation was made on 5 April 2022, about 11 months after the incidents. The Claimant's grievance was dated 9 August 2021, and so the recommendation was made 8 months afterwards. Whilst a charge of gross misconduct would not necessarily follow, Mr Gerred-Hart was recommending an investigation which could lead to a charge of misconduct. The problem with Mr Gerred-Hart's position is the passage of time. The length of time the grievance took will have taken its toll on the Claimant. That will have been compounded by an outcome being that she was to be subject to a disciplinary investigation, 11 months on. We recall that when the incident first happened, management agreed with the Union to investigate the matter as though it were a grievance brought by the Claimant not as a disciplinary matter. We do not find that Mr

Gerred-Hart would have treated a white or non-disabled person differently, and so we reject the claim of direct discrimination and harassment.

81. Contrary to Mr Heard's submission, the grievance dated 9 August 2021 was a protected act for the purposes of victimisation. It included references to her stress and anxiety and to an access to work assessment which concerned dyslexia. There was an express assertion that the Claimant needed support because of that.
82. However, we find that Mr Gerred-Hart recommended a disciplinary investigation not because the Claimant had brought a grievance but because he believed she may have behaved inappropriately on the days in question, for example by deliberately attending work late and refusing to do markdowns. Accordingly, we reject the claims in respect of this recommendation under the Equality Act 2010. That does not preclude further consideration of the matter as contributing to a constructive dismissal.
83. The impartiality of Mr Gerred-Hart. The Claimant did not challenge Mr Gerred-Hart's impartiality until the appeal. That was way too late if she wanted to do this. It is the case that the Regional managers do have meetings with one another. They are known to each other. Mr Gerred-Hart did not socialise with Mr Shepherd outside work. We do note that managers from Taunton and Melksham were used in 2015 grievance and 2016 appeal. However, we are satisfied that within the language of the grievance policy, first he was more senior to Mr Shepherd, secondly he was not connected to matters. On the balance of probability, he was impartial and there was no act of discrimination in him conducting the grievance. We note the GMB did not object to him when the original attempt at an investigation as though a grievance was made.
84. Failure to secure promotions because of a failure to provide reasonable adjustments. The concentration of the evidence around reasonable adjustments was 2010 to 2011. This claim is presented significantly too late for that period. We have had no evidence of any promotion application. The Claimant's position in the grievance was that she had only made one mistake around the waste meat incident.
85. Leanne and Lorraine receiving support when making mistakes when the Claimant was not. Lorraine Henshaw accepted she had failed to remove out-of-date milk. She was spoken to about it. There was no file note. The value of the waste was, we understand, significantly less than £85. The fundamental point, however, although the Claimant would not see it this way, was that she did receive support in respect of the meat waste, as the file note records, in that she would be retrained. We find this was a supportive not a disciplinary matter. Indeed, others were going to be retained, too.

Reasonable Adjustments

86. Mr Shepherd told us that there were no issues with the Claimant's performance on a day-to-day basis in her role, using the handheld electronic device. The Claimant does not establish that there was a high workload for her role in the sense that it was a struggle to achieve. She was not subjected to a substantial disadvantage in terms of workload. The Claimant could perform her work successfully. Whilst there was a requirement to work with dates and numbers (sell-by etc.), the Claimant did not struggle with performing her work with the handheld device or at all. There has been no performance management of the Claimant in her role.
87. The incident around 10 and 11 May 2021 concerning a failure to remove £85 of meat was an isolated incident and was not part of a pattern showing the Claimant struggled with the role. She did not. Insofar as she asked for training on 13 May 2021, Ms Jones file noted it would be provided. Indeed, in the apparently subsequently discovered statement from Ms Jones, the team - not just the Claimant - was going to be retrained. In her grievance the Claimant did not assert she needed adjustments or training in respect of work performance. In her statement to the Tribunal she describes the waste meat incident as human error, the first time it happened.
88. Because this was a grievance and not a disciplinary hearing, statements taken in the course of the grievance investigation from those other than the Claimant, who of necessity would be interviewed after the Claimant, were not shared with the Claimant. The grievance policy does not say otherwise. (The position would be very different in a disciplinary context). Whilst this was a provision, criterion or practice, it did not put her at a substantial disadvantage as a person with dyslexia in a grievance, because it was not part of the process that a person bringing a grievance sees the statements of those interviewed. The process of the grievance appeal did not start before her resignation. Accordingly, there was no failure to make reasonable adjustments in this respect, or at all.

Constructive Dismissal

89. We have already rejected the contention that Mr Gerred-Hart was not impartial. He was.
90. It appears right that the Respondent had not kept the dyslexia documentation on file. We know that Mr Stoneman of HR was involved in 2010. It is likely that the Respondent knew about the dyslexia assessment and if it were acting competently, it would have asked for copies. It appears that they were mislaid. The debate about reasonable adjustments was concentrated in 2010 and 2011. The dyslexia reasonable adjustments was not a live issue in June 2022. The Claimant did not resign because elements of her personnel file had gone missing. Her resignation concerned the grievance.

91. Whilst Mr Hart periodically informed the Claimant's union and the Claimant of the state of play with the grievance, the grievance did take 8 months to conclude. There are 2 significant periods of delay. The first is that it took 3 months from Mr Gerred-Hart interviewing the Claimant to interviewing Mr Shepherd. Explanations were put forward which are not satisfactory. At the end of the day, it is a matter of priorities. Then there was a further delay of 4 months between Mr Shepherd being interviewed and the outcome. The reason given was that Ms Jones was unavailable and might return to work. In the event, Mr Gerred-Hart decided he could decide the grievance without interviewing her. On 27 October 2021 Mr Gerred-Hart wrote to the Union stating he should be ready within a fortnight. Mr Shepherd was interviewed on 14 December 2021. That goes also to the first period of delay. As regards Mr Gerred-Hart, he had Ms Sogrowiczuk's account from which he could derive Ms Jones' position on the file-noting of the waste meat which was the main point of the grievance. As regards ASDA, there were statements in existence which the Respondent has disclosed from Ms Jones and from Ms Sogrowiczuk which did not make themselves to Mr Gerred-Hart. The Respondent does not have reasonable cause for waiting 8 months from the time of the presentation of the grievance to the outcome. It is conduct likely to destroy trust and confidence.
92. Similarly, the outcome being 11 months after the incidents, Mr Gerred-Hart did not have reasonable cause for recommending disciplinary investigation. Too much time had passed. The focus should have been on managing a return to work if possible, health-wise.
93. Further, we understand Miss Richards' position on last straw. Mr Rick Rickard/Rawle had been her manager in the past in 2010. He had worked alongside Mr Shepherd for many years, we understand, and had also worked with the Claimant when she moved to the Newquay store having had difficulties in St Austell. She alleges the store manager, Alan Crowe, stated he would not want her sort in his store and she suggests Mr Rawle said she was classed as a troublemaker because she had made allegations about Mr Crowe. Whatever the truth of those matters, Mr Rawle was reasonably regarded by her as too close, and as with the 2016 grievance appeal, a manager from further East with the region would have made more sense. His appointment was not innocuous.
94. Whilst we have covered elsewhere in the Judgment our findings on the other points raised by the Claimant, we are satisfied that she was constructively dismissed in respect of these matters. Serious breaches of contract were represented by the delay and the referral to an investigation of her conduct. The last straw was the appointment of an appeal manager who was too close to the individuals concerned, in stark contrast to the appointment of the appeal manager in 2016. The Claimant did not affirm the contract. She was entitled to await the outcome of the grievance. She was entitled to await the appointment of an appeal manager. She did not affirm these serious breaches of contract and she resigned because of them.

95. The Respondent did not purport to dismiss the Claimant for a potentially fair reason. Accordingly, we find the Claimant was unfairly constructively dismissed.
96. Her discrimination claims fail.

Employment Judge Smail

Date: 28 November 2023

Judgment & Reasons sent to the Parties:
08 December 2023

For the Tribunal Office