EMPLOYMENT TRIBUNALS

Claimant:	**Mr M Thornley**
Respondent:	**Lidl GB**
Heard at:	**East London Hearing Centre**
On:	**22, 23, 24, 28 and 29 March 2023 and 23 May 2023 with 31 March 2023 and 22 May 2023 in chambers**
Before:	**Employment Judge S Park**
Members:	**Ms T Jansen**
	Mrs B K Saund

Representation

For the Claimant:	Mr L Ogilvy (Consultant)
For the Respondent:	Mr A Rhodes (Counsel)

JUDGMENT having been sent to the parties on 31 May 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Claims and issues

1. At a preliminary hearing on 8 November 2021 a draft list of issues was agreed by the parties. The claimant's representative confirmed the claimant was making the following claims:

    1.1. harassment relating to disability;

    1.2. failure to make reasonable adjustments;

    1.3. unfair dismissal (constructive);

    1.4. wrongful dismissal;

1.5. holiday pay; and

1.6. arrears of pay.

2. Initially the claimant's representative had indicated that a claim for discrimination arising from disability was being pursued. This was subject to the provision of further information. That information had not been provided and at the outset of this hearing the claimant confirmed that he was not pursuing a claim under section 15 of the Equality Act 2010.

3. After the preliminary hearing the claimant had also been ordered to provide further information about the holiday and wages claim. The respondent said that the claimant had not provided the required information about the wages claim so it was insufficiently particularized. Following a brief discussion with the claimant it was still not possible to understand the basis of any claim for wages, i.e. what the claimant said he was owed and why. The claim for wages was struck out due to the claimant not complying with the directions to provide the further information to enable the Tribunal and respondent to understand the claim.

4. The respondent accepted that the claimant was disabled due to his diabetes, loss of toes and loss of eyesight in one sight. The issue of when the respondent had requisite knowledge of disability remained a live issue.

5. The agreed issues in respect of the claims to be considered were agreed to be as follows.

<u>Harassment related to disability – section 26 Equality Act 2010</u>

6. Did the respondent engage in the following unwanted conduct:

6.1. Did Irene Osinga ask the claimant to step down or leave the job?

6.2. Did Steven Greest ask the claimant to step down or leave the job?

6.3. Was the claimant removed from his position as the store manager at Maldon?

6.4. Was the claimant demoted to customer assistant level and reduced to the duty of stacking shelves at the Braintree store?

6.5. Was the claimant required to pull heavy pallets?

7. If so, did that unwanted conduct relate to disability?

8. If so, did that conduct have the purpose or effect of violating the claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

<u>Failure to make reasonable adjustments – section 20 and section 21 Equality Act 2010</u>

9. Did the respondent apply the following provision, criteria and/or practice ("PCP"):

9.1. requiring employees to work on the shop floor;

9.2. requiring employees to handle heavy pallets.

10. Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:

10.1. being on his feet on the shop floor was more difficult because of his amputated toe;

10.2. working on the tills was more difficult because of his impaired vision.

11. Did the respondent take such steps as were reasonable to avoid the disadvantage? The claimant identified the following adjustments:

11.1. the removal of shop floor duties;

11.2. enabling the claimant to only work in the office.

12. Did the respondent know, or could it reasonable have been expected to know that the claimant had a disability?

13. Did the respondent know, or could it reasonably have been expected to know, the claimant was likely to be placed at a disadvantage set out above?

Unfair dismissal

14. The respondent denies the claimant was dismissed. The claimant said the respondent did the following things:

14.1. refused to grant the claimant access to all his personal records, despite a data subject access request ("DSAR") and follow up requests;

14.2. refused to consider all the evidence and correctly investigate his grievance;

14.3. delayed in providing a response to his grievance appeal after the original deadline;

14.4. reinvestigated matters from a March 2020 investigation that the claimant was told that;

14.5. in disciplinary proceedings, used evidence from witnesses, including Mr Hyde, who were no longer employed, some of which dated from 2 years before, beyond the 6-month timeframe in the respondent's guidance;

14.6. failed to interview potential witnesses the claimant had identified;

14.7. allowed the same person to deal with the disciplinary allegations as dealt with the claimant's grievance, which he contends was a conflict of interest;

14.8. in the disciplinary proceedings, used private messages without gaining consent from any of the parties involved;

14.9. failed to investigate whether or not the claimant had followed the company absence procedures;

14.10. did not treat the claimant in the same way as 3 other store managers, Stuart Brown, Dean Hynard and Jason Dunt, who had been shown to use the same language about colleagues but were not investigated;

14.11. treated the claimant inconsistently by suspending the claimant but not Mr Clifton and Mr Nothdurft;

14.12. Mr Clifton threatened one of the claimant's witnesses, My Hynard, which the company failed to investigate in the claimant's grievance; and

14.13. In a letter of 8 January 2021, gave the claimant an impossible deadline to meet by not posting it until 11 January.

15. Did the respondent breach the implied term of trust and confidence? The Tribunal will need to decide:

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

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

16. Did the claimant resign in response to the breach?

17. Did the claimant affirm the contract before resigning?

18. If the claimant was dismissed, was he dismissed for a potentially fair reason within section 98 Employment Rights Act 1996 and was dismissal fair in all the circumstances.

Wrongful dismissal

19. Was the claimant dismissed?

20. If so, what was the claimant's contractual notice period?

Holiday Pay

21. How much annual leave had he accrued and not taken on the termination of his employment.

22. How much was the claimant paid in respect of untaken annual leave on the termination of his employment.

Limitation

23. The ET1 was presented on 2 April 2021. The Early Conciliation certificate is dated 9 March 2021. In respect of any act or omission which took place on or before 9 December 2020:

23.1. Can the claimant prove there was conduct extending over a period of time, so it is to be treated as done at the end of that period? Is a claim about such conduct in time?

23.2. Was any complaint presented within such period as the Tribunal considers just and equitable?

Procedure, documents and evidence heard

24. Both parties were represented.

25. A bundle of documents had been agreed and prepared. The claimant had prepared a witness statement and gave evidence in person. The respondent called seven witnesses. They were Louise Andrews, Steven Greest, Ottis Whittington, Lauren Axtmann, Mark Ingram, Jennifer Davidson and James Igoea.

26. The hearing was arranged as a hybrid hearing due to Ms Axtmann being unable to attend in person. The claimant was in relatively poor health at the time of the hearing. On some days when he was not giving evidence, he left early to help him manage his wellbeing. He also attended the final day by video, rather than needing to undertake the journey to the Tribunal.

27. At the outset of the hearing the issues were clarified. At an earlier preliminary hearing the claimant had been ordered to confirm if he was pursuing a claim under section 15 Equality Act 2010 and, if so, provide further information. The claimant had not provided this information and confirmed at this hearing he was not pursuing that claim.

28. The claimant had also initially included a clam for unpaid wages and holiday pay. He had been ordered to provide further information in respect of those claims. The information the claimant had provided was limited and the respondent stated it still did not understand the nature of the claimant's claim for unpaid wages, so it was unable to respond to that claim. Having heard representations from the parties we struck out the claimant's claim for unpaid wages due to it still being inadequately particularized. The holiday pay claim proceeded on the basis it was just about whether the correct sum had been paid to the claimant on the termination of his employment.

29. During the hearing the claimant's representative suggested at points there were other documents that should be disclosed. At the end of the evidence, before submissions, he sought to make an application for the respondent's sickness absence policy to be disclosed and taken into account. This application was refused. We could not see how this document was relevant, given that the respondent had never taken any action under it in relation to any of the claimant's absences. If the claimant thought it was relevant his representative could have asked for a copy at any point prior to the hearing, but this had not happened.

30. At the end of the evidence both parties made oral submissions. The claimant's representative also had prepared written submissions. Initially he refused to provide these to the respondent. We directed that he must to so because if any document is relied on by one party and provided to the Tribunal it must also be available to the other party.

Findings of Fact

General comments on fact finding:

31. We heard a lot of evidence during the hearing about events spanning several years. There were a significant number of documents and we also heard from a number of witnesses. We have not made detailed findings of fact on everything that we heard evidence about. Our findings of fact are limited to the points that are relevant to the issues we needed to determine and the directly connected background matters.

32. During the hearing the claimant's representative suggested on occasion, though did not expressly argue, that some of documents were not reliable. For example, the claimant's representative drew to our attention to the fact that some notes are not signed or the format of meeting minutes varied. We did not accept that this provided any indication that these were not genuine contemporaneous documents.

33. In terms of evidence, within the list of issues the claimant made some allegations of fact that formed the basis of his constructive dismissal claim but no evidence was advanced on those points. The claimant did not include evidence on those points in his witness statement or draw our attention to any relevant documentary evidence. On these points we have not been able to make detailed findings of fact due to the lack of evidence. Therefore, we can only note that the claimant has not on the balance of probabilities proved those factual allegations. The consequences of this are set out in our conclusions below.

34. The claimant resigned in January 2021. His claims are for disability discrimination during his employment (harassment and failure to make reasonable adjustments) and constructive unfair dismissal. We were provided with a lot of evidence about the grievance and appeal procedures that continued after the claimant's employment terminated. We have considered this evidence, so far as it provides additional evidence about what occurred during the claimant's employment and the issues we need to determine. We have not made detailed findings of fact on these procedures themselves as they have no direct relevance to the issues we need to determine, because they all postdate the claimant's employment and the claimant brings no separate claims about those matters. The fact that we may not expressly refer to any of that evidence in this judgment does not mean it has not been considered, as far as it is relevant to the issues we are required to determine.

Factual background

35. The claimant was employed by the respondent as a store manager.

36. Store managers are responsible for the day to day running of individual stores. They report directly to an area manager. The job description for store managers focuses on management responsibilities. However, we heard from

the respondent's witnesses that in practice store managers are very hands on. They are expected to be on the shop floor much of the time and assist with the day-to-day tasks within the store, such as stocking shelves and being on the tills. The reality was that the role was not office based. We also accepted the respondent's evidence that it was not possible to easily change an individual store manager's role so that it became primarily office based. This was due to the respondent's overall business model.

37. In November 2016 the claimant moved to the Maldon store. In late 2016 the claimant had an accident and injured his foot. He then had one of his toes amputated in January 2017. He was signed off work for several months. He initially returned to work in May 2017 but was signed off work again in June, returning in August 2017.

38. The claimant is diabetic and while he was signed off work he had been diagnosed with glaucoma. By the time he returned to work he was blind in his right eye. He also had another toe amputated. The respondent referred the claimant to Occupational Health and a report was provided in September 2017. Occupational Health reported that he was managing following the amputation of his toes and *"he walks unaided without difficulty. He gets occasional pain in his right foot but is otherwise unaffected".* They also advised the claimant was *"fit to continue his full working role without adjustments or adaptations".*

39. On his return to work the claimant was managed by Irina Osinga. The claimant's relationship with Ms Osinga was poor. The claimant alleged as part of this claim that Ms Osinga told him to step down and leave the job. Ms Osinga did not give evidence. Nonetheless, we concluded that any conversation between the claimant and Ms Osinga at this time was not as the claimant now describes as part of this claim. In his evidence the claimant did not give a clear account of what he says Ms Osinga said to him in this conversation. The contemporaneous notes from a meeting between the claimant and Ms Osinga in October 2017 indicate there had been a telephone conversation where the future of the claimant's employment was discussed. These notes show the discussion as being about the claimant's performance and Ms Osinga warned him he may be at risk of dismissal if a particular test, Think25, was failed again at his store. We accepted the notes from the time as accurate. We were not provided with any other evidence by the claimant to support the allegation the claimant now makes that she told him to leave because of his medical conditions. Instead we accepted there were more general discussions about the claimant's performance.

40. The claimant had an aneurysm in his left eye in October 2017 and was periodically signed off work again for several months. He eventually returned to work in April 2018. During his absence Ms Osinga relocated and Steven Greest took over as the claimant's manager. The claimant attended welfare meetings with Mr Greest in January 2018 and another on his return on 4 April 2018.

41. On his return the claimant was moved to the Braintree store. There is no dispute that he moved there from Maldon. The claimant has alleged as part of this claim that he was removed from his position at Maldon. Based on the notes of the meeting between the claimant and Mr Greest, which we accept as accurate, we find that this was not the case. The minutes make it clear that the claimant agreed to the move and it was accompanied with a phased return to work.

42. The claimant met with Mr Greest on 6 June 2018. The notes of this meeting record that the claimant was mainly working on the shop floor and not undertaking management tasks. Mr Greest flagged this up and said he would discuss the claimant taking on more management tasks with the other store manager in Braintree.

43. As part of this claim the claimant complained that on transfer, he was demoted to customer assistant. We concluded that this assertion was not supported by the contemporaneous documentary evidence. We accept that there was another store manager in the Braintree store. However, the claimant's role remained store manager and he was paid accordingly. We have already accepted the respondent's evidence that its store managers are expected to undertake day-to-day tasks on the shop floor along with management tasks. We also note that initially the claimant had been on a phased return to assist his recovery, which partially explains the lack of management duties initially.

44. The claimant was referred to Occupational Health again in June 2018. Occupational Health reported that the claimant was coping with full time hours and duties. They noted that he had some pain in his foot but that this was not correlated to how long he spent on his feet. Occupational Health advised that the claimant should not work on tills but he was fit to work on his feet

45. The Claimant met with Mr Greest again on 29 June 2018 to discuss the Occupational Health report. By this point the condition of the claimant's feet had been deteriorating. They had become infected and the claimant was signed off work. In this meeting the claimant mentioned that pulling pallets was an issue. Mr Greest asked the claimant if the Occupational Health report was already outdated. The claimant confirmed that it was.

46. Mr Greest discussed different options with the claimant. The claimant raised the possibility of working in a different store. Occupational Health had said that the claimant could not work on tills but the claimant told Mr Greest that in some stores the till screens were different so he may be able to work on them. Mr Greest asked what duties the claimant could complete. The claimant said he could do most things other than pulling pallets. Mr Greest asked the claimant if he had thought about looking for office roles. The claimant had not considered this. We noted the claimant did not say at the time he was interested in exploring that as an option.

47. Mr Greest met with the claimant again on 20 July 2018. The claimant was signed off sick again at this point. The discussion in this meeting was similar, about what the claimant could and could not do. Mr Greest suggested again that the claimant should consider the possibility of office-based roles in the Regional Distribution Center. The claimant again said he had not thought about this.

48. As part of this claim the claimant has alleged that Mr Greest also asked him to step down or leave. Again, we have concluded that the claimant has not proved that Mr Greest made any such comment to him around that time. The claimant's witness evidence did not include a clear account of what he says Mr Greest said about this or when this conversation occurred. Within the records from the time Mr Greest is recorded as asking the claimant if he should be returning to work. He also asked the claimant if being store manager was the right role for him. However, we found that these comments were made in the context of discussing the claimant's welfare and return to work. The minutes show that the claimant had indicated to Mr Greest he had difficulties with aspects of the role, so it was understandable for Mr Greest to make these enquiries. Also, during these discussions Mr Greest suggested the claimant look for alternative office-based roles with the respondent.

49. The claimant returned to work in August 2018. At some point in August or September 2018 he transferred to the Halstead branch. The claimant's own evidence was that when he moved there, at least initially, he mainly did office work and did not have to pull pallets. This move was made permanent in November 2018.

50. In October 2018 the claimant raised a grievance. This was primarily about his time at Braintree. By the time the claimant raised the grievance he had already moved to the Halstead branch and a number of the issues he had raised, such as having to pull pallets, had been resolved. We make no further findings about this grievance as it is of no direct relevance to the issues we need to determine. We just note that it was investigated and an outcome was sent to the claimant in January 2019.

51. The situation at Halstead changed in early 2020. By this point Gary Robins had taken over as Area Manager. We have seen notes of some meetings between him and the claimant from March 2020. One of these related to a grievance that had been raised against the claimant. The other related to the claimant's working hours. In this meeting the claimant indicated that things were worse for him because he was needing to work on his feet more and this also meant he had to pull pallets. The claimant suggested he wanted to move to a different store.

52. We accept that at this particular time the claimant was pulling pallets more. The claimant's evidence, as corroborated by the minutes of the meetings at the time, indicate that this was due to staffing pressures and changes in targets. The additional pressures were not disputed by the respondent. We accepted that the practical consequence of these pressures was that the claimant had to be

more involved with the work on the shop floor than he had when he first transferred to Halstead. However, we have also concluded that the claimant was not specifically instructed by anyone that he must pull pallets. The respondent's witnesses, including Ms Axtmann, gave evidence that as store manager the claimant had authority to delegate tasks to other employees. At the time the claimant was the Halstead store manager. We concluded that the claimant could have delegated the tasks that involved pulling pallets to other employees. We also noted that the record of one of the March 2020 meetings show Mr Robbins asked the claimant directly what he needed in terms of support. The claimant just said he did not know.

53. The meetings in March 2020 became more significant later when the claimant raised further grievances. In these grievances the claimant questioned the status of the meetings. The claimant alleges as part of this claim that he was told that the complaints made against him would go no further. This is documented in the outcome to the grievance the claimant raised in October 2020. Based on this we accept the claimant was told in April 2020 that no action would be taken.

54. At some point in the first half of 2020 Gary Clifton took over as Area Manager and Moritz Nothdurgt as Head of Sales for the region. In his evidence the claimant has made a number of complaints about how Mr Clifton acted towards him. These were the subject of the claimant's subsequent grievance. We are not making any detailed findings of fact in respect of the substance of these complaints as they do not form part of the claimant's case.

55. In June 2020 the claimant was referred to Occupational Health again. Another referral was made on 3 August 2020. An assessment was carried out on 17 August 2020. Occupational Health noted that the pain in the claimant's feet was made worse by standing or walking for long periods. Occupational Health recommended that ideally the claimant should be office based for 70% of the time and he should only spend 30% of his working time on his feet. We note that Occupational Health's recommendation was only about sitting versus being on his feet. Occupational Health make no reference to pulling pallets.

56. The claimant was signed off work again in late August 2020, returning on 4 September 2020. He met with Mr Clifton on 21 September 2020 to discuss the Occupational Health report. Mr Clifton discussed with the claimant different tasks and aspects of the store manager role in the context of considering how the recommendations could be implemented. The record of this meeting show that the claimant briefly said that pulling pallets was a problem. He did not go into this in detail or say anything that suggested this was a particular problem. It was said in the context of a general discussion of all aspects of the role. The claimant also explained why he may prefer to work in a smaller store. No decisions were made by Mr Clifton at that meeting.

57. We also noted from the minutes of this meeting the claimant had indicated to Mr Clifton that he did not think he could work as a store manager in the long term and he had been looking at other roles. In the minutes the claimant

indicated there may have been a specific job he had applied for, but it had fallen through. During this meeting the claimant indicated he was unsure what other roles he could do with the respondent. There is some suggestion within the notes that the claimant may have been applying for other roles externally.

58. After this meeting, on the same day, the claimant was informed by Mr Clifton that he was being moved to Chelmsford. This was because a complaint had been made against the claimant by other employees. The claimant was transferred to allow the investigation to be carried out. The claimant was not suspended.

59. The respondent started an investigation into the complaint made about the claimant. We have not seen the actual complaint that was raised. However, we have seen the minutes of the interviews that were undertaken and the various internal reports of the investigation. From these and other evidence we can summarise that the complaint was generally about the way the claimant interacted with colleagues, including allegations of bullying and poor communication.

60. The investigation was initially done by Gary Clifton. In total 24 employees were interviewed. The first interview was on 18 September and then the remainder were undertaken between 22 and 25 September.

61. One of those interviewed was Michael Hyde. In his claim the claimant has said that the respondent interviewed ex-employees and identified Mr Hyde as one of those ex-employees. This was disputed by the respondent who said Mr Hyde was still employed at that point. The claimant did not provide any evidence to show that Mr Hyde had left in fact left the respondent's employment by then. The minutes of the interview with Mr Hyde indicate that he was no longer working directly with the claimant at the time. The interview related to earlier events when Mr Hyde did work with the claimant, i.e. early 2020. The minutes show that during this investigation Mr Hyde was just asked quite generally about his views of the claimant rather than the incidents that gave rise to the earlier investigation.

62. In terms of the claimant's complaint about the respondent interviewing Mr Hyde, we were not clear if there was any reason why the respondent should not have included him within the later investigation. The complaint seemed to have been about how the claimant behaved with colleagues and Mr Hyde had previously worked with the claimant. The claimant suggested this was against the respondent's policy. We were not directed to any evidence that supported this assertion. We do not accept as a matter of fact that the respondent's decision to interview Mr Hyde was contrary to any policy.

63. The claimant moved to the Chelmsford store in late September 2020. During oral evidence we heard that the claimant had initially been asked to work in the Whitham store for a short while. The claimant's evidence was that when he worked there, he had to pull pallets on the shop floor. The claimant's evidence on this was not clear. However, we heard that the time the claimant worked in

Whitham was very short, around a week. We also note that it is not disputed by the respondent that when the claimant first transferred from Halstead there was some miscommunication. This meant that the claimant's new manager did not initially know about the claimant's limitations as had been highlighted by the Occupational Health review.

64. We accepted that the consequence of this miscommunication was that the claimant undertook tasks that were problematic for him including pulling pallets. However, we also concluded that this was for a very short period of time. We also find the context of this situation was as follows:

    64.1. The respondent's store managers were required to be quite hands on and assist with the day to day operations within stores. This would equally apply in any store the claimant moved to on a permanent or temporary basis.

    64.2. The claimant was still at all times a manager. He had a significant amount of autonomy about what he did and did not do.

    64.3. The claimant did not provide any evidence that showed that for during this particular period of time someone expressly instructed him to undertake tasks that meant he had to pull pallets.

65. In early October 2020 the claimant raised another grievance. This time it was against his manager, Gary Clifton, for bullying and harassment and he also complained of disability discrimination. He also complained about Moritz Northdurft. The grievance included complaints about several matters that had occurred over the preceding years. He also complained about the most recent events and the fact he had been moved to Chelmsford. He complained that Mr Clifton had been discussing the situation in public places, breaching confidentiality.

66. The respondent arranged a meeting to discuss the claimant's grievance on 21 October 2021. This was with Lauren Axtmann. Mark Ingram took notes and the claimant was accompanied by Dean Hynard.

67. During the meeting there was some discussion about the investigation that had taken place earlier in 2020. The claimant said that he had been told that would not go further and that he had still not received the notes from the investigation from February 2020. Ms Axtmann asked the claimant if there was anything further he wanted to add. The minutes do not show the claimant adding anything. There is also no record in the notes of that meeting that the claimant asked that specific evidence was into account or named people were interviewed. Neither did the claimant provide evidence that he made such a request at another time.

68. The respondent then investigated further. Ms Axtmann interviewed Gary Clifton and Mark Ingram interviewed Moritz Northdurft. We accepted Ms Axtmann's evidence that there were practical reasons for this based on various people's availability. It meant that the grievance was dealt with more efficiently.

69. During this time the disciplinary investigation was ongoing. It had been started by Gary Clifton. The claimant's new manager, Otis Whittington then took over. This was because the claimant had raised a grievance about Mr Clifton. Mr Whittington met with the claimant on 28 October 2020 and carried out a further investigatory interview.

70. On 2 November 2020 Mr Whittington met with the claimant again. This was a welfare meeting to discuss the claimant's occupational health report and review what accommodations the claimant needed at work. At this meeting the claimant said it was better in Chelmsford. This was a relatively detailed discussion about what the claimant could do. In this meeting he did say that pulling pallets and time on his feet were the main issues. Mr Whittington said he did not want the claimant to pull pallets and he needed to manage time and rest if need be. Mr Whittington also arranged a risk assessment.

71. On 5 November 2020 Mr Whittington wrote to the claimant summarising what had been agreed on 2 November. This included 4 adjustments. These included an express instruction that the claimant should not pull pallets and he should only spend 4/5 hours on his feet and 4/5 hours off his feet.

72. On 6 November 2020 Lauren Axtmann wrote to the claimant to say that there would be a delay in providing an outcome to his grievance. She said there would be a decision by 13 November 2020.

73. Also, on 6 November 2020 further interviews were carried out as part of the disciplinary investigation. These interviews were by Graham Smyth, a trainee area manager. He reinterviewed a number of employees. During the original interviews some employees had given details of a managers' WhatsApp group the claimant was part of and a similar store group. Mr Smyth asked about these WhatsApp groups when he carried out further interviews. For example, the minutes of the meeting with Richard Thrussell indicate he showed pictures of the group conversation to Mr Smyth. Michael Hyde was also reinterviewed at this point.

74. On 10 November another allegation was made that claimant had been consuming food without paying for it. Mr Wellington interviewed the claimant about this on 11 November 2020. No action was taken in respect of this and the investigation was concluded.

75. On 11 November Mr Whittington met with the claimant and held a further investigatory meeting about the main complaint. This has been described by the respondent in proceedings as investigation 3 but it appears to be a continuation of the main investigation, but with some new allegations being discussed. We are not going to make detailed findings about all aspects of the

investigation as they primarily just form background. Our findings of fact will be limited to those issues which form part of the claimant's case. During this meeting the claimant was asked about some of the WhatsApp messages.

76. On 11 November 2020 the claimant raised a further grievance. This was sent to Laruen Axtmann. He complained about a number of things including:

    76.1. the length of time the disciplinary investigation was taking;

    76.2. that he had not received his personnel file yet;

    76.3. he alleged witnesses had been intimidated;

    76.4. the respondent using the WhatsApp messages in the investigation which he alleged had been illegally obtained.

77. On 13 November 2020 Lauren Axtmann wrote to the claimant with the outcome from the grievance raised in early October 2020. We do not intend to go through the findings in detail as the claimant's case is not about the substance of the grievance. We do make the following findings

    77.1. Most of the claimant's grievance was not upheld. However, Ms Axtmann did partially uphold some points.

    77.2. She accepted there had been a miscommunication when the claimant transferred to Chelmsford so his new manager had not been fully aware of his physical limitations from the outset.

    77.3. The findings are relatively thorough and Ms Axtmann has not obviously ignored anything the claimant has said to her.

    77.4. In respect of allegations that Gary Clifton breached confidentiality, the claimant had not provided Ms Axtmann with details of who had overheard any conversations so this could not be investigated further.

    Overall, we find that the way Ms Axtmann handled the grievance was appropriate and there were no clear failings in the process or investigation.

78. The claimant appealed against the grievance outcome in a letter dated 18 November 2020. In this letter he disclosed the names of individuals he said had overheard Mr Clifton discussing him. This information had not been provided by the claimant previously. These were Dean Hynard and Greg Hayton. The claimant did not identify any other potential witnesses he thought should be interviewed at this stage.

79. In the appeal the claimant also generally complains about the findings and says that they are not supported by evidence. The claimant did not identify any specific evidence that he says has not been taken into account, apart from minutes of a meeting from February 2020 that appear to have been missing.

80. On 19 November 2020 the respondent wrote to the claimant formally inviting him to a disciplinary hearing. This was scheduled to take place on 24 November 2020. We do not make detailed findings in respect of the disciplinary allegations against the claimant as they do not form part of the claimant's case and the disciplinary hearing ultimately did not take place. The allegations were broadly about the following:

    80.1. Allegations of name calling, making offensive remarks and breaching the anti-harassment policy. This was based on the WhatsApp messages provided by other employees.

    80.2. Breach of data protection also related to the content of the WhatsApp messages where a photo of an individual had been shared.

    80.3. Breach of trust, which also included how the claimant had acted during the investigation by denying certain allegations that were subsequently corroborated by photographic evidence of the WhatsApp messages.

81. On 20 November Mark Ingram wrote to the claimant to invite him to a meeting to discuss his subsequent grievance. This was due to take place on 27 November 2020. The claimant responded to say he could not attend as he was signed off sick.

82. The claimant remained off sick at this time. An issue arose about whether the claimant had followed the correct sickness reporting procedures. The claimant's case, and therefore the point on which we need to make factual findings, is that the respondent failed to investigate whether he had followed the correct procedures. The documentary evidence showed the claimant said to the respondent he sent a fit note that was tracked. Mr Smyth wrote to the claimant on 4 December 2020 asking him to provide details of who the letter and fit note was sent to and details of the tracking information. In oral evidence the claimant confirmed he did not do this. On 29 January 2021 Mr Ingram also asked the claimant to provide a copy of his fit note for 27 November until 6 December so they could ensure he was paid for that time. We have concluded that the respondent did try to investigate the problem of the missing fit note so it could be addressed. They asked the claimant twice to provide the information that would confirm he had done as he said he had. The claimant did not cooperate and provide the information that the respondent asked for.

83. On 23 November Jennifer Davison, the Regional Director, wrote to the claimant to invite him to a grievance appeal meeting on 4 December 2020. This did not go ahead as the claimant was signed off sick at that time.

84. During December 2020 the claimant remained off sick and as a result there was no progress with the disciplinary process, with the appeal from his October 2020 grievance or with the meeting to discuss his grievance dated 11 November 2020.

85. On 21 December 2020 the respondent wrote to the claimant advising they wanted to undertake an assessment of his health to see if he was unable to attend the disciplinary or grievance/appeal hearings and whether any adjustments could be made to enable him to attend. The respondent sent the claimant a consent form to facilitate this.

86. The claimant responded to this letter on 2 January 2021. In this letter the claimant raised further complaints about the disciplinary and grievance/appeal processes in general. We are not going to list those in detail but note the claimant's complaints included the following:

    86.1. He asked that Ms Axtmann did not chair the disciplinary as she had heard his grievance.

    86.2. He complained that he was the only manager being investigated and he was being treated differently to other store managers who were also on the WhatsApp group.

87. On 8 January 2021 Mark Ingram responded to the claimant. The key points in this letter are as follows:

    87.1. The disciplinary and various grievance meetings had not taken place due to the claimant being signed off sick. They wanted to obtain medical advice on whether or not the claimant was fit to attend the meetings.

    87.2. Mr Ingram addressed the issue about the missing sick note and asked the claimant to provide a copy.

    87.3. The claimant's concerns about the disciplinary process could be discussed at the disciplinary hearing.

    87.4. As Ms Axtmann is the claimant's disciplinary manager it was appropriate for her to hear the disciplinary.

88. In terms of Ms Axtmann's involvement, we heard oral evidence about the respondent's hierarchy and what a 'disciplinary manager' was under the respondent's policies. We also were provided with the disciplinary policy which set out who would hear the different stages of a disciplinary process. We accepted the respondent's evidence that under this policy Ms Axtmann was the person who would hear the disciplinary against the claimant. As a matter of fact, she had also heard the grievance and not upheld most of it. Having considered the outcome of the grievance and the appeal we concluded that the claimant did not actually make any complaints directly about Ms Axtmann in the appeal.

89. Mr Ingram asked that the claimant return the medical consent forms by 14 January 2021. While we note that Mr Ingram gave this date as the latest to

return the form, it was also described as a proposal. The claimant said he did not receive this letter until 14 January 2021. We accept that this was the case.

90. On 14 January 2021 the claimant sent an email to Mr Whittington that he asked to be forwarded to Mr Ingram stating he could not return the consent form that day and it will be forwarded by post the following day. He also said he had already provided details to the people he had spoken to about his absence and provided information about who had signed for the sick note.

91. On 14 January 2021 the claimant raised a further grievance. This was sent to Nan Gibson. We are not going to go through in detail the contents of this grievance. It repeats some points the claimant had complained of previously. It also lists some complaints that the claimant subsequently listed as issues in his constructive dismissal claim. The respondent acknowledged this grievance on 21 January 2021.

92. On 23 January 2021 the claimant wrote to Mr Whittington resigning with immediate effect. On 29 January 2021 Mark Ingram wrote to the claimant regarding the consent for a medical assessment. In this letter Mr Ingram noted the claimant had resigned so the disciplinary process would be put on hold but the grievance appeal and additional grievances would continue.

93. The claimant started a new job on 25 January 2021. This information is included in his ET1. During oral evidence the claimant also confirmed this. We have concluded that it is likely that the claimant had already been offered the new role when he resigned. We have already noted that during meetings in 2020 the claimant had said he was looking for other roles as he did not think he could continue as a store manager with the respondent. He also confirmed in cross examination that he had been actively looking for work to try and leave the respondent. We find it very unlikely that the claimant would be able to start a new role just 2 days after resigning if he had not already been offered the job before resigning.

94. Following the termination of the claimant's employment the respondent continued to deal with the various grievances and appeals. The claimant attended some meetings. Various people heard these grievances and appeals. As noted before, we are not going through in detail what happened as it is not part of the claimant's case or the issues we need to determine. We do note there were some significant delays at times, and this was not disputed by the respondent. However, these delays all post-date the claimant's decision to resign.

<u>Miscellaneous findings of fact</u>

95. There are some additional findings of fact we need to make that do not fit neatly into the chronological findings of fact we have set out above. We set out these findings of fact below.

96. The first of these relates to the claimant's data protection request. The claimant alleged that the respondent refused to grant him access to his personnel records despite making a data subject access request ("DSAR").

97. We accept that the claimant did make a DSAR, but we were unable to identify from the evidence we had when this was first made. In November 2020 the claimant stated that he had not received his fie. This is in both the grievance appeal and the November grievance. However, the claimant has not clearly stated in evidence when the request was first made and how it was made.

98. We then have evidence in the form of emails from December 2020. The claimant provided ID on 16 December 2020. On 12 January 2021 the respondent provided the information by way of a link to documents that could be downloaded.

99. It is not disputed by the respondent that initially this was incomplete. The claimant has alleged that the respondent refused to provide the records. We do not accept this was the case as a matter of fact. While there appear to have been some delays, we were not provided with any evidence that this was deliberate. Ms Davidson explained in evidence about logistical issues due to the claimant's records being held in two different places, leading to some initial gaps. We found this explanation credible and accept that any failure was due to administrative errors.

100. The other findings of fact we need to make relate to the claimant's claim for holiday pay. The claimant was paid in respect of some untaken annual leave in his last pay in January 2021. We understand that the claimant's case is that this was incorrect and he had more accrued additional leave so the amount he was paid should have been higher.

101. The claimant was ordered to provide details of how many days holiday he had taken since April 2020 and how much leave he had accrued that he says he was owed. The claimant did not provide this information or evidence on this point. On the contrary Mr Ingram provided a detailed breakdown of how the respondent had calculated the claimant's holiday entitlement and what he was owed. We accepted Mr Ingram's evidence on this point as nothing the claimant said on this matter gave us any reason to doubt its reliability.

102. Finally, the claimant has alleged that other managers on the WhatsApp group were not investigated. He has also complained of different treatment because Mr Clifton and Mr Northdurft were not suspended when he was suspended.

103. As a matter of fact, it was not disputed that the other managers were not investigated. We had copies of the WhatsApp messages. These relate to what the claimant says. The claimant did not provide any evidence of other managers using the same language as the claimant had used on WhatsApp. On the balance of probabilities, we do not accept the claimant has shown that other managers did act in the same way as he had done.

104. In terms of different treatment of Mr Clifton and Mr Northdurft, first we note the claimant was not in fact suspended. We also find that the claimant was based in a store and therefore he was transferred to a different store to allow the investigation to be carried out. When the claimant made his grievance, he was no longer being managed by Mr Clifton and Mr Northdurft. We accepted the respondent's explanation that there was no reason to transfer either of them or suspend them in these circumstances, because they were no longer in contact with the claimant on a day to day basis.

The Law

Failure to make reasonable adjustments – section 20 and 21 Equality Act 2010 ("the EqA")

105. Section 20 of the Equality Act 2010 provides, so far as is relevant:

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

    (2) The duty imposes 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…

106. Section 21 EqA 2010 provides that a failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments, and further that A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

107. The EAT in **Environment Agency v Rowan [2008] ICR 218** held that an employment tribunal considering a breach of the duty to make reasonable adjustments (under the then-current DDA 1995), must identify:

    (a) the provision, criterion or practice applied by or on behalf of the employer; or

    (b) the physical feature of premises occupied by the employer;

    (c) the identity of non-disabled comparator(s) (where appropriate); and

    (d) the nature and extent of the substantial disadvantage suffered by the claimant.

    This guidance continues to apply to claims brought under s. 20 – 21 EqA 2010 (see e.g. **Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins [2014] ICR 341** at [29] – [30], where the EAT also noted that it is necessary for the ET to identify the "step" or "steps" that the employer should have to take to avoid the disadvantage).

108. The Court of Appeal in **Ishola v Transport for London [2020] ICR 1204** has given detailed guidance as to the meaning of the phrase “provision, criterion or practice”:

> *“35. The words "provision, criterion or practice" are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. I also bear in mind the statement in the Statutory Code of Practice that the phrase PCP should be construed widely. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words "act" or "decision" in addition or instead. As a matter of ordinary language, I find it difficult to see what the word "practice" adds to the words if all one-off decisions and acts necessarily qualify as PCPs…*
>
> *36. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an employer's PCP. In both cases, the act of discrimination that must be justified is not the disadvantage which a claimant suffers (or adopting Mr Jones' approach, the effect or impact) but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course (as Mr Jones submits) that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply.*
>
> *37. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.*
>
> *38. In context, and having regard to the function and purpose of the PCP in the Equality Act 2010 , all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to*

> *anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."*

109. In considering whether the application of a PCP places a disabled person at a substantial disadvantage:

> *"one must simply ask whether the PCP puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they are treated equally and may both be subject to the same disadvantage when absent for the same period of time does not eliminate the disadvantage if the PCP bites harder on the disabled, or a category of them, than it does on the able bodied"*

Griffiths v Secretary of State for Work and Pensions [2017] ICR 150.

110. In considering whether an employer has complied with the duty to make reasonable adjustments, the focus must be on the practical steps that can be taken to alleviate the substantial disadvantage suffered, rather than the process by which a decision is reached, or the information obtained in reaching that decision. See on this point **Royal Bank of Scotland Plc v Ashton [2011] ICR 632**, and in particular the quotation from **Spence v Intype Libra Ltd** at (reference to section 4A is to the predecessor Disability Discrimination Act 1995):

> *"The nature of the reasonable steps envisaged in section 4A is that they will mitigate or prevent the disadvantages which a disabled person would otherwise suffer as a consequence of the application of some provision, criterion or practice … The duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise. The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate or prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing*."

111. Paragraph 20 of Part 3 of Schedule 8 to the Equality Act 2010 provides that an employer will not be subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know, that the relevant disabled person is disabled and is likely to be placed at the disadvantage referred to in the first, second or third requirement as set out in section 20 (see above).

112. In **Secretary of State for Work and Pensions v Alam [2010] ICR 665**, the EAT confirmed that an employer will not be subject to the duty to make reasonable adjustments unless it either knows or ought reasonably to know (a) that the employee is disabled and (b) that his/her disability is liable to place him/her at a substantial disadvantage in the way set out in s. 20(3), (4) or (5) (see [17] – [18]; the case was decided under the predecessor provisions of the Disability Discrimination Act 1995).

> *"the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP'.*

Newham Sixth Form College v Sanders [2014] EWCA Civ 734.

113. Provision, criterion or practice: It is a concept which is not to be approached in too restrictive a manner; as HHJ Eady QC stated **in Carrera v United First Partners Research UKEAT/0266/15** (7 April 2016, unreported), 'the protective nature of the legislation meant a liberal, rather than an overly technical approach should be adopted'. In this case the ET were found to have correctly identified the PCP as 'a requirement for a consistent attendance at work'.

114. Pool of comparators: has there been a substantial disadvantage to the disabled person in comparison to a non-disabled comparator? **Archibald v Fife Council [2004] UKHL 32, [2004] IRLR 651, [2004] ICR 954**: the proper comparators were the other employees of the council who were not disabled, were able to carry out the essential functions of their jobs and were, therefore, not liable to be dismissed.

115. While it is not a breach of the duty to make reasonable adjustments to fail to undertake a consultation or assessment with the employee (**Tarbuck v Sainsburys Supermarkets Ltd)**, it is best practice so to do. The provision of managerial support or an enhanced level of supervision may, in accordance with the Code of Practice, amount to reasonable adjustments **(Watkins v HSBC Bank Plc [2018] IRLR 1015)**

116. The adjustment contended for need not remove entirely the disadvantage; the DDA says that the adjustment should 'prevent' the PCP having the effect of placing the disabled person at a substantial disadvantage. **Leeds Teaching Hospital NHS Trust v Foster UK EAT /0552/10, [2011] EqLR 1075**: when considering whether an adjustment is reasonable it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage— there does not have to be a 'good' or 'real' prospect of that occurring. **Cumbria Probation Board v Collingwood [2008] All ER (D) 04 (Sep)** - 'it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage'.

117. The test of 'reasonableness', imports an objective standard and it is not necessarily met by an employer showing that he personally believed that the making of the adjustment would be too disruptive or costly. **Lincolnshire Police v Weaver [2008] All ER (D) 291 (Mar):** it is proper to examine the question not only from the perspective of a claimant, but that a tribunal must also take into account 'wider implications' including 'operational objectives' of the employer.

118. Employer's knowledge: **Gallop v Newport City Council [2013] EWCA Civ. 1583, [2014] IRLR 211** – a reasonable employer must consider whether an employee is disabled and form their own judgment. The question of whether an employer could reasonably be expected to know of a person's disability is a

question of fact for the tribunal (**Jennings v Barts and The London NHS Trust UKEAT/0056/12, [2013] EqLR 326,). Donelien v Liberata UK Ltd UKEAT/0297/14:** when considering whether a respondent to a claim 'could reasonably be expected to know' of a disability, it is best practice to use the statutory words rather than a shorthand such as 'constructive knowledge' as this might imply an erroneous test. The burden is on the employer to show it was unreasonable to have the required knowledge.

119. The EHRC Code includes examples of adjustments which may be reasonable:

a. making adjustments to premises

b. allocating some of the disabled person's duties to another worker

c. transferring the worker to fill an existing vacancy

d. altering the worker's hours of working or training

e. assigning the worker to a different place of work or training or arranging home working

f. allowing the worker to be absent during working or training hours for rehabilitation, assessment or treatment

g. acquiring or modifying equipment

h. providing supervision or other support.

Harassment – Section 26 Equality Act 2010

120. Under section 26 Equality Act 2010

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

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

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

(i) violating B's dignity, or

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

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

(a) the perception of B;

(b) the other circumstances of the case;

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

121. With a claim for harassment the claimant must prove on the balance of probabilities that the conduct he has complained of occurred.

122. The test of whether the conduct amounted to harassment is part objective and part subjective. The Tribunal must take into account the claimant's subjective perception but it is also required to look at that objectively to see if it was reasonable for the claimant to have considered his dignity to be violated or that it created an intimidating, hostile, degrading, humiliating or offensive environment.

123. In **Grant v HM Land Registry [2011] EWCA Civ 769** the Court of Appeal said that:

> *"Tribunals must not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive environment". They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."*

124. In **Richmond Pharmacology v Dhaliwal [2009] ICR 724** the EAT stated:

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

125. Whether or not the conduct is related to a protected characteristic is a matter of fact for the Tribunal drawing on all the evidence before it.

<u>Unfair Dismissal</u>

126. The law on unfair dismissal is set out in the Employment Rights Act 1996. The relevant provisions are 94—98. A claim for unfair dismissal can only be pursued when the employee is dismissed. Under section 94c an employee is dismissed when they terminate the contract in circumstances in which they are entitled to do so without notice by reason of the employer's conduct. This is often known as a constructive dismissal.

127. The circumstances that entitle the employee to terminate the contract without notice are as follows:

    127.1. there must be a breach of contract by the employer;

    127.2. that breach must be sufficiently important to justify the employee resigning;

    127.3. the employee must leave in response to the breach not some unconnected reason; and

    127.4. the employee must not delay as such as to affirm the contract.

128. The breach relied on can be a breach of an express or implied term. Every contract of employment contains an implied term that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. Any breach of the implied term will be sufficiently important to entitle the employee to treat themselves as dismissed.

129. Where there are a number of incidents culminating in a final event the tribunal must look at the entire conduct of the employer. The final act relied on need not in itself be repudiatory or even unreasonable, but must contribute something, even if relatively insignificant to the breach of contract.

130. The test to be applied in assessing the gravity of any conduct is an objective one and neither depends upon the subjective reaction of a particular employee nor the opinion of the employer as to whether its conduct is reasonable or not.

131. If we find that the Claimant has established the above, then he will have been dismissed. Section 98(1) Employment Rights Act 1996 requires the employer to show that there is a potentially fair reason for dismissal. If the employer cannot show a potentially fair reason for dismissal, then the dismissal will be unfair. If there is a fair reason, then we must consider whether the dismissal was actually fair. The test in section 98(4) Employment Rights Act 1996 must be applied.

Discussion and Conclusions

Harassment

132. The claimant made 5 separate claims for harassment on the grounds of disability. The factual allegations relied on are set out at paragraph 14 above.

133. The first allegation of harassment was that Irene Osinga asked him to step down or leave his job. As a matter of fact, we concluded that this conversation did not happen as described now by the claimant. The claimant has not proved the unwanted conduct happened and therefore this claim fails.

134. The claimant then alleged that Steven Greest had also asked him to step down or leave the job. Again, we concluded as a matter of fact that this conversation did not happen as described now by the claimant. The claimant has not proved the unwanted conduct happened and therefore this claim fails.

135. The claimant alleged that he was removed from his position as the store manager in Maldon. As a matter of fact, we concluded this did not happen as alleged. At all times the claimant was a store manager. He moved to Maldon but this was by agreement, it was not imposed on the claimant. Therefore, the claimant has not proved the alleged unwanted conduct happened and this claim for harassment fails.

136. The claimant has alleged that he was then demoted to customer assistant level and reduced to the duty of stacking shelves at the Braintree store. Again, as a matter of fact we have concluded this did not happen as the claimant now alleges. The claimant was not demoted because he remained a store manager at all times. We acknowledged that the claimant did stack shelves. This was not a demotion because as a matter of fact the respondent expected all store

managers to be hands on and work on the shop floor. This is what happened in the claimant's case, i.e. as a store manager he also stacked shelves. The claimant has not proved the alleged unwanted conduct occurred this claim for harassment fails.

137. For completeness, we have also considered the Tribunal's jurisdiction to hear these specific harassment claims. The events that gave rise to those four harassment claims occurred in 2017 and 2018 and the claim was not started until 2021. The first two allegations were distinct and involved different people. The third and fourth allegations were connected but arose out of a specific period of time when the claimant was working at Braintree during 2018. All four claims were presented significantly out of time. The claimant did not provide any explanation for the delay in presenting these claims.

138. We considered if it would be just and equitable to extend time for those claims. We were unable to identify any reason to do so. The claim to the Tribunal was triggered by the termination of the claimant's employment. These particular allegations were historic and there was no clear link between these earlier events and the termination of the claimant's employment. There was no obvious reason for resurrecting these complaints several years after these events occurred other than the fact that the claimant had decided to pursue a claim about other matters.

139. The final allegation of harassment was that the claimant was required to pull heavy pallets. We accepted that the claimant did pull pallets at times as this was one of the duties in the stores that managers were expected to assist with in general. However, we have also concluded that the claimant was not expressly instructed to pull pallets by anyone else. As a manager the claimant had autonomy about what tasks he actually did himself and he could delegate specific tasks to others.

140. As the claimant was not required to pull pallets, he has not shown that the alleged unwanted conduct he relies on occurred. To the extent that the claimant did in practice pull pallets, we have found that it does not meet the definition of harassment. This task was simply something that fell within part of his job description. The claimant had difficulties with this and did not want to do this. Looked at objectively we concluded this does not have the proscribed effect. Therefore, this claim for harassment also does not succeed.

<u>Reasonable adjustments – discussion and conclusions</u>

141. The claimant said there were two provisions, criteria or practices ("PCPs") that placed him at a disadvantage. These were:

    141.1. requiring employees to work on the shop floor;

    141.2. requiring employees to handle heavy pallets.

142. A requirement to work on the shop floor is a PCP. The respondent did not dispute that its store managers were expected to be hands on and spend a lot of time on the shop floor and assist with the operational duties. The claimant was a store manager and therefore this PCP was applied to the claimant.

143. A requirement on employees to handle heavy pallets is also potentially a PCP. The question for us to determine is whether this PCP was applied by the respondent generally and did it apply to the claimant. Pulling heavy pallets was one of the tasks that store based employees of the respondent could be asked to do. The PCP of pulling pallets falls within the tasks that can be done as part of the wider PCP of working on the shop floor. However, it does not automatically follow that because the claimant was required to work on the shop floor, he was also required to handle heavy pallets.

144. We have found as a matter of fact the respondent did not actually require the claimant to pull or handle heavy pallets. Although it was a task that was carried out on the shop floor it was just one of many. There were two different groups of employees working within the respondent's stores. These were the general customer assistants and the store managers. As the store manager the claimant had the authority to delegate tasks to other employees and he decided which tasks he personally undertook. The consequence of this is that there was no requirement on him to handle heavy pallets. There were periods of time when the claimant was not pulling pallets, such as during 2019 when he was working in Halstead. There were some times where we have accepted the claimant did pull pallets. However, but no one instructed him to do so and he could have delegated those tasks to someone else.

145. Our conclusion is that there was just one PCP that applied, that of working on the shop floor. The requirement to handle heavy pallets was not a separate PCP that was applied to the claimant. The question then is whether the PCP of working on the shop floor put the claimant at a substantial disadvantage compared to a non-disabled employee who worked in the stores and, if so, when this was.

146. The general disadvantage to the claimant was working on the shop floor meant he had to spend more time on his feet. The evidence showed that at points during his employment the claimant did have difficulties with pain in his feet but the evidence was less conclusive about whether that was due to him working on the shop floor. The situation also changed over time as the state of the claimant's health varied. The Occupational Health report from June 2018 said that the pain the pain the claimant experienced was not linked to being on his feet and Occupational Health also reported that he was able to undertake all aspects of his role.

147. The claimant was then transferred to the Halstead store. The same PCP of having to work on the shop floor applied to the claimant when he worked in Halstead. The claimant's own evidence was that he did not have problems while working at Halstead during 2019. In part this was because although he was still required to work on the shop floor, he was able to manage the work in such a way that he was office based for more of his time.

148. The claimant then says that the situation worsened in early 2020 due to the pressures in terms of the workload. We accepted the claimant's evidence on this and that he had to be on the shop floor more. The claimant says he was at a substantial disadvantage because being on the shop floor means he needed to be on his feet and this was more difficult. We accept that in 2020 this was the case. It is evidenced by the Occupational Health report from Aug 2020 which states that pain was provoked by standing or walking for long periods and

the claimant was also vulnerable to injury. At that time Occupational Health concluded that the claimant could not stand and walk for the majority of the day.

149. We have concluded that the PCP that the claimant was required to work on the shop floor did place the claimant at a substantial disadvantage from early 2020. The respondent knew that the claimant was disabled before this date. By August 2020 they definitely knew that the claimant should not be standing or walking for the majority of the day. The claimant had also indicated in a meeting with Mr Robbins in March 2020 that he was having problems, though at that point he only highlighted pulling pallets as a particular issue rather than generally having to work on the shop floor. Nonetheless, the respondent did know that the claimant was having difficulties, so we accept that around March 2020 so the duty to make reasonable adjustments arose.

150. The next issue for us to consider was whether or not the respondent did take steps that were reasonable to avoid the disadvantage to the claimant. In the list of issues, the claimant had suggested two adjustments. The first was the removal of shop floor duties and the second was enabling the claimant to work in the office.

151. First, we note that in March 2020 when the claimant told Mr Robbins he was having difficulties he said that he did not know what could be done to assist him. He did not ask for either of these adjustments. We also note that in previous years Mr Greest had suggested to the claimant that he looked to see if there were other office-based vacancies and the claimant said he was not interested.

152. In terms of whether those adjustments should have been made in any event, we find that they were not reasonable adjustments. We have already accepted that within the respondent business the role of store manager was not an office-based role. There was a requirement that store managers were hands on and worked on the shop floor. The respondent would need to have completely changed the claimant's role in order to implement the suggested adjustments of removing shop floor duties completely or allowing the claimant to be office based. In effect the respondent would need to have created a completely new role for the claimant. This in turn would require a complete change in how the respondent operated and managed its resources within the store where the claimant worked.

153. We also have concluded that removing shop floor duties and allowing the claimant to be completely office based would go beyond what was needed to avoid the disadvantage to the claimant. The same PCP of working on the shop floor had applied throughout his employment. At times, such as during 2019, the claimant was able to undertake the role without being entirely office based. The situation changed in 2020 partly due to the workload which meant the claimant was having to do more on the shop floor. At the time what the claimant indicated would help was moving to a smaller store where he would not need to do some of the problematic tasks, such as pulling pallets.

154. In 2020 the respondent did then take steps to assist the claimant. The claimant was referred to Occupational Health again. He was then transferred to the Chelmsford store. The main reason for the transfer was to allow an investigation into complaints against the claimant. However, but the practical effect was the same. The claimant's own evidence was that things were better one he was in

Chelmsford. After the claimant transferred, he had a detailed meeting with Otis Whittington who expressly set limitations on the claimant should be doing. This included an instruction not to pull pallets. We find that at that point adjustments were made and they were reasonable.

155. In summary, we find that the PCP of being on the shop floor did place the claimant at a disadvantage. In practice the extent of the disadvantage depended on the store where the claimant worked and wider workload pressures. When the claimant told the respondent in early 2020 that he was having difficulties he was referred to Occupational Health. Any disadvantage ceased when he transferred to Chelmsford in September 2020, which in practice was an adjustment. An express agreement about not pulling pallets was reached on 2 November 2020, which was a further adjustment.

156. The respondent did make the adjustments that were reasonable in the circumstances. There was some delay between March 2020, when the claimant started to have difficulties again and the duty arose, and September 2020 when the claimant moved store. We do not find this an unreasonable delay in the circumstances. It was reasonable for the respondent to first seek Occupational Health advice. The claimant remained a manager so was also able to delegate the tasks he found more problematic.

Unfair Dismissal

157. The respondent started disciplinary proceedings against the claimant, but the claimant resigned before these were completed. Therefore, there was no express dismissal by the respondent. The claimant needs to show that he was constructively dismissed. To do this he needed to prove facts that showed that the respondent had acted in a way that was a fundamental breach of his contract of employment and that he resigned in response to that breach of contract without delay.

158. The claimant relied on several specific allegations which he says was conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the him and the respondent. We will go through these specific allegations of fact in turn setting out our conclusions on whether the claimant has on the balance of probabilities proved the facts on which he relies and, if so, whether those facts show a fundamental breach of contract.

159. The claimant says that the respondent refused to grant him access to all his personal records, despite making a data subject access request ("DSAR") and follow up requests. As a matter of fact, we found there was no refusal to provide the personnel records. The records were provided to the claimant. At most there was a delay and an error that lead to some documents not being included initially. We accepted the respondent's explanation for that delay, namely that the records were held in two places leading to an initial omission. We conclude that the respondent's conduct did not amount to a breach of contract.

160. The claimant says that the respondent refused to consider all the evidence and correctly investigate his grievance. We found as a matter of fact that Ms Axtmann did consider all the evidence when investigating the claimant's

grievance. The claimant has not proved the facts on which he relies in this respect.

161. The claimant raised other grievances but none of these were investigated or concluded before the claimant resigned. Therefore, any potential failings in respect of these cannot form part of the reason for the claimant's resignation.

162. The claimant says the respondent delayed in providing a response to his grievance appeal after the original deadline. As a matter of fact, none of the grievance appeals were concluded before the claimant resigned. The only appeal that was ongoing before the claimant resigned was his appeal against Ms Axtmann's decision on the first grievance from October 2020. There were delays in that appeal process. However, we accepted that there were good reasons why that appeal was not concluded promptly. The delay was due to the claimant being signed off work and unfit to proceed with the appeal process. It was not due to any failing on behalf of the respondent. Therefore, the claimant has not proved the respondent delayed so we conclude there was no breach of contract.

163. The claimant alleged that the respondent reinvestigated matters that had already been investigated in March 2020. We accepted that the claimant had been told that the March 2020 investigation would go no further at that time. We also found that some of the people interviewed then were re-interviewed in the later investigation. However, we did not accept that the respondent had told the claimant the matter would not be looked into again. Neither do we accept there was any separate obligation on the respondent not to investigate further if it had reason to do so. An employer is entitled to investigate concerns it has about an employee. In September 2020 additional allegations were made against the claimant that the respondent was entitled to investigate. The respondent was entitled to include within the scope of that investigation matters which may be relevant. We conclude the respondent had reasonable and proper cause to act as it did. We do not find that the decision to re-look at earlier incidents is a breach of the claimant's contract of employment.

164. The claimant said that in disciplinary proceedings the respondent used evidence from witnesses, including Mr Hyde, who were no longer employed, some of which dated from 2 years before, beyond the 6-month timeframe in the respondent's guidance.

165. The respondent did interview Mr Hyde as part of the investigation carried out in September and October 2020. However, the claimant did not prove that Mr Hyde was no longer employed by the respondent. Neither did he show that interviewing Mr Hyde was in breach of any policy or guidance. Therefore, the claimant did not prove the facts on which he relies.

166. Even if Mr Hyde had left the respondent's employment, we could not see any reason why a decision to interview Mr Hyde would be wrong. An employer is entitled to decide on the scope of an investigation and who to interview. Mr Hyde had worked with the claimant and previously made similar complaints about his behaviour. Therefore, the respondent had reason to interview him and had reasonable and proper cause to act as it did.

167. The claimant said that the respondent failed to interview potential witnesses he had identified. We concluded as a matter of fact that the claimant did not identify Mr Hayton and Mr Hynard as potential witnesses during the investigation into his original grievance. He only identified them later on. Therefore, the claimant has not proved on the balance of probability the facts on which he relies.

168. It was suggested during submissions that there were other witnesses the claimant had identified who should have been interviewed. This was the first time this was suggested and there was no evidence that the claimant had suggested any other witnesses at the time.

169. The claimant complained that the respondent had allowed the same person to deal with the disciplinary allegations against him and deal with his claimant's grievance. The claimant contended this was a conflict of interest.

170. As a matter of fact, Ms Axtmann did hear both the grievance and she was due to hear the disciplinary allegations, which ultimately did not go ahead. We concluded the claimant did not make any complaints about Ms Axtmann's handling of his grievance. He appealed the conclusion she reached and the outcome. However, in his appeal he did not raise any particular complaints about how Ms Axtmann had handled the grievance, such as suggesting she was biased.

171. We heard from the respondent about their policy in place for determining who considers any grievances raised by an employee or any disciplinary brought against an employee. We accepted that under this policy Ms Axtmann was the appropriate person to hear both the grievance and disciplinary. As the claimant had not made any complaints directly against Ms Axtmann we have concluded there was no conflict in interest by applying this policy. We also have concluded the respondent had reasonable and proper cause to act as it did. Therefore, we have concluded that the claimant has not shown this was conduct that was likely to breach trust and confidence.

172. The claimant alleged that during the disciplinary proceedings the respondent used private messages without gaining consent from any of the parties involved. The respondent did rely on WhatsApp messages. We found as a matter of fact these were used with the consent of the other participants of the WhatsApp conversations. The other individuals voluntarily provided images of the messages to the respondent during the investigatory interviews. This shows that they had given their consent to use those messages. The claimant has not proved the facts on which he relies on the balance of probabilities.

173. The claimant alleged that the respondent failed to investigate whether or not the he had followed the company absence procedures. We found that the contrary was in fact true. The evidence provided showed that the respondent had repeatedly asked the claimant to provide relevant information to demonstrate he had sent in his fit note. We cannot see how this can be viewed as anything other than investigating the situation. The claimant then refused to provide this information or evidence to the respondent. The claimant has not proved the facts which he relies in support of this allegation.

174. The claimant alleged that the respondent did not treat the claimant in the same way as 3 other store managers, Stuart Brown, Dean Hynard and Jason Dunt. The claimant said they had been shown to use the same language about colleagues but were not investigated. The other managers were not investigated. The claimant provided no evidence that Mr Brown, Mr Hynard and Mr Dunt used the same type of language. Therefore, while it is true he was investigated and they were not, the claimant has not proved on the balance of probabilities that they had demonstrably acted in the same way as him. The claimant has not proved the facts on which he relies on this point.

175. The claimant also complained that the respondent treated him inconsistently by suspending him but not suspending Mr Clifton and Mr Nothdurft, about who he had complained. As a matter of fact, the claimant was not suspended. He was transferred to a different store, which was also something he had asked to happen for different reasons. In addition, we have concluded as a matter of fact his situation was not the same as the situation with Mr Clifton and Mr Northdurft. The claimant was the manager of a store and the people he worked with on a day to day basis had raised complaints about him. There were good reasons to transfer him while the investigation was ongoing. The claimant complained about Mr Moritz and Mr Northdurft, but he had already been transferred so was no longer managed by either of them by that point. He would not be in contact with either of them on a day to day basis while his grievance was investigated.

176. The claimant has not proved the facts on which he relies, in that he was not suspended. In any event, the respondent had reasonable and proper cause to act as it did.

177. The claimant said that Mr Clifton threatened one of the claimant's witnesses, Mr Hynard. He also says the company failed to investigate this. We were unable to make any findings of fact on this point because the claimant provided no evidence in support of the allegation. The claimant has not proved the allegation on which he relies.

178. The claimant alleged that in a letter of 8 January 2021 the respondent gave him an impossible deadline to meet by not posting the letter until 11 January. We did not accept that an impossible deadline was given. As a matter of fact, we found there was no deadline, it was just a proposal. There was no ultimatum and no potential consequences to the claimant of not responding in the timeframe. While the time was tight, any problem was trivial and easily resolved. The claimant has not proved an impossible deadline was given. In any event, any pressure put on the claimant was trivial.

179. In summary, we have found that a number of the allegations of fact the claimant made are unproven. There are some allegations where either the underlying facts were not disputed, or the claimant has proved the factual allegation. We have not found that any of these allegations show that the respondent has acted in a way that was likely to breach mutual trust and confidence without reasonable and proper cause. The individual complaints were about matters which were not serious and the respondent had reasonable and proper cause to act in the way it did.

180. The claimant has not shown that the respondent fundamentally breached his contract of employment therefore his claim for unfair dismissal does not succeed.

181. The consequence of this is that the claimant has not shown he was dismissed. Therefore, his claim for wrongful dismissal claim also fails.

Holiday Pay

182. The claimant had included a claim for unpaid holiday pay. It was unclear what he was saying he was owed. During evidence this was not clarified sufficiently and the claimant did not provide any evidence to substantiate this claim.

183. As a matter of fact, the claimant has not proved that the amount he was paid for holiday pay on termination of his employment was wrong. He did not provide the information he was required to do in order to prove this claim and therefore it fails.

Employment Judge S Park
Date: 21 February 2024