EMPLOYMENT TRIBUNALS

Claimant: **Mr D Cooper**

Respondent: **Sainsbury's Supermarkets Ltd (1)**
Mr M Hourihan (2)

Heard at: **Cardiff** **On:** **13-17 May 2024**
(17 May 2024 Chambers)

Before: Employment Judge R Brace
Members: Mr A McLean
Mr M Lewis

Representation
Claimant: Mrs A Johns (Counsel)
Respondent: Mr Fireman (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

Direct discrimination

1. The complaints of direct disability discrimination are not well-founded and are dismissed.

Harassment

2. The following complaint of harassment related to disability is well-founded and succeeds against both respondents:

    a. The Second Respondent failed to include the Claimant on the 'International Men's Day' post sent to all internal colleagues and published on LinkedIn

3. The remaining complaints of harassment related to disability are not well-founded and are dismissed.

Unfavourable treatment because of something arising in consequence of disability

4. The complaint of unfavourable treatment because of something arising in consequence of disability is well-founded and succeeds against both respondents:

a. The Second Respondent failed to include the Claimant on the 'International Men's Day' post sent to all internal colleagues and published on LinkedIn

5. The remaining complaints of being unfavourable treatment because of something arising in consequence of disability are not well-founded and are dismissed.

Unfair Dismissal

6. The complaint of unfair dismissal is not well-founded and is dismissed.

WRITTEN REASONS

Preliminary Issues

1. This has been an in person hearing heard over 5 days in the Wales Employment Tribunal, with the parties not being required to attend on the fifth day which was for deliberation only.

2. The hearing proceeded without difficulty and no specific adjustments were required by either party save for regular breaks which was undertaken.

The Claims and Early Conciliation

3. The Claimant entered into early conciliation on 14 February 2023 in respect of both respondents, which ended on 28 March 2023 [9 and 10].

4. On 25 April 2024, the Claimant's claim was filed in which the Claimant brought claims of disability discrimination against the First Respondent, as his employer, and against Matt Hourihan, the First Respondent's Regional Stores Director and Claimant's line manager, as a named Second Respondent [11].

5. In the Grounds of Complaint [23], the Claimant set out the background to his absence from work on 26 July 2022, that following being alerted by Matt Hourihan, about an altercation between a customer and another member of staff at his store late on the night of 25 July 2022, he had felt distressed and upset upon learning the news and disappointed not to have been contacted by his team about this, that he struggled to sleep and felt unable to return to work the next day[1]. The following day he commenced a period of sick leave as a result of feeling anxious and remained off sick leave until the termination of his employment in the following June of 2023.

6. The Claimant complained of the conduct of Matt Hourihan following the commencement of that sick leave (in particular from when a meeting was arranged for 5 August 2022,) through to 18 November 2022 when Matt Hourihan had posted on Yammer, the First Respondent's internal message board, and on his own LinkedIn page, a post to celebrate International Men's Day ("IMD") which did not include or reference the Claimant.

[1] §8 and 9 Grounds of Claim [24]

7. He brought claims of disability discrimination, relying on his anxiety as the disability, of:

    a. Direct discrimination (s.13 Equality Act 2010 ("EqA 2010")) in relation to some comments allegedly made by Matt Hourihan at the meeting on 5 August 2022;

    b. Discrimination arising from disability (s.15 EqA 2010) in relation to the timing of that meeting, again comments allegedly made at that meeting, an announcement made regarding cover for his absence and the IMD post, claiming that his sickness absence was the 'something arising'; and

    c. Harassment (s.26(1) EqA 2010) relying on broadly, although not exactly the same acts as both the direct and discrimination arising and, in addition, that the Second Respondent had falsely stated in a letter dated 3 August 2022 that the Claimant had not replied to a text and had breached the absence policy, at the meeting on 5 August 2022 had focussed on the trigger for the Claimant's absence and, following the meeting, had sent inappropriate questions and referenced the Claimant's performance at work to occupational health.

8. The Claimant claimed that he had suffered an exacerbation of his pre-existing anxiety as a direct result of the respondents' treatment and brought a claim for personal injury, in addition to injury to feelings and a compensatory award.

9. An ET3 and Grounds of Resistance were filed [43], the respondents relying on jurisdictional points of time in respect of any acts preceding 15 November 2022 as well as substantive grounds of resistance, at that time not admitting that the Claimant was disabled at the time of the alleged discriminatory treatment pending further information and denying disability discrimination.

10. At that point, the Claimant was still in employment, employed as a 6S Store Manager but, as at the date of the filing of the respondents' ET3, the Claimant's final absence review meeting, or FARM as it has been referred to, was scheduled to take place on 14 June 2023.

11. On 5 July 2023, Judge Jenkins issued disability directions and, on 12 July 2023 the Claimant entered into a second period of early conciliation againts the First Respondent that ended on 14 July 2023 [71].

12. On 10 August 2023, an application to amend the ET1 was made to include an additional claim of unfair dismissal only, the Claimant having been dismissed from employment at that FARM on 14 June 2023 [72-87].

13. At case management preliminary hearing on 21 August 2023 before Judge Moore, the Claimant was permitted to bring that further claim of ordinary unfair dismissal by way of amendment to the existing claim and to rely on Amended Grounds of Claim, the Respondent was given permission to filed an Amended ET3 response and agree a final list of issues [76].

14. An amended Grounds of Resistance was so filed [106] and in that amended Grounds of Resistance the Respondent conceded that the Claimant was disabled at the relevant times, although knowledge of disability was disputed.

List of Issues

15. The parties had prepared an agreed list of issues as directed by Judge Moore and at the outset of this final hearing, this was agreed to be the list of issues save for an amendment to reflect that disability had now been conceded. A copy of the agreed and amended list of issues is attached as an Appendix to this reserved judgment.

Bundle

16. The Tribunal was referred selectively to the hearing bundle of relevant documentary evidence ("Bundle"). References to the hearing Bundle (pages 1-895) appear in square brackets [ ] below. These are references to the hard copy bundle and not electronic PDF automated numbering. An additional document, a copy of a post on LinkedIn made for International Women's Day was submitted in evidence by the respondent and added to the Bundle with the Claimant's consent in the course of the first day of the hearing and numbered [896-900].

The Evidence

17. The Tribunal heard evidence from the Claimant, and for the respondents, from
    a. Matt Hourihan, Second Respondent and Director of Customer Service, but Regional Stores Director and Claimant's line manager at the relevant time;
    b. Joanne Southworth, Head of Talent and responsible for managing Claimant's sickness absence from 22 November 2022;
    c. Karoline Irving, Head of Talent and responsible for the decision at the Claimant's Fair Treatment (i.e. grievance) Appeal;
    d. Hayley Wilson, Director of Logistics and responsible for the decision to dismiss the Claimant; and
    e. Kerry Johnson, Regional Stores Director and responsible for the decision on the Claimant's appeal against dismissal.

18. All witnesses relied upon witness statements, which were taken as read. All were all subject to cross-examination, the Tribunal's questions and re-examination.

19. The Respondents also relied on a witness statement for Rupa Grahame, who had been employed by the First Respondent at the relevant times as Head of Talent and had been responsible for the decision on the Claimant's Fair Treatment complaint. The Tribunal was informed that she had left the First Respondent's employment in December 2023, the respondents had not secured her attendance and did not seek a witness order. The Claimant did not agree her statement, and the parties were aware that little to no weight would be placed on the statement of a witness who does not attend to be orally examined.

Facts

Introduction

20. The Claimant initially worked for the First Respondent ("Sainsbury's") on a part-time basis whilst still at school and university and, after leaving university, was permanently employed as a Graduate Trainee Manager on Sainsbury's Graduate Scheme. In 2010, he was promoted to a 6S Store Manager, i.e. a Store Manager for one of Sainsbury's larger supermarkets and as at termination of employment, he was Store Manager for the Pontypridd store. At that point he was 52 years' old and had over 30 years' service at Sainsbury's.

21. Sainsbury's is a large, nationwide retailer employing over 150,000 across stores England and Wales and with centralised functions, such as finance, and a Head office in Holborn, London.

22. The Second Respondent, Mr Matt Hourihan, has been employed by the First Respondent for around 19 years. He is currently Director of Customer Service, but from 2015 to 2024 had been employed as one of Sainsbury's Regional Sales Directors.

23. The Claimant was employed on terms and conditions [122] that stated that the Claimant had continuous employment from 29 March 1993. The First Respondent also had a number of policies and procedures in place applying to the Claimant's employment and those relevant for the purposes of this claim were as follows:

    a. Attendance Policy [723], which provided that if absence was ongoing for more than 4 weeks then this would be treated as longer term sickness absence and employees were directed to the Long Term Ill Health Policy [724]. The policy also referenced that Occupational Health ("OH") were independent specialists to help the First Respondent understand the impact of employee's health on their capability to do their job [728];

    b. Long term Ill Health Policy [769], which provided if employees were absent for more than 4 weeks then this was considered to be long term and highlighted both employee and management responsibilities [770]; that:
        i. The employee should contact the line manager on a weekly basis unless an alternative was agreed; and
        ii. That managers would arrange meetings on a regular basis once the employee had been absent for more than 4 weeks [770].

24. The Long Term Ill Health Policy also gave an overview of the absence review meeting ("ARM") procedure, with a minimum staged process indicated and a third stage Final Absence Review Meeting, or FARM, where a potential outcome could include agreeing a new role, a return or dismissal for capability. That policy contained specific provisions in relation to:
    a. Rehabilitation and redeployment [772];
    b. Medical dismissal and ill health retirement [773].

25. Line Managers also had a series of management guides to accompany such policies, including guides relating to:

a. Attendance [779], which guided managers to take a proactive approach to attendance management and to support employees during absence;

b. Stress at work [711], which included provision that if an employee reported stress directly as a result of their work, then the line manager must make sure that a more detailed investigation of the problem was conducted including identifying possible actions that could be taken to help the individual deal with the problem and resolve the situation and that a full documentary record be kept including completion of a Work Impact Checklist ('WIC') [713] and

c. Long Term Ill Health [848], which indicated that the first meeting should be held as soon as reasonably possible after the absence has elapsed over 4 weeks and provided guidance on what matters should be identified at the first meeting including the cause of the absence.

26. To complete the picture, a Colleague Guide to Long Term Disability Insurance provided information on how to make a claim and that if the employee had been absent for more than 12 weeks and the absence was expected to exceed 26 weeks, the line manager would notify the Insurance and Risk Management Team [737].

27. The events relevant for the Claimant's claims relate to the period from July 2022, when the Claimant commenced sickness absence from work which continued to 14 June 2023, when the Claimant was dismissed by the Respondent.

28. It is accepted that prior to his July 2022 absence, the Claimant had two previous periods of sick leave when he was off work on both occasions by reason of anxiety:

    a. In 2014, when he was off work for around 4-5 weeks (no documentation has been available in relation to this absence); and
    b. In 2018, when the Claimant was away from work for 4-5 weeks as a result of anxiety state following a period of restructure [130-133].

29. From 2021, Matt Hourihan was employed as Regional Stores Director for the South Wales and Gloucestershire Region, a region that encompassed the Pontypridd store and had become the Claimant's line manager at that point. In that role, his key responsibilities were for profit and loss accountability for stores in his region as well as customer and colleague (i.e. staff) metrics.

30. The Claimant gave evidence that in March 2022, he had been '*incredibly upset'* to have received an email from Matt Hourihan regarding non-completion of an action plan and that he had told Matt Hourihan that he was '*furious'* to have received it that way. This was a general email that had been sent to all store managers in the region (around seven in total,) after Matt Hourihan had not been satisfied with the improvement in performance having raised previously raised performance concerns at regional meetings. The Tribunal did not find that this was an example of Matt Hourihan '*making up the rules as he goes along*' or '*undermining policy and process'*, as had been contended by the Claimant in his

statement, but rather a reasonable and explicable management action in the face of regional performance issues that was not directed at the Claimant specifically. We did not consider this to be relevant to our findings of fact.

31. The Claimant also gave witness statement evidence that around the same time he had a conversation with Matt Hourihan and that they had discussed the potential removal of one of the managers at the Pontypridd Store and that the conversation had made the Claimant feel '*uncomfortable'*. Again, we accepted Matt Hourihan's live evidence, that such conversation was in the context of the manager significantly underperforming and generating a number of complaints from customers. We did not consider that this demonstrated that Matt Hourihan was a manager that was comfortable in removing staff where no legitimate reason for doing so, as had been suggested by the Claimant. Further, we found that this scenario was wholly unrelated to a member of staff taking time off work for sickness in any event.

32. The Tribunal considered that when giving live evidence, Matt Hourihan did not shy away from accepting that there were discussions and debate, in the context of profit and loss, around sick pay for absent colleagues but we did not find that the evidence supported the contention that Matt Hourihan was someone who had a 'low tolerance for sickness,' as it had been put on cross-examination.

33. The Claimant and Matt Hourihan did have a conversation in the end of year March 2022 review when the Claimant told Matt Hourihan that the 1:1 reviews made him anxious, but we did not accept that the Claimant had told him that he had to manage his mental health very carefully or, even if he had, that this would have put Matt Hourihan on any kind of notice of any underlying mental health issue when said in the context of being anxious about the end of year review.

34. The Claimant had managed the Pontypridd store through Covid pandemic, during what must have been an exceptionally difficult and challenging time for store managers. We also found that there was nothing in the Claimant's day to day behaviour, whether as Store Manager or Labour Lead (i.e. a point of contact should any stores have issues with staffing levels,) over that lengthy Covid period that would indicate to Matt Hourihan that the Claimant was impacted by any poor mental health. We also found that there was nothing in the immediate period leading up to the end of July 2022, when the Claimant and Matt Hourihan had met and spoken at the Pontypridd store, that would have indicated to Matt Hourihan that the Claimant was impacted by any poor mental health.

35. Matt Hourihan had known the Claimant from around 2012, having been a Store Manager himself prior to his appointment as Regional Stores Director. He also worked with the Claimant's wife and the Claimant's father had also worked for him at some point. He was not aware of any indication that the Claimant had any issue with his line management and considered that he had a good positive relationship with the Claimant. His view was that the Claimant was a valued member of the team; that there was 'nothing burdensome about the Claimant', as he put it in live evidence.

36. We accepted that evidence and found that there were no personal issues or specific management concerns regarding the Claimant's performance. The Claimant was a valued Store Manager.

37. Matt Hourihan's sister also worked for Sainsbury's and had covered for the Claimant's absence in 2018. The Claimant has suggested that as a result she would have told Matt Hourihan, and in turn he personally had knowledge, of both the fact and reason for the Claimant's 2018 absence. We did not find this to be the case, accepting Matt Hourihan's evidence that:

    a. he was not at that time the Claimant's line manager; and
    b. his sister worked in a more junior capacity to him and they would not be in a position to discuss the reasons for the non-attendance of a store manager.

38. Matt Hourihan did not know the reasons for that 2018 absence until informed of this by a regional assistant at some point between 26 July 2022 and 3 August 2022.

Confirmation of sickness absence and WhatsApp exchange

39. In May 2022, all store managers were updated on a Sainsbury's restructure taking place in July 2022 that would change the management structure at stores and included the removal from store structure of the equivalent of a Deputy Store Manager. In the lead up to that restructure, the Claimant lost three members of his team in moves to other stores and another to resignation. The restructure went live on 24 July 2022, with the Claimant facing the prospect of launching that new management structure with 2.5 manager heads not filled.

40. By WhatsApp message on the night of 25 July 2022, Matt Hourihan informed the Claimant that a female member of staff at the Claimant's Pontypridd Store had been assaulted earlier that evening by a customer, WhatsApp being the normal communication channel between the two. The Claimant was disappointed that his new store management team had not contacted him personally about this, despite only being with him for a matter of days.

41. At 7.05am the following day, the Claimant called Matt Hourihan to confirm that he would be unable to attend work due to feeling anxious, that he would be contacting his GP that morning and would get back to him later that day. The Claimant made no reference to the cause of his anxiety.

42. The Claimant asserts that he told Mr Hourihan that he needed to shut off from work and that he had already deleted WhatsApp from his personal phone to reduce his levels of anxiety. The Claimant's position is that Matt Hourihan knew that he had deleted WhatsApp, suggesting that Matt Hourihan had been setting him up to look like the Claimant had ignored him when he had sent a WhatsApp message to the Claimant a few days later[2]. Whilst we accepted the Claimant believed he had in fact told Matt Hourihan that morning that he had deleted his WhatsApp, we noted that the Claimant did not remind Matt Hourihan of this when he texted him later on 3 August 2022 [244], rather that text reads as though he is telling him for the first time.

43. Furthermore, we did not consider it likely that Matt Hourihan deliberately contacted the Claimant by WhatsApp to look as if the Claimant had ignored him. Rather, we found that

[2] CWS§24

it was more likely than not that even if the Claimant had mentioned it in that early morning telephone call to Matt Hourihan, that issue would not have been the focus of that conversation and that Matt Hourihan had either not registered the significance of this at the time, or had forgotten.

44. We accepted Matt Hourihan's evidence (evidence that he also gave at the later Fair Treatment appeal meeting [309]), that he only became aware of the Claimant having deleted WhatsApp when the Claimant informed him of this in the text he had sent him on 3 August after receiving Matt Hourihan's letter [244], Hence why he sought to make contact with the Claimant by WhatsApp on 1 August 2022 [247].

45. A second call took place between the two that evening, when the Claimant again called Matt Hourihan and informed him of the GP diagnosis, explaining that the reason was anxiety, and that he had been signed off for 4 weeks as a result. Again, the Claimant gave no reason for the cause of his anxiety.

46. A brief discussion took place and Matt Hourihan commented to the effect that it must be serious if the Claimant had been signed off for 4 weeks, although it is disputed by Matt Hourihan that this was the only matter that was discussed and that there would have been a wider conversation outside that one short sentence, evidence which was unchallenged and which we accepted.

47. Matt Hourihan did tell Karoline Irving, when subsequently meeting her on 21 January 2023 as part of the appeal investigation into Claimant's Fair Treatment complaint that he had not spoken on the telephone to the Claimant that morning [307]. It was suggested on cross-examination that he had been seeking to paint the Claimant in a negative light when he had wrongly informed her that the Claimant hadn't called him to confirm his absence. It was also alleged that some 'distorted' documents had been disclosed relevant to the fact that the Claimant had in fact called Matt Hourihan that morning, comparing the screenshot of Matt Hourihan's phone record [326], compared to the Claimant's record [327], suggesting that Matt Horihan was engaged in '*blatant lies'*.

48. We did not accept either suggestion as credible. Rather, we accepted Matt Hourihan's evidence that being responsible for 4,500-5,000 colleagues or members of staff, the amount of calls he received was excessive and that if there had been a misunderstanding on whether the Claimant had called that morning, it was cleared up quickly and that there was no intent to mislead the subsequent Fair Treatment appeal investigation. We also accepted that Matt Hourihan could not personally provide an explanation why screenshot image was cropped within the bundle as he had provided a full screenshot to the respondents' legal representatives as part of disclosure [347]. That was a reasonable explanation in our view, which we accepted was a likely explanation and we drew no inference from this.

Letter of 3 August 2022

49. At some point between the Claimant commencing his sick leave and 3 August 2022, Matt Hourihan was verbally informed by a regional assistant that the Claimant had been off with anxiety following a previous restructure. He sought to make contact with the Claimant.

50. Matt Hourihan has given evidence that he wanted to check in on the Claimant's well-being and wanted to have an absence review meeting as the Claimant's fit note indicated that he would be off for 4 weeks. The Tribunal concluded that it was likely that he would also have had the Claimant's previous absence in 2018, which had also followed a restructure, at the forefront of his mind following that conversation. He said as much to Karoline Irving when he met with her as part of his Fair Treatment appeal meeting with her [307].

51. Matt Hourihan considered that an ARM was appropriate as the Claimant had indicated that he was going to be absent for around 4 weeks, and it seemed sensible to him to hold the first ARM at the earliest possibility to identify if any adjustments could be put in place to support his return to work.

52. That a first ARM could take place early on in an employee's sickness absence, and on a date within, not after, the first four weeks was not obvious from either the policy or guide as:

    a. The Long Term Ill Health process provided that such a meeting would take place after the first four weeks of absence; and
    b. The Long Term Ill Health Guidance for managers indicated that the first ARM would take place '*as soon as reasonable possible after the absence has elapsed over 4 weeks'* [848].

53. However we accepted the evidence from Matt Hourihan that he had conducted the first ARM for other employees within the first 4 weeks of their sick leave, although this was the earliest in a period of an employee's sickness absence that he had conducted a first ARM. He sought advice from Sainsbury's employee relations team ("ER Team") and they had also agreed that this would be an appropriate way forward.

54. It was also Karoline Irving's conclusion as part of the Claimant's Fair Treatment complaint and her live evidence, that she had concluded that it was reasonable to hold a first ARM with the Claimant earlier than policy and guidance as Sainsbury's would expect such guidance to be adapted to suit the situation and that as the Claimant was off with anxiety it was even more important to meet sooner than 4 weeks [348]. She did not accept when challenged that whilst this might be the case for an informal 'catch-up' that this was not the case for a formal ARM. She did not agree and confirmed that she had experience of holding early formal ARMs in other cases. We accepted that evidence but did find that the written policy and guidance documents did not clearly state that this could arise.

55. On 1 August 2022, Matt Hourihan sent the Claimant a WhatsApp [247] as follows:

    '*Hi Darren,*
    Just checking in to say hello and see how you're doing?
    I'd like to catch up this week to complete and Absence review Meeting with you, ideally in person, Friday afternoon would be good.
    Could sort a mutually convenient & location and non sainsbury's if you'd prefer…'

56. Having deleted WhatsApp from his phone, the Claimant did not receive that message and as a result, Matt Hourihan did not receive a response from the Claimant.

57. Matt Hourihan therefore emailed the Claimant on 3 August 2022, attaching a letter of the same date [136/137], a letter headed 'Temporary Store Cover'. He considered it appropriate to identify store cover on a temporary basis and confirmed that to the Claimant in the opening two paragraphs.

58. He also stated the following:

> *'I sent you a text message (Monday 1st August) to check in on your wellbeing but have not received a reply. As per the Attendance Policy, which requires you to maintain regular/agreed contact with your manager. I am keen that we keep in regular contact, and establish a mutually agreeable pattern of contact, ideally once a week.*
>
> *Also as mentioned in my message, I am keen to complete an absence review meeting with you in order to establish how best to support you, your wellbeing and review our ability to support your return to work in due course. Could you confirm (by return email or text message), your availability and potential location that you would be comfortable for us to meet in person on Monday 8th August.*
>
> *If you should have any questions in relation to the content of this letter, then do not hesitate in contacting me.'*

59. In his claim and in his witness statement[3] the Claimant asserts that the letter contained the 'false accusation' that he had not been in contact with Matt Hourihan.

60. Whilst the letter did reference both the need to keep in contact and did remind the Claimant of the terms of the Attendance Policy, we did not find that the content of the letter could properly labelled as 'false accusation'. Rather, it was just confirmation that Matt Hourihan had sought to make contact and was reminding him of the terms of the Attendance Policy.

61. The letter also incorrectly referred to a 'text' having been sent on 1 August 2022 and not a WhatsApp. We placed no weight on the fact that there was an incorrect reference in the letter to the word 'text'. Rather, we found that this was more likely than not a common error in referencing the exact or specific method of electronic communication as opposed to a deliberate attempt to set the Claimant '*up to look like he had ignored'* as had been claimed, although the Tribunal did conclude that at this time, this was likely to be how the Claimant viewed the communication. He was anxious and likely to view all correspondence in a negative light.

62. This letter made the Claimant 'furious'. He felt insulted that he was being accused of breaching company policy and was upset. He felt that his integrity was being questioned and texted Matt Hourihan as he wanted to 'discuss his false and baseless allegation', words that did not appear in the subsequent text exchange between the two as the Claimant texted Matt Hourihan later that day [244] with the following:

[3] CWS§24

'Hi Matt, I've seen the letter you sent me and wanted to apologise for not replying to the text you sent me on Monday. I have absolutely no idea how I missed a text from you as there is nothing at all on my phone…I'm not sure if you sent it as a text or a WhatsApp but I have deleted WhatsApp in an attempt to be able to switch off. If it was a text, the only thing I can think is that inadvertently deleted it whilst I was deleting historic texts on Monday. Rest assured if I had seen it I would have replied, as I have always done with messages from you. Seeing that letter has clearly upset me but I am happy for you to call me at any time when you are free.'

63. Matt Hourihan responded within a couple of hours, thanking the Claimant for coming back to him and stating that it was clearly not intended to upset, that he was keen to support the Claimant and review the position with him. He referred back to his letter of 3 August 2022 and asked the Claimant where it suited him to meet up the following week.

64. The Claimant responded the next day asking if they could '*pick up a call'* later that day or the following as he would rather not wait until the following week as this was playing heavily on his mind. He asked if Matt Hourihan could '*spare a few minutes*' as he would appreciate it. By text exchange, by 4.00pm that day, they had agreed to meet in Starbucks close to the Claimant's home at 14.00 the following day.

Meeting on 5 August 2022

65. The Claimant gave written statement evidence that he believed that this was a meeting at his request for him to discuss what the Claimant perceived to be the '*false accusation'* regarding the breach of the attendance policy set out in the letter of 3 August 2022[4]. His belief was supported by the fact that:

    a. the letter did not follow the standard template for an invite to an ARM of the kind reflected in subsequent letters to the Claimant, the Claimant as an experienced manager of staff being familiar with the ARM process [148]; and

    b. his interpretation of the exchange of texts between the two arranging the meeting over 3 and 4 August 2022 [293].

66. The Claimant attended that meeting, not in the belief that this was a first ARM, but in the belief that it was a meeting to discuss his concerns and his upset at the 'false allegation', as he has termed it, set out in the letter of 3 August. Indeed, the Claimant's evidence was that he did not know that this was the first ARM until after 12 August 2022, after receipt of the emailed copy of Matt Hourihan's notes of the meeting referring to them being 'captured on ARM document' [138-142].

67. Despite accepting that the Claimant did misunderstand that this was a first ARM meeting, when reading the text exchange, the Tribunal did not consider the Claimant's interpretation of the text exchange, or in turn purpose of that meeting, to be a reasonable one. On a reasonable interpretation of the letter and subsequent text exchange, the meeting was

[4] CWS§28

intended, and communicated to be, the first ARM to establish how Matt Hourihan could support the Claimant and his wellbeing and review Sainsbury's ability to support him return to work in due course. We accepted Matt Hourihan's evidence that the purpose for having an early ARM was not a question of trust or that the Claimant's absence was a nuisance, as had been suggested, but because he was not prepared to 'do nothing' when he felt that he could help the Claimant early on.

68. The manner of the discussion at that meeting, as well as the detail of what was discussed, is disputed and was the subject of much of the cross-examination of both the Claimant and Matt Hourihan. In many ways, we considered that the Claimant's perspective of that meeting shaped how he felt about how he was dealt with by the respondents subsequently and, in the Tribunal's view, feeds into the view held by the Claimant that there was an agenda to remove him from employment, a view which the Tribunal found was not reasonably held.

69. Neither took detailed notes during the meeting but the bundle contained notes of that meeting from both Matt Hourihan [140] and the Claimant [173-176]:

    a. Matt Hourihan's notes were written by him immediately after the meeting when he returned to the local store nearby. He had been unable to complete during the meeting as the pdf template used could not be written over;

    b. The Claimant had been advised by his father to prepare his own notes of the meeting which he also prepared after the meeting. Those notes were very detailed and amounted to four pages of typed notes [173-176], part of an eventual 14-page set of notes relating to the Claimant's ARM meetings with Matt Hourihan [173-186].

70. The Claimant does not dispute Matt Hourihan's notes of the discussion. The Claimant's position is that they just do not reflect the totality of the discussion that day between the two and invites us to accept his notes as the more accurate as following the meeting. Although all undated, these notes appear to cease when Matt Hourihan ceased being responsible for managing the Claimant's sickness [172-186]. The Claimant did not contemporaneously provide a copy to the respondents nor, on receipt of the notes from Matt Hourihan, seek to clarify or expand at that time on what he believed he had discussed.

71. Some focus of the cross-examination of Matt Hourihan was on the fact that particular words in his record of the meeting, were in quotation marks. The Tribunal placed little weight on that, accepting Matt Hourihan's explanation that this was simply to denote direct words used at that meeting and not because he did not believe that the Claimant was genuinely unwell as has been suggested in this hearing.

72. Whilst at that point, Matt Hourihan was aware that the Claimant had been off with anxiety following a restructuring four years previously, this did not place him into a position of either knowing the Claimant was disabled at this point, or that it could be said that he could reasonably have been expected to know that the Claimant was disabled. Such sickness absence did not put either respondent on enquiry of disability either, taking into account the Claimant's lack of sickness absence in the intervening years and general behaviour in the workplace. The Tribunal did not find that even accounting for the 2014 absence, it

could not be said that either respondent ought to know that the Claimant was disabled. In addition, we found that Matt Hourihan did not have concerns or believe that the Claimant might be disabled at that point either.

73. Further, we did not find that it was Matt Hourihan's intent to commence a process to remove the Claimant, or that he saw the Claimant's absence as a problem that created additional work for him. The Claimant was a valued and senior store manager and it was more likely than not that Matt Hourihan approached and conducted that meeting with intent to be supportive to the Claimant and explore options that would assist the Claimant, albeit in the context of a second bout of anxiety following restructure, to return to work. If the Claimant had left that meeting concluding that he was fighting for his career and if the meeting had increased his anxiety, we found that this was objectively, not a reasonable conclusion to have reached.

74. We did not consider it necessary to reject the Claimant's evidence, in whole or in part, by regarding him as unreliable or as not telling the truth, or that the notes were 'fabricated'. Rather, we found that in some parts, the Claimant's notes reflect what the Claimant perceived was being said by Matt Hourihan, rather than what was actually said by him. Scrutiny of the Claimant's note indicated that whilst detailed, it included the Claimant's subjective thought and reflective opinion on matters discussed. For example, in response to the Claimant looking for clarity as to what Matt Hourihan meant by telling the Claimant that he could support him, when Matt Hourihan had suggested that he could look at different roles for the Claimant, the Claimant had noted '*which I took to mean me accepting a demotion to a lower level or grade*' [175].

75. The Claimant did not write detailed notes during the meeting. Had he done so, these would have been provided to the respondents. They were not. Whilst we accepted that the notes were written a short time after the meeting, we did not consider it credible that the level of detail that was included was likely to have come from recall. We were not persuaded and also found it unlikely that the Claimant's detailed notes would have been a wholly accurate interpretation of what exactly was said, being based on his recall after the meeting.

76. The Tribunal concluded that there was little dispute between the parties on generally what was discussed. Rather, it seemed to the Tribunal that there was a real divide between how the Claimant interpreted the discussion, an interpretation which the Tribunal found had not been intended by Matt Hourihan. Taking into account our findings in relation to the lead up to the meeting, including that the Claimant was not only in an anxiety state but also in a negative emotional state, being furious, and our findings in relation to the notes, where there was a dispute as to what was said, we preferred the evidence of Matt Hourihan.

77. Matt Hourihan was late to the meeting, having got stuck in traffic and having travelled from Cheltenham. The Claimant met him at a Starbucks coffee shop and took a table at the back of the coffee shop and away from other customers. We accepted Matt Hourihan's evidence that he sought to hold the meeting in a place that was neutral and not in the Sainsbury's store that was close by. We also noted that the Attendance Policy suggested that such meetings could take place in such venues by agreement. This was only the second time that the Claimant had been out of his home since his period of sickness absence.

5 August meeting - Potential triggers

78. The Claimant claims that Matt Hourihan focussed on the 'trigger' of the Claimant's anxiety and told him what he believed his trigger to be. Within his statement evidence, the Claimant asserts that as Matt Hourihan had asked about restructuring being a potential trigger, '*He had concluded I had to go, I had concluded that he was going to remove me at all costs..'.*

79. It is accepted that the Claimant was asked about potential triggers for his absence but we did not find that there was any particular focus or emphasis on the trigger.

80. Rather, Matt Hourihan pointed out that the Claimant's absence had again followed a restructure and queried if there was a link between the absence and the structural change, a question the tribunal considered reasonable in the context of the Claimant's previous absence. Indeed the Claimant's own evidence and notes of the meeting refer to Matt Hourihan '*asked me if I felt there was a link and I said that it was a possibility*' [173]. The Claimant confirmed that he was unaware of the trigger for his anxiety, and that he had put in place a healthier physical lifestyle and had support from family.

81. We further accepted Matt Hourihan's evidence that as managers, they should seek to find the cause of absence and that he was concerned to explore if there was a link for the Claimant's most reason absence to clarify if there were any barriers that needed to be removed or what support could be put in place to facilitate the Claimant's return to work and prevent any further instances. We did not find that this was an unreasonable approach in itself taking into account the timing of the Claimant's absence and the obvious concern that the absence was work-related. Indeed we accepted Matt Hourihan's evidence that it was necessary and appropriate to ask such a question in these circumstances.

82. The Tribunal did not find it was a reasonable conclusion for the Claimant to have reached and we did not find that asking the Claimant if there was a link, amounted to Matt Hourihan telling the Claimant what he believed the trigger to be or is evidence that he had already decided what was the trigger for the Claimant's anxiety.

5 August meeting - 'large changes' to role and 'resilience'

83. It is accepted that Matt Hourihan informed the Claimant that significant changes were going to take place and that the two did have a conversation about resilience and ability, but his evidence was that this was raised to identify if there was any support that could be put in place to support the Claimant.

84. Matt Hourihan also gave live evidence in response to cross-examination that he did not raise resilience and ability of the Claimant to continue his role in the context of the Claimant's disability, as he did not believe or know that the Claimant had a disability.

85. We accepted that evidence and did not find that Matt Hourihan told the Claimant that he was concerned about his resilience to cope with such changes as a result of his disability.

5 August meeting - Alternative role/demotion

86. Matt Hourihan gave evidence that he did not question the Claimant's ability to perform his role at S6 level and he did not suggest demotion to the Claimant. He denied that at any point did they discuss moving the Claimant to manage a 'small supermarket', but that a range of adjustments were suggested and that the Claimant asked for support with 'time to recover' and did not want to consider any of that at that time.

87. His evidence was that he spoke of the number of options that were available to him as Regional Stores Director, raising that a move to a less complicated or smaller store than Pontypridd was an option, in the context of a supportive conversation that did not include him referencing a 'small supermarket', which was a reference to a 5S and in turn a store run by a leader at a less senior grade, or demotion.

88. We accepted his evidence that he only suggested alternative roles at some stage could be considered as an adjustment, as the Claimant had expressed concerns regarding loss of support as a result of the restructure and that it was practical to discuss alternatives at that stage taking into account the Claimant was a valued Store Manager, there were no concerns regarding his ability, he had only been off for a limited period and he was looking at ways to support the Claimant's return.

89. Indeed, we found this evidence accorded with the Claimant's own notes which stated that Matt Hourihan had asked him on '3 *separate occasions that he could support me in ways that [he] wouldn't be able to do [for]… colleagues as I am in a Senor Leadership position'.* We also found that it was the Claimant that had, unreasonably, taken alternatives suggested to mean him accepting a demotion.

5 August meeting - Support as long as not off for longer than 4 weeks / 4 weeks was a long time

90. Although it is not disputed that the length of the Claimant's absence of 4 weeks was referred to, it is disputed that Matt Hourihan told the Claimant that he would only support him as long as he was not off work for longer than 4 weeks. We accepted his evidence on this point as likely despite the Claimant's note and because we found that:

    a. Matt Hourihan did continue to support the Claimant for longer than 4 weeks; and
    b. We accepted Matt Hourihan's evidence that the length of the Claimant's absence was not an issue for him; and
    c. the Claimant had indicated that he was hopeful of a return within 4 weeks.

91. We found that whilst Matt Hourihan did speak to the Claimant about the length of his sickness absence, he did not tell the Claimant that he would support him as long he was not off for longer than four weeks.

92. At the end of that meeting, it was agreed that weekly communication was appropriate and that Matt Hourihan would confirm times to the Claimant in advance.

93. In addition to completing the ARM note, following the meeting Matt Hourihan also completed a Fit Note Support document, which included a range of suggested adjustments that could be put in place to enable the Claimant to return to work [139]. He also completed

a Work Impact Checklist [245]. A copy of this document was not sent to the Claimant although we did not find that this document was 'suspect' or 'forged' as has been suggested – it contained little more than a repeat of matters discussed and as the Claimant was not in a position to return to work at that time did not amount to a risk assessment. We drew no adverse inference from the fact that the Claimant did not receive a copy of this risk assessment.

Discussion 12 August 2022

94. At some point after 5 August 2022 meeting, Matt Hourihan received a copy of the Claimant's return to work documentation in relation to the 2018 absence [132]. He had not seen this documentation prior to the 5 August 2022 meeting. That note indicated that back in 2018, the Claimant had felt overwhelmed following significant change to the business that led to anxiety, that he had been placed on medication at that time but had indicated that he did not need any support to undertake his role.

95. Matt Hourihan called the Claimant on 12 August 2022. He recorded his discussion by way of email [142]. In that call Matt Hourihan recorded how the Claimant described how he had 'gone backwards' and that the conversation on 5 August 2022 had caused his mind to wander about potential hurdles he could face in the future up to and including the loss of his job and that his GP had increased his dosage of medication [142].

96. It was agreed that there would be reduced contact and the Claimant would have a full 10 days of no-contact. The Claimant was informed that another Head of Team would be available as impartial support for him and their contact details were provided, contact that the Claimant did not at any time make. The Claimant requested a copy of the notes from the meeting from 5 August 2022.

97. These were provided together with the GP Fit note document which the Claimant was asked to give to his GP, by way of email on the same day [138]. This document set out some adjustments that could be made for the Claimant to enable him to return to work including an alternative role, an alternative store location, less responsibility, a phased return to work. The form indicated that the respondents were '*open to reviewing any adjustments that may support Darren's return.'* In relation to potential adjustments, the GP was asked to *'Please advise'*. The Claimant did not provide such a document to his GP.

98. Matt Hourihan confirmed that he would be in touch next on 22 August 2022 following the Claimant's GP appointment [138].

ARM2 – 4 October 2022

99. It appears that the Claimant kept Matt Hourihan updated, informing him that his symptoms were not improving and further fit notes were provided for a further 8 weeks to 22 October 2022 [145/146]. A second ARM was arranged for 4 October 2022, around 10 weeks after the first ARM. The Claimant was sent a letter of invite [148].

100. At that meeting, it was agreed that Matt Hourihan would refer the Claimant to occupational health and a copy of Matt Hourihan's notes were sent to the Claimant [155].

Occupational Health Referral

101. On 6 October 2022, the Claimant was sent a copy of the additional questions that Matt Hourihan intended to ask the occupational health adviser, sent to him in an effort to reduce the Claimant's anxiety during the appointment and allow the Claimant to prepare any responses in advance. Matt Hourihan said as much in the email to the Claimant of 6 October 2022 [151].

102. The Claimant complains that the content of those questions as 'inappropriate' and referenced his performance at work despite the Claimant never having been made aware of any performance issues.

103. The first four questions related to what adjustments could be made to enable the Claimant's immediate return to work and the fifth related to possible triggers for absence in order to support the Claimant. During the hearing, it was clarified that the Claimant did not complain of questions 1-5. His complaint of harassment related to the opening preamble and question 6.

104. The opening preamble was as follows:

> *'Given the nature of Darren's senior role within the organisation and the high stress, complex, and fast paced environment that he works in, I have a number of questions I would like to build into the assessment.'*

105. Question 6 was as follows:

> '*Given the nature and profile of his role, the continually increasing complexity of his role and lack of supporting on site senior leadership (ie, no Deputy Manager in structure, and a leaner management team), has Darren reflected on his suitability/capability and ability to fulfil the role of Store Manager'*

106. Having read the questions, the Tribunal found that neither the preamble nor question 6 made any reference to the Claimant's performance at work. The preamble was a statement setting out the context of the Claimant's role and was not factually incorrect. Question 6 was a question regarding the Claimant's perspective and could not in our view on a reasonable interpretation be a reference to the Claimant's performance in his role.

107. Matt Hourihan was also cross-examined on the additional questions Fiona Hide, ER Case manager subsequently raised with OH following receipt of the OH report in October [221]. We did not find from those questions that Matt Hourihan did not like the content of the OH Report or tried to obtain support that the Claimant was not capable of returning to his position from those additional questions and drew no any adverse inferences from this.

Third ARM – 21 October 2022

108. The Claimant was sent an invite to a third ARM for 21 October 2022 [157]. The notes reflect that the Claimant had obtained a further fit note for a further 4 weeks and that his GP did not consider that a rehabilitated return to his old role, or other adjustments, including redeployment, were suitable at that point [160]. It was agreed that there would be a follow up meeting following the Claimant's occupational health referral.

109. It is now alleged that at that meeting Matt Hourihan told the Claimant that '*this would be a totally different conversation'* if he was to be off work for a number of months. The Claimant had originally claimed that such a comment had taken place on 5 August 2022 and his general evidence regarding that 21 October 2022 discussion[5] was that Matt Hourihan had been '*threatening'* and comments had made him feel '*humiliated'.*

110. Matt Hourihan was cross-examined regarding this meeting. His evidence was that such a comment had been taken out of context, if it was said at all, as what was generally being discussed was how they could support the Claimant and that he was looking for clarification from the Claimant's GP as to what was required to support the Claimant and that adjustments would change or differ depending on the circumstances.

111. We accepted Matt Hourihan's evidence that any comments were made in the context of assessing how best to assist the Claimant to return and how as the absence progressed, the 'avenues' as he put it, that opened would change.

First OH Report 25 October 2022

112. The first OH appointment took place on 25 October 2022 and the report was received by the respondents shortly after the assessment [165]. The OH adviser did not consider that the Claimant was fit to return to work and that absence was likely to continue until there was an improvement which hopefully would be in the following 6-8 weeks i.e. around 6-20 December 2022.

113. The OH adviser confirmed that it was their opinion that the Claimant had not developed a serious mental health problem but was displaying a psychological response to a combination of factors. They recommended regular meetings and communication. They further advised that the condition appeared to related to '*the current situation at work'* and that a stress risk assessment be completed to clearly identify the sources of perceived stress at work and that the Claimant would benefit from a Wellness Action Plan as recommended by MIND.

114. They further opined that the medical condition appeared to cause a substantial impairment of the Claimant's day to day activities and was likely to persist at that point beyond 12 months and in turn the disability provisions of the Equality Act 2010 would apply.

115. It is conceded by the respondents, that at the point of receipt of that report, they were on notice that the Claimant was a disabled person. The Tribunal also found that this was the earliest date that it could be said that either respondent knew or ought to have known

[5] CWS at §76-80

that the Claimant was a disabled person, having made our earlier findings that knowledge of disability was not held by either respondent in August 2022.

116. OH recommended that there should be regular communication to monitor condition and progress and when fit to return to work, the respondents should consider a phased return to work and consider reasonable adjustments and undertake a stress risk assessment. At this point no specific further discussion date was agreed. Matt Hourihan reflected that in hindsight, he could have arranged a further date at that point but it had been agreed that contact would be clearly set out and he did not wish to go back on that and no proactive steps were taken by him at this stage to meet with the Claimant.

117. We drew no adverse inference from this and indeed found that this lack of action was not reflective of a senior manager intent on removing the Claimant from employment.

Temporary Store Cover

118. On 28 October 2022, the Claimant spoke to Matt Hourihan and confirmed that he would be off for a further 8 weeks. On the same date, Matt Hourihan wrote to the Claimant confirming that the Pontypridd store would be covered by a member of the regional team, Beth Walker Store Manager for Tenby, on a temporary basis until further notice [170]. Matt Hourihan informed Martin Bennett, who was covering the Pontypridd store as well as his own store, that he would no longer be covering and would need to do a handover with Beth Walker.

119. As a result, Martin Bennett circulated an internal announcement on Yammer, Sainsbury's recognised message board, that Beth Walker would be the Store manager '*in Pontypridd over the next eight weeks'* and that her first day would be Tuesday 8 November 2022. Matt Hourihan did not instruct him to do so but saw nothing wrong with the post, liking it as he did with every post unless a negative one.

120. Whilst the Claimant gave evidence that he was informed by a colleague that this had happened, he gave no evidence as to the effect such a post had on him.

International Men's Day – 19 November 2022

121. On 18 November 2022 the Claimant and Matt Hourihan had a brief conversation. It was a 'catch-up' only, a more formal meeting yet to be diarised for week commencing 27 November [261].

122. On the following day, on 19 November 2022, Matt Hourihan posted a message on the Yammer noticeboard [187] and a similar post on his LinkedIn [189] 'Celebrating International Men's Day', having celebrated International Women's Day in March in a similar fashion.

123. The post referenced that Sainsbury's activities were focussed specifically around men's mental health. It included the following:

'*I'd like to take a moment to celebrate the male leaders in my team and say thank you for all that you do to help make our stores across South Wales, Gloucestershire and Worcester, places where colleagues love to work and customers love to shop. All of you do this whilst leading busy lives outside of work too, dealing with health, family and personal issues in the same way that everyone else does, yet you all show up for work each day, put on a name badge and provide support, guidance and leadership to the thousands of colleagues that work on our region.*
Thank you & Happy International Men's Day everyone!
Matt
#internationalmensday2022 #sainsburys

124. In both the Yammer and LinkedIn post, he included photos of each of the male store managers in his region and in the LinkedIn post, named and 'tagged' each of them such that this would then link to the LinkedIn pages of those store managers. He did not name or tag the Claimant.

125. The Claimant gave evidence that his wife had told him about the post and gave statement evidence that this post caused him '*untold further damage'* to his health along with the angst it caused him having to field questions from friends, colleague and LinkedIn connections asking him if he had left Sainsbury's. He gave statement evidence that he felt excluded, humiliated and violated by the post and that he had felt he had been excluded because he was absent.

126. Matt Hourihan was questioned on his actions in relation to these posts. His evidence was that as the Claimant had deleted WhatsApp and had asked to be not contacted and be left alone to recover, he felt that if he had tagged the Claimant on LinkedIn, then this would have meant that the Claimant would have received hundreds of alerts, which he considered was the last thing that the Claimant would have wanted. He did not have a photograph of the Claimant and did not consider it appropriate to ask the Claimant for one. He took advice from ER support on the appropriate thing to do, with options considered being leave the Claimant alone or to ask for a photograph. He chose the former.

127. We accepted that Matt Hourihan considered what to do and had proactively reached the conclusion that, on balance, given that the Claimant had been off work for 16 weeks, he should not include the Claimant.

Fair Treatment Complaint and ongoing ARM

128. On 21 November 2022, a further fit note to 23 December 2022 was provided and on 22 November 2022, Matt Hourihan wrote to the Claimant to invite him to a fourth ARM on 30 November 2022 [192]. That meeting did not take place with Matt Hourihan as on 22 November 2022, the Claimant submitted a complaint against him [195 and 199].

129. As a result of the Claimant's complaint, on 25 November 2022, the Claimant was invited to attend the Fourth ARM with Joanne Southworth, Head of Talent, who from that point on took over managing the Claimant's sickness absence from Matt Hourihan. The notes of that meeting reflect that the Claimant was still not fit for work and it was agreed

that they would catch up again after the Claimant had his Fair Treatment meeting on 14 December 2022 [222]..

130. In his written complaint, the Claimant had complained of harassment and discrimination from June 2022 to the current time. It was lengthy and identified 48 discrete concerns with the overview complaining of the conduct of Matt Hourihan including:
    a. The conduct of an ARM 11 days into sickness absence
    b. The questions posed to occupational health
    c. The failure to consider adjustments.

131. The Claimant was informed that an independent manager would investigate [209]. The investigation was allocated by Matt Hourihan's line manager, Vickie Gooch to Rupa Grahame, a manager who was not senior to Matt Hourihan. Whilst the Tribunal accepted that this was not in accordance with the written policy, we did not draw inferences or make findings that this investigation or her conclusions was undertaken in an attempt to destroy the Claimant's integrity or to protect Matt Hourihan.

132. Her investigation over the following month including meeting with Matt Hourihan on 30 November [224] and 8 December 2022 [234] and the Claimant on 2 December 2022 [229]. On 15 December 2022, she provided the Claimant with her conclusions in relation to the specific complaints that the Claimant had raised dating back to a June regional meeting, before the commencement of the Claimant's sickness absence [262]. Of the 48 complaints raised by the Claimant, she upheld one relating to the LinkedIn post, in which she concluded that the post did not breach Sainsbury's Social Media Policy and any impact on the Claimant had been unintended although she partially upheld the Claimant's complaint as a result. She confirmed that Matt Hourihan had taken down the posts regarding IMD.

133. On 21 December 2022 the Claimant presented a further fit note for one month indicating that he was not fit for work [273].

134. On 23 December 2022, the Claimant indicated that he wished to appeal that decision [279]. Karoline Irving was appointed to consider the Claimant's appeal meeting and the Claimant submitting a more detailed appeal document on 6 and 11 January 2023 [284/291/672]. She met with Rupa Grahame and Matt Hourihan as part of her investigation and read relevant documentation including the original Fair Treatment outcome from Rupe Grahame and ARM notes as well as the occupational health report and text and WhatsApp exchanges.

135. Further ARM meetings took place in the meantime with Joanne Southworth on 30 December 2022 and 13 January 2023 [299] when the Claimant indicated again that his GP had advised he was still unfit for work [329].

136. On 23 January 2023, Karoline Irving met with the Claimant to discuss his appeal [313].

137. On 25 January 2023, the Claimant was advised by Avivia that his claim for incapacity from the Sainsbury's Group Income Protection Scheme had been declined them [330/331].

138. On 27 January 2023, a further ARM took place with Joanne Southworth in which the Claimant again confirmed that he was not fit for work on GP advice and that rehabilitation into his role as Store Manager would arise when he was fit to return in line with OH advice. In relation to adjustments, it was noted that as his Fair Treatment appeal was in progress, that he felt that resolving that would support his return to work. Next steps were to be agreed once that had been concluded [368].

139. In terms of that Fair Treatment appeal, a meeting was arranged for 30 January 2023 when Karoline Irving met the Claimant to discuss her findings and inform him of her decision on his Claimant's appeal, findings which were confirmed in writing [344/346]. In particular, she concluded that it was reasonable that an ARM was held earlier than guidance of 4 weeks. In relation to the IMD LinkedIn and Yammer posts, she confirmed that she agreed with the original outcome.

140. On 14 February 2023, the Claimant contacted ACAS as part of early conciliation [9] and a further ARM took place on 24 February 2023 [380] when again the Claimant confirmed that his GP advised that he was not fit to return to work.

Second Occupational Health Report 14 March 2023

141. A second OH health referral was made and a report obtained [396]. That confirmed that the Claimant was not fit to return in any capacity at that time due to his '*affected psychological resilience and perceived stressors at work that have caused this*.' Despite noting that 14 May 2023 was an 'Estimated Return To Work Date', they further indicated that they were unable to provide the First Respondent with a timescale for the Claimant's return to work and recommended that a meeting was held to discuss work issues and discuss a way forward incorporating a risk assessment. It was noted that the Claimant perceived '*work related stress due to a fracture within the team dynamics and a lack of support from management*.'

142. The Claimant was asked by Joanne Southworth to meet to discuss the report and complete a stress risk assessment, or Work Impact Checklist/WIC as the First Respondent referred to it [403]. The Claimant was unhappy, 'absolutely infuriated' as he put it that this would be an ARM combined with a review of the OH report and that he had been asked to complete a WIC.

143. Nevertheless the two did meet, the Claimant having already prepared a WIC [421]. This was updated, at a meeting that did take place between the two on 27 March 2023, by both the Claimant and with Joanne Southworth's comments in bold [434].

144. The comments on that WIC, from both the Claimant and Joanne Southworth, reflect the Claimant's negative view of the respondents at that time; that, in summary, the Claimant felt that Matt Hourihan had not supported him in building his resilience and had 'meddled' in the Claimant's case, undermining Sainsbury's policies to 'facilitate his own agenda', that he had been lied to and discriminated against by Matt Hourihan, who had he considered committed gross misconduct on numerous occasions. In terms of an agreed

action plan, he referred to these tribunal proceedings and referenced that he had contacted ACAS as part of the early conciliation process.

145. Joanne Southworth took the view that it was not appropriate to continue to discuss the Claimant's grievances when these had already been investigated and concluded as part of the Fair Treatment process and was of the view that the Claimant's absence would continue until he received desired vindication through this legal process. She concluded that the Claimant's return to work hinged on Matt Hourihan no longer being his line manager, but as this required Matt Hourihan to move regions and given that the Fair Treatment investigation had not identified concerns regarding Matt Hourihan's conduct, this did not seem proportionate to her.

146. On the following day, 28 March 2023, ACAS Early conciliation ended and an EC Certificate was issued [9].

147. Further ARMs took place on 3 April 2023 [432] and 3 May 2023 [448] when the Claimant was still reporting as not fit to return to work in any capacity and no rehabilitation or further adjustments were discussed as a result. At that latter ARM, the Claimant was informed that as no likely return to work date had been identified, there would be a Final Absence Review Meeting, or FARM, in accordance with Sainsbury's Long Term Ill Health Policy.

148. On 24 April 2023, these proceedings were filed at the Employment Tribunal.

FARM - Dismissal Meeting

149. On 26 May 2023, Hayley Wlson, Director of Logistics, wrote to the Claimant inviting him to a FARM on 14 June 2023 to discuss his absence and ability to continue his employment [582]. We found that as a senior manager, a Store Manager himself, he would have known that the possible outcome of that meeting was his dismissal.

150. The Claimant was not accompanied and notes of that meeting were included in the Bundle [597] which we accepted were an accurate summary of the matters discussed. Prior to the meeting, a Capability Dismissal on Health Grounds Checklist had been considered by her and completed. She was unable to recall if completed by her or HR support [450].

151. At that meeting, the OH reports were discussed. The Claimant confirmed on a number of occasions that he still felt unable to return to work and could not indicate when he would feel able to return, being guided by his GP, his own views and family.

152. Over the course of the meeting, adjustments to enable the Claimant to return were discussed including a move to an alternative store, role and shift patterns, a return on a very limited phased return of an hour a day or week as well as working from home were discussed. The Claimant indicated that there were no other regions, within a commute distance, that he could work at.

153. Hayley Wilson was challenged that it was clear that the Claimant was open to redeployment at that meeting. She denied that this was the case giving live evidence that at that meeting the Claimant had repeated opportunity to confirm when he could return to work and he had not been able to and had been inconsistent in his response.

154. From the Tribunal's own review of the notes, we found that whilst the Claimant did from time to time did appear to indicate that he could consider looking at other roles, including a move into a non-operational role, when reading the notes in totality we found that overall at that meeting, the Claimant was indicating that he was 'too far away' from considering any return to work in any capacity, even working from home for one hour a week in a different role, and that October, at the earliest, was he indicating a possible return date in any capacity, a date that was linked to the date that this final hearing was originally listed.

155. After conducting the FARM, that included adjournments for the Claimant to compose himself and consider his position, and for Hayley Wilson to consider her decision, the Claimant was informed that she had decided to terminate his employment.

156. We found that this decision was reached after she had considered not only the discussions she had with the Claimant at that meeting but also after she had considered the length of the Claimant's absence, the content of the occupational health reports and concluded that the recommendations in the reports had been followed but that the Claimant still felt unable to return to work. We also accepted her evidence that she had been mindful of the Claimant's long service and balanced that with the significant number of ARMs that had been conducted.

157. We did not find that there was no reference to the Claimant's length of service in the dismissal outcome, was reflective of a decision that was predetermined. Indeed, we did not consider that there was any evidence that would persuade us to find that the outcome was one that was pre-determined.

158. Hayley Wilson confirmed her decision in her outcome letter sent to the Claimant on 21 June 2023 [588/595] confirming that she was of the view that further occupational health report was not needed, there was nothing to suggest that the Claimant's attendance would improve in the foreseeable future. Although not discussed with the Claimant, she also concluded that:

a. Ill Health Retirement as the eligibility criteria had not been met, the OH report giving no indication that the Claimant would not ever be in a position to return to work; or
b. Medical dismissal payment – again eligibility criteria had not been met as there was no indication in the OH report that the Claimant was not fit to return to any role at Sainsbury's.

Dismissal Appeal

159. On 26 June 2023, the Claimant appealed that outcome [618]. He claimed that the action at the dismissal meeting constituted unfair dismissal and complained, in summary:

a. about the conduct of the meeting and the accuracy of the notes taken, as well as length of time that it took to receive the outcome letter;
b. of the time that it took Hayley Wilson to reach her decision;
c. that this was a pre-determined decision;
d. that there had been no attempt to discuss reasonable adjustments, including a lack of exploration of alternative roles;
e. that the WIC recommended by OH had not been completed by Sainsbury's and there had been a failure to complete a meaningful WIC;
f. Ill health Retirement had not been discussed with him.

160. Kerry Johnson, Regional Stores Director, for the Kent region was asked to conduct that appeal and invited the Claimant to an appeal meeting on 21 July 2023 [627]. He was informed of his right to be accompanied and supporting documents were attached including the notes from the FARM and outcome letter. Due to unforeseen difficult family issues, Kerry Johnson had to reschedule that meeting. The Claimant was understandably upset. The meeting was rescheduled to 4 August 2023, a date agreed to by the Claimant.

161. In advance of the meeting, she considered the relevant documents including the dismissal documents, ARMs and OH reports as well as the WIC that had been completed in March 2023 with the Claimant.

162. The Claimant attended the appeal hearing unaccompanied and notes of the appeal meeting were provided in the Bundle which again we accepted as an accurate summary of the matters discussed [641]. She considered and discussed the separate points of appeal with the Claimant.

163. On 9 August 2023, Kerry Johnson wrote to the Claimant confirming that the outcome of his appeal was that she had decided to uphold his appeal [652]. The Tribunal found that the rationale for her decision was set out in her decision-making summary [636].

Respondent Submissions

164. Oral submissions only were provided by both counsel, which we deal with in summary

165. Mr Fireman commented adversely on the reliability of the Claimant's evidence, that he was unreasonable and often inconsistent, post rationalising that he has been 'wronged', giving examples of altering which occupational health questions he held concerns, claiming he didn't expect to be dismissed whilst contending the dismissal was pre-determined and how the complaint regarding being 'demoted' had altered.

166. In terms of time, it was accepted that the unfair dismissal and the act in relation to the IMD post were in time. In respect of the previous acts of discrimination relied on, we were reminded of **Bexley Community Centre (t/a Leisure Link) v Robertson** [2003] EWCA Civ 576 and asked to conclude that there was no course of conduct and no just and equitable extension. In terms of knowledge, the Tribunal was asked to find that there was no knowledge, either actual or that it could be said that the respondents ought to know of disability, until receipt of the OH report in October.

167. In relation to the false statement that the Claimant had not replied to a text message and breached the Absence Policy, the Tribunal was asked to prefer Matt Hourihan's evidence but, even on the Claimant's case, Matt Hourihan did not know that the Claimant was disabled and there was no link to disability. In relation to conducting the ARM after 11 days, it was argued that the treatment was not because of the absence, but because of the restructure; the Claimant had to demonstrate unfavourable treatment, that context was important and the Claimant had struggled to pinpoint disadvantage. In any event it was factually untrue that it was to speed up the ARM process.

168. In relation to what had been said at the meeting of 5 August 2022 (and the comments on 21 October 2022,) the Tribunal was asked to prefer the evidence of Matt Hourihan and that the factual case had not been made out. In relation to claims of direct discrimination, that such a discussion would, in any event, have taken place regardless of disability and that it was not less favourable treatment. In relation to the s.15 EqA 2010 claims, it was argued that any comments arose out of the restructure and not the Claimant's absence, that it was not reasonable for the Claimant to consider it unfavourable treatment in any event and that there was no knowledge of disability. In relation to the s.26 EqA 2010 claims, it was argued that any comments were not related to disability, that the purpose was not to create the relevant statutory environment for the Claimant and it was not reasonable for it to have had that effect. In relation to the comments made 21 October 2022, again it was argued that the factual case was not made out but that not unfavourable treatment in any event and not related to disability and that it was not reasonable for the statutory effect to have been created.

169. In relation to the announcement on 29 October 2022, we were invited to find that there was no evidence that the Second Respondent circulated the announcement, that the post did not mention the Claimant and that it was in any event proportionate to tell people that cover would be provided and in relation to the IMD post, we were asked to find that this was not unreasonable treatment in context of Claimant wanting no contact; that any offence taken by the Claimant was not reasonable.

170. Finally, in relation to the unfair dismissal claim, that the grievance process was not undertaken by a higher grade did not render the dismissal unfair and had been looked at thoroughly. We were reminded that the OH report in March confirmed that the Claimant was not fit in any capacity and that after 10 months of sickness absence and 9 ARMs, the reality was that the Claimant was committed to these tribunal proceedings and would not countenance a return to work. We were invited to accept the evidence from both Hayley Wilson and Johnson that the Claimant could not commit to any return to work and that IHR would have been futile when the Claimant did not qualify and that dismissal was in the range of reasonable responses.

Claimant's submissions

171. Ms Johns, counsel for the Claimant, also dealt with credibility and, as the Claimant took detailed contemporary notes, these were more likely to provide an accurate account. It was argued that both respondents knew or could reasonably be expected to know that the Claimant was a disabled person at the material times from 3 August 2022 as a result

of the second absence in 2018, that they were aware that the Claimant was taking Sertraline for his anxiety and that it could be said that the anxiety was likely to recur. The Tribunal is invited to find that it was not credible that Matt Hourihan's sister did not speak to him about the reason for the Claimant's absence and that the Claimant had told him in March 2022 that he had to handle his mental health carefully.

172. In relation to the 3 August 2022 letter, it was a clear implication that when reading the letter the Claimant had breached the Absence Policy and it was reasonable for the Claimant to believe that there was such an allegation, an allegation that was unfair as he had deleted WhatsApp and reasonable for him to view the letter as offensive harassment. It was related to disability as sent at a time of absence for anxiety and as the purpose of the letter was to discuss absence, disability formed a direct backdrop. We were invited to find that Matt Hourihan did know that the Claimant had switched off his WhatsApp and that there was a clear link forming in the mind of Matt Hourihan between structural change and the Claimant's absence.

173. In relation to the timing of the first ARM, we were reminded of the terms of the Long Term Ill Health Policy and that the respondents were putting a 'spin' on the wording which did not exist. The meeting was clearly unfavourable and the respondent had sought to twist the content and tenor of the meeting, that this was not a supportive meeting or a friendly discussion but an initiation of a process to remove the Claimant and had the real potential for exacerbating the Claimant's anxiety. It was unfavourable treatment as the Second Respondent saw the Claimant's disability-related absence as a problem and created additional work for him. It was accepted that the respondents had a legitimate aim in holding the ARM but treatment was not proportionate.

174. In relation to the meeting on 5 August 2022, we were invited to accept the Claimant's factual interpretation of the meeting and in terms of direct discrimination complaint, the hypothetical comparator was an employee with the same absence as the Claimant that started on 26 July 2022, but whose reason for absence was not disability, but an ailment that could be recovered from. It was harassment to ask about potential triggers in these circumstances as the Claimant had been signed off with anxiety so early as unwanted conduct and related to anxiety as a result of the context. To speak of 4 weeks off being a long time was unwanted as it made the Claimant feel guilty about taking time off and related to disability due to context and reasonable for the Claimant to view that as offensive. In terms of changes and resilience, the discussion was heavy-handed and in the context of the Claimant's service, was inappropriate, that a comparator would have been very unlikely to have been questioned and was also unfavourable treatment, linked to the Claimant's concerns that he was a burden. In terms of the demotion, again that highly unlikely that demotion would have been suggested to a comparator and in terms of the s.15 EqA 2010 claim we were asked to reflect on how disability was viewed, that it was seen as a problem that could reoccur and be a burden, leading to the Claimant feeling that Matt Hourihan had no faith or confidence in him; that it was also harassment as it was an offensive approach instead of a supportive mindset. That speaking of being off 4 weeks was harassment as Matt Hourihan was warning the claimant that he could not take more time off and that it was reasonable for the Claimant to find humiliating and offensive; that Matt Hourihan's approach to disability-related absence amounted to unfavourable treatment.

175. In relation to the questions to OH, we were invited to find that the questions were inappropriate and referenced performance, that the introduction was an attempt to lead answers and that it was not a neutral introduction: it implied that Matt Hourihan did not believe the Claimant was capable of his role. Question 6 was offensive and went beyond scope of a referral as the Claimant was never made aware of performance issues. In relation to the comments on 21 October 2022, this was Matt Hourihan putting time pressure on the Claimant and amounts to harassment as not appropriate and relates to disability as that was the reason for his absence.

176. In relation to the temporary cover announcement, it was reasonable to deduce that the Second Respondent effective carried out the act as he had confirmed the cover and informed Martin Bennett who had posted the announcement on Yammer, that the post was offensive as it revealed personal information which the Claimant found offensive. It was also unfavourable treatment for the respondent to have arranged cover without agreement from the Claimant as to when he would be returning to work. In relation to the IMD posts, that content was important, that the post was a direct dig at the Claimant and highlighted intolerance to sick leave and that not including the claimant was a deliberate act; that it was understandable for the Claimant to be offended.

177. In relation to time limits, it was accepted that the only act in time was the last, IMD posting, but that the primary argument was that there was a continuing act, all acts closely connected in terms of timing, involved the same person and all related to fact that the Claimant was not in work. Time should be extended in any event as whilst the Claimant had taken legal advice, the Claimant's disability status should form a factor and hardship fell in favour of extending time.

178. Finally, in relation to unfair dismissal, it was accepted that the First Respondent had dismissed for the potentially fair reason of capability but that Sainsbury's was a large nationwide employer and the standard expected was high due to the level of resources. In terms of substantive fairness, that there was no robust consideration of alternatives to dismissal or at all, that IHR was not discussed and that the same argument prevailed regarding medical dismissal. It was accepted that these options would not have avoided dismissal but would have been a better option for the Claimant.

179. The failure to consider redeployment was the greatest injustice and meant that the Claimant's 30 year career came to an end, that Hayley Wilson should have adjourned to consider a full and robust consideration of redeployment options as the Claimant's comments at the FARM showed his interest; that it was not fair to proceed to dismissal when the Claimant indicated that he may have been able to apply for alternative roles within 4 weeks. The Claimant's service should have been taken into account and was not.

Relevant Lw

S.13 EqA 2010 Direct Discrimination

180. Section 13(1) provides that a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

181. It is not possible to infer unlawful discrimination merely from the fact that an employer has acted unreasonably: **Glasgow City Council v Zafar** [1998] ICR 120 and in **Nagarajan v London Regional Transport and others** [1999] IRLR 527 HL, the House of Lords held that the Tribunal must consider the reason why the less favourable treatment has occurred or, why the Claimant received less favourable treatment. The concept of treating someone "less favourably" inherently requires some form of comparison.

182. Section 23 provides that when comparing cases for the purpose of Section 13 "there must be no material difference between the circumstances related to each case." In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 Lord Scott noted that this means, in most cases, the tribunal should consider how the Claimant would have been treated if they had not had the protected characteristic. This is often referred to as the hypothetical comparator.

183. It is well established that where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of the mental processes, conscious or subconscious, of the individual(s) responsible; see the decision of the Employment Appeal Tribunal in **Amnesty International v Ahmed** [2009] IRLR 884 and the authorities discussed at paragraphs 31- 37. The protected characteristic must have had at least a material influence on the decision in question.

S.15 EqA 2010 - Discrimination arising from disability

184. Discrimination arising from disability is defined in s15 EA 2010:
(1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

185. Section 15(2) applies only if the employer did not know (and could not reasonably have been expected to know) about the disability itself: ignorance of the consequences of the disability is not sufficient to disapply s15(1).

186. As for the correct approach when determining section 15 claims we refer to **Pnaiser v NHS England and others** UKEAT/0137/15/LA at paragraph 31. The relevant steps to follow are summarised as follows:
   a. the tribunal must identify whether there was unfavourable treatment and by whom – no question of comparison arises;
   b. the tribunal must determine the cause of the treatment, which involves examination of conscious or unconscious thought processes. There may be more than one

reason but the "something" must have a significant or more than trivial influence so as to amount to an effective reason for the unfavourable treatment;

c. motive is irrelevant when considering the reason for treatment;
d. the tribunal must determine whether the reason is "something arising in consequence of disability"; the causal link between the something that causes unfavourable treatment and disability may include more than one link – a question of fact to be assessed robustly;
e. the more links in the chain between disability and the reason for treatment, the harder it is likely to be able to establish the requisite connection as a matter of fact;
f. this stage of the causation test involves objective questions and does not depend on thought processes of the alleged discriminator;
g. knowledge is required of the disability only, section 15 (2) does not extend to requirement of knowledge that the "something" leading to unfavourable treatment is a consequence of disability;

187. It does not matter precisely which order these questions are addressed. Depending on the facts the tribunal might ask why the respondent treated the claimant in an unfavourable way in order to answer the question whether it was because of "something arising consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment.

188. When considering justification, the role of the Tribunal is to reach its own judgment, based on a critical evaluation, balancing the discriminatory effect of the act with the business/organisational needs of the Respondent. The test is reasonable necessity and the Tribunal must make its own objective assessment, weighing the real needs of the undertaking against the discriminatory effect of the unfavourable treatment.

s.26 EqA 2010 - Harassment

189. Section 26 of the Equality Act defines harassment under the Act as follows:

> (1) A person (A) harasses another (B) if –
> A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of –
>
> a. violating B's dignity, or
> b. 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 circumstances of the case;
> c. whether it is reasonable for the conduct to have that effect.

190. EHRC Code Part 7 provides that unwanted conduct 'related to' a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic. The broad nature of the 'related to' element means that a finding about what is the motivation of the individual is not the only possible route to the conclusion that the conduct in question is related to the particular characteristic but nevertheless there

must still be some feature of the factual matrix identified by the Tribunal which properly leads it to the conclusion that the conduct is related to the protected characteristic and the Tribunal must articulate what those features are (**Tees Esk and Wear Valleys NHS Foundation Trust v Aslam** [2020] IRLR 495). In relation to other protected characteristic, the phrase "related to" a protected characteristic encompasses conduct associated with sex even if not caused by it; **Equal Opportunities Commission v Secretary of State for Trade and Industry** [2007] ICR 1234.

Burden of Proof

191. Section 136 provides that:

> (2) If there are facts from which the court (which includes a Tribunal) could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provisions.

192. Guidance as to the application of the burden of proof was given by the Court of Appeal in **Igen v Wong** 2005 IRLR 258 as refined in **Madarassy v Nomura International Plc** [2007] ICR 867. The Court of Appeal emphasised that there must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the respondent. They are not, without more, sufficient material from which a Tribunal could properly conclude that, on the balance of probabilities, the respondent had committed an act of discrimination. In some cases, however, it is appropriate for the tribunal to dispense with the two stage analysis if it is able to make a positive finding about the reason for the treatment in question.

193. The Court of Appeal has established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove, again on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground.

Time limits

194. Section 123 EqA 2010 sets the time limit for bringing any complaint in contravention of Part 5 of the EqA 2010 and provides that proceedings may not be brought after the end of

a. The period of three months starting with the date of the act to which the complaint relates, or
b. Such other period as the employment tribunal thinks just and equitable.

195. For the purposes of s.123 EqA 2010, conduct extending over a period is to be treated as done at the end of the period and a failure to do something is to be treated as occurring when the person in question decided on it (s.123 EqA 2010).

Unfair dismissal – s98 ERA 1996

196. With unfair dismissal, we first have to consider the reason for the dismissal and whether it was a potentially fair reason for the dismissal. In this case, it is conceded that the Claimant was dismissed for capability which is a potentially fair reason for dismissal in section 98(1) Employment Rights Act 1996.

197. The Tribunal then has to consider whether the application of that reason in the dismissal for the Claimant in the circumstances was fair and reasonable in the circumstances (including the respondent's size and administrative resources) set out in S.98(4) ERA 1996This should be determined in accordance with equity and the substantial merits of the case and the burden of proof in this regard is neutral.

198. In **Polkey v AE Dayton Services Ltd** 1988 ICR 142, HL, the House of Lords ruled that employers could not argue that a procedurally improper dismissal was nevertheless fair because it would have made no difference if the employer had followed a fair procedure - an employer's actions in dispensing with a fair procedure were highly relevant to the question of whether an employer acted reasonably in dismissing, and that tribunals were not entitled to take into account, when determining the fairness or otherwise of a dismissal, whether a proper procedure would have made any difference to the employer's decision to dismiss.

199. When assessing the reasonableness of the Respondent's actions against those of a reasonable employer the Tribunal is conscious not to substitute its own views as to the appropriateness or otherwise of the dismissal .

Conclusions

200. We do not deal with our conclusions in the formulaic order set out in the list of issues by considering each class of disability discrimination in order. Rather, we deal with the claims in chronological order in time, commencing with the individual acts and the separate complaints of discrimination, and end with the claim of unfair dismissal.

201. We start by saying that we accept that this was a difficult case for both parties: the Claimant was a valued and long serving store manager at Sainsbury's. He had Orange Blood as it was monikered, where he had worked from Sainsbury's since a pupil and still at school. Likewise, we accept that Matt Hourihan is a senior manager at Sainsbury's and has been facing claims against him personally of discrimination.

202. We had found that both the Long Term Ill Health Policy and Guidance had expressly stated that a first ARM would take place *after* [our emphasis] the first four weeks of absence. Matt Hourihan had sought to arrange an ARM within days of the Claimant's absence, a point that was earlier than he had held an ARM previously for any other employee. The Tribunal concluded that these were facts from which we could decide, in the absence of any other explanation, that acts of discrimination had arisen in relation to:

a. the content of the initial letter to the Claimant of 3 August 2022;
b. the arranging of the meeting 11 days into the absence; and

c. and the content of the meeting of 5 August 2022,

203. We therefore considered whether the respondents had shown that they had not so discriminated as alleged in relation to these acts.

The Second Respondent falsely stating that the Claimant had not replied to a text message and breached the absence policy despite the Claimant making him aware that he had deleted WhatsApp form his personal phone

204. This was only pleaded as a claim of harassment related to disability under s.26 EqA 2010.

205. Whilst we did find that there was an implication that the Claimant was in breach of the Absence Policy, in that Matt Hourihan had told the Claimant that he had not received a reply to his text and reminded him of the Absence Policy, we did conclude that this was more of a reminder as opposed to an allegation. We had also found that there was nothing intentionally misleading on the part of Matt Hourihan to refer to the contact as being by text as opposed to WhatsApp.

206. However we accepted that may have confused the Claimant at the time and accept that this was unwanted conduct.

207. Albeit we did find that he knew that the Claimant had been absent with anxiety following restructuring in 2018, we found that Matt Hourihan had no knowledge of the Claimant's disability at this time.

208. In that context, we were persuaded by the respondents that the implication that the Claimant was in breach of the Absence Policy, by not responding to the Second Respondent's messages, was not conduct related to disability. We did not accept that simply because the letter was sent when the Claimant was off work with disability-related absence enabled us to draw any conclusion that the conduct was related to disability.

209. The claim of harassment in relation to the content of that letter of 3 August 2022 is dismissed.

Conducting an ARM after 11 days' absence despite the policy stating it was to take place 4 weeks after an absence

210. This complaint is brought under *s*.15 EqA 2010.

211. We had found that Matt Hourihan had conducted an Absence Review Meeting after 11 days of absence, despite the policy stating that such a meeting was to take place 4 weeks after an absence.

212. It is conceded by the respondents that the fact that the Claimant was absent does arise from his disability, but they dispute that it arose early because of the Claimant's disability and contend that it arose early because of the restructure.

213. In accordance with the guidance in **Pnaiser**, we considered the cause of the treatment; the cause of the early invite.

214. The Tribunal was not persuaded by the respondents' arguments that the cause of the treatment and principal basis for such an early meeting, was the restructure alone. We concluded that the causal link for the early ARM did include the restructure, but was because the Claimant was absent with anxiety following that restructure. Had the Claimant not been absent following the restructure, an ARM would not have been conducted at all and we concluded that the invite to the early ARM was because of the Claimant's absence, which was something arising from the Claimant's disability.

215. We then considered whether this was 'unfavourable treatment', recognising that:

a. Whilst this term is not defined in the EqA 2010, para 5.7 of the 2011 Equality and Human Rights Commission's Code of Practice on Employment ('EHRC Employment Code') states that it means that the disabled person 'must have been put at a disadvantage' (para 5.7); and

b. Taking into account case law on the meaning of 'disadvantage' in the context of indirect discrimination has interpreted it to cover any instance in which the individual reasonably feels that he or she has suffered a detriment.

216. Whilst we accepted that the Claimant was already in a heightened stage of anxiety, and that it was unusual for such a long term sickness meeting to take place so early in the sickness absence, we had been persuaded by Matt Hourihan's explanation for such an early ARM. We had accepted his evidence that this was a supportive meeting on how to help the Claimant return back to work. It was not an initiation of the process to remove the Claimant from employment. We also concluded that it was not reasonable for the Claimant to have considered this unfavourable treatment – it was a meeting to see what support could be given to him in the context of unexpected absence with anxiety and immediately after a restructure.

217. On those basis, the respondents had persuaded us that the Claimant had not been subjected to discrimination arising from his disability in relation to the early ARM and the complaint is dismissed.

218. We had further found that neither respondent knew, or could reasonably be expected to have known the Claimant had a disability at that date, and so even if we had concluded that the Claimant had been treated unfavourably because of that absence which arose out of his disability, s.15(2) EqA 2010 would have

afforded a defence to the claim and on that basis the claim would also have been dismissed.

5 August 2022 Meeting

219. The Claimant's complaints in relation to the conduct of this meeting related broadly to five complaints regarding what Matt Hourihan said to him at that meeting of:

a. A focus on the trigger for his absence (s.15 EqA 2020);
b. That 'large changes' were going to occur to his role and he was 'concerned about his resilience to cope with such changes as a result of his disability' (s.13 EqA 2010, s.15 EqA 2010 and s.26 EqA 2010);
c. That he had suggested a demotion to him (s.13 EqA 2010, s.15 EqA 2010 and s.26 EqA 2010);
d. that he would only support him as long as he was not off for longer than 4 weeks (s.26 EqA 2010); and
e. That 4 weeks was a very long time to be off work (s.15 EqA 2010 and s.26 EqA 2010).

220. We concluded that the meeting of 5 August 2022, and the Claimant's perception of what was said to him at that meeting, shaped how the Claimant perceived the subsequent behaviour of Matt Hourihan and likely led to the Claimant feeling wronged when he hadn't been. We also concluded that his tendency of hyperbole, as it had been termed by the respondents' counsel, as reflected in his written statement did demonstrate a lack of reasonable perspective of the actions of Matt Hourihan, leading him to be convinced that he was subject to a conspiracy to remove him, which we concluded was implausible. We had not found that Matt Hourihan twisted the meeting of 5 August 2022 to support his evidence that this was a supportive meeting and a friendly discussion, or that he had a cynical view of absence that shaped how he subsequently dealt with the Claimant.

221. Save for reference to comments regarding being off work for 4 weeks being a long time, the Tribunal therefore concluded that the factual allegations in relation to what had been said to the Claimant at this meeting had not been proven on balance of probabilities. On that basis all complaints in relation to the meeting of 5 August 2022, save for those set out below in relation to that comment, however pleaded were not well-founded and were dismissed.

222. We set out our conclusions in relation to each individually.

The Second Respondent focussed on the 'trigger' of the Claimant's anxiety and told him what he believed his trigger to be

223. This is brought as a single complaint of harassment under s.26 EqA 2010.

224. Whilst it was accepted, and the Tribunal had found, that Matt Hourihan did ask the Claimant whether he knew what his trigger was, we had been persuaded by the evidence from Matt Hourihan that there had been no focus on the trigger. We had found

that Matt Hourihan had not told the Claimant what he believed the trigger to be, that he had only asked the Claimant if he himself thought that the restructuring might be a trigger. We therefore concluded that the factual allegation had not been proven on balance of probabilities. As indicated, an on that basis, the complaint as pleaded was dismissed.

225. Even if the interpretation of the claim could be interpreted as Matt Hourihan simply asking the Claimant about potential triggers, we concluded that such questions, if unwanted were not at that stage related to disability. The conversation was related to the Claimant's absence again following a period of restructure and any link to disability, was intangible as we had found that disability (or even potential disability of the Claimant) not in Matt Hourihan's mind at that stage, the Claimant only just absenting himself from work and being a valued employee.

226. The questions were in any event appropriate in the context of the Claimant having a period of sick leave for anxiety again immediately following a corporate restructure. Further, taking into account the circumstances that had prevailed the previous week, whereby Matt Hourihan had been with the Claimant and there had been no visible signs of anxiety, then had suddenly been off with anxiety, we do not consider it reasonable for the Claimant to have considered that such a discussion to be humiliating at that stage,.

227. In the alternative, in light of our factual findings, we concluded that the purpose of such conversation was not to create the requisite statutory environment for the Claimant in any event.

Matt Hourigan told the Claimant large changes were going to occur to his role and he was concerned about his resilience to cope with such changes as a result of his disability

228. Whilst this has been brought as a complaint of direct discrimination under s.13 EqA 2010, it has also has been pleaded as an act of discrimination arising from disability and harassment, albeit in each case the allegation is slightly different: that Matt Hourihan:

a. questioned the Claimant's resilience and ability to be a Store Manager in a direct response to him being absent from work as a result of his disability - s.15 EqA 2010;

b. told the Claimant that big changes were going to occur to his role – s.26 EqA 2010; and

c. told the Claimant that he was concerned about his resilience to cope with the role in future - s.26 EqA 2010.

229. The Claimant's representative confirmed that in essence the allegation was the same and that there was no distinction in how it had been pleaded.

230. That a discussion took place at that meeting regarding needing resilience and that Sainsbury's were going to see big changes, is not in dispute. We had found that Matt Hourihan had not questioned the Claimant's ability and resilience to be a Store Manager and therefore concluded that the factual allegation had not been proven on balance of probabilities.

231. On that basis all complaints, in relation to this allegation as pleaded, were not well-founded and were dismissed.

232. Again, even if the complaint could be interpreted more generally as having any discussion about change and resilience on the facts as found:

a. in relation to the harassment complaints, we concluded that it was not reasonable for the Claimant to find discussing changes at Sainbury's, and needing resilience in the context of restructuring, offensive even if it could be said to be related to disability with the Claimant being absent at the time for reasons related to disability.

b. Whilst we concluded that having discussions about resilience in the face of restructure was connected more to mental health than physical health, we did not conclude, on the basis of our findings, that the purpose of a general conversation regarding needing resilience in the face of changes, was to offend the Claimant. Any claim of harassment would therefore fail on that wider basis in any event;

c. We concluded that the comparator for the purposes for a direct discrimination complaint would be an employee with the same sickness absence as the Claimant following restructure in both 2018 and 2022, who was not disabled by reason of anxiety. We further concluded that such a comparator would have had the same, not more favourable treatment than the Claimant and that the same discussion would likely have taken place as we concluded that the reason for such a discussion was not because the Claimant was disabled but because the Claimant was off sick again immediately following a restructure. Any s.13 EqA 2010 direct discrimination claim on that basis in the alternative, would also be not well-founded;

d. Finally, in relation to the claim brought as a s.15 EqA 2010 claim, we did not conclude that it would be objectively reasonable for the Claimant to have considered such a conversation unfavourable, in light of our findings that the context was of a supportive meeting following the Claimant's sudden absence and such a claim would fail. In the alternative, knowledge again would afford the respondents a defence.

Matt Hourihan suggesting a demotion to 5S Store Manager after the Claimant was absent from work as a result of his disability

233. Again, this has been pleaded in three different ways and again in each case the allegation is slightly different and again it was confirmed that the allegation was essentially the same; that on 5 August 2022, Matt Hourihan suggested
   a. the Claimant find an alternative role as a 5S Store Manager which is a demotion to the Claimant's current rank (s.13 EqA 2010);
   b. a demotion to 5S Store Manager after the Claimant was absent from work as a result of his disability (s.15 EqA 2010).
   c. a demotion to 5S Store Manager after only 11 days absence (s.26 EqA 2010)

234. We would repeat our conclusion that based on our findings that Matt Hourihan did not suggest a demotion to 5S Store Manager, all claims are not well-founded and are dismissed. Even on the Claimant's own evidence, he did not allege such words had been

used by Matt Hourihan and his own notes reflected that it was his reaction was that any support would be a demotion as opposed to what had been said to him.

235. On that basis, we therefore concluded that the factual allegation had not been proven on balance of probabilities and all complaints, in relation to this allegation as pleaded, were not well-founded and were dismissed.

236. Again even on a liberal interpretation of the Claimant's claim that discussing alternative roles is an act of discrimination:

a. We did not consider it reasonable for such a discussion to have either been unwanted conduct or to create the requisite statutory environment for the Claimant in the context of a discussion about how to assist the Claimant to return or indeed, that the Claimant had felt that. For the same reasons, we also concluded that the purpose of the conversation was not to humiliate or offend the Claimant, rather it was to support.

b. Any direct discrimination claim would also fail on the same basis as the first direct discrimination complaint. It was not less favourable treatment than a comparator.

c. Again, we concluded that it was not reasonable to consider discussions about alternative options as unfavourable treatment in the circumstances and context of the discussions and a s.15 EqA 2010 claim would also fail on that basis. Further, the respondents had the defence of knowledge under s.15(2) EqA 2010.

Matt Hourihan told the Claimant he would only support him as long as he was not off work for longer than 4 weeks

237. We had made clear findings that Matt Hourihan did not tell the Claimant that he would only support him as long as he was not off work for longer than 4 weeks and on that basis, both the s.15 and s.26 EqA 2010 claims are not well founded and are dismissed.

Matt Hourihan told the Claimant that 4 weeks off is a very long time which caused him unnecessary stress when he was trying to recover – s.26 EqA 2010

238. This is brought as a claim of harassment only.

239. We had found the length of sickness absence of 4 weeks had been discussed, but in the context of what support could be given for the Claimant's return to work within the 4 week period.

240. We would repeat our earlier conclusion regarding whether such conduct could be said to be related to disability, concluding that it could not. Even if we had been persuaded that such a comment was unwanted comment and could be said to be related to disability that led to the Claimant feeling intimidated, we agreed that this was an anodyne comment in the context of a supportive environment and in that context it was not reasonable for the Claimant to have reacted so negatively to such a comment. It did not meet the threshold of harassment related to disability.

241. For the same reasons that we have previously given, we concluded that the purpose of such a comment was not to intimidate the Claimant. On that basis the claim is dismissed.

Matt Hourihan sent inappropriate questions to Occupational Health/referenced performance at work in the Claimant's Occupational Health referral despite the Claimant never been made aware of any performance issues.

242. The Claimant had by this stage been off work for some 10 weeks since the meeting of 5 August 2022 and the Tribunal did not conclude that there were any facts that could lead us to infer or find discrimination and the burden of proof remained with the Claimant in respect of his subsequent complaints.

243. The complaints in respect of the referral to occupational health were pleaded as harassment and we deal with them together.

244. We did not find or conclude that these were inappropriate questions or in fact reference the Claimant's performance at work, or attempt to lead the occupational health adviser to give responses to support a negative approach to the Claimant.

245. On the basis that our finding was that the opening preamble and questions did not refer to the Claimant's performance, we did not conclude that the Claimant had made out primary facts and on that basis both claims did not succeed and were dismissed.

On 21 October 2022 Matt Hourihan told the Claimant "this would be a totally different conversation" if he were to be off work for a matter of months when discussing support.

246. This claim is brought as one of both discrimination arising from disability (s.15 EqA 2010) and of harassment (s.26 EqA 2010).

247. Whilst we did find that such a comment was made, we did not find that it was made in the context as alleged by the Claimant. Rather our finding was that the comment was not made in the context as suggested by the Claimant's counsel, that it was designed to put time pressure on the Claimant to return, but that such a comment was made in the context of discussions on how Matt Hourihan could support the Claimant to return to work and that Matt Hourihan was seeking clarification from the Claimant's GP as to what was needed.

248. We concluded that the comments did not meet the threshold for harassment in that it was not reasonable for the Claimant to have been effected by such comments and again, for reasons already articulated we concluded that the purpose of such a comment would not have been to have created the statutory environment for the Claimant.

249. Likewise, it was not reasonable for the Claimant to have considered such a comment unfavourable treatment in the context of the s.15 EqA 2010 claim.

*On 29 October 2022 Matt Hourihan circulated an announcement that there would be store cover for the next 8 weeks without clarifying his return to work following the Occupational Health Repor*t

250. The Second Respondent did not circulate any announcement and we did not find that he directed the announcement be sent. The Claimant has not proven facts from which we could find or infer discrimination by the Second Respondent and on that basis, both complaints against him personally are dismissed.

251. We had found that the post did not name or refer to the Claimant. There had been reference to the cover for store being for 8 weeks and this had been sent in the context of the Claimant having then been off work for an extended period as a result of that disability and the purpose of the announcement to record cover because of that sickness absence. It could be said to be related to disability.

252. We were not persuaded however that such an act was unwanted conduct. The Claimant gave no statement evidence of the effect on him of this announcement and we concluded that the Claimant had not proven that such conduct was unwanted or that it had the statutory effect on him. Likewise, we concluded that the Claimant had not proven that such an act was unfavourable treatment. On that basis, both complaints were not well-founded and were dismissed.

253. Even if wrong on that point, we concluded that as the announcement had been sent to confirm cover because the Claimant was absent through disability, it was entirely unreasonable for the Claimant to have considered the act as one of harassment or unfavourable treatment in the context of

a. his lengthy past absence,

b. it did not identify or refer to the Claimant or his absence and

c. that there was an acknowledged need to inform staff of cover; and

d. the Claimant was in fact to be off on sick leave for at least a further 8 weeks.

254. Further, we concluded that the purpose of the announcement was to communicate with staff who was to provide cover and not to harass the Claimant.

On 18 November 2022 Matt Hourihan failed to include the Claimant on the 'International Men's Day' post sent to all internal colleagues and published on LinkedIn.

255. This complaint is brought under s.26 EqA 2010 and s.15 EqA 2010.

256. We accepted that the failure to include the Claimant on that LinkedIn and Yammer post, was unwanted conduct by the Claimant. We further found that the Claimant's exclusion from the posts were related to his disability, noting that s.26 EqA 2010 includes no causative link but, at this point, Matt Hourihan had received the OH report which had indicated that the Claimant was likely to meet the definition of disability, the Claimant had

been off work for an extended period as a result of that disability and had not been included in the post because of that sickness absence. In those circumstances, we found that the failure to include the Claimant in the posts was related to his disability.

257. The purpose of the post was to celebrate male employees and that the purpose of not including the Claimant was Matt Hourihan's desire not expose the Claimant to potentially unwanted contact which might have arisen if he had tagged the Claimant and because he did not wish to ask the Claimant for a photograph which he considered inappropriate when the Claimant was still in a lengthy sickness absence.

258. In those circumstances, we did not find that the purpose of failing to include the Claimant from the posts, was to violate the Claimant's dignity or create any intimidating, hostile, degrading, humiliating and/or offensive environment for the Claimant. We found the opposite. We had sympathy with the view that the Second Respondent may very well have been challenged by the Claimant if he had asked him for a photograph to include, when the Claimant had asked for no contact. We concluded that the intent will be an important factor when assessing compensation.

259. We then considered the effect of the purpose on the Claimant and considered whether by this stage the Claimant was hypersensitive and unreasonably took offence - the Claimant had been challenged on this, that by this stage he had 'lost perspective' and he felt that everything was about him. Whilst the Tribunal again has sympathy with the respondents' position, we nonetheless accepted the Claimant's evidence that having people contact him caused him to feel excluded and that it was reasonable for this Claimant, as a senior Store Manager, in those circumstances for him to feel humiliated as a result particularly when there had been nothing to have prevented Matt Hourihan from telling the Claimant of the post when speaking to him the day prior.

260. We concluded that the treatment was also unfavourable treatment arising from the Claimant's sickness absence, accepting the Claimant's evidence that he felt humiliated. The cause of the treatment was the conscious thought process of Matt Hourihan to not include the Claimant from the post as he was absent and therefore this amounted to unfavourable treatment because of something arising from disability i.e. the Claimant's absence at a time that the respondents had knowledge of the Claimant's disability.

261. There has been no suggestion by the respondents of reliance on the justification defence.

262. On that basis, both claims in respect of the IMD post are well-founded and succeed.

263. We did not need to consider time limits as such a complaint was in time but, for the avoidance of doubt, had we concluded that the previous complaints were well – founded we would have concluded that such complaints formed part of a continuing act, for the reasons submitted by the Claimant's counsel, and had been brought in time.

S.98(4) ERA 1996 Ordinary Unfair Dismissal

264. The Claimant has conceded that the First Respondent had a potentially fair reason for dismissal – capability.

265. We therefore focussed on whether the dismissal was fair in all the circumstances and considered that in a capability case such as his when an employee is suffering from an underlying condition, leading to long-term absence, that it was essential to consider:
    a. whether the employer can be expected to wait longer, balancing the relevant factors on the individual case; and
    b. Whether a fair procedure had been carried out involving consultation with the employee, a medical examination to establish the nature of the illness and prognosis and consideration of other options. In particular alternative employment within the employer business.

266. We were satisfied that the conduct of the procedure leading up to the FARM was in accordance with the Respondent's procedures and that no unfairness resulted in the management of the Claimant's absence in terms of the number or content of the meetings. We were not persuaded that there was a design to remove the Claimant or that such a decision was premediated. Nothing in the grievance procedure led us to such a conclusion.

267. At no time during the Claimant's absence and specifically at no time during any ARM was the Claimant indicating that he was fit to return to work in any capacity. At no time was he in a position to discuss what adjustments, if any, would enable him to return and it was agreed that this would be discussed when the Claimant was in such a position. This did not arise at any time in the lead up to the ARM.

268. In those circumstances, we concluded that there was adequate consultation with the Claimant regarding his impairment and the impact that it had on his ability to return to work period, in the period leading up to the FARM. We also concluded that failure to consider alternative employment or consider modifications to the Claimant's role or indeed any other adjustments, in those ARMs was reasonable in those circumstances and did not lead to unfairness for the Claimant in the eventual dismissal.

269. In relation to the conduct of the FARM before Hayley Wilson, we were satisfied that she ascertained the medical position prior to her decision to dismiss. She had in her possession an occupational health report that concluded that the Claimant was not fit to return to work and that she reasonably concluded that she could not foresee when the Claimant would be fit. Further GP notes also confirmed that the Claimant was not fit to return to work.

270. In submissions, Claimant's counsel did not seek to argue that medical evidence was lacking, rather she focussed on criticising the First Respondent's approach to IHR and medical dismissal and the dismissal manager's reliance on such a report to conclude that the Claimant would not be eligible for either, albeit accepting that neither IHR nor medical dismissal would have avoided the Claimant's dismissal.

271. We concluded that there had not been a failure to consider whether the Claimant was or may be eligible for either as an alternative. Rather Hayley Wilson had proactively concluded that the Claimant was not eligible. We also concluded that it was reasonable for Hayley Wilson, on the evidence before her, to conclude that the Claimant was not eligible for either IHR or medical dismissal despite not having discussed either with the Claimant. Neither options would have avoided dismissal and lack of detailed conversation with the Claimant or further consideration of either did not lead to unfairness.

272. The Claimant's counsel has submitted that failure to consider redeployment led to the greatest injustice for Claimant – it meant his 30 year' employment with Sainsbury's came to an end and the Claimant may have been able to preserve his career with Sainsbury's had Hayley Wilson adjourned that FARM and given the Claimant opportunity to consider a career move inviting us to find that parts of the transcripts of the FARM indicated that the Claimant was showing an interest in redeployment

273. Whilst we had found that the Claimant had, at that FARM, indicated that he was prepared consider redeployment options, we had also found that this indication was contradictory and that he was also indicating that a return was too far away. We rely on findings that not just redeployment, but a range of alternatives including returning one hour a week or working from home in an entirely different capacity were discussed.

274. In those circumstances, we concluded that it was reasonable for Hayley Wilson to conclude from the Claimant's responses at that FARM, that he was not likely to apply or consider return to work, on a redeployment basis or otherwise, in the foreseeable future. We concluded that she had not failed to consider those options, or fail to make a reasonable adjustment more generally, that would have avoided the need to the dismiss the Claimant. No adjustments were acceptable to the Claimant in the FARM, nd we did not conclude that her approach to redeployment or other adjustments before reaching her decision to dismiss was unfair in all the circumstances of this case.

275. Taking into account that neither occupational health, nor the Claimant or his GP at any time had indicated that the Claimant was fit for work in any capacity with or without adjustments, we did not accept that if there had been a further time after the meeting on 14 June 2023, that the Claimant might have or would have been able to return to work within the foreseeable future.

276. Indeed, we concluded that it was reasonable for the dismissing officer to reach the view that even if the Claimant had been given more time, whether 4 weeks or otherwise, the Claimant would not have been in a position to return to work, whether in his Store manager role, on a redeployed basis or with adjustments, and that it was reasonable to conclude that the Claimant would not have been able to return to work until an employment tribunal had concluded in his favour, which at the earliest would have been October. This was a position that the Claimant had indicated to Joanne Southworth in his ARM with her and had repeated to Hayley Wilson at the FARM.

277. We concluded that many employers would have reached the same decision as that reached by Hayley Wilson and after 10 months of sickness absence, repeated absence management meetings and no indication of a likely return to work date in the foreseeable future, they too would have concluded that they had no option other than to end the working relationship. We did not consider it unreasonable to conclude that further time would have not made any difference.

278. We concluded that the medical position had been ascertained, the Claimant had been adequately consulted with regarding his anxiety and the impact that it had on his ability to return to work and alternative employment and other adjustments had been considered prior to the decision to dimiss.

279. Having accepted Hayley Wilson's evidence that she did take the Claimant's lengthy service into account when reaching her dismissal, we concluded that it could not be said that no reasonable employer would have reached the decision that was taken to dismiss the Claimant.

280. In those circumstances, we concluded that dismissal fell within the range of reasonable responses open to the First Respondent as the employer and that the claim of unfair dismissal was not well-founded and was dismissed.

_____

Employment Judge R Brace
Dated: 4 June 2024

JUDGMENT SENT TO THE PARTIES ON 5 June 2024

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS
Mr N Roche

APPENDIX 1
LIST OF ISSUES

CASE NO: 1600755/2023

BETWEEN:

MR DARREN COOPER

Claimant

and

SAINSBURY'S SUPERMARKETS LTD

First Respondent

and

MATT HOURIHAN

Second Respondent

LIST OF ISSUES

Jurisdiction

1. What was the last act of discrimination relied upon and when did it take place? The Claimant relies on the last act of discrimination taking place on 18 November 2022 when the Second Respondent failed to include him in the "International Men's Day" post sent to all internal colleagues and published on LinkedIn.

2. When was the ACAS Early Conciliation Certificate issued? 28 March 2023

3. On what date was the Claimant's claim lodged? 25 April 2023

4. Have the Claimant's claims for disability discrimination been brought within the three month time limit prescribed under section 123(1)(a) of the Equality Act 2010? The Respondents will say that any act preceding 15 November 2022 is out of time, since the Claimant commenced ACAS Early Conciliation on 14 February 2023.

5. If the Claimant's last act of discrimination was in time, then was there a continuing course of conduct?

6. If the Claimant's claim was brought outside of the prescribed time limit, why did the Claimant fail to bring their claim within the time limit?

7. Is it just and equitable for the Employment Tribunal to extend time for the Claimant to bring their claims of disability discrimination?

Disability

1. It is conceded that the Claimant was a disabled person for the purposes of Section 6 of the Equality Act 2010 at the relevant time by reason of Anxiety.

Direct discrimination under Section 13 of the Equality Act 2010

2. Did the Respondent's treat the Claimant less favourably than it treats or would have treated others?

3. The Claimant relies on the following instances of les favourable treatment. Which, if any, of the following acts occurred:

a. 05.08.2022 – MH told the Claimant large changes were going to occur to his role and he was concerned about his resilience to cope with such changes as a result of his disability.

b. 05.08.2022 – MH suggested the Claimant find an alternative role as a 5S Store Manager which is a demotion to the Claimant's current rank.

4. Did any of these acts amount to less favourable treatment of the Claimant than his hypothetical comparator? The Claimant relies on a hypothetical comparator whom shares the same skills and abilities as him, but does not share his mental impairment of Anxiety.

5. Was the less-favourable treatment because of the Claimant's disability?

Discrimination because of something arising from disability under Section 15 of the Equality Act 2010

6. Did the Respondent's know or could they have been reasonably expected to know that the Claimant had a disability?

7. Did the Respondent's treat the Claimant unfavourably because of something arising in consequence of his disability? The "something arising" is that the Claimant was absent from work as a result of his disability.

8. The Claimant relies on the following instances of unfavourable treatment. Which, if any, of the following acts occurred:

a. 05.08.2022 – MH conducting an Absence Review Meeting after 11 days of absence despite the policy stating it is to take place 4 weeks after an absence.

b. 05.08.2022 – MH questioning the Claimant's resilience and ability to be a Store Manager in a direct response to him being absent from work as a result of his disability.

c. 05.08.2022 – MH telling the Claimant he would only support him as long as he was not off work for longer than 4 weeks.

d. 05.08.2022 – MH suggesting a demotion to 5S Store Manager after the Claimant was absent from work as a result of his disability.

e. 05.08.2022 – MH told the Claimant "this would be a totally different conversation" if he was to be off work for a matter of months.

f. 29.10.2022 – MH circulated an announcement that there would be store cover for the next 8 weeks without clarifying his return to work following the Occupational Health Report;

g. 18.11.2022 – MH failed to include the Claimant on the 'International Men's Day' post sent to all internal colleagues and published on LinkedIn.Can the Respondents show that the treatment was a proportionate means of achieving a legitimate aim?

Harassment related to disability under Section 26 Equality Act 2010

9. Did the Respondents engage in unwanted conduct related to the Claimant's disability?

9.1 Did any such unwanted conduct have the purpose or effect of violating the Claimant's dignity and/or creating an environment that was intimidating, hostile, degrading, humiliating or offensive to the Claimant?

The Claimant relies on the following conduct:

a. 03.08.2022 – MH falsely stated that the Claimant had not replied to a text message and breached the absence policy despite the Claimant making MH aware that he had deleted WhatsApp from his personal phone.

b. 05.08.2022 - MH focused on the "trigger" of the Claimant's anxiety and told him what he believed his trigger to be.

c. 05.08.2022– MH told the Claimant that 4 weeks off is a very long time which caused him unnecessary stress when he was trying to recover.

d. 05.08.2022 – MH told the Claimant that big changes were going to occur to his role.

e. 05.08.2022– MH told the Claimant that he was concerned about his resilience to cope with the role in future.

f. 05.08.2022 – MH told the Claimant he would only support him as long as he was not off for longer than 4 weeks.

g. 05.08.2022 – MH suggested a demotion to 5S Store Manager after only 11 days absence.

h. 06.10.2022 – MH sent inappropriate questions to Occupational Health.

i. 06.10.2022– MH referenced performance at work in the Claimant's Occupational Health referral despite the Claimant never been made aware of any performance issues.

j. 21.10.2022 – MH told the Claimant "this would be a totally different conversation" if he were to be off work for a matter of months when discussing support.

k. 29.10.2022 – MH circulated an announcement that there would be store cover for the next 8 weeks without clarifying his return to work following the Occupational Health Report;

l. 18.11.2022 – MH failed to include the Claimant on the 'International Men's Day' post sent to all internal colleagues and published on LinkedIn.

9.2 Did the conduct have the effect as outlined at 10.1 above, when taking into account the perception of the Claimant, the other circumstances of the case, and whether it was reasonable for the conduct to have that effect?

Unfair Dismissal

10. What was the reason or principal reason for the Claimant's dismissal? Was it a potentially fair reason? (ERA 1996, s 98(1), (2))

11.1 The First Respondent relies on the fair reason of Capability.

11. Did the First Respondent follow a fair procedure?

12. In all the circumstances of the case (including the size and administrative resources of the First Respondent) did the First Respondent act reasonably in treating the reason for the Claimant's dismissal as a sufficient reason for dismissal?

13. Did the First Respondent ascertain the medical position prior to the dismissal?

14. Did the First Respondent adequately consult with the Claimant regarding his impairment and the impact it had on his ability to return to work?

15. Did the First Respondent consider alternative employment, or consider making modifications to the Claimant's current role?

Personal Injury

14. Did the Respondents treatment as alleged under the Equality Act 2010 cause the Claimant to suffer from an exacerbation of his pre-existing Anxiety?

[See paragraph 92 Grounds of Claim/ 114-115 Amended Grounds of Claim]

Remedy

15. If any of the above claims are made out, to what compensation is the Claimant entitled?

16. What is the Claimant's basic award?

17. What is the Claimant's compensatory award?

18. Is the Claimant entitled to an award for injury to feelings in accordance with the guidelines set out in *Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102?*

19. Should the Claimant's compensation be reduced or limited to reflect the chance that the Claimant would have been dismissed in any event and that any procedural errors made by the Respondent made no difference to the outcome (*Polkey v AE Dayton Services Ltd [1997] IRLR 503*)?

20. Has the Claimant taken reasonable steps to mitigate their loss?