



EMPLOYMENT TRIBUNALS

Claimant: Mr L Worley

Respondent: EE Limited

Heard at: East London Hearing Centre
(by hybrid and in person hearing)

On: 22, 23 and 24 August 2023

Before: Employment Judge S Shore

Members: Ms J Isherwood
Miss S Harwood

Representation

Claimant: In person
Respondent: Mr H Sheehan (Counsel)

JUDGMENT having been sent to the parties on 4 September 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Introduction and history of proceedings

1. The Claimant commenced employment with the Respondent on 6 August 2018 and was latterly employed as a Store Manager. The Claimant was responsible for the running of one of the Respondent's stores and his responsibilities included selling mobile phones and services provided by the Respondent to its customers.
2. The Claimant did not attend work between 13 September 2021 and 26 September 2021. As a result, the Claimant was dismissed after a disciplinary hearing on 7 October 2021 for unauthorised absence. His effective date of termination of employment was 7 October 2021.
3. The claimant appealed his dismissal on 18 October 2021. The appeal hearing took place on 9 November 2021. The claimant was advised that his appeal had been refused on 6 December 2021.

4. The Claimant started early conciliation with ACAS on 5 December 2021 and obtained an early conciliation certificate dated 7 December 2021 [1]. The Claimant presented a claim form (ET1) and Particulars of Claim on 7 December 2021 [6-17]. He claimed:
 - 4.1. Unfair dismissal;
 - 4.2. Breach of contract (failure to pay notice pay); and
 - 4.3. Disability discrimination. He alleged he did not understand the Respondent's policy on absence because of dyslexia.
5. The Employment Tribunal acknowledged the claim on 6 January 2022 [4-5] and issued a Notice of Claim on the same date [2-3]. The Notice of Claim instructed the Respondent to submit its response by 3 February 2022.
6. The Respondent presented its ET3 and Grounds of Resistance on 2 February 2022 [18-30]. On 3 February 2022, the Tribunal sent the parties a Notice of Preliminary Hearing [31-32], which to take place on 11 July 2022. On 10 February 2022, the Tribunal acknowledged receipt of the Respondent's response [33-34] and sent the parties a Notice of Final Hearing [35-36], which:
 - 6.1. Confirmed that the final hearing would take place on 22, 23, 24 and 25 August 2023;
 - 6.2. Required the Claimant to produce a statement setting out the impact that his claimed disability (dyslexia) had on his ability to carry out normal day to day activities by 31 March 2022;
 - 6.3. Required the Claimant to produce a Statement of Remedy setting out his financial losses because of the Respondent's alleged actions by 24 March 2022;
 - 6.4. Required both parties to disclose to each other a list of documents in their respective possession or control by 6 April 2022 and provide copies of any documents requested by the other side;
 - 6.5. Required the Respondent to produce a bundle of documents for the final hearing by 21 April 2022;
 - 6.6. Required a draft List of Issues to be produced seven days before the final hearing; and
 - 6.7. Required that an agreed Cast List and Chronology be to be brought to the final hearing.
7. The preliminary hearing took place before Employment Judge Jones on 11 July 2022 by telephone, The Claimant represented himself. A legal representative represented the Respondent. EJ Jones made a series of case management orders in a document dated 13 July 2022 [49-60].
8. The parties were ordered to agree a List of Issues based on the draft list produced by EJ Jones [55-60]. The List was incomplete as more detail was required from the

Claimant. The Respondent was ordered to revise the draft List and send it to the Claimant by 25 July 2022. The Claimant was ordered to comment on the draft List produced by the Respondent. The Respondent was then to revise the List if any changes needed to be made and send the final List to the Tribunal by 1 August 2022 [50].

9. The claimant had submitted a Schedule of Loss but was ordered to prepare another and send it to the Respondent by 7 November 2022 [50]. He was given additional time to do this to enable him to take legal advice.
10. EJ Jones discussed the Claimant's disability discrimination claim with him. The Claimant said that his mental impairment is dyslexia but the condition was not a medical condition. He had not mentioned it to his GP or consulted his GP about it [51]. EJ Jones noted that the Claimant had submitted a report about dyslexia dated 26 May 2022 [41-45] and an impact statement [38] which was undated. The report did not indicate how long the claimant had been dyslexic and ordered him to file an addendum to the report with that information by 1 August 2022 [51].
11. The parties had not completed the List of Issues by the start of the first day of the hearing, so we went through the draft list with the parties. Mr Worley confirmed the claims he was making and the PCPs contended for and Mr Sheehan confirmed the legitimate aim of the Respondent in respect of the indirect discrimination claim.
12. Mr Sheehan completed the list of issues during our reading break and sent a copy to the Tribunal and Mr Worley. The final list was agreed and appears below.

Issues

1. *Unfair dismissal*

- 1.1. *What was the reason or principal reason for dismissal? The respondent says the reason was conduct or some other substantial reason. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.*
- 1.2. *If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:*
 - 1.2.1. *there were reasonable grounds for that belief;*
 - 1.2.2. *at the time the belief was formed the respondent had carried out a reasonable investigation;*
 - 1.2.3. *the respondent otherwise acted in a procedurally fair manner;*
 - 1.2.4. *dismissal was within the range of reasonable responses.*

2. *Remedy for unfair dismissal*

- 2.1. *Does the claimant wish to be reinstated to their previous employment?*
- 2.2. *Does the claimant wish to be re-engaged to comparable employment or other suitable employment?*
- 2.3. *Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.*
- 2.4. *Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.*
- 2.5. *What should the terms of the re-engagement be?*
- 2.6. *If there is a compensatory award, how much should it be? The Tribunal will decide:*
 - 2.6.1. *What financial losses has the dismissal caused the claimant?*
 - 2.6.2. *Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?*
 - 2.6.3. *If not, for what period of loss should the claimant be compensated?*
 - 2.6.4. *Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?*
 - 2.6.5. *If so, should the claimant's compensation be reduced? By how much?*
 - 2.6.6. *If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?*
 - 2.6.7. *If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?*
 - 2.6.8. *Does the statutory cap of fifty-two weeks' pay or £86,444 apply?*
- 2.7. *What basic award is payable to the claimant, if any?*
- 2.8. *Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?*

3. Wrongful dismissal/Notice pay

- 3.1. *What was the claimant's notice period?*
- 3.2. *Was the claimant paid for that notice period?*

- 3.3. *If not, was the claimant guilty of gross misconduct? / did the claimant do something so serious that the respondent was entitled to dismiss without notice?*

4. Disability

- 4.1. *Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:*

4.1.1. *Did he have a physical or mental impairment: dyslexia?*

4.1.2. *Did it have a substantial adverse effect on his ability to carry out day-to-day activities?*

4.1.3. *If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?*

4.1.4. *Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?*

4.1.5. *Were the effects of the impairment long-term? Tribunal will decide:*

4.1.5.1. *did they last at least 12 months, or were they likely to last at least 12 months?*

4.1.5.2. *if not, were they likely to recur?*

5. Indirect discrimination (Equality Act 2010 section 19)

- 5.1. *A "PCP" is a provision, criterion, or practice. Did the respondent have the following PCP:*

5.1.1. *All employees need to be able to read, understand and follow the written AWOL policy or they will face disciplinary action leading to dismissal.*

5.2. *Did the respondent apply the PCP to the claimant?*

5.3. *Did the respondent apply the PCP to persons without dyslexia or would it have done so?*

5.4. *Did the PCP put persons with dyslexia at a particular disadvantage when compared with persons without dyslexia, in that it made him vulnerable to being disciplined and/or dismissed if he unknowingly breached the policy?*

5.5. *Did the PCP put the claimant at that disadvantage?*

5.6. *Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were:*

5.6.1. *Ensuring adequate attendance, and*

5.6.2. *Ensuring compliance with the disciplinary procedure.*

5.7. *The Tribunal will decide in particular:*

5.7.1. *was the PCP an appropriate and reasonably necessary way to achieve those aims;*

5.7.2. *could something less discriminatory have been done instead;*

5.7.3. *how should the needs of the claimant and the respondent be balanced?*

6. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

6.1. *Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?*

6.2. *A "PCP" is a provision, criterion, or practice. Did the respondent have the following PCP:*

6.2.1. *All employees need to be able to read, understand and follow the written AWOL policy or they will face disciplinary action leading to dismissal.*

6.3. *Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant says that he was unaware of the contents of the policy, which caused him to breach it?*

6.4. *Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage? The claimant says that the respondent knew of his disability as he told the managers who interviewed him that he had it. When the claimant completed the application form for the job, he did not tick the box to alert the respondent that he had an impairment/disability. The respondent's position is that it was unaware of any disability.*

6.5. *What steps could have been taken to avoid the disadvantage?*

6.6. *The claimant suggests:*

6.6.1. *That the respondent's policies should have been available for him to read as an audio file. The claimant confirmed today that as a store manager he would have had to implement the respondent's employee policies but had never had to use the AWOL policy during his employment.*

6.7. *Was it reasonable for the respondent to have to take those steps and when?*

6.8. *Did the respondent fail to take those steps?*

7. Remedy for discrimination

7.1. *Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?*

7.2. *What financial losses has the discrimination caused the claimant?*

- 7.3. *Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?*
- 7.4. *If not, for what period of loss should the claimant be compensated?*
- 7.5. *What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?*
- 7.6. *Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?*
- 7.7. *Should interest be awarded? How much?*

- 13. As we dismissed all the Claimant's claims, there was no requirement to deal with the Issues related to remedy for unfair dismissal, breach of contract or disability discrimination.

The law

- 14. The statutory law related to the Claimant's claims of disability discrimination is contained in the Equality Act 2010. The relevant sections are section 6 (definition of disability) section 19 (indirect discrimination); sections 20 and 21 (failure to make reasonable adjustments); and section 136 (burden of proof). The relevant provisions are set out here:

6. Disability

A person (P) has a disability if—

- (a) P has a physical or mental impairment, and*
- (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

A reference to a disabled person is a reference to a person who has a disability.

19. Indirect discrimination

A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

A provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*

(c) *it puts, or would put, B at that disadvantage, and*

(d) *A cannot show it to be a proportionate means of achieving a legitimate aim.*

20. Adjustments for disabled persons

Duty to make adjustments

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

(2) *The duty comprises the following three requirements.*

(3) *The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

(4) *The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

(5) *The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.*

(6) *Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.*

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

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

(9) *In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—*

(a) *removing the physical feature in question,*

(b) *altering it, or*

(c) *providing a reasonable means of avoiding it.*

(10) A reference in this section, section 21 or 22, or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

- (a) a feature arising from the design or construction of a building,
- (b) a feature of an approach to exit from or access to a building,
- (c) a fixture or fitting, or furniture, furnishings, materials, equipment, or other chattels, in or on premises, or
- (d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

21. Failure to comply with duty

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

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

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

136. Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;...

15. The law relating to breach of contract is set out in Article 3 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.
16. We were also referred to several precedent cases that we considered before making our decision.

Housekeeping and conduct of hearing

17. We called the parties in at 10:00am on the first morning to discuss housekeeping matters. We had not seen a final List of Issues and asked if one had been produced. It was confirmed that a final List had not been produced so we asked Mr Sheehan to finalise the List during the break we were about to take to complete our reading.
18. The Claimant confirmed that he was proceeding with his claim for disability discrimination and that his case was that he was dyslexic. Mr Sheehan confirmed that the Issue of whether the Claimant was a disabled person remained in dispute.
19. We asked both parties if any reasonable adjustments were requested for the hearing. The claimant indicated that none were required but he may ask for things to be repeated. Mr Sheehan indicate that he may request breaks for medical reasons. We agreed to both requests.
20. The parties produced an agreed bundle of 230 pages. If we refer to pages in the bundle, we will note the relevant page numbers in square brackets (e.g. [423]). The Claimant produced an additional thirteen pages of documents about supporting dyslexia from Headstart.io, which we added to the bundle at pages 231-243.
21. We then confirmed the claims that the Claimant was making:
 - 21.1. Unfair dismissal;
 - 21.2. Breach of contract (failure to pay notice pay);
 - 21.3. Indirect disability discrimination; and
 - 21.4. Failure to make reasonable adjustments.
22. The Claimant gave evidence in person. His evidence in chief was an impact statement [38] and a witness statement dated 10 August 2023 running to four pages and seven paragraphs. Evidence was also given in support of the Claimant by Amit Mandalia, a Store Manager with the respondent, who was one of a panel of three who appointed the Claimant and who oversaw the Claimant's two-week induction training. His evidence in chief was a witness statement dated 15 August 2023 that ran to two pages and nine paragraphs.
23. Evidence was given in person on behalf of the Respondent by:-

- 23.1. Danny White, who is Regional Commercial Manager, employed by the Respondent. He was the dismissing officer. His witness statement dated 14 August 2023 ran to seven pages and forty-four paragraphs.
- 23.2. Aldona Walczak, who at all material times was Regional Manager for the Respondent. She heard Mr Worley's appeal against dismissal. Her witness statement ran to five pages and twenty-five paragraphs.
- 23.3. Paul Redhead, who at all material times covered by this claim was employed by the Respondent as a Regional Manager. His witness statement dated 15 August 2023 ran to four pages and twenty-two paragraphs.
24. All witnesses gave evidence in person other than Mr Mandalia, who gave evidence by video link. All witnesses gave evidence on affirmation. Mr Sheehan cross-examined all the Claimant's witnesses. Mr Worley cross examined all the Respondent's witnesses. The Tribunal asked questions of the witnesses as it saw fit.
25. The hearing was scheduled for four days to include remedy. We were able to complete the hearing within three days.
26. We heard the evidence in the first two days and closing submissions at the start of the third day and then started our deliberations. We completed our deliberations in time to deliver an oral judgment and reasons on the afternoon of the third day. Neither party asked for written reasons after the oral Judgment and Reasons had been delivered. The Judgment was sent to the parties on 4 September 2023.
27. The Respondent requested written reason on 29 August 2023.
28. **Note from EJ Shore - It is entirely my responsibility that it has taken far too long to produce these Reasons, for which I can only offer my sincere and profuse apologies to the parties, the representatives, and my colleagues. At the time of the hearing and since, I had to deal with several personal matters that reduced the time I had available to complete what were complicated reasons in a complex case, whilst also fulfilling my obligations to ongoing hearings and family duties.**

Findings of fact

29. All findings of fact read on the balance of probabilities. If a matter was in dispute, we have set out the reasons why we have decided to prefer one party's case over the other. If there is no dispute over matter, we leave the record of the finding of a no comment as to the reason the particular finding was made. We have not dealt with every single matter that was raised in evidence or on the documents. We only dealt with matters that we found relevant to the issues that we had to determine. No application was made by either side to adjourn this hearing to complete disclosure or to obtain more document, so we have dealt with the case on the basis of the document produced to us and the claim as set out in the list of issues.
30. Much of the factual nexus of this case was not in dispute. The dispute was about the interpretation of what happened.

Undisputed facts

31. We should record as a preliminary finding that there are relevant facts not disputed, not challenged, or agreed by the parties. We therefore record as formal findings of fact. These were:-
- 31.1. The Claimant commenced employment with the Respondent on 6 August 2018 and was latterly employed as a Store Manager at the Respondent's Basildon store, which was situated in an Argos store. The Claimant was responsible for the running of the store and his responsibilities included selling mobile phones and services provided by the Respondent to its customers.
- 31.2. The Claimant's initial job application dated 11 May 2018 [83-88] contained a question that enquired if the Claimant had any disabilities that required an adjustment. His response was "No." [84] In answer to the question of whether the Claimant had a disability [85] the answer was recorded as "No."
- 31.3. The Claimant was provided with a job offer letter and contract of employment dated 12 July 2017 [89-109]. The Claimant's contract set out his annual holiday entitlement and defined the holiday year as 1 April to 31 March [95-96]. The contract also stated:
- "To make sure we have enough people to cover our business needs, all holiday requests must be approved by your manager before you take time off."*
- 31.4. The Claimant's contract referred to the Respondent's Disciplinary Policy [61-63], Disciplinary Procedure [64-77] and Unauthorised Absence Policy [78-82]. The Claimant did not dispute that he was subject to all three policies.
- 31.5. The Respondent's evidence that the weeks of the launch of a new iPhone, which is usually an annual event, is by far the Respondent's busiest trading weeks of the year in its stores was agreed by the Claimant. The Respondent's position was that leave was embargoed during the launch weeks of a new iPhone. The Claimant disagreed. We will return to this.
- 31.6. At the time with which this case is concerned, the Claimant's Line Manager was Paul Redhead, who was Regional Manager. Mr Redhead became the Claimant's Regional Manger on 21 April 2021. In accordance with the Claimant's contract, Mr Redhead had to sign off the Claimant's holiday requests.
- 31.7. This case arises from an offer that the Claimant received to appear on a reality TV show. He had booked a week's holiday at the start of September and at the end of September 2021 but, to appear on the show, he had to be free between 13 September and 22 September 2021 in addition to the leave he had already booked. It was agreed that the period that the Claimant needed as holiday was the iPhone launch in 2021.
- 31.8. It was agreed that the Claimant and Mr Redhead had a telephone conversation on 24 August 2021. Both mentioned the conversation in their

respective witness statements. It was agreed that the Claimant asked for leave from 15 September 2021 to 22 September 2021. It was later accepted by the respondent that the Claimant was not scheduled to work on 13, 14, 23, 24, 25 and 26 September 2021 and the request for leave made to Mr Redhead did not include these dates. It was also agreed that the Claimant had been granted leave between 27 September 2021 and 3 October 2021 [121].

- 31.9. It was agreed that the Claimant and Mr Redhead spoke on 25 August 2021 after Mr Redhead had taken advice from an HR Business Partner. The evidence of the Claimant and Mr Redhead was that the Claimant's application for leave was refused because the period requested was in the iPhone embargo period.
- 31.10. There is a dispute between the witnesses as to what the Claimant's reaction was. The Claimant says he would take the period as unpaid leave. He says Mr Redhead thanked him for letting him know and went on to have a discussion with the Claimant about who would be covering his work in the store. Mr Redhead says that the Claimant said that he would still be taking the opportunity [to appear on the reality TV show] and would face any consequences on his return to work. We will deal with this conflict of evidence later.
- 31.11. Mr Redhead emailed the Claimant on 31 August 2021 [115] to follow up their telephone conversation on 25 August. He wrote:
- "Your request was for an additional 3 weeks of leave after your already approved annual leave in early September due to the embargo period & upcoming launch this was declined after careful consideration due to the impact on your store team, region & wider business.*
- I appreciate your honesty in coming forward to make the request & subsequently your desire to continue with the opportunity you have been presented, as our call last week any unauthorised leave if it does occur will lead to an investigation."*
- 31.12. The Claimant accepted that he did not reply to the email.
- 31.13. The Claimant did not attend work on 13 September 2021. The Respondent's contract with the Claimant [100] requires employees to contact their managers at least 30 minutes before their start time to explain their absence. It was agreed that the Claimant did not contact Mr Redhead.
- 31.14. Mr Redhead attempted to contact the Claimant by telephone on 13, 16, and 20 September 2021 but he did not pick up the call or respond. Mr Redhead wrote to the Claimant on 17 September 2021 [151-152] advising him that his absence from 13 September was unauthorised and he was regarded as being AWOL from that date. The Claimant was suspended from 13 September 2021.
- 31.15. Mr Redhead wrote to the Claimant again on 22 September 2021 [118] inviting him to a disciplinary hearing to be chaired by Danny White on 29 September

2021. The subject of the disciplinary hearing was the allegation of unauthorised absence from 13 September 2021 and failure to comply with the Respondent's Absence reporting Procedure. The letter enclosed a copy of the Respondent's:

31.15.1. Disciplinary Policy;

31.15.2. Unauthorised Absence Policy;

31.15.3. Contact Log; and

31.15.4. Mr Redhead's evidence about the Claimant's annual leave request.

31.16. The disciplinary hearing was rescheduled for 7 October 2021 [122-123].

31.17. The Claimant was dismissed at the disciplinary hearing on 7 October 2021. His effective date of termination of employment was 7 October 2021.

31.18. The claimant appealed his dismissal on 18 October 2021. The appeal hearing took place on 9 November 2021. The claimant was advised that his appeal had been refused on 6 December 2021.

31.19. The Claimant started early conciliation with ACAS on 5 December 2021 and obtained an early conciliation certificate dated 7 December 2021 [1]. The Claimant presented a claim form (ET1) and Particulars of Claim on 7 December 2021 [6-17].

Points of dispute

Unfair Dismissal

32. We find that the Respondent has shown on the balance of probabilities that the reason for dismissal was misconduct that it regarded as gross misconduct. We make this finding because it was never disputed what the reason for dismissal was. Specifically, the Respondent found that the claimant had taken more than 6 days' unauthorised absence, which it regarded as gross misconduct.
33. We find that the Respondent's belief in the claimant's guilt was genuine. We appreciate that the Claimant believes the belief was wrong, but that does not prevent our finding that it was a genuinely held belief by the respondent.
34. We find that there were reasonable grounds for the Respondent's belief because we fundamentally disagree with the Claimant's interpretation of the facts in the case.
35. We find that the Claimant looked at the relevant policy two years before he was dismissed because he said as much. He admitted that he did not recall every word.
36. The Claimant said he had a group of fellow managers that he could turn to for advice. He said that he turned to Mr Mandalia at times.
37. The Claimant could have turned to his line manager, Mr Redhead, Mr Mandalia, his colleagues, or the Respondent's HR/ER resource to check his understanding of the

AWOL Policy and/or his plans to take leave, but he failed to do any of these things, relying on what he thought he remembered from reading a document two years previously.

38. The Claimant says he is aware of his alleged inability to correctly understand documents, which makes his failure to check the position regarding AWOL himself or with others even more surprising.
39. We find that the Claimant's assertion that, as a general principle of employment law, any employee of any company can tell their employer that they will not be coming into work because it doesn't suit them to do so, if they give reasonable notice and do not expect to be paid for the time off, is incredible.
40. We find it highly unlikely that the Claimant, as a manager with about 7 years' experience, never dealt with a case of one of his line reports being absent when unauthorised.
41. We find that there was no imperative on the Respondent to investigate the impact of dyslexia on the Claimant's ability to understand the AWOL policy before the appeal because:
 - 41.1. It was not raised until the appeal;
 - 41.2. The Claimant did not raise it himself when Mr White was questioning him in the disciplinary hearing;
 - 41.3. We do not find that there is any compunction on Mr Mandalia to have reported the Claimant's statement that he was dyslexic to HR or management because of what the Claimant said at his interview or what he said when he was presented with eight policy documents in his induction.
42. It is clear and unchallenged evidence that the Claimant asked for leave on 24 August 2021 that included a period when leave was forbidden for customer facing staff because of an embargo caused by the launch of a new iPhone. We reject the Claimant's evidence that leave was allowed in this period, because documents and evidence could have been produced that were corroborated his evidence (if it were correct) but were not. Also, the Respondent's witnesses were consistent in denying that such leave was granted. We found their evidence was credible.
43. The Claimant raised the issue of managers being allowed leave during an iPhone launch at his disciplinary hearing [129]. He was asked if these managers were in his region. The Claimant replied, "No on others. The training team and RBC also had annual." Mr White challenged the Claimant's statement by asserting that the training team and RBC did not work within retail and, regardless of anything else, the Claimant's manager had refused his request. The Claimant provided no further information about managers in other regions to the respondent or to this hearing.
44. It is also undisputed that Mr Redhead told the Claimant on 24 August that leave would be unlikely because of the embargo.
45. It is also unchallenged by the Claimant that his request for leave was denied by Mr Redhead on 25 August 2021 in a telephone call.

46. There is a dispute about what words the Claimant used in the call on 25 August, but what we find most likely to have happened on the balance of probabilities is that the Claimant said that he would be taking the leave anyway. We make that finding because of the near-contemporaneous email sent by Mr Redhead to the Claimant on 31 August 2021 [115]. That email clearly records that the Claimant was to continue with the opportunity with which he had been presented. That clearly means that the Claimant was going to take the time off, whatever Mr Redhead said. The Claimant repeated that he would have taken the time off whatever the response to his request had been in oral evidence.
47. We find the Claimant's assertion that the investigation that Mr Redhead referred to was going to be about the performance of his store in his absence was highly unlikely given the context of the comment. It was not a point that the Claimant raised in his disciplinary or appeal.
48. With hindsight, Mr Redhead may have worded the email of 31 August 2021 differently, but we take judicial notice of the fact that HR departments often advise managers to not send letters to employees that can later be alleged to infer that a disciplinary decision has already been made.
49. The Claimant was absent from work for more than six days. The Respondent believed that period to be unauthorised. There was some dispute about how long the period of unauthorised absence was, but it was at least from 15 September 2021 to 22 September 2021.
50. Mr Redhead tried to contact the claimant on 13, 16, 17, 20 (twice) and 22 September 2021 and received no response.
51. We find that the Claimant must have been aware of the disciplinary situation when he received the letter inviting him to a disciplinary meeting on [118-119] because it specifically states that the case could be viewed as gross misconduct and could result in summary dismissal. The Claimant's assertion that he was unaware of the seriousness of the matter until the hearing is not credible.
52. The hearing was rescheduled and another letter sent on 29 September 2021 [122-123] which again warned of possible dismissal for gross misconduct.
53. The Claimant knew he had taken unauthorised absence because he admitted it in the disciplinary [125] but believed he was not in breach of the AWOL policy because he had told his manger that he would not be coming into work with enough notice.
54. He only mentioned unpaid leave for the first time late in the hearing [128].
55. We find that the UA Policy (and AWOL) policy could be clearer, as they both link the idea of "not turning up to work" with the concept of "without telling your manager." There is room for misunderstanding here, but not enough to explain or excuse the behaviours of the Claimant who was a manager with 7 years' management experience.
56. All the panel have experience of managing people and find it highly unlikely that a manager with the experience of the Claimant would not have known that an

employee who had been refused leave could then take the period of leave requested as unpaid leave without the authority of their manager, as the Claimant did.

Dyslexia

57. We find that, although the claimant may be dyslexic; on the evidence produced to this Tribunal, the Claimant has failed to meet the evidential burden on him (the balance of probabilities) to show that at the time with which this claim is concerned, he met the definition of 'disabled person' in section 6 of the Equality Act 2010.
58. We make that finding for the following reasons:
 - 58.1. The SDCA Dyslexia Test Report dated 26 May 2022 is not a medical report.
 - 58.2. It is written by someone who has given no indication of their medical and/or other relevant qualifications to determine whether the claimant is dyslexic or not.
 - 58.3. It is a marketing document aimed at persuading the claimant to take a subscription to the services offered by the company.
 - 58.4. The report notes the Claimant's age (29) [42] but then refers to him as deserving "...help to avoid low literacy at adolescence." This indicates to us that the writer gave little thought or care to the document.
 - 58.5. We find we can give little weight to the report because of the matters listed above and certainly cannot give it sufficient weight to make a finding that the Claimant is dyslexic.
 - 58.6. The report states that the claimant is "functionally near illiterate." We find that means that the Claimant can barely read.
 - 58.7. That conclusion is at odds with what we observed of the Claimant, who was able to read the bundle and witness statements. His case was not that he could not read, but that he misunderstood the documents he did read.
 - 58.8. The Claimant's evidence about dyslexia was entirely reliant on his own assertions.
 - 58.9. He produced no medical, educational or employment records that suggested he was dyslexic. We took the Claimant's oral evidence that there was a fire at his home that destroyed his personal medical records that may have supported his case at face value. However, that account was not mentioned at the preliminary hearing before EJ Jones. Additionally, the Claimant's written evidence lacked detail and credibility, his oral evidence was inconsistent with his written evidence and the 'medical' report was not credible.
 - 58.10. The evidence of Mr Mandalia was not evidence that the Claimant has dyslexia. It was evidence that the Claimant told Mr Mandalia he had dyslexia. Mr Mandalia is unable to make such a diagnosis.

- 58.11. We find that we cannot make a diagnosis of dyslexia ourselves on our own initiative, as we have none of the qualifications to be able to do so. We must be guided by the evidence. Unfortunately for the Claimant, the evidence he produced was insufficient for us to make a finding that he has dyslexia.
- 58.12. Had we found that the Claimant has dyslexia, we would not have found that it had a significant long-term adverse effect on his ability to carry out normal day-to-day activities because his impact statement and oral evidence did not meet the standard of proof required. There were two pieces of evidence from the appeal hearing that undermine the Claimant's assertions about the impact of his asserted disability:

"I do interpret things differently to some people. I am more of a visual learner; my spelling isn't too bad." [160]

"With my dyslexia its more of an interpretation and I wouldn't know if I don't understand something until afterwards. I genuinely believed I understood the policy and maybe that is not the case." [161]

- 58.13. We therefore must conclude that the Claimant has not discharged the burden on him to show on the balance of probabilities that he met the definition of 'disabled person' in section 6 of the Equality Act 2010.
- 58.14. If the Claimant was not a disabled person, then the Tribunal has no jurisdiction to hear his claims of disability discrimination. Those claims are dismissed.

Applying the findings of fact to the Law and the Issues

Disability discrimination

59. We find that the Claimant has not shown that he was a disabled person at the time with which this claim is concerned so his claims of indirect disability discrimination and failure to make reasonable adjustments fail.

60. We ought to add that we found both claims to be factually weak. The PCP relied on by the Claimant in both claims was:

"All employees need to be able to read, understand and follow the written AWOL policy or they will face disciplinary action leading to dismissal."

61. On his own admission, the Claimant said that he thought he understood the AWOL Policy:

"Unauthorised absence is sometimes referred to as AWOL or absence without leave, which mean the same thing. If you don't come to work when you're supposed to and don't tell your manager and/or provide a legitimate reason why you've been absent then your absence is unauthorised and will be unpaid."

"Anyone whose absence is seen as unauthorised will be subject to this policy and the disciplinary policy."

62. On our findings above, the Claimant can have had no reasonable belief that his request for leave had been granted by Mr Redhead because of the conversation they had on 25 August and Mr Redhead's email of 31 August. The Claimant did not have a legitimate reason for absence. We find that the Claimant was capable of reading, understanding, and following the AWOL Policy.

Unfair dismissal

63. The Respondent has shown that the reason for dismissal was the claimant's conduct. No other reason was suggested.
64. The Respondent had a genuine belief in the Claimant's guilt.
65. The Respondent's belief was based on reasonable grounds.
66. The Respondent conducted a reasonable investigation.
67. The Respondent conducted a reasonable procedure.
68. The Respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant.
69. The decision to dismiss was within the band of reasonable responses.

Breach of contract

70. We find that the Claimant committed an act of Gross misconduct that justified the Respondent in terminating his contract of employment without notice.

**Employment Judge Shore
Date: 14 October 2024**