Case Number: 2402263/2019(V)

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr M Miah **V** Boots Management Services Limited

Heard at: Manchester Employment Tribunal (remotely using 'CVP')

On: 9, 10, 11, 12 & 13 November 2020

Before: Employment Judge Johnson

Members: Mr P Stowe
Mrs A Eyre

Appearances
For the First Claimant: in person
For the Respondent: Mr T Sheppard

JUDGMENT

1. The complaint of direct sex discrimination is not well founded, or in the case of the treatment relating to the respondent's dress code is presented out of time and the Tribunal has not jurisdiction to hear it. These claims are dismissed.

2. The complaint of indirect sex discrimination is not well founded and is dismissed.

3. The complaint of harassment on grounds of sex is not well founded and is dismissed.

4. The complaint of victimisation is not well founded and is dismissed.

5. The complaint of associative direct discrimination by reason of the claimant's mother's disability is not well founded and is dismissed.

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

REASONS

Background

1. These proceedings arise from the claimant's employment as a dispensing operative with the respondent from 22 February 2017 until 1 March 2019.

2. The claimant presented a claim form on 8 March 2019 following a period of early conciliation. He made claims of constructive unfair dismissal, discrimination on grounds of sex and associative disability discrimination, (relating to his mother's disability).

3. The respondent presented a response on 16 April 2019 and there was case management at preliminary hearings on 16 July 2019 and 13 January 2020. Employment Judge Holmes considered the case on 16 July 2019 and listed the case for hearing on 16 to 20 March 2020 in the Manchester Employment Tribunal. He also made an order for the claimant to provide further particulars of his claim in reply to the respondent's request for further particulars provided with their response. The respondent was permitted to present an amended response following this, together with the usual case management orders that one would expect to find in a case of this nature relating to disability, disclosure, bundles and witness evidence.

4. Detailed further particulars were provided by the claimant and the respondent presented an amended response on 18 September 2019. Employment Judge Dunlop considered the matter further on 13 January 2020. The final hearing was confirmed as being in relation to liability only. She also confirmed that due to the claimant's concerns about sensitive medical information being discussed in a public hearing, any evidence or submissions which related to his surgery which took place in 2017, would be heard in private. The claimant had originally made an application for an anonymity order, which was rejected by EJ Dunlop, but which she confirmed could be renewed during the course of the final hearing if it became appropriate to do so.

5. The hearing which was due to take place in March 2020, was postponed due to issues presumably relating to the restrictions imposed by the Covid 19 pandemic. It was relisted to the current dates given above in this judgment and the case was heard remotely using the courts' and tribunals' Cloud Video Platform, commonly known as 'CVP'.

The Evidence Used in the Hearing

6. This was a case where the claimant produced a short witness statement which did little more than refer to documentation in the hearing bundle, namely; his grievance, grievance appeal, letter of resignation, claim form, further particulars, impact statement (for his mother) and schedule of loss. We took into account the claimant's unrepresented status and Employment Judge Johnson informed the parties that we would apply the overriding objective under Rule 2 of the Tribunal's Rules of Procedure. We would therefore allow these documents to form part of his evidence. Before giving evidence, the claimant was asked to add a statement of truth to his statement and to sign and date it.

7. The claimant also called a number of witnesses to give evidence in support of his case. Some were colleagues or former colleagues:

   a) John Barden;
   b) Alia Kaleem; and,
   c) Levina Banzi.

   The others were friends and a relative:

   a) Kevin Roberts;
   b) Rohima Miah (the claimant's sister);
   c) Angelos Fousketakis;
   d) Kasim Nawaz; and,
   e) Jessica Bamber.

   The latter two witnesses did not give oral evidence as they were unavailable. The claimant confirmed that he wished to rely upon their evidence, but it was noted that while Ms Bamber's statement was signed and dated, Mr Nawaz's statement was signed and undated and neither statement contained a statement of truth. Accordingly, Employment Judge Johnson confirmed that while this witness evidence could be considered by the Tribunal, it would be given less weight than the evidence of those witnesses who had attended the Tribunal hearing and who had given oral evidence under oath.

8. The respondent relied upon 5 witnesses. These were:

   a) Steven Lea (Continuous Improvement Manager at the time of the claimant's employment);
   b) Paul Wilson (Pharmacy Delivery & Collection Manager in North of England and manager hearing claimant's grievance);

c) David Donald (Senior Operations Manager);
d) Chris Watts (Senior Development Manager and officer hearing the claimant's grievance appeal); and,
e) Alex Lowe (HR Business Partner and HR support to Mr Watts during the claimant's grievance appeal).

9. The bundle was provided to the Tribunal electronically and was in excess of 800 pages. A few issues arose in ensuring that the claimant had all of the necessary pages. However, Mr Sheppard and his instructing solicitor worked effectively to ensure any missing documents were quickly sent to the claimant.

10. As the hearing was conducted by CVP, all of the witnesses gave evidence remotely.

The Issues

11. A draft list of issues was included in the hearing bundle and were used during the hearing by the parties and the Tribunal and are as follows:

Jurisdiction

a) Has the claimant brought his claim within the primary limitation period set out in section 123 of the Equality Act 2010?
b) Do the matters alleged amount to a continuing act pursuant to section 123(3) of the Equality Act 2010, the last time of which is in time?
c) If not, is it just and equitable for time to be extended in all the circumstances?

Direct Sex Discrimination

a) Did any of the following amount to less favourable treatment because of his sex (male) contrary to section 13 of the Equality Act 2010?

    (i) An incident with Stephen Lea in relation to the claimant taking time off for surgery in July 2017;
    (ii) The claimant was given an unauthorised absence on 22 August 2017;
    (iii) The claimant was told to drink an out of date drink after being told there was drinkable tap water in the bathrooms in August 2017;
    (iv) Only the claimant (and not his female colleagues) was disciplined as a result of him taking a jumper from the storage area and false accusations of stealing in February 2018;

(v) The claimant was given a final written warning on 19 April 2018 because he had not followed the absence reporting procedures by texting his line manager;
(vi) Between June and July 2018, the claimant was targeted for a phone search, under the direction of Stephen Lea but female colleagues did the same but were not disciplined;
(vii) The claimant was unable to talk at work on various dates between January 2018 and July 2018;
(viii) The claimant was shouted at across the work area by Stephen Lea multiple times between January 2018 and July 2018;
(ix) The claimant was unable to wear shorts or three-quarter length trousers between June and July 2018;
(x) The claimant was interrogated about his absence when taking two days off because of a leg injury between April and May 2018;
(xi) During January to July 2018, the claimant was told not to leave his jumper on a shelf;
(xii) There was ongoing criticism of the claimant's work between January 2018 and July 2018; and,
(xiii) The claimant was being overworked and that there were unrealistic expectations on his workload between June and July 2018.

b) Are any of the following people the appropriate comparator for this claim?
(i) Natalie;
(ii) Alia K;
(iii) Levina Banzi;
(iv) Abbie Culkshaw;
(v) Kim Gudgeon;
(vi) Anna H;
(vii) Jess Winbow;
(viii) Vicky;
(ix) Linda;
(x) Lisa D;
(xi) Lucy Stones;
(xii) Lyndsey Harrison;
(xiii) Natalie [duplicate name of (i) above?]
(xiv) Kerry Trusdale

<u>Indirect sex discrimination</u>

a) The issues to be decided in relation to the claims under section 19 of the Equality Act 2010 are as follows:

(i) it is accepted that the respondent's uniform policy is a provision, criterion or practice ('PCP');
(ii) it is accepted that the respondent applied the PCP (its uniform policy) to the claimant;
(iii) did the respondent apply the PCP to those who did not share the claimant's protected characteristics (respectively, being male) during his employment?
(iv) Did the PCP put men at a substantial disadvantage?
(v) did the PCP actually put the claimant at a disadvantage?
(vi) If so, has the respondent shown that the PCP was a proportionate means of achieving a legitimate aim?

Associative disability discrimination

a) The respondent submits that the Employment Tribunal does not have jurisdiction to hear the claim of associative disability discrimination. The claimant has stated that in further and better particulars that the act of associative disability discrimination occurred on 19 April 2018, meaning this claim is out of time and therefore the respondent requests that this claim be struck out. The respondent respectfully requests that the Employment Tribunal makes this determination.

b) In the alternative, has the respondent discriminated against the claimant contrary to section 13(1) of the Equality Act 2010 by treating the claimant less favourably than the respondent treats or would treat others, because of his mother's disability in particular:

(i) That during a return to work interview on 19 April 2018, the claimant was issued with a warning for not reporting his absence in accordance correctly.

Harassment

a) Are the following acts or omissions of the respondent engaging in conduct that has the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading or humiliating or offensive environment for the claimant?

(i) Informal meeting for 'jumper' incident – by Stephen L – February 2018;
(ii) False accusation of stealing – by Stephen L – February 2018;
(iii) Deliberate targeted phone search – Stephen L delivered by Lyndsey H – June – July 2018;
(iv) Formal meeting for texting in an absence – Stephen L delivered by Helen H – 19th April 2018;

(v) Not being allowed to chat whatsoever - by Stephen Lea – various dates – January 2018 to July 2018 (ongoing);
(vi) Shouting my name and shouting for me to stop chatting – Stephen Lea – January 2018 to July 2018 (ongoing);
(vii) Row over shorts – by Stephen Lea – between June and July 2018;
(viii) Threat – by Stephen Lea – between June and July 2018;
(ix) Surgery appointment incident – by Stephen Lea – July 2017;
(x) Doctor's appointment incident – by Stephen Lea – 22 August 2017;
(xi) 'Pain in Leg' interrogation – Stephen Lea delivered by Helen H – April – May 2018;
(xii) Criticism of work and general criticism – by Stephen Lea – January 2018 to July 2018 (ongoing);
(xiii) Unreasonable expectation to get more work done – by Stephen Lea – January 2018 to July 2018 (ongoing).

Victimisation

a) Did the claimant make a protected act as set out at paragraph 5(a) of the claimant's further and better particulars, or did the respondent believe that the claimant had done or may do a protected act?

b) Did the respondent subject the claimant to the detriments listed below because he had done that protected act or because the respondent believed that the claimant had done or may do a protected act?

i) Deliberate targeted phone search – Stephen L delivered by Lyndsey H – June – July 2018;
ii) Not being allowed to chat whatsoever – by Stephen Lea – various dates – January 2018 to July 2018, (ongoing);
iii) Shouting my name and shouting for me to stop chatting – Stephen Lea – January 2018 to July 2018, (ongoing);
iv) Row over shorts – by Stephen Lea – between June and July 2018;
v) Threat – by Stephen Lea – between June and July 2018;
vi) Criticism of work and general criticism – by Stephen Lea – January 2018 to July 2018, (ongoing); and,
vii) Unreasonable expectation to get more work done - by Stephen lea – January 2018, (ongoing).

c) In all cases did the respondent have knowledge of the alleged protected act?

d) If the Tribunal finds that the claimant has done a protected act, the respondent will argue:

i) That the act(s) complained of did not amount to a detriment; and,

ii) That the act(s) complained of were not carried out because of (and had absolutely no link with), the protected act.

Constructive unfair dismissal

a) was the claimant dismissed by the respondent in accordance with section 95(1)(c) of the Employment Rights Act 1996? In particular:

   i) did the respondent commit a breach of the claimant's contractual terms, (either express or implied)?
   ii) If the respondent did breach the terms of the claimant's contract of employment, did any breach amount to a fundamental breach of contract?

b) If the Tribunal finds that the respondent did commit a fundamental breach entitling the claimant to resign, is the claimant entitled to rely upon the alleged breach(es) for the purposes of claiming constructive unfair dismissal? In particular, did the claimant:

   i) Affirm any purported breach by delaying in resigning; and/or,
   ii) Did the claimant resign for a reason, or reasons , other than the alleged breach(es)?

c) Should the Tribunal find that the respondent did commit a repudiatory breach of contract entitling the claimant to resign, was the claimant's dismissal fair for some other substantial reason and was the claimant's dismissal fair having regard to all the circumstances in the case?

Remedy

a) [To be determined at a later remedy hearing in the event that the claimant is successful in whole in part with his claim].

Findings of fact

The employer and the employee

12. The Tribunal understands that the respondent company is part of the larger Alliance Boots Holdings Limited. Its retail element of the company is commonly known as 'Boots' or 'Boots the Chemist'. The respondent company operates a Dispensing Support Pharmacy ('DSP'), which consists of workplaces employing staff who are responsible for providing medicines to pharmacy stores in their area. One such workplace was located in Preston. It used part of a warehouse unit operated by Alliance Healthcare, occupying a mezzanine floor (known by staff as 'The Mezz') and an office space.

13. Staff working at this location were subject to a number of policies and procedures including Security Rules, Health & Safety, Social Media, Timekeeping and Sickness/Absence and Appearance and Dress Standards. It was understood by the Tribunal that because employees at the DSP were handling medicines, accuracy was essential. As a consequence, restrictions were in place concerning the use of mobile phones and talking while working.

14. The claimant started working for the respondent as a Dispensing Operative from 22 February 2017. The claimant signed a number of documents as part of his induction, which indicated his confirmation that he had read and understood the documents provided. Of particular note were the Security Rules (which identified the respondent's 'right of search' and the requirement that personal property including phones must be stored in lockers) and the Timekeeping and Sickness/Absence Policy (with the original signed on 22 February 2017 and the updated version signed on 9 March 2017). This latter document warned the respondent's staff that if they did not follow the correct absence reporting procedure, their absence will be recorded as unpaid sickness and sick pay would not be paid. It also provided that repeated failure to follow the correct absence reporting procedure would be classified as misconduct and disciplinary action could be taken.

Events in 2017

15. On 1 August 2017, the claimant attended a pre-operative appointment in advance of a surgical procedure which he says resulted in an incident arising with Stephen Lea concerning his taking time off work. This was followed by the claimant having an unauthorised absence recorded. There was little witness evidence heard from the claimant concerning this event. However, it was noted from a return to work interview in the hearing bundle, that on 2 August 2017 an informal meeting took place with his line manager, Kath Hilton. Ms Hilton was critical of the late notice given by the claimant of his absence, despite it relating to a pre-booked medical appointment for a pre-operative process on 1 August 2017. The claimant said that he forgot to notify the respondent but had independently (and unsuccessfully), tried to rearrange his shift in advance of this appointment.

16. Mr Lea said that he only became involved in this incident following an enquiry which was made by Ms Hilton with the clinic who were carrying out the claimant's surgical procedure. While he accepted that Ms Hilton made this enquiry independently and without the authorisation of the claimant, it was only following this enquiry being made, that she referred the issue to him for further consideration. His concern was that the claimant was apparently not being clear as to the reason for his absence from work and

he was anxious that without clarity being provided, the respondent could not properly support him and made adjustments in relation to his duties as would be appropriate.

17. The Tribunal recognised that employees may undergo surgical procedures which they quite reasonably feel sensitive about and that they may be reluctant to disclose the relevant details to their employer. However, Mr Lea gave credible evidence both in his statement and under cross examination that this issue related to Ms Hilton and that his involvement was limited to making enquiries as to the claimant's wellbeing. Moreover, he was very clear that in similar circumstances involving sensitive medical procedures and a female employee, he would have behaved no differently.

18. A further issue arose on 22 August 2017, when the claimant attended a further return to work interview with Mr Lea. This was described in the form as being a 'conduct' issue. The claimant had a doctor's appointment in Manchester which started at 3.45pm and which finished at 5pm. The claimant had informed Mr Lea of his appointment, but on that day had been due to work a 2pm to 10pm shift. Accordingly, the claimant had been expected to return to work following his appointment and to work the remaining 3 to 4 hours of his shift, (allowing for travelling time from Manchester to Preston). The claimant did not return to work or notify his employer of any health issues arising from this appointment that prevented him resuming his shift. The claimant was unable to provide an explanation as to why he was unable to return to work following this appointment and under the circumstances, the record of 'an unauthorised absence. The Tribunal were also satisfied that Mr Lea would not have treated a comparable female employee any differently, in the event that similar circumstances arose.

19. There was no dispute that the canteen at the Preston site was the responsibility of Alliance Healthcare and that they would order new water bottles to replenish the water fountain available to all staff on site. Alliance Healthcare had decided not renew the contract with the water fountain company during the summer of 2017 and as a consequence, no new bottles were supplied. It was not entirely clear why drinking water was not available from the tap in the canteen area, but both Mr Lea and the claimant confirmed that Mr Lea at a time in August 2017, had told the claimant that he could replenish his water bottle from a tap in the gents toilets. The claimant believed this to be a discriminatory act on grounds of his sex. However, Mr Lea was very clear that he told female employees to access the taps in the ladies toilets if they needed drinking water. There was no evidence to suggest that the water from these taps was not potable, but it is understood by the Tribunal that employees might feel reluctant to refill their water bottles from the taps in the toilets.

20. There was no dispute that upon being unhappy about the suggestion that he used the taps in the gents toilets, a bottle of orange was found and given to the claimant. There was no suggestion that the seal on the bottle had been broken, but unfortunately its best before date had expired. Mr Lea in his statement suggested that he gave the bottle, whereas in oral evidence he said that a colleague named Tara obtained it in for the claimant. This is not a material issue, but given that the claimant in his evidence also referred to Tara providing the bottle, we find that she was the person responsible. While it was unfortunate that the orange drink was out of date, we do not find anything malicious or deliberate in its provision and it was simply a case of management trying to assist a thirsty member of staff. That said, it is simply not satisfactory for employees to not have access to potable water from a tap in the canteen or other suitable location, if this is not already the case.

Events in 2018

21. In February 2018, the Preston DSP, which clearly experienced problems with temperature regulation, was very cold. The claimant and his colleague Ms Banzi, obtained a Boots uniform jumper each from the spare uniform cupboard. It is not clear why the claimant and Ms Banzi did not bring their own issued warm weather clothing to work, but the claimant told the Tribunal that he didn't think it was going to be as cold as it was and was only wearing a t shirt issued by the respondent. There was no evidence to suggest that the claimant had not been issued with his own corporate uniform fleece or jumper. They did not ask permission from managers, but the claimant explained that he had not been told *not* to take clothing from the cupboard.

22. What then happened was somewhat confusing. However, Mr Lea said he was informed by an assistant manager Jude Causer to participate in an interview with the claimant. Mr Lea said that the claimant was difficult when asked questions about the matter. The claimant felt he was being disciplined, accused of stealing and intimidated. Whatever was said, there was no evidence to suggest that this was a formal disciplinary hearing and management understandably were concerned that clothing had been taken without permission. Based upon the evidence we heard, we find on balance it was simply a matter of the claimant taking something without permission, being spoken to by a manager and being told to return the jumper as he shouldn't have taken it. It does seem that this could have been avoided had the claimant simply brought his issued clothing to work. As this incident happened in February, this should reasonably have included his issued jumper or fleece.

23. As to whether Ms Banzi was treated in a different way, Mr Lea said that he would have attended a meeting with her had Ms Causer asked him to do

so. Ms Banzi's evidence was that she was not at the interview with the claimant. She was somewhat vague as to whether she had been interviewed separately, but taking into account all of the evidence that we heard and the absence of anything to the contrary, we conclude that she was not interviewed about the jumper incident.

24. On 19 April 2018, the claimant was given a final written warning because he had failed to attend shifts on 3 and 4 April 2018 and did not follow the reporting criteria. The reporting criteria in the absence policy (which he had been briefed on and signed acceptance of), required any absence to be notified with a phone call, but with the provision that those attending an early morning shift could initially send a text first as an early alert, before making a call. The claimant had previously complied with these requirements, but on this occasion he had chosen to text instead. The respondent did not receive the text and were unable to record a reason for the absence at the time arose. The claimant mentioned that he was looking after his disabled mother on these days, but did not explain why this affected his ability to phone and why he could only text the respondent on this occasion. He did not appeal the decision despite being informed of this right and he confirmed in evidence that he accepted the decision of Helen Holmes, even though he felt it *'…a bit harsh'*. The claimant suggested that other colleagues had been getting away with simply texting when informing the respondent of absence without sanction. However, no evidence was heard from him of examples of individuals who escaped disciplinary action and whether they were male or female.

25. The respondent had a strict requirement under its Dress Code and Security Rules that employees could not have their phones with them in the Mezz while working. Mr Donald confirmed that the respondent had a search policy in place which applied to all staff and which existed due to concerns about employees bringing inappropriate items into the work area including personal medication which could get mixed up with the respondent's medication being prepared on the Mezz.

26. The claimant was vague as to the exact date but described a search which took place in June or July 2018. Mr Lea's recollection of the incident was that Lyndsey Harrison assistant manager, had concerns that employees were bringing mobile phones with them onto shift. He authorised a search and Ms Harrison searched 4 people consisting of 3 female employees and the claimant. The claimant felt that he was targeted and was the first employee to be searched in this group. The claimant believed he did not have a phone on him, whereas Mr Lea recalled that he did, although he was not present when the search took place. We did not hear evidence from Ms Harrison and there was no log available of the incident. Accordingly, we find it more likely than not that the claimant did not have a phone when the search took place.

27. The claimant's 'issue' was that while he did not object to the policy of searches but was troubled that it was not applied consistently to males and females. He suggested that female employees were bringing phones into the Mezz and managers were turning a blind eye to them being there contrary to rules. Ms Banzi, initially said that she had her phone at work her all of time, sometimes with permission and sometimes not. However, she accepted that she was caught by Mr Lea having phone and on that occasion, she did not have permission. The claimant was previously the subject of an informal meeting on 20 February 2018 for being caught with a phone and cautioned that he would face an investigation if it happened again. As there was no evidence of an investigation taking place following the search in June or July 2018, it is likely that the claimant did not have his phone with him. The Tribunal does find that the respondent had a reasonable need to limit phones given the nature of its work. The policy applied to everyone, with searches being carried out on both male and females. The Tribunal heard no convincing evidence that males were treated differently or worse than females and/or that the claimant deliberately targeted. Ms Banzi's evidence was somewhat confusing and we did not find it reliable in relation to this issue.

28. Mr Donald confirmed that accuracy was essential for employees working on the Mezz and it was '*of paramount importance to reduce distraction which compromised accuracy'* in the preparation of medicines. He confirmed that there was not an absolute policy of silence, but that employees were required not spend time chatting with each other due to the distraction it might cause. While this might seem harsh, it is an understandable policy to have in place given the nature of the product being handled. The claimant alleged that he was unable to talk at work between these dates. The Tribunal did not hear any evidence to convince it that the claimant was treated particularly harshly in this matter when compared with other colleagues, whether they be male or female. It may well be the case that some employees who enjoy chatting to colleagues at work, may find it more onerous than others to comply with this policy. While this might be the case, it was certainly something applied to everyone working in that location and there no convincing evidence to suggest it was applied inconsistently.

29. The claimant alleged that Mr Lea had a tendency to shout at him in the Mezz and that this happened between January 2018 and July 2018. This was denied by Mr Lea, although he did acknowledge he may have raised his voice in relation to the 'shorts incident' which will be considered below. The claimant's witnesses did not seem to have regular contact with Mr Lea and the Tribunal sees no evidence that during this period the claimant was shouted at by Mr Lea on a regular basis.

30. It was acknowledged by management that there was a problem with the temperature in the Mezz becoming far too warm. As a consequence, when Mr Donald arrived at the respondent's Preston site, he arranged for air conditioning to be installed in the car park. Initially, this was powered by a generator which became operational in May 2018. It was understood however, to be temperamental. During the summer it became possible to power it from the mains electricity, but there were occasions when it did not work as well as it should.

31. The respondent's dress code which applied to all employees at this time at the Preston site, expressly provided that shorts could not be worn, but that black/navy leggings, trousers, jogging bottoms and skirts with opaque tights could be worn. There was no reference to any items only relating to male or female employees and neither could wear shorts. The claimant was again vague about dates (suggesting that the incident happened *'between June and July 2018'*, but described coming into work with plain black cotton trousers which were three-quarter length. He compared them with the length of trousers and leggings that female colleagues were wearing at the time and he asserted they were not criticised by management, for doing so.

32. Mr Lea said that he when he saw the claimant's 'legwear', he believed they were shorts '*that just ended below the knee'* and he clearly did not identify them as being trousers. The assistant manager Kerry Trussdale had told him that the claimant had worn them on a previous occasion and she had told him not to wear them again. The claimant had clearly ignored this request and when Mr Lea saw him, there was a disagreement over whether they were shorts and thereby contrary to the dress code, or trousers which complied with the dress code. Mr Lea conceded that he raised his voice while they were in the Mezz area, but then proceeded to his office to discuss the matter further. He then told the claimant that he should not wear them again. Mr Lea confirmed that upon reflection he shouldn't have raised his voice concerning this matter in the Mezz. The claimant said he felt threatened because Mr Lea said '*I don't want to see you in those shorts tomorrow'*.

33. The Tribunal finds that the claimant was determined to wear the shorts/trousers regardless of management guidance and it understandable that the discussion with Mr Lea would have become frustrating to both of them. But what we find, is that Mr Lea thought he was applying the policy correctly. Based on how it was written at the time, this 'grey area' was left as a matter to be interpreted by individual managers. The claimant was not asked to leave work that day, was not disciplined and was simply advised what could not be worn. Mr Lea was simply attempting to provide reasonable management instruction to an employee.

34. The real question was whether the policy was being applied consistently to male and female employees and the claimant argued that women were able to wear three quarter length trousers or leggings without being subject to management criticism. Ms Banzi said that she was able to come into work wearing what she described as '*cycling shorts just above the knee'* and that management did not criticise her for doing this. The claimant suggested that Lyndsey Harrison, Abbey Culshaw and Kim Gudgeon wore three quarter length trousers or leggings and that he '*struggled to believe they were disciplined for wearing them'*. However, no evidence was provided to support his contention that they were disciplined. Mr Lea, was very clear that other colleagues were warned about wearing shorts at work and when he became aware what had happened with the claimant, he held an interview with him.

35. Mr Lea explained that he could not remember specific incidents of female employees wearing leggings as described by the claimant, but recalls that the clothing described would have a seam halfway down the calf. It appeared that at that time, this grey area of what constituted full length trousers/leggings and shorts was a discretion that was more rigidly applied to men than women. The Tribunal is not clear, whether the reason for this practice was because of different historical perceptions of what constitutes full length legwear for men and women. Whatever the reason, the Tribunal does find that women were afforded a greater degree of discretion when choosing to wear trousers or leggings that ended above the ankle but below the knee. It is therefore not surprising that the respondent replaced this dress code in 2019 with the standard Boots dress code which allowed employees to wear tailored shorts.

36. The claimant did not appear to have been specifically targeted in relation to his dress. Mr Lea confirmed that a male colleague 'Martin' was told not to wear what he described as 'ankle grazers', which the Tribunal assumes to have a hem just above the ankle. On balance, it is unlikely a female employee dressed in this way at the time, would have been criticised.

37. On 12 July 2018, following a period of absence, the claimant had a return to work interview with Helen Holmes, assistant manager. His absence was recorded as being left leg pain, sustained while running, and he was absent from work on 10 and 11 July 2018. The record of the interview provides a narrative of the claimant's history concerning this injury and also a description of his absence history. It appears from this record that the claimant had a previous informal warning for absence issued on 12 February 2018 and a second informal warning was issued at this interview, which was to remain on his record for 9 months. Mr Lea was unable to provide evidence concerning this absence and the claimant did not provide evidence explaining why he believes he was subject to an interrogation.

38. The claimant did assert as part of his alleged less favourable treatment, during January to July 2018, he was told not to leave a jumper on the shelf and which he described as being on a high shelf. He mentioned that it was actually a fleece and the reason for the criticism was because of general concerns that jumpers could get mangled on trolleys. This allegation was extremely vague and while it may well have happened, it simply appeared to be a case of management being concerned that loose clothing could be a safety concern and indeed it is noted in the dress code that loose skirts were not allowed to be worn.

39. The claimant suggested that he was subject to ongoing criticism from Mr Lea over a period from January to July 2018. He conceded during cross examination that there was some praise from Mr Lea, but that it was '*rarely*'. The Tribunal noted that Mr Lea clearly had pressures placed upon him to reach targets as a manager and said that he would *'encourage all colleagues to aim to hit targets that were set'*. There was no doubt that Mr Lea had a perception that the claimant could be lazy and had been subject to a number of behavioural issues while he worked with the respondent. Our finding is that Mr Lea attempted to manage the claimant and that the claimant was (or gave the impression), to be resistant to following workplace policies such as the dress code or generally communicating with his employer, such as asking for permission when he took the jumper from the cupboard or properly following absence notification requirements. Mr Lea may have found himself having to be more assertive with the claimant than other colleagues. However, this appeared to be connected with the claimant's general behaviour rather than anything to do with his sex, as there was insufficient evidence available to suggest that female employees were not treated more favourably.

40. Although the claimant suggested that he was overworked during June and July 2018 and that unrealistic expectations were made of him, no evidence was heard to support this allegation. The Tribunal is unable to find that the claimant was worked harder or had higher expectations placed upon him that his female colleagues.

41. On 12 July 2018 the claimant had a return to work interview with Helen Holmes following two days of absence on 10 and 11 July 2018 due to a pain in his leg. The return to work interview form mentioned that a '1st informal' had been issued following an absence on 12 February 2018 and as his absence record was described as being poor, a '2nd informal' was issued which would remain in operation for 9 months. These were measures imposed by the respondent's absence management procedure.

42. The claimant was shortly afterwards signed off work by his GP because of *'fatigue under investigation'.* The duration of the fit note which was produced was that the claimant would remain unfit for work from 19 July

2018 until 20 August 2018. The respondent completed a number of 'Keeping in Touch' records and on 13 August 2018, the claimant informed his line manager Kerry Trussdale, that a further sick note was being posted. The claimant remained absent from work until he resigned in 2019. He continued to submit fit notes with the same reason being given by his GP.

The grievance process

43. On 11 August 2018 the claimant raised what he entitled 'Emergency Grievance against Boots DSP management (Preston). Alex Lowe confirmed that there was no separate category of 'emergency grievance' within the respondent's processes and this would be treated like any other grievance. The letter was lengthy and detailed and ran to 9 pages in length.

44. The claimant said the grievance was triggered by an allegation that the respondent had breached data protection legislation. He said that he gone into work on or around 19 July 2018 when his first 'fatigue' fit note was provided by his GP. He had asked to speak with Ms Trussdale as she was his line manager, but as she was unavailable, he passed the fit note to Tara Quinn who was an HR officer and whom he said in his grievance '*I felt comfortable giving it to her – Tara has always been very understanding of people's circumstances and she actually made me feel like it was okay to be unwell.*'

45. It appears that the fit note was left on Ms Quinn's desk and as a consequence, he became aware that the reason for his absence became general knowledge to management and his colleagues. He described this situation causing him a great deal of anxiety and a perception that everyone was talking about him and his personal issues.

46. The grievance letter then went on to allege on a number of occasions that there was a culture of bullying and he referred to a number of *'isolated incidents'*, including the way in which he had been managed following sickness absence, the issues relating to alleged management shouting and the policy of silence in the workplace. He referred to the incident involving his treatment in relation to the three quarter length trousers, the borrowed jumper and his general feeling of being *'…intimidated by Helen [Holmes] and Steven [Lea].* However, the allegations did not identify when they took place, often referred in general terms to 'management' and made only one reference to *'gender discrimination'* in relation to the incident regarding the shorts/trousers.

47. Under cross examination, the claimant confirmed that the *'isolated incidents'* had not been the subject of any informal grievances. He went

on to say that in relation to these incident; *'I would have let it go, had you* [the respondent] *not breached my data'.* He also said that *'I would have carried on, I was not happy…plus I was looking to jump ship'.* The Tribunal notes that the claimant did appear to have reached a point in the summer of 2018 where he was sufficiently unhappy to want to look for an alternative job had the data incident regarding his fit note not arisen. This was the primary reason for raising the grievance and he would probably have resigned as soon as he found suitable alternative work.

48. Paul Wilson, who was at that time the Pharmacy Deliveries and Collection ('PDC') Manager for Yorks and Lincs, was appointed as the officer who would hear the grievance. He wrote to the claimant on 21 August 2018 introducing himself, explaining the process and enclosing a copy of the process. The Tribunal accepts that Mr Wilson was independent of the Preston DSP and was experienced in dealing with grievance processes for the respondent.

49. Mr Wilson then wrote to the claimant on 31 August 2018 and invited him to a meeting on 19 September 2018 at the main Boots shop in Preston and reminded him that he could be accompanied if he wished. The meeting took place as planned and a detailed note of the claimant's grievance was taken over an hour, which was some 14 pages in length. A number of witnesses were identified and Mr Wilson then met with Tara Quinn, Kerry Trusdale, Steven Lea, Linda Griffin, Matthew Coulson, Helen Holmes and Jon Barden.

50. Mr Wilson produced his outcome letter and this was sent to the claimant on 29 October 2018. He confirmed that his sick note was not treated with confidentiality, that procedures were not sufficient, that a new process had been introduced and that managers had been instructed in its operation. He also informed that the matter had been reported to the Boots Data Protection and Compliance Officer.

51. In relation to the dress code, Mr Wilson noted that neither male or female staff could wear shorts. However, he recommended that a review take place concerning the uniform policy.

52. The old dress code remained in place until it was varied with the introduction of the Boots DSP Appearance and Dress Guidelines. These revised guidelines were much clearer in how they explained what dress was acceptable and included allowing employees to wear tailored shorts. This would have placed the claimant in a position where he would not have expected to be treated differently than comparable female employees. Until these new Guidelines were implemented, the claimant felt unable to wear the shorter trousers and instead returned to wearing jeans. Mr Donald suggested in his evidence that this change of policy took place in June 2018. However, as the change of guidelines appeared to be

connected with the claimant's grievance and its outcome in late October 2018. On this basis, it is unlikely that this change happened until some time between the initial meeting with the claimant on 19 September and 29 October 2018.

53. Mr Wilson was unable to identify any systematic bullying and did not uphold this part of the grievance, but he felt that *'…some elements of the management style were not in line with the expectations set out in the Boots Leadership Behaviours'.* as a consequence, *'…[a] substantial development plan is currently underway to ensure all members of the DSP management team will receive additional training and tools that they will be able to grow as leaders'.*

54. Mr Wilson was concerned that there was confusion regarding the issue of the *'No Talking Policy' within '…the quiet zone'* and that it was inconsistently applied. Due to concerns about how this policy was enforced, he upheld this complaint and had advised that the policy should be upheld. However, there was no suggestion that the claimant had been targeted by Mr Lea or other managers.

55. The allegation concerning the phone searches was found to *'…initially corroborated your allegation and I uphold this element'.* As a consequence, an internal investigation was to be carried out.

56. It was noted that the claimant did not intend to steal the jumper, but that he should have sought permission before doing so. He felt the incident could have been managed better and as air conditioning was now installed, the need to borrow a jumper should not arise in future.

57. It was confirmed that only Mr Donald would be informed of the decision and the claimant was told that nobody else would know about his current mental health condition and that he had a right of appeal.

58. Although the claimant did not have any issue with how Mr Wilson handled the grievance, he decided to appeal the decision and gave notice by letter on 8 November 2018. He made enqueries regarding the notification of the Information Commissioner's Office regarding the data breach of his fit note. He then went on to express disappointment concerning the rejection of the bullying allegation and the '*gender discrimination'* issue, which he believed Mr Wilson misunderstood. He argued that he had chosen to wear trousers of a similar length to those being permitted to be worn by female employees, both being *'..just below the knees'.* In a grievance letter of just over 3 pages in length, the claimant concentrated upon the dress code issue over 2 pages and it is clear that this had become his main concern in the grievance process.

59. Chris Watts who was then a Senior Development Manager at Boots' headquarters in Nottingham was appointed as the appeal manager and he introduced himself to the claimant by letter dated 22 November 2018. The claimant was then written to again on 12 December 2018 and invited to a meeting on 18 December 2018 at Boots' main Preston store. The meeting took place as arranged and in addition to the claimant and Mr Watts, Alex Lowe attended as HR support. The meeting lasted for 45 minutes and Mr Watts was able to identify the issues. He confirmed that his role under the grievance procedure was to review rather than re-hear the grievance. He confirmed that he thought the purpose of the claimant's appeal was to consider new evidence that had come to light which may impact the original decision and the appropriateness of the outcome.

60. On 3 January 2019, he called Mr Wilson to discuss the question of bullying, the alleged misunderstanding about gender discrimination and that Ms Holmes' behaviour had not been addressed. He confirmed that he was only able to interview 5 of the 7 witnesses identified as being relevant to the grievance by the claimant but that two of them were not available when he visited the DSP in Preston. He said that he had initially thought about upholding the gender discrimination part of the grievance relating to clothes, but that following discussions with Mike Kerfoot who is a HR Partner with the respondent, it was decided to review the uniform policy instead. In relation to Ms Holmes, he said that her behaviour towards the grievance investigation was *'appalling*'. However, there was no evidence that the claimant was singled out by Ms Holmes and that her behaviour was indicative of a problem with management culture at the time. The Tribunal notes that Ms Holmes no longer works for the respondent, although it was not informed of the reason for her departure.

61. There was a slight delay in the progress of the grievance appeal, but on 23 January 2019, Mr Watts interviewed a further witness Jamie Skellorn, who suggested that women were *'..not called on as much as men'* in relation to the dress code. It appears that Mr Skellorn suggested that men were treated less favourably when managers interpreted the dress code.

62. On 30 January 2019, Mr Watts wrote to the claimant with the outcome of his grievance and he upheld Mr Wilson's finding in the grievance that there was no evidence of bullying, but a need for better leadership had been identified. He included his findings concerning Ms Holmes in relation to this finding. Mr Watts agreed that there was no firm evidence of gender discrimination, but that the dress code was '*ambiguous'* and he supported the recommendation that it be reviewed.

63. Overall, the Tribunal felt that the grievance process was carried out efficiently and properly by the respondent. There was no significant delay, it was independent and a thorough investigation took place. There was a

willingness to accept where management was not performing as well as it should and this was confirmed in the evidence of Mr Donald, who supported the changes. The Tribunal understands the reason for the findings which were made in relation to the dress code, but there did appear to be a misunderstanding as to the claimant's issue with its application rather than the code itself. However, the main issue which gave rise to the grievance in the first place, was the data breach and this was upheld and indeed led to a change in policy.

64. The claimant confirmed to the Tribunal that he did not believe that the grievance process was in any way discriminatory. He asserted in submissions that he did not look to commence proceedings until after he resigned because of ongoing issues relating to his mother, his debts and his ill health. However, no evidence was heard from him in relation to these issues and we are unable to make findings of fact in relation to these matters.

The claimant's resignation

65. The claimant remained signed off sick from work. However, on 26 February 2019, a reference request was received by the respondent from a company called NCO and who confirmed that the claimant *'…has recently been offered employment with our company in the capacity of Customer Service Representative'.* The letter was marked for the attention of Kerry Trusdale and on 28 February 2019, a further letter was sent asking for the reference. Ms Trusdale replied with the usual basic factual reference and he was described as *'still currently employed'* by the respondent.

66. It is noted by the Tribunal that February in 2019 only consisted of 28 days as it was not a Leap Year. This is relevant because the claimant sent a letter of resignation on the following day, 1 March 2019. It can reasonably be concluded that at this point the claimant would have been under the impression that he had a job with NCO when he sent this letter and may well have been aware of the reference having been sent by Ms Trusdale. The claimant did explain that ultimately his offer of a job with NCO was not confirmed, but that this was due to a problem concerning previous driving offences and that this withdrawal of the offer would have taken place before he gave notice of his resignation to the respondent.

67. The resignation letter alluded to three separate reasons. He asserted that they were a fundamental breach of contract because of *'…gender discrimination, racial profiling…, undue bullying, false accusations, harassment and intimidation…'.* He argued breach of trust due to *'…damage to my reputation amongst all my colleagues at the DSP (which is probably at least over 100 people) due to the leaked sick note…'.*

Finally, he informed the respondent that the grievance process was not followed properly. This involved his belief that all of the proposed witnesses were not interviewed, *'…the right questions were not asked…'* and the procedure was delayed.

68. The claimant made no mention of his offer of employment in his letter of resignation, although the Tribunal finds that the claimant was aware of this offer and had no reason to believe that he would receive an unfavourable reference from the respondent, that might prejudice the confirmation of the job offer.

The Law

69. The relevant sections of the EQA applicable to this claim are as follows:

70. *Section 6 Disability*

(1) 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.

It is noted that P in these proceedings is the claimant's mother and that the respondent accepts that she is disabled.

71. *Section 11 Sex*

In relation to the protected characteristic of sex –

(a) A reference to a person who has a particular protected characteristic is a reference to a man or to a woman;

(b) A reference to persons who share a protected characteristic is a reference to persons of the same sex.

72. *Section 13 Direct discrimination*

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

In addition to the claimant's protected characteristic of sex, this form also relates to the allegation of discrimination against him by the respondent by reason of his association with his mother who is disabled.

73. *Section 19 Indirect discrimination on grounds of the claimant's sex*

(1) 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.

(2) For the purposes of subsection (1), 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.

(3) […]

74. *Section 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.

75. *Section 23 Comparison by reference to circumstances*

(1) On a comparison of cases for the purposes of section 13....there must be no material difference between the circumstances relating to each case.

76. *Section 26 Harassment*

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

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

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

(i) violating B's dignity, or

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

77. Section 27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act."

100. Section 123 Time limits

(1) [Subject to [sections 140A and 140B],] proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) […]

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

101. Section 136 Burden of proof

(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.

102. In final submissions, Mr Sheppard referred to a number of cases and principles found in these decisions.

103. Firstly, he noted that in a comparison of cases for the purpose of section 13 of the EQA 2010, there must be no material difference between the circumstances relating to each case; EqA 2010, section 23(1). 'All the characteristics of the complainant which are relevant to the way his case was dealt with must also be found in the comparator'; per Lord Hope in MacDonald v MoD [2003] ICR 937, HL.

104. He then referred to the question of associative discrimination and noted that Coleman v Attridge Law and anor [2008] ICR 1128, ECJ, the EU Equal Treatment Framework Directive (No.2000/78) covers those who, although not themselves disabled, nevertheless suffer direct discrimination (or harassment) owing to their association with a disabled person;

105. The claimant must prove that the protected characteristic was the reason for the treatment; Lee v Ashers Baking Company Limited and ors [2018] IRLR 1116, SC.

106. In relation to the two stage test under section 136 EQA, Mr Sheppard noted that it is only if the Claimant does prove the existence of such facts under subsection 136(2), on the balance of probabilities, that the second stage under subsection 136(3) is triggered. This requires the Respondent to prove that it did not commit, or is not to be treated as having committed, the unlawful act(s) in question[1]. Igen Limited v Wong; Brunel University v Webster; Chamberlain Solicitors v Emokpae [2005] ICR 931, CA.

107. In deciding whether to grant an extension of time, the ET was informed that in accordance with British Coal Corporation v Keeble and ors [1997] IRLR 336, EAT, it should consider such factors as the prejudice that each party would suffer as part of the decision reached and the length of and reasons for the delay.

108. Where it is contended that there was an act extending over a period of time-a continuing course of conduct Hendricks v Metropolitan Police Comr [2003] ICR 530 states that the Claimant has to demonstrate that the acts complained of were linked, and under Aziz v FDA [2010] EWCA Civ 304, one relevant but not conclusive factor, is whether the same or different individuals are responsible for the acts in question

Constructive Unfair Dismissal

109. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

110. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 it was held that in order to claim constructive dismissal an employee must establish:

(i) that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach); (note that the final act must add something to the breach even if relatively insignificant: Omilaju v Waltham Forest LBC [2005] IRLR 35 CA). Whether there is breach of contract, having regard to the impact of the employer's behaviour on the employee (rather than what the employer intended) must be viewed objectively: Nottinghamshire CC v Meikle [2005] ICR 1.

(ii) that the breach caused the employee to resign – or the last in a series of events which was the last straw; (an employee may have multiple reasons which play a part in the decision to resign from their position. The fact they do so will not prevent them from being able to plead constructive unfair dismissal, as long as it can be shown that they at least partially resigned in response to conduct which was a material breach of contract; see Logan v Celyyn House UKEAT/2012/0069. Indeed, once a repudiatory breach is established if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon; see: Wright v North Ayrshire Council EATS/0017/13/BI); .and

(iii) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

111. All contracts of employment contain an implied term that an employer shall not without reasonable and proper cause conduct itself in a manner

calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Malik v BCCI [1997] IRLR 462. A breach of this term will inevitably be a fundamental breach of contract; see Morrow v Safeway Stores plc [2002] IRLR 9.

112. In Croft v Consignia plc [2002] IRLR 851, the Employment Appeal Tribunal held that the implied term of trust and confidence is only breached by acts and omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach of the implied term is very much left to the assessment of the Tribunal as the industrial jury.

113. In addition to the above cases, Mr Sheppard for the respondent in final submissions reminded the Tribunal that an employee must in addition show that he left because of the alleged breach of contract at issue; Walker v Josiah Wedgwood & Son Ltd [1978] ICR 744.

Discussion and Analysis

Discrimination under the Equality Act 2010

Protected characteristics

114. For the purposes of the complaint of associative direct discrimination arising from the claimant's mother's ill health, there is no dispute that she is disabled within the meaning of section 6(1) EQA.

115. For the purposes of the complaints of sex discrimination, there is no dispute that the claimant is male/a man

The complaint of associative direct discrimination (disability)

116. The claimant asserted that he was the subject to associative disability discrimination arising from an absence connected with his mother's disability. This took place on 19 April 2018 and related to management action following his failure to follow absence management procedures by phoning rather than his simple reliance on sending a text without a follow up call. It was an isolated incident and it was not identified as a potential claim until the claim form was presented on 8 March 2019. This was almost 12 months following the alleged discriminatory act. It was separate from the 'data leak' which gave rise to his grievance being brought. It is therefore well outside of the 3 month time period from the date the act occurred, being the limit for presenting a claim of discrimination under section 123 Equality Act 2010.

117. The claimant failed to give any real explanation as to why it might be just and equitable to extend time to the date when the claim form was presented. He alluded in his final submissions to his mother's health, his own health issues, the ongoing grievance process in late 2018 and issues

relating to his debt. While this might be the case, he was clearly an IT literate individual, who was educated, was able to articulate his grievances in lengthy and detailed letters and would have been expected to be able to make enquiries concerning the possibility of litigation. It is noted that he was able to present a claim to the Tribunal within a week of giving notice of his resignation and this does not suggest a man who finds navigating the on line Tribunal application process, a difficult one. Accordingly, not only was this complaint presented out of time, but it is not just and equitable to extend time.

118. Even if the claimant had presented his claim in time, the Tribunal would not consider him to have been directly discriminated against on grounds of associative disability discrimination. The treatment he alleged was not discriminatory as it simply involved management action in respect of an employee who failed to follow the sickness/absence reporting process. Following this process was something that he had been able to follow on previous occasions and which he had signed as understanding. He did not advance an argument to demonstrate that this treatment was connected with his mother's disability and we find that it is simply an example of a number of failures by the claimant to take sufficiently seriously, the respondent's reporting requirements for absences. Any employee who fell foul of this procedure would be similarly treated and the Tribunal did not hear any evidence from the claimant to suggest a difference in treatment with other employees to support his claim. It was simply about a failure to follow policy and not about a request for time off being refused. Had the claimant given proper notice of his absence when it was about to take place, it is doubtful that he would have been subject to any criticism for this absence by the respondent.

The complaint of direct discrimination (sex)

119. The Tribunal has given consideration to all of the forms of treatment identified by the claimant and set out in the list of issues. Almost all of these alleged treatments were given somewhat vague dates as to when they happened, or have involved a blanket allegation over a period of time with no specific incidents being alleged. Understandably, this did cause the respondent's witnesses some difficulty in recalling the events relating to the relevant detriments, especially where no documentary evidence was produced. It was primarily the incidents relating to absences and return to work and the warning letters which provided documentary evidence in support of the alleged detriments.

120. It is unnecessary to repeat each of the detriments and discuss them in turn in relation to the question of whether they were discriminatory by reason of the claimant's male sex. These have been discussed in as much depth as is reasonably possible in the Findings of Fact section of this judgment. What was noticeable is that the majority of the alleged detriments were found not to have happened as alleged, or where they did take place, were found not to be targeted against the claimant at all and more importantly, not in relation to his sex.

121. The exception however, relates to the finding of fact made in respect of the dress code and the way in which management and in particular Mr Lea, treated the claimant differently when he wore three quarter length trousers when compared with Lyndsey Harrison, Abbey Culshaw and Kim Gudgeon, who were wearing leggings that were below the knee, but above the ankle. Mr Lea was honest in how he gave his evidence and there was clearly in his mind a belief that when a male employee wore trousers whose hem was above the ankle, they would be deemed unacceptable. This was confirmed in relation to the treatment of the employee Martin and his 'ankle-grazer' trousers being deemed in breach of the policy.

122. Women certainly appeared to have a great deal more latitude in relation to legwear and it did seem that leggings or three-quarter length trousers would not receive the same criticism. While at times the claimant could be vague and equivocal in how he gave some of his evidence, he was very clear throughout his evidence that he had compared his trouser length with comparable female employees and had been subject to challenge over compliance with the dress code. This was not about the question of 'shorts versus leggings' as described by the claimant, but management not applying a coherent and consistent discretion as to when a pair of trousers became a pair of shorts on a man and on a woman. The fact that the respondent during the grievance process determined that the dress code needed revision and was ultimately replaced by the Boots national model, supports a concern that the existing code was problematic and could result in inconsistent outcomes.

123. On this basis, the respondent treated the claimant less favourably than others because of his sex and in principle this complaint is well founded. However, the question of whether or not this claim was brought in time needs to be considered.

124. It was unclear when exactly the incident involving the claimant's trousers took place, but there is no dispute that it occurred during June and July 2018. The claimant did not raise a grievance in relation to this incident at the time it happened, although it did become a part of his grievance which he raised because of the data breach on 11 August 2018.

125. The incident relating to the dress code was a distinct act not repeated on other occasions. It does not form part of a continuing series of acts in that no further incidents of the claimant being warned about wearing these trousers took place, other than the two occasions mentioned by Mr Lea. Given that the incidents happened in June/July 2018, the claim was brought many months after this date and certainly more than three months required by section 123 EQA. However, the dress code remained in place until it was varied with the introduction of the Boots DSP Appearance and Dress Guidelines. These revised guidelines were much clearer in how

they explained what dress was acceptable and included allowing employees to wear tailored shorts. This would have placed the claimant in a position where he would not have expected to be treated differently than comparable female employees.

126. Until these new Guidelines were implemented, the claimant's evidence was that he felt unable to wear the shorter trousers and instead returned to wearing jeans. On this basis, the discrimination continued because based upon Mr Lea's evidence, a male employee was likely to be deemed to be breaching the dress code if wearing trousers above the ankle. Mr Donald suggested in his evidence that this change of policy took place in June 2018. However, as this appeared to be connected with the claimant's grievance and the outcome was not until the end of October 2018, it is unlikely that this change happened until some time between late September and 29 October 2018. However, even if we assume that the claimant was concerned that the management discretion under the old policy would continue until the end of October 2018, the presentation of his claim form on 8 March 2018, is outside of the 3 month period under section 123 EQA. While the claimant did eventually increase his focus during the grievance process upon the discriminatory impact of the application of the dress code, the discriminatory acts effectively ceased following the intervention of Mr Wilson and Mr Donald as a result of the initial grievance investigation. The appeal was made in relation to a historic issue which had been remedied and which simply involved the claimant seeking an admission of discrimination by the respondent rather than a change to policy.

127. This does of course mean that the Tribunal then needs to consider whether it is just and equitable to extend time for presenting the claim to the date the claim was presented in accordance with section 123(1)(b) EQA. The claimant was a knowledgeable person who despite his lack of legal training, could produce lengthy and articulate correspondence setting out his grievances, identifying alleged detriments and discrimination. He was IT literate and would be able to make enquiries as to the potential to bring claims to the Tribunal. He did not delay presenting a claim following his resignation on 1 March 2019 and this suggests that he was not experiencing any difficulties in commencing proceedings. The claimant was signed off sick with anxiety related symptoms from July 2018 until he resigned. But there was no suggestion that his condition prevented him from participating in his grievance process. The Tribunal did not hear evidence relating to the claimant's difficulties experienced during his absence, although he did allude to issues involving his mother's ill health, his ill health, emotional issues and debt problems. However, the Tribunal were not provided with anything that would suggest that the claimant was in difficulties and the likely reason for his delay was that he was waiting to see what happened with his appeal. While this might be the case, the claimant had the ability to access advice and information concerning time limits and could easily have presented a claim bringing a complaint of sex discrimination once he received the decision of Mr Wilson in the initial

grievance. Under these circumstances it was not just and equitable to extend time.

128. Accordingly, although the claimant's complaint that he was subjected to less favourable treatment by being unable to wear three-quarter length trousers was potentially an act of sex discrimination, it fails on the basis that the claim was presented out of time, it is not just and equitable to extend time under section 123 EQA and the Tribunal has no jurisdiction to hear it.

Indirect discrimination arising from a disability

129. There was no dispute that the respondent's uniform policy which was applicable in June/July 2018 was a provision, criterion or practice, ('PCP') for the purposes of sub-section 19(1) EQA. It was also accepted by the respondent that this PCP was applied to the claimant and to those who did not share the claimant's protected characteristic during his employment. In effect, this means that the uniform policy was applied to both men and women.

130. The question of course is, did this PCP put men generally and the claimant specifically at a substantial disadvantage? The existing policy did not describe some of the permitted clothing to be restricted to men or women and was non-gendered when referring to specific items of clothing. It is fair to say that some clothing would usually be expected to be found on women rather than men. However, there was nothing to suggest that a man could not wear any of the clothing specified provided that it complied with the policy.

131. The real issue in this matter was that when it came to trousers, the application of the policy appeared to provide women with a greater degree of latitude when it came to determining an appropriate hem length. This is discussed in greater depth in relation to the discussion concerning direct discrimination above.

132. However, in relation to the complaint of indirect discrimination, the Tribunal finds that the PCP (namely the uniform policy), did not place the claimant and men generally at a substantial disadvantage when compared to women. Had management applied the policy consistently, no disadvantage would take place. The application of the policy was not asserted to be the PCP by the claimant and in any event, given that the way in which it was applied was because of the wearer's gender, it is something which falls within a direct discrimination complaint and which has already been considered above in the direct discrimination section of this discussion.

133. Taking this finding into account, it is not necessary for the Tribunal to consider whether the PCP was a proportionate means of achieving a legitimate aim. The respondent did not seek to assert a legitimate aim and there is not need for any further discussion on this matter.

134. In the event that the Tribunal was wrong in its determination concerning indirect discrimination, the complaint was presented out of time and it was not just and equitable to extend time under section 123 EQA for the reasons given above in the discussion concerning direct discrimination.

Harassment

135. The claimant identified a number of acts or omissions on the part of the respondent which he believed amounted to conduct which had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading or humiliating or offensive environment for the claimant at work. They effectively repeated most of the allegations of discriminatory treatment relating to the complaint of direct discrimination and the parties are referred to the Tribunal's findings of fact and the discussions concerning the complaint of direct discrimination, (above).

136. The Tribunal has largely concluded that the forms of treatment and/or conduct alleged by the claimant were largely (other than those found not to have happened as alleged or at all), an attempt by management to manage the claimant. They not related to the claimant's sex for the reasons that have already been discussed above.

137. There is of course the question of the incident relating to the three-quarter length trousers which is simply described as being the '*Row over shorts – by Stephen Lea – Between June and July 2018'* in the list of issues. This only refers to the second of the two incidents and involves the discussion which took place between the claimant and Mr Lea as to whether the three-quarter length trousers were shorts and contrary to the dress code applicable at the time.

138. The incident clearly involved an argument and Mr Lea telling the claimant that he did not want to see him wearing them again. However, it was a single incident and happened because of a difference of opinion. The Tribunal does not see any evidence supporting a contention that Mr Lea's comments was conduct which had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. While it might have been unwanted conduct in the claimant's opinion, it was a management instruction, albeit one which was potentially directly discriminatory on grounds of sex. It was not a form of harassment.

139. In the event that the Tribunal was wrong in its determination concerning indirect discrimination, the complaint was presented out of time and it was

not just and equitable to extend time under section 123 EQA for the reasons given above in the discussion concerning direct discrimination.

Victimisation

140. The claimant did assert that he was the subject of victimisation because he made protected acts by making a potential complaint in relation to discrimination towards men because of the uniform policy. Additionally, he advised that he had supported Levina Banzi when she raised a grievance on 27 March 2018 and also in relation to clashes between her and Helen Holmes, in relation to alleged race discrimination. Finally, he argues that he submitted a letter to the respondent for *'…the proposed new nights (sic) shifts in approximately August 2017…which were related to the disability of my mother'.*

141. The potential complaint made in relation to discrimination towards men because of the uniform policy appeared to be the 'emergency grievance' that he raised in August 2018. This is something which could amount to a protected act under section 27(2)(c) and (d) in that it was something in connection with the EQA, (alleged sex discrimination) and potentially that another person had contravened that act.

142. The support that the claimant provided to Ms Banzi was potentially a protected act in that it related to something in connection with the EQA, (alleged race discrimination). This was something which was not challenged by the respondent, but which the claimant did not deal with in his witness statement, which was very basic and simply referred to existing documents that he had produced. Ms Banzi did not deal with this matter in her witness evidence and as a consequence, it is unlikely that this happened as alleged by the claimant. Accordingly, this cannot amount to a protected disclosure.

143. The letter which he submitted to the respondents in August 2017. The Tribunal were not provided with a copy of this letter and in the absence of the claimant providing a detailed witness statement, it is difficult to see any evidence that a disclosure of this nature took place. This accordingly could not amount to a protected disclosure.

144. While the claimant was unrepresented, he had been able to provide detailed further particulars and which formed the basis of the list of issues. But he did not seek to build upon the issues that he had identified in either his own witness statement, or the witness evidence of his own witnesses. The Tribunal is willing to make some allowances for the claimant in respect of the claims that he is bringing, but in relation to the latter two alleged protected acts, he has simply not provided the Tribunal with any evidence to support the allegation that these disclosures were made and that their substance could amount to protected disclosures.

145. The alleged acts of victimisation contained in the list of issues, do repeat in many respects, the treatments identified in the complaints of direct discrimination and the alleged acts of harassment. They involve the phone search, the not being allowed to chat, Steven Lea shouting, the 'row over the shorts', threats by Steven Lea, criticism and unreasonable expectations in relation to his work. There is nothing new here and the alleged acts have already been considered in the discussion regarding direct discrimination and (to a lesser extent) regarding harassment, (see above). Very little evidence was heard from the respondent concerning these acts and the Tribunal is satisfied that both of the acts referred to were protected. Many of the acts were found not to have happened as alleged or at all. Only the 'row over the shorts' could possibly be considered a detriment, for the reasons given in the discussion concerning direct discrimination, (above). However, as was considered in discussion regarding harassment, (above), this related to a single incident and while it might have been considered 'a row', it was a reasonable management exercise, albeit arising from a misunderstanding by Mr Lea in relation to the dress code. But what is clear to the Tribunal that the alleged event did not amount to a detriment arising from the claimant bringing the protected act of the grievance. Indeed, the detriment actually *preceded* the grievance and so it can hardly be considered to have happened because of the subsequent disclosure.

146. For these reasons, the Tribunal is unable to accept the claimant's complaint of victimisation. However, even if it was wrong in reaching this conclusion, taking into account the vague times given in relation to the alleged acts, they were all presented out of time. This failure to comply with subsection 123(1)(a) and that it is not just and equitable to extend time for the reasons given above in the discussion concerning direct sex discrimination, is why the Tribunal would have no jurisdiction to hear this complaint.

<u>Constructive unfair dismissal</u>

147. The claimant presented his claim in time and there is no dispute that he gave notice of his resignation on 1 March 2019.

148. His letter of resignation identified three separate reasons for his dismissal, which were fundamental breach of contract largely connected with the treatment identified in his complaint of direct sex discrimination, breach of trust due to the data breach concerning his fit note and that the grievance process was not followed properly.

149. Due to the issues which have been discussed above in relation to the complaints of discrimination under the EQA, the Tribunal does not accept that most of the issues identified under the heading 'fundamental breach' in the claimant's letter of resignation were actually that. Even though the Tribunal were concerned about the application of the dress code by management, it is not satisfied that in relation to the claim of constructive dismissal, it was sufficiently serious to amount to a fundamental breach.

This is especially the case given the subsequent decision to update the dress code in response to the claimant's grievance in the Autumn of 2018. The claimant took no action to challenge the issue regarding the shorts/three-quarter length trousers at the time and simply added it to his grievance which was brought following that data breach.

150. The claimant did confirm that the leaked sick note was a 'final straw' and this led him to issue his 'emergency' grievance. In this instance, the Tribunal accepts that a fundamental breach of trust could exist where an employee finds that he cannot reasonably believe his employer can keep his personal medical issues confidential.

151. While the claimant referred to the grievance process not being properly followed in his resignation letter, his witness evidence during the hearing did not convince the Tribunal that he was particularly troubled by the grievance. He conceded that the managers involved with the process handled it fairly and he showed a marked reluctance to criticise issues other than a slight delay over the Christmas period in the appeal and a failure to interview every single witness. However, as the Tribunal has concluded in the findings of fact, the grievance process was followed properly, was fair and did not have any undue delay. It simply cannot amount to a fundamental breach justifying a decision to resign.

152. The claimant did refer to a number of issues in his claim which had begun in 2017 and which ended with the data breach which gave rise to the grievance. The grievance itself was not and could be a contributory factor to his decision to resign. Taking into account the Tribunal's findings in this case, the issues that he identified in his resignation letter did not amount to a course of conduct which gave rise to his decision to resign. Indeed, the proximity of the grievance appeal on 30 January 2019 to the date of resignation on 1 March 2019, is purely coincidental. The real reason for the claimant's resignation was that he had a job offer, the reference for which, had been processed by the respondent on the previous day. The claimant did not secure this new job because of the reference and at the point at which he decided to resign, the claimant would have known he had another job to go to. He was clear in his evidence that he was looking '*to jump ship'* from 2018 and that was the real reason for his resignation. Indeed, the issues relating to the data breach had been remedied during the grievance and the Tribunal finds that the claimant did not like his job with the respondent and had found a better job elsewhere.

153. Moreover, whether it was the dress code issue or the data breach, the claimant simply delayed too long before resigning. The grievance process was followed properly and the claimant made many concessions in his evidence that it was followed properly and that any issues were minor in nature. Although it was referred to as being a matter which contributed to his decision to resign, we do not accept that this was a material factor in that decision. As a consequence, it is our finding that he effectively affirmed his contract of employment by not resigning sooner, by allowing

the grievance to run its course and then allowing some time to elapse before he resigned, which of course coincided perfectly with the offer of employment.

154. For these reasons the claimant's claim of constructive unfair dismissal cannot succeed.

Conclusion

155. The complaints of direct sex discrimination, indirect sex discrimination, harassment on grounds of sex, victimisation, associative direct discrimination by reason of the claimant's mother's disability are not well founded and/or are out time meaning that the claims are dismissed.

156. The complaint of constructive unfair dismissal is dismissed.

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Employment Judge Johnson

Date: 23 November 2020

Sent to the parties on:
18 December 2020

For the Tribunal Office