



EMPLOYMENT TRIBUNALS

Claimant: Mr S Galley

Respondent: Sports Direct.com Retail Limited

HELD AT: Manchester

ON: 8, 9, 10 & 11 January
2024

BEFORE: Judge Johnson

MEMBERS: Mr B Rowen
Mr N Williams

REPRESENTATION:

Claimant: Unrepresented (supported by his wife, Mrs L Galley)

Respondent: Mr D Patel (counsel)
Ms C Reid (solicitor, observing)

JUDGMENT

The judgment of the Tribunal is that:

- (1) The complaint of disability discrimination is not well founded which means that it is unsuccessful.
- (2) The complaint of constructive unfair dismissal is not well founded which means that it is unsuccessful.

REASONS

Introduction

1. These proceedings arose from the claimant's employment as a store manager with the respondent from 2013 and his decision to resign in 2022. Essentially this decision was made following performance issues which had been identified by management and which resulted in a grievance being brought by the claimant. He resigned following the outcome of the grievance decision.

2. The claimant presented a claim form to the Tribunal on 13 September 2022 following a period of early conciliation from 8 August 2022 to 9 September 2022 and brought complaints of constructive unfair dismissal and various forms of disability discrimination. The claimant's disability is anxiety and depression.
3. The response was presented on 25 October 2022. It resisted the claim and raising of issues of jurisdiction involving time limits. Initially disability was not admitted.
4. Case management was considered at the preliminary hearing case management before Judge Buzzard on 1 February 2023 when the case was listed for a final hearing, a preliminary list of issues identified, and case management orders made.

Issues

5. A final list of issues was agreed shortly before the final hearing, and it was provided to the Tribunal just before the hearing began. As will be explained where relevant in the discussion below, the Tribunal found some problems with the way in which the list of issues was presented. However, it was the agreed and final list and that was what was used throughout the hearing. It is reproduced in the paragraphs immediately below.

Jurisdiction

6. Are any complaints of discrimination out of time?
7. If so, is there any conduct extending over a period?
8. If not, should time be extended pursuant to s.123 Equality Act 2010?

Disability

9. The Respondent accepts that the Claimant was disabled at all material times for the purposes of the Equality Act 2010. However, this is without prejudice to:
 - a. The Respondent's position on knowledge; and
 - b. The Respondent's comments that:
 - i. There look to have been discrete periods of illness in 2013 and 2019 and 2022.
 - ii. There seem to have been large gaps between these episodes with no reported symptoms and limited/no treatment (e.g., no medication appears to have been prescribed to the Claimant between April 2020 and March 2022 from his GP records).

Knowledge of disability

10. Did the Respondent know, or should it reasonably have known of the Claimant's disability? If so, what is the date of such knowledge? The Claimant contends the Respondent knew from approximately 2013.

Disability discriminationDiscrimination arising from disability (s.15 Equality Act 2010)

11. Did the Respondent subject the Claimant to unfavourable treatment? The Claimant relies on the following alleged conduct:
- a. On one occasion in 2020-2021 Chris Howard commented loudly across the shop floor to ask why the Claimant wasn't using a face covering and commented that the Claimant was using his disability as an advantage (in reference to the Claimant's) exemption from wearing face masks.
 - b. The grievance process allegedly took over 4 months to conclude from when the Claimant raised this with Jennifer Cherry on 5 April 2022, with the Claimant receiving no/few progress updates.
 - c. Within the grievance outcome, Matt Brindle recorded the Claimant felt he was working extreme hours and like he was working like a dog, but stated he was working 45-47 hours a week without offering support as to how this can be addressed and instead criticising his management style.
 - d. On several occasions, Chris Howard would contact less senior members of the Claimant's team and they would relay information to the Claimant.
12. Was such unfavourable treatment because of 'something arising' from the Claimant's disability? The Claimant relies on the following as being 'something arising' from his disability:
- a. As regards 11.a. above, the Claimant experienced difficulty in complying with a requirement to wear a face covering on the shop floor.
 - b. As regards 11.b. above, the Claimant found the grievance process difficult due to the length of time it took for an outcome to be confirmed to him, which he says had an impact on his mental health.
 - c. As regards 11.c. and d. above, his management style was related to his disability.

13. If so, was this a proportionate means of achieving a legitimate aim?

- a. As regards 11.a. above, the Respondent relies on the need to wear a face covering or have an explanation for not wearing one in light of the Covid-19 pandemic and government guidance at the time.
- b. As regards 11.b. above, the Respondent relies on its obligation to conduct a full, fair, and thorough grievance process in compliance with the ACAS Code.
- c. As regards 11c. the Respondent relies on *[Claimant to confirm]*.
- d. As regards 11.d, the Respondent relies on *[Claimant to confirm]*.

Indirect discrimination (s.19 Equality Act 2010)

14. Did the Respondent have the following PCPs (as alleged by the Claimant)?

- a. Requiring stores to operate in line with the companies operating model/family tree in terms of the number of management staff they could use.

15. Did this apply to persons with and without the Claimant's disability?

16. Did it put the Claimant at a particular disadvantage?

- a. The Claimant alleges this put him to a particular disadvantage as he suffered from extreme tiredness and therefore needed additional support.

17. Did it or would it put persons with the Claimant's disability at that particular disadvantage compared to persons without his disability?

18. If so, was any such PCP a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments (s.20 and 21 Equality Act 2010)

19. Did the Respondent have in place the following PCPs (as alleged by the Claimant)?

- a. Declining the Claimant's request for additional management/full time staff.
- b. Increasing the trade in opening hours for the Claimant's store on or around 14/4/21 to 9am to 8pm.
- c. Requiring stores to operate in line with the companies operating model/family tree in terms of the number of management staff they could use.

- d. Not acknowledging or detailing a disability or associated symptoms that have been reported or witnessed during a grievance in the grievance investigation or any form during the grievance process.

20. Did one or more of the above PCPs put the Claimant at a substantial disadvantage by reason of his disability?

- a. In relation to 19.a. to c. above, the Claimant relies on extreme tiredness.
- b. *[Claimant to confirm the 'substantial disadvantage' which the other PCP at 19.d. put him to as a result of his disability.]*

21. Did the Respondent know or ought it reasonably to have known of such substantial disadvantage? If so, when is the date of knowledge?

22. Did the Respondent fail to take reasonable steps to alleviate the substantial disadvantage? The Claimant contends that the following adjustments should have been made:

He should have been provided with additional management and full-time employees (as regards 19.a to c. above).

[claimant to confirm the other reasonable adjustment in relation to 19.d above]

Harassment (s.26 Equality Act 2010)

23. Was the Claimant subjected to 'unwanted conduct'? He relies on the following alleged conduct:

- a. On one occasion in 2020-2021, Chris Howard commented loudly across the shop floor to ask why the Claimant wasn't using a face covering and commented that the Claimant was using his disability as an advantage (in reference to the Claimant's) exemption from wearing face masks.
- b. On several occasions, Chris Howard would contact less senior members of the Claimant's team and they would relay information to the Claimant.
- c. On several occasions, Chris Howard called the Claimant a '*mind terrorist*'.
- d. On 8 March 2022, Chris Howard said to the Claimant that he had 'too much negative equity' on the shop floor in front of customers and employees, and then again used the phrase 'negative equality' in a sit-down meeting with the shop's management team.
- e. On 4 July 2022, in the grievance outcome, Matt Brindle recorded the Claimant felt he was working extreme hours and like he was working like a dog, but stated he was working 45-47 hours a week without

offering support as to how this can be addressed and instead criticising his management style.

- f. On 4 July 2022, in the grievance outcome, Matt Brindle stated that the Claimant did not make Chris Howard aware of his condition until difficult conversations started being held when this was untrue.

24. If the alleged conduct occurred, was it related to the Claimant's disability?

25. Did it have the purpose or effect of creating an intimidating, hostile, degrading etc. environment for the Claimant?

Constructive unfair dismissal

26. Has the Respondent, without reasonable and proper cause, acted in a manner that is calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee?

The Claimant relies on the following alleged conduct:

- a. In 2020-2021 Mr Howard commenting that the Claimant was using his disability as an advantage to avoid wearing a face-mask.
- b. Mr Howard stating in the performance review of April 2022 that:
 - i. He would be applying for the new general manager role in the new store.
 - ii. Even if the Claimant managed to achieve the PIP development areas, he would not be moving to the new store.
- c. In April 2022, downgrading the Claimant in the performance review meeting from a 4 to a 1 without any pre-warning.
- d. Failing to investigate the concerns raised by the Claimant in his grievance of May 2022.
- e. When considering the Claimant's grievance of May 2022, only asking witnesses that would favour the outcome, or who had not been present for any of the matters complained of in the grievance (e.g., Tony Cobain).
- f. Failing to deal with the grievance brought on 13 May 2022 within a reasonable timescale.
- g. Stating in the grievance outcome of 4 July 2022 that:
 - i. The Claimant's grievance had been received in May when the grievance process had begun in April via a phone call between the Claimant and Jen Cherry on 5 April.

- ii. Mr Howard had no awareness that the Claimant suffered from anxiety and took medication when this was not true.
- iii. The Claimant did not make Mr Howard aware of his condition until difficult conversations started being held.
- iv. It is not always possible for area managers to visit each store whilst the store manager is on duty when most of Mr Howard's visits to the store were on the Claimant's days off.
- v. Mr Howard could not have known of the fire visit as it was unplanned, when this was wrong given that the Claimant had notified Mr Howard of the fire visit upon their arrival.

27. If so, did the Claimant in fact resign in response to such a breach?

Remedy

28. What, if any, compensation should the Claimant be awarded? The issues to consider will include:

- a. Whether any reduction should be made to the basic award or compensatory award by reason of the Claimant's conduct?
- b. Whether any reduction should be made to the award to reflect any unreasonable failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures?

Evidence used

29. The claimant gave evidence, but also called 3 other witnesses. They were former colleagues:

- a) Melika Azhdari (gave evidence remotely by CVP from Derry)
- b) Ana Alves (attended in person)
- c) Nicolas Saunders (attended in person)

30. The respondent called 3 witnesses who had been involved with the background issues which gave rise to the claimant presenting a Tribunal claim. They were:

- a) Chris Howard (Area Manager – Greater Manchester)
- b) Matthew Brindle (Area Manager – NW & Cumbria)
- c) Nicola Creagh (Assistant Store Manager – Arndale, Manchester)

31. Documents were contained in a single hearing bundle of more than 400 pages. The bundle included pleadings and related correspondence, the claimant's medical records, grievance, and performance management documents. A supplemental bundle was produced at the beginning of the hearing which contained further documents jointly provided by the parties. Ms

Reid helpfully arranged for the bundle to be paginated before evidence was heard and these papers were then added to the bundle.

32. The claimant provided a copy of a WhatsApp message during Mr Howard's evidence. It was relevant and related to a publicity announcement on the business social media site *'Linked In'* by the respondent concerning the proposed new Arndale store sent in March 2022. It was not contentious and the respondent's agreed that it would be added to the hearing bundle, marked document 'C1'.

Findings of fact

33. The respondent (Sports Direct), is a limited company which is part of the Frasers Group plc. It is a very large sports retailer with a national presence and has many stores across the UK. It is understood that Sports Direct employs many thousands of people in permanent and casual capacities. The store relevant to this case was located in the Arndale Centre, Manchester. At the relevant time, the claimant was employed as its manager and 11 permanent members of staff and 65 casual workers were typically employed at the store.
34. There was no dispute that the Arndale branch was a store which had historical operational difficulties. This included issues with staffing, processing stock due to limited space and with shoplifting.
35. Given Sports Direct's size, it had access to significant HR and legal resources to advise on employment matters. It had relevant policies and procedures in place, including a grievance process and a performance management process.
36. Mr Howard explained that each store was staffed using a business IT system which considered the square footage of the store area (providing a base number of hours), together with the store's monthly turnover. In broad terms, if turnover increased, available hours for staff would be increased in accordance with a certain ratio. Each store manager was expected to use the available hours appropriately. In addition to the core of permanent staff, the manager could call upon casual zero hours contract workers to work those hours available at the store.
37. In terms of stores which experienced issues with security (such as the Arndale in Manchester), we accepted Mr Howard's evidence that Sports Direct would use external security companies for revenue protection purposes. They would fall outside the staffing structure for each store, although more recently it is understood that the company had begun to employ some staff to deal with security issues as appropriate. This was not relevant at the time of the claimant's employment.
38. A matter which was the subject of some discussion during the hearing, was the question of the *'family tree'* for the Arndale store. The Tribunal understood that this was effectively a staffing structure, and every store had a family tree identifying the management hierarchy. Sports Direct did not

provide a formal HR 'organogram' for the Arndale store at the material time, but the claimant (Mr Galley), produced a handwritten family tree which he believed represented the structure immediately before he resigned/following his resignation, (p399).

39. Each Sports Direct geographic region had an overall Area Manager who was responsible for managing the day to day performance of the stores in the area to which he was responsible. In this case, Mr Howard was Area Manager for Greater Manchester which included the Arndale store and 14 others. Mr Brindle was the Area Manager for the neighbouring Northwest and Cumbria area, which included Bury and Burnley stores which were situated relatively nearby to the Arndale store.
40. As a large sports retailer, the Tribunal noted that there were complicated contractual agreements in place with major brands supplying products for sale. Nike and Adidas were particularly significant suppliers given their size and reputation with customers. Being mindful of protecting their brand image, these companies would require Sports Direct stores to position products in particular location and in a particular way so that customers could see them to their best advantage. The suppliers also provided branded containers for some of their products which were for display purposes and were not to be used to hold products from other companies.
41. As the Arndale store was one of the largest UK Sports Direct stores (described by Mr Brindle and Mr Howard as a 'flagship store'), these large suppliers would periodically arrange for publicity events to take place there to promote their brand. This would sometimes result in additional staffing hours being required and Area Managers might ask neighbouring Area Managers to provide some of their staff from nearby neighbouring stores to assist with staffing the event.

The claimant

42. The claimant (Mr Galley) began working with Sports Direct from 5 March 2013. He started as store manager in Bolton, which was understood to be a traditional shop without the challenges that might be encountered in other larger metropolitan stores in the region. Mr Howard gave credible evidence that Mr Galley performed well during his time in Bolton. He found him to be a hard worker who improved the performance in the store. Mr Howard believed that he had a good relationship with Mr Galley at that time and found him to be a manager who would be able to progress to the management of larger stores.

Knowledge of disability

43. Mr Galley was referred to psychological services by his GP in late 2012. In March 2013, his practitioner Ms R Caren at 'Think Positive' identified mental health issues following testing. Following further testing in May 2013, Ms Caren identified anxiety and low mood. Therapy followed with Mr Galley being discharged in 2013, but with a re-referral in 2014 and treatment appeared to continue with Greater Manchester Mental Health Services until

2019. Sports Direct accept that Mr Galley was disabled within meaning of section 6 Equality Act (EQA), by reason of anxiety and depression. However, they dispute actual or constructive knowledge at the material time to which this case relates.

44. Mr Galley commenced employment with Sports Direct in Bolton on 5 March 2013 which was at the same time as he was initially being treated by Think Positive. He was appointed as store manager and was working full time.
45. His Area Manager at that time was Mr Howard. He confirmed in that his permission was sought by Mr Galley so that he could leave the Bolton store on Wednesdays each week. Mr Howard's evidence was that Mr Galley had to speak to somebody personally and privately and while he did not expressly state what appointments related to and why they were needed. Mr Howard assumed that it was *'some sort of talking therapy'*. The Tribunal accepted that his oral evidence was consistent with his witness statement. While Mr Galley stated in cross examination that he told Mr Howard about his mental health issues and that he was placed on medication, we noted that there was lack of precision as to when such conversations took place. Mr Galley's medication was not prescribed until 2014 which was the year following the Talk Positive sessions.
46. Mr Galley had a good attendance before his long term sickness absence in 2022, with no prolonged periods of absence between 2013 and 2022. In his email to Ursula Ellis of HR at Sports direct on 29 July 2022, (p272), Mr Howard said:

'I was never made aware by Steven [Galley] that he had these mental anxiety issues that were affecting his work until he told me in our meetings earlier this year that he was struggling and had asked to be put back on anti-depressants or happy pills as he referred to them. Steven was a bit of a closed book in this respect; he never even told me he was on the medication until we began talking about his poor performance and that was his choice. I believe he wanted this to be kept private and personal and so I at no point was asked to notify HO of this as in all honesty I didn't know he was on this medication until I started the review process earlier this year.'

He went on to say:

'...I would not have moved anybody who was of a fragile mind into a shop [Arndale] that was essentially broken at the time Steven moved into the store.'

47. When Ms Creagh moved to an assistant manager role in Arndale from April 2021, she confirmed that Mr Galley mentioned having depression, but said she was unaware of its extent. Mr Galley's witnesses all referred to their being aware of his mental health issues and mentioned him being quite open with them. Ms Azhdari recalled him referring to depression. Mr Saunders went as far to say he recalled Mr Howard having conversations with Mr Galley about his mental health and support being asked, However, Mr Saunders was not precise about what was said and the occasions when it took place and on balance, we did not find his evidence to be reliable.

48. In a Sports Direct questionnaire (p323) dated 19 February 2013, Mr Galley was asked the question about whether he is undergoing any psychiatric treatment and he answered the question with the reply of 'no'. While it was his prerogative to write the answer 'no', he was in the process of being referred to a mental health practitioner and an opportunity was lost to alert HR at Sports Direct of this issue. There was no evidence of him alerting HR later, whether when he was working at Bolton or following his transfer to Arndale.
49. Although we were not taken to any evidence concerning the precise date when Mr Howard and/or other managers became aware of Mr Galley's disability, it is accepted by the respondent that knowledge arose from Christmas 2021. This was discussed in the interview of Mr Howard by Mr Brindle during the grievance investigation on 1 June 2022, (p227). Events may have reached the point where difficult conversations were beginning to take place regarding Mr Galley's performance on earlier dates, but in the absence of any convincing evidence to the contrary, the Tribunal accepts that knowledge did not take place until Christmas 2021

The Arndale store.

50. When it became clear to Mr Howard that a new manager was required for the Arndale store, he believed that Mr Galley would be a good candidate and was encouraged to take this role. Mr Galley was offered this position and commenced his new role in October 2018. Because Arndale was a challenging store to manage at that time, Mr Galley was allowed to bring a team of junior managers with him who were considered reliable, which included Nicholas Saunders, who was responsible for the footwear department.
51. For the first few years of his employment at the Arndale Store, the Tribunal accepted that Mr Galley showed signs of improving areas of performance within the shop and there were no obvious areas for concern. However, following the arrival of the Covid pandemic, the lockdowns imposed on the retail sector from 2020 until 2022 and subsequent Head Office management restructures, issues began to arise regarding Mr Galley's management performance which caused Mr Howard some concern.
52. Mr Galley alleged that at some time during the Covid lockdowns which took place on several occasions during 2020 and 2021, there was an incident where Mr Howard *'commented loudly across the shop floor'* asking why he was not wearing a face covering. He further alleged that Mr Howard then said that Mr Galley was using his disability as an advantage. This was understood to relate to Mr Galley being exempted from wearing a face mask because of his mental health issues.
53. There was a lack of precision from Mr Galley concerning when this incident took place. Moreover, there was no documentary evidence available in support of a complaint being made by Mr Galley at around the time it allegedly took place. The Tribunal were also concerned that there was no convincing witness evidence in support of this allegation. Mr Saunders recalled the

alleged incident took place ...*during Covid or not long afterwards...*' but he was unable to narrow it down to a particular year.

54. Mr Howard confirmed that when the requirement for face coverings to be worn was introduced by the government (which the Tribunal understood to be around July 2020), he faced a challenging time. He explained that on each occasion he visited a store, he would need to ask some members of staff to wear face masks. He could not recall the incident alleged by Mr Galley but confirmed that if he saw someone without a face mask, he would ask them why they were not wearing one. He accepted that he was unaware of Mr Galley being exempt from wearing a mask.
55. Mr Galley had notified HR that he was exempt from wearing a mask and there is a document dated 28 September 2020 which described him as being 'Face Covering Exempt' for '*medical or personal reasons.*' We accepted that Mr Howard was unaware of this formal exemption. Mr Galley was wearing a lanyard at this time which was customarily worn by people who were unable to wear face masks, and which had a sunflower logo running along the cord. The logo was used to explain that a person was not wearing a mask for a health or wellbeing reason. The Tribunal accepts that these lanyards were worn by many people without proof of a disability being required.
56. The Tribunal found there was simply a lack of precision about the allegation so that it was extremely difficult for the respondent to be able to rebut it. It is noticeable that the matter was not raised as part of the grievance on 13 May 2022, and it was not asserted until the claim was brought.
57. At its highest, there may have been a challenge from Mr Howard during the initial period when face mask wearing was mandatory in 2020, but there was simply insufficient evidence to suggest there were any adverse treatment or comments relating to Mr Galley's disability, which would not become known to Mr Howard until Christmas 2021.
58. As the Covid pandemic became less of an issue in the UK, Sports Direct Head Office began to look at how the business could improve and launched what was known as its '*Retail Reset*'. Although there was some confusion as to the precise date when it began, it appeared to become effective during 2021 as shops were allowed to fully reopen. This object of this exercise was to improve stores, have stronger merchandising, *streamlining* people development and giving staff an opportunity to improve. The impact of this exercise was to place greater pressure on store managers and area managers, with stores having experienced inevitable turnover difficulties during 2020 and 2021.
59. While the Arndale store remained a challenging store to manage, Mr Howard's evidence was that he began to have concerns about Mr Galley's management decisions and the impact that this had on improvements in performance to the store. Mr Galley had effectively been store manager at Arndale for 18 months before the Covid pandemic lockdowns began. Mr Howard acknowledged that this initial period resulted in Mr Galley stabilising the store performance.

60. However, as time progressed, he began to have concerns that improvements were not consistent. Mr Howard gave credible evidence that issues arose concerning staff turnover, team communications, a deterioration in the presentation of the store and a continual request for additional staffing hours despite there being no improvement in turnover. There was no evidence that during this period that Mr Galley had identified to Mr Howard or anyone else that he was experiencing health issues. While Mr Howard believed he had a good relationship with Mr Galley, he acknowledged that he found him to be a very private person. Mr Howard could have been more persistent in his enquiries, the initial request made by Mr Galley to attend appointments to see a therapist while in Bolton, was simply referred by him as personal and private. There was a reluctance on Mr Galley's part to share his health issues with his employer and while that was his decision to make, it did make it more difficult for Mr Howard and other managers to support him.
61. Indeed, the Tribunal accepted that there was a difficulty with Mr Howard being able to contact Mr Galley as part of his routine Area Manager role. This involved speaking with managers of stores within his area on a regular basis. Mr Galley believed that Mr Howard would deliberately contact less senior members of the Arndale management team in preference to Mr Galley as its store manager.
62. The Tribunal accepted Mr Howard's evidence that sometimes, it was necessary for him to speak with those junior managers directly. Additionally, this could happen because Mr Galley was on leave or unavailable. While the Tribunal acknowledged that Mr Galley might perceive these events to be undermining of him as a manager, on balance of probabilities we accepted that it was not always possible for Mr Howard to contact him, and it did not amount to a deliberate attempt to marginalise Mr Galley. An Area Manager may need to discuss a matter with a store urgently and often the person who would be contacted would be in the relevant department of the store or the only manager who was available at the time. We acknowledged that while Mr Galley was not always readily available, if this happened, messages would be given to members of staff by Mr Howard with instructions to be pass them on to him.
63. Sports Direct opening hours increased from April 2021 including the Arndale store. The Tribunal accepted that this did not directly impact on Mr Galley as he retained his usual hours of work and working pattern which were typically between 10am to 8pm. Other managers would cover the earlier period and there was no evidence of an expectation that he should start work at this earlier time or criticism of him by Mr Howard for him failing to do so.

Grievance and performance

64. We accept that Mr Howard found himself having to deal with management issues at the Arndale store and he decided to bring Nicola Creagh back to the store. She had been moved to the smaller Market Street store in 2018 at the request of Mr Galley when he took on the store manager role. Ms Creagh gave evidence during the final hearing, and she was not questioned about her

working relationship with Mr Galley. Consequently, we were unable to accept that there was any evidence which suggested the actual reason behind the move was for any reason other than to provide additional management support within the store. We do not accept on balance of probabilities that it was designed to undermine Mr Galley

65. Mr Howard did refer to some additional matters concerning problems with Mr Galley not clocking off during his normal working day when he would visit the Post Office to post items he was selling online. This was part of his own business and unconnected with Sports Direct. However, this was dealt with informally and did not result in a formal disciplinary process.
66. The normal system of performance reviews was that the Area Manager would carry out reviews with each Store Manager annually on date during March each year. Mr Howard accepted that the Covid pandemic in 2020/21, caused some delay to these reviews taking place at their usual time. Outside of this formal process, Mr Howard said that he relied upon informal coaching discussions with those managers for whom he was responsible. He gave credible evidence that the degree and frequency of informal coaching would be dependent upon how well a particular manager was performing. Those who had the greatest need would receive the most Area Manager visits with those performing well, would receive fewer visits.
67. In early March 2022, Mr Howard carried out a review with Mr Galley. Mr Brindle explained that the review used an electronic system which would produce scores between 1 and 4 for each category. The manager under review would answer several prearranged questions before the review meeting and during the actual review meeting with the Area Manager, the correct answers being accurately inputted. A score figure of 1 was the lowest and 4 was the highest. The categories covered by the scoring were in relation to 'Operations', 'Controls', 'Sales', 'Development', 'Leadership',
68. Mr Galley prepared the initial template explaining what he felt had gone well, what could be done differently and estimated what he believed were the appropriate scores. He believed the scores should all be 3s or 4s apart from 'Development', for which he gave a 2. Mr Howard then discussed his performance during the meeting and noted that there was a significant variation between the scores Mr Galley had estimated when compared with the available data into the digital system.
69. Mr Howard explained that it was a difficult conversation and he had to challenge Mr Galley's scores because the store performance did not support the grades which he had applied. He said that the correct scores showed Mr Galley's performance for the previous year were below average. Moreover, because Mr Galley was a manager who had been in post for several years, allowances could not be made for him being a *developing* manager. He was therefore considered an underperforming employee with a score of 1.
70. The Tribunal noted that this issue came as a surprise to Mr Galley. But we accepted on balance that conversations had taken place between him and Mr Howard during the previous year concerning performance of the store.

Indeed, the Arndale store's month on month performance data would have been available to Mr Galley as a store manager. His own narrative in the draft performance document was that *'the store has really struggled'*. (2d). The Tribunal accepted that the outcome of the performance review was based upon objective data and used a system that was applied to all store managers.

71. Mr Galley left the performance review and said he needed to gather his thoughts. As well as discussing how Mr Galley could improve as manager of the Arndale store, there was agreement between both Mr Galley and Mr Howard that some discussion took place regarding possible solutions to the difficulties that had been identified. One of these suggestions was the possibility of an agreed move where Mr Galley would assume the Store Manager role in Leigh. This role was understood to be vacant at the time of the performance review and if agreed, would include Mr Galley's salary being protected despite Leigh being a smaller store than Arndale. As a smaller store, and not located in Manchester, the Leigh branch would have the advantage of being closer to Mr Galley's home address at that time and would also be less busy than his current role in the Arndale store. The proposal would have therefore provided Mr Galley with a less pressurised environment. The Tribunal accepted that the proposal was simply a suggestion made by Mr Howard at that time in response to the performance difficulties that had been identified and it was not being imposed upon Mr Galley.

72. Mr Galley sent an email to Mr Howard at 20:17 on 8 March 2022. He expressed his shock at the scores that were given at the meeting and also noted that:

'Before today's review, we have been working towards me becoming the General Manager of the new Manchester store once opened, however today you stated this was no longer an option for me based on;
1) you down grading my performance rating to an overall 1 compared to a 4 in May 21,
2) the company are looking to reduce the number of Area Managers, therefore you will be looking to take up the role as General Manager of the new store going forward.'

He then identified 4 potential options which he believed were discussed during the performance review and described as:

- a) moving to an unspecified smaller store,
- b) an alternative role in the new Manchester store, (but importantly not the General Manager role which Mr Galley was interested in),
- c) working at another Fraser group company (known as a *'fascia'*) with reference to Flannels Liverpool (which was being expanded into a flagship store), or alternatively,
- d) Redundancy.

He indicated that *'I believe redundancy would be the only option for me personally'*. (pp163-4).

73. Mr Howard replied by email later that day at 21:41 and simply acknowledged receipt and confirmed he would get back to Mr Galley.
74. There was no evidence available to suggest that Mr Galley raised concerns about his disability and the impact that this might have on his performance either in the meeting or in the subsequent email. He did mention that '*at times been below my personal best*' but it did not specifically refer to the reason being his health.
75. Mr Galley then began a period of sick leave with his GP signing him off work from 10 March 2022 for the reason of anxiety due to stress at work, (p144). He returned to work a few weeks later.
76. The Tribunal heard evidence from both Mr Galley and Mr Howard concerning the options that were discussed at the performance review or shortly afterwards. We accepted that redeployment was discussed but there was a dispute as to whether specific locations were identified. Mr Galley did not recall any reference being made to the Leigh store. No document was produced supporting the offer of the store manager role at Leigh and if this is something which Mr Howard investigated and may have been discussed later, on balance we do not accept it was mentioned as a specific option on 8 March 2022.
77. The proposed new Sports Direct store in Manchester city centre was planned to open in another part of the Arndale centre. However, it would have a much bigger floor area (described as 'footprint'), and would include within it, several other businesses which were owned by Fraser Group in addition to Sports Direct. The proposed new store was announced on the work based social media platform '*Linked in*' in February 2022. Given the size of new store and the range of businesses operating at the proposed site, it was understandably a location which would require the appointment of a senior and experienced manager.
78. Mr Brindle gave credible evidence about a comparable store previously being opened in Birmingham with a manager at Area Manager grade being appointed. It was likely that each of the individual businesses operating within the store would then have their own managers in place. It may well have been the case that such a role would have ultimately been available to Mr Galley. It appears credible that a large flagship store with several smaller stores operating within it, could justify an Area Manager grade in overall charge and more traditional store managers being appointed for each smaller store.
79. However, for the purposes of this case, on balance of probabilities the Tribunal were unable to accept that any formal promise had been made to Mr Galley when he transferred to the Arndale store in 2018 or at a later date, that he would eventually be offered the general manager role for proposed new Manchester store. Encouraging conversations may well have taken place between Mr Galley and Mr Howard during informal meetings that regularly occurred as part of their relationship. However, there was simply no convincing evidence that this was a role which was promised to him. In any

event we accepted Mr Brindle's evidence that a formal recruitment process would be required, and it would not be possible to earmark the role for one person before that process was concluded.

80. We also accepted on balance of probabilities that the performance review meeting was not engineered by Mr Howard so as to remove Mr Galley out of contention for this role. Mr Brindle's evidence confirmed and supported Mr Howard's argument that the scores were generated by the HR system based upon the performance record data. Accordingly, it would not be possible for convincing incorrect scoring to be applied deliberately by Area Managers carrying out these performance reviews, whether to undermine a particular manager's ambitions or to disguise poor performance out of kindness.
81. Mr Galley did expressly raise the question of redundancy in his email sent on 8 March 2023. Mr Howard did not recall it being discussed at the performance review meeting on 8 March 2020, but he was clearly placed on notice of Mr Galley's belief that it was '*on the table*' and that it would be his preferred option.
82. Mr Howard did not appear to revisit this request in the available correspondence within the bundle. The Tribunal notes that there was no evidence suggesting circumstances where a genuine staffing reduction exercise would make the Store Manager role for the Arndale store redundant. There was no documentary or witness evidence available during the final hearing which persuaded us that redundancy was something which could be offered at that time.
83. Accordingly, the only realistic options available for discussion at the time of Mr Galley's performance review appeared to be either a performance improvement plan within his existing Arndale store manager role or alternatively redeployment to a suitable role at another store. Mr Galley did not express interest in the suitable alternative role option and as of 8 March 2022, appeared to have reached a point where he would like to end his employment with Stores Direct. Redundancy was something which he desired, rather than something which was realistically available to him.
84. In the absence of any alternative action being agreed, a performance improvement plan (PIP), was arranged with the first meeting taking place with Mr Howard on 4 April 2022. The actual proposed plan was a lengthy document which discussed development areas, the support and training required, measures which will demonstrate a successful improvement and a target date. The initial period for improvement was 5 weeks with time being allowed for Mr Galley's annual leave. It also included a commitment from Mr Howard to support Mr Galley during that period and explained how this would be done. The PIP needed to be signed by both managers (pp277-281). Mr Galley refused to sign the document.
85. The planned meeting could not take place in the Arndale store because Mr Galley felt uncomfortable in attending either those premises or any Fraser Group store. It was therefore conducted in a local Costa Coffee shop.

86. Mr Galley sent a letter on 13 May 2022 entitled '*Formal Grievance*' and which raised 49 factors which focused upon how difficult it was for him to manage the Arndale store and that this impacted upon his ultimate score at the 2022 performance review in March of that year, (pp193-198). He was invited to a grievance meeting on 20 May 2022, (p212) chaired by Mr Brindle.
87. This meeting took place as arranged on 20 May 2022 and the Investigation Form which was completed by Mr Brindle aimed to establish '*a focus*' as to real issues behind the grievance. It was not necessary for him to consider each of the 49 bullet points identified as the purpose of the meeting was to identify what the complaint was about and many of the matters identified amounted to background information rather than complaints (pp227-236). Mr Brindle also spoke with Ms Creagh, Tony Cobain (St Helens manager brought in to support Arndale store while Mr Galley was absent) and Mr Howard, before reaching his decision.
88. Mr Brindle's decision was provided in a letter date 4 July 2022 (pp254-263). It was a lengthy and considered response and noted the following points:
- a) There was no evidence that Mr Galley was unsupported as Store Manager thereby causing him further anxiety.
 - b) There was no evidence of him being required to work extra hours when a store visit was due.
 - c) There was no evidence that Mr Howard undermarked the performance review in March 2022.
 - d) There was no evidence that Mr Howard failed to support him.
 - e) There was no evidence of lack of support concerning Health & Safety in the loading bay.

Mr Galley was offered a right of appeal to Linda Lavender (ER Manager), but he decided not to lodge a formal appeal to Mr Brindle's grievance decision.

89. Instead, on 7 July 2022, Mr Galley gave Ursula Ellis (Employment Relations Director), of Sports Direct, notice of his resignation in an email sent at 14:52. He complained of his treatment by the company (and specifically his treatment by Mr Howard), the grievance process and that this treatment aggravated his anxiety, (p264).
90. He alleged the grievance took more than 4 months to resolve in his list of issues. In his resignation email he said he had raised his grievance 3 months previously and Sports Direct had:
- '...dragged the process out...'* and that they *'...knew that its delay in dealing with that grievance was making my anxiety symptoms worse'*.
- He argued that management had been aware of his disability since before Christmas 2021.
91. Ms Ellis replied to this email on 7 July 2022 at 16:22 and accepted the resignation, (p266). Although questioning whether Mr Galley's resignation without notice was a breach of contract, she said it would be possible to agree

this '*...if you feel it is the best decision for yourself.*' She did, however, ask that Mr Galley reconsider his decision and gave him until 5pm on 11 July 2022 to confirm whether he wished to resign.

92. Although Mr Galley had not formally appealed the grievance decision received a few days later, Ms Ellis quite sensibly queried whether his resignation email was suggesting he might wish to bring such an appeal. She therefore reminded him of the right to appeal and invited him to do so if he so wished.

93. Mr Galley quickly replied to Ms Ellis the same day at 16:42 replying as follows:

'Thank you for your email. I do not need time to reconsider my resignation and, for the reasons set out in my resignation letter, I can no longer work for Frasers [in other words, Sports Direct].'

Ms Ellis acknowledged receipt of this email on 8 July 2022 and thanked him for confirming his resignation, thanking him for his work from Sports Direct and wishing him luck for the future, (p270). Despite being reminded he could appeal the grievance, Mr Galley did not take advantage of this step.

94. There was subsequent correspondence between Ms Ellis and Mr Howard later that month. In an email sent by Mr Howard on 29 July 2022, he informed Ms Ellis of his lack of awareness of Mr Galley having mental health problems as discussed above. As has already been mentioned above, he stressed in his reply that he would not have moved Mr Galley from the Bolton store had he known he '*...was of a fragile mind*' given that he believed the Arndale store was '*...a shop that was essentially broken at the time.*' (pp272-4). He emphasised that Mr Galley did a good job when he initially moved to the Arndale store and that things deteriorated during the pandemic. Having considered all the evidence relating to his time working at the Sports Direct Arndale store, we found that this description was a fair one by Mr Howard.

95. In terms of the grievance process, we noted that it was raised on 13 May 2022 and Mr Brindle behaved proportionately, looking at the themes behind the numerous allegations made by Mr Galley and arranging a meeting very quickly on 20 May 2022. He concluded his investigation quickly and interviewed managers whom he believed were relevant to the grievance and completed his decision letter and sent it on 4 July 2022. These were Mr Howard, Ms Creagh and Tony Cobin who was the acting store manager at the time.

96. Mr Brindle gave evidence that he tried to speak with other members of staff but they either declined to be interviewed, were not considered relevant or had left Sports Direct employment. While Mr Galley may have wanted additional witnesses to be interviewed, he could have requested that this takes place as part of a grievance appeal. However, he decided not to pursue this course of action.

97. Having considered the grievance, the Tribunal could not see any evidence that there was a deliberate attempt to drag out the grievance process as

alleged. Indeed, it was completed relatively quickly, especially when considering the many allegations raised by Mr Galley in his initial grievance letter. We did not see any evidence that the grievance process was managed in a way which could reasonably have been considered to aggravate Mr Galley's disability and there was insufficient evidence to persuade the Tribunal that Mr Galley's symptoms would be particularly worsened by the reasonable time taken by Mr Brindle in his investigation.

98. Ultimately, this was a case about a decision to resign following Mr Galley's unhappiness with a performance review and his request for redundancy immediately after the meeting. There was no evidence that Mr Galley subsequently reflected and sought other alternative solutions, and this suggested that it was only a matter of time before he resigned. The Tribunal understands that Mr Galley may have developed a particular perception of his situation and become concerned about the intentions of Mr Howard. However, there was simply was no convincing evidence before us which demonstrated on balance of probabilities that he was being undermined or unfairly treated by Sport Direct or its senior managers.

Law

Jurisdiction

99. Section 123 of the Equality Act 2010 (EQA) provides that a discrimination complaint is out of time if they are brought at the end of the period of 3 months starting with the date of the act to which the complaint relates or such other period as the Tribunal considers just and equitable. (s123(1))

100. Conduct extending over a period is treated as being done at the end of that period and failure to do something is to be treated as occurring when the person in question decided on it. (s123(3))

101. In relation to time limits and reasonable adjustments complaints, Mr Patel refers to the guidance given in *Fernandes v Department for Work and Pensions* [2023] EAT 114.

102. In relation to conduct extending over a period, Mr Patel refers to *Hendricks v Metropolitan Police Commissioner* [2002] EWCA Civ 1686 at [52] and additionally, *Aziz v FDA* [2010] EWCA Civ 304.

103. In relation to the question of just and equitable extensions, he referred to the following cases:

- a) *Robertson v Bexley* [2003] IRLR 434.
- b) *Szmidt v A C Produce Imports Ltd* EAT 0291/1

Disability

104. Section 6 of the EQA provides that a person has a disability if he has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out day-to-day activities.
105. Section 212 of the EQA explains that the term 'substantial' means more than minor or trivial. Schedule 1 of the EQA provides that the effect of an impairment is long-term if it has lasted for at least 12 months, it is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected. An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to correct it and but for that it would be likely to have that effect.
106. When considering whether a Claimant is disabled within the meaning of the EQA, the Tribunal must take into account the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011) issued by the Secretary of State which appears to it to be relevant.
107. In terms of caselaw relating to knowledge of disability, Mr Patel referred to section 15(2) EQA and Para 20(1) Schedule 8 of the EQA. Additionally, he mentioned the EHRC Employment Code at 5.17.

The right to claim discrimination against an employer.

108. Section 39(2) of the Equality Act 2010 provides, amongst other things, that an employer must not discriminate against an employee by dismissing him or subjecting him to any other detriment.

Section 15 EQA – discrimination arising from disability

109. Section 15 of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. However, this kind of discrimination will not be established if A shows that he did not know, and could not reasonably have been expected to know, that B had the disability.
110. Mr Patel referred to the following cases:
- a) *Secretary of State for Justice and anor v Dunn* EAT 0234/16 - describing the 4 elements required when proving a section 15 complaint.
 - b) *Pnaiser v NHS England and anor* 2016 IRLR 170 EAT - concerning unfavourable being because of something and it must have at least a significant influence upon the alleged treatment.

Section 19 EQA – indirect discrimination

111. Section 19(1) EQA, provides that a person (A) discriminates against another (B) if they apply a provision, criterion or practice (known as a 'PCP'), which is discriminatory in relation to a relevant protected characteristic of B.

112. Section 19(2) provides that a PCP is discriminatory if A applies it to people who do not share B's protected characteristic (in this case disability). If that PCP puts persons who share B's disability at a particular disadvantage when compared with those who are not so disabled, and it puts/would put B at a disadvantage it is indirectly discriminatory. However, this is only the case if A cannot show a proportionate means of achieving a legitimate aim.
113. Mr Patel referred to the case of *Dziedziak v Future Electronics Ltd* EAT 0271/11 - the burden of proof resting on the claimant concerning the PCP and the alleged disadvantages.

Sections 20 & 21 EQA – reasonable adjustments

114. Sections 20, 21 and 39(5) read with Schedule 8 of the EQA provide, amongst other things, that when an employer applies a provision, criterion or practice ("PCP") which puts a disabled employee at a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled, the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.
115. Paragraph 20 of Schedule 8 provides that an employer is not expected to make reasonable adjustments if he does not know and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage.
116. Mr Patel also referred to the case of *Secretary of State for Justice v Prospero* EAT 0412/14 - the need for the Tribunal to rely upon the PCP identified at the start of the claim.

Section 26 EQA – harassment

117. Section 40 of the EQA provides that an employer must not, in relation to employment by him, harass an employee. The definition of harassment is set out in section 26(1) of the EQA. A person (A) harasses another (B) if:
- a. A engages in unwanted conduct related to a protected characteristic (disability in this case); 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.
118. Section 26(4) provides that whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account:
- a. the perception of B;
 - b. the other circumstances of the case;

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

Thus, the test contains both subjective and objective elements. Conduct is not to be treated as having the effect set out in section 26(1)(b) just because the complainant thinks it does. The Tribunal is required to take into account the Claimant's perception, the other circumstances of the case, and whether it is conduct which could reasonably be considered as having that effect.

119. Mr Patel referred to the case of *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336, the Employment Appeal Tribunal held a Tribunal should address three elements in a claim of harassment:

- a) first, was there unwanted conduct?
- b) Second, did it have the purpose or effect of either violating dignity or creating an adverse environment:
- c) Third, was that conduct related to the Claimant's protected characteristic?

Burden of proof.

120. Section 136 of the EQA sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

Constructive Unfair Dismissal

121. Section 95(1)(c) of the Employment Rights Act 1996 (ERA), 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.

122. 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);
- (ii) that the breach caused the employee to resign – or the last in a series of events which was the last straw;
- (iii) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

123. 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.
124. Mr Patel also referred to the case of *Tullett Prebon plc and ors v BGC Brokers LP and ors* 2011 IRLR 420 CA, which explained that trust and confidence will be considered from the perspective of an objective person.

Discussion

Jurisdiction

125. Mr Galley's employment terminated on 7 July 2022 when he gave notice of his resignation to Ms Ellis at Sports Direct. Ms Ellis accepted the resignation the same day and despite Mr Galley being offered a chance to reflect, he refused to withdraw his resignation. It was also accepted by Ms Ellis that the resignation could be accepted without notice.
126. It is accepted that the constructive unfair dismissal complaint was presented in time.
127. For the purposes of bringing a claim following the termination of his employment, Mr Galley had a period of 3 months in which to bring his claim (or at least to notify ACAS of early conciliation), in accordance with section 123 EQA. This means that these steps must have been taken by no later than 6 October 2022.
128. Mr Galley notified ACAS of a potential claim on 8 August 2022 and the certificate was issued on 9 September 2022. This period of early conciliation time does not count towards the calculation of time limits. However, as he presented his claim form on 13 September 2022 it is not necessary for the Tribunal to engage in a detailed calculation of the 3 month period and of course the claim form was accepted at vetting following its presentation.
129. This is not the end of matters however, because the claim involves allegations of discrimination which took place over a prolonged period prior to the date his employment ended. Taking into account the initial reference to ACAS on 8 August 2022 and applying the 3 month limitation period backwards from this date, any allegation which took place before 9 May 2022, is out of time.
130. This of course is subject to the Tribunal considering whether any of the alleged conduct could be considered as continuing or extending over a period which ended on or after 9 May 2022.
131. In terms of the disability discrimination complaint, there are several allegations which predate the 9 May 2022. These include questions relating to comments made about face masks and the extension of store hours which

long predate this limitation date. Only those matters that relate to the performance review from March/April 2022 and consequential grievance process in May to July 2022 can be accepted as having been presented in time. The earlier matters were not the subject of grievances which then continued for a period and seemed to be isolated events. Additionally, the claimant did not provide any evidence which might persuade the Tribunal to accept that these older allegations should have time extended on a just and equitable basis under section 123 EQA. Accordingly, these earlier allegations must be treated as outside the Tribunal's jurisdiction and cannot form part of the issues being considered below.

Disability

132. As already explained in the findings of fact, Sports Direct have accepted that Mr Galley was disabled within meaning of section 6 Equality Act (EQA), by reason of anxiety and depression. They dispute actual or constructive knowledge at the material time to which this case relates.

133. Mr Howard as Mr Galley's Area Manager gave credible evidence that permission was given to Mr Galley so that he could leave the Bolton store on Wednesdays each week from 2013 to attend Talk Positive sessions. Mr Howard added that in the absence of any information from Mr Galley as to what exactly these sessions related to, he assumed that it was '*some sort of talking therapy*'. Mr Galley had a good attendance record before his long term sickness absence in began in March 2022, with no prolonged periods of absence between 2013 and 2022.

134. There was no precise date identified when Mr Howard and/or other managers became aware of Mr Galley's disability. As explained in the findings of fact above, it is accepted that earliest date that Sports Direct could be considered to have knowledge was from Christmas 2021. This was supported by comments made during the grievance investigation on 1 June 2022, (p227).

Discrimination arising from disability (s.15 Equality Act 2010)

135. Mr Galley relied upon a number of allegations which he believed amounted to unfavourable treatment.

136. The first one involved the alleged comments made by Mr Howard that Mr Galley was using his disability to his advantage concerning him not wearing a face covering in 2020/21. Although we have concluded above that this allegation must be out of time, we in any event, found that this allegation did not happen as alleged, because of the absence of convincing evidence.

137. Similarly, although Mr Galley was vague as to precise dates when Mr Howard would contact less senior managers and they would relay information to him, even if these allegations formed part of an ongoing and continuing pattern of behaviour which meant it was presented in time, we could not accept that this behaviour was something that amounted to unfavourable treatment. Mr Galley was not always easy or available to contact and also as

an Area Manager, Mr Howard sometimes had to speak with specific assistant managers. He wanted to ensure that Mr Galley received messages and instructed junior colleagues to pass these on to him. There was no evidence that this was a deliberate act on the part of a more senior manager to undermine Mr Galley and was instead a proportionate and flexible way of dealing with issues where he could not speak with him.

138. Mr Galley argued in the list of issues that the *something* arising from his disability was his '*management style*' but did not explain logically why the alleged treatment by Mr Howard was unfavourable. Had he argued that Mr Howard's apparently reasonable actions caused a particular adverse reaction to him, then Mr Galley may have been able to construct a more arguable case in relation this allegation. Instead, we simply have Mr Galley's management style which he says gives rise to circumstances where Mr Howard was not always available to speak with him and so he would simply speak with junior managers.
139. In many ways, this allegation under section 15 bears a closer resemblance to a reasonable adjustments complaint under sections 20 & 21 EQA. This, however, is not the issue which we are faced with here and the treatment is simply a reaction to a manager who is not always available for whatever reason. We did not hear a convincing argument from Mr Galley that it could amount to unfavourable treatment. It does not connect with something that was clearly identified as something arising from a disability and there simply is insufficient evidence available to explain how the disability affected this management style as alleged.
140. In relation to this allegation, the respondent did not assert a legitimate aim/proportionate means defence, but under given our conclusion about the merit of this allegation, it is unnecessary to consider this matter further.
141. The allegations relating to the grievance process were of course considered to be presented in time and can be accepted. However, while Mr Galley argued in his resignation that the grievance process took more than 3 months to complete and increasing to 4 months in the list of issues, the reality was the actual grievance when presented in May 2022 and was completed less than 2 months later in July 2022. Considered objectively, this was not a prolonged period. On the contrary, we found that the time taken was a reasonable period given the numerous allegations made and the interviews which needed to take place. The allegation did not happen as alleged. Even if we accept the allegation on the basis that 2 months was what Mr Galley intended (rather than 3 or 4 months as described above), we cannot objectively conclude that the length of time impacted upon his mental health. It cannot amount to unfavourable treatment.
142. In relation to this allegation, Sports Direct rely upon the legitimate aim of the need to follow the ACAS Code of Practice in relation to a proper investigation of a grievance process. We accept that this is a legitimate aim given that it relates to an obligation placed on an employer when dealing with such an issue. Indeed, the timescales taken by Mr Brindle and the steps which he took within that period in our view amounted to a proportionate

means of managing that aim. Accordingly, even if the treatment was unfavourable because of the something arising in relation to this allegation, the Sports Direct 'defence' succeeds.

143. The only other allegation under section 15 is that within the grievance outcome, *'Matt Brindle recorded that Mr Galley felt he was working extreme hours and like he was working like a dog, but stated he was working 45-47 hours a week without offering support as to how this can be addressed and instead criticising his management style.'*
144. The difficulty with this allegation was that even when the store hours increased in 2021 as the respondent emerged from the pandemic, Mr Galley continued to work the usual hours he had worked as described within the findings of fact, above. Mr Brindle did indeed identify Mr Galley's belief that he *'worked like a dog'*, he identified the tasks being carried out by Mr Galley which he could delegate, such as blowing up balls. Moreover, he reminded him in the outcome letter decision that there should have been more briefings with staff to make them aware of Mr Galley's leadership role and to allocate tasks to appropriate junior members of staff, (p256).
145. Mr Galley asserts that his management style was something which arose from his disability, but the allegation does not relate to unfavourable treatment arising from a failure by him to do something connected with his management style. Instead, the grievance decision is a response to this style and explaining that this may have given rise to Mr Galley's feelings that he was working disproportionately hard, namely through a failure to delegate. Instead, the treatment is a supportive measure and over several paragraphs within the grievance outcome letter, a description of what Mr Galley could do was in effect a supportive measure. Indeed, had he returned to work following the grievance outcome or appealed the decision seeking further clarity, there is no reason to believe that Mr Howard would not have provided assistance to Mr Galley in achieving a management style that encouraged greater delegation.
146. We also accepted the evidence of managers that when a store visit was taking place by one of the suppliers, additional staff would be provided to assist with the additional work that arose from these visits. The Kronos timecard system for Mr Galley confirmed that he worked his contracted hours *'consistently'*. For these reasons, we cannot objectively conclude that the treatment complained of happened as alleged as it did not happen as alleged and supportive measures were explained. Objectively, the something arising, namely management style was ameliorated by this letter, rather than contributing to something which could amount to unfavourable treatment.
147. The respondent did not particularise the legitimate aim/proportionate means defence in relation to this allegation according to the list of issues, but in any event it is unnecessary to consider it given the conclusions reached above.

Indirect discrimination (s.19 Equality Act 2010)

148. Section 19 complaints are not typically encountered in disability discrimination claims. However, Mr Galley raised a specific allegation under this section in relation to his claim. He argued that Sports Direct as respondent had a PCP in place which required stores to operate in line with the companies operating model/family tree in terms of the number of management staff they could use.
149. The Tribunal heard evidence concerning the family tree model from both Mr Galley and respondent management witnesses. It did appear to be a model which responded to the number of staff working in a store and allocated management appropriately. On balance, it appeared to apply to persons with and without the Mr Galley's disability as it was as a human resources practice within Sports Direct.
150. Mr Galley argued that this PCP placed him at a particular disadvantage because he suffered from extreme tiredness and therefore needed additional support. However, the Tribunal noted that he continued to work his contractual hours as measured by the respondent's Kronos time recording system. Mr Galley also failed to cross examine the respondent management witnesses who asserted that the Arndale store had the correct staff levels.
151. Even so, he was allowed by Mr Howard to have some additional staff transfer into management roles. Indeed, when he transferred from Bolton to Arndale, he was allowed to bring specific managers with him to ensure the challenges of this city centre store could be addressed. While city centre stores had additional challenges compared with smaller town stores such as having fewer salaried staff and relying on zero hours of casual staff, it appeared that this was recognised by management.
152. Indeed, later, Ms Creagh was brought back from another store to an assistant manager role and Mr Howard adopted a degree of flexibility in supporting Mr Galley in Arndale. As such, this PCP was not so rigid as asserted by Mr Galley to place persons with his disability at a particular disadvantage compared to persons without his disability. Accordingly, this complaint cannot succeed.
153. This was another issue where the respondent Sports Direct had failed to particularise a legitimate aim/proportionate means defence, but again it is unnecessary to consider it further given the findings above.

Failure to make reasonable adjustments (s.20 and 21 Equality Act 2010)

154. Mr Galley relied upon a number of PCPs:
- a. Declining the Claimant's request for additional management/full time staff. There were issues arising between Mr Galley and Mr Howard, but the Tribunal accepted that additional staff were provided on several occasions to help Mr Galley manage a build up with workload.

As submitted by Mr Patel, Mr Galley did not cross examine the respondent witnesses concerning this PCP. However, the Tribunal have concerns that this was not something that could amount to a PCP as drafted in Mr Galley's list of issues. Mr Galley asked for staff on occasions when he had failed to develop those already transferred (who had records of excelling in other stores pre transfer). Accordingly, it was not always possible to allow additional transfers to take place.

Mr Galley mentioned difficulties recruiting and retaining casual or zero hours staff which was something not connected with the PCP alleged.

However, this allegation does not appear to amount to a PCP as it is described as relating to a specific request from Mr Galley rather than a general practice relating to all staff whether they share his disability or not. Indeed, the evidence available to the Tribunal was that allowances were being made and additional staff were being provided.

A potential PCP could have been that staff were expected to manage the staff provided based upon the turnover of the store in question, which was something referred to by Sports Direct managers when giving evidence. But this is not what Mr Galley complains about and he instead refers to a refusal which was not on the evidence given absolutely. The evidence revealed some flexibility towards him concerning additional staff, even though this may have been frustrating to Mr Howard as described in the grievance outcome letter.

- b. Increasing the trade in opening hours for the Claimant's store on or around 14/4/21 to 9am to 8pm. There was no dispute that this increase in opening hours took place and can amount to viable PCP.
- c. Requiring stores to operate in line with the companies operating model/family tree in terms of the number of management staff they could use. As described above in relation to section 19 EQA, this was something which did take place, but was adapted somewhat to take account of the needs of Mr Galley when he moved to Arndale from Bolton and later when Ms Creagh moved back to the store as an assistant manager. In many respects it relates to PCP a. above but is constructed in a way which can be considered as a valid PCP, given that it relates to a practice which applies to all management staff managing Sports Direct stores.
- d. Not acknowledging or detailing a disability or associated symptoms that have been reported or witnessed during a grievance in the grievance investigation or any form during the grievance process. Mr Brindle acknowledged that he became aware that Mr Galley suffered from anxiety and stress when they met on 20 May 2020. He did not refer to these health issues in the grievance outcome letter. The Tribunal felt however, that this was not an alleged PCP which applied to employees who did not share Mr Galley's disability. Mr Galley referred to anxiety in his grievance and being prescribed anti-depressants within the numerous allegations contained within the letter. Mr Galley does not

identify the PCP as being a Sports Direct policy of not recording disability when raising grievances.

155. Mr Galley said that he was placed at a substantial disadvantage by reason of his disability in that with regards to PCPs a, b and c, above, he suffered with extreme tiredness.
156. As has already been explained, the Tribunal does not accept that PCP a amounts to a legitimate PCP under section 20 EQA. The Tribunal did not hear sufficient evidence to accept that Mr Galley was placed under additional stress because of his disability and in any event, he was provided with additional support on occasion, but not every time that he asked for it. Indeed, when cross examined, he accepted that his mental health played no part in his performance. Accordingly, even if such a PCP existed, no duty to make reasonable adjustments arose.
157. In relation to PCP b, the Tribunal accepts that Sports Direct increased its hours from 14/4/21 and potentially it could have placed Mr Galley at a substantial disadvantage, had he been placed in a position where his hours of work increased proportionately. But this was not the case and he continued to work his usual contractual hours as evidenced by the Kronos time recording referred to by Mr Brindle in the grievance outcome letter. This did not place him at a substantial disadvantage as a consequence.
158. In relation to the wider impact of the extended hours on Mr Galley's workload, this was addressed in the grievance outcome letter. Mr Brindle convincingly explained in his evidence that this arose not from the extension of hours, but from his management style and a reluctance to hold team meetings and to delegate. Accordingly, on balance we are unable to accept that PCP b did place Mr Galley at the substantial disadvantage as alleged.
159. PCP c was something which potentially placed Mr Galley at a substantial disadvantage by reason of the extreme tiredness he alleges. In principle, the staffing model did identify a staffing level associated with turnover and this might limit the number of staff working at Arndale. However, this will be considered in the alleged adjustments below.
160. In relation to PCP d, the list of issues describes that this put him to a substantial disadvantage as a result of his disability. It does not specifically explain what that disadvantage was but, in any event, the Tribunal does not accept that Mr Galley has asserted a PCP which can be accepted as such under section 20 EQA.
161. By Christmas 2021, the respondent was aware of Mr Galley's disability. Mr Howard was certainly aware at that stage of ongoing issues relating to stress and anxiety. Accordingly, it was not until that date that the respondent was aware that Mr Galley might be placed at a substantial disadvantage. However, Mr Galley failed to advance a case which demonstrated that any disadvantage took place.

162. In relation to the adjustments alleged, the list of issues indicates that Mr Galley felt in relation to PCPs a, b and c, additional management and full-time employees should have been provided. He did not confirm the adjustment which he required in relation to PCP d but given the Tribunal's decision regarding its status and the lack of specificity regarding substantial disadvantage, this particular allegation is not well founded.
163. However, the Tribunal notes that Mr Galley was provided with some additional staff beginning from when he moved to the Arndale, but also later with Ms Creagh moving back to an assistant manager role. Some additional staff were also provided by Mr Howard at Mr Galley's request but it is noted that this did not always happen. However, Mr Howard remained available to discuss matters with Mr Galley as his Area Manager and when Mr Galley complained about these matters in his grievance, he was given advice concerning management of his workload issues. The respondent took all reasonable steps to alleviate any substantial disadvantage. The difficulty was that Mr Galley failed to demonstrate a specific reasonable adjustment in terms of additional support and when he raised the grievance, he was unhappy with decision that he could improve his workload matters through engaging with his team members and delegating as appropriate. He had certainly not increased his hours and insofar as any PCPs existed accompanied with a substantial disadvantage, Sports Direct provided relevant support.
164. The Tribunal accepted that it was not reasonable for the respondent to simply accede to every request for additional management or permanent staff as this would be disproportionate in terms of the staffing costs measured against turnover in the Arndale store.
165. Unfortunately, Mr Galley had failed to properly identify a coherent complaint for reasonable adjustments within his list of issues despite the support of Judge Buzzard at the case management hearing. However, the proceedings remain his claim to prove and the allegations in the list of issues are his. Based upon our consideration above, it is not possible to find that this complaint was well founded at all.

Harassment (s.26 Equality Act 2010)

166. In considering this complaint, the Tribunal has examined the unwanted conduct allegations, their purpose or effect and whether they related to the protected characteristic of his disability.
167. Mr Galley referred to the following 'unwanted conduct' allegations:
- a. On one occasion in 2020-2021, Chris Howard commented loudly across the shop floor to ask why the Mr Galley wasn't using a face covering and commented that the Claimant was using his disability as an advantage (in reference to the Claimant's) exemption from wearing face masks. No complaint was raised at the time and as explained above, the Tribunal finds that it was presented out of time. In any event, we were unable to accept that it happened as alleged and in a way that amounted to unwanted conduct. Mr Howard gave evidence

concerning the pressure he was under to get staff to comply with the requirement to wear masks and at its highest, it appears Mr Galley overheard comments about employees being requested to wear masks.

- b. On several occasions, Mr Howard would contact less senior members of the Claimant's team and they would relay information to the Claimant. This may have been an ongoing matter and can be accepted as being presented in time as it would have continued until he began sick leave following his performance review.

The Tribunal was unable to accept however, that this behaviour arose from Mr Galley's disability. It simply Mr Howard involved operating in accordance with his role as Area Manager and ensuring communication takes place.

However, even if this is the case, there is no evidence available to suggest that Mr Howard behaved in this way with the purpose creating an intimidating, hostile, degrading environment for Mr Galley. Even if this was not his purpose, the Tribunal does not accept that objectively this had the effect of creating an intimidating environment. This was because it did not arise from Mr Howard avoiding Mr Galley deliberately, but because of his unavailability or the need to speak with a specific assistant manager. In any event communications were directed to Mr Galley through his assistant managers as appropriate.

- c. On several occasions, it is alleged that Mr Howard called the Mr Galley a '*mind terrorist*'. The Tribunal noted that this was an allegation which if it did happen, would have taken place much earlier than 9 May 2022. It was not the subject of a specific grievance at the time it arose. However, the evidence available to the Tribunal was limited and lacked any specific date as to when it occurred. It did not persuade us that Mr Howard made an allegation in the terms alleged and while it may have related to disability, we do not accept on balance of probabilities that it happened as alleged.
- d. On 8 March 2022, Chris Howard said to the Claimant that he had 'too much negative equity' on the shop floor in front of customers and employees, and then again used the phrase 'negative equity' in a sit-down meeting with the shop's management team. This was an allegation which Mr Galley failed to support with any credible evidence and on balance, we accept Mr Howard's evidence that it was not his usual turn of phrase, and it was not something he would have said. In any event, this allegation is not part of a continuing act and is out of time having taken place before 9 May 2022.
- e. On 4 July 2022, in the grievance outcome, Matt Brindle recorded the Claimant felt he was working extreme hours and like he was working like a dog, but stated he was working 45-47 hours a week without offering support as to how this can be addressed and instead criticising his management style. As has already been explained in relation to

this allegation where it appeared above, the Tribunal accepts that Mr Brindle did offer support to him. Mr Galley did not cross examine him about this matter and the Tribunal accepts Mr Brindle's evidence. It was not unwanted conduct and did not have the purpose or reasonable effect of creating an intimidating or hostile environment etc.

- f. On 4 July 2022, in the grievance outcome, Matt Brindle stated that the Claimant did not make Chris Howard aware of his condition until difficult conversations started being held when this was untrue. Mr Brindle did record this matter in his outcome letter, but in doing so was relying upon what had been told to him by Mr Howard. The Tribunal does not accept this was unwanted treatment that had the purpose or effect of creating an intimidating or hostile environment. This was because it was done so innocently by Mr Brindle and was not done so because of his disability, even if it did refer to his condition.

168. For these reasons, the allegations which we found occurred did not have the purpose or effect of creating an intimidating, hostile, degrading etc. environment for Mr Galley and were not related to his disability.

Constructive unfair dismissal

169. In considering this allegation Mr Galley relies upon alleged conduct on the part of Sports Direct as respondent where without reasonable and proper cause, they acted in a manner that is calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. The allegations are considered below:

- a. In 2020-2021 Mr Howard commenting that the Claimant was using his disability as an advantage to avoid wearing a face-mask. Mr Howard gave credible evidence about the issues arising from July 2020 when he had to remind employees of the need to wear face masks. This was reasonable given the pandemic, but in any event, the Tribunal were unable to accept that the alleged words were used by Mr Howard and whatever he said, it did not amount to a breach of the implied term of trust and confidence.
- b. Mr Howard stating in the performance review of April 2022 that:
 - i. He would be applying for the new general manager role in the new store. This was something which based upon Mr Galley's evidence, appeared to arise in a meeting in March 2022. However, Mr Howard denied that he said this and on balance of the evidence heard, we accepted that he did not say he was applying for that role. It is possible that because an Area Manager grade was appointed to the Birmingham flagship store that some confusion may have arisen. However, even if this was said by Mr Howard, the Tribunal is unable to accept that this amounted to something that would reasonably seriously damage the relationship of trust and confidence. After all,

recruitment for the new role would involve a competitive process for those who chose to apply.

- ii. Even if the Claimant managed to achieve the PIP development areas, he would not be moving to the new store. The Tribunal did not accept that this was said as alleged. There may have been discussions about possible alternatives following the poor scores achieved by Mr Galley, but even if it was said as alleged, the comments would not reasonably amount to serious damage to the employment relationship.
- c. In April 2022, downgrading the Claimant in the performance review meeting from a 4 to a 1 without any pre-warning. This variation was based upon applying actual performance to the scoring system and was a legitimate step for Mr Howard to take. It could not amount to serious damage to the employment relationship as it was the proper application of performance criteria, however disappointing it was to Mr Galley.
- d. Failing to investigate the concerns raised by the Claimant in his grievance of May 2022. Mr Brindle was confronted with numerous allegations in Mr Galley's grievance letter. He met with him on 20 May 2022 and agreed with him the broad grounds under which he would investigate. This was an appropriate step to take was not something which could be described as a breach of the implied term of trust and confidence.
- e. When considering the Claimant's grievance of May 2022, only asking witnesses that would favour the outcome, or who had not been present for any of the matters complained of in the grievance (e.g., Tony Cobain). Mr Brindley gave credible evidence concerning which witnesses he interviewed, and which witnesses he couldn't or decided not to interview because they appeared to be irrelevant to his investigation of the issues. It was a proportionate step and one which Mr Galley could have appealed once he received the decision letter, but he chose not to do so. It was not a breach of the implied term of trust and confidence.
- f. Failing to deal with the grievance brought on 13 May 2022 within a reasonable timescale. As has already been explained, it was dealt with in a reasonable timescale being a period of less than 2 months.
- g. Stating in the grievance outcome of 4 July 2022 that:
 - i. The Claimant's grievance had been received in May when the grievance process had begun in April via a phone call between the Claimant and Jen Cherry on 5 April. This is incorrect as the formal grievance clearly began in May 2022 when Mr Galley sent his grievance letter. This placed the respondent in a position where it had to deal with the grievance and that was when the time began to run.

- ii. Mr Howard had no awareness that the Claimant suffered from anxiety and took medication when this was not true. Mr Brindle based his decision upon what he was told by Mr Howard and was simply describing what he had heard, he was not attempting to be misleading.
- iii. The Claimant did not make Mr Howard aware of his condition until difficult conversations started being held. Effectively, the same answer as given in (ii) above is relevant and Mr Brindle was recording what he had been told.
- iv. It is not always possible for area managers to visit each store whilst the store manager is on duty when most of Mr Howard's visits to the store were on the Claimant's days off. Mr Galley did not give evidence or cross examine witnesses concerning this matter, but in any event, the Tribunal did not hear evidence which persuaded us that Mr Howard somehow deliberately visited the Arndale store at times when he knew Mr Galley would be unavailable.
- v. Mr Howard could not have known of the fire visit as it was unplanned, when this was wrong given that the Claimant had notified Mr Howard of the fire visit upon their arrival. Mr Galley did not cross examine management witnesses concerning this matter, but based upon the evidence available, this was something which was not communicated by him to Mr Brindle during the grievance process.

170. In considering whether Mr Galley resigned in response to these breaches, the Tribunal has questioned whether any of the alleged breaches played a part in his resignation. Mr Patel argued that Mr Galley had been interested in leaving Sports Direct for some time and had previously been offered a role with T K Maxx but was persuaded to stay by his managers. He also noted that Mr Galley had wanted to move to Wales and by the time of the final hearing he had done so. Additionally, he knew his performance management was poor from April 2022 and did not want to be performance managed and also had been previously subject to disciplinary action relating to a member of staff being allowed to work while suffering from Covid.

171. The Tribunal did not feel that the decision to resign was prompted by a desire to move to another job or to Wales. If this had been the case, it is likely that he would have carried out the steps of securing an alternative job before resigning. However, as we found in the findings of fact, the poor outcome in the performance review meeting in April 2022 was a shock for him and he was extremely unhappy about the prospect of a management process having to take place. He clearly did want to explore redundancy, but this was something that was not available at the time of his performance review.

172. While he raised a grievance which the Tribunal found on balance was provoked by his unhappiness with the performance review, he could not

reasonably conclude that his scores arose from poor management of the process by Mr Howard or an attempt to undermine his prospects of securing the new management role at the Manchester flagship store which was proposed.

173. Mr Galley had identified the unreasonable behaviour on the part of Mr Howard in his resignation email dated 7 July 2022, but based upon the findings above, we are unable to accept that any of the alleged conduct either happened as alleged or if it did, amounted to a breach of the implied term of trust and confidence. Accordingly, even if they caused Mr Galley to resign, they did not amount to something which individually or collectively could justify his resignation on grounds of constructive unfair dismissal.

174. While it was not entirely clear whether he resigned because of the reasons alleged, given our findings regarding his allegations, there is no need to consider this in detail. Mr Galley did resign quickly following Mr Brindle's grievance decision on 4 July 2022, but it is noted that he did not appeal the decision. It is not certain that the outcome of such an appeal if raised would have produced a genuine substantial breach of the implied term of trust and confidence, but based upon the allegations as made, Mr Galley has been unable to demonstrate that he was constructively unfairly dismissed.

Conclusion

175. Accordingly, Mr Galley has not succeeded with any of his claims. His list of issues as prepared did not assist him for the reasons explained in the discussion above. However, even allowing for these difficulties, we were unable to identify a well founded complaint and his claim must fail in its entirety.

176. This means that the complaint of disability discrimination contrary to sections 15, 19, 20 & 21 and 26 of the Equality Act 2010 is not well founded which means it is unsuccessful.

177. Additionally, the complaint of constructive unfair dismissal is not well founded and is therefore unsuccessful.

Employment Judge Johnson

Date 7 March 2024

JUDGMENT SENT TO THE PARTIES ON

11 March 2024

FOR THE TRIBUNAL OFFICE

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