



EMPLOYMENT TRIBUNALS

Claimant: Ms E McDonald

Respondent: Roseberry Care Centres (UK) Limited

HELD AT: Manchester

ON: 7 and 8 June 2017

BEFORE: Employment Judge Feeney
Ms C S Jammeh
Mr A J Gill

REPRESENTATION:

Claimant: Mr W Josling, Counsel

Respondent: Mr P Mills, Consultant

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's claim of unfair constructive dismissal succeeds.
2. The claimant's claim of harassment under the Equality Act 2010 in relation to D, E, F and G succeed.
3. The claimant's other disability discrimination claims under the Equality Act 2010 fail and are dismissed.

REASONS

1. The claimant by a claim form issued on 28th July 2016 brought a claim for constructive unfair dismissal and disability discrimination following events during her employment and on her last day of employment on 14th March 2017.
2. It was agreed the correct name of the respondent was Roseberry Care Centres (UK) Limited.

IssuesDiscrimination arising from a disability

3. (i) did the respondent treat the claimant less favourably in
- (a) on 14th March telling the claimant she was a liability to the residents advising her to go on sick leave if she could not continue her kitchen duties.
 - (b) on the same date the claimant's manager telling her if you won't do the kitchen you can't do the care.
 - (c) on 20th March the claimant being forced to submit her resignation as her manager would not allow her to relinquish her kitchen duties or take her concerns seriously.
 - (d) on 21st March the claimant telephoned her manager to inform her she would be returning her uniform, during this conversation the claimant's manager advised her sick notes were invalid and accused the claimant of attending work under the influence of alcohol.
- (ii) Did the unfavourable treatment if it occurred arise in consequence of the claimant's disability i.e. on the basis she was no longer able to work in the kitchen as this exacerbated her condition and caused her pain.
- (iii) if so was the respondent's treatment of the claimant objectively justified.

Reasonable Adjustments

- (a) did the respondent apply a provision, criteria or practice that if the claimant could not work in the kitchen she could not work as a Care Assistant.
 - (b) if so did this put the claimant at a substantial disadvantage in comparison with those who do not suffer from her disability as the claimant would not have been able to work.
- (iv) did the respondent know or ought it reasonably to have known that:-
- (a) the claimant had a disability and
 - (b) the PCP was likely to put the claimant at a substantial disadvantage in comparisons with persons who are not disabled.
- (v) if so did the respondent take such steps as it was reasonable to have to take to avoid the disadvantage caused by the PCP i.e.

- (a) would the advantage have avoided the disadvantage and
- (b) if so was it reasonable for the employer to have to take that step.

Harassment

4. Did the respondent subject the claimant to unwanted conduct in respect of the matters alleged in paragraph 42 of the claimant's particulars of claim.

- (a) that in August 2015 the claimant's manager initially agreed to advertise a kitchen assistant's post but subsequently advised the claimant she would be removing 10 hours of her care assistant post and she would have to continue working in the kitchen.
- (b) the claimant informed her manager she was unable to work in the kitchen because of her disability but was told that she had no choice.
- (c) the claimant's complaints about her pain and discomfort were continually ignored and her kitchen duties were not relinquished.
- (d) the respondent refused to accept the claimant's resignation of her kitchen duties and told her she must go off sick and be re-trained on her return.
- (e) the claimant was told that if she could not work as a kitchen assistant she could not work as a care assistant either.
- (f) when the claimant stated she might as well resign her manger in response said go on then.
- (g) the claimant's line manager called her a liability and implied the claimant was not able to work with residents and
- (h) on 21st March 2015 the claimant was informed that her sick note was invalid and accused her of attending work under the influence of alcohol and in an aggressive manner.

Unfair Constructive Dismissal

- 5. (i) Did the respondent commit a fundamental breach of contract in respect of trust and confidence in respect of all the matters referred to above including Mrs Radcliffe's behaviour to the claimant on the 14th March in particular informing the claimant she was a liability and when she stated she might as well resign stating "go on then",
- (ii) did the claimant resign because of that fundamental breach of contract.

Claimant's Submissions

6. The claimant submitted that the respondents had failed to make reasonable adjustments because of her disability, they had made harassing comments in relation to matters arising from her disability and had treated her unfavourably due to the problems she was having with her hands, neck and back as a result of her disability. In addition this plus the way she was treated by her manager Mrs Radcliffe on 14th March led to her resigning and claiming constructive dismissal.

Respondent's Submissions

7. The respondent submitted that although they now concede that the claimant was disabled they did not accept they had knowledge of disability prior to the 14th March. The respondent disputed the claimant's description of events on 14th March and argued that the manager was simply trying to understand whether the claimant was fit to do care work if she was not fit to do the kitchen work.

Witnesses and Bundle

8. The Tribunal heard for the claimant the claimant herself and her partner Mr Stirzaker and for the respondent Mrs Carol Radcliffe, Deputy Manager and Ms Angela Pomfret, Chef and Ms Kim Astley, Care Assistant. There was an agreed bundle.

9. The Tribunal's findings of fact are as follows.

10. The claimant began working for the respondent on 13th March 2013, the claimant initially worked as a Kitchen Assistant temporarily and then from August 2013 worked as a Care Assistant, it was the claimant's case that she was asked in March 2014 to consider working one day a week as a Kitchen Assistant in addition to her Care Assistant duties.

11. It was the claimant's case that she told Mrs Radcliffe at this juncture that she would have to see how this impacted upon her condition given that she had previously experienced pain during her time working as a Kitchen Assistant. We find that the claimant did not make this clear at the time, she did advise Mrs Radcliffe that she had some misgivings about taking the role on but she did not make clear it was due to experiencing pain.

12. In August 2016 the claimant said that she felt unable to continue with the kitchen duties due to them aggravating her condition and causing her pain, particularly using the dishwasher as she had to carry trays fully weighed up from shin height to chest height. The claimant said that she raised this with Mrs Radcliffe again in August and said could she relinquish doing the kitchen shifts but Mrs Radcliffe eventually refused. The claimant said that she initially agreed to advertise it but then said "oh no that wasn't sensible as nobody would want such a short shift". Mrs Radcliffe said no she had always said it wasn't worth advertising because nobody would just want one shift. We accept Mrs Radcliffe's evidence on this and believe the claimant probably misheard her. Mrs Radcliffe's understanding was that

the claimant simply wanted to reduce her hours as she was finding full time difficult having worked part time before and because that that particular shift was a long one by comparison. Mrs Radcliffe offered to reduce her care hours by one shift and then two shifts but the claimant stated one shift was too short and two shifts was too long. This to us suggested that there was not an in-depth conversation about the fact that it was the kitchen assistant duties that were aggravating the claimant's condition. The claimant said that she said to Mrs Radcliffe that the three other kitchen workers were prepared to cover for the claimant and do extra shifts but that Mrs Radcliffe said this was not possible, in evidence Mrs Radcliffe said that there would not be enough cover for holidays if the claimant did not do the Tuesday which we accepted that that was her reasoning at the time. The claimant never got back to Mrs Radcliffe to emphasise why it was important to give up the kitchen duties and Mrs Radcliffe persisted in thinking that the claimant wanted to drop the kitchen duties because it was a long shift compared to her other shifts which were 6 1/2 hours and that she simply preferred to drop that one and keep the care work which was more manageable. The claimant agreed that she never raised it again and although she described herself as working under protest she agreed she was simply protesting to herself.

13. The next incident which arose was on the 14th March. Prior to this the claimant was obviously struggling as she had been to see her doctor on the 10th March, obtained a sick note stating that she had Cervicalgia - pain in the neck, the sick note went on to say "Mrs McDonald has Osteo Arthritis affecting her neck and hands, this is exacerbated by heavy lifting in the kitchen, I fully support her request to resign from these duties but I understand that she wishes to continue in her caring role, I hope her request can be considered on medical grounds".

14. On the 14th March Mrs Radcliffe approached her and she said having heard from Kim Astley that the claimant had got some sort of sick note. Kim Astley did not say in her witness statement that she had informed Mrs Radcliffe of this and the claimant said that Kim Astley did not know she was actually getting a sick note but that she had talked about getting one. We find that the situation was that Mrs Radcliffe had heard that the claimant was getting a sick note and went to find out what it was all about. We find this because the claimant's third letter to the respondent which we will refer to later on of 21st March records that "on Tuesday of last week Carol said to me that she had been told that I was getting a sick note". Therefore although Kim Astley denied it we believe that something was said to Mrs Radcliffe about the fact that the claimant had said she was going to get a sick note and this put Mrs Radcliffe on the alert.

15. When Mrs Radcliffe went to see the claimant the claimant said yes she had got a sick note, there was then considerable dispute over what was said, Mrs Radcliffe said the claimant said to her, that it was "her hands", she had Arthritis and could not use her hands and that the claimant clarified that she would not be going off sick, she was giving notice in respect of the kitchen work only. Mrs Radcliffe said "I asked her how she could do care if she couldn't use her hands and she said she didn't use her hands for care".

16. The claimant said that Mrs Radcliffe was immediately antagonistic and said that she should go off sick and only return to work when she felt better and that she

could be re-trained upon her return. We never really were aware of what that meant as the claimant was not questioned about what it meant and Mrs Radcliffe denied saying it. The claimant said that Mrs Radcliffe said "if you won't do the kitchen you can't do the care" and that she replied "if that was the case I might as well resign" and in response that Mrs Radcliffe has said "go on then". She went on to say that she was also a liability to the residents which upset her and she began crying, she was too upset to continue working and left.

17. Mrs Radcliffe and the respondent's other two witnesses stated that the claimant was the one doing the shouting and had torn off her apron and stormed out however neither of those two witnesses heard the whole of the conversation and we have decided we prefer the claimant's version of the conversation for the following reasons.

18. Firstly because her correspondence was measured and consistent with the facts. The letters she had drafted on 14th March regarding resigning from the kitchen duties stated that she had contacted and discussed with her doctor the problems she was having and had been diagnosed with Osteo Arthritis and this confirms the sick note that she had obtained four days earlier on the 10th March. Her resignation on 20th March was measured and reasonable, in particular that she said "I do not accept that I am a liability to the residents because as I tried to explain to you I do not use my hands, neck or back in any way for me to feel pain or discomfort". The use of the word liability in our mind is not a word that would normally occur in a letter like this and is corroborative of the fact that Mrs Radcliffe did say something along the lines of the claimant being a liability, presumably because she might not be fit to use her hands in her care work.

19. We further find the claimant's versions of events credible because they are in the main recited in the letter we have already referred to of 21st March 2016 where she sets out her version of events including "on showing it (the sick note) to her along with the letter of resignation for the kitchen she said she was not accepting it and told me that if I won't do the kitchen then I can't do the care ... she was waving her arm at me walking away saying she was not going to argue with me ... she returned and told me I was a liability and putting the service users in danger, she also told me to go on the sick when I was better to go back and she will retrain me ... I said to her if that's how you feel I may as well go now Carol replied "go on then" I removed my apron and told her she was good at intimidating people and proceeded to get my coat. I said I will go back to my doctor and get a sick note for four weeks and resign at the end of that from the whole job". We are bolstered in our belief that this letter was an accurate representation of what happened as the claimant mentions a number of matters in this letter which she did not mention in her letter of resignation which leads us to believe that at the time of her resignation she was simply resigning and had no particular plan or litigation in mind.

20. To continue with the narrative and to return to the letters later following the claimant leaving the premises on the 14th March nothing happened, nobody got in touch with the claimant, the respondents say that the claimant had done this before in either August or December and that she had walked out but that she had come back quite quickly. However, we do not accept this explanation for not contacting the claimant for six days as the respondents would have needed to know whether

the claimant was coming back to work and it seems inherently improbable to us that they would have left it for more than twenty four hours before getting in touch with the claimant to see what her intentions were. This suggests to us that the respondents knew that whatever had happened was serious and it was unlikely that the claimant was going to come back.

21. As the claimant had said she then did resign by letter of 20th March which said

"Dear Carol,

As promised I have been to see my doctor and she has given me a sick note for four weeks commencing on 15th March and ending 12th April. This four week period will cover my four weeks resignation term required as it says in my contract. I have tried to talk to you about dropping my hours in the kitchen but you refuse and appear to be unsympathetic to my condition of Osteo Arthritis affecting my hands and neck whilst lifting the dishwasher trays. I do not accept that I am a liability to residents because as I tried to explain to you I do not use my hands, neck or back in any way for me to feel pain or discomfort, I also explained that I would prefer to utilise that time and put more effort into activities for the residents. Although I have enjoyed working with the residents for almost three years I feel that as you are not prepared to listen to me and let me explain I can no longer be part of the team at Beech Grove".

22. Following this the claimant rang Mrs Radcliffe on 21st March to confirm she would be returning her uniform and other items belonging to the respondents. This was just intended to be a business like call however during this call the claimant said that the manager said her sick note was invalid and that she had attended work smelling of alcohol. She felt that Mrs Radcliffe was aggressive, shouting at her and persistently spoke over her, the claimant's partner said he was sat next to the claimant and heard everything on speakerphone and he supported what the claimant said about the content and the tone of the conversation. As a result of this the claimant rang the respondent's human resources department, Mrs Leigh Anne McNamara and then set out what had happened in a letter dated 21st March from which we have already quoted. This adds in our view to the claimant's credibility as in her resignation letter she did not refer to these additional matters and that suggests to us that at that point in time she was simply resigning and not thinking about the future. In our view if she had been thinking about bringing a claim it seems more likely to us she would have contacted HR before this point but genuinely the only reason she contacted HR was because she was so upset by the telephone call on 21st March.

23. This then led to the claimant sending a long letter of 21st March setting out the timescale of events. In this she said that "approximately ten months ago Carol the manager approached me and offered me the position of Kitchen Assistant on a weekly basis on Tuesdays, I told her at the time I would take on this position on condition that I would see how things go and if I could cope with the shift alongside my four care shifts and preparing and delivering activities to the service users". We note that the claimant is not saying that she told Mrs Radcliffe in terms that the

reasons for her equivocation was because of any problem with her neck, back or hands and certainly not that she had the condition of Osteo Arthritis.

24. The letter continued "as time went on I realised that due to the heavy lifting that it was having a detrimental effect on my hands and neck due to having Osteo Arthritis. I then approached Carol about five months ago asking if it would be a problem if I gave up my kitchen duties due to the pain and discomfort in my neck, hands and back. Carol asked the secretary if the position could be advertised on which the secretary replied "yes" and then I continued with my kitchen duties. A short while later Carol said to me that she would give me three three hours shifts for activities and I would stay in the kitchen. I tried to explain that I didn't want to drop my care shifts but the kitchen and that I would rather utilise the time to prepare activities and displays of the display boards so relatives and friends could see what the service users were participating in". The letter goes on "later on Carol then offered me one care shift per week, I said I would think about it, after great consideration I realised it would not work for me, the following Tuesday Carol asked me if I had made a decision and I told her I didn't want to give up my care shifts but the kitchen. Carol told me this was not an option, I did mention to other members of staff and three of the kitchen staff volunteered to pick up the Tuesday kitchen duties but Carol told them no. I felt I had no other option but to consult my doctor on this matter and she agreed with me that due to the pain and discomfort I was experiencing in my neck and hands it would be appropriate for me to amend my duties by ceasing kitchen duties, fully supporting me my doctor gave me a sick note with a recommendation to amend my duties".

25. The letter then went on as referred to earlier. Following this Ms McNamara wrote on 24th March to ask her if she wanted to have a grievance hearing about it and that she could reconsider her decision to resign but if she did not hear from her within a week she would presume that she did not want to resign or have a grievance meeting.

26. On 29th the claimant replied saying in effect that she did not want to change her decision. The letter was somewhat ambiguous and Ms McNamara wrote again on 30th March saying "I asked you if you wished to reconsider your resignation and if you would like to attend a grievance hearing, she referred to a telephone conversation on 29th March where the claimant had confirmed that she did not wish to attend a formal grievance hearing and wished to continue with her resignation so Ms McNamara confirmed that her leaving date would be the 12th April.

27. In addition following the situation on 14th March Mrs Radcliffe contacted her line manager Lynne Anderson and HR. We heard no evidence from them but Mrs Radcliffe advised that she was told to gather statements about what had happened. This statement supported Mrs Radcliffe's version of events, there was a statement from Angela Pomphret who said she was in the kitchen at the time. Mrs Pomphret confirmed that Mrs Radcliffe had said had she got a sick note as she had heard about it from other members of staff. It was explained it was just for kitchen work and that she would a month's notice and then make the hours up on care. Mrs Radcliffe then said that she would have to run it past head office and that the claimant said it was arthritis in her hands. Mrs Pomphret agreed she was not in the kitchen all the time but could hear raised voices by the locker area. Ms Astley also did a witness statement saying that she was in the kitchen briefly but also heard

raised voices from the dining room where she was giving out medication. She confirmed the same issue that Mrs Radcliffe had quizzed the claimant how it would be possible to do the care work if she had a problem with her hands. Ms Astley did not hear the whole of the conversation but later said she heard Mrs Radcliffe asking the claimant to come in to the office but that the claimant was irritated and said "you have burnt your bridges, cut off your nose to spite your face I am leaving" and she left driving out of the car park "like a bat out of hell". We accept the claimant said this but in response to Mrs Radcliffe saying "go on then" when she threatened to resign

28. There was also a statement from Gemma Bond regarding the previous incidents when the claimant had left a shift without notice and saying also that she smelt alcohol on the claimant's breath on that occasion. Whilst this might have been a defensive measure by the respondent no issue regarding it was pursued.

THE LAW

(1) Disability Discrimination

Harassment

29. Harassment is defined in section 26 of the Equality Act 2010, which states:

- “(1) A person (A) harasses another (B) if –
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) The conduct has the purpose or effect of –
 - (ii) Violating B's dignity, or
 - (iii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) ...
- (3) ...
- (4) In deciding whether conduct has the effect referred to in subsection 1(b) each of the following must be taken into account:
- (a) The perception of B;
 - (b) The other circumstances of the case; and
 - (c) Whether it is reasonable for the conduct to have that effect.”

Section 15 – discrimination arising out of disability

30. The claimant makes a claim under section 15, something arising in consequence of disability. Section 15 states that:

“A person (A) discriminates against a disabled person (B) if –

(d) A treats B unfavourably because of something arising in consequence of B’s disability; and

(e) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.”

31. In **Basildon and Thurrock NHS Foundation Trust v Weerasinghe** EAT (2015) stated that:

“(1) In a section 15 claim a Tribunal must firstly establish that the disability has the consequence of something; and

(2) That the treatment complained of as unfavourable was because of that particular ‘something’.

32. An employer also has a defence to a section 15 claim if they can establish they had no knowledge of the claimant’s disability (section 15(2)). Section 15(2) also states that the employer could not be reasonably expected to know of the employee’s disability. The employer, in accordance with the EHRC Employment Code, must do all it reasonably can to find out if the person has the disability, and knowledge held by the employer’s agent or employee, such as Occupational Health adviser etc., will usually be imputed to an employer.

33. In **Hardys and Hansons PLC v Lax [2005]** Court of Appeal it was said, in respect of justification:

“It is for the Employment Tribunal to weigh the real needs of the undertaking expressed without exaggeration against the discriminatory effect of the employer’s proposal. The proposal must be objectively justified and proportionate...A critical evaluation is required and is required to be demonstrated in the reading of the Tribunal. In considering whether the Employment Tribunal has adequately performed its duty appellate courts must keep in mind the respect due to the conclusions of the fact finding Tribunal and the importance of not overturning a sound decision because there are imperfections in the presentation. Equally the statutory test is such that just as the Employment Tribunal must conduct a critical evaluation of the scheme in question, so the appellate court must critically consider whether the Employment Tribunal has understood and applied the evidence and assessed fairly the employer’s attempts at justification.”

Section 20 - Reasonable Adjustments

34. The claimant also makes a reasonable adjustment claim. Section 20 says:

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

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

35. In **The Royal Bank of Scotland v Ashton [2011] EAT** it was stated that the PCP must be a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled, and by comparing to non disabled comparators it can be determined whether the employee has suffered a substantial disadvantage. The correct comparators are employees who could comply or satisfy the PCP and were not disadvantaged.

36. In **Environment Agency v Rowan EAT [2007]** the EAT said:

“A Tribunal must go through the following steps:

- (5) Identifying the PCP applied by or on behalf of the employer;
- (6) The identity of non disabled comparators where appropriate;
- (7) The nature and extent of the substantial disadvantage suffered by the claimant.”

37. Serota J stated:

“In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments...without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed amendment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.”

38. Paragraph 21 of schedule 8 to the Equality Act provides that:

“A person is not subject to the duty if he does not know and could not reasonably be expected to know that an interested disabled person has a disability and is likely to be placed at a disadvantage by the employer's PCP, the physical features of the workplace or a failure to provide an auxiliary aid.”

39. This encapsulates the idea of constructive knowledge i.e. that either someone within the respondent's organisation who is responsible for these matters, such as Occupational Health, knows of the substantial disadvantage, or that the respondent should have known from all the factors available but closed their eyes to it.

40. Further, the adjustment has to be reasonable and effective. Section 18B(1) of the Disability Discrimination Act 1996 (these matters are no longer in the Equality Act but they are useful to have in mind in considering what would be a reasonable adjustment) set out some factors to take into consideration as follows:

- “(1) The extent to which the step would prevent the effect in relation to which a duty was imposed.
- (2) The extent to which it was practical for the employer to take the step.
- (3) The financial or other costs which would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of its activities.
- (4) The extent of the employer’s financial and other resources.
- (5) The availability to the employer of financial or other assistance with respect to taking the step.
- (6) The nature of the employer’s activities and size of its undertaking and matters relevant to a private household.”

(2) Constructive Dismissal

41. An employee can lawfully resign employment with or without notice if the employer commits a repudiatory breach. Resignation can be interpreted as an election by the employee to treat himself as discharged from his contractual obligations by reason of the employer’s breach. This is known as constructive dismissal and is a species of statutory unfair dismissal by virtue of section 95(1)(c) Employment Rights Act 1996.

42. It was described in **Western Excavating (ECC) Limited v Sharpe [1978]** by Lord Denning as follows: “If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed”.

43. An employee must act reasonably quickly in responding to a repudiatory breach of contract otherwise s/he may be taken to have accepted the continuation of the employment contract and affirmed the contract. However, mere acceptance of salary without the performance of any duties by the employee will not necessarily be regarded as an affirmation of the contract following an employer’s repudiation.

44. A claimant can rely on implied or express terms of the contract. Express terms can be written or oral. The claimant relied on the breach of the implied term of trust and confidence in this case as well as an express (though oral) agreement about salary.

45. In **Wood v WM Car Services (Peterborough) Limited [1982]** the Court of Appeal approved the development of the implied term of trust and confidence.. It was finally given House of Lords' approval in **Malik v BCCI** in 1997 where Lord Stein stated that the question was whether the employer's conduct so impacted on the employee that viewed objectively the employee could properly conclude the employer was repudiating the contract. It is not necessary to show that the employer intended to damage or destroy the relationship of trust and confidence. In **Malik** the formulation is that the employer "must not conduct itself in a manner calculated and likely to destroy confidence and trust" and it is relevant to consider whether the employer's conduct in question was "without reasonable and proper cause". This is not the same as the range of reasonable responses test.

46. In proving breach an employee may pray in aid evidence of past repudiatory breaches even though he waived his right to object to them at the time. **Lewis v Motorworld Garages Limited [1985]**.

47. In cases where the basis is an allegation an employer subjected the employee to unacceptable workplace stress the Tribunal should apply the ordinary common law principles on stress cases and go on to consider whether any breach by the employer was sufficiently fundamental to be repudiatory. Of course discrimination against an employee will generally be a breach of the implied term of trust and confidence.

48. Failure to deal properly with a formally raised grievance may constitute a contractual repudiation based on a specific implied term to take such grievances seriously and not just on the more general term of trust and confidence. **Goold v Pearmak (Limited) v McConnell [1995] EAT**.

49. The particular incident which causes the employee to leave may in itself be insufficient to justify resignation but may amount to constructive dismissal if it is the last straw in a deteriorating relationship. This means that the final episode itself need not be a repudiatory breach of contract although there remains the causative requirement that the alleged last straw must itself contribute to the previous continuing breaches by the employer. **Waltham Forest Borough Council v Omilaju [2004] CA**.

50. Therefore the claimant has to show that the matters he relies on either individually or cumulatively amounted to a breach of the implied term of trust and confidence. He then has to establish that that breach played a part in his decision to resign where it is argued he has to show that he has not unduly delayed or affirmed the contract.

51. A claimant can also rely on specific breaches without a continuing course of conduct.

52. The respondent can argue that there was a fair dismissal if constructive dismissal is found.

Conclusions

Constructive Unfair Dismissal

53. As we have indicated earlier we accepted the claimant's version of events of the 14th March, consequently we find that the claimant was constructively and unfairly dismissed by the matters Mrs Radcliffe brought up with her.

54. The comments that if she won't do the kitchen she couldn't do care, comments that she was a liability, the comment "go on then" after she said she might as well resign, these were all comments which constitute a repudiatory breach of contract on the basis of the implied term of trust and confidence.

55. The claimant accepted the breach and left resigning six days later. The respondent did not argue any other matter on constructive dismissal other than the facts alleged by the claimant were not correct.

Disability Discrimination

Respondent's Knowledge

56. Although the claimant's letters supported the premise that she had raised issues before with Mrs Radcliffe regarding her disability we found that she had not been as clear as she alleged before 14th March. We find this because she said in the letter of 20th March "I tried to talk to you about dropping my hours in the kitchen but you refused and appeared to be unsympathetic to my condition of Osteo Arthritis affecting my hands and neck whilst lifting the dishwasher trays". We believed this referred to the conversation on 14th March and not earlier as the claimant had not got a diagnosis of Osteo Arthritis until then, we have considered the claimant's medical documents and the word Osteo Arthritis is not used until the doctors note of 10th March although clearly the claimant had a significant problem from 2010 onwards in relation to her spine.

57. In addition in the claimant's letter of more detail of the 21st March where she says "approximately ten months ago" ...which ostensibly suggests she spoke about her condition earlier is not corroborative of this as in the claimant's own words she did not say in terms that she might have difficulties because of any condition or because her hands would get swollen or her neck sore due to lifting.

58. In respect of whether this was discussed in August again we find that although there was some reference to pain and discomfort the claimant was not clear that this arose for any long term condition.

59. Therefore we accept the respondent's position that they had no knowledge of disability and could not be reasonably expected to know the claimant was disabled prior to seeing her sick note on 14th March.

Reasonable Adjustments and Section 15 claim

60. Accordingly the claimant's claims of the failure to make reasonable adjustments and unfavourable treatment due to something arising from disability must fail as knowledge is required for those claims.

Harassment

61. In respect of the claimant's harassment claims A to H we find that because the claimant did not make clear her physical condition and its ramifications A, B and C fail. The respondent did not undertake the relied on actions because of anything related to her protected characteristic.

62. H also fails as these matters are unconnected with anything to do with the claimant's disability.

63. D, E, F and G succeed as all these actions took place on 14th March when the claimant had made her difficulties clear. The comments were made because the claimant had difficulties doing the job because of her disability and therefore were related to a "relevant protected characteristic"

64. Albeit the respondent did not know of her disability until that date it is not necessary for harassment case that they know of her disability.

65. The comments and actions had the effect reasonably of creating a hostile and intimidating environment for the claimant, they were clearly hostile and combative comments encouraging the claimant to leave the employment and denigrating her contribution to the care home.

Summary

66. Accordingly the claimant's claim of unfair constructive dismissal succeeds and the claimant's claims of harassment in relation to D, E, F and G also succeed.

67. The matter is listed for remedy on 18th September, if the parties are unable to settle the matter they are ordered to agree a bundle for the hearing by 14th August 2017 and to serve any relevant written statements on the other side by 4pm on the 21st August.

Employment Judge Feeney

Date 11th July 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

11 July 2017

FOR THE TRIBUNAL OFFICE

[JE]