



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mrs Diana Jenner

Respondent

AND Dr P Taylor, Dr J Halford, Dr J Allen, Dr S Ellis,
Dr B McKenna, Dr E Guinness, Dr L Crosby and Dr J Ashby
(together in partnership as the Axminster Medical Practice)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 19, 20 and 21 February 2018

EMPLOYMENT JUDGE N J Roper **MEMBERS** Mr T McAuliffe
Mr J Howard

Representation

For the Claimant: In person
For the Respondent: Mr R Anderson, Consultant

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims are dismissed.

REASONS

1. In this case the claimant Mrs Diana Jenner, who resigned her employment, claims that she has been unfairly constructively dismissed, and that she was discriminated against because of a protected characteristic, namely her disability. The claim is for harassment only. The respondent concedes that the claimant is disabled, but denies knowledge of the disability, denies any harassment, and denies that the claimant was dismissed.
2. We have heard from the claimant. For the respondent we have heard from Mrs Linda Coombs, Mrs Caroline Bovill and Dr J Allen.

3. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence and have observed their demeanour in the witness box. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The respondent is a medical partnership based in Axminster in Devon. The claimant Mrs Diana Jenner was born in 1958. Following a history of employment in pharmaceutical companies she was employed by the respondent with effect from 19 September 1994 as a dispenser. The respondent practice has its own dispensary which opens from 8:30 am to 6:30 pm Monday to Friday, and the claimant worked for 21 hours each week. The dispensary has seven dispensers and two dispensary assistants, plus a supervisor, who reports directly to the Practice Manager who is also the Dispensary Manager. The respondent's partner who was responsible for the dispensary was Dr Halford, who was also the staff partner. He attended the dispensary at least one morning a week to discuss various issues, and was on hand if any employee wished to raise any issues with him.
5. During the times which are relevant to these proceedings the Practice Manager and Dispensary Manager was Mrs Linda Coombs, from whom we have heard. The Dispensary Supervisor was Mrs Caroline Bovill, from whom we have also heard. The respondent practice and dispensary are subject to professional regulation, and have standard operating procedures. The dispensary managers generally held monthly meetings with the dispensary staff to discuss any issues, which included problems and ways in which matters might be improved.
6. Historically there had been a good atmosphere in the dispensary and all of the employees who worked there generally got on well. In particular the claimant and Mrs Bovill were good friends. Unfortunately the claimant suffered from a number of personal difficulties which included the death of her mother, and serious illnesses to herself and other close members of her family. The claimant accepts that on occasions she lost concentration and lost focus, and started to make mistakes. The claimant's colleagues began to notice that she would make the occasional mistake, but these were generally rectified in a supportive manner. In any event it was not a serious issue and the claimant had a very positive appraisal in 2013 from both Mrs Coombs and the staff partner Dr Halford.
7. From the end of 2013 Mrs Coombs began to perceive that the claimant's behaviour was slightly more erratic and the mistakes became more substantial or at least might have involved lack of judgment. This followed the death of the claimant's mother, and these were generally resolved by way of discussion and resolution in a supportive and non-confrontational manner. The claimant herself insisted throughout that she was well enough to work and accepted that it was appropriate for any mistakes to be brought to her attention and resolved as discussed above.
8. Two incidents are relevant from 2014 in respect of which the claimant subsequently complains. The first was on 22 April 2014 when the claimant's husband had attended for an appointment with his GP and the claimant was unable to see where he had gone. She appeared to assume that something bad had happened and ran around from one window to another shouting her concern that something might have happened. Her friend Mrs Bovill suggested she left the dispensary to find him and ensure that he was safe, which she then did. During this event Mrs Bovill tried to calm her friend the claimant down and suggested that she was being hysterical and worrying unnecessarily.
9. The other occasion was in June 2014 in which Mrs Coombs raised issues with the claimant about her concentration and that colleagues were concerned about her beginning to make mistakes. Mrs Coombs discussed these issues with her issues relating to her performance and memory. The claimant conceded in her evidence before us that it was necessary and reasonable for the respondent to have raised these issues with her.
10. There was then an incident in January 2015 which related to a bottle of Oramorph. Dr Bates of the respondent was treating the child of another colleague who had suffered burns and was in considerable pain. The air ambulance had been summoned. Dr Bates

- asked the claimant to dispense a bottle of Oramorph for these urgent purposes, but the claimant refused to do so without a prescription. The respondent disputes that a prescription was required in those circumstances, but in any event argues that because Dr Bates had asked for the medicine, the claimant should have given it to her, and obtained the necessary prescription subsequently after the child had been treated. Mrs Coombs admits that she raised her voice at the claimant in frustration in order to obtain the medicine in those circumstances. The claimant objects that she was reprimanded for complying with the respondent's correct procedures.
11. Another incident occurred this time on 19 January 2015. The claimant issued a prescription to a patient, but accidentally stapled to it a prescription for another patient. This was a breach of confidentiality. The claimant accepts that she made a mistake, and that it was appropriate for Mrs Coombs to raise the matter with her. Nonetheless she says that Mrs Coombs was very negative and accused her of making too many mistakes.
 12. Shortly thereafter the claimant attended a consultation with Dr Ellis of the respondent on 23 March 2015. Dr Ellis signed the claimant off work and issued a certificate for two weeks which was described to be because of "emotional exhaustion". The claimant was prescribed antidepressants. At this stage Dr Ellis felt that there might be a conflict of interests between her position as the claimant's treating GP, and her employer, and suggested it was inappropriate for her to advise the claimant further. At that time it was difficult for any patient to seek to register in a GPs' practice which was not local, although within the year that rule had changed. The claimant asserts that she was unable to seek medical assistance thereafter. We accept Dr Allen's evidence that the respondent has reciprocal arrangements with other surgeries slightly out of the area and that if the claimant had requested or needed subsequent medical assistance, this could have been arranged with another practice. We also accept Dr Allen's evidence that the consultation with Dr Ellis was confidential and Dr Ellis did not discuss it with her partners. In addition Dr Allen did not read the claimant's medical notes at any stage and was not aware of that consultation.
 13. In any event Mrs Coombs dealt with the claimant's absence in a considerate and supportive manner. At about the same time Mrs Coombs had obtained an occupational health report on the claimant which was dated 25 March 2015. This suggested that the claimant was suffering from depression, but that no adjustments were needed other than a course of counselling. Mrs Coombs persuaded the claimant to extend the two weeks certified sickness absence by a further two weeks on paid compassionate leave, and agreed a phased return to work over the following three weeks.
 14. In July 2015 Mrs Coombs felt the need to raise the issue of another mistake which the claimant had made. While serving at the acute hatch at the dispensary, she tried to help a colleague on the repeat prescription hatch but lost concentration and made a mistake. The claimant accepts that she made a mistake and does not deny that it was reasonable for the respondent to raise that issue, but objects to being criticised for being forgetful. The claimant complains that the manner in which she was reprimanded was cruel rather than the fact that she should have been reprimanded. Mrs Coombs asserts on the other hand that she raised the matter with the claimant in a professional manner, and was entitled to do so.
 15. Another instance arose on 30 September 2015 which concerns the dispensing of a repeat hormone injection, and a concern raised by the claimant as to whether it was a safe treatment to have been prescribed. She raised the matter with her friend and supervisor Mrs Bovill, who told her that she was being over anxious. The claimant does not suggest that the respondent was wrong to make that comment, but now objects to the fact that it was raised while she was working at the hatch whilst other people were being served.
 16. Another instance arose on 3 November 2015. The respondent's computer system records tasks which need to be completed, and when the task is completed it is closed on the computer. This creates an audit trail which shows who completed which tasks and when. On this occasion there was a task concerning a Dosette box which the claimant closed in error, when the task had not been completed. The claimant says that this was

- at 4:50 pm late one afternoon and that she intended to close it down the following day, but appeared to have forgotten to have done so. The claimant accepted in her evidence that Mrs Coombs was entitled to consider that it was a mistake and was an issue which could quite properly be raised with the claimant. She conceded that it was arguably practice which could give rise to criticism. It was a matter which it was appropriate for Mrs Coombs to raise, including at one of the Department monthly meetings where the respondent's working practices were discussed.
17. There was another occasion in January 2016 when the claimant was serving at both the acute hatch and the repeat prescription hatch. The claimant apparently became flustered and called for assistance when the respondent felt that it should have been easily within her normal duties to have coped with the required work at that time. However, the claimant accepted in her evidence that serving at both hatches was expected and she was one of the most experienced members in the team. The claimant never told the respondent that she was struggling in her role and always said that she was fine to continue as normal. Mrs Bovill says that she asked the claimant to cover both hatches and the claimant was pleased to do so. When she had made a mistake it was brought to her attention. The claimant did not raise any complaint at that time.
 18. Another example arose on 29 February 2016 when both the claimant and her supervisor and friend Mrs Bovill had made a similar mistake together. The claimant had been working alone after 5:30 pm and had been busy. Mrs Coombs felt it appropriate to discuss the matter with both of them. She addressed the issues individually with each of them, and subsequently raised the matter at a department meeting. The claimant assumed that she had been criticised individually and complained that she had been criticised in front of the dispensing team. In fact, Mrs Coombs had already addressed the matter with Mrs Bovill separately and it was appropriate for Mrs Coombs to have raised the matter with each of them.
 19. The above issues are examples of mistakes which the claimant made at work, and which effectively each of the respondent's managers, particularly Mrs Coombs, were entitled to draw to the claimant's attention and to discuss. The claimant now complains of harassment in respect of the same, as can be see further below, but at the time the claimant did not raise any complaint or objection about this conduct. The claimant accepted in her evidence that it was appropriate for the respondent to raise these issues with her and during these discussions continually asserted that she was well enough to work and complete her normal duties.
 20. On 16 March 2016 a more serious issue then arose with the claimant following a complaint made by a patient referred to as Mr H. Following advice from his consultant, Mr H was expecting to collect two medications: his usual methotrexate at a new higher dose, and a new medication, namely hydroxychloroquine. When he called at the dispensary to collect his medication only the second medication was ready for collection. When he questioned this he was advised that the methotrexate had been stopped and that the hydroxychloroquine had been prescribed instead of methotrexate, and not in addition to it. On the following day the patient's wife complained to Mrs Bovill, and said that she had been at her husband's hospital appointment where his medication and dosage were confirmed to him.
 21. The respondent's practice is a regulated environment and the respondent was required to investigate this complaint. Mrs Coombs investigated the matter and Mr H's medical records confirmed that the claimant was the dispenser at the time. Mrs Coombs also checked what the other dispensers were doing at the time and spoke to each of them. There was then an investigation meeting on 21 March 2016 at which Mrs Coombs, Mrs Bovill and Dr Halford questioned the claimant about the matter. She was not told that she could be accompanied by a representative or colleague. The claimant informed the respondent that she had no recollection of speaking with Mr H and she felt that someone must have used her private login details. That allegation in itself raised concerns with the respondent because it might well have meant the claimant failing to log out properly, or alternatively someone else wrongly using the claimant's login details. Mrs Coombs decided to check with Mr H whether he could recall who had served him, and he

- confirmed that he would be able to recognise that person and came to the practice on 23 March 2016. Mr H identified the claimant as the person who had served him. The claimant complains that he was not asked to select anyone from a police style identity parade, and that Mr H had merely looked through the dispensing hatch and confirmed it was her, without being able to see any other employees.
22. There was then another investigation meeting on 23 March 2016 at which Mrs Coombs, Mrs Bovill and Dr Halford questioned the claimant further about the matter. The respondent remained concerned and decided to proceed with a formal disciplinary investigation. A significant concern was that if the claimant had dispensed the medication she had done so as a non-clinician, and according to Mr H had given clinical advice, which was different from that which he had received from his consultant.
 23. By letter dated 12 April 2016 the claimant was required to attend a disciplinary hearing a week later on 19 April 2016. The letter set out the allegations which she would have to face, which concerned the giving of incorrect advice to Mr H. The letter made it clear that if substantiated the allegations might be regarded as serious misconduct. It did not suggest the possibility of gross misconduct which might result in dismissal. The letter enclosed the notes of the preliminary investigation, and the relevant disciplinary procedure. The claimant had previously indicated that she would be accompanied by her trade union representative, and this was confirmed. She was asked to provide copies of any documents upon which she wished to rely at least two days before the hearing.
 24. The claimant complains that she only received this letter at least two days later which afforded her very little time to prepare for the hearing. However, there was no request made by the claimant or by her trade union representative to postpone the matter. Mrs Coombs confirmed in her evidence that a request for a postponement in these circumstances would have been granted. In any event the claimant then submitted a sickness certificate for two weeks and was absent from work with effect from 15 April 2016 for "work related stress". Her sickness absence continued with a number of subsequent sickness certificates, and she never returned to work.
 25. Mrs Coombs was concerned for her welfare and by letter dated 18 April 2016 invited the claimant to attend an informal welfare meeting. Mrs Coombs would not ordinarily have done so in such a prompt manner, but considered that the absence had been triggered by the prospective disciplinary proceedings and wished to ascertain whether, and if so when, she might be well enough to continue with that process. The claimant's trade union representative Mrs Fogg and Mrs Coombs then exchanged emails, with Mrs Fogg questioning the nature of the investigative meeting, and the details of any notes, and confirming that the claimant would not attend a welfare meeting pending a consultation with her GP.
 26. By letter dated 3 May 2016 Mrs Coombs again invited the claimant to an informal welfare meeting, and suggested 17 May 2016. The claimant declined by email and stated that her GP advised such a meeting would be counter-productive. Mrs Coombs responded by letter dated 17 May 2016 with a number of questions concerning the claimant's medical condition and well-being, and asking the claimant to complete written replies if she was unable to attend a meeting. The claimant's GP then responded confirming his advice that further involvement at that stage would be counter-productive because of the work-related stress issues. By letter dated 6 June 2016 Mrs Coombs then wrote to the claimant to confirm that the suggested informal welfare meetings were to discuss her health and well-being, and that the disciplinary process would remain on hold pending her sickness absence. In addition Mrs Coombs referred the claimant to the relevant grievance procedure in the event that the claimant had any concerns which she wished to raise.
 27. The claimant then raised a formal written grievance by letter dated 24 June 2016 to Dr Taylor, the respondent's senior partner. She described the details of her grievance as follows: "the recent handling of the methotrexate incident; repeated comments regarding my memory; inconsistency of treatment; reprimanded for following a procedure; reference to a deceased colleague and likening her to me which caused me grief; inconsistencies regarding annual leave and overtime; bullying; inappropriate criticism; and harassment

- whilst off sick." The claimant confirmed that she was still being represented by Mrs Fogg and requested a meeting at a time which they could both attend.
28. Mrs Coombs and Mrs Fogg then agreed by email that Mrs Coombs, Dr Halford and Dr Taylor should not hear the grievance in the first instance, and that Dr Taylor would be available for any subsequent appeal. They agreed that Dr Allen, from whom we have heard, should investigate and hear the grievance in the first instance. Dr Allen then wrote to the claimant confirming that he would hold a grievance hearing on 15 July 2016 if convenient to her and Mrs Fogg, and asked the claimant to provide further clarification of the allegations in her grievance letter. The claimant did so by way of a detailed reply, and confirmed that "I am not criticising the partners themselves who I respect enormously" and that she blamed both Mrs Coombs and Mrs Bovill for a course of conduct over many years which she claimed to be "unreasonable, threatening, humiliating, or uncomfortable behaviour leading to a loss of dignity or respect."
 29. Mrs Coombs and in particular Mrs Bovill were appalled and distressed to read the allegations against them which they considered to be wholly untrue. In particular Mrs Bovill, who had been friends with the claimant for many years, said that she felt "physically sick" at reading these allegations against her, in circumstances where she felt that she had been entirely friendly and supportive of the claimant during her recent personal difficulties.
 30. Dr Allen spent several hours considering the claimant's detailed written complaints, and subsequently investigating the matter with the relevant members of staff. They were only able to progress seven of the claimant's nine main allegations at the first grievance hearing, and the remainder had to wait until Mrs Fogg was able to attend a subsequent meeting on 3 August 2016. In the meantime they had agreed between them a number of questions which Dr Taylor was to put to each of the relevant dispensing staff. They were all asked the same questions and their replies were recorded anonymously. Dr Allen had felt it appropriate to guarantee anonymity to the various members of staff so that they could talk openly about the allegations made. He also interviewed Mr H again to check his understanding of the dispensing incident, and interviewed Dr Bates about the Oromorph incident.
 31. Following this process Dr Allen concluded that there were no grounds to substantiate any of the claimant's points of grievance. None of the other members of staff were able to corroborate the allegations made against Mrs Coombs and Mrs Bovill, who had denied the allegations. In addition the accounts given by Mr H and Dr Bates contradicted the version of events given by the claimant in respect of each of the matters which involved them. On 18 August 2016 Dr Allen prepared detailed written conclusions running to seven pages, and the claimant was informed that she had the right of appeal against his rejection of her grievance.
 32. By letter dated 6 September 2016 the claimant confirmed that she intended to appeal the grievance outcome. The respondent acknowledged her appeal and forwarded various documents as requested by the claimant on 8 September 2016. The appeal hearing was arranged for 27 September 2016. Meanwhile on 17 September 2016 a Facebook photo was uploaded by Mrs Gaffney, an employee of the respondent, which showed Mrs Coombs, Mrs Bovill and a number of other colleagues from the respondent's practice having enjoyed a meal, with the comment "United we stand". Towards the end of September 2016 there was then an exchange of emails between Mrs Coombs and Mrs Fogg in connection with the claimant's confirmation that she was no longer able to attend the appeal hearing on 27 September 2016, and that it should be postponed.
 33. By letter dated 19 October 2016 the claimant then tendered her written resignation to Dr Taylor, confirming that she was resigning with immediate effect. She stated: "I feel I have been left with no choice but to resign in light of previous and recent experiences regarding the way I have been treated whilst off sick, raising my grievance and the handling of the methotrexate incident. I have been increasingly shocked and saddened at events over the past few months. My position has, over this period, become increasingly untenable due to a fundamental breach of contract; breach of trust and confidence; last

- straw doctrine. I consider this to be a fundamental/unreasonable breach of the contract on your part.”
34. Dr Taylor responded seeking to dissuade the claimant from resigning. He stated: "I believe you may have reached this decision in the heat of the moment and I'm now writing to ask whether this is really what you want to do." He invited her to withdraw her resignation. The claimant decided to proceed with her resignation. She subsequently commenced the early conciliation process with ACAS on 6 January 2017, and the early conciliation certificate was issued on 3 February 2017. She then issued these proceedings on 28 February 2017.
 35. Before concluding with our findings of fact, we make the following observations about the claimant's credibility. During this hearing the weight of the evidence was against the claimant. Her allegations were denied by the respondent's three witnesses, and their evidence was consistent with the contemporaneous documents. On the other hand, the claimant was often confused and contradictory in her evidence. She made concessions to the tribunal under cross-examination, which then subsequently she sought to retract. By comparison the claimant's three witnesses were measured and consistent in their evidence. In addition, the claimant alleged that the three respondent's witnesses, Dr Allen Mrs Coombs and Mrs Bovill, had all conspired and colluded to manufacture and distort the evidence and findings of the grievance investigation. There was no evidence at all to support such a serious allegation, which they firmly denied. For these reasons where there was a conflict in the evidence we preferred the evidence of the respondent.
 36. Having established the above facts, we now apply the law.
 37. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if he 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.
 38. If the claimant's resignation can be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case”.
 39. This is also a claim alleging discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant's only claim is one of harassment.
 40. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person. In addition, paragraph 6(1) of Part 1 Schedule 1 EqA provides that Cancer, HIV infection and multiple sclerosis are each a disability.
 41. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.
 42. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

43. We have considered the cases of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131; Claridge v Daler Rowney [2008] IRLR 672; Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA; Lewis v Motorworld Garages Ltd [1985] IRLR 465. We take these cases as guidance, and not in substitution for the provisions of the relevant statutes.
44. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
45. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: "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 his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."
46. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that the 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: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence". 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".
47. This has recently been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was for a potentially fair reason; (iv) If he does so, it will be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see

- Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair.”
48. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672); and that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA).
 49. We turn first to the issue of the claimant's disability. The respondent originally disputed that the claimant was a disabled person and in any event asserted that it did not know and could not reasonably have known that the claimant was disabled. During the course of the proceedings the parties obtained an independent expert's report from Dr Lynch who advised that the claimant was a disabled person by reason of depression with effect from 2013. The parties have accepted the findings of the report and we agree, and so find, that the claimant was a disabled person at all material times for the purposes of her claims before us by reason of depression.
 50. Whether or not the respondent had knowledge of that disability is a more confused picture. When the claimant consulted with Dr Ellis of the respondent on 23 March 2015 she was signed off work with "emotional exhaustion" and prescribed antidepressants. There had been previous prescriptions of antidepressants. In addition Mrs Coombs obtained an occupational health report on 25 March 2015 confirming that the claimant was suffering from depression, and that no reasonable adjustments were needed other than a course of counselling. For this reason we find that Dr Ellis and Mrs Coombs were on notice of the claimant's disability from late March 2015. We accept Mrs Bovill's evidence that despite the fact that she dispensed antidepressants to her (then friend) the claimant, such a prescription does not necessarily mean that the claimant was suffering from depression as a disability, and that she had no knowledge of the same. Although the respondent practice was arguably on constructive notice of the disability by reason of the consultation with Dr Ellis, nonetheless we accept Dr Allen's evidence that he had not seen the claimant's medical notes, and was not aware of this consultation, and that he himself had no actual knowledge that the claimant was disabled at any stage. As far as the three protagonists of the alleged harassment are concerned therefore, we find that Mrs Coombs was on notice that the claimant was disabled from late March 2015, but that Mrs Bovill and Dr Allen did not know that the claimant was disabled as alleged.
 51. We now turn to the specific allegations of harassment. The claimant has helpfully prepared a schedule of her allegations of harassment, and of the original 21 allegations, allegations 5, 15, 19, 20 and 21 were not pursued. Our judgment with regard to the remaining allegations is as follows.
 52. The first allegation is that on 22 April 2014 Mrs Bovill accused the claimant of being hysterical and worrying unnecessarily. That allegation taken purely in isolation is, in so far as it goes, accurate. However, we accept Mrs Bovill's evidence that she was being helpful and supportive at the time when the claimant appeared concerned that she could not find her husband. This was not a matter which the claimant raised in her detailed grounds of grievance. We do not accept that there was any behaviour which might amount to harassment. In any event any such behaviour cannot be said to relate to the claimant's protected characteristic of her disability. We reject that allegation.
 53. The second allegation is that during June 2014 Mrs Coombs accused the claimant of having a negative attitude, bad memory and poor performance. Again that allegation taken purely in isolation is, in so far as it goes, largely accurate. However, the context is that the claimant had begun to make more mistakes in a controlled environment, and the claimant accepted in her evidence that it was appropriate for the respondent to question her on these issues which were real. She was effectively told that on occasions she was not concentrating fully and that colleagues had noticed that she was making mistakes,

- and the claimant accepted in her evidence that it was necessary for the respondent to raise these issues with her. In her detailed grievance complaint the claimant originally referred to this incident as being one of "ageism", and did not mention that it was on the grounds of her depression. We do not accept that there was any behaviour which might amount to harassment. In any event any such behaviour cannot be said to relate to the claimant's protected characteristic of her disability. We reject that allegation.
54. The third allegation is the oramorph incident in January 2015, in which the claimant alleges Mrs Coombs shouted at her and reprimanded her for following standard operating procedures. Mrs Coombs admits raising her voice at the claimant in frustration. She described the circumstances as extraordinary. These were that Dr Bates had urgently asked for Oramorph to treat the child of a work colleague who was in considerable pain from burns and awaiting the arrival of the air ambulance. There is a dispute of fact between the claimant and Mrs Coombs as to whether the claimant could have given Dr Bates the medicine without a formal prescription. We suspect the respondent to be correct on this issue, but even if the claimant were correct, she could have given the medicine when Dr Bates requested it urgently, and then helped to follow the matter up with a prescription subsequently. In any event the act of Mrs Coombs raising her voice in frustration in order to obtain the medicine in those circumstances is not conduct which in our view amounts to harassment, and in any event cannot be said to relate to the claimant's disability. We reject that allegation.
55. The fourth allegation is that on 19 January 2015 Mrs Coombs told the claimant that she was making too many mistakes and was being negative. This followed the event in which the claimant had given a patient a prescription, but had accidentally stapled someone else's prescription to it. That was a breach of confidentiality. During her evidence the claimant accepted that Mrs Coombs had told her that confidentiality was an important issue and that her mind did not appear to be on the job, and that in that instance Mrs Coombs was right to raise that issue with her. We do not accept that there was any behaviour which might amount to harassment. In any event any such behaviour cannot be said to relate to the claimant's protected characteristic of her disability. We reject that allegation.
56. The next allegation is original allegation 6 in July 2015 when Mrs Coombs is alleged to have accused the claimant of having been forgetful and unable to do her job properly while serving on the acute hatch, but helping a colleague on another hatch. Again these were circumstances in which the claimant admitted in her evidence that she had made a mistake, and that it was reasonable for the respondent to draw that to her attention. The claimant complained that the manner in which she was reprimanded was cruel rather than the fact that she should have been reprimanded. The claimant complained that she objected to being told that she was forgetful and that this was not conducive to doing her job properly. However, we cannot see that this relates to her depression. Again, we do not accept that there was any behaviour which might amount to harassment. In any event any such behaviour cannot be said to relate to the claimant's protected characteristic of her disability. We reject that allegation.
57. Allegation number 7 is that on 30 September 2015 Mrs Bovill criticised the claimant for querying a repeat hormone injection. In fact she was told that she was being over anxious, and does not suggest that the respondent was wrong to raise the issue with her. She objected to the fact that it was raised while she was working at the hatch and people were being served. The claimant suggested she was worried that she might get in trouble because she dealt with the matter one way but was told not to. Mrs Bovill denied that she had spoken to the claimant in an offensive or difficult manner and she was not challenged on that evidence. We do not accept that there was any behaviour which might amount to harassment. In any event any such behaviour cannot be said to relate to the claimant's protected characteristic of her disability. We reject that allegation.
58. Allegation number 8 is that on 3 November 2015 Mrs Coombs criticised the claimant in connection with the Dosette box and closing her task on the computer in error, when the task had not been completed. The claimant originally denied making a mistake in not closing the task at 4:50 pm one afternoon so that she could do so the following day.

- However, the claimant accepted in her evidence that Mrs Coombs was entitled to consider that it was a mistake and was an issue which could quite properly be raised with the claimant. She conceded that it was arguably practice which could give rise to criticism. It was a matter which it was appropriate for Mrs Coombs to raise, including at one of the Department monthly meetings where the respondent's working practices were discussed. Again, we do not accept that there was any behaviour which might amount to harassment. In any event any such behaviour cannot be said to relate to the claimant's protected characteristic of her disability. We reject that allegation.
59. Allegation number 9 is that Mrs Bovill criticised the claimant in January 2016 when she called for assistance instead of serving at both the acute and the repeat hatch. However, the claimant accepted that serving at both hatches was expected and she was the one of the most experienced in the team. The claimant never told the respondent that she was struggling in her role and always said that she was fine to continue as normal. Mrs Bovill says that she asked the claimant to cover both hatches and the claimant was pleased to do so. When she had made a mistake it was brought to her attention. The claimant did not raise any complaint at that time. We do not accept that there was any behaviour which might amount to harassment. In any event any such behaviour cannot be said to relate to the claimant's protected characteristic of her disability. We reject that allegation.
60. Allegation 10 is that on 29 February 2016 Mrs Coombs criticised the claimant for making mistakes when she had been working alone after 5:30 pm and was very busy. This was the occasion upon which both the claimant and Mrs Bovill had made a mistake, and Mrs Coombs felt it appropriate to discuss the matter with both of them. She addressed the issues individually with each of them. The claimant assumed that she had been criticised individually and complained that she had been criticised in front of the dispensing team. In fact, it was appropriate for Mrs Coombs to have raised the matter with each of them. We do not accept that there was any behaviour which might amount to harassment. In any event any such behaviour cannot be said to relate to the claimant's protected characteristic of her disability. We reject that allegation.
61. Allegation 11 relates to the first investigation meeting on 21 March 2016 and the complaint that Mrs Coombs Mrs Bovill and Dr Halford were very accusatory and hostile. Allegation number 12 is similar which is that at the second investigation meeting on 23 March 2016 Mrs Coombs and Mrs Bovill were confrontational and criticised the claimant for having a poor memory. For the reasons explained in our findings of fact above, we accept the evidence of Mrs Coombs and Mrs Bovill that they were not aggressive or intimidating when they questioned the claimant during these meetings. It was clear that there was a potentially serious patient complaint, and given that the claimant's explanation appeared to be unsatisfactory on the facts before them, they were entitled to hold a second investigatory meeting having checked the account given by Mr H. It was also reasonable for the respondent to proceed from that position to the prospective disciplinary hearing. The claimant may well have felt concerned when being challenged as to her actions, but the respondent was entitled to do so and acted reasonably in that respect. We do not accept that there was any behaviour which might amount to harassment. In any event any such behaviour cannot be said to relate to the claimant's protected characteristic of her disability. We reject that allegation.
62. Allegation 13 is that on 13 April 2016 at a management meeting Mrs Coombs accused the claimant in front of colleagues of using each other's NHS log in cards. The claimant accepted in evidence that these meetings were necessary to discuss and improve the respondent's standard practices, and that that this issue did need to be discussed. The claimant complained that she was put on the spot about using the cards in this way and it could have been done more generally. We find that this happened at the meeting in which the claimant had raised the issue and other members of staff agreed. It was a normal procedural discussion in a monthly meeting. We do not accept that there was any behaviour which might amount to harassment. In any event any such behaviour cannot be said to relate to the claimant's protected characteristic of her disability. We reject that allegation.

63. Allegation 14 is that Mrs Coombs gave the claimant insufficient notice of the disciplinary meeting and the requirement to supply any supporting paperwork. As explained in our findings of fact above, we find that the letter dated 12 April 2016 calling the claimant to a disciplinary meeting on 19 April 2016 did not arrive until at least 14 April 2016 which did give little time for the claimant to make arrangements to attend with her union representative, and to prepare her necessary paperwork. However, that said the claimant had the benefit of advice at that time from an experienced trade union representative, and either the claimant or her representative could have requested a postponement, which would have been granted. In the event the claimant did not have to attend a disciplinary hearing without a representative or in an unprepared fashion, because the disciplinary hearing did not take place. Whereas we accept that the letter could be read as giving an abrupt timescale, nonetheless we do not accept that there was any behaviour which might amount to harassment. In any event any such behaviour cannot be said to relate to the claimant's protected characteristic of her disability. We reject that allegation.
64. Allegation number 16 is that the letter from Mrs Coombs dated 19 April 2016 requesting attendance at the welfare meeting was too sudden and immediately after the claimant's first day of absence. As noted in our findings of fact, this did appear to be an unusually early request, but Mrs Coombs explained that there seemed to be a direct causal link between the claimant's sickness absence and the letter requiring her to attend a disciplinary hearing, and that she felt that reason appropriate to make investigations as to the claimant's health and her possible return to work and ability to proceed with the hearing. We do not accept that there was any behaviour which might amount to harassment. In any event any such behaviour cannot be said to relate to the claimant's protected characteristic of her disability. We reject that allegation.
65. Allegation number 17 is similar and relates to the three subsequent requests for the claimant to attend welfare meetings or in the alternative to explain her medical position by way of written responses. Again we find that it was not unreasonable for Mrs Coombs to request this information in order to seek to have up-to-date information on the claimant's medical position. The claimant was not obliged to attend any such meeting, following discussions with both her trade union representatives and her GP she declined to attend any such meeting on the basis it might be counter-productive. She was entitled to act in that way, but we do not accept that there was any behaviour which might amount to harassment. In any event any such behaviour cannot be said to relate to the claimant's protected characteristic of her disability. We reject that allegation.
66. Finally, allegation number 18 is that during the grievance meeting on 15 July 2016 Dr Allen made comments about her having a poor memory and "being paranoid". It is true that Dr Allen said words to the effect: "your comments do have a paranoid flavour, no bones about that". The context of this comment was that the claimant had made a number of allegations against various colleagues, but that the claimant had given insufficient details of which colleagues were supposed to have made comments about her. Dr Allen needed more details in order to address the grievances which the claimant had raised. The claimant had raised a number of wide-ranging issues which included allegations of ageism and which were not subsequently pursued. He was commenting that the number of general allegations without any detail to back them up could be seen as having a paranoid flavour. We have also seen an exchange of text messages between the claimant and Mrs Bovill in which the claimant herself admitted to being "paranoid", and so it does not appear to be a word which the claimant would find to be offensive. Although Dr Allen's comment could be seen as unfortunate, in the context of the grievance hearing and his attempt to investigate fully and do justice to the claimant's allegations, we do not accept that there was any behaviour which might amount to harassment. In any event any such behaviour cannot be said to relate to the claimant's protected characteristic of her disability. We reject that allegation.
67. In conclusion therefore we find that there was no unwanted conduct on the part of the respondent which related to the claimant's relevant protected characteristic of her disability and which had the purpose or effect of violating her dignity, or created an

- intimidating, hostile, degrading, humiliating or offensive environment for her. We therefore dismiss the claimant's harassment claims.
68. In any event we would have dismissed the above harassment allegations because they have been presented out of time. The last allegation of unlawful harassment was allegation number 18 which is said to have occurred on 15 July 2016. The normal three-month time limit for presenting the claim in this respect expired on 14 October 2016. The claimant did not start the ACAS early conciliation process or issue proceedings until some three to four months later. The claimant presented no evidence as to why it might have been just and equitable to have extended time. In these circumstances the claimant's harassment claims are out of time and accordingly must be dismissed.
69. We now turn to the claimant's constructive unfair dismissal claim. The claimant relies on a fundamental breach of the implied term that an employer will not, without reasonable cause, act in a way which is calculated or likely to destroy or seriously damage trust and confidence between them.
70. The first alleged breach relates to the initiation of the disciplinary proceedings against the claimant following the dispensing incident and the complaint raised by Mr H. The claimant complains that it was heavy-handed and that she would not have acted in that manner, and that the matter should have been concluded informally following the initial investigation. The claimant originally conceded in her evidence that it was entirely reasonable for the respondent to proceed with a disciplinary investigation against her given the information which they had, but that addressing the matter as one of serious misconduct was unnecessary and heavy-handed. The claimant later retracted that concession and now suggests that the instigation of the disciplinary proceedings was of itself heavy-handed and unnecessary. For the reasons explained in our findings of fact, we find that it was entirely reasonable for the respondent to proceed with the disciplinary process. Given that the evidence which the respondent had recently gathered gave rise to the possible conclusion that the claimant had given clinical advice when she should not have done so, it could reasonably be seen as an act of serious misconduct. We reject the allegation that the respondent acted in any way which, without reasonable or proper cause, could be said to destroy or seriously damage the trust and confidence between them. All of the issues which the claimant now raises to suggest that she was innocent of any mistake or innocent of any serious misconduct could have been raised and considered at any disciplinary hearing.
71. The claimant complains of two other matters during that process, although it is unclear whether she asserts that each is a separate fundamental breach of contract. The first is that she was not invited to be accompanied by a colleague or trade union representative at the initial investigative meeting. However, these were initial investigative meetings, and not disciplinary meetings, and it is not a requirement of any statute or any ACAS code or guidance that an employee has to have the right to be accompanied at that stage. There is no breach-of-contract by the respondent in this respect. Secondly the claimant has complained that it was wrong of the respondent to rely on Mr H's identification of her, without a fuller more police style identity parade. We reject that assertion. The respondent is only required to make such investigations as may be reasonable, and given that Mr H voluntarily attended the practice and positively identified the claimant, we find that the respondent is entitled to rely on his identification.
72. The second alleged breach relates to the letter of 12 April 2016 which is said to have given insufficient time to the claimant to respond appropriately with her evidence and to prepare for the prospective disciplinary hearing on 19 April 2016. As explained in our findings of fact above, we find that the letter dated 12 April 2016 calling the claimant to a disciplinary meeting on 19 April 2016 did not arrive until at least 14 April 2016 which did give little time for the claimant to make arrangements to attend with her union representative, and to prepare her necessary paperwork. However, that said the claimant had the benefit of advice at that time from an experienced trade union representative, and either the claimant or her representative could have requested a postponement, which would have been granted. In the event the claimant did not have to attend a disciplinary hearing without a representative or in an unprepared fashion, because the

- disciplinary hearing did not take place. Whereas we accept that the letter could be read as giving an abrupt timescale, nonetheless we do not accept that the respondent acted in any way which, without reasonable or proper cause, could be said to destroy or seriously damage the trust and confidence between them.
73. Next the claimant complains generally about the respondent's handling of her grievance. The first aspect concerns Dr Allen's appointment and the manner in which he prepared questions and put them to the various employees in the dispensary. For the reasons explained in our findings of fact we find that Dr Allen was chosen to investigate the grievance because of his seniority and independence from involvement in the matters which had earlier been raised. The claimant through her appointed union representative agreed with that appointment. They further agreed on the nature of the questions which Dr Allen then put to the other employees, and which he recorded in an anonymous fashion. The claimant asked to read the various responses, and it was not for Dr Allen to refuse that request. Dr Allen carried out a full and thorough investigation and acted responsibly and reasonably in trying to reach a fair conclusion which was supported by the evidence before him. The claimant objected to the findings and objected to a number of the answers given to Dr Allen, but that was because she did not agree with the responses. We find that Dr Allen dealt with the matter in a thorough and reasonable manner, and the conclusion which he reached to reject the claimant's grievance was one which was open to him on the evidence before him. We find that the claimant's serious allegation that Dr Allen, Mrs Coombs and Mrs Bovill colluded to distort that process to be wholly unsubstantiated and wholly unreasonable. We do not accept that the respondent acted in any way which, without reasonable or proper cause, could be said to destroy or seriously damage the trust and confidence between them.
74. The claimant also complains of the Facebook post in which her colleagues had been on an evening out and one posted the comment "United we stand". We can understand why the claimant might have been distressed by this post because it arguably indicates that her former colleagues were united in rejecting her allegations and enjoying doing so on an evening out to which she was not invited. However, that individual post by one employee cannot be said to be action which was taken or caused by the respondent. We do not accept that the respondent acted in any way which, without reasonable or proper cause, could be said to destroy or seriously damage the trust and confidence between them.
75. Finally, as we understand it, the claimant asserts that she was unable to appeal against the rejection of her grievance because there was no unbiased or independent process of doing so. We reject that allegation. Dr Taylor the senior partner had, with the agreement of the claimant and her union representative, not been involved in the initial grievance in order that he might remain independent and be able to deal with any appeal. The claimant resigned her employment before completing the appeal process. In response to her resignation Dr Taylor sought to dissuade her from resigning. The allegation that there was no unbiased or independent process of appeal is wholly unsubstantiated, and one which we reject.
76. In short this seems to us to be a sad case in which the claimant had a number of personal difficulties at home and began to make occasional mistakes at work. She was supported helpfully and responsibly by her colleagues, many of whom were good friends. She raised no complaint about any alleged harassment by her colleagues and friends until after the commencement of disciplinary proceedings. It seems probable from the evidence that we have seen that the claimant committed a serious mistake and/or may have committed serious misconduct during the incident with Mr H. When challenged she sought to suggest that she could not remember, and/or blamed another colleague for having logged in under her log in. It was an entirely reasonable response for the respondent to pursue an initial investigation and then a disciplinary investigation. The respondent also investigated her grievance in a thorough and responsible manner. The claimant did not like the response, and ultimately felt that she was unable to return to work with former colleagues given all that had happened. She then resigned employment and continued with that course of action despite an attempt by the respondent to

dissuade her from leaving. We cannot find that the respondent acted in any way which, without reasonable or proper cause, could be said to destroy or seriously damage the trust and confidence between them. There was therefore no fundamental breach of contract by the respondent, and the claimant's resignation cannot be construed to be a dismissal by the respondent. In circumstances where the claimant was not dismissed, her unfair dismissal claim must also fail.

77. In conclusion therefore the claimant's claims are dismissed.

78. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 35; a concise identification of the relevant law is at paragraphs 37 to 48; how that law has been applied to those findings in order to decide the issues is at paragraphs 49 to 77.

Employment Judge N J Roper
Dated 21 February 2018

Judgment sent to Parties on
