



THE EMPLOYMENT TRIBUNALS

Claimant: Mrs R Robertson

Respondent: Wickes Building Supplies Limited

Heard at: Newcastle upon Tyne Hearing Centre
On: Monday 14th March to Friday 18th March 2022

Before: Employment Judge Johnson

Members: Mr R Dobson
Mr R Greig

Representation:

Claimant: Ms A Rumble of Counsel
Respondent: Mr S Foster – Employment Consultant

JUDGMENT

The unanimous judgment of the employment tribunal is as follows:-

1. The claimant's complaint of unauthorised deduction from wages (failure to pay accrued holiday pay) is well-founded and succeeds. The respondent is ordered to pay to the claimant the sum of £570.10 in respect of accrued holiday pay. That is a net amount and the respondent shall be responsible for the payment of any income tax and national insurance contributions thereon.
2. The claimant's complaint of unauthorised deduction from wages (failure to pay accrued wages) is well-founded and succeeds. The respondent is ordered to pay to the claimant the sum of £1,123.89 in respect of wages unlawfully deducted. That is a net amount and the respondent shall be responsible for the payment of any income tax and national insurance contributions thereon.
3. The claimant's complaint of unfair constructive dismissal is well-founded and succeeds.
4. The claimant's complaint of wrongful dismissal (failure to pay notice pay) is well-founded and succeeds.

5. The claimant's complaints of unlawful disability discrimination were presented to the employment tribunal after the end of the period of three months starting with the date of the act to which the complaint relates and the employment tribunal is not satisfied that it is just and equitable for that time limit to be extended. Those claims are out of time and are dismissed.

REASONS

1. The claimant was represented by Ms Rumble of Counsel, who called to give evidence the claimant herself and her former work colleague, Ms Paula Ellis. The respondent was represented by Mr Foster who called to give evidence Mr Kevin Tippey, Ms Carrie-Lee Beattie, Ms Louise Skeoch and Ms Maxine Porter.
2. The claimant and all other witnesses had each prepared a typed, signed, witness statement which was taken "as read" by the tribunal, subject to questions in cross examination, re-examination and questions from the tribunal.
3. There was an agreed bundle of documents marked R1, comprising an A4 ring-binder containing 352 pages of documents.
4. The claimant brought 2 separate sets of proceedings. The first with claim number 2502354/2020, contained allegations of unlawful disability discrimination and unlawful deduction from wages. Those proceedings were commenced on the 22nd December 2020. By a second claim form presented on 28th May 2021, under claim number 2500854/2021, the claimant brought additional complaints of unfair constructive dismissal, breach of contract (failure to pay notice pay), unauthorised deduction from wages, unpaid holiday pay and unlawful disability discrimination. Both parties agreed that all claims should be consolidated and heard together.
5. The respondent has conceded that the claimant is and was at all material times suffering from a mental impairment which amounts to a disability as defined in Section 6 of the Equality Act 2010. The respondent concedes that it knew, or could reasonably have been expected to know, the claimant suffered from that disability at all material times. The disability is recurrent depressive disorder with emotionally unstable personality disorder (impulsive type).
6. The parties' representatives had most helpfully agreed a list of issues (the questions which the employment tribunal will have to decide). The claim for accrued holiday pay was agreed at the commencement of the hearing, in the sum of £570.10 net and it was agreed that judgment should be entered in favour of the claimant in that amount. The remaining claims were:-
 - (i) unfair constructive dismissal;
 - (ii) wrongful dismissal (failure to pay notice pay);
 - (iii) unlawful deduction from wages;
 - (iv) unlawful disability discrimination.
7. By way of brief summary, the claimant was employed by the respondent as a kitchen and bathroom advisor from 20th November 2016 until she resigned with

immediate effect on 21st May 2021. During her employment, the claimant was managed for a period of time by Ms Maxine Porter. The claimant alleges that she was subjected to direct disability discrimination, harassment and unfavourable treatment because of something arising in consequence of her disability, by the actions of Maxine Porter. The claimant alleges that the respondent failed to make reasonable adjustments to accommodate her disability and victimised her because she raised a grievance. The allegation of victimisation was withdrawn, leaving the allegations under Sections 13, 15, 21 – 22 and 26 of the Equality Act. The claimant alleges that the alleged acts of discrimination also amounted to a breach of the implied term of trust and confidence which must exist between employer and employee and thus amounted to a fundamental breach of her contract of employment. The claimant further alleges that she submitted a formal grievance in June 2019 but, despite frequent protests, never received a formal written outcome to that grievance. The claimant alleges that the respondent's failure to reasonably deal with her grievance amounted to another breach of the implied term of trust and confidence and another fundamental breach of her contract. The claimant maintains that on 21st May 2021 she submitted her resignation in response to those fundamental breaches and that she was thus unfairly constructively dismissed. The claimant claims unfair dismissal, together with wrongful dismissal, because she was not paid her notice.

8. Finally, the claimant alleges that the respondent failed to pay her wages for a period of time between July and September 2020 and that this amounted to an unlawful deduction from wages and a further breach of her contract of employment.
9. The respondent denies making any unauthorised deduction from wages, maintaining that its failure to pay wages to the claimant during the relevant period was in fact a recoupment of overpaid wages. The respondent denies any discriminatory conduct, denies any fundamental breach of contract and maintains that the claimant, by her conduct, accepted any breach (none being admitted) and thereby affirmed the contract before her resignation.

Findings of fact

10. Having heard the evidence of the claimant, and the other witnesses, having examined the documents to which it was referred and having carefully considered the closing submissions of both representatives, the tribunal made the following findings of fact on a balance of probabilities.
11. The claimant's employment with the respondent began on 20th November 2016. She was employed as a kitchen and bathroom advisor, although that role changed in or about June of 2020 to that of a "store colleague", which was more of a sales assistant. Whilst employed as a kitchen and bathroom sales advisor, the claimant reported to a showroom manager, Ms Maxine Porter. The claimant's evidence to the tribunal was that Ms Porter "did not like me" and "had issues with me because I had a number of absences or had taken holidays at short notice." The claimant stated, "I found the way that Maxine would speak to me, often in front of colleagues and sometimes customers, was in a more aggressive and demeaning tone than she would speak to other colleagues, who appeared to be in

her favour.” Examples given by the claimant were that Ms Porter was often rude and aggressive, shouting “Oi – come here”, snapping her fingers at the claimant or shouting, “Have you done this?”. The claimant said that when writing e-mails to staff, Ms Porter would use capital letters and exclamation marks, which made her e-mails come across as being aggressive. The claimant felt that she was often being picked up or criticised for things that other people were not criticised for. However, the claimant failed to provide any specific examples of these allegations. The claimant failed to provide any evidence to suggest that any of this behaviour was in any way because of, or related to, her disability. Ms Porter’s evidence to the tribunal, which was supported by the respondent’s other witnesses, was that she is a “firm but robust” manager, who demands the highest of standards from her staff and who is equally demanding to all members of staff over whom she has management responsibility. The tribunal found it likely that Ms Porter adopted an attitude and approach to her staff which was generally blunt and frequently bordered on being rude and dictatorial. However, the tribunal found that, in the absence of any specific examples, the claimant had failed to show that this was discriminatory in respect of her disability, or was such that no reasonable employee could be expected to put up with it.

12. There were, however, some specific examples of Ms Porter’s conduct which were given by the claimant. The first was during the claimant’s appraisal, conducted by Ms Porter in 2018. The claimant asked during her appraisal about the possibility of her progressing to become a design consultant, which was effectively a promotion for the claimant. The claimant’s evidence to the tribunal was that Ms Porter told her that she would not be put forward for the role of a design consultant because I “needed to get my attendance sorted out, and I did not have the right mind-set or mental strength for the position.” When asked about this incident in cross-examination, Ms Porter conceded that she had used words to that effect to the claimant during the appraisal. Ms Porter accepted that she was aware of the claimant’s depression, which Ms Porter had noticed led to the claimant having high moods and low moods and which resulted in the claimant being “difficult to manage”. Ms Porter accepted that this may well be a symptom of a mental health impairment. Ms Porter accepted that she had told the claimant she needed someone who was “more reliable”, but insisted that this referred to the need for design consultants to be full-time rather than part-time. In her own witness statement, Ms Porter confirms that she told the claimant, “When you are good you are the best, but when you are not you can be very difficult.” In her witness statement, Ms Porter confirms that she believed at the time that a “more sustained level of attendance would be required in order to fulfil the scope of the role of design consultant.”
13. Ms Porter was reluctant to accept that the claimant’s depression may amount to a mental impairment which constitutes a disability as defined in Section 6 of the Equality Act 2010. Ms Porter insisted that she spoke to the claimant and treated the claimant in exactly the same way as other employees. The tribunal found that Ms Porter’s refusal to consider the claimant for promotion to the role of a design consultant, was because of her disability and was thus directly discriminatory, contrary to Section 13 of the Equality Act 2010.

14. The claimant further alleged that Ms Porter had made disparaging comments about her, again because of her depression. Ms Porter is alleged to have informed colleagues that she had “had enough of the claimant and planned to manage her out of the business”. Ms Porter is alleged to have said in front of the claimant’s colleagues in a mocking way, “A design consultant? Really? Have you seen the state she’s in?” These comments were overheard by Paula Ellis, who gave evidence on behalf of the claimant. Ms Porter denied making those comments. The tribunal did not accept Ms Porter’s evidence in this regard. The tribunal found it likely that Ms Porter had made those comments. The tribunal found that Ms Porter would not have made those comments about someone who did not suffer from depression and who was not disabled. The comments were both directly discriminatory because of the claimant’s disability and also amounted to unwanted conduct related to the claimant’s disability and thus harassment, contrary to Section 26 of the Equality Act 2010.

15. The claimant began a period of sick leave on 5th November 2018 and did not return to work until 11th May 2019. It was upon her return to work that she was told by another member of staff of the comments made by Ms Porter to the effect that the claimant was to be managed out of the business. As a result of that, the claimant raised a formal grievance by letter dated 13th June 2019, a copy of which appears at page 108 in the bundle. The letter alleges that Ms Porter, “actively displayed discriminating behaviour against multiple members of staff, including myself” and mentions that Ms Porter had discussed “that it was time to manage me out of the business”. The grievance letter was acknowledged by the respondent in a letter of 14th June, in which the claimant was invited to attend a grievance meeting on 24th June. The claimant was unable to attend on that date and the meeting was re-arranged for 28th June. Ms Carrie-Lee Beattie was appointed by the respondent to conduct an investigation into the claimant’s complaint. Ms Beattie met with the claimant on 28th June. Minutes appear at page 116 – 121 in the bundle. Ms Beattie’s evidence to the tribunal was that she interviewed Maxine Porter on 20th July, but there are no notes in the bundle relating to that interview. Rather strangely, at paragraphs 24 and 25 of her witness statement, Ms Beattie records the following:-

“24. Following a full and fair investigation I concluded that I could not uphold Rebecca’s grievance in full, however I did make the point that I was aware of office gossip which I reasonably believed could have led to part of the grievance.

25. As a follow-up, I also had a conversation with Maxine with regards to her tone of voice which can be perceived as stern. Whilst I am satisfied that she addresses everyone in the same way, I discussed with her the need to adapt as some styles of management may not work with everyone and this could be the case for Rebecca as it has been perceived in the wrong way.”

16. In her evidence to the tribunal, Ms Beattie referred to a letter, a copy of which appears at page 122 – 125 in the bundle. That letter is undated and does not have the claimant’s address on it. It is simply headed “Private and Confidential – Rebecca Robertson.” That letter goes through the grounds of complaint raised by

the claimant, states that Ms Beattie met with the Maxine Porter on 20th July, but concludes as follows:-

“Having now considered and investigated all the issues raised, I write to confirm the outcome which is that I part uphold the comments with regards to office gossip, but I do not feel that there is any discriminatory behaviour towards any particular person. I can substantiate that you were not treated differently to other colleagues in the branch. Therefore, I do not believe this constitutes discriminatory behaviour. Although I do feel this is an unacceptable way to talk to any colleagues and is not in line with our company cornerstone. Further to my investigations I can substantiate that you did not report the concerns to myself as manager before raising the grievance or in fact ask for a meeting with Maxine to discuss. As an outcome of this grievance, you stated that you were willing to enter into mediation with Maxine Porter to build a better working relationship going forward. I recommend that we discuss this in further detail. If you are dissatisfied with this decision, you should send your grounds of appeal and reasons for your dissatisfaction in writing to Pauline Devlin for reconsideration. You have 5 days from receipt of this letter to appeal the decision.”

17. In her evidence to the tribunal, Ms Beattie insisted that she had personally purchased a postage stamp at the local post office, put it on the envelope containing this letter and posted it to the claimant. Ms Beattie insisted that there would be a copy of that letter on the claimant's personnel file. In his evidence to the tribunal, Mr Kevin Tippey confirmed that he had undertaken a search of that personnel file and had been unable to find any copy of this letter. Nor had he been able to find any notes of any meetings with the claimant relating to her grievance. In her evidence to the tribunal, Ms Skeoch confirmed that she had never seen the letter which appears at page 122, prior to these employment tribunal proceedings. It was pointed out to the respondent's witnesses that there are obvious errors in the letter in the bundle, particularly because it doesn't mention the date of the hearing, the date of the letter, nor the claimant's address. No-one could explain the absence of a copy of the letter on the claimant's file. The claimant's evidence to the tribunal was that she never received that letter. The tribunal accepted the claimant's evidence in this regard. The tribunal found it highly unlikely that Ms Beattie would personally have purchased a stamp, put it on the envelope and posted the letter to the claimant herself. The tribunal found that the letter was probably not sent to the claimant. The respondent's witnesses accepted that if the claimant did not receive a written outcome to her grievance, then this amounted to a breach of the respondent's internal grievance policy, which appears at page 349 in the bundle and which clearly states, “All decisions will be communicated in writing, in a timely manner.”
18. The claimant commenced a period of absence from work on 18th September 2019, during which period Louise Skeoch replaced Carrie Lee-Beattie as the store manager in Stockton. The claimant attended an absence management meeting with Ms Skeoch on 8th March 2020, during which meeting Ms Skeoch accepted that the claimant mentioned that she still had not received a written outcome to her grievance. In his evidence to the tribunal, Mr Tippey confirmed that, during a

meeting on 19th March 2021, the claimant again complained that she had still not received a written outcome to her grievance. Mr Tippey confirmed that, at a further meeting on 15th April, the claimant again raised the issue of the outcome to her grievance.

19. The tribunal found that the respondent had, in breach of its own internal grievance policy, failed to provide the claimant with a written outcome to her grievance. In so doing, the respondent had effectively denied the claimant the right to appeal against that outcome. The claimant was never informed in writing of the outcome, nor the reasons for rejecting the grievance. When challenged about this in cross examination, the evidence of the respondent's witnesses was fairly consistent. They all formed the view that it would be inappropriate to reopen that grievance and that it was in the best interests of everyone to "move on" and put those issues behind them.
20. The claimant returned to work in June 2020 and agreed with Ms Skeoch that she would change her role from bathroom and kitchen advisor to that of a "store colleague", equivalent to a sales assistant. This amounted to a change to the claimant's role and duties and the claimant was required by the respondent to sign a new contract of employment. The change of role involved a change in duties, hours and wage structure. Although the claimant began working as store colleague, she did not sign a new contract, because she requested clarification about whether she would still be entitled to commission payments, which had been paid to her under the previous role. The claimant was warned by Ms Skeoch that if she failed to sign the new contract in good time, then there may be difficulties with the respondent's payroll department in making the appropriate wage payments to the claimant. That is in fact what happened. The claimant received no wages on the due date on 14th August 2020 and, again, on 15th September 2020. The claimant could not understand that she had received no wages. She wrote to the respondent on 3rd September requesting clarification, but was simply told that the deduction was the respondent's means of recouping an overpayment made in earlier months.
21. Before the employment tribunal, none of the respondent's witnesses was able to provide any meaningful explanation as to the calculation of the sums which were deducted from the claimant's wages. The evidence from the respondent's witnesses was simply that Payroll was responsible for calculating any sums due to the claimant and for making any deductions in respect of earlier overpayments. Ms Skeoch, whom the tribunal found to be a particular impressive and honest witness, confirmed that she had relied upon the calculations carried out by Ms Susie Hill of Payroll and that she had presumed those calculations to be correct. Ms Skeoch accepted that the claimant had never agreed to any deduction and had certainly not confirmed her agreement in writing. Ms Skeoch accepted that the claimant had never been told that the calculation of her sick pay under her new role was different to that under her old role. None of the respondent's witnesses was able to confirm that any of the calculations set out in the documents were correct. In the absence of any meaningful evidence from the respondent, the tribunal accepted the claimant's evidence that there had been a deduction from her wages and that she had not agreed to any such deduction in writing before the deduction was made. In the absence of any meaningful

evidence from the respondent, the tribunal was not satisfied that the respondent was entitled to deduct from the claimant's wages any alleged earlier overpayment. The tribunal found that the respondent made an unauthorised deduction from the claimant's wages and the respondent is ordered to pay to the claimant the sum of £1,123.89, being wages unlawfully deducted. That is a net amount and the respondent should be responsible for the payment of any income tax and national insurance contributions thereon.

22. On 28th September 2020, the claimant contacted ACAS as the first stage of the early conciliation process and obtained the ACAS early conciliation certificate on 13th October. She presented her claim form ET1 in case number 2502354/2020 on 22nd December 2020. In that claim form the claimant refers to the following:-

“The claimant has been subjected to a long campaign of bullying and/or less favourable treatment by the respondent, in particular from her manager Ms Porter. Ms Porter has stated to colleagues on or about March 2019 how she would manage the claimant out of the business and conducted herself in a manner to achieve this outcome. The claimant did pursue a grievance against Ms Porter but this was unsuccessful and not properly/reasonably handled when investigated by the respondent. The claimant has been absent from work due to illness arising from the treatment to which she was subjected between September 2019 and May 2020. The claimant was extremely unwell as a consequence of this treatment. On return from sickness absence the claimant was moved to a different department away from Ms Porter, but as a consequence was on reduced hours and without commission. The claimant was then subjected to a series of wages deductions between June and October 2020.”

23. The claimant began another period of sickness absence on 11th January 2021 and did not return to work thereafter before she resigned on 21st May 2021.
24. During this period of time, the claimant attended an occupational health assessment on 11 February 2021, which produced the occupational health report dated 18th February 2021. It is clear from the contents of that report that the claimant had complained to occupational health that she had not received an outcome to her grievance. The tribunal was satisfied that the respondent would be aware that the claimant was complaining that she had not received the outcome to her grievance.
25. On 19 March 2021 the claimant attended an absence management meeting with Mr Tippey, who was then the new store manager. It is clear from the minutes of that meeting that the claimant complained to Mr Tippey that she had not received a written outcome to her grievance. Again, the tribunal was satisfied that the respondent was aware that the claimant continued to complain that she had not received a written outcome to her grievance.
26. The claimant attended a further absence management meeting with Mr Tippey on 15 April. The claimant again raised the issue of the outstanding grievance and was told by Mr Tippey, “It is out of my hands – the grievance was from 2019. I will raise that for you to find out what I can do.” Again, the tribunal found that the

respondent was aware that the claimant continued to complain about not having received a written outcome to her grievance.

27. Following that meeting, Mr Tippey wrote to the claimant by a letter dated 12 May, a copy of which appears at page 253 in the bundle. The letter makes reference to the claimant's concerns about the grievance which she had raised in 2019. The letter concerns the following warning:-

“As previously explained, the purpose of these meetings are to review the situation with all the information available at this time. Based upon our discussion we will aim to make a decision in reference to your future with the company and you should be aware that an outcome of this meeting could be the termination of your employment due to ill health and incapacity.”

28. The final paragraph of the letter invites the claimant to a further meeting on 18 May and informs the claimant that she may deal with that meeting by way of written submissions if she felt unable to attend in person.

29. By a letter dated 21 May the claimant tendered her formal, written resignation to Mr Tippey. The letter expresses the following concerns:-

- (a) I was subjected to what I consider having been bullying and discriminatory behaviour towards me from the showroom manager, Maxine Porter. This led to my submission of a grievance on 18 June 2019. My grievance was acknowledged and I met with the manager of this store to discuss the issues. However, there was no outcome that was ever provided and I don't believe any investigation into my concerns took place.
- (b) I tried to put up with the behaviour I was being subjected to. I moved into a retail role as the only option provided. It was with reluctance I accepted this because I needed a job despite the fact I had been forced out of a position to take a different role which was far less satisfying and also involved a much lower rate of pay.
- (c) Incorrect information in relation to my hours worked was provided to Payroll and I believe this prompted action to be taken to have deductions taken from my wages. The deductions were made from my wages without any prior warning or agreement.
- (d) It was not only the fact that the deductions were made, it was the manner in which it was done which distressed me so. I did oppose the deductions, but my objections were ignored.
- (e) These further events aggravated my health and led to me going off for a further prolonged period of sickness. I have attended the occupational health and found the advisor supportive. The issue of my grievance remains an ongoing concern for me as I considered the problems that were not addressed back in 2019 still to continue. The refusal to review this issue as recommended is a further concern for me and leads me to believe that Wickes as a company were not taking my complaints serious.

- (f) This is not a job I wanted to lose. However I don't believe as an organisation that the management have listened to me or that my concerns have been taken seriously. The complaints and issues I have raised have simply been brushed under the carpet.
30. By a letter dated 27th May, Mr Tippey acknowledged the claimant's resignation letter bandstated as follows:-
- “You have raised a number of concerns including tendering your formal notice of resignation. As a company we take matters of this nature very seriously. I am also concerned that you may have resigned in haste. I wish to offer you the opportunity to discuss these concerns in more detail and I would be grateful if you would contact me. If I do not hear from you by 3rd June, please take this letter as acceptance of your resignation making your last working day 3rd June 2021. Any further monies owing to you and your P45 will be paid to you in due course.”
31. The claimant submitted her claim to the Employment Tribunal on 28 May. The grounds of complaint in the claim form specifically refer to the failure to properly deal with the grievance dated 18 June 2019, the failure to pay wages in August and September 2020 and the alleged bullying/discriminatory treatment by Ms Porter.

The law

32. The claimant's complaints of unlawful disability discrimination exercise the provisions of the Equality Act 2010.

6 Disability

(1)A person (P) has a disability if—

(a)P has a physical or mental impairment, and

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

(2)A reference to a disabled person is a reference to a person who has a disability.

(3)In relation to the protected characteristic of disability—

(a)a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b)a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4)This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a)a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6) Schedule 1 (disability: supplementary provision) has effect.

13 Direct discrimination

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

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex—

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

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

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

20 Duty to make adjustments

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

(2)The duty comprises the following three requirements.

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

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

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

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

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

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

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

(a)removing the physical feature in question,

(b)altering it, or

(c)providing a reasonable means of avoiding it.

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

(a)a feature arising from the design or construction of a building,

(b)a feature of an approach to, exit from or access to a building,

(c)a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises,
or

(d)any other physical element or quality.

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

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

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

21 Failure to comply with duty

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

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

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

27 Victimisation

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

(a)B does a protected act, or

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

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

(a)bringing proceedings under this Act;

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

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

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

(3)Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4)This section applies only where the person subjected to a detriment is an individual.

(5)The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

39 Employees and applicants

(1)An employer (A) must not discriminate against a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;

(b)as to the terms on which A offers B employment;

(c)by not offering B employment.

(2)An employer (A) must not discriminate against an employee of A's (B)—

(a)as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

(3)An employer (A) must not victimise a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;

(b)as to the terms on which A offers B employment;

(c)by not offering B employment.

(4)An employer (A) must not victimise an employee of A's (B)—

(a)as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

(5)A duty to make reasonable adjustments applies to an employer.

(6)Subsection (1)(b), so far as relating to sex or pregnancy and maternity, does not apply to a term that relates to pay—

(a)unless, were B to accept the offer, an equality clause or rule would have effect in relation to the term, or

(b)if paragraph (a) does not apply, except in so far as making an offer on terms including that term amounts to a contravention of subsection (1)(b) by virtue of section 13, 14 or 18.

(7)In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

(a)by the expiry of a period (including a period expiring by reference to an event or circumstance);

(b)by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

(8)Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms.

136 Burden of proof

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
- (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
- (5) This section does not apply to proceedings for an offence under this Act.
- (6) A reference to the court includes a reference to—
 - (a) an employment tribunal;
 - (b) the Asylum and Immigration Tribunal;
 - (c) the Special Immigration Appeals Commission;
 - (d) the First-tier Tribunal;
 - (e) the Special Educational Needs Tribunal for Wales;
 - (f) an Additional Support Needs Tribunal for Scotland.

123 Time limits

- (1) Proceedings on a complaint within section 120 may not be brought after the end of—
 - (a) the period of 3 months starting with the date of the act to which the complaint relates, or
 - (b) such other period as the employment tribunal thinks just and equitable.
- (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
 - (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
 - (b) such other period as the employment tribunal thinks just and equitable.
- (3) For the purposes of this section—
 - (a) conduct extending over a period is to be treated as done at the end of the period;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.
- (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
 - (a) when P does an act inconsistent with doing it, or
 - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

33. The claimant's complaint of unfair constructive dismissal engages the provisions of the Employment Rights Act 1996.

95 *Circumstances in which an employee is dismissed.*

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) **F1**. . . , only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—

(a) the employer gives notice to the employee to terminate his contract of employment, and

(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire; and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

97 *Effective date of termination.*

(1) Subject to the following provisions of this section, in this Part "the effective date of termination"—

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and

(c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect.

(2) Where—

(a) the contract of employment is terminated by the employer, and

(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)),

for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

(3) In subsection (2)(b) “the material date” means—

(a) the date when notice of termination was given by the employer, or

(b) where no notice was given, the date when the contract of employment was terminated by the employer.

(4) Where—

(a) the contract of employment is terminated by the employee,

(b) the material date does not fall during a period of notice given by the employer to terminate that contract, and

(c) had the contract been terminated not by the employee but by notice given on the material date by the employer, that notice would have been required by section 86 to expire on a date later than the effective date of termination (as defined by subsection (1)),

for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

(5) In subsection (4) “the material date” means—

(a) the date when notice of termination was given by the employee, or

(b) where no notice was given, the date when the contract of employment was terminated by the employee.

98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(ba)

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(2A) (3) In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(3A)

(4) Where the employer has fulfilled the requirements of subsection (1), 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.

(5)

(6) Subsection (4) is subject to—

(a) sections 98A to 107 of this Act, and

(b) sections 152, 153, 238 and 238A of the **M1** Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).

34. The claimant’s complaints of unauthorised deduction from wages engaged the provisions of Part II of the Employment Rights Act 1996.

13 Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4)Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5)For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6)For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7)This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

14 Excepted deductions.

(1)Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—

(a)an overpayment of wages, or

(b)an overpayment in respect of expenses incurred by the worker in carrying out his employment, made (for any reason) by the employer to the worker.

(2)Section 13 does not apply to a deduction from a worker's wages made by his employer in consequence of any disciplinary proceedings if those proceedings were held by virtue of a statutory provision.

(3)Section 13 does not apply to a deduction from a worker's wages made by his employer in pursuance of a requirement imposed on the employer by a statutory provision to deduct and pay over to a public authority amounts determined by that authority as being due to it from the worker if the deduction is made in accordance with the relevant determination of that authority.

(4)Section 13 does not apply to a deduction from a worker's wages made by his employer in pursuance of any arrangements which have been established—

(a) in accordance with a relevant provision of his contract to the inclusion of which in the contract the worker has signified his agreement or consent in writing, or

(b) otherwise with the prior agreement or consent of the worker signified in writing,

and under which the employer is to deduct and pay over to a third person amounts notified to the employer by that person as being due to him from the worker, if the deduction is made in accordance with the relevant notification by that person.

(5) Section 13 does not apply to a deduction from a worker's wages made by his employer where the worker has taken part in a strike or other industrial action and the deduction is made by the employer on account of the worker's having taken part in that strike or other action.

(6) Section 13 does not apply to a deduction from a worker's wages made by his employer with his prior agreement or consent signified in writing where the purpose of the deduction is the satisfaction (whether wholly or in part) of an order of a court or tribunal requiring the payment of an amount by the worker to the employer.

35. The principle allegations of unlawful disability discrimination refer to the comments made to the claimant or about the claimant, by Maxine Porter in or around May 2018 and June 2019. For the reasons set above, the tribunal was satisfied that Ms Porter had made those comments. The tribunal found that the comments were made because of the claimant's disability and therefore amounted to direct disability discrimination contrary to section 13 of the Equality Act 2010. They also amounted to unfavourable treatment because of something arising in consequence of the claimant's disability, contrary to section 15 of the Equality Act 2010. The respondent has not attempted to show that those comments were a proportionate means of achieving a legitimate aim. The tribunal also found that the comments amounted to harassment contrary to section 26 of the Equality Act 2010.
36. The claimant withdrew the allegations that the failure to pay her wages amounted to a breach of section 15 of the Equality Act 2010. The claimant also withdrew her allegation that the manner in which the capability process was applied to her was also a breach of section 15 of the Equality Act. Finally, the claimant withdrew the allegation of victimisation in contrary to section 27 of the Equality Act 2010.
37. The claimant pursued her complaints of failure to make reasonable adjustments contrary to sections 20-21 of the Equality Act 2010. The first allegation was that the respondent's practice of recovering wages from employees who had allegedly been overpaid, put disabled people at a substantial disadvantage when

compared to people who were not disabled. The tribunal was not satisfied that this practice caused any greater disadvantage to a disabled employee than it would or did to an employee who was not disabled. The claimant had failed to prove facts from which the Tribunal could infer that there may be any such disadvantage.

38. The claimant complained that the respondent's process or practice for allocating holidays, shifts and working hours also put disabled employees at a substantial disadvantage when compared to non-disabled employees. This complaint related to an allegation by the claimant that Ms Porter had unilaterally allocated the holidays of the claimant when she had failed to specify by a certain date which holidays she wished to take during the following holiday year. Again, the Tribunal was not satisfied that the claimant had proved that this caused any particular disadvantage to a disabled person when compared to someone who was not disabled. The claimant's position was that it was better for her mental health that she could apply for shorter holidays at short notice rather than having to take long holidays which were notified months in advance. Whilst that may have been something which the claimant preferred to do, the Tribunal was not satisfied that it amounted to any kind of disadvantage when compared to people who are not disabled.
39. Mr Foster for the respondent submitted that all the claimant's complaints of unlawful disability discrimination fell foul of the time limit provisions in section 123 of the Equality Act 2010. According to the agreed chronology, the last incident of alleged unlawful discrimination took place in early January 2021, when the claimant alleges that her 2021 holidays were allocated by Maxine Porter and that her shift patterns were changed so that she would have to work five, four hour shifts and could not work two consecutive days. Whilst the precise date is not clear, if the last act was on 31 January 2021 then the claimant's complaint to the Employment Tribunal (or her application for ACAS early conciliation) would have to have been made by 30 April 2021. The application to ACAS was not made until 26 May 2021.
40. In respect of the first claim to the Employment Tribunal on 22 December 2020, that simply stated as follows:-

"The claimant has been subjected to a long campaign of bullying and/or less favourable treatment by the respondent and in particular from her manager Ms Porter. Ms Porter had stated to colleagues on or about March 2019 that she would manage the claimant out of the business and conducted herself in a manner to achieve this outcome."

The claim form was presented on 22 December 2020 and refers to matters which had occurred before the claimant raised her first grievance on 13 June 2019. Most claims are accordingly outside the three month time limit.

41. In her submissions to the tribunal, Ms Rumble for the claimant acknowledged that many of the claimant's allegations appeared "on their face" to be well out of time. Ms Rumble further accepted that many of the allegations were raised against different employees within the respondent's organisation. Ms Rumble sought to rely upon the "just and equitable" provisions, which in the appropriate circumstances would enable the Employment Tribunal to extend time so that claims could be considered by the tribunal.
42. The tribunal took guidance from the Judgment of the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA – Civ 23. In that case Lord Justice Underhill stated as follows:-

"The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b), is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular "the length of, and the reasons for, the delay"."
43. Section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard. What the tribunal must do is to consider the length of and reasons for the delay, and whether the delay has caused prejudice to the respondent (for example by preventing or inhibiting it from investigating the claim while matters are fresh).
44. The tribunal found that the claimant had failed to provide any meaningful explanation as to why she had not presented the complaints to the Employment Tribunal within the time limits. The claimant was clearly able to consider her position, as is evidenced by the fact that she raised a formal grievance in writing about the allegations of unlawful discrimination, as early as 15 June 2019. The burden is on the claimant to provide an explanation for the delay and why the delay was as long as it clearly was in this case. The claimant has failed to do so.
45. Mr Foster for the respondent submitted that the respondent had been prejudiced in their ability to submit their defence to the claims raised by the claimant, particularly because some of the witnesses involved had left the respondent's employment. Mr Foster reminded the tribunal that there was no suggestion that this was a continuing breach or a course of conduct by an individual over a period of time, the last incident of which occurred within the time limit.

46. Having taken all of those factors into account, the tribunal was satisfied that it would not be just and equitable in this case to extend the time limit so as to enable the tribunal to consider the complaints of unlawful disability discrimination. All those complaints are dismissed.
47. With regard to the claimant's complaints about unpaid holiday pay and unpaid wages, the respondent has conceded that the claimant is owed the sum of £570.10 net in respect of unpaid holiday pay. For the reasons set out above, the tribunal was satisfied that the claimant had not agreed to any deduction from her wages and that the respondents had failed to show that it was entitled to recoup from the claimant any alleged overpayment of wages. In simple terms, the respondent had failed to provide appropriate evidence to persuade the tribunal that there had been an overpayment and accordingly that they were entitled to withhold the claimant's wages. That claim succeeds and the respondent is ordered to pay to the claimant the sum of £1123.89 (net) in respect of unpaid wages.

Unfair constructive dismissal

48. Section 95(1)(c) of the Employment Rights Act 1996 include in the definition of dismissal, the employee terminating the contract in circumstances in which he/she is entitled to terminate it without notice by reason of the employer's conduct.
49. The question of what constitutes conduct which would entitle the employee to terminate the contract is the subject of a vast amount of case law. In **Western Excavating (ECC) Limited v Sharp** [1978 ICR 221] it was held that, "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."
50. In considering what is a repudiatory breach, the tribunal must seek to identify the alleged breach of contract, establish the evidential basis for the allegation and consider whether the facts are sufficient in law to amount to a repudiatory breach of contract. That is essentially a question of fact and degree. The breach must be significant and either go to the root of the contract or show that the employer no longer intends to be bound by one or more of the essential terms of the contract. The necessary elements therefore are:-

- (i) A repudiatory breach by the employer, which may come from a series of acts.
 - (ii) The employee must elect to accept the breach and treat the contract as at an end. The employee must resign in response to the breach.
 - (iii) The employee must not delay too long, otherwise he/she may be regarded as having accepted the breach and waived the right to resign in response to it.
51. When considering whether, as a result of delay, the employee has waived the right to resign, the tribunal takes guidance from the guidance given by the Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust** [2018 EWCA – Civ – 97A]:-
- What was the most recent act (or omission) on the part of the employer which the employee says caused or triggered his or her resignation.
 - Has he or she waived the breach or affirmed the contract since that act.
 - If not, was that act (or omission) by itself a repudiatory breach of contract.
 - If not, was it nevertheless a part of a course of conduct compromising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence.
 - Did the employee resign in response (or partly in response) to that breach.
52. When looking at the term allegedly breached, that may be an express term or an implied term of the contract. The most famous implied term is that redefined in **Malik v Bank of Credit and Commerce International** [1998 AC 20]. The employer will not, without reasonable and proper cause, conduct itself in a manner which is calculated or likely to undermine the relationship of trust and confidence which has to exist between the employer and the employee. Very often it is not possible to point to one single event which amounts to a “last straw” which leads the employee to resign. The employee may however point to a series of breaches of contract, or a course of conduct by the employer which, taken cumulatively, amounts to a breach of the implied term of trust and confidence.
53. When considering the “last straw” in a series of acts or incidents, that final straw must contribute something (even if it is relatively insignificant) to the breach. However, it must not be utterly trivial, but it does not have to be of the same character as earlier acts. It is not necessary to characterise the final straw as unreasonable or blameworthy conduct in isolation. An entirely innocuous act

cannot be a final straw, even if the employee genuinely mistakenly interprets the act as hurtful and destructive of their trust and confidence in the employer.

54. It is trite law that there is implied into every contract of employment a term that the employer will give an employee a reasonable opportunity to obtain address in respect of a grievance (**W A Goold) (Pearmak) Limited v McConnell – 1995 IRLR 516**). It is a question of fact whether the poor handling is sufficiently bad. Plus, an Employment Tribunal was entitled to find that poor handling of a grievance (failing to give an explanation for rejecting an appeal and disclosing the existence in gist of it to colleagues) was not a repudiatory breach. (**Sawar v SKF (UK) Limited – UK EAT/0355/09**).
55. When there appears on the face of the case to have been delay by the employee in resigning, the true question is, “What is the reason behind the delay”. In **Munchkins Restaurant Limited v Karmazyn** (UK EAT/0359/09) the claimants had put up with intolerable conduct day after day, for several years. It was relevant that they were migrant workers, with no certainty of continued employment, who were under financial and sometimes parental pressure. Not only were there considerations of convenience, but “the claimants had found an equilibrium at work which made the job acceptable.” This equilibrium was disturbed when the assisting manager departed. It was notable that all claimants resigned within three months of her departure. She had protected them against the manager’s conduct. The Employment Tribunal compared the situation of these women, to the battered wife who puts up with violence, commenting, “putting up with it does not make it welcome.” The Employment Appeal Tribunal concluded that it was “not completely beyond the scope of reason to think that women in this particular situation would behave as they did.”
56. The tribunal found that the conduct by Maxine Porter (which apart from the time limit point) produced a finding of unlawful disability discrimination in favour of the claimant, was itself a fundamental breach of the claimant’s contract of employment, because it was a breach of the implied term of trust and confidence. Similarly, the respondent’s failure to pay the claimant’s wages on their due date also amounted to a breach of the implied term of trust and confidence. Finally, failure by the respondents to fairly, reasonably and timeously deal with the claimant’s formal grievance was a breach of the implied term of trust and confidence and a fundamental breach of her contract of employment. The respondent’s handling of the claimant’s grievance was wholly inadequate in all the circumstances. The failure to deal with that grievance amounted to a continuing breach, because the claimant regularly sought to have a written

outcome to the grievance so that she could submit a formal appeal against that outcome. The last date when the respondent was aware that the claimant was still complaining about her grievance, was at the last meeting with Mr Tippey on 15th April 2021. The tribunal found that there had been no unreasonable delay by the claimant and that she had made it clear to the respondent that she was not accepting that breach of contract with regard to the grievance outcome. The claimant had been told by Mr Tippey at the earlier meeting that he would look into it for her, but it was clear that Mr Tippey failed to do so.

57. The respondent's failure to fairly and reasonably deal with the claimant's grievance amounted to a breach of the implied term of trust and confidence and thus a fundamental breach of her contract. The tribunal was satisfied that the claimant resigned in response to that breach and that she had not by her conduct accepted the breach and waived her right to resign.
58. The claimant's complaint of unfair constructive dismissal is therefore well founded and succeeds.
59. The tribunal was satisfied that the claimant resigned without notice and is entitled to be paid her notice period as the respondent was in breach of her contract of employment.
60. The parties will be provided with details of a case management hearing at which arrangements will be made for the listing of a remedy hearing.

EMPLOYMENT JUDGE JOHNSON
12 May 2022

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