



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104710/2020

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Hearing Held by Cloud Video Platform (CVP) on 8 and 9 March 2022

Employment Judge - A Strain  
Members – W Canning and L Hutchison

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Ms K Edwards

Claimant  
In Person

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JD Sports Fashion PLC

Respondent  
Represented by:  
Mr Carlo Breen -  
Counsel

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

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- (1) the Claimant's claim of constructive unfair dismissal is unsuccessful and is dismissed; and
- (2) the Claimant's claims of failure to pay wages, disability discrimination under sections 13, 15 and 20 of the **Equality Act 2010 (EA 2010)** are unsuccessful and are dismissed.

#### Background

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1. The Claimant represented herself. She asserted claims of Constructive Unfair Dismissal, Breach of contract in respect of a failure to pay wages and Disability Discrimination under sections 13, 15, 26 and 27 of the **Equality Act 2010 (EA 2010)**. The Claimant sought a Basic Award, Compensatory Award, failure to pay wages and damages for injury to feelings as detailed in her schedule of loss.
2. The Respondent was represented by Mr Breen, Counsel.

3. The Parties had lodged a Bundle of Documents with the Tribunal for the purposes of the Hearing. Additional documents were lodged by the Claimant and added to the bundle at the commencement of the Hearing.
4. Disability status was agreed between the Parties in respect of the conditions of depression and obsessive compulsive disorder. The Respondent accepted that it knew or ought reasonably to have known that the Claimant had the protected characteristic of disability.
5. The Tribunal heard evidence from the Claimant, Mark Stevenson, Hayley Edge and Ian Martin for the Respondent. Witness Statements had been lodged and exchanged in advance.

### **Findings in Fact**

6. Having heard the evidence and considered the documentary evidence before it the Tribunal made the following findings in fact:
7. The Claimant was employed by the Respondent from 22 September 2011 until the termination of her employment on 3 August 2020. She worked as a Sales Assistant at the Respondent's Hamilton Store.
8. The Respondent operates a chain of retail stores selling Sports Fashionwear.
9. The Claimant was paid on the 25th day of every month and earned an annual pay of £17,138.63 Gross. Her monthly Gross Pay was £1,427.
10. The Claimant suffered from depression and OCD and had been on medication since 2018.
11. In January of 2020, the Claimant was in a period of depression and was feeling suicidal. Her GP increased her dosage for Sertraline from 50mg to 100mg a day. She experienced a number of side effects from the increase. This included extreme fatigue, nausea, migraines, agitation and extreme anxiety, insomnia and depersonalisation.

12. The Claimant had informed her line manager, Chris Temple (CT), she was going through changes to her medication at that time.
13. At the start of 2020, the Claimant made significant changes to her life to help alleviate the strain her mental health conditions were having on her. She had previously been working 6 days a week; 5 days at the Hamilton branch for the Respondent, and 1-2 days a week in Ardrossan (Ayrshire) as a Reporter. She left her second job in December 2019. She continued with her role at the Respondent, while actively looking for full-time work in Journalism. She made the Responent aware she was doing so.
14. Towards the end of February 2020, the Claimant was having private Counselling sessions. She was struggling with her new dosage of anti-depressants.
15. Over the first few months of 2020, the Claimant had several interviews for positions as a full-time journalist. While waiting to hear back from interviews, it was necessary to have her phone on her whilst carrying out her regular duties with the Respondent. It was common practice within to allow staff to have their phone on them if they were awaiting important phone calls or news provided they had sought permission at the start of the shift by whomever was in charge.

20 *25 April 2020 Payslip*

16. The Claimant received her payslip (p146a) and noticed money had been deducted for an unpaid sick day and being late. It also stated that her annual salary had reduced from £17,132.63 to £16,383.93.

*25 May 2020 Payslip*

- 25 17. On the 25th of May, the Claimant received her payslip, (p149-150). This reflected an annual salary the same as the previous month (£16,389.93).

*Grievance 17 June 2020*

18. The Claimant submitted a grievance against her store manager (p69-77). In her grievance the Claimant asserted she had been treated unfairly by

him and other members of the management team due to her mental health in 2 incidents on 19 and 23 March 2020.

19. Ian Martin (Respondent's Human Resources Business Partner) (IM) was appointed to investigate and deal with the grievance. He wrote by letter of 30 June 2020 (Page 78) confirming his appointment and inviting her to a Zoom Grievance Meeting on 1 July 2020.

*Grievance Meeting 1 July 2020*

20. The Claimant participated in the meeting by Zoom with IM. Notes of the meeting were produced (Pages 82-90).
21. The Claimant raised additional issues during the grievance meeting.

*25 February 2020*

22. She raised an incident on 25 February 2020 involving a supervisor Scott Adams (SA). She said he had a bad attitude and was intimidating. She details the incident in Pages 83-84 of the Notes.
23. The Claimant asserted that as she went to the back of the store to the toilet she noticed a colleague (Hannah Williamson) was upset. She stopped to check she was ok. As she did so the supervisor, came through behind her and asked what she was doing. She told SA that she was going to the toilet. SA told her that she had "an attitude". As she returned from the toilet she went through the shopfloor and noticed another colleague (Chloe Chalmers) struggling. She went to assist her carry hangers to the till but the box they were in broke and they fell out. SA told her that staff were needed on the shop floor. She stated she was helping with the hangers and was told by SA that "it wasn't a two person job". SA stated that he was instructing her to go on the shop floor. The Claimant responded by saying she didn't know who he was and was cut off as SA raised his voice shouting "what's your problem with me".
24. The Claimant also complained that CT called her that same day about the incident. She stated that CT asked her "are you sure you weren't

doing anything you shouldn't"? The Claimant considered that CT was blaming her for the incident.

25. The Claimant asserted that the store management and CT in particular had singled her out and discriminated against her on the grounds of disability.

*19 March 2020*

26. The Claimant details this incident at Pages 85-86. She alleged that she had become concerned at the lack of PPE, hand sanitizer, disinfectant spray and gloves. She alleged that she suggested to her supervisor (Ellis) that they should only accept card payments to minimise contact with cash. She was told no. She felt increasingly at risk and anxious. She left the shopfloor and was comforted by a work colleague in the stockroom. The Assistant Manager (Anita) asked why she was upset and crying. The Claimant told her she was anxious and upset about the situation. Anita told her to stop distracting her colleague and cry somewhere else.

27. The Claimant alleged that Ellis asked her to come into the office and said "they know how you get". Ellis told her that if she could not work the shift then she could go home without pay.

*23 March 2020*

28. The Claimant details this incident at Pages 86-87. The Claimant alleged that she had been tasked by CT to empty the stockroom. CT asked her what was up as she was quiet. He asked her to come and speak with him outside the front of the store. (CT's explanation for this was that he took her outside the shop to a public area simply because he was aware that the Claimant was nervous about transmission of Covid and had made known her concerns about the store office being very small.) She could not understand why this was being done outside in front of people instead of in the office. She became anxious and felt intimidated. CT had asked her what was wrong and she indicated the lack of equipment and social distancing. She stated the store should be closed. CT stated he had done

her a favour assigning her to work in the stockroom. He said he had taken her anxiety into consideration. He had then made comments to the effect that “this Kyra is hard to manage” and “I can’t manage you when you are this emotional”. She considered his tone condescending and abusive.

5 *After Lockdown*

29. The Claimant felt she had been singled out after questioning the validity/legality of what management were saying in the store’s WhatsApp group during lockdown. Management left the group as a consequence of her questioning them. The Claimant details this at Pages  
10 87-89.

*3 June 2020*

30. The Claimant had submitted a grievance to the Respondent . The basis of this was the way the Respondent was talking about a roadmap for return to store operation. She had included correspondence from her MP.  
15 The Grievance had been passed to Tony Hall who had communicated and explained matters to the Claimant and her MP. The Claimant considered that Mr Hall had not really responded to her.

*Desired Grievance Outcome*

31. The Claimant indicated to IM that she couldn’t return to the Hamilton  
20 store, wanted to leave the company and was looking for a settlement.

32. The Grievance Meeting concluded with IM indicating he would investigate and get back to the Claimant with his findings.

33. IM emailed the Notes of the meeting to the Claimant by email of 9 July 2020 (Page 79).

25 *Witness Statements*

34. IM interviewed relevant witnesses following the Grievance Meeting (Pages 91-107).

*Grievance Outcome 13 July 2020 (Pages 108-113)*

35. IM emailed the Grievance Outcome to the Claimant on 15 July 2020 (Page 80).

5 36. The Claimant's allegations were not upheld. IM did not consider that there had been any deliberate attempt either through words or actions to single the Claimant out or discriminate against her. Management had genuinely attempted to deal with the situation as best they could. IM accepted that there may have been a poor choice of words at times but no real malice or intent in any of the instances complained of by her. Further, whilst she  
10 did not accept the response her earlier grievance to Mr Hall had been responded to and dealt with.

37. The Claimant was advised of the right to Appeal the Grievance Outcome.

*Grievance Appeal (undated) (Pages 114-118)*

15 38. The Claimant asserted that the Respondent had omitted to act on the Grievance in 3 June 2020. She explained that she believed Mr Hall failed to respond to her follow up and carry out an investigation.

39. The Claimant asserted that the conduct of SA and CT was a breach of mutual trust and confidence and discrimination on the basis of her disability.

20 40. The Claimant challenged IM's assessment of and the accuracy of the Witness evidence.

41. The Claimant made reference to the case of *Judic v JD Sports Fashion PLC* and asserted that this concluded it was inappropriate to criticise a manager's poor performance on the shop floor in support of her  
25 contention that CT's conduct of the meeting outside the shop was inappropriate.

42. The Claimant asserted that she was harassed.

*July 2020 Payslip (Page153-154)*

43. The Claimant considered that she had been underpaid and wrote to payroll to query the payment on 27 July 2020 (Page 121).

5 44. By email of 23 July 2020 (Pages 119-120) the Respondent's HR Adviser wrote confirming that Marc Stevenson (MS) had been appointed to hear the appeal and when it would take place.

*Appeal Hearing 28 July 2020 (Page122-124)*

10 45. The meeting took place by telephone on 28 July 2020. In attendance were the Claimant and MS. Notes of the Meeting were produced (pages 122-124). MS clarified the Grounds of Appeal with the Claimant at the outset of the meeting and thereafter afforded the Claimant the opportunity to put forward submissions in support of her appeal.

15 46. The Claimant raised an additional point about her pay and the queries she had raised with payroll.

47. At the conclusion of the appeal MS communicated to the Claimant that he would have to investigate the matters raised by her.

*Interview with IM*

20 48. MS interviewed IM. Notes of the interview were produced (Pages 125-126).

*Grievance Appeal Outcome Letter 30 July 2020 (Pages 127-130)*

25 49. MS communicated the Grievance Appeal Outcome to the Claimant by letter of 30 July 2020. MS set out his finding in relation to each ground of appeal and informed the Claimant that he accepted IM's conclusions and agreed that some of the comments could have been phrased differently but there was insufficient evidence to demonstrate discrimination.



50. In so far as her pay queries were concerned these were being looked at by Payroll.

*Resignation Letter 3 August 2020 (Pages 131-133)*

51. The Claimant intimated her resignation by letter of 3 August 2020.

5 52. The Claimant asserted she had no option other than to resign due to disability discrimination, harrasment, failure to correctly adress a grievance, breach of mutual trust and confidence, allegations of poor performance and failure to pay wages.

*Failure to pay wages*

10 53. The reduction in the Claimant's pay in April and May 2020 was due to the Claimant being on furlough. The Respondent clarified the amounts due and the calculations during the course of the hearing. The Claimant was paid flexible furlough in July 2020 at 80% of her average earnings. The Claimant received all payments to which she was entitled by the date of  
15 the Hearing apart from an amount of £80 which the Respondent conceded was due and would be paid.

**The Relevant Law**

54. The claimant asserts constructive unfair dismissal.

*Constructive Unfair Dismissal*

20 55. The leading case relating to constructive unfair dismissal is **Western Excavating (ECC) Ltd v Sharp 1978 ICR 221**, in which it was held that to claim constructive dismissal, an employee must establish that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to  
25 a fundamental breach entitling the employee to resign, whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach; the final act must add something to the breach even if relatively insignificant; if she does so, and terminates the contract by reason of the employer's conduct, she is constructively

dismissed. In a complaint of constructive unfair dismissal, Langstaff P in **Wright v North 15 Ayrshire Council [2014] ICR 77 (Wright)** at paragraph 2 said *"that involves a tribunal looking to see whether the principles in Western Excavating (ECC) v Sharp [1978] IRLR 27 can be applied"* and sets out 4 issues to be determined: 1) *"that there has been a breach of contract by the employer"*; 2) *"that the breach is fundamental or is, as it has been put more recently, a breach which indicates that the employer altogether abandons and refuses to perform its side of the contract"*; 3) *"that the employee has resigned in response to the breach, and that"* 4) *"before doing so she has not acted so as to affirm the contract notwithstanding the breach."*

56. As set out above, the resignation must be in response to the breach. Further, as Langstaff P confirmed in **Wright** para 10, the approach to causation was set out in the judgment of Keane LJ in **Meikle v Nottinghamshire County [2004] IRLR 703** at paragraph 33: *"...the repudiatory breach by the employer need not be the sole cause of the employee's resignation...there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job... The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation ..."* and although not quoted by Langstaff P above, Keane LJ concludes *"It is enough that the employee resigns in response, at least in part, to fundamental breaches of contract by the employer."*

### 30 *Breach of Contract*

57. As described in **Malik v BCCI SA (in Liq.) [1997] ICR 606 (Malik)**, employment contracts contain an implied term of mutual trust and

confidence, that the parties will not without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust, which should exist between employer and employee. The test for determining whether the employer has acted in breach of that mutual term is a severe one. The conduct must be, such as, to destroy or seriously damage the relationship, and there must have been no reasonable and proper cause for the conduct.

58. While it is unnecessary to make a factual finding as to the respondent's actual (subjective) intention about the contract, a finding should be made as to whether objectively the conduct complained of, was likely to seriously damage the relationship of trust and confidence.

#### *Disability Discrimination*

#### *Direct Discrimination*

59. Section 13 of EA 2010 provides:
- (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.*
60. Direct discrimination occurs where "because of a protected characteristic, A treats B less favourably than A treats or would treat others" (section 13(1), EqA 2010).
61. The less favourable treatment must be because of a protected characteristic. This requires the tribunal to consider the reason why the claimant was treated less favourably: what was the Respondent's conscious or subconscious reason for the treatment?
62. The tribunal will need to consider the conscious or subconscious mental processes which led A to take a particular course of action in respect of B, and to consider whether a protected characteristic played a significant part in the treatment.

63. If the treatment of the Claimant puts them at a clear disadvantage compared with others, then it is more likely that the treatment will be less favourable.

5 64. A tribunal must compare like with like (except for the existence of the protected characteristic) and so "there must be no material difference between the circumstances" of B and the comparator (Section 23(1) EA 2010).

*Burden of proof*

65. In summary, a two-stage approach to the burden of proof applies:

10 Stage 1: can the Claimant show a prima facie case? If no, the claim fails. If yes, the burden shifts to the respondent.

Stage 2: is the Respondent's explanation sufficient to show that it did not discriminate?

15 66. In **Royal Mail Group Ltd v Efofi [2021] UKSC 33**, the Supreme Court explicitly confirmed the continued application of the two-stage approach under the EA 2010.

67. The burden will shift where "there are facts from which a tribunal could decide, in the absence of any other explanation" that a breach of the Act has occurred.

20 68. The claimant needs to establish facts from which, absent a reasonable explanation, the tribunal could conclude there had been discrimination.

69. The Respondent is required to show a non-discriminatory explanation for the primary facts on which the prima facie case is based (**Glasgow City Council v Zafar [1998] IRLR 36 (HL)**).

25 *Unfavourable Treatment*

70. Section 15 of EA 2010 provides:

(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.*
- 5 (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.*

Unfavourable treatment can include dismissal.

### *Harrasment*

10 71. Section 26 of EA 2010 provides:

#### **26 Harassment**

- (1) *A person (A) harasses another (B) if—*
  - (a) *A engages in unwanted conduct related to a relevant protected characteristic, and*
  - 15 (b) *the conduct has the purpose or effect of—*
    - (i) *violating B's dignity, or*
    - (ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

20 Under section 26(4) EqA 2010 In deciding whether conduct shall be regarded as having the effect referred to above, the following must be taken into account:

- (a) *The perception of B.*
- (b) *The other circumstances of the case.*
- (c) *Whether it is reasonable for the conduct to have that effect.*

### *Victimisation*

25 72. Section 27 of EA 2010 provides:

## 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*

5 (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;*

10 (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.*

73. Under the EA 2010 victimisation occurs where an employee is subjected  
15 to a detriment "because" the employee has done (or might do) a protected act.

74. As with direct discrimination, victimisation need not be consciously motivated. If A's reason for subjecting B to a detriment was unconscious, it can still constitute victimisation (**Nagarajan v London Regional Transport and others [1999] IRLR 572**). Further, the protected act need  
20 not be the main or only reason for the treatment; victimisation will occur where it is one of the reasons (**paragraph 9.10, EHRC Services Code**).

75. However, the protected act must be more than simply causative of the treatment (in the "but for" sense). It must be a real reason.

25 76. The term "detriment" is not defined in the EA 2010. Tribunals follow the meaning of detriment established by case law. In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11**, it was

held that a worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work.

5 77. An "unjustified sense of grievance" is not enough (**Barclays Bank plc v Kapur (No.2) [1995] IRLR 87, approved in Shamoon**).

### *Compensation*

78. Section 124(2)(b) of EA 2010 makes provision for the Tribunal to award compensation where it finds there has been a contravention of sections 13, 15 and 20.

10 An award in discrimination cases can include:

*i. Financial Loss*, such as past and future loss of earnings.

*ii. Injury to Feelings*

15 79. A Tribunal may make an award of compensation for injury to feelings in a discrimination case. The guidelines for awarding compensation for injury to feelings are set out in the case of **Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102 CA (updated by Simmons v Castle [2012] EWCA Civ 1039)**.

20 80. Factors a Tribunal will take into account when assessing the level of an award for injury to feelings is the impact of the discriminatory behaviour on the individual affected rather than the seriousness of the conduct of the employer or the individual responsible for the discrimination.

### **Submissions**

81. Both Parties made oral submissions at the conclusion of the case and referred to the Schedule of Loss.

### 25 *The Claimant*

82. The Claimant submitted that she had done everything by the book. The Respondent had made large amounts of profit during the pandemic. The

Respondent had made mistakes and this clearly had an adverse effect on her.

83. She felt she had a good relationship with everyone in the store. She has spoken to most of the full time staff and feels she remains close to them.

5 84. The Claimant did not accept the outcome of the investigation, grievance or appeal. Her manager, CT, did not know how to handle her well.

85. The Respondent knew of her disability and the impact it had upon her. The whole episode has had a detrimental impact on her disability and she has been left with permanent scars.

10 86. She stood by everything in her claim.

87. In so far as pay was concerned she looked to her pre lockdown pay slips to calculate pay. The Respondent had not provided her with a detailed breakdown of how furlough pay was calculated.

#### *The Respondent*

15 88. The Claimant described her relationship with CT as good.

89. The various issues and incidents she raised had been dealt with by reasonable management action. They had been investigated in the course of the Grievance and reasonable decisions made. Her colleagues gave different accounts to that of her and the Respondent was entitled to prefer and accept any conflicting evidence. While the Claimant painted a picture of intimidation this was not the picture provided by the investigation.

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90. The Respondent was aware of her disability and at all times sought to support her.

25 91. The comments made that she complained of had nothing to do with her disability.

92. Dealing with each claim in turn:



- a. Section 13 Claim. The Claimant has not established even a prima facie case. The burden of proof is upon her. She has not established less favourable treatment.
- 5 b. Section 15 Claim. The Claimant cannot argue “but for” her disability, the focus is on the reason for her treatment and in each such case it is reasonable management action and work related.
- c. Section 26 Claim. Hypersensitivity is not enough to establish. Even if she did feel her dignity was violated that alone was not enough. The tribunal must have regard to all the circumstances.
- 10 d. Section 27 Claim. There was no dispute that the making of the grievance was a protected act. There was no evidence to support the Claimant’s assertion that the Respondent attempted to manipulate her hours.
- 15 e. Constructive Dismissal Claim. There was insufficient evidence to get over the test in **Malik**.
- f. Failure to pay wages. There had been errors in the calculation of the Claimant’s pay during furlough and delay. These had been rectified and were in any event insufficient to amount to a fundamental breach.

### **Discussion and Decision**

20 93. The Tribunal then considered the various claims advanced.

#### *Constructive Unfair Dismissal*

94. The matters asserted by the Claimant to constitute breach of contract were the alleged breaches of the Equality Act and breach of contract in relation to wages (April/May and July).
- 25 95. Those matters were said to amount individually or cumulatively to a breach of the implied term of trust and confidence and fundamental breach of contract.

96. The Tribunal considered each of the discrimination claims and alleged breach of contract in turn.

*Direct Discrimination (section 13)*

5 97. The Claimant relies upon the conduct and comments she complained of in her grievance to IM in support of this claim. She asserts that the treatment by CT and SA on 25 February, the Assistant Manager (Anita) and Ellis on 19 March and CT on 23 March to have been less favourable treatment on the basis of her disability. She asserts that she was treated with less respect, care and empathy than a non-disabled employee would have been. The tribunal notes that the claimant stated in her evidence that she did not consider the behaviour of SA on 25 February to have been discriminatory but she was upset by the phone call from CT on the same day blaming her for the incident. The Claimant's allegations were thoroughly investigated by IM and witness statements obtained from the Claimant's colleagues. The Claimant's colleagues gave reasonable explanations for their actions and while some of the facts were in dispute the comments made by her colleagues were not. IM considered all of the evidence in the knowledge of the Claimant's disability and the tribunal consider that IM was entitled to reach the conclusion that he did on the basis of that evidence.

15 98. IM was an experienced HR Professional who took a reasoned and balanced approach to the Claimant's Grievance. The tribunal agree with IM that some of the comments could have been better worded, however, the comments found to have been made (which did not significantly differ from those asserted by the Claimant) did appear to be reasonable management action and work related. The tribunal did not find the comments and treatment to be motivated by the Claimant's disability. It was evident that the Respondent's employees were aware of the Claimant's disability and had taken some steps to support and manage her.

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99. The tribunal accepted IM's evidence that Mr Hall had responded to the Claimant's 3 June Grievance. The fact that the Claimant did not accept that response did not constitute a failure to follow up or respond to her grievance.

5 100. The tribunal applied the two-stage approach to the burden of proof. Stage  
1: can the Claimant show a prima facie case? If no, the claim fails. If yes,  
the burden shifts to the Respondent. The tribunal agreed with Mr Breen's  
submission that the Claimant does not establish a prima facie case. The  
Claimant has failed to establish facts upon which the tribunal could find  
10 direct discrimination. The claimant didn't provide evidence to convince  
the tribunal that she was treated less favourably than others. Even if the  
tribunal had not so determined in applying Stage 2: is the Respondent's  
explanation sufficient to show that it did not discriminate? The tribunal  
would have found that the Respondent's explanation was sufficient to  
15 show that it did not discriminate.

*Discrimination Arising from Disability (Section 15)*

101. The Claimant asserts that the same incidents constitute discrimination arising from her disability.

102. Before the tribunal the Claimant asserted that the allegations of poor  
20 performance and misconduct made by CT in his statement to IM in the  
investigation were further proof of being targeted as a result of  
discrimination arising from disability. The comments said to be made by  
CT were to the effect that the Claimant was not following instruction and  
everything she was asked to do seemed to be an issue.

25 103. The focus in section 15 cases is on the connection (if any) between the  
unfavourable treatment and the disability. The tribunal must consider  
whether the unfavourable treatment was consciously or subconsciously  
motivated by a consequence of the Claimant's disability. The tribunal  
considered and found that the treatment asserted by the Claimant was  
30 work related and management action. The tribunal do not consider any  
of the treatment asserted by the Claimant to have been connected to her

disability or for that matter the visible effects or symptoms of her disability. The tribunal did not consider the treatment to have been consciously or subconsciously motivated by a consequence of the Claimant's disability .The tribunal did not consider such treatment to be unfavourable.

5 104. The comments attributed to CT during the course of the investigation were not made to the Claimant, were made in the context of an investigation and were not evidence of any "treatment" by the Respondent nor were they motivated by or connected to her disability or for that matter the visible effects or symptoms of her disability. The  
10 tribunal did not consider the treatment to have been consciously or subconsciously motivated by a consequence of the Claimant's disability. The tribunal did not consider such treatment to be unfavourable.

*Harassment (Section 26)*

15 105. The Claimant asserts that the same incidents constituted unwanted conduct that violated her dignity and created an intimidating, hostile, degrading, humiliating or offensive environment for her. The tribunal carefully considered the conduct complained of by the Claimant which was the same facts and circumstances relied upon in support of the section 13 and 15 claims. The tribunal had regard to section 26(4) EA  
20 2010. In deciding whether conduct shall be regarded as having the effect referred to above, the following must be taken into account:

- (a) The perception of the Claimant.
- (b) The other circumstances of the case.
- (c) Whether it is reasonable for the conduct to have that effect.

25 106. The tribunal considered that the Claimant's perception may well have been that the conduct complained of violated her dignity and created an intimidating, hostile, degrading, humiliating or offensive environment for her. The Claimant clearly felt offended and upset. However, considering the whole circumstances of the case and applying the test referred to  
30 above the tribunal considered the conduct to have been work related and

management action. The tribunal did not find that the conduct was in any way related to or motivated by her disability or for that matter the visible appearance of her disability. The tribunal concluded that it was not reasonable for the claimed conduct to have the effect asserted by the Claimant.

*Victimisation (Section 27)*

107. The Claimant asserts that the protected acts were the lodging of the two grievances and that these were protected acts was not in dispute. The detriment alleged by the Claimant was (page 14) that she discovered when she queried the July Pay that the hours that had been submitted were wrong. The Claimant asserts that she believes CT, in an act of victimisation, submitted incorrect hours to payroll acting out of malice and knowing the impact this would have on her.

108. Beyond the assertion that this was the Claimant's belief the tribunal were presented with no evidence in support of this. The only evidence was the Claimant's statement of belief and the fact there had been errors in the payroll which were rectified. The tribunal concluded that this belief was not held on reasonable grounds and was without foundation. Any errors in the payroll were not "because" the Claimant had lodged grievances.

109. An "unjustified sense of grievance" is not enough (**Barclays Bank plc v Kapur (No.2) [1995] IRLR 87, approved in Shamoon**). The tribunal considered that the Claimant had an unjustified sense of grievance.

110. The tribunal concluded that there had been no act of victimisation against the Claimant.

*Breach of Contract*

111. The Claimant asserted that the aforementioned discrimination claims under the Equality Act constituted breaches of her employment contract. The particular term of her contract relied upon is the term of mutual trust and confidence.

112. The tribunal carefully considered the conduct and comments relied upon by the Claimant in support of this and the tribunal's own findings in connection with the claims under the Equality Act. The tribunal found that the conduct complained of had been work related and management action. The only criticism of the conduct was that some of the comments made by her colleagues were, in the opinion of IM (with which the tribunal agree), could have been better worded. The tribunal did not consider that the conduct and/or comments amounted to a breach of the term of mutual trust and confidence as set out in **Malik**.
113. The Claimant asserted that the allegations of poor performance and misconduct made by CT in his statement to IM in the investigation were a breach of mutual trust and confidence. The Claimant did not find out about these comments until she received the Grievance Outcome from IM. The tribunal considered the comments made in CT's statement, IM's findings and the Claimant's perception of the comments. The tribunal did not consider that the comments made by CT constituted a breach of mutual trust and confidence. They were made in the context of an investigatory interview and no action was being taken against the Claimant in respect of these matters.
114. The Claimant asserted that the failure to pay the correct wages was the last straw. It is of significance that the Claimant queried the July 2020 Pay towards the end of July. The query was being looked at by Payroll and at the point of resignation the Claimant had not heard back from Payroll. The Claimant did not await the outcome of that query before resigning. The tribunal did not find that the Claimant had a reasonable basis, at the point of resignation, for considering that the payroll error was a breach of contract. She had not yet received the response from Payroll and the query had only just been raised by her.
115. The Claimant, by her own admission, had clearly formed the view that she wished to leave the Respondent's employment by the date of the Grievance Meeting which predated the July pay error.

116. The tribunal considered whether or not the actions of the Respondent amounted to a fundamental breach of contract entitling the Claimant to resign (**Western Excavating**). As the tribunal have concluded above other than the failure to correctly pay her wages in April, May and July the remainder of the acts said to have constituted breaches of contract have not been established. This leaves the issue of the failure to pay the correct amounts of pay. The tribunal carefully considered this and concluded that, at the point of resignation, there were relatively minor disparities in her pay in April and May due to the furlough scheme being in operation. The July pay issue had come to light on 25 July and the Claimant had queried it on 27 July. She had not received the outcome from HR. At the point of resignation any breach of contract by the failure to pay the correct wages was relatively minor and did not satisfy the requirements of a fundamental breach of contract.

117. The claim in respect of constructive dismissal is unsuccessful.

118. The tribunal consider that it was particularly poor practice and unreasonable for the Respondent to have taken so long (from end July 2020) to resolve queries about unpaid holiday pay, incorrect deductions for sick pay and to clarify that the authorised deductions of wages were related to the two different furlough schemes and the way in which they calculated them.

Employment Judge: Alan Strain  
Date of Judgment: 08 April 2022  
Entered in register: 14 April 2022  
and copied to parties