EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms R Owen	**v**	(1) Mr P Wright; and (2) London Borough of Enfield

Heard at: Norwich by CVP **On:** 7 and 8 July 2022

Before: Employment Judge M Warren

Appearances
For the Claimant: In person
For the Respondents: Mr S Bishop, Counsel

JUDGMENT
OPEN PRELIMINARY HEARING

1. Oral Judgment given at the hearing:

    1.1. During her employment with the Respondent, the Claimant was a disabled person as defined in the Equality Act 2010 by reason of Dyspraxia.

2. Reserved Judgment:

    2.1. The Claimant's claims of harassment related to disability are dismissed upon withdrawal.

    2.2. The Respondent's Application for the Claimant's complaint of constructive unfair dismissal and of failure to make reasonable adjustments be Struck Out or subject to a Deposit Order, is refused.

REASONS

ORAL DECISION TO THE PARTIES - DISABILITY

Background

1. The issue which I have to decide first is whether Ms Owen was a disabled person at the relevant time as defined in the Equality Act 2010. The Respondent accepts that she has dyspraxia which is long term and that she had it at the relevant time. They say that it was mild and so did not have a substantial adverse impact on her day to day activities.

Evidence

2. I had before me two witness statements from Ms Owen, neither of which contained a great deal on the central issue of the effect of her dyspraxia on her day to day activities. I also had a bundle of documents in PDF format. I was frustrated by the numbering of the bundle, in that the way page numbers had been printed, they were extremely difficult, in some cases impossible, to read because of over printing. That would be confusing enough as it is, but given that Ms Owen has dyspraxia, as the respondent accepts, it was all the more exasperating. The numbering caused understandable and predictable confusion for Ms Owen during the course of the hearing. When I quote page numbers below, I am referring to the number in accordance with the numbering within the PDF file, not the paper numbering.

The Law

3. For the purposes of the Equality Act 2010 (EqA) a person is said, at section 6, to have a disability if they meet the following definition:

> *"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.*

4. The burden of proof lies with the Claimant to prove that she is a disabled person in accordance with that definition.

5. The expression 'substantial' is defined at Section 212 as, *'more than minor or trivial'*.

6. Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is

produced by the government's office for disability issues entitled, 'Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability'. Although I acknowledge that the guidance is not to be taken too literally and used as a check list, (Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19) much of what is there is reflected in the authorities, (or vice versa).

7. As to the meaning of 'substantial adverse effects', paragraph B1 assists as follows:

> *"The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences and ability which may exist amongst people. A substantial effect is one that is more than a minor or trivial effect".*

8. The guidance suggests that whilst specialised activities either to do with one's work or otherwise, are unlikely to be normal day-to-day activities, (paragraphs D8 and 9) some work related activities can be regarded as normal day-to-day activities such as sitting down, standing up, walking, running, verbal interaction, writing, driving, using computer keyboards or mobile phones, lifting and carrying (paragraph D10). That needs to read in light of Paterson v Commissioner of Police of the Metropolis [2007] ICR 1522 EAT and Chacon Navas v Eurest Colectividades SA [2007] ICR 1 ECJ, which are authority for the proposition that normal day to day activities includes activities relevant to participation in professional life, and Chief Constable of Dumfries and Galloway Constabulary v Adams [2009] ICR 1034 EAT which clarifies that does not apply to specialist skills.

Findings

9. Ms Owen has a degree in psychology and a masters in social work. She is intelligent and by observation, an articulate person. She says herself that she would describe herself as someone who functions better at a high level.

10. Whilst studying for her Masters in Social Work at the University of Middlesex, the university commissioned a report by a John Butler, expert in specific learning difficulties, (SpLD) which is dated 25 Jan 2016. It is in the bundle and I refer to the conclusions which start at page 197.

11. Mr Butler refers to Ms Owen's test scores as revealing above average strengths in abstract verbal reasoning. He writes that, in contrast with her excellent underlying verbal ability, she has weaknesses in areas of cognitive processing; specifically auditory short-term and working memory, phonological awareness and the speed of processing visual and phonological information. However he says, her word reading efficiency and phonological decoding are competent. He wrote that she had difficulties predominantly organisational in nature, rather than phonological. He said that her reading accuracy was good and single word

reading tests showed visual errors rather than phonological errors. She has a very slow reading speed. He wrote that her difficulties will affect her ability to efficiently read large amounts of text under timed conditions and organise writing tasks, and that note taking would be difficult. He said that she would have slow performance in reading tasks. He made reference on page 198 to her condition affecting a range of day to day activities, particularly when demands are made on working memory and when information must be processed efficiently. He said that despite her strengths, she showed significant weaknesses in several areas of literacy and information processing, which put her at a substantial disadvantage in many study situations which would require appropriate support and adjustments. He suggested she met the definition of a disabled person, (it is of course for me to decide whether or not she meets that definition, it is not a question for an expert in a particular discipline).

12. Under a heading of written composition, Mr Butler wrote that that Ms Owen's weak working memory would increase the time that she would need to compose written assignments. He said that individuals with SpLD have a difficult in writing fluently and producing structured work. He said that when she was writing complex sentences, she may forget what she intended to say, resulting in grammatical inconsistencies or losing the thread of an argument. She may also have difficulty accessing appropriate words to express her ideas clearly.

13. In an application for employment with the respondent, copied in the bundle at 207, Ms Owen wrote that she ensured that all her work is documented and uploaded onto a database. She referred to placements that she had been on during her Masters and she wrote:

> *"These placements have developed my writing skills and I am now able to write thorough and detailed reports, including analysis and observations. I have written a Section 7 report to a high standard where I also gave evidence in court and the recommendations were approved."*

And a little later she wrote:

> *"I am trained and can confidently use the Liquid Logic system. I am IT literate and able to use all Microsoft Office applications"*

14. On a part of the form at 209, the applicant is asked to state whether they are disabled or not, the form setting out a definition of disability lifted from the Equality Act. Ms Owens answered, "no".

15. After starting work with the respondent in November 2015, a work place assessment was carried out by an occupational health physician, Dr Lucy Grundy in February 2018, (page 237). Specific difficulties with work are noted at page 240:

> *"Rebecca explained difficulties writing, for example, she said she struggled to get her ideas down both in her work and her qualification coursework…difficulties with reading, as it requires a lot of effort to read and amend documents… difficulties managing her email inbox, for example, she said she does not know how to place things in folders or how to organise them. She reported difficulties with general tidiness and organisation … she currently struggles to organise her paperwork… some difficulty with note taking … difficulties with note taking … difficult to concentrate on her own tasks when others are talking … she remembers verbal instructions and said she prefers to have them written down, so she can refer back to them at a later date. She reported pronunciation difficulties and said she sometimes gets words wrong."*

A lot of that of course, is consistent with the report of Mr Butler. It does not escape my notice there, that a lot of what Dr Grundy writes is what she was told by Ms Owen, but it has a corroborative value.

16. In September 2019, the respondent obtained an Occupational Health report, (page 261/2). The advisor records that Ms Owen told the advisor that she finds it difficult to start writing sentences fluently, that she has to think about it and it takes her a long time to write notes. The advisor writes, *"the disability provisions of the Equality Act 2010 are like to be applicable to the disabilities arising out of the underlying Dyspraxia at present".*

17. In terms of Ms Owen's evidence, I found her an entirely compelling witness. There were situations where Mr Bishop was following a line of questions, where through no fault of his, he found himself digging a bigger and bigger hole for the respondent, as Ms Owen's evidence became the more compelling with the answers that she gave.

18. I focus on findings relating to Ms Owen's activities, at the material time, in her personal life and in work, in what might be described as, "ordinary day to day work activities" and not on what might be regarded as, "specialist activities":

    18.1. She could not organise filing her own emails, personal or work related.

    18.2. She found it hard to concentrate if there were noises around her.

    18.3. She found it hard and time consuming to complete forms, not just her mileage forms at work, but any sort of form, including in her personal life. She had to have a hard copy and to have family help her.

    18.4. She had difficulties accessing and using Google maps, WhatsApp or saving numbers to her phone.

18.5. She found it difficult to navigate her phone.

18.6. It took her a long time to compose simple text messages to her friends. Mr Bishop made issue of the fact that she had not said that before, but I found her long explanation of how, even though EJ Wyeth had explained the meaning of, “day to day activities” to her, she thought he meant in the context of work, not personal life, entirely convincing.

18.7. She had the same problem composing emails.

18.8. She struggled to remember and follow standards scripts in how to answer the phone at work

18.9. She found herself with clumsy hands sometimes when using her phone or writing with a pen. Her handwriting sometimes became scruffy.

18.10. She found driving, in particular finding her way to somewhere she is not familiar with, a challenge. I noted the OH report at 262 referred to Ms Owen driving a car.

18.11. She struggled to differentiate right from left.

19. I witnessed for myself manifestation of the difficulties Ms Owen faced in answering questions and dealing with documents during the hearing. She was not play acting. Her demeanour was compelling, as someone experiencing precisely the sort of difficulties she had described and as is described in the contemporaneous reports, even after making allowance for the added difficulty of the confusing page numbers, which would have been a problem for anyone.

20. Ms Owen struggled to understand and follow new procedures.

21. Mr Bishop attempted to undermine Ms Owen’s credibility by reference to emails, for example that of Mr Wright in January and February 2020 about the reason for her absence at that time. That attempt was unsuccessful, as it was clear from the emails that there were personal matters and work related matters that were causing her absence.

22. Mr Bishop tried unsuccessfully to catch Ms Owen out by making reference to information, which was not before the tribunal, which he said indicated total editing time on the second of Ms Owen’s witness statements, 7 pages 3331 words, was 106 mins. Even before he got to put his point, Ms Owen was explaining the lengths she had gone to with saving various drafts as they evolved, working in manuscript on print-outs of the same, sending drafts to her mother, who would sense check and send back as re-drafts to re-save. Her evidence was compelling. I declined Mr Bishop’s invitation that I should see the document he was referring to and that it should be

referred to Ms Owen. It had not been disclosed in advance anyway and in any event, she had dealt with it.

Conclusions

23. Mr Bishop in his submissions astutely recognised the potential impact of Ms Owen's evidence and demeanour. He is right to caution me against assuming that what I saw yesterday was a representation of the way that Ms Owen was and the impact of her impairment during her employment with the respondent. I have not made that assumption, but her demeanour and her explanations, for me, enhanced the credibility of her evidence.

24. Mr Bishop also made the point that in the context of previous Employment Judges going to some lengths to explain to Ms Owen that her witness statement should contain information about the impact of her impairment on her day to day activities in normal life, and given her high intellectual abilities, it is not credible for her to make references for the first time in oral evidence, to problems sending texts, organising and sending emails, driving and so on. He said it made it impossible for him to cross examine effectively. That is a good point. Ordinarily, from a person of such apparent intellectual ability, I would frankly have given such evidence short shrift in these circumstances. But this witness has dyspraxia. Indeed, it seems to me that this problem with her evidence is illustrative of the effect of that. At the risk of using the word too often, I found it compelling.

25. It is true to say that contrary evidence is contained in the job application at page 207 quoted above. I accept Ms Owen's evidence in cross examination, that she was trying to impress, as anyone would in a job application. She was trying to shine a favourable light on herself and in terms of the questions about her disability, did not regard herself at the time, as disabled; to her, a disabled person was someone with physical impairments.

26. I have described in my findings day to day activities, both common in the average work place and in a person's private none work life. I have set out how those activities are impacted for Ms Owen by her dyspraxia. Not being able to easily and quickly write a text or an email, or to organise one's emails, or to fill in a form, might on their own be minor and trivial, but cumulatively, their impact is substantial.

27. Problems of slowness in reading, difficulties in preparing written work, in organising oneself, in writing with structure, in short term working memory, in losing the thread, in keeping written work tidy, in remembering verbal instructions – these are all effects which will be substantial in any workplace that involved administration and use of the written word. They are day to day activities. They are not specialist activities.

28. The respondent says a distinction must be drawn between finding work intellectually challenging and finding it difficult because of a disability. I agree. But I find that Ms Owen's difficulties as described above, were

because her of impairment, not because of the intellectual demands of the job.

29. For these reasons, I find that during her employment Ms Owen was a disabled person as defined in the Equality Act 2010 reason of her dyspraxia.

RESERVED DECISION

Background

30. An oral decision was given to the parties as to whether or not Ms Owen was a disabled person at the material time on day one of the Hearing, 7 July 2022. Due to shortage of time, I reserved my decision on the remaining matters.

Has the Claimant withdrawn part of her claim and should she be permitted to reintroduce it ?

31. Ms Owen's claim is of disability discrimination. In her claim form at 8.2 (page 13) she complained that discrimination and bullying caused her to be signed off sick. In the opening paragraph of additional information provided at section 15 of the ET1, she referred to suffering from the First Respondent's bullying and harassment.

32. Ms Owen was ordered to provide further and better particulars by Employment Judge George. She responded by saving an electronic copy of the letter written on the instructions of EJ George and typing in her narrative response. In his Hearing Summary following the Preliminary Hearing on 9 December 2021, Employment Judge Lewis set out a list of allegations of harassment related to disability which he had prepared from Ms Owen's claim form and further and better particulars. Respect to EJ Lewis for the work which must have gone into that.

33. In preparation for the Preliminary Hearing on 9 December 2021, the parties co-operated in the preparation of an agreed List of Issues and Ms Owen submitted a completed Agenda. Not known to EJ Lewis, confirmed to me by Ms Owen during this hearing, she had the benefit of legal advice when completing those documents.

34. Ms Owen provided a draft List of Legal Issues which set out the legal test for whether or not she met the definition of a disabled person and the relevant questions in relation to a claim of failure to make reasonable adjustments, including a proposed PCP. That is all. There was no reference to any other form of claim.

35. In the Agenda at 2.1, (where it asks whether any claims are withdrawn), Ms Owen has written,

> *"The bulling* [sic] *and harassment claim of being put on performance has been withdrawn because it was out of time, I could not get any legal help and due to my disability and illness found the system too difficult to do in the right time frames".*

36. Not known to EJ Lewis at the time, but confirmed to me by Ms Owen in this hearing, she withdrew her harassment claim on legal advice.

37. EJ Lewis records in his Hearing Summary at paragraphs 6 – 9 that Ms Owen said during the hearing that she had not wanted to withdraw those claims and that she still wished to pursue them. The Respondent's position was that it was not open to her to do so. EJ Lewis observed that there remained proceedings and the Tribunal had power to permit an amendment at any time. He directed these issues be dealt with at this Open Preliminary Hearing.

38. Miss Owen issued a second claim on 21 March 2022. At section 8.1 of the ET1 she ticked the box that she was claiming unfair dismissal only. At 8.2 she wrote,

> *"I am therefore making a claim for constructive dismissal. This is related to my previous claims of failure to make reasonable adjustments and bully and discrimination related to my disability…"*

The Law

39. Rule 51 of the Employment Tribunals Rules of Procedure 2013, provides:

> "Where a Claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end…"

40. Rule 52, provides:

> "Where a claim, or part of it, has been withdrawn under Rule 51, the Tribunal shall issue a judgment dismissing it (which means that the Claimant may not commence a further claim against the Respondent raising the same, or substantially the same, complaint) unless –
>
> (a) the Claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or
>
> (b) the Tribunal believes that to issue such a Judgment would not be in the interests of justice."

41. The case of Campbell v OCS Group Limited and Moffatt UK EAT/0188/16/DA, the decision of the then President, Mrs Justice Simler as

she then was, deals with the application of Rules 51 and 52. Where a Claimant withdraws a claim, it comes to an end and cannot be revived, (Rule 51). The Tribunal must then issue a Judgment, unless either of the exceptions in Rule 52 apply. If a Judgment is not issued, it remains the case the claim in the extant proceedings cannot be revived, that does not mean that a fresh claim on the same facts could not be made, (see paragraph 13). Issuing a Judgment dismissing the claim on withdrawal, does mean that a fresh claim on the same facts cannot be issued, (Rule 52).

42. The exceptions in Rule 52 which may cause an Employment Judge not to issue a Judgment dismissing the withdrawn claim are either where the Claimant has expressly reserved the right to bring a further claim, (which does not apply here) or it is not thought to be in the interests of justice to issue such a Judgment, which might apply here.

43. This exception gives rise to a discretion on my part. That discretion must be exercised judicially, having regard to the balance of prejudice to the parties and the overriding objective.

44. The overriding objective is at Rule 2 and provides as follows:

> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

45. It is in the interests of justice that there shall be finality in litigation.

Conclusions

46. Miss Owen has clearly withdrawn her harassment related to disability claim. Whilst at first blush, I had thought there might be some ambiguity, because it appeared it might have meant she was withdrawing her claim of being put on performance only, (in other words not other aspects of her harassment claim). However, it becomes perfectly clear that it is the entirety of her harassment claim that she has withdrawn when one has regard to the List of Issues that she produced, bearing in mind that the same was produced with, and on, legal advice. Pursuant to Rule 51, the claim is withdrawn, it has come to an end and cannot be revived.

47. Absent a Judgment dismissing it upon withdrawal, she could have issued a fresh claim for harassment, in her second claim form. She did not do so.

48. I must have regard to the provisions of Rule 52, which requires me to consider whether it is in the interests of justice to issue a Judgment dismissing her claims on withdrawal.

49. The prejudice to the First Respondent is that he faces potential personal liability for alleged acts of discrimination said to have been carried out by him during the course of his employment. He and the Second Respondent are entitled to take the Claimant's withdrawal at face value. The Respondents will still have to answer harassment allegations, but in the context of a complaint of constructive dismissal, (which will be subject to limits on the amount of compensation that might be awarded), in any event.

50. The prejudice to Miss Owen if I issue a Judgment is that she will not be able to issue a further claim of disability related harassment. That prejudice is ameliorated by:

    50.1. She made the decision to withdraw her claim with the benefit of legal advice;

    50.2. Were she to have attempted to issue a third claim for harassment, it would have been out of time and therefore subject to questions of whether it would be just and equitable to extend time;

    50.3. She had the opportunity of adding the harassment claim in her second claim form, (although had she done so that would then have been subject to an enquiry as to whether the principles of issue estoppel and the rule in Henderson v Henderson should apply); and

    50.4. She is still able to pursue the factual allegations lying behind the former harassment claim in support of her complaint of constructive unfair dismissal, albeit with compensation for unfair dismissal subject to the statutory cap of a year's salary.

51. The most significant aspect to the overriding objective in this instance is the potential absence of a level playing field. As I have observed a number of times already, Miss Owen acknowledged to me that her withdrawal was with the benefit of legal advice.

52. For these reasons, I dismiss the Claimant's claims of disability related harassment upon them having been withdrawn.

Strike Out or Deposit Order – the Law

Strike Out

53. Employment Tribunals Rules of Procedure, rule 37 provides that:

> *(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success;*
> *…*

54. A tribunal should be slow to strike out a claim brought by a litigant in person on the basis that it has no reasonable prospects of success, see Mbuisa v cygnet Healthcare Ltd UKEAT 0119/18. Strike out is a draconian step that should only be taken in exceptional cases. If a case is poorly pleaded, the appropriate step is to record how the case is put, ensure that the pleading is amended and make a deposit order if appropriate.

55. In respect of discrimination cases, the appropriate approach to strike out stems from the case of Anyanwu v Southbank Student Union 2001 ICR 391. In broad, general terms, that case was authority for the proposition that discrimination cases should be heard and not struck out. In Ezsias v North Glamorgan NHS Trust 2007 CA ICR 1126 at paragraph 29, Kay LJ said that only in exceptional cases would a case be struck out when the central facts are in dispute.

56. In Morgan v Royal Mencap Society [2016] IRLR 428 the then President of the EAT, Mrs Justice Simler, reminded us that the threshold is high, (paragraph 13). She acknowledged at paragraph 14 that there are cases where, if one takes the claimant's case at its highest, it cannot succeed on the legal basis on which it is advanced and in those circumstances, it will be appropriate to strike out. However, she says, where there are disputed facts, unless there are very strong reasons for concluding that the claimants view of the facts is unsustainable, a resolution of the conflict of facts is likely to be required.

57. In exercising discretion, a Tribunal should have regard to the overriding objective as set out above.

Deposit Order

58. The Employment Tribunals' rules of procedure at Rule 39 provide as follows:

> *(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*
> *…*

59. In Hemdan v Ishmail and another UKEAT/0021/16. Mrs Justice Simler, (as she then was) reviewed the legal principles to be applied when considering whether or not to make a Deposit Order. She said at paragraph 10,

> *"There can accordingly be little doubt in our collective minds that the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails."*

At paragraph 12,

> *"The test for ordering payment of the deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasis the fact that there must be such a proper basis."*

And she said at paragraph 13,

> *"The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. …a mini-trial of the facts is to be avoided…*
>
> *Where there is a core factual conflict it should be properly resolved at a full Merits Hearing where evidence is heard and tested."*

Should the Claimant's complaint of Constructive Dismissal be Struck Out or the subject of a Deposit Order ?

60. Mr Bishop told me in submissions that the Respondent does not take a time point in relation to the constructive unfair dismissal claim, (not in terms of jurisdiction).

61. Miss Owen was absent from work due to ill health between 17 December 2020 and her resignation on 12 November 2021. Events prior to the commencement of her absence form a substantial part of her constructive dismissal claim; a series of events which she says form part of the Respondent's breach of the implied term requiring it to maintain mutual trust and confidence.

62. During the period of her absence through ill health, she received contractual sick pay at her full rate of pay for six months and one half her rate of pay for a further six months.

63. Also during her period of absence, she received outcomes to her Grievance, (May 2021) and her Appeal against that outcome, (August 2021).

64. She gave one month's notice; her dismissal was effective 12 January 2022 and she issued these proceedings on 21 March 2022 claiming constructive unfair dismissal.

65. Mr Bishop's first argument is that the so called, "last straw" must be when somebody from Human Resources, (a Ms Read) suggested that Ms Owen be referred to Occupational Health in order to support her return to work.

66. What Ms Owen says at 8.2 of her claim form is:

> *"I was offered to come back but the stress was counter-productive to my recovery as I just could not trust that the equipment would be in place given that there had been two prior repeated failures to ensure the recommendations from my Learning Difficulties Report. Therefore I had no option but to resign due to ill health as a result of this negligence from working for months on end in these discriminatory conditions."*

67. What Ms Owen told me during the hearing is that this period of absence was due to her having a breakdown. She said she was in a bad way, crying every day and undergoing therapy. She said she was,

> *"not really there to be honest"*

and she said that every so often something would happen with her Grievance and she would not know what to do. She then said when Ms

Read got in touch with her and said she had to go back to work, her reaction was,

"oh my God, I'm not going back".

68. She said that at that time, she was still in therapy and still trying to come to terms with what had been going on. Mr Bishop says that there is no medical evidence about this, a point Ms Owen might bear in mind and rectify.

69. Mr Bishop suggests that Ms Owen affirmed the Contract of Employment because the last alleged breach would only have been events which happened before her absence began in December 2020 and that thereafter, Ms Owen continued to take payment of her sick pay. For Ms Owen's benefit, I explained that this means it is suggested because she continued to receive sick pay, she was happy for the Contract of Employment to remain in place and so had agreed to put up with the Respondent's alleged earlier breaches of contract by the way it behaved.

70. Further, Mr Bishop refers to the timing of the resignation. Ms Owen resigned once her contractual sick pay came to an end. That is evidence of her affirmation of the Contract and that the reason for her resignation was not the Respondent's breach of contract, but the fact that her sick pay had run out.

71. Contrast to that what Ms Owen said to me during the hearing as quoted above; that she was going through a breakdown and when the Respondent suggested she should return to work, she just could not face it.

72. In these circumstances, I cannot say that Ms Owen's complaint of constructive unfair dismissal has no or has little reasonable prospects of success. A Tribunal will have to hear the evidence and decide whether firstly, it upholds her allegations; secondly, whether there are events during her period of ill health that contributed toward a breach of the implied term of mutual trust and confidence, and then, whether because of her ill health one cannot say that she affirmed the contract. I will not make a Deposit Order and I will not Strike Out the constructive dismissal claim.

Should the Claimant's complaint of Failure to Make Reasonable Adjustments be Struck Out or made the subject of a Deposit Order ?

73. Mr Bishop in closing submissions acknowledged that it is possible for a Tribunal to find time does not run until a decision is made and the Respondent does not therefore take a time point at this stage.

74. In his submissions, Mr Bishop focused his application on seeking a Deposit Order, no doubt recognising when considering whether or not to

strike out a discrimination claim, a Tribunal must take the Claimant's case at its highest.

75. EJ Lewis identified the issues in the reasonable adjustments claim in his Preliminary Hearing Summary from December 2021. The first is in respect of provision of equipment, coaching and software by way of auxiliary aids. Mr Bishop says that these would not have made any difference to Ms Owen's poor performance. Ms Owen responds that when these types of adjustment have been made for her in the past at University and in the early days of her employment, she had thrived. I cannot say that answer has little reasonable prospects of success.

76. EJ Lewis then lists four PCPs: the requirement to complete mileage forms; the new way of working so called, *"a collective process"*; Mr Wright's tendency to focus on negatives or the requirement to attend team meetings at 9am and the imposition of a heavy workload with insufficient training. Mr Bishop's submission is that on the basis of what we have seen in the litigation so far, the documents that Ms Owen has produced, their structure (or lack of it), her explanation of the difficulties she has in producing documentation and the help that she receives from her family, all point towards the conclusion that no matter what the Respondent would have done, Ms Owen would not have been able to cope.

77. I return to Ms Owen's response referred to above, that she had previously thrived. She says that adjustments are crucial and she benefits from them. I cannot say Ms Owen has no or little prospects of success in this regard.

78. For these reasons I decline to either strike out or make a Deposit Order in relation to Ms Owen's complaint of the Respondent's failures to make reasonable adjustments.

Delay

79. Producing this decision has been delayed by a lack of typing resources at the employment tribunal.

_____
Employment Judge M Warren

Date: 1 September 2022

Sent to the parties on: 4 October 2022

For the Tribunal Office.