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EMPLOYMENT TRIBUNALS

Claimant: Miss Kala Harvey

Respondent: Summercare Limited

Heard at: East London Hearing Centre

On: 13, 14 & 15 February 2018

Before: Employment Judge Russell

Members: Mr G Tomey
Mr J Quinlan

Representation
Claimant: In person
Respondent: Mr G Ridgeway (Consultant)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:

(1) The Respondent's conduct entitled the Claimant to resign and treat herself as dismissed. The dismissal was unfair.

(2) The Respondent's failure to adjust the Claimant's working duties was a failure to make reasonable adjustments (s.20), alternatively, unfavourable treatment because of something arising in consequence of disability.

(3) The Respondent's failure properly to consider the Claimant's request to adjust her duties was an act of unfavourable treatment because of something arising in consequence of disability (s.15).

(4) The refusal to permit the Claimant to work a longer period of notice was not unfavourable treatment because of something arising in consequence of disability (s.15) or a failure to make reasonable adjustments (s.20).

(5) With regard to the notice period the Claimant was contractually entitled to three months notice expiring at the end of March 2017 and the Respondent acted in breach of contract.

REASONS

1 By a claim form presented to the Tribunal on 12 June 2017, the Claimant brings complaints of disability discrimination, constructive unfair dismissal and breach of contract in respect of notice. The Claimant confirmed that she does not bring any claim in respect of the minimum wage. The Respondent defends the claims.

2 We heard from the Claimant on her own behalf and her three witnesses: Mrs Susie Slater, Ms Leanne White and Ms Vicky Saunders. For the Respondent we heard evidence from Ms Julie Homan (Homecare and Accommodation Base Service Manager), Mr Kevin Smith-Hart (Operations Manager) and Dr Asif Raja (Managing Director). We were provided with a signed witness statement from Ms Susan Bray (Senior Manager). Ms Bray was unable to attend Tribunal for health reasons which was supported with adequate medical evidence. We admitted her statement and attached such weight as we thought appropriate in the circumstances. We were provided with a bundle of documents and we read those pages to which we were taken during the course of evidence.

Findings of Fact

3 The Respondent provides care to vulnerable adult service users in a variety of settings. It operates one day care centre, four residential homes and seven schemes. The Managing Director is Dr Raja, to whom reported three managers, including Mr Hart and Ms Homan. Each scheme has a leader who undertakes some managerial tasks. The equivalent position is the manager of a residential setting. The Respondent's case is that a scheme leader's role comprises approximately 10% to 15% time spent on managerial duties. The Claimant assess the proportion of management tasks at 20%. On balance, we find that the precise amount of management time varied according to the needs of the business but was on average around 15%. The rest of the scheme leader's working time is in supporting service users in the community, not undertaking heavy physical work but accompanying them to doctor's appointments or shopping trips and the like.

4 The Claimant started as a support worked on 30 January 2011. She was a good worker, well regarded and was successfully promoted to Senior Support Worker then, from 2014, was Scheme Leader for Saddlers and Saxon. The Claimant's line manager was Ms Homan. There were supposed to be regular supervisions and appraisals, although the last one documented in the bundle occurred in February 2016.

5 The Claimant's evidence, which Ms Homan agreed in cross-examination, was that in July 2016 there had been discussions about the Claimant's aspirations for more managerial work. Ms Homan was supportive. It is against this background that, on 16 October 2016, the Claimant emailed to suggest that she take on a further managerial role to include Benfleet and Basildon. Thereafter she took on responsibility for Basildon as well as her existing duties. By this time, the Claimant's eyesight was deteriorating significantly. She had attended a routine optician's appointment in September 2016 which suggested that she had possible cataracts. We accept Ms White's evidence that the deterioration of the Claimant's sight was clearly noticeable, for example that she had to bring her eyes very close to the screen when using her mobile phone or computer.

6 The Claimant attended a hospital appointment on 3 November 2016 in which she was told that the problem with her eye was not simply cataracts. She saw a specialist on 7 November 2016 who believed that there may also be a detached retina requiring

surgery. Upon leaving the hospital, the Claimant spoke to Ms Morgan (Care Support Services Manager) because Ms Homan was not available. We accepted the evidence given by the Claimant and Ms Slater, who was also present, that the Claimant told Ms Morgan that she was concerned about supporting service users in the community as she could only see about a foot in front of her, rather she needed to be office based and to have a more managerial role. Ms Morgan did not see this as a problem but made clear that the decision rested with Dr Raja.

7 The same day, Ms Morgan sent Dr Raja an email informing him that the Claimant had been advised that she had a detached retina in one of her eyes, on top of the issue regarding cataracts which required an operation on 21 November to stabilise the worst affected eye. The Claimant would not be at work for around two weeks but would manage the end of month administration work from home during that period. She went on to state:

> "**She has also been advised that she is to [be] mindful of working within a stable environment due to her failing eyesight. Kala copes extremely well with computer work and managing her schemes and has recently taken on Basildon, she is concerned regarding her future at Summercare and her continued employment as a manager, her only perceived restriction will be working on the floor on active shift.**
>
> **As she is now co-ordinating Basildon as well as her schemes I wondered if a move after Christmas to change her job title/role to that of area coordinator would be considered.**
>
> **I have advised Cathy [***in HR*] **of the situation and informed Kala Harvey that you may wish to speak to her directly in relation to her operation and prognosis."**

The Claimant's mobile telephone was provided in the email.

8 Dr Raja responded to Ms Morgan and Ms Sutton on 7 November 2016 saying: "**I am unclear what mindfulness is required wouldn't OH and ELAS review be appropriate for something like this**." Ms Sutton clarified that she believed that Ms Morgan was exploring the possibility of the Claimant becoming supernumerary after Christmas.

9 The Claimant was not copied into the email exchanges between Ms Morgan, Ms Sutton and Dr Raja. Nobody spoke to her further about her request or what else may be required to support her with her eye problems. There was no mention to the Claimant of an Occupational Health referral.

10 In her witness statement, Ms Homan's evidence was that Dr Raja was preparing to explore multiple options in relation to the Claimant's medical conditions by engaging proper Occupational Health services after her operation. In her oral evidence, however, she denied any knowledge of the Claimant's request for management duties or possible Occupational Health involvement, saying that she had been told to "stay out of it" as other people were dealing with the Claimant. Ms Homan did not see Dr Raja's email until the bundles had been prepared in these proceedings. Mr Hart was not aware of any plan to involve Occupational Health.

11 For his part, Dr Raja maintains in his statement and oral evidence that upon receipt of Ms Morgan's email he believed that the Claimant's eye problems needed exploration, that it was critically important to safeguard her health and safety in the workplace and that it was necessary to engage Occupational Health following the Claimant's return to work if necessary. This is not what is set out in his email. Moreover,

we found Dr Raja's evidence about the involvement of Occupational Health to be unconvincing. He suggested that he left it to others to deal with the arrangements, however, his evidence as to what was to be done was so speculative as to be entirely unreliable. Dr Raja's evidence today was that his managers worked very closely together and discussed matters informally. If so, it is remarkable that if there truly were an Occupational Health plan at the time, it was unknown to both Ms Homan and Mr Hart and equally not even mentioned to the Claimant. Nor is there any evidence of steps being taken to prepare a referral to Occupational Health. The Respondent is seeking to take Dr Raja's general question about whether Occupational Health review might to appropriate and turn it into a settled plan to engage Occupational Health after the operation to consider any adjustments. We find that there was no such plan, rather it is an argument formed in hindsight to meet the case now brought by the Claimant.

12 The Claimant's evidence was on 18 November 2016 she called Ms Homan to see whether or not a decision had been made on her request. She was told that it had been discussed and that Dr Raja had refused it as there was no management only contract. The Claimant said that in the circumstances, she had no future with the Respondent and had to resign. Ms Homan informed the Claimant that she had to give three months' notice in order to allow recruitment of a successor. The Claimant agreed and sent her resignation letter the same day stating:

> "**To whom it may concern,**
>
> **Please accept this letter as a formal notification of my three months notice to leave my job as scheme leader effective from 1 January [2017].**
>
> **Despite the fact I love my role as Scheme Leader, I feel I am no longer able to do my role effectively and company policies, procedures, ideals and mission statement are open to individual interpretations.**
>
> **To make this transition as smooth as possible for the individuals I support as well as my team, I am willing to assist in any way I can.**"

13 Ms Homan's evidence was that in the beginning to middle of November 2016, the Claimant had disagreed with the timing of the placement of a service user on one of her schemes. Ms Homan says that receipt of the Claimant's resignation letter came as a shock to her and she contacted the Claimant to find out her reasons for resigning. Ms Homan maintained that it was because of the placement of the service user and stated that she had no discussion with the Claimant prior to her resignation about the request to move to management or office based duties.

14 As for whether the Claimant's request for varied duties had been refused at that time, Dr Raja's evidence at Tribunal changed over the course of questions. First, he said that there had been a decision, then that there had not, before finally stating that he had considered whether he could take the duties from other scheme leaders and amalgamate them into a role for the Claimant. He had decided that he could not as schemes required some local management, 10 of the 12 schemes were geographically close whereas the Claimant was based in an outlying site.

15 On balance, we find that by 18 November 2016 Dr Raja had decided to refuse the Claimant's request. Ms Homan told the Claimant of the refusal and that there was no management contract available. She did not tell the Claimant any of the reasons

advanced by Dr Raja in his oral evidence nor was the Claimant asked whether she would be prepared to relocate or consider reduced hours. The Claimant was a credible and reliable witness; her evidence was internally consistent and had the ring of truth. It is not credible to suggest, as the Respondent does, that having asked for a move to a management contract due to the significant problems with her eyesight, the Claimant would then resign without first checking whether her request had been accepted. The issue about the service user was a concern about timing only and, although a matter about which she felt passionate, it was not of such magnitude that she would have resigned. The problems with her eyesight and the refusal of the variation of her job were material and effective reasons for her resignation.

16 Ms Homan discussed the Claimant's resignation with Dr Raja and they agreed to accept her proposal of three months' notice as it would help the Respondent recruit a suitable replacement. Although the resignation letter was a little ambiguous, it was agreed that the three months' notice period would commence on 1 January 2017 and expire on 31 March 2017. The decision to accept three months' notice is consistent with the Claimant's evidence of her discussion with Ms Homan on 18 November 2016. It is also consistent with Mr Hart's evidence that he was told to give three months notice when he had resigned earlier in the year.

17 The Claimant's operation took place on 21 November 2016. It was not successful. The Claimant sent Ms Homan a text on 25 November 2016 informing her that the hospital were doing more tests as they did not know the cause of her problems. The Claimant took annual leave, rather than sick leave, in order to have her operation. She returned to working duties on 3 December 2016 to assist the Respondent. Despite the agreement that the Claimant would continue in employment until 31 March 2017, there was no return to work interview or discussion about Occupational Health or her duties immediately upon return.

18 On 7 December 2016, the Claimant attended a meeting with Ms Sutton at which she was accompanied by Ms White. Ms Sutton left the Respondent's employment on 27 December 2016. The Respondent has not provided any notes of the conversation nor do its witnesses deal with what was discussed. We accept as truthful the evidence of the Claimant, as confirmed by Ms White. The Claimant updated Ms Sutton about the ongoing problems with her eyesight and referred to her earlier request to do a more managerial role. The Claimant told Ms Sutton that she had been told of the refusal by Ms Homan and that this was the reason why she had resigned. Ms Sutton offered to speak to Dr Raja about the possibility of a variation of duties. The Claimant and Ms Sutton also discussed the provision of a screen for the Claimant's computer to assist her at work. There was some delay but this is not an issue before the Tribunal and we consider that it is relevant only insofar as it demonstrated the ongoing substantial adverse effect upon the Claimant caused by her eyesight.

19 Dr Raja asked Ms Homan to speak to the Claimant about the operation, how she was, about her return, ability to continue at work and how she would manage on a planned trip to Skegness with service users. The meeting took place on 8 December 2016.

20 The Claimant's evidence is that she explained the limitations of her sight, the need for management work and, that if this were to be provided, she would not need to resign. Ms Homan said that there was no such contract and she was not there to convince the

Claimant to stay. The Claimant said that there was a discussion about the timing of the arrival of the new resident which the Claimant accepted she had not been happy about. They then discussed the Claimant's ability to take service users on a trip to the Skegness Butlins and the steps that she had taken to minimise the risk caused by her eyesight. The Claimant addressed her ability to deal with road conditions, to function if outside in the dark and other matters relating to access. Essentially, the Claimant carried out her own risk assessment and then notified Ms Homan of the steps that she was putting in place on her own.

21 Ms Homan's witness statement does not deal in any detail with the contents of the discussion on 8 December 2016. Again there are no notes. In oral evidence, Ms Homan recalled that the discussion concerned the timing of the new service user's arrival and that the Claimant was very passionate. Her evidence was that this was the reason for comment that there was nothing she could do to change the Claimant's mind. Ms Homan could not recall whether the discussion about the Skegness trip occurred during this meeting. She had been informed that the sight operation had not gone as planned, that there was a need for further operations and that the Claimant would not know the outcome until after there had been further appointment. Ms Homan's evidence was that they had discussed only the screen and not the request for management duties.

22 Ms Homan appeared ill at ease when giving her evidence, relying upon a lack of recollection of any discussion about management duties or the Claimant's ability to perform her duties whilst remembering clearly and in great detail those parts of the discussion which supported the Respondent's case (such as the Claimant's passion about the service user issue). We did not find credible her evidence that the request for varied duties was not discussed given the admitted discussion about the ongoing problems with the Claimant's eyesight and her work. By contrast, the Claimant was a convincing witness. Her evidence was spontaneous. She accepted that she was passionate about the service user and that this was a matter weighing heavily on her mind, even though this was a matter relied upon by the Respondent as the real reason for resignation. On balance, we preferred the Claimant's evidence and accept as truthful her account of the meeting which is consistent with the matters which Dr Raja expected would be covered.

23 On 12 December 2016, Ms Bray attended the Claimant's Saddlers scheme. The Claimant's evidence, supported by Ms White who was present, is that they had a discussion in the lounge. The Claimant explained the whole situation about her sight and that she did not want to leave. Ms Bray said that the Claimant should talk to Ms Homan. The Claimant said that she had and had not been satisfied. Ms Bray said she would speak to Dr Raja. In her witness statement, Ms Bray says that the Claimant did not tell her about resigning because of the lack of measures to safeguard her employment, rather they had discussed the operation and the fact that the Claimant could potentially lose her sight. Ms Bray is not here to be cross-examined, albeit for good reason. Ms Bray essentially denies being told the reason for resignation was a lack of adjustments. The Claimant's evidence is a discussion about her sight problems and desire to stay. The two are not inconsistent in our view, rather we find that it was implicit in what the Claimant said that she could not continue in employment unless her duties were adjusted.

24 On 22 December 2016, Mr Hart met the Claimant at Saddlers. He had known the Claimant for a long time and they discussed her resignation and the reasons for it. The Claimant says that she told Mr Hart about the need to change her job duties, the details of her earlier conversations with Ms Morgan, Ms Sutton, Ms Homan and Ms Bray and the

fact that she had been left with no choice but to resign. Mr Hart said he would speak with Dr Raja. Mr Hart did not dispute the Claimant's account, either agreeing or accepting it may have been said but he could not now recall. Mr Hart agreed that the Claimant told him about her conversations with other managers, that he probably did ask her about what changes were required to enable her to stay and that he saw no issue with what was being requested by the Claimant. Mr Hart was not an employee of the Respondent at this date. Mr Hart became an employee of the Respondent at some point between 22 December 2016 and 7 February 2017. Dr Raja's evidence was that as an employee, Mr Hart had the authority to agree an alternative role.

25 On 20 January 2017, the Claimant attended a meeting with Ms Homan. Ms McGarrity took notes and Ms White was also present. The notes include "**Kala Harvey – Basildon doesn't want to do any more. – Rota's done til 1st March. Can do to 23rd March. No pay increase. Too much stress. No extra money and no extra management.**" Ms Homan's evidence is that the Claimant was giving her reasons for resigning. The Claimant denies that the notes are accurate or that she said that she found Basildon too stressful. Ms White's evidence was that Basildon was discussed but in the context of splitting the role when recruiting a replacement, any reference to stress was related to the future of the post not the Claimant's resignation. On balance, and having regard to the content of the note in full, we find that it refers to the transitional arrangements from January 2017, hence the reference to the rotas which the Claimant agreed to produce until March. It did not relate to the Claimant's reasons for resigning in November 2016.

26 At the same meeting, Ms Homan and the Claimant discussed the intended resignations of Ms White and Ms Saunders. Ms White was leaving to pursue her long standing ambition to be a lorry driver. Ms Saunders wished to have greater involvement in mental health work. It was agreed that both women would provide formal letters of resignation. Ms White and Ms Saunders were contractually required only to give one week's notice yet the notes record 31 March 2017 as the leaving date for both women. We find that the Claimant proposed that they give longer notice and leave on the same day as her to afford the Respondent enough time recruit a stable replacement team. Ms Homan did not express concern or object, rather she asked that Ms Saunders and Ms White provide formal letters of resignation.

27 Ms Saunders and Ms White sent in their resignation letters on 31 January 2017, copied to Dr Raja. Dr Raja was concerned that the resignations were "clearly aligned" with the Claimant's intended final day; in essence, he believed that she had improperly encouraged the two women to resign at the same time as her and that this would impact upon the scheme. The Claimant was copied on Dr Raja's email and responded with an explanation that she had asked the women to work longer to help find replacements and denied improper pressure. Dr Raja was not satisfied. In her email, the Claimant told Dr Raja that the operation on her eyes had not worked and she would lose her sight within the year.

28 On 2 February 2017, Dr Raja became aware of a Facebook post shared by the Claimant. The post was a picture of a woman poised to jump off a rock with some sort of motivational comment about change, to the effect that one should jump even though it feels scary or risk staying in the same place for life. In the comments, Ms White said that she was ready to jump months ago, the Claimant referred to conscience and loyalty and Ms Saunders said that she had fully committed to the jump. Dr Raja believed that these comments referred to the three women's decision to leave the Respondent and reinforced

his view that there was improper collusion. He did not speak to the Claimant, Ms White or Ms Saunders about the comments which, Ms White told us, related to a domestic situation and not work.

29 On 2 February 2017, letters were prepared for each woman, accepting their resignation on one week's notice and stating that the Respondent did not accept the longer notice given. Their employment would terminate on 9 February 2017 and each was put on garden leave in the interim. The letters were signed by Ms Homan. We preferred Ms Homan's oral evidence to that in the written statement drafted on her behalf (albeit signed by her). This was a decision taken entirely by Dr Raja with Ms Homan acting on his instructions. The letters were hand delivered to the women's homes late in the evening; whether it was in fact 8.45pm or 10.00pm matters little in our view. Ms Homan offered to deliver the letters, Dr Raja refused and instructed Mr Makumbe to deliver them. Mr Makumbe was a self-employed contractor working closely with the Respondent but he was unknown to the Claimant and it caused her distress to receive the letter in this way. We do not make any finding as to whether or not this was intentional by Dr Raja. Rather, we find that Dr Raja genuinely believed that the Facebook posts were about work and that there was a coordinated exodus form the scheme which may spread to other employees if the Claimant, Ms White and Ms Saunders were not removed from the workplace. Whether or not this was logical (and we tend to think it was not given that the Claimant had worked since November 2016 without cause for concern, the agreed termination dates were openly shared with Ms Homan and were intended to promote stability) and even if the dismissal would certainly have been unfair, we accept that Dr Raja's reasons were entirely unrelated to the Claimant's disability when he shortened her notice and were instead entirely related to his concerns about the stability of staffing on the scheme.

30 The Claimant was distressed about the decision and raised a grievance which was rejected by Mr Hart, against whose decision she subsequently appealed. Neither the grievance nor the appeal are issues before us and we considered them only in so far as they provided evidence relevant to the agreed issues.

31 The Claimant's complaint that the Respondent refused to change her job duties was discussed in the grievance hearing and addressed in the decision letter. At no point did Mr Hart refer to any plan for Occupational Health involvement or that this had been superseded by the Claimant's resignation or that there had been proper consideration of the practicalities of the request for a variation of duties. Both are matters asserted in the Respondent's case at the Tribunal.

32 Dr Raja chaired the appeal hearing. The Claimant asserted that her request for a contract change had been refused on 18 November 2016 and so she had resigned. Dr Raja did not reply to the effect that her request had not been refused or, alternatively, it had been refused after proper consideration of matters such as the need for local management. Nor did he say that there had been a plan to go to Occupational Health but this was not effected because she resigned. Nor did Dr Raja challenge the reason for resignation by stating, as he does now, that it was because of the service user. Dr Raja did ask the Claimant about her health, but only in the context of whether or not she had given sufficient information and the fact that she had felt able to go to Skegness. Dr Raja's comments at the appeal hearing are not consistent with the case advanced at this Tribunal. We do not accept Dr Raja's explanation that he did not mention these matters because they were not relevant. We find that the Respondent's current case on the

reasonable adjustments to duties (both in consideration of the request and Occupational Health) is not what pertained at the time, rather it is an attempt to interpret the available evidence in the way which may best provide a defence to the Claimant's case at Tribunal.

33 The Claimant was certified as severely sight impaired on 20 February 2017.

Law

34 Section 15 of the Equality Act 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."**

35 There is no need for the Claimant to show less favourable treatment than a non-disabled comparator, simply 'unfavourable' treatment caused by something which arises in consequence of the disability. It is necessary to identify the "something" and establish that it arose in consequence of the disability. We had regard to paragraph 5.8 of the EHRC Equality Act 2010 Employment Statutory Code of Practice and its guidance as to what is required. The consequences of disability include anything which is the result, effect or outcome of that disability.

36 The duty to make adjustments is defined by section 20 of the Equality Act 2010. The duty is applied to an employer by section 39(5) of the 2010 Act; and Schedule 8 contains additional provisions. Section 20(1) to (3) provide that:

> **"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."**

37 Where, as here, the employer is alleged to be in breach of the duty to make reasonable adjustments imposed by section 20(3) of the 2010 Act, the Tribunal should identify (1) the PCP(s) applied, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, and (3) the nature and extent of the substantial disadvantage suffered by the employee, **Environment Agency v Rowan** [2008] IRLR 20 at paragraphs 26-27 (Judge Serota QC). Having done so, the Tribunal must consider and identify what (if any) step it is reasonable for the employer to have to take to avoid the disadvantage. The aim of the duty is to remove or at least ameliorate the substantial disadvantage so that the disabled person may remain in the workplace. The

potential adjustment need only have *a* prospect of alleviating disadvantage and there is no need to show that it would have been completely effective or even that there was a good or real prospect of it being so.

38 The Code of Practice on Employment, at paragraph 6.28, suggests that the following factors might be taken into account when deciding what is a reasonable step for the employer to have to take:

- **whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step;**
- **the financial and other costs of making the adjustment and the extent of any disruption caused;**
- **the extent of the employer's financial or other resources;**
- **the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and**
- **the type and size of the employer.**

39 In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground.

40 Section 95(1)(c) ERA provides that a dismissal occurs if the employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to do so by reason of the employer's conduct. Whether the employee was entitled to resign by reason of the employer's conduct must be determined in accordance with the law of contract. In essence, whether the conduct of the employer amounts to a fundamental breach going to the root of the contract or which shows that the employer no longer intended to be bound by one or more of the essential terms of the contract, **Western Excavating Ltd v Sharp** [1978] IRLR 27 CA.

41 The term of the contract which is breached may be an express term or it may be an implied one. In this case, the Claimant relies upon breach of the implied term of trust and confidence. This requires that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. The employee bears the burden of identifying the term and satisfying the tribunal that it has been breached to the extent identified above. The employee may rely upon a single sufficiently serious breach or upon a series of actions which, even if not fundamental in their own right, when taken cumulatively evidence an intention not to be bound by the relevant term and therefore the contract. This is sometimes referred to as the "last straw" situation. This last straw need not itself be repudiatory, or even a breach of contract at all, but it must add something to the overall conduct, **Waltham Forest London Borough Council – v- Omilaju** [2005] IRLR 35.

42 The question of fundamental breach is not to be judged by reference to a range of reasonable responses, **Buckland v Bournemouth University Higher Education Corp** [2010] IRLR 445, CA. The tribunal must consider both the conduct of the employer and its effect upon the contract, rather than what the employer intended. In so doing, we must look at the circumstances objectively, that is from the perspective of a reasonable person in the claimant's position. The question of fundamental breach is not to be judged by a range of reasonable responses test.

43 In **Tullett Prebon Plc v BGC Brokers LLP** [2010] EWHC 484 QB, Jack J stated at paragraph 81 that the conduct must be so damaging that the employee should not be expected to continue to work for the employer and that:

> "**Conduct, which is mildly or moderately objectionable, will not do. The conduct must go to the heart of the relationship. To show some damage to the relationship is not enough**."

44 Establishing breach alone is not sufficient: the employee must also resign in response to it and do so without affirming the contract. Once an employee has affirmed the contract, the right to repudiate is at an end. Mere delay in itself is not an affirmation, but prolonged delay may be evidence of an implied affirmation.

45 The employee must satisfy the tribunal that he left in consequence of the employer's breach of duty. There may be more than one reason why an employee leaves a job; it is enough that the repudiatory breach was an effective cause with no requirement that it be the most important cause, **Wright v North Ayrshire Council** [2014] IRLR 4.

Conclusions

Disability

46 It is conceded that the Claimant's eyesight meets the statutory definition of a disability. The point taken by the Respondent is whether it did not know and could not reasonably be expected to know that the Claimant had this disability.

47 For the purposes of section 6 of the Equality Act 2010, an impairment will be 'long-term' when it has lasted or is likely to last for 12 months or more. In other words, the impairment does not need to have lasted 12 months at the date of the relevant treatment. Nor is there any need for a firm medical diagnosis, it is sufficient that there is an impairment with the required impact on day to day activities. So when considering knowledge, it is not relevant that the employer has not been given a diagnosis or firm prognosis. The question is whether or not there is sufficient information which reasonably should have put the employer on notice of the disability.

48 We have found that the Claimant had deteriorating eyesight which was obvious to her colleague, even without medical evidence, from as early as September 2016. It was causing significant problems with her ability to read both on a computer and also on her phone. The Respondent was aware of these difficulties from September 2016. It obtained further information in October 2016 that there was a potential problem with cataracts. By 8 November 2016 it was aware that the problem was more serious than cataracts alone and that there was a possible detached retina. By the text at the end of November 2016, Ms Homan was aware that the operation had not been successful and

that further tests were required. In other words, it was an ongoing impairment with no immediate prospect of improvement.

49 The Claimant provided further information on 8 December 2016 about the effects of her impaired eyesight on her day to day activities (specifically in discussion about the Skegness trip), including problems with new places, negotiating traffic and levels of lighting. The fact that the Claimant was proactively putting coping measures in place does not undermine the substantial effect of her deteriorating eyesight. Moreover, on 12 December 2016 Ms Bray was informed that the problem was so serious that the Claimant could lose her sight permanently. Mr Raja was made aware before the Claimant's notice took effect that she expected to lose her sight within a year.

50 Mr Ridgeway submits that the Claimant was working without any apparent effect caused by her disability and it could not reasonably have been expected to know that the Claimant was disabled. We do not accept that submission. The Claimant's work was affected by her eyesight problems (reading, screen use, the trip to Skegness). The Claimant had said that she could no longer do direct work supporting service users in the community. This was information which put the Respondent on notice of a significant health problem. The Respondent did not seek medical evidence nor did it instruct Occupational Health to gain a better understanding of the extent of the Claimant's impairment. This was not reasonable. Had it taken such steps, it is very likely that the long term effect of the impairment would have been identified not least as the Claimant was registered as severely sight impaired in February 2017. Taking all of the information available to the Respondent, we conclude that there was sufficient from which it could reasonably be expected to know that this was likely to be a physical impairment with a substantial adverse effect upon day to day activities which was likely to last for 12 months or more.

Reasonable Adjustments

51 The first PCP relied upon is a requirement that the Claimant to work to the full extent of her contractual and/or job description duties. There was no dispute that this was a PCP which applied to the Claimant, not least as the Respondent's case is there was no such thing as purely management contract and that the Claimant would need to continue to provide her direct care as before. The duties in the community required the Claimant to be able to accompany vulnerable adults in a range of settings. She could not safely do so because of her failing eyesight, for example inability to read other than close up, risk when crossing the road or being out when it was dark. The requirement that the Claimant continue to do this work put her at a substantial disadvantage compared to a person who was not disabled. The Respondent has not advanced evidence to support its assertion in submission that comparative disadvantage was not established. We are satisfied that the duty to make reasonable adjustments arose.

52 The adjustment proposed by the Claimant was a variation of her duties to office-based or management only. The optimistic tone of Ms Morgan's initial email and Ms Sutton's comments on 12 December 2016 suggested that this would not be unreasonable or unduly difficult. This was supported by Mr Hart's evidence to the Tribunal that the Respondent had been flexible and able to accommodate him, albeit on reduced hours of work, when he required an adjustment. On Dr Raja's evidence, we conclude that there was scope to combine some of the management duties across all of the schemes or care settings, even if not all could be consolidated in one employee. Dr Raja raised two points

of objection in evidence: firstly, the need for management on site and secondly, the tight profit margins in care work. We have accepted that 10 of the 12 sites were in close proximity but were away from the Claimant's usual place of work. A substantial amount of management work could reasonably have been consolidated in one of those 10 settings even if the Claimant may have had to change her usual place of work. Whilst consultation is not a reasonable adjustment in itself, case-law makes clear that a lack of consultation may render it harder for the Respondent to argue that a step is not reasonable. We consider that this is the case here. The Respondent has adduced no financial evidence. Moreover, if the management duties had been reduced for other scheme leaders, there would potentially be more time for direct care.

53 Overall, we conclude that it would have been a reasonable step to have adjusted the Claimant's job duties. Whether the adjusted job would have been full-time or part-time role we leave for the remedy hearing.

54 The second PCP is said to be a requirement that the Claimant work only one week's notice because she had resigned. We are not satisfied that the Claimant has made out any such PCP. We have found that when the Claimant resigned the Respondent accepted that she could work an extended period of notice. This notice was subsequently curtailed for reasons which we have found entirely unrelated to disability. The reasonable adjustments claim on this PCP fails.

Section 15 – unfavourable treatment because of something arising in consequence of disability

55 The section 15 claim essentially relies upon the same matters as the reasonable adjustments claim. The unfavourable treatment is made out as we have found that there was a refusal to adjust the Claimant's working duties and there was a failure properly to consider the request. The parties had agreed a three month notice period and the Claimant was required to work a shorter period of notice when sent the letter dated 2 February 2017. Each of these things is unfavourable and no comparator is required.

56 The "something" relied upon is the limitation on her ability safely to support service users because of her deteriorating eyesight. We accept the Claimant's case that she could not safely discharge her full duties as a scheme leader and that this arose in consequence of her limited sight. There may be several 'links' in the causal chain. The Claimant's request was not considered properly; the request was made due to the restrictions caused by her disability. We consider that the causal link is sufficiently established for this unfavourable treatment too. We do not accept the Respondent's submission that because the request was made before the operation and before the prognosis was known, the Claimant's case was fundamentally flawed as she had acted too soon. The impairment existed, its effects were significant and the need for variation was raised with the Respondent. It was the Respondent who refused the request before the operation had taken place. At no time, did it tell the Claimant that it would consider her request with the benefit of further information after the operation.

57 For reasons set out above, the notice period was shortened for reasons entirely unrelated to the disability.

58 The issue is whether the discriminatory treatment is objectively justified. The aim relied upon is of ensuring that the business is operated within profit margins that could ensure sufficient funding that the schemes were properly run by the organisation. That is

clearly a legitimate aim. Was the unfavourable treatment a *proportionate* means of achieving that legitimate aim? We think no. We have heard little, if any evidence, to support that contention. There was no evidence as to the cost of the possible reallocation of duties from other scheme leaders into a consolidated role undertaken by the Claimant. If approximately 15% of the job of a scheme leader role is managerial and if there are seven scheme leaders, a reallocation of duties would not necessarily require either a pay increase or the recruitment of additional support workers. The fact is however that no proper consideration was given the Claimant's request as it was refused out of hand. For these reasons, the s.15 claim succeeds.

Constructive Dismissal

59 The actual refusal to agree the Claimant's request for a variation is not a breach of contract, as there is no entitlement to a variation of one's job duties and the Respondent was entirely within its right to refuse the request. The implied term of trust and confidence will however encompass the manner in which an employer exercises a contractual entitlement. Here, the second part of the conduct relied upon is a failure to consider properly or at all the Claimant's request. We have found that the request was refused out of hand. Even taken at its most favourable for the Respondent, Dr Raja's evidence was of a decision based upon assumption and made without discussion with either the managers involved or the Claimant. The implied term of trust and confidence required at the very least that the request be considered and rejected for reasonable and proper cause, this did not happen. The Claimant made it clear to Ms Morgan and Ms Homan that without a variation of her duties, she did not have a future with the Respondent. The refusal of her request on 18 November 2016 therefore was essentially the Respondent agreeing that Claimant had no future with it. That is sufficiently serious to amount to a repudiatory breach. This was reinforced by Ms Homan's clear comment to the Claimant on 8 December 2016 that there was to be no attempt by her managers to change her mind and try to enable her to stay.

60 As to the reasons for resignation, we have found that the refusal of her request was a material and effective cause and we infer that the manner in which it was refused (without any further discussion or reason) was also part of her reason for resigning. We accept Mr Ridgeway's submission that the words used in the letter of resignation is capable of an interpretation consistent with its case that the reason for resignation was the dissatisfaction about the placement of the new service user. It is also capable of being interpreted in the way in which the Claimant contends. The Claimant has not, as Mr Ridgeway submits, distorted the words of her letter of resignation to suit her ends following a discussion with ACAS. We conclude that the Claimant simply accepted in November 2016 that the refusal of her request meant that she could do nothing other than resign and try to persuade the Respondent to change its mind whilst serving out her notice. It may have been naive not to make more of a fuss, such as by lodging a grievance or formalising her request in writing and asking for full reasons for refusal. That other employees would have done so is not a matter to be used against the Claimant who believed that she was acting honourably. It is perhaps a sad feature of this case that had it not been for the precipitous termination of the Claimant's notice period in February 2017, and the manner in which that was done, it is highly unlikely that the parties would be in this room today. The Claimant resigned in response to the breach.

61 As for affirmation, the Claimant gave notice on 18 November 2016 that her three month notice period would start to run on 1 January 2017. Essentially, notice that she

would give notice. An employee is entitled to work out their notice period without it being said that they have affirmed the contract. The issue really is whether during the period from 18 November 2016 until 1 January 2017 the Claimant's conduct was such as to waive any breach and affirm the contract. In this period, the Claimant was still raising the required adjustment with Ms Sutton, Ms Homan, Ms Bray and Mr Hart. She was led to believe by each that they would take it back to Dr Raja for further consideration. On balance we have concluded that the Claimant as seeking to remedy the breach rather than acting to accept the breach in that intervening period. There was no affirmation by the Claimant, not even by "tacit acquiescence" as Mr Ridgewood put it.

62 The Respondent does not advance a potentially fair reason for dismissal and for that reason we find that the Claimant was unfairly dismissed.

Breach of Contract - Notice

63 Even if the express term entitled the employee to terminate on one week's notice, we have found that Ms Homan instructed the Claimant that as a manager she was required to give three months' notice and the Claimant agreed by her letter of 18 November 2017. Even on the Respondent's case, the Claimant offered three months' notice and, after discussion, Ms Homan and Dr Raja accepted. Either way, the notice provisions of the contract were varied when the parties agreed that the contract would terminate on 31 March 2017. The Claimant was entitled to that notice and it is not for the Respondent unilaterally to resile from the agreement in circumstances were it was adamant that it was not dismissing the Claimant. The Claimant is entitled to payment for the period from 10 February 2017 until 31 March 2017.

Next Steps

64 The Remedy Hearing has been listed for **14 May 2018.** The Claimant must provide an updated Schedule of Loss on or before **10 April 2018.** Disclosure by list and copy must take place by **10 April 2018.** The Respondent must produce an agreed bundle by **17 April 2018**. Witness statements should be simultaneously exchanged by **1 May 2018.**

65 The parties may wish to consider the following in preparation for that hearing.

- The Claimant is not entitled to double recover. Insofar as she is compensated for notice pay until 31 March 2017, she cannot also claim damages for loss of earnings during that same period.

- When considering compensation for loss of earnings after the expiry of the notice period, the Tribunal will need to consider (i) whether or not the reasonable adjustment would have been for full-time or part-time work and (ii) if part-time, what the Claimant would have been paid.

- The Tribunal will also have to consider what effect the Claimant's ongoing problems with her sight would have on her earnings if she had not resigned. Would the adjustment have been temporary? Would she have returned to her substantive post after a period of time? Would she have resigned because her eyesight had so diminished that even the reduced role was not possible?

- When assessing injury to feelings, the Tribunal will consider the nature of the breach committed by the Respondent and the effect upon the Claimant.

- If either party intends to rely upon medical evidence or other evidence, they need to ensure that it is before the Tribunal and not rely on mere assertions.

Employment Judge Russell

23 March 2018