

Reserved judgment



Claimant: Ms V Rock
Respondent: Care Outlook Limited

Heard at London South Employment Tribunal on 2-4 January 2018

Before Employment Judge Baron

Lay Members: Ms N A Christofi & Mr S Goodden

Representation:

Claimant: The Claimant was present in person

Respondent: Michael Howson - Consultant

ORDER AND JUDGMENT

The Tribunal **orders** that the name of the Respondent be corrected to be 'Care Outlook Limited'.

It is the **judgment** of the Tribunal that the claims be dismissed.

REASONS

Introduction

- 1 On 30 November 2017 the Claimant presented a claim to the Tribunal making claims arising out of her employment by the Respondent as a Quality Monitoring Officer from 4 July 2016 until she resigned on 31 July 2016. The claims being made and the issues to be decided were clarified at a preliminary hearing held on 17 March 2017 and in an email from the Claimant of 12 May 2017. Further details are set out below.
- 2 The Claimant gave evidence herself and did not call any other witnesses. Evidence for the Respondent was given by the following:
 - Stella Evans – Regional Manager
 - Kathryn Rhodes – Head of Training & Staff Development
 - Peter Jerrari – Managing Director.
- 3 We were provided with what was said to be a witness statement of Diane Dacosta. It was not signed. Mr Howson told us that Ms Dacosta was no longer employed by the Respondent. We were not told of the circumstances in which the statement had been prepared. We have to

place little weight on the statement save where its contents are supported by the evidence of other witnesses.

- 4 We were provided with a bundle of documents and have taken into evidence those documents to which we were referred.

The claims and issues

- 5 There was a preliminary hearing held for case management purposes on 17 March 2017. The issues as defined at that hearing were as follows:

1. The Claimant claims (i) unfair constructive dismissal by reason of health and safety grounds pursuant to section 100 of the Employment Rights Act 1996; (ii) wrongful dismissal/breach of contract (one week's notice pay); (iii) a failure to make reasonable adjustments; (iv) disability harassment and (v) victimisation.
2. With regard to the unfair dismissal claim, the Claimant argues that she was employed as a Care Quality Monitoring Officer but was asked to undertake "Care Assistant" duties which she was unable to do because of the effects of her Type 2 Diabetes, in particular back and joint problems. The matter was left unresolved and therefore the Claimant considered she had no alternative but to leave her employment.
3. After discussion it appeared that the Claimant was pursuing her claim under either section 100(c)(ii) and/or (d). The Claimant is ordered above to confirm which sub-section/s she relies upon. [See below]
4. The issues for the Tribunal to determine will be:
 - Whether the Respondent constructively dismissed the Claimant:-
 - Whether the Respondent committed a fundamental breach of contract;
 - If so whether that breach formed part of the reason for the Claimant leaving her employment;
 - If so, whether any such breach was affirmed by the Claimant;
 - If constructively dismissed, whether the principal reason for the Claimant's dismissal was the health and safety reason relied upon.
5. The wrongful dismissal claim is in respect of notice pay. The issue is whether in the circumstances the Claimant was contractually entitled to notice pay.
6. With regard to the disability based claims, the Respondent is to confirm whether or not it is accepted that the Claimant was a disabled person at the material time with the pleaded condition of Type 2 Diabetes.
7. Subject to that issue:
8. With regard to the failure to make a reasonable adjustment claim, the provision criteria and practice relied upon by the Claimant is to undertake care work, the substantial disadvantage compared to non-disabled persons was that she could not undertake the role she was being required to do. A suggested reasonable adjustment would have been not to undertake care work.
9. The issues for the Tribunal to determine are:
 - Whether the Respondent operated a pcg of employees in the Claimant's role undertaking care work;

- If so; whether that pcp placed the Claimant at a substantial disadvantage compared to non-disabled persons on the ground that she was unable to do care work and therefore could not undertake the tasks being required of her.
 - If so, whether the Respondent knew or ought reasonably to have known both of the Claimant's disability and/or the substantial disadvantage;
 - If so, whether the Respondent could have made a reasonable adjustment to avoid the disadvantage (e.g. not require the Claimant to undertake care work).
10. With regard to the harassment claim, the Claimant argues four acts of unwanted conduct: (i) On 18 July 2016 Ms Stella Evans informing the Claimant that she was expected to do care work; (ii) On 25 July 2016 Ms Evans asking the Claimant what she had decided to do about the Respondent wanting her to do care work; (iii) At 4.45 pm on 28 July 2016 Ms Diane Da Costa asking the Claimant what she had decided to do with Ms Evans about care working; (iv) At 5.00 pm on 28 July 2017 Ms Evans telephoning the Claimant and instructing her to go out on a care visit.
11. The issues for the Tribunal to determine are:
- Whether the conduct as set out above occurred and if so whether it amounted to unwanted conduct;
 - If so, whether that conduct related to the Claimant's disability;
 - If so, whether the conduct had the purpose or effect of creating an intimidating, hostile, degrading, humiliating, or offensive environment for the Claimant.
 - In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.
12. With regard to the victimisation claim the Claimant could not confirm the protected act relied upon and is ordered to confirm her position above and also whether this claim is being pursued. [See *below*]
13. The Claimant argues that the unfavourable treatment was a delay in receiving her wages which were due to be paid on 29 July 2016, but not received until 30 July 2016.
14. The issues for the Tribunal to determine are:
- Whether the alleged act occurred and if so whether it amounted to unfavourable treatment;
 - If so, whether the protected act, to be confirmed, had a material influence on the unfavourable treatment.
- 6 The impairment relied upon for the purposes of the claims under the Equality Act 2010 of a failure to make reasonable adjustments and of harassment is type 2 diabetes. The Respondent accepts that the Claimant is a disabled person by reason of that impairment. Mr Howson also accepted that the Claimant was therefore at a substantial disadvantage by comparison with non-disabled persons for the purposes of section 20 of the 2010 Act.
- 7 In an email of 12 May 2017 the Claimant clarified her claims. She said she was relying on paragraphs (c)(ii) and (d) of section 100(1) of the Employment Rights Act 1996. She further said as follows:

I . . . believe that I was victimised as a result of what I said to the Regional Manager, Stella Evans, which was that I had a disability and that I could not physically do care work.

Statutory provisions

8 The material statutory provisions are as follows:¹

Employment Rights Act 1996

95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) and section 96, only if)—

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

100 Health and safety cases

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that--

- (a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,
- (b) being a representative of workers on matters of health and safety at work or member of a safety committee--
 - (i) in accordance with arrangements established under or by virtue of any enactment, or
 - (ii) by reason of being acknowledged as such by the employer,the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,
- (ba) the employee took part (or proposed to take part) in consultation with the employer pursuant to the Health and Safety (Consultation with Employees) Regulations 1996 or in an election of representatives of employee safety within the meaning of those Regulations (whether as a candidate or otherwise),]
- (c) being an employee at a place where--
 - (i) there was no such representative or safety committee, or
 - (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,
- (d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or
- (e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

¹ We are including the whole of section 100 of the 1996 Act so that the provisions relied upon by the Claimant can be seen in the context of the whole of the section.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

Equality Act 2010

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.

26 Harassment

(1) A person (A) harasses another (B) if—

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
- (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.

(2) – (3)

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of 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.

(5) The relevant protected characteristics are—

- . . . ;
- disability;
-

27 Victimisation

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

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

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

- (a) bringing proceedings under this Act;
- (b) giving evidence or information in connection with proceedings under this Act;
- (c) doing any other thing for the purposes of or in connection with this Act;
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

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

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

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

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
- (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
- (5) This section does not apply to proceedings for an offence under this Act.
- (6) A reference to the court includes a reference to—
 - (a) an employment tribunal;
 - (b) – (f)

The facts

- 9 We find the material facts to be as below. We are not recording all the evidence provided to us, nor making a finding on every detail which was in dispute.
- 10 The business of the Respondent is the provision of domiciliary care. It has seven offices, and some 700 or so staff. As we understand it, the staffing arrangements are as follows. Each branch has a Branch Manager and she is responsible to the Regional Manager. In each branch there is one or more Care Co-ordinators, whose responsibility it is to manage rotas to ensure that the Carers provide the service to the service users at the correct times. In addition there are Quality Monitoring Officers ('QMO') to whom we will refer in more detail below.
- 11 We were provided with the Claimant's CV. She had worked for 20 years from 1974 for British Telecom in various roles, finishing as a Marketing and Communications Manager. After a short time with the CAB the Claimant had worked in administrative roles in the social housing field, and supporting resident families. That ended in 2014. For the period from 2011 to 2014 the Claimant was also engaged in supervising the care for her elderly parents in the Caribbean, travelling there as necessary. After her father died, the Claimant became the carer for her mother in the UK from some date in 2014 until her mother's death in 2015. This involved the Claimant undertaking the personal care of her mother, and also the taking of responsibility for her mother's affairs.
- 12 In 2016 the Claimant was seeking employment and visited the Respondent's office in West Wickham to enquire whether there were any posts available. She saw Ms Couling, the Care Director of the Respondent, and Ms Dacosta, the Branch Manager. The Claimant made it clear that she did not want the post of a Carer because she had been undertaking that role for some time. The Claimant completed an application form for the position of a QMO. That application form was before us. The position applied for as set out by the Claimant on the claim form was 'Care Management / Supervision / Quality Monitoring / Assurance / Management ?? (as discussed)'. The Claimant was not provided with a job description at the time.
- 13 On the form the Claimant stated that she had had many years of practical experience in care and support work, and listed her employment history.

One section of the form was headed 'Medical Questionnaire'. In that section the Claimant stated that she was in good health but took medication for 'diabetic management. There were various specific questions, and the Claimant had ticked 'No' in answer to the question as to whether she had had any problems with 'persistence / recurrent backache or injury'. The Claimant had had an operation principally relating to a hiatus hernia earlier in the year, and ticked the relevant boxes concerning her admission to hospital and the operation.

- 14 As the impairment relied upon for the purposes of establishing a disability is diabetes, and the fact of diabetes was mentioned on the claim form, the Respondent knew for the purposes of the 2010 Act from the outset that the Claimant was a disabled person.
- 15 The Claimant was interviewed by Ms Dacosta and Mr Jerrari on 17 June 2016. Mr Jerrari would not normally have been involved but he happened to be in the branch at the time and was asked to sit in by Ms Dacosta. Ms Dacosta had a copy of the job description with her. One of the major factual disagreements in this claim is the extent (if at all) to which it was made clear that the Claimant may have to carry out some personal care herself. Mr Howson sought to persuade us that the terms of the job description included the carrying out of such work. We do not intend to set out the whole of the job description. It suffices to say that we are unable to interpret it as Mr Howson would have us do. There are eighteen paragraphs, many of which commence: 'To ensure . . .'. None make specific reference to the carrying out of care work itself.
- 16 There were two aspects of personal care discussed during this hearing. The first was that in her role as a QMO the Claimant may have to intervene or assist or instruct a Carer during the supervision of that Carer when with a service user. The second is being on an 'on-call' rota to undertake care if a Carer was ill or similar emergency arose. We find that the matter of the on-call rota was discussed at the interview, and that the discussion was not limited to the Claimant being in the office and carrying out a co-ordinating role when on the rota, but included actually taking on care work when required. That was the job of the Care Co-ordinator. We prefer the evidence of Mr Jerrari on this point. However, we do accept that this was not a major aspect of the interview, and the focus was on the principal duties of the Claimant as a QMO.
- 17 The Claimant had various medical appointments for review purposes arranged for July and the beginning of August 2016.² She wanted to start with the Respondent in August, but agreed with Ms Dacosta to start on 4 July 2016 because there was a pending CQC inspection following one in April 2016 which had concluded that improvement was required.
- 18 Ms Dacosta and Mr Jerrari were impressed with the Claimant. Ms Dacosta wrote to the Claimant on 24 June 2016 offering her the post. With that letter were enclosed a contract of employment, a copy of the job

² See [162]

description and a copy of the Staff Handbook. The Claimant and Ms Dacosta went through those documents on 4 July 2016, and the Claimant signed a copy of each of the contract of employment and the Handbook.

- 19 The contract of employment had two material provisions. The following sentence was included in the paragraph relating to hours of work:

It is an express condition of employment that you are prepared, whenever necessary to support alternative areas, departments or duties within our Company, during holiday periods etc and it may be necessary for you to take over some duties normally performed by colleagues.

- 20 The further material provision was as follows:

ON CALL ROTA

You may be required to be available for work outside your normal working hours as part of our On Call Rota for out of hours service.

- 21 The Staff Handbook contained similar provisions, and also a provision as to mobility between branches.³

- 22 The Claimant went through a formal induction course along with a dozen or so new employees from 12 to 15 July 2017. The course was run by Ms Rhodes. All the other new employees were Carers. At the end of the first day Ms Dacosta contacted Ms Rhodes to tell her that the Claimant was a QMO and not a Carer, a point not previously made known to Ms Rhodes. The course covered a wide variety of topics relevant to the role of Carers, including manual handling. We accept the evidence of Ms Rhodes that there was no mention by the Claimant of any issue concerning her back and manual handling at the time. If there had been then Ms Rhodes would have taken special notice as the manual handling of service users was one element of the induction course. We also accept that the Claimant did not refer to diabetes. Again Ms Rhodes would have noted the reference as she also has diabetes.

- 23 During the course the Claimant had a discussion with another QMO who was visiting for training purposes. During that discussion there was mention of the Claimant having to undertake care work as a normal part of her role as a QMO. The Claimant then raised the matter with Ms Rhodes. She told Ms Rhodes that she was not willing to undertake the personal care of service users because of having had to care for her parents. This surprised Ms Rhodes whose view was that in the care industry employees at all levels may have to undertake a caring role if necessary. Ms Evans and Mr Jerrari gave similar evidence, which we accept. We do note that although the Claimant had been employed in businesses which provided 'care' in a wide sense of that word, she Claimant had not previously been employed in a business of the same nature as that of the Respondent.

- 24 Ms Rhodes advised the Claimant to speak to Ms Dacosta. The Claimant then requested a meeting with Ms Dacosta which was arranged for 18

³ [46]

July 2016.⁴ At that meeting the Claimant told Ms Dacosta that she had a bad back, that she had done care work in the past and did not want to undertake further care work. The reference to the bad back surprised Ms Dacosta as there had not been any mention of the issue during the Claimant's interview, nor when Ms Dacosta and she discussed the job description on the first day when the Claimant started work. Ms Dacosta contacted Ms Evans about the matter, and they agreed that they should meet with the Claimant on the following day, 19 July 2016.

- 25 A meeting was held on 19 July 2016 as planned. Ms Evans emphasised the need for the Claimant to undertake the personal care of service users in emergencies. The Claimant told Ms Dacosta and Ms Evans that she did not wish to do such work because of her bad back. When asked if the back condition had been disclosed on the application form the Claimant said that it had been. The form was not available at that time for Ms Evans to inspect. It was at the Respondent's head office. It was agreed that the issue would be discussed further on 25 July 2016.
- 26 Having a back condition is not infrequent amongst carers, and as already mentioned manual handling skills form a significant part of the initial training provided by Ms Rhodes. The Respondent is used to having employees with back problems, and making arrangements where required.
- 27 There was a brief discussion between Ms Evans and the Claimant on 25 July 2016. The end result was that it was agreed that the matter would be discussed with Mr Jerrari on his return from leave, because he had been present at the interview. That would have been during the week commencing 8 August 2016. Ms Evans expected the Claimant to carry out her role in full in the meantime, including providing personal care when necessary.
- 28 A problem arose with a service user on 28 July 2016. A Carer had reported that she was ill, and consequently it was necessary for somebody to attend to the service user. Ms Dacosta asked the Claimant to take on the responsibility, and she refused saying that it had been agreed with Ms Evans that she would not undertake personal care. Ms Dacosta then contacted Ms Evans who asked to speak to the Claimant. Ms Evans said that the Claimant needed to provide the care in the particular situation. The Claimant refused, again citing a bad back. We accept the evidence of Ms Evans that at no stage did the Claimant refer to diabetes.
- 29 A fresh issue then arose. The Claimant was due to be paid on 29 July 2016, which was a Friday. The wages due to her were not in her bank account when she checked on that day. The Claimant needed to be paid to buy petrol to enable her to carry out her job function. There were various telephone conversations during the day, but the Claimant did not receive her payment. The procedure for payment of staff was that a computer file

⁴ The Claimant said in her witness statement that this meeting was requested by email but unfortunately there was not a copy of such email in the bundle.

was prepared by the Respondent's payroll team, and it was submitted to Mr Jerrari with a print of its contents. If he was satisfied with it he then had the file transmitted to the Respondent's bank so that the payments in it could be effected. Mr Jerrari could not be expected to ascertain that any particular employee was not included in the list.

30 We were shown various text messages between Ms Dacosta and Mr Jerrari from 16:54 on 29 July 2016 to 20:34 on 30 July 2016 concerning the Claimant's wages although Mr Jerrari was on leave at the time. We find that there was simply an error made in number of the Claimant's bank account. When the issue of non-payment was first raised with Mr Jerrari late on 29 July 2016 he took steps to ensure payment was made. He appears to have authorised the one-off payment to the Claimant on 29 July 2016, possibly after the close of banking hours, and the payment was received by the Claimant on 30 July 2016. Neither Mr Jerrari nor Ms Dacosta deliberately delayed the payment being made to the Claimant. The Claimant acknowledged in evidence that she had learned that there had in the past been some difficulties about the payment of other employees.

31 The Claimant resigned by a letter dated 31 July 2016 which is as follows:

I was informed by Diane Dacosta that I am not required to give 4 weeks notice, I am therefore informing you that I will not be returning to work on Monday, 1st August 2016.

I have been dealing with an issue relating to a post/position which was misrepresented to me on interview and on offer of employment. I do not wish to continue on that matter any further. It was a situation not of my making.

I also cannot work with an organisation and/or work where I am unsure if I am going to be paid, especially when I am aware my colleagues received their salary on time (29/7). I spent most of my lunchtime and at the end of the day trying to resolve this and it was only after Diane's intervention liaising with Peter I finally received money on Saturday 30th. This did not reflect payment for reimbursement for my car insurance premium, which I took out on agreement. More important is that I have no clear understanding why the situation occurred and no apology.

32 There is one further finding of fact which is material to the claims. Ms Rhodes was the health and safety representative, and her name was on a poster in each of the Respondent's branches. The Claimant did not seek to raise any health and safety issues with her.

Discussion and conclusions

33 There is a theme running through this case which is somewhat mysterious, and that is uncertainty as to the reasons given by the Claimant for not being willing (or able) to undertake care work. We have found that the reason given to Ms Rhodes initially was that she had been caring for her parents and did not wish to continue doing that work. Then later the question of a bad back was introduced. The issue of diabetes as a disability and contributing to any back pain from which the Claimant was suffering was not raised. Indeed, the Claimant's evidence was that she considered (at least at the time) that any back pain was being caused by the relatively recent operation which she had undergone.

- 34 We were provided with some medical documents. A letter from the Claimant's GP dated 7 June 2017 refers to 'multiple medical problems including type II diabetes'. Of more relevance perhaps a letter dated 14 October 2016 signed by Mr F H Smedley at King's College Hospital. He said as follows:

Abdominal examination does reveal she is overweight. She does have a small port side hernia in the epigastric area. She has had a [] in the past but her real problem is one of poor weight control. This I think is exacerbating her diabetic control and her arthritic problems and also her back ache.

That does not say that any back pain was caused by the Claimant's diabetes, being the impairment in issue in these proceedings. However, as will be seen below, Mr Howson specifically accepted that the Claimant was a disabled person by reason of diabetes, and further that she was at a disadvantage by reason of that disability because she was not able to undertake care work.

- 35 The first claim that the Claimant makes is of constructive unfair dismissal. She relies upon provisions in section 100(1) of the Employment Rights Act 1996. That subsection is clearly designed to cover circumstances where an employee is actually dismissed by the employer. However, the Claimant resigned. The Claimant must establish as a fact that either or both of the circumstances set out in paragraphs (c)(ii) and/or (d) of section 100(1) applied. She must then show that as a consequence the Respondent acted in such a manner as to be in fundamental breach of contract, and that that breach was the reason or principal reason for the Claimant's resignation.
- 36 We will deal first with paragraph (c)(ii). This head cannot succeed for the simple reason that there was a health and safety representative, being Ms Rhodes. That was stated by Ms Rhodes and not disputed by the Claimant. However we consider other elements.
- 37 We will accept for present purposes that for whatever medical reason the Claimant reasonably believed that the carrying out of care work, and particularly lifting, would or could be harmful to her health. What the Claimant has to show is that by reason of raising that matter with the Respondent there was then such conduct by the Respondent as was likely to destroy or seriously damage the employment relationship. There was no such conduct. The only matter upon which the Claimant could possibly rely was the request on 28 July 2016 to carry out care work, which the Claimant refused to do. There was no evidence that that request was caused by the mention of the issue with the Claimant's back. The making of that one request is in any event in our judgment wholly insufficient to justify a resignation. The contractual documents mentioned above oblige the Claimant to carry out such work. The further element which is mentioned at length in the Claimant's resignation letter is the delay in paying her. That was simply an error, and not in the slightest related to any mention of any back condition.

- 38 The Claimant also seeks to rely on paragraph (d). We find that there were no circumstances which the Claimant reasonably believed to be serious and imminent causing her to take steps to protect herself from the danger. What occurred here is very different from the mischief covered by that paragraph. Further, nothing occurred as a result of the Claimant refusing to undertake care work which could cause the Respondent to have been in fundamental breach of contract. The same points apply as mentioned in the preceding paragraph.
- 39 Insofar as the Claimant relies upon the delay in the payment of her wages by one day as being a fundamental breach then she cannot rely on it. The Claimant had not been employed for the requisite two years to have acquired the ordinary right not to be unfairly dismissed. She therefore has to rely on the provisions of section 100.
- 40 The claim of constructive unfair dismissal is therefore dismissed. The claim for notice pay must therefore also fail.
- 41 We now turn to the claims under the Equality Act 2010. It was conceded on behalf of the Respondent that the Claimant was a disabled person by reason of her diabetes. It was also accepted by the Respondent's witnesses that there was a provision, criterion or practice of requiring all employees to carry out care work as and when necessary. Mr Howson also conceded that the Claimant was at a substantial disadvantage for the purposes of the section 20 of the Act by comparison with persons who did not have diabetes in that she was unable to carry out personal care duties. We have to say that we found that concession somewhat surprising in that the Claimant had most recently been engaged carrying out such duties when caring for her late mother, but there it is. We did not hear any detailed evidence as to the capabilities or otherwise of the Claimant, and she was not cross-examined on the matter. The Tribunal is bound by the concession.
- 42 Mr Howson accepted that as a consequence of the concessions made there was a duty on the Respondent to make reasonable adjustments to remove or mitigate the disadvantage to the Claimant. This claim has to fail also. For there to be a breach of the duty an employer must have a reasonable time to consider whether adjustments need to be, or should be, made and whether it is reasonable to make such adjustments. The Claimant simply did not give the Respondent a chance. Paragraph 6.32 of the EHRC Code of Practice in Employment states as follows:
- It is a good starting point for an employer to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required. Any necessary adjustments should be implemented in a timely fashion, and it may also be necessary for an employer to make more than one adjustment. It is advisable to agree any proposed adjustments with the disabled worker in question before they are made.
- 43 The physical issue which the Claimant raised was that of a bad back. We have to assume by reason of the concession that that was as a result of the diabetes. The Claimant had indicated on the application form that she did not have any back pain. The issue of back pain first arose on 18 July

2016. Mr Jerrari was on leave during the last week of July and the first week of August 2016. There was to be a discussion with him on his return. The matter needed to be investigated and an Occupational Health or similar report obtained.

- 44 It is a further requirement of section 20 that the Claimant be at a disadvantage by comparison with persons without her disability. During the period that the Claimant was employed she was not in fact at any actual disadvantage simply because she did not carry out any care work.
- 45 The Claimant is making claims of harassment as defined in section 26 of the Act. The elements of section 26 are as follows. There must first of all be unwanted conduct. That conduct must be related to the disability. That conduct must also have the purpose or effect of causing any of the results set out in paragraphs (i) or (ii) of section 26(1)(b) taking into account subsection (4).
- 46 There are four allegations. The first is that on 18 July 2016 the Claimant was told by Ms Evans that she was expected to undertake care work. We find as a fact that that allegation is wrong in that the Claimant did not discuss the matter with Ms Evans until the following day. On 18 July 2016 the discussion was with Ms Dacosta. We will treat the notes of the preliminary hearing as containing an error. Whether the Claimant is referring to Ms Dacosta on 18 July or Ms Evans on 19 July 2016 matters not. Simply being told that she was expected to carry out care work as a QMO cannot in our judgment in those circumstances constitute harassment of the Claimant within section 26.
- 47 We accept that what occurred was unwanted conduct in that the Claimant did not wish to undertake care work. Whether it was related to the disability is more difficult. The expectation to do care work was unwanted by the Claimant because of her disability. The statement that the Claimant was expected to undertake care work was made not because of her disability but rather that that was simply what she was expected to do as part of her role as a QMO. However that is not the test as the phrase is 'related to a relevant protected characteristic'. We must ask whether the statement in question was associated with the disability. We conclude that it was not. It was associated with, or related to the terms on which the Claimant was employed. All that happened was that the Claimant had raised an issue as to her role, and that Ms Dacosta or Ms Evans told her what was expected of her.
- 48 The final element of section 26 is the effect on the Claimant. We find that there was no intention to cause any of the proscribed consequences. We also find that what was said did not in fact have any of the proscribed consequences. The Claimant did not give evidence that that had occurred. In any event, it would not have been reasonable in the circumstances for the Claimant to have considered that any of the proscribed consequences applied.
- 49 The second matter relates to the conversation on 25 July 2016. We have not accepted the Claimant's evidence that she was asked what she had

decided to do about the matter. However, even if that had been the case, and it was unwanted conduct, it was not related to the Claimant's disability, and in our judgment it is far far away from falling within any of the consequences set out in paragraphs (b)(i) and (ii) of section 26(1). All that was happening was that further discussions were taking place about an issue which the Claimant had raised. Again the Claimant did not give evidence that any of the proscribed consequences occurred, and again we find that it would not have been reasonable for them to have occurred.

- 50 The third factual allegation is that on 28 July 2016 Ms Dacosta asked the Claimant what she had decided to do with Ms Evans about care working. The Claimant's witness statement recorded that the Claimant then updated Ms Dacosta about her discussion with Ms Evans. For the same reasons as set out in the preceding paragraph that cannot be harassment. All that Ms Dacosta was doing was quite reasonably asking for information from the Claimant.
- 51 The fourth allegation is that on 28 July 2017 Ms Evans instructed the Claimant to undertake a care visit. The allegation is factually correct. We accept that it was unwanted conduct. We do not accept that the request was related to the Claimant's disability. It was related to the need for care work to be carried out. In any event we find that the request did not have any of the proscribed effects in section 26(1). There was no evidence to that effect.
- 52 The final element of these claims is that of victimisation. The alleged protected act is that the Claimant says that she told Ms Evans that she 'had a disability and that [she] could not physically do care work.'⁵ That was a statement by the Claimant of (alleged) fact. It does not fit in any of the four categories in section 27(2) and consequently was not a protected act. The alleged detriment was the delay in the payment of wages. We have found that that delay was nothing more than an administrative error. It was not caused by any conversation with Ms Evans.
- 53 For those reasons the claims are dismissed.

**Employment Judge Baron
Dated 10 January 2018**

⁵ See email from the Claimant to the Tribunal dated 12 May 2017.

