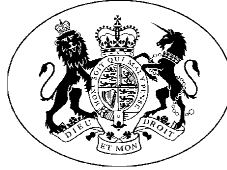

EMPLOYMENT TRIBUNALS

Claimant: **Mr S Walker**

Respondent: **Akari Care Limited**

HELD AT: **Leeds** **ON: 28 and 29 January 2019**

BEFORE: **Employment Judge Davies**
Mr Dowse
Mr Appleyard

REPRESENTATION:

Claimant: **In person**
Respondent: **Ms Amartey (counsel)**

JUDGMENT having been sent to the parties on 31 January 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. These were claims brought by the Claimant, Mr S Walker, against his former employer Akari Care Limited. The Claimant has represented himself extremely capably. The Respondent has been skilfully represented by Ms Amartey of counsel. The Tribunal heard evidence from the Claimant on his own behalf and for the Respondent we heard evidence from Ms Firth, Mr Dolman, Mr How and Mr Lightowlers. We had an agreed file of documents and we referred to those.

2. The Tribunal discussed at the outset of the hearing with Mr Walker what adjustments we might make to ensure that he could participate fully in the hearing. We were guided by some medical advice on the Tribunal's file provided by a Dr Hall and Mr Walker agreed that it would be helpful if we had that advice in mind in conducting this hearing. We also encouraged Mr Walker to ask for breaks and we took regular breaks throughout the proceedings.

3. The issues to be decided were as set out in a case management order by Employment Judge Jones and were as follows:

Harassment

3.1 Did Mr Lightowlers engage in unwanted conduct by calling the Claimant a “fucking idiot” and/or a “fucking moron” in November 2017?
3.2 If so, did that relate to disability?
3.3 If so, did it have the purpose or effect of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive for him?
3.4 Is it just and equitable to consider the complaint of harassment out of time?

Discriminatory Dismissal

3.5 Did Mr Lightowlers use the words set out above?
3.6 If so, did he act in a manner that was calculated or likely to destroy or seriously undermine the relationship of trust and confidence between the parties?
3.7 If so, was that without reasonable and proper cause?
3.8 If so, it was the conduct discriminatory?
3.9 If so, did the Claimant resign as a consequence of that conduct?
3.10 Did the Claimant affirm the contract before his first resignation?
3.11 In respect of the second resignation, did further behaviour cause or contribute to a breach of trust and confidence, and did it add to and thereby become connected to earlier discriminatory conduct?

Remedy

3.12 If the Claimant succeeds in his claims, what is the appropriate sum to compensate the Claimant for injury to his feelings (there being no loss of earnings), and should any recommendation be made to reduce any adverse effect arising from the discriminatory conduct?

Breach of Contract/Unauthorised Deductions/Holiday Pay

3.13 Did the Respondent fail to pay the Claimant nine days’ holiday pay at the termination of his employment such that he is owed £1,500, and is the Claimant owed £69 in travel expenses?

The Facts

4. The Respondent is Akari Care Limited. It is a UK-wide residential and nursing care provider, which has its head office in Leeds. The Claimant started work for the Respondent in April 2017 as an Estates Manager. Earlier in the proceedings the Respondent admitted that at the relevant times the Claimant met the definition of disability in the Equality Act by virtue of the conditions of dyslexia and ADHD. The Claimant provided some information about the effects of those two conditions on him and the Tribunal took that into account.

5. Initially the Claimant reported to the Chief Operating Officer, who was then Mr How. After Mr How’s departure from the business in around mid-March 2018, the Claimant reported to the Chief Financial Officer, Mr Lightowlers. The Claimant signed a contract on 13 December 2017. Obviously that was some months after he started work. He suggested in his evidence that he only signed it under duress because he was being chased by HR to do so. There was no evidence before the Tribunal to support a finding that the Claimant signed the contract under duress. Being chased by HR does not amount to duress. The Tribunal found that the contract accurately reflected the terms agreed between the Claimant and the Respondent. It is necessary for us to refer to some specific parts of the contract:

5.1 Clause 11 of the contract deals with holidays. It makes clear that holidays must be taken at times to be agreed with the line manager, such agreement to be obtained in advance.

5.2 Clause 12 of the contract requires the company to reimburse the Claimant for his expenses reasonably incurred in the performance of his duties. However, that is subject to his complying with their policies and procedures, in particular providing such receipts or other appropriate evidence as may be required. The procedure in place was that the Claimant was required to fill in an expenses claim form. For mileage he did not have to provide receipts but for other expenses he did.

5.3 Clause 13 of the contract deals with sickness absence. It says that an employee must notify his line manager of the reason for absence as soon as possible, but no later than 9am on the first day of absence. For any absence of seven consecutive days or more a medical certificate must be provided.

5.4 Clause 15 of the contract says that either party must give three months' notice in writing to terminate the contract. Section 23 deals with company property. Clause 23.1 requires the employee to hand over any company property to the employer on termination of employment. Property must be returned to the line manager or as otherwise directed in writing at the end of employment. Under clause 23.3 if the employee does not do so the cost of replacement items will be deducted from the employee's final salary payment.

6. The company also has a sickness reporting procedure. Section 4.1 of that procedure requires employees to contact their line manager as soon as they know they are unable to attend work. For an absence that is likely to be under seven days they must contact their line manager on a daily basis unless agreed by the line manager.

7. Although the Respondent now accepts that Mr Walker had the disabilities of dyslexia and ADHD at the relevant time, the Respondent's evidence was that nobody knew he had those disabilities until the very end of his employment. The Claimant could not remember whether he told Mr How at the start of his employment about his conditions. Mr How gave clear evidence that he did not and the Tribunal accepted Mr How's evidence. The Claimant accepted that he had not told Mr Lightowlers and that Mr Lightowlers was not aware in November 2017 that the Claimant had dyslexia or ADHD. The Tribunal found that nobody at the Respondent was aware until April 2018 that the Claimant had either of those conditions. Further, there was nothing in the evidence before the Tribunal that should have put the Respondent on notice that the Claimant had those conditions. The fact that the Respondent did not ask him to fill in a health form or questionnaire at the start of his employment was not enough to put them on notice.

8. That brings us to the events of November 2017. At that time the Respondent had agreed some re-financing with its bank and there were a number of conditions attached to that. One of those required the bank to be provided with information about asbestos at each of the Respondent's properties. A meeting took place in the Respondent's head office at Leeds in November 2017. The Claimant and Mr How were present. During the course of the meeting the Claimant emailed Mr Lightowlers about the bank's requirements. Mr Lightowlers was not happy with the content of the email and the Claimant's evidence was that he came running into the room, burst in swearing and shouting, stood about two feet away from him and verbally abused him. The Claimant says that in the course of that abuse Mr Lightowlers called him a "fucking idiot" and a "fucking moron." Mr Lightowlers accepts that he raised his voice and swore but he says that he did not swear at Mr Walker

and was not calling him any name. He says that he said, "We will all look like fucking idiots."

9. Mr How's evidence went somewhat further than that of Mr Lightowlers. He described more swearing and a greater degree of anger and hostility. He was asked whether Mr Lightowlers was directing his comments at the Claimant or calling him names. He said that in a sense it was directed at the Claimant and him, because they were the only two people in the room, but it was also directed at anybody else who could hear. It was accepted that anybody could have overheard. However, Mr How was clear that Mr Lightowlers had not been calling the Claimant names and that he had not used the word "moron." He said that Mr Lightowlers said something like, "We will all look like fucking idiots."

10. The Tribunal had to resolve what happened in the light of that conflicting evidence. We found the Claimant's evidence wholly lacking in credibility. We start with what he said in his witness statement about these events. He set out in some detail his thought process after the meeting. He described travelling up to Newcastle in his car, beginning to realise during the course of the drive how violated and humiliated he felt, and thinking about handing in his resignation but realising that he needed to meet his financial obligations and could not do so. He then described how he arrived at the hotel in Newcastle that night and set about applying for employment with other organisations. That led to an interview on 27 November 2017, which he attended. He was quite clear that the incident with Mr Lightowlers had taken place on 20 or 21 November 2017.

11. Ms Amartey asked him about this in his evidence. He confirmed again that this had all taken place before 27 November 2017, because it was Mr Lightowlers's behaviour that had prompted him to start looking for a new job, and that led to the interview on 27 November 2017. The Claimant was then shown his mileage expenses claim for November 2017. That showed that the only time he had been at head office in Leeds was 28 November 2017, which was the date when the Respondent said this incident had taken place. When he saw the claim, the Claimant accepted that the meeting in Leeds took place on 28 November 2017. Crucially, that was after the job interview on 27 November 2017. That led the Tribunal to conclude that the whole detailed account in the Claimant's witness statement of his thought process, and what prompted him to apply for a job for which he was interviewed on 27 November 2017 was not true. This was not a case of being confused about dates. It was a case of advancing a positive, detailed account that did not fit with the timings.

12. The Tribunal also took into account the fact that there has been some variation in the Claimant's description of what was said to him. In a grievance he submitted in April 2018 he did not say that Mr Lightowlers had used the word "moron", but he said that he had used the word "imbecile". During the course of cross-examination, he suggested that what had actually been said to him was that he would, "Look like a fucking idiot." That too is different from what he said in his witness statement. He could not explain sensibly to whom it was being suggested that he would look like an idiot. At another point in his evidence he said that he "took it" that the reference to looking like an idiot referred to him because he was responsible for the document.

13. Taking all of those matters into account, the Tribunal found that the words used were as described by Mr Lightowlers and as confirmed by Mr How. There was plainly wholly inappropriate behaviour by Mr Lightowlers - shouting, swearing and banging his fists on the table - but as far as the words used were concerned they were as he says they were.

14. The Tribunal was surprised by Mr Lightowlers's evidence that raising his voice in this way might be described as a legitimate part of the management tool kit. We heard evidence of

a very high turnover among managers and we also took account of Mr How's evidence. He no longer works for the Respondent. He was an extremely measured individual. He referred to concerns about the atmosphere at the Respondent. It was plain that there were real problems with Mr Lightowlers' approach and behaviour. However, the particular issue in this case is what Mr Lightowlers said to the Claimant and whether that related to his disability.

15. Having made a finding about what was said, the Tribunal noted again that at that time Mr Lightowlers was unaware that the Claimant had a disability. Further, there was nothing to put him on notice of that fact. The Claimant's evidence to the Tribunal was that there was nothing wrong with the document he had produced or the information he had provided to Mr Lightowlers. He was not saying that there was a shortcoming that was caused by or related to his disability. On the contrary, his evidence was that Mr Lightowlers simply did not understand the document and that he was at fault. So, there was nothing in the evidence to suggest that there was any link between Mr Lightowlers's behaviour and the Claimant's disability. Although in his closing submissions the Claimant referred to some of the consequences of his disability and suggested that there might be a link between that and the document he had produced, that was not the evidence he gave.

16. The Claimant accepted that he knew in November 2017 that he could bring an Employment Tribunal claim and that Employment Tribunals deal with discrimination, because he had previously brought a Tribunal claim. He was also a member of Unite the Union at that time.

17. The Claimant did not make any complaint about Mr Lightowlers's conduct to anybody, including to Mr How, whom he described as being something of a mentor to him. Nor did he lodge a grievance about what had happened. He continued to work with Mr Lightowlers and indeed from March 2018 he was line managed by him. He suggested that he was afraid to complain but the Tribunal did not accept that evidence. He had a good relationship with his line manager, Mr How, who had actually witnessed the conduct in question.

18. That brings us to the circumstances in which the Claimant came to resign in April 2018. On 18 April 2018 the Claimant wrote to Mr Lightowlers to resign. He explained that he had been offered a role closer to home that suited his career aspirations and salary requirements and gave notice of resignation. He said that he intended to undertake his duties to the best of his abilities for the period of one month's notice. He said that he had some holiday entitlement to take and suggested he take a week at an agreed time. Mr Lightowlers replied on 19 April 2018 saying that he was sorry to hear the Claimant was going and attaching a letter acknowledging the Claimant's resignation. That letter referred to the fact that the Claimant's notice period was in fact three months and referred to clause 15.1 of his contract. It confirmed that the Respondent expected him to work his three months' notice and that his last day of employment would be 18 July 2018. The letter explained that Mr Lightowlers would arrange a date to meet the Claimant to do a full handover of his work and all the company equipment.

19. The Claimant replied the following day, 20 April 2018. He said that he disagreed about the notice period and had taken advice from his trade union. He said that the Respondent could not force anyone to work for them and that if they wanted to pursue him for breach of contract that was their prerogative. He went on to say that if they did so he would refer to the events of November 2017 when he said that he had been humiliated by Mr Lightowlers and called a "moron" and an "idiot." He said that if they wanted to pursue him he would raise this issue and would also raise issues about lack of investment in the Respondent's homes and other matters. He added that he wanted to point out at this point that he suffered from a learning disability and that any discussions around breach would

centre around this. He said that he would be taking a week's leave on 30 April 2018. That was the first reference to the Claimant having a disability and was the first time any concern was raised about what had happened the previous November.

20. On the same day that he had resigned, the Claimant had accepted and signed a job offer with a new employer. He was unable to tell the Tribunal at any point in his evidence when he started work for that employer but he indicated that it was sometime in May. His evidence to us was that he told them he had a three-month notice period and had a small amount of holiday outstanding. The Tribunal found that entirely implausible. If the Claimant had told his new employer that he had a three-month notice period, it would have made no sense for him to write to the Respondent saying that he was going to work his one month's notice. Nor would it have made sense, when the Respondent wrote back to him and said that it needed him to work the three months' notice, for him not simply to agree to do so.

21. The Tribunal found that the Claimant thought he had to give one month's notice and made plans with his new employer on that basis. When he was told that he had a three-month notice period and that he was expected to work it, that led to him writing the email of 20 April 2018 referred to above. It was at that stage that he started raising concerns and referring to the fact that he had a disability. The Tribunal accepted the Respondent's submission that he was trying to use these facts as leverage to negotiate his way out of a three-month notice period.

22. Mr Lightowlers referred the Claimant's letter to Ms O'Brien in HR in case it raised a grievance. She contacted the Claimant providing him with a copy of the Respondent's grievance policy and inviting him to raise a grievance. The Tribunal saw some correspondence between the Claimant and Mr Lightowlers on 23 April 2018. In the course of it, the Claimant asked if he could re-schedule a call with Mr Lightowlers because he had to pick his children up. Mr Lightowlers replied saying, "Sure" and asking when would work for the Claimant. The Claimant said that any time the next day would be fine.

23. Mr Lightowlers also sent the Claimant an email on 23 April 2018 in response to the Claimant's email of 20 April 2018. Mr Lightowlers confirmed that the company wanted the Claimant to work his three months' notice because there were only two people in the Estates Department and it needed him to work until he could be replaced. Mr Lightowlers also said that while he was happy to approve four days' holiday for the Claimant, he could not agree to 1 May 2018 being taken as leave, because there was a pre-scheduled Estates meeting on that day and he needed the Claimant to attend.

24. The Claimant lodged a written grievance on 24 April 2018. He set out his concern about what had taken place in November and we have already dealt with that. He set out his disagreement with his notice period, saying that his contract had been signed under duress and also saying that other people had been let go on less than three months' notice recently. He also complained that he had not been given permission to take annual leave and he said that this was to care for a relative and for childcare reasons. He said that he had been reprimanded for not keeping his diary up-to-date and referred most recently to an email of 23 April 2018 from Mr Lightowlers dealing with that. He raised other matters that the Tribunal does not need to deal with.

25. The Tribunal saw the email of 23 April 2018 to which the Claimant referred. There did not seem to be anything in it that could be taken as a reprimand of the Claimant. When the Claimant was asked that question he acknowledged that there was no reprimand in the email.

26. Mr Dolman was responsible for dealing with the Claimant's grievance and they exchanged emails about it. Mr Dolman suggested that he meet with the Claimant on 1 May 2018, before or after the Estates meeting the Claimant was scheduled to attend. The Claimant replied to say that part of the grievance related to the refusal of his leave request, which included 1 May 2018, and he referred to it being unlawful to prevent carers with young children from taking leave. Mr Dolman replied saying that he had understood the Claimant had been requesting annual leave for 1 May 2018. He provided him with some information about leave for parents or carers and said that if the Claimant was referring to any of those he was happy to provide advice. He asked the Claimant to let him know that day.

27. The Claimant replied the same day, 26 April 2018. He said that the time off was to care for dependants, because he had two young children who had come down with chicken pox that day and he also had to care for a parent. He suggested that he attend the Estates meeting by conference call. Mr Dolman replied again. He asked the Claimant whether he had ever told Mr Lightowlers that he needed the leave to look after his dependants. Mr Dolman also asked Mr Lightowlers whether it would be possible for the Claimant to attend the Estates meeting by telephone. Mr Lightowlers sent Mr Dolman an email explaining that he needed the Claimant present in person, not only to deal with matters at the Estates meeting, but also to approve and review invoices. Mr Dolman informed the Claimant of this in an email dated 27 April 2018.

28. On 30 April 2018 the Claimant called in sick. On 1 May 2018, Ms Firth emailed him to ask if he was feeling better and whether he was coming to Leeds that day for the Estates meeting. The Claimant did not call or let anybody know that he would not be at the meeting, but he emailed Ms Firth at 8.30pm to say that he had been to the doctor and had been given antibiotics. He said that he would advise on a return once his infection had cleared. Ms Firth passed that information on to Mr Lightowlers. In the meantime, Mr Lightowlers had emailed the Claimant at around 6pm to tell him the outcome of some of the discussions that day about a particular project. There was nothing untoward in the content of Mr Lightowlers's email.

29. The Claimant apparently remained off sick. The Tribunal was not given any evidence that he kept in touch or informed his line manager of his absence and the reasons for it as required by the Respondent's policy.

30. The Claimant returned to work on 8 May 2018 and Mr Lightowlers emailed him mid-morning to ask him to arrange to spend at least one day in Leeds that week, because there were a number of invoice queries that needed addressing as a priority. He asked the Claimant to let him know which day he would be there. Mr Lightowlers also left a telephone message for the Claimant in brief terms asking him to call him. The following day, 9 May 2018, the Claimant emailed Mr Lightowlers at 7am apologising for his late response and asking if they could deal with the matters by phone call because he was still recovering. Mr Lightowlers replied at 8am saying that it was not clear to him if the Claimant was back at work or whether he was off sick again. If the Claimant was off sick he asked him to concentrate on recovering but to provide a medical certificate. If he was fit to work he asked him to spend a day that week in Leeds so that they could deal with the outstanding queries. The Claimant did not reply and a couple of hours later Mr Lightowlers left him a brief message by telephone asking him to call him. He emailed him again towards the close of business on 9 May 2018. He said that he was assuming the Claimant was still off sick and, given that the absence had extended beyond seven days, he asked the Claimant to provide a medical certificate. In the absence of a medical certificate he asked the Claimant to telephone him by 9am every morning to tell him whether he was still ill or was

well enough to return to work. He said that if he did not hear from the Claimant, he would call him.

31. That led the Claimant to email Mr Lightowlers at 9.45pm suggesting that messages had not come through in a rural area. He said that he had been working that day and the previous day and had had five days off absent with a chest infection. He said that in light of Mr Lightowlers's continued arrogance, bullying and harassing behaviour he was resigning with immediate effect and he said that he would send any company property in the post once he had found a courier that would transport it. Mr Lightowlers wrote to him on 10 May 2018 acknowledging his resignation with immediate effect. He reminded him that he needed to return the company's equipment.

32. On 15 May 2018 the Claimant wrote to Mr Lightowlers raising a number of queries about his pay. He told Mr Lightowlers that his company computer and other equipment was packaged and ready to be returned but said that because the company credit card had been cancelled and the company delayed in paying his expenses he was not willing to use his personal money to return it. He said that that the company should collect it by courier on Saturday 19 May 2018. He sent a further communication on 23 May 2018 to similar effect. On 23 May 2018 Mr Lightowlers wrote to the Claimant to set out adjustments that were being made to his final pay. He explained that because the Claimant had failed to return his laptop, mouse, mobile phone, security pass and credit card a deduction was being made from his final salary in accordance with his contract. He also said that there had been an overpayment for sickness absence on 30 April 2018 that was being corrected.

33. The Claimant's payslip for that month showed that he was paid £1,791.36 for 11.5 days of accrued but untaken holiday, but that a deduction of £1,535.19 was made because of an overpayment for sickness on 30 April 2018 and the cost of company property.

34. After that the Claimant continued to insist that the Respondent should arrange to collect the equipment at its cost and the Respondent continued to insist that it was his obligation to return it and that unless and until he did so the deductions would stand.

35. There was also correspondence about an expenses claim for £69.00. The Claimant wrote to Mr Lightowlers on 29 May 2018. In the course of that letter he said that he had not had the opportunity to issue his last expenses. He referred to travelling to Silver Lodge and to a claim for £69, but he did not provide information about the date to which the claim related. After that, he corresponded with Mr Dolman about it. Mr Dolman said that he had repeatedly advised the Claimant that the company would settle any outstanding expenses subject to the provision of receipts and checking that the expenses had been validly incurred. He said that he had not received an expenses form and he asked the Claimant for a copy. The Claimant emailed on 24 September 2018 to say that he did not have access to a form and said that as an ex-employee he did not have to fill one in. He said the claim was for £69 from home to Sheffield and was hardly a significant amount.

36. The Tribunal was not shown any document in which the Claimant either completed an expenses form or wrote explaining how he had incurred the expenses, on what date and doing what work.

Legal Principles

37. Harassment in employment is prohibited by s 40 Equality Act 2010. Harassment is defined by s 26 Equality Act, as follows:

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.

…

(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;

… .

38. The question whether conduct is related to a protected characteristic is not a question of "causation". Rather, the Tribunal must ask itself why the alleged harasser acted as he did. What, consciously or unconsciously, was his reason?

39. The time limits for bringing claims of discrimination in the Employment Tribunal are governed by s 123 Equality Act as follows:

123 Time limits

(1) Subject to section 140A, proceedings on a complaint within section 120 may not be brought after the end of -

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…

40. When deciding whether time should be extended, the Tribunal has a wide discretion under s 123(1)(b) to do what it thinks is just and equitable in the circumstances. The factors that are to be considered by the civil courts under s 33 of the Limitation Act 1980 in determining whether to extend time in personal injury actions may provide a helpful checklist. They include the prejudice each party would suffer as a result of granting or refusing an extension, and all the other circumstances, including the length of and reasons for the delay and the extent to which the cogency of the evidence is likely to be affected by the delay.

41. Under s 39 Equality Act 2010 an employer must not discriminate against an employee by dismissing him. That includes what is usually called a constructive dismissal, i.e. where the employee terminates the employment contract in circumstances where he is entitled to so without notice by reason of the employer's conduct. In deciding whether an employee has been constructively dismissed, the issues for a Tribunal are:

37.1 Was the employer in breach of the contract of employment?

37.2 Was it a fundamental breach going to the root of the contract, i.e. such as to entitle the employee to terminate the contract without notice?

37.3 Did the employee resign in response and without affirming the contract?

42. It is an implied term of the contract of employment that the employer will not, without reasonable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

Individual actions taken by an employer that do not by themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust and confidence, thereby entitling the employee to resign and claim unfair dismissal. The final act in such a series (or “last straw”) need not be of the same character as the earlier acts but it must contribute to the breach of the implied term.

43. Mere delay in resigning does not, of itself, amount to an affirmation of the contract. The question is whether the employee has made the choice to affirm the contract or to accept the employer’s fundamental breach and resign. The employee’s own position and the question whether he is attending work are relevant in considering whether his conduct amounts to affirmation. Where an employee resigns as a result of a last straw incident, the Tribunal must consider whether the last straw is sufficient to revive the earlier matters, taking into account the nature of any incidents, the overall time span, the length of time between the incidents and any factor that may have amounted to a waiver of any earlier breaches.

Application of the law to the facts

44. Applying those principles to the findings of fact set out above, the Tribunal turned to the issues in this case. We started with the harassment claim. Logically, the first question is whether the claim was presented in time.

45. The events complained of took place on 28 November 2017. The Claimant started early conciliation on 4 June 2018 and the certificate was issued on 4 July 2018. His Tribunal claim was presented on 13 August 2018. He did not contact ACAS within three months of 28 November 2017, so he does not benefit from any extension of the time limit for early conciliation. His harassment claim was therefore presented more than five months outside the time limit.

46. The Tribunal therefore considered whether it was just and equitable to extend time for bringing the claim. As set out above, the Claimant knew in November 2017 that he could bring a Tribunal claim because he had done so before. He was also a member of a trade union. He did not bring a claim. He suggested to the Tribunal that he was fearful of doing so, but the Tribunal noted his evidence that he had a good relationship with Mr How, his line manager at the time, and indeed regarded him as a mentor. Mr How was even present on the occasion of Mr Lightowlers’s conduct. The Tribunal did not consider that there was any basis for the suggestion that the Claimant was fearful of raising a concern with Mr How. Further, we considered that he could have brought a Tribunal claim at the time if he had chosen to do so.

47. As set out above, the Tribunal found that he only raised a complaint about Mr Lightowlers’s conduct in April 2018 when he wanted to use it in order to escape his three-month notice period. Extending time would cause prejudice to the Respondent, which would have to face a claim that it otherwise would not have to face. On the other hand, not extending time would cause prejudice to the Claimant, who would not be able to bring that part of his claim. He would, however, be able to rely on it in his complaint of discriminatory dismissal. The delay in bringing the claim is substantial, particularly in the context of a three-month primary time limit. No good reason for the delay was identified and the reason for raising a complaint in April 2018 was a self-serving one. The impact on the cogency of the evidence was limited. In all those circumstances, the Tribunal did not consider that it would be just and equitable to extend time for bringing the harassment claim. The balance lay in favour of the Respondent, given the lengthy delay for no particularly good reason and the circumstances in which the Claimant did raise a concern.

48. If the Tribunal had extended time for bringing the harassment claim, we would have found that Mr Lightowlers did engage in unwanted conduct on 28 November 2017, by shouting and swearing in the terms set out above. However, we would have found that the unwanted conduct did not relate to the protected characteristic of disability. Mr Lightowlers was unaware of the Claimant's disabilities and there was nothing to put him on notice of them. We have found that the shortcomings in the Claimant's work were not related to his disabilities. We have also found that what was said was not directed at the Claimant. It was to the effect that everyone would look stupid, because the bank's requirements had not been complied with. For those reasons the Tribunal would have found that there was no unwanted conduct related to disability and the harassment complaint would not have succeeded in any event.

49. We turn then to the question of discriminatory dismissal. The short answer is that, in the absence of any prior discrimination, no complaint of discriminatory dismissal can succeed. It may be that Mr Lightowlers's conduct on 28 November 2017 was conduct without reasonable and proper cause that was calculated or likely to undermine mutual trust and confidence. But it was not discriminatory conduct.

50. In any event, the Tribunal found that the Claimant affirmed the contract after the incident on 28 November 2017. He continued to work without any complaint at all until April 2018, when he obtained new work and resigned. Continuing to work for almost five months without referring to the events of 28 November 2017 at all amounted in the Tribunal's view to an affirmation of the contract. The Claimant was choosing to continue with the contract.

51. The Claimant said that he was entitled to resign with immediate effect on 9 May 2018 because between his first resignation and 9 May 2018 the Respondent committed further fundamental breaches of contract. The Tribunal found that there was no conduct, whether by itself or taken together, that was calculated or likely to undermine mutual trust and confidence during that period.

52. The Claimant said that Mr Lightowlers had been chasing him about his sickness absence and harassing him about that. The Tribunal did not accept that characterisation of what was taking place. As the findings of fact make clear, the Claimant was not keeping his line manager informed about his absence, as he was required to do. Mr Lightowlers was making entirely legitimate enquiries about that. The Claimant did not suggest at the time that his absence was related in any way to a disability. He said that he had a chest infection.

53. The Claimant also complained about being required to attend the meeting in Leeds on 1 May 2018. As set out above, his contract said that he had to agree in advance the dates of his annual leave. The Respondent was entitled to refuse permission to take leave on a particular day. This meeting had been in the diary for some time. The Claimant accepted that he always attended the Estates meetings in person. As the correspondence made clear, it was not only the business of the Estates meeting that required the Claimant's personal attendance, there were also invoices to be cross-referred to the computer system. The Tribunal was quite satisfied that there were business reasons for refusing the Claimant's request to take annual leave on 1 May 2018. The Claimant then suggested that he needed the leave to care for his children or for his parents. Mr Dolman immediately sent him some information and took steps to try and address the issue with the Claimant. In the event, it seems to have been superseded by his being off sick. No part of that was conduct, without reasonable cause, that was calculated or likely to undermine mutual trust and confidence.

54. Therefore, when the Claimant resigned for the second time, there had been no further conduct capable of amounting to or contributing to a breach of the implied term of mutual trust and confidence, and nothing capable of reviving the previous breach (after which the contract had been affirmed). As such, there was no constructive dismissal, never mind a discriminatory dismissal.

55. The Tribunal then turned to the claim of breach of contract/unauthorised deduction from wages. The Claimant was credited with 11.5 days' accrued holiday, but a deduction was made because he had not returned company equipment. The Tribunal found that the deduction was authorised by the written terms of his contract. Under those written terms it was his duty to return the equipment to the Respondent, and the Respondent was entitled to deduct the cost of replacing that equipment if he did not do so. The Claimant has made much of the difference between the value of new items and the value once they have depreciated, but the contract allows the company to deduct the cost of replacing them and the Tribunal was satisfied that this must mean with new items. As far as the claim for expenses is concerned, the Respondent was only obliged to pay the Claimant his expenses if he put in an expenses claim. He did not do so, either on the correct form or in a different format but providing the necessary information. The claims for nine days' holiday pay and £69 expenses therefore do not succeed.

Employment Judge Davies
13 March 2019

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