Case Number: 2500712/2017

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		***Respondent***
Mr T Warren	**AND**	EE Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: North Shields **On:** 8, 9 and 10 January 2018

Before: **Employment Judge A M Buchanan**

Non Legal Members: **Mr R Dobson**
Mr M Ratcliffe

Appearances

For the Claimant: **Mr Richard Owen – Gateshead CAB**

For the Respondent: **Mr Paul Sangha of Counsel**

JUDGMENT

JUDGMENT having been sent to the parties on 17 January 2018 and written reasons having been requested in accordance with Rule 62(3) of Schedule I to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the following reasons are provided:

REASONS

Preliminary Matters

1. By a claim form filed on 18 July 2017 supported by an early conciliation certificate on which day A was shown as 24 March 2017 and day B as 24 April 2017, the claimant brings to the Tribunal claims of disability discrimination and unfair constructive dismissal.

2. The response from the respondent filed on 21 August 2017 denied liability to the claimant.

3. A Private Preliminary Hearing ("the PPH") took place on 19 September 2017 when orders were made to bring this matter on for final hearing. Those orders included a requirement that the parties agree and file a list of issues arising in respect of the claims advanced. The issues provided by the parties at that stage relating to a claim of direct disability discrimination and unfair constructive dismissal did not appear to reflect the claims which were advanced.

4. Further information in respect of the claims advanced was filed by the claimant on 23 October 2017 and the respondent filed an amended response on 6 November 2017.

Witnesses

5. During the hearing we heard evidence from the claimant who called no other witnesses. For the respondent we heard from Barry Stonebanks ("BS") the claimant's line manager for some of the relevant time, from Pamela Young ("PY") the claimant's line manager at other relevant times, from Lee Taylor (LT") who dealt with a grievance filed by the claimant dated 14 November 2017 and from Catherine Hancock ("CH") who dealt with an appeal dated 29 December 2017 filed by the claimant against the grievance outcome.

Documents

6. The Tribunal had before it an agreed bundle of documents extending to some 537 pages. Any reference to a page number in these reasons is a reference to the corresponding page within the agreed bundle.

The Claims

7. The claims before the Tribunal were as follows:

7.1 Claim of harassment related to disability relying on section 26 and section 40 of the Equality Act 2010 ("the 2010 Act").

7.2 Claim of discrimination arising from disability relying on section 15 and section 39 of the 2010 Act.

7.3 Claim of disability discrimination by failure to make reasonable adjustments relying on sections 20 and 21 and schedule 8 of the 2010 Act.

7.4 Claim of ordinary unfair constructive dismissal relying on section 95(1)(c) and sections 94 and 98 of the Employment Rights Act 1996 ("the 1996 Act").

The Issues

8. The parties failed to provide a full list of issues and the following issues were identified by the Tribunal at the outset:

The Disability Discrimination Claims

8.1 The respondent had conceded at the PPH that the claimant was a disabled person at the material time for the purposes of section 6 of the 2010 Act. The impairment was not identified. In contradiction to that position, the respondent denied the claimant was a disabled person in the amended response filed on 6 November 2017 at paragraphs 29 and 30 of section 5. At the outset of the hearing before this tribunal, the concession in respect of the claimant's disabled status was confirmed and the impairment accepted as amounting to a disability was an impairment of the claimant's back.

8.2 Did the words used by Emma Ferries (EF") to the claimant at the end of June 2016 amount to an act of harassment related to the claimant's disability contrary to section 26 of the 2010 Act? In the alternative was this unfavourable treatment because of something arising in consequence of the claimant's disability contrary to section 15 of the 2010 Act?

8.3 Was the treatment of the claimant by BS in respect of his return to work after a period of illness from June 2016 until August 2016 an act of harassment related to the claimant's disability contrary to section 26 of the 2010 Act? In the alternative was this unfavourable treatment because of something arising in consequence of the claimant's disability contrary to section 15 of the 2010 Act?

8.4 Did the respondent fail to provide a wireless headset for the use of the claimant on his return to work in August 2016? Was this a failure to make a reasonable adjustment contrary to section 20(5) of the 2010 Act?

8.5 Did the imposition of a stage 1 sickness absence caution on the claimant by the respondent on 23 August 2016 amount to unfavourable treatment contrary to section 15 of the 2010 Act?

8.6 Did PY make a remark to the claimant on 8 October 2016 after he had an accident with his chair and, if so, what was said? Did what was said amount to an act of harassment related to the claimant's disability contrary to section 26 of the 2010 Act? In the alternative was this unfavourable treatment because of something arising in consequence of the claimant's disability contrary to section 15 of the 2010 Act?

8.7 What information did PY convey to the occupational health team in respect of a referral arising out of the said accident on 8 October 2016? Did what was said amount to an act of harassment related to the claimant's disability contrary to section 26 of the 2010 Act? In the alternative was this unfavourable treatment because of something arising in consequence of the claimant's disability contrary to section 15 of the 2010 Act?

8.8 Did the imposition of a stage 2 sickness absence caution on the claimant by the respondent after a meeting on 2 December 2016 amount to unfavourable treatment contrary to section 15 of the 2010 Act?

8.9 Did the manner in which the respondent dealt with a grievance filed by the claimant on 14 November 2016 amount to an act of harassment related to the claimant's disability contrary to section 26 of the 2010 Act? In the alternative was this unfavourable

treatment because of something arising in consequence of the claimant's disability contrary to section 15 of the 2010 Act?

8.10 What support (if any) did the respondent give to the claimant whilst the claimant was away from work ill during the period of the grievance and a subsequent unsuccessful appeal which was notified to the claimant by letter on 27 February 2017? Did the respondent's conduct in that period amount to unfavourable treatment because of something arising in consequence of the claimant's disability contrary to section 15 of the 2010 Act?

Unfair Constructive Dismissal Claim

8.11 Did the conduct of the respondent towards the claimant amount to a breach of the implied term of trust and confidence? Did the respondent without proper and reasonable cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant?

8.12 If so, did the claimant affirm the contract before resigning?

8.13 If not, did the claimant resign in response to the respondent's conduct? Was it a reason for the claimant's resignation? – it need not be the reason.

Findings of fact

9. We have considered the evidence given to us orally and in writing and we have considered the documents to which we were referred. Having done so, we make the following findings of fact on the balance of probabilities:

9.1 The claimant worked for the predecessor of respondent between 1999 and 2006 when he was made redundant. He returned in 2009 and continued then until he resigned on 24 March 2017 and at that time he was a team leader working in the loyalty, retention and broadband sales section of the business and he had been responsible also for two teams of apprentices at sometime during that last period of his employment.

9.2 The claimant had an accident in Greece in 1995 as a result of which he damaged his back. That condition recurred from time to time and the respondent accepts that the claimant was a disabled person for the purpose of Section 6 of the Equality Act 2010 at all material times. The material time for the purpose of this claim effectively is from June 2016 until the resignation in March 2017.

9.3 The claimant was from work away ill by reason of his back condition between the 9 May 2016 and 3 June 2016 and he returned on a phased return on 3 June 2016 which was due to last some four weeks. During the period of the phased return, he did not work a full day nor did he carry out all his duties: they were adjusted and he particularly did not take up duties which required him to sit for any length of time. Over that period the claimant did enjoy a gradual improvement of his symptoms.

9.4 The first incident of relevance for the purposes of these proceedings was an event that occurred on Monday 27 June 2016 and was recorded at paragraphs 4, 5 and 6 of

the claimant's witness statement. This incident occurred during the working day when the claimant had approached BS and a Stuart Ellis to have a conversation in the workplace close to where EF, who was the senior manager on site, was sitting. During the course of the claimant's conversation with BS and Stuart Ellis, EF interrupted and said "*Because of you that team has had no cover for 4 weeks. If you can't do the job you shouldn't be at work. If this continues I will have to manage you on unable to fulfil duties of the role".* The claimant tried to make light of the remark and said he would call HR to which EF replied: "*Ring them, we are running a damned business here".*

9.5 We accept the claimant's evidence as to what was said on that occasion. We have balanced the fact that it is clear to us that the claimant has rehearsed that event in his mind many times since it occurred and that as a result the exchange has taken on in the mind of the claimant a significance and importance that it did not have. Notwithstanding the possibility of exaggeration, we accept the evidence of the claimant as to what was said. We did not have evidence from EF. We did have evidence from BS but he had no recollection of the exchange and so did not assist us. We have taken account of the fact that the claimant raised a grievance about this exchange some months later and EF was interviewed about it and herself accepted that she had said at least some of the things alleged by the claimant. That gives us further basis and justification for our finding that EF did say that which the claimant asserts she said.

9.6 As a result of that exchange, the claimant was upset and left work early on 27 June 2016 giving pain in his back as the reason. On the following day the claimant telephoned BS and we find a note made by BS of the conversation at pages 128/129. We accept that note of the conversation as accurate and it is clear the claimant made no mention to BS on 28 June 2016 of the exchange with EF.

9.7 The claimant was away from work as a result of his back pain from 27 June 2016 until he returned to work on 6 August 2016.

9.8 On 1 July 2016 there was a Display Screen Equipment Workstation Assessment carried out (pages 130-132) and that assessment, which arose as a result of the claimant's absence from work in May-June 2016, recommended that the claimant should have an RH 400 ergonomic chair for his use in the work place and there is also reference (page 131) in that assessment to the effect that the claimant had been recommended a wireless headset by occupational health "*to help him remain mobile when call listening and needing to be logged in".* The call listening duties of the claimant were a small part of his duties.

9.8 Absence review meetings with the claimant took place regularly and in particular there were meetings between the claimant and BS on 8 and 14 July 2016. On 14 July 2016 the claimant told BS that he did not require any further support from the business and that he would return to work as soon as he was able. On the following day 15 July 2016 (page 139,) BS placed the order for the blue tooth headset. We accept that BS chased up that order on 1 August 2016 (page 143).

9.9 The claimant was seen on 19 July 2016 by Doctor Turley, an Occupational Health ("OH") Physician, instructed by the respondent and the resulting report (pages 141/142) was produced on that same day. The salient part of the report notes:
"*Based on the information available to me, Mr Warren is currently in the final stages of*

recovery from an acute episode of mechanical back pain. I expect that he will reach a point where he is fit to return to work with support and adjustment in the next 2 weeks. My expectation is that he will make a complete recovery from this phase of difficulty and not experience any significant residual disability". The report went on to indicate steps which could be taken to support and facilitate a return to work and those steps included a phased return over a four week period and the provision of a wireless headset.

9.10 On 6 August 2016 the claimant returned to work and a meeting (documented at page 144/145) took place between the claimant and BS and PY. At that meeting the claimant indicated that he was fully fit for work and did not need a phased return and that he was resuming health fitness including a four mile run that night. Thus the claimant returned to the workplace and continued to work full time with his duties still somewhat adjusted until he went off on holiday in the middle of September 2016.

9.11 In the period leading up to the claimant returning to work on 6 August 2016, we accept that BS did make reference to a possible phased return to work for the claimant. That matter arose out of the OH assessment on the claimant dated 19 July 2016 and we find that there was nothing in any way inappropriate in the content and manner of the conversations in which BS raised that question.

9.12 We conclude that BS did hand to the claimant a bluetooth headset for his use and BS did so in the period which began on 6 August 2016 and ended when the claimant went away on holiday in the middle of September 2016. In reaching this conclusion we prefer the evidence of BS to that of the claimant. BS gave us clear evidence which was not damaged in cross examination to the effect that he did hand the claimant a headset and we are supported in that conclusion by the clear reference in the documents to that headset being ordered. We accept that there may have been a delay in delivery of the actual headset ordered for the claimant but we accept the evidence of BS that he obtained another headset from a Mr Mooney and handed that over to the claimant. We accept that the headset had not been delivered by 23 August 2016 but conclude it was delivered shortly after that.

9.13 By a letter dated 16 August 2016 (pages 146/7) the claimant was brought to a so called "stage one sickness meeting" under the terms of the sickness policy of the respondent and that was because of five periods of absence which the claimant had had beginning on 26 October 2015 and going through until the absence which began on 28 June 2016 to which we have already referred. The meeting took place on 23 August 2016. Minutes of that meeting were taken (pages 153/6) and were not challenged by the claimant. We accept that at the end of the meeting the claimant indicated that he would not be appealing the decision to impose a stage one sickness absence caution and that he understood the rationale for it. Indeed in giving evidence before us, the claimant made the same statement and same concession to the effect that he understood the reason why the stage 1 caution was imposed and accepted it. The claimant did not appeal the warning.

9.14 We move onto the period in mid-September 2016 when the claimant went away on holiday for two weeks and was due to return on 4 October 2016. In fact on that day the claimant was ill and was absent from work by reason of the "flu" and he did not return to work until Monday 10 October 2016.

9.15 On that day we find that the claimant went into the work place and exchanged pleasantries with his colleagues including EF but around 11am an unfortunate incident took place when the claimant sat down on the ergonomic chair which he had been provided with by the respondent to assist him with his back condition. The claimant sat back in the chair but found it tilted back much further than he had expected and anticipated and as a result he damaged his back. The claimant felt it necessary to go off to hospital but not before he completed with BS an accident report on the online reporting system.

9.16 We find that on that day the claimant reported the incident to PY and in the ensuing conversation PY did use the words to the effect "*did you not check the chair before you sat on it?".* We conclude that that was an entirely appropriate remark to make and said in a supportive and friendly way and we do not attribute to that remark the adverse criticism of his actions which the claimant himself has attributed to it. We conclude that the claimant did not see anything wrong with the remark when it was made but he has dwelt on the matter over a long period of time and as a result has made much more of that incident than it merits. We see ample evidence before us of the supportive relationship between the claimant and PY. We have had particular regard to her notes of meetings and conversations with the claimant subsequently as the year went on and indeed the text messages which passed between them in October 2016 through to March 2017 and beyond which evidence full support of the claimant by his line manager. This supports us in our conclusion that the remark made by PY was innocuous and certainly not critical of the claimant.

9.17 When the claimant had completed his visit to the hospital at around 3.30 pm that afternoon, he sent a text message to PY (page 478) in which he sets out that he has aggravated his previous injury and that he has whiplash. The message reads: "*Hiya am out, have aggravated sacroiliac injury and have whiplash. I've been given nefopam and have to make emergency appointment with go in morning after the event faxed over paperwork for emergency physio"* (sic).

9.18 As a result of that incident the claimant was referred to OH by PY and the occupational health referral is to be found at pages 159a-c. We have noted what that referral says and we see at page 159a PY states:
"*Tom has returned from 2 weeks holiday and then 1 week sick (due to a cold). When Tom sat on his ergonomic chair he has advised it tipped back causing whiplash to his neck and aggravating his back".*
On page 1590b we see a further comment:
"*Tom has recently undertaken another self employed role selling bric a brac on a market on Sunday. Since June Tom has been absent numerous times due to a bad back and again has gone off on Monday due to sitting on a chair which has leant too far back causing whiplash and aggravating his back".*
We have considered those remarks in the context of what occurred on 11 and 12 October 2016 and we find nothing inappropriate or improper in the use of the word *"whiplash*" and we do no see any attempt by PY to discredit the claimant in seeking to suggest that he had self diagnosed whiplash: there is no suggestion of that in the papers that we have seen. We have considered the comment in relation to the claimant's role in the market which the claimant sought to suggest was designed to paint a poor picture of him. The claimant himself accepted in evidence that in fact that comment was not made to discredit him but made in order that the OH team could

consider whether a standing desk for the claimant might be a reasonable adjustment. We see nothing inappropriate in the way that that referral was phrased and we do not attribute to it any criticism of the claimant by PY as the claimant at one time sought to suggest.

9.19 The resulting OH report is dated 14 October 2016 and is found at pages 160 to 162 and we have noted all that is said in that report. There is reference to the claimant's previous psychological ill health and there is also reference to a phased return being necessary as and when the claimant becomes fit to return to work which was hoped for at the expiry of his then current fit note on 26 October 2016. In fact the claimant did not return to work after the incident on 10 October 2016 up until the date of his resignation in March 2017.

9.20 On 24 October 2016 a telephone absence review meeting took place between the claimant and PY (pages 163/164) and for the first time we see reference being made to EF and the incident in June 2016 (then some four months ago) and the claimant expressed his unhappiness at the way EF had spoken to him on that occasion. The claimant also complained that he saw comments made by PY in the OH referral as being an indication that she felt the incident on 10 October 2016 and the resulting absence were staged. The claimant indicated that he did not want any support from PY in relation to resolving the EF issue but that he wanted to seek external advice before progressing with a grievance. The note concludes:
"Before we had this discussion, Tom had received some distressing news regarding a friend's pet. I advised him to reflect on our conversation today and we'd revisit once Tom was in a better space".

9.21 The next matter of importance is the fact that on 2 November 2016 the claimant and PY had a face to face sickness absence review meeting recorded at pages 168/169. The claimant indicated that he did not wish to have any additional support from the respondent over and above that which was already being provided. In addition the claimant indicated that he was putting in a grievance but he did not wish to discuss the matter with PY.

9.22 On 14 November 2016 the claimant raised a grievance which we see at pages 173- 176. The first substantive matter raised was the incident with EF on 27 June 2016. The claimant set out his feelings of confusion embarrassment and anger about the incident. The claimant explained that that incident had led him not to accept an offer of a phased return from his absence which began on 27 June 2016 "*because of the way I was humiliated on the sales floor in front of him and also one of our sales advisors last time and also because my back felt good enough....I subsequently returned to work on a full time basis".* The claimant raised issues about the content of the OH referral on him by PY after the incident with the chair on 10 October 2016 and suggested that "*the comments were an attempt to tarnish my credibility, discredit the accident and attribute the blame elsewhere".* The claimant complained that he was being asked to return to work again on a phased return and for a second time "*I'm unable to stop worrying about being managed out of the business and ridiculed in front of my colleagues and again find myself in a position where I am not able to follow the independent advice from medical professionals under threat of bullying and ultimately my job".* The claimant then raised issues about the conduct of EF towards another colleague. The claimant raised an issue about not having received feedback in respect of his performance in a process

called "*Raising the Bar*" from May 2015. The letter concludes that BS had been compassionate and supportive to the claimant throughout periods of back related sickness and that BS was "*a shining example of a great operations manager"*. The claimant also stated that after internal investigations had been concluded he intended that the elements of his complaint in respect of unlawful behaviour should be considered by an external tribunal.

9.23 The claimant remained away from work and the reason for his absence on fit notes changed on 15 November 2016 from "low back pain" to "stress at work" and that remained the reason for absence until the point of the claimant's resignation.

9.24 Running alongside the grievance process was the continuing sickness absence management process. That led to a meeting between the claimant and BS on 2 December 2016 which was a Stage 2 Sickness meeting. The minutes of that meeting (pages 214-219) were not challenged by the claimant. The outcome of the meeting was to award the claimant a stage 2 sickness caution "*due to the volume of days and the impact this has on the department and the business. You have 7 days to appeal once you receive the letter".* The claimant did not appeal that outcome and commented in the meeting: "*I don't see the need to appeal. I understand the procedure*". The claimant made it clear to the respondent that he did not wish to be referred to occupational health (page 211) nor did he wish to have an independent medical examination (page 200).

9.25 On 2 December 2016 the claimant met with LT who had been appointed to investigate the grievance. The meeting was carefully minuted (pages 221-230) and demonstrated a careful investigation of the matters raised by the claimant in his grievance principally against EF and PY. After that meeting LT interviewed all relevant witnesses. He did so with conspicuous thoroughness preparing for each meeting by setting down in writing the questions he needed to raise with the various interviewees.

9.26 On 8 December 2016 LT interviewed EF (pages 231-236), then on 9 December 2016 there was an interview (pages 237-245) with BS, on 13 December 2016 an interview with PY (pages 249-252) and then finally on 16 December 2016 an interview with Stuart Ellis (pages 253-254).

9.27 On 23 December 2016 LT finalised his conclusions in relation to the matters raised by the claimant and sent out to the claimant the outcome letter (pages 256-260). It is of note that the complaint about the EF incident is upheld in the following terms: *"Although there is an element of disagreement on the exact wording used, my investigations show that there was an incident between Emma and yourself and therefore I uphold your grievance. This will be picked up by management as appropriate".* Other aspects of the grievance were not upheld. The question of the second suggested phased return to work was considered but the grievance was not upheld. The outcome recorded: "*I do not uphold this element of your grievance. Whilst I acknowledge you felt nervous about a phased return to work there was the opportunity to address the situation with Emma and it is disappointing you chose not to engage in this in an attempt to resolve matters".*
The grievance in relation to the wireless headset was not upheld as it was concluded (as we conclude) that a headset had been made available for use by the claimant.

The grievance in relation to the reference in the OH referral to "*whiplash"* by PY was not upheld as it was noted the claimant had used that phrase in a text message he had sent to PY.
The grievance in relation to the reference by PY in the OH referral to the claimant's second job at the market was not upheld and it was stated:
"...I do not have concerns over either issues. Should an employee have a second job which may be impacting on their health or ability to attend work in their primary role then I do not feel it is inappropriate to query this in an OH referral".
The grievance in respect of PY's comment in relation to checking the chair on 10 October 2016 was not upheld: *"We work in a busy volume environment and it is not beyond the realms of possibility that the chair could have been moved or adjusted in your absence. I do not feel it is unreasonable that Pam queried whether you had checked over the chair upon your return..".*
The grievance in respect of lack of training in the use and adjustment of the ergonomic chair was not upheld.
The grievances in respect of the suggestion that the claimant enter mediation with EF and/or PY and in respect of a further OH referral were not upheld.

9.28 The claimant appealed the grievance outcome by email dated 29 December 2016 (pages 262-264).The claimant did not appeal the EF outcome as he understood he could not appeal a matter which had been upheld. All other outcomes were appealed and in addition the claimant mentioned that the matters he had grieved in respect of "raising the bar" feedback had not been covered in the grievance outcome. In addition the claimant commented that when he was away from work due to his back condition he was receiving calls numbering 2-3 per week from BS to check on his position but when the diagnosis became stress at work the number of calls greatly decreased. He continued: "*The point of contention is: was I being over-managed for my back or shown a distinct lack of care when going through a hugely emotional and stressful time? After everything outlined in my initial grievance I'm amazed this continues, hidden in broad daylight. Upon reflection of the whole series of events and receipt of counsel, as the business was aware of my time off being down to the reoccurrence of an historical injury that has caused me impairment, I believe I have been discriminated against because of a disability".*

9.29 A meeting took place on 31 January 2017 between the claimant and CH who had been asked to deal with the grievance appeal. The meeting was minuted (pages 359-367). A letter was sent to the claimant dated 27 February 2017 (pages 441-445) giving the outcome of the appeal which was partially upheld. It was suggested that there should be a change of reporting line for the claimant on his return to work. The appeal in respect of the headset was allowed although it was noted the claimant did not consider that matter a major point in itself. It was noted that the claimant had not referred to "whiplash" at any time before that diagnosis was given to him. Other points of the appeal were not upheld. We find that to be a reasonable way to deal with matters raised by the grievance appeal.

9.30 On 24 March 2017 the claimant emailed his resignation (pages 460-462) to PY and others. The claimant resigned with 30 days' notice. The claimant referred again to the EF incident and his resultant feelings of being bullied humiliated and threatened with capability management. He also referred to being made to feel he had falsified the incident on 10 October 2016 in relation to the ergonomic chair. The claimant further

referred to a lack of invitations to face to face meetings with PY since late December 2016 and continued: *"...and having just received notification of my SSP expiring I have no option but to resign".* The claimant went on to assert that he had been directly discriminated against because of his disability and that he had been constructively dismissed. The letter continued by reference to the fortnightly calls from PY since the end of 2016 incident and continues: "*Whilst Pam has been lovely as ever and ensured (sic) me I would be welcome back, I have had no goals or suggestions from the business to support this. ....I have had no support during the grievance and appeal process, I was the victim in this circumstance yet was left to find my way through the mess alone....".* The claimant indicated he would be instituting proceedings and would share his story at the conclusion of the Tribunal with the national press and social media.

9.31 The final matter of our concern has been to look at the contact between the claimant and his line managers in the period from 10 October 2016 through to the resignation on 24 March 2017 and in particular PY's conduct which is criticised by the claimant as being peremptory and mechanical in respect of the questions she asked of him. We conclude first of all from PY's oral evidence and from documentary evidence completed at the time that there was ample contact with and support of the claimant during this period of time. We have perused the notes of meetings made by PY (pages 255 and 271 –examples) and also reviewed the text messages passing between the claimant and PY (pages 483-504) which clearly evidence contact which was far beyond the mechanical and routine contact which the claimant asserted it to be. They are not messages indicative of a relationship which is a mechanical tick box relationship but there is clear evidence of conversations and information being exchanged about matters which go beyond that of a normal, routine working relationship. We conclude that there is clear evidence of more than reasonable support of the claimant during that time and we take account of claimant's position that he did not wish to have further medical referrals or OH referrals and that position was respected by the respondent whilst the grievance process and the appeal were ongoing.

Submissions

Respondent

10. For the respondent Mr Sangha made oral submissions which we briefly summarise:

10.1 The words used by EF to the claimant cannot be said to have been related to his disability. There needs to be consideration given to what was in the mind of EF when she spoke to the claimant. The Tribunal should look at the interactions between the claimant and EF prior to and after the June 2016 incident. It was suggested that the remarks showed the frustration of one manager about how well things were being dealt with on the claimant's team and that the words were spoken without animosity. The Tribunal should consider was the claimant's disability in her mind or was she concerned about the phased return? The Tribunal must consider the words used objectively and whether the claimant could reasonably consider the words used as words of harassment. It was suggested that the claimant had gone over that incident in his mind resulting in him making more of it than he did at the time it occurred. He did not report the matter promptly and there was a very significant delay before the matter was even raised. The claimant did not feel about the incident when it occurred as he does now.

The incident was neither unwanted nor unfavourable treatment. Any claim arising out of the June 2016 incident is out of time for remedy as an act of discrimination and time should not be extended.

10.2 It was submitted that there was no evidence of harassment or unfavourable treatment in respect of the claimant's return to work in June 2016. There had been no failure to provide a wireless headset to the claimant which was not a major feature of the claimant's case in any event as he admitted. There was neither harassment nor discrimination in respect of the imposition of stage I and stage II sickness absence cautions. The claimant accepted both cautions were appropriate and did not appeal either. The minutes of the meeting show that he accepted the cautions. It was submitted that the comments made by PY on 8 October 2016 were not made in an unpleasant manner or in an accusatory tone. They were not totally unnecessary sarcastic or facetious remarks as the claimant had described them at various times. There was nothing remarkable about the occupational health referral in October 2016. All the matters raised in that referral were relevant and nothing was inappropriate. The grievance raised by the claimant was appropriately dealt with and indeed upheld in part and neither the grievance hearing nor the appeal hearing and their respective outcomes were acts of discrimination.

10.3 It was submitted that the respondent clearly had not committed a fundamental breach of the claimant's contract of employment. In respect of the EF incident the matter had occurred in June 2016 and was not complained about for over four months. If that incident was a breach of contract, the breach had been affirmed. It is not part of the claimant's case that he ever raised questions either formally or informally about what action was taken with EF in respect of the June 2016 incident. The claimant had wanted the incident to be marked and it was marked and the respondent had no reason to think the claimant required anything else. The respondent offered mediation and other steps to the claimant but none of them were taken up. It was submitted that the respondent was not in breach of contract and that the claimant had no reason to resign when he did.

Claimant

11 .For the claimant, Mr Owen made oral submissions which we briefly summarise:

11.1 It was submitted that the June 2016 incident with EF was a very serious incident. If that incident is out of time then in the absence of any medical evidence to explain the long delay in bringing proceedings, then it was accepted that time should not be extended. However, it was submitted that there were later incidents of discrimination which amounted to a series of actions to which the June 2016 incident could be attached.

11.2 The claimant was very passionate about his job and his duties and it is clear that the June 2016 incident had a very profound effect on him leading him to a very difficult decision to resign. The Tribunal was asked to accept that the claimant gave his evidence in an honest way.

11.3 The evidence of the claimant very clear as to the EF incident and his version of events should be accepted. The actions of EF were clearly unwanted conduct by the

claimant and because it related to the phased return to work, it was related to the claimant's disability which had caused the absence which led to the phased return. It was submitted that the words of EF clearly showed that she intended to violate the claimant's dignity or create the prohibited environment but, if not, it was clearly reasonable for the claimant to have considered the words to have had that effect.

11.4 It was submitted that the incident in relation to the chair in October 2016 was an act of harassment and not discrimination arising from disability and that the claimant's version of events should be preferred.

11.5 It was accepted that the claim in relation to the occupational health referral was not the strongest of claims but it did continue a series of acts of discrimination.

11.6 It was submitted that the failure to provide the headset was an act of discrimination being a failure to provide an auxiliary aid.

11.7 It was submitted that the continuing theme throughout the time of the claimant's absence was the lack of support provided to him. Everything leads back to the occupational health referral and the incident with EF in June 2016. When all is looked at and taken together, it is clear that the respondent was in breach of the implied term of trust and confidence and that the claimant was entitled to resign and treat that resignation as a dismissal.

The Law

The claim of failure to make reasonable adjustments

12.1 The Tribunal has reminded itself of the relevant provisions of section 20 and 21 and Schedule 8 of the 2010 Act which read:

Section 20:

"(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.....

(5) The third requirement is a requirement, where the disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid".

Section 21

(1) A failure to comply with the first second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person
(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purposes of establishing whether A has

contravened this Act by virtue of subsection(2): a failure to comply is , accordingly, not actionable by virtue of another provision of this Act or otherwise.

Schedule 8

The Tribunal has had regard to the relevant provisions of Schedule 8 of the 2010 Act and in particular paragraph 20 which reads:
" (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know...
(b)….that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement".

12.2 The Tribunal has reminded itself of the guidance in respect of the burden of proof in claims relating to an alleged breach of the duty to make reasonable adjustments in the decision in **Project Management Institute -v- Latif 2007 IRLR 579** where Elias P states:

"It seems to us that by the time the case is heard before a Tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative……that is why the burden is reversed once a potentially reasonable adjustment has been identified…..the key point…is that the claimant must not only establish that the duty has arisen but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made……we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not."

Discrimination arising from disability – section 15 of the 2010 Act.

12.3 The Tribunal has reminded itself of the provisions of **section 15 of the 2010 Act** which read:

"(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arises in consequences of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Sub-Section (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

12.4 We remind ourselves that in considering a claim pursuant to section 15 of the 2010 Act, we need to consider what breach of section 39 of the 2010 Act is established, whether there was unfavourable treatment of the claimant, whether there is something arising in consequence of the disability and finally whether the unfavourable treatment was because of the something arising from the disability. In respect of the meaning of

unfavourable in section 15 we noted **Trustees of Swansea University Pension & Assurance Scheme –v- Williams 2015 UKEAT/0415/14** and we have noted in particular the guidance:

"I accept Mr O'Dair's submission that it is for a Tribunal to recognise when an individual has been treated unfavourably. It is impossible to be prescriptive of every circumstance in which that might occur. But it is, I think, not only possible but necessary to identify sufficiently those features which will be relevant in the assessment which this recognition necessarily involves. In my judgment, treatment which is advantageous cannot be said to be "unfavourable" merely because it is thought it could have been more advantageous, or, put the other way round, because it is insufficiently advantageous. The determination of that which is unfavourable involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life. Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be".

The claim of harassment – section 26 of the 2010 Act

12.5 The relevant provisions of section 26 of the 2010 Act provide:

(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;

12.6 In relation to what is required to establish a case of discrimination by harassment the Tribunal has reminded itself of the guidance given by Underhill J in **Richmond Pharmacology Limited –v- Dhaliwal 2009 IRLR 336** and in particular that the Tribunal should focus on three elements namely:

(a) unwanted conduct
(b) having the purpose or effect of either violating the claimant's dignity or creating an adverse environment for her and
(c) being related to the claimant's disability or P's disability or both.

Time Limits in the 2010 Act

12.7 The relevant provisions of section 123 of the 2010 Act provide:

(1) 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.

(3) For the purposes of this section--
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something--
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

12.8 In relation to the time limit for the institution of claims the Tribunal reminds itself that the time limits found in the 2010 Act are meant to be observed and there is no presumption that time limits should be extended unless the claimant convinces the Tribunal that it is just and equitable to extend time. The Tribunal notes that in deciding whether or not to extend time, regard should be had to the checklist contained in section 33 Limitation Act 1980 and in particular the Tribunal should have regard to the length and reason for delay, the extent to which the respondent has cooperated with request for information, the promptness with which the claimant acted once the cause of action was plain to her, the steps taken by the claimant to take advice and the extent to which the cogency of the evidence is likely to be affected by any delay.

Burden of Proof and section 39 of the 2010 Act

12.9 The Tribunal has reminded itself of the relevant provisions of **section 136 of the 2010** Act which read:

"(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 sub-Section (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……..."

12.10 The Tribunal has reminded itself of the relevant provisions of **section 39 of the 2010 Act** and in particular:

(2) An employer (A) must not discriminate against an employee of A's (B)-
…
(c) by dismissing B

(d) by subjecting B to any other detriment……
(5) A duty to make reasonable adjustments applies to an employer…
(7) In subsections (2)(c)… the reference to dismissing B includes a reference to the termination of B's employment-…
(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice".

The claim of ordinary unfair dismissal – Section 98 of the 1996 Act

12.10 The Tribunal has reminded itself of the provisions of Section 95(1)(c) of the Employment Rights Act 1996:

"For the purposes of this part an employee is dismissed by his employer if and only if …

(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."

12.11 The Tribunal has noted the classic definition of constructive dismissal by Lord Denning was in **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221:**

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, he terminates the contract by reason of the employers conduct. He is constructively dismissed."

12.12 We have reminded ourselves of the decision in **Malik -v- Bank of Credit of Commerce International SA [1997] IRLR 463** where Lord Steyn states that there is implied into a contract of employment an implied term of trust and confidence which provides 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 confidence and trust between the employer and employee".* We note that the impact on the employee of the employer's behaviour is what is significant and not its intended effect and that the effect is to be judged objectively.

12.13 We have noted the words of Browne- Wilkinson J in **Woods v W M Car Services (Peterborough) Ltd [1981] ICR 666:**

"To constitute a breach of this implied term it is not necessary to show the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect judged reasonably and sensibly is such that the employee cannot be expected to put up with it".

12.14 We have reminded ourselves of the decision in **Clements –v- Lloyds Banking plc (above)** and we note the definition of and guidance about constructive dismissal contained in the Judgment of Langstaff J:

"Where an employer commits a repudiatory breach of contract in respect of his employee, the employee has the option of accepting the breach as terminating his own

*obligations to continue to perform the contract as he had originally promised to do. Provided he has not acted, by words or conduct, so as to affirm the contract as continuing once he knew of the breach, his acceptance of the repudiation not only puts an end to the contract at common law but is by statute also a dismissal in respect of which he may claim unfair dismissal rights (section 95(1)(c) **Employments Rights Act 1996**). Since the Court of Appeal decision in **Western Excavating v Sharp** [1978] QB761 ordinary contractual principles have applied to such a constructive dismissal. The judgments in **Western Excavating** itself do not expressly state that the employee must resign in response to the breach, though this might be considered implicit; nor does section 95(1)(c) require that the employee resigned in response to a particular breach. However, it has become accepted principle that he must: such that in **Meikle v Nottinghamshire County Council** [2005] ICR 1 Keene LJ said (paragraph 33):*

"The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer not amounting to a breach of contract would not vitiate the acceptance of their repudiation. It follows that, in the present case, it was enough that the employee resigned, in response at least in part, to fundamental breaches of contract by the employer…"

And again at paragraph 39
***"**Once it is clear that the employer was in fundamental breach… the only question is whether [the employee] resigned in response to the conduct which constituted that breach."*

*To ask whether the resignation was in response to the breach identified by the claimant is to ask the same question as whether the breach was a cause of the resignation. That the search is for an effective cause rather than for the effective cause and that the test is whether the breach played a part in the resignation is equally now well established (see **Abby Cars West Horndon Ltd v Ford** (unreported) 23rd May 2008; **Wright v North Ayrshire Council** **[2014] ICR 77**)……..*

The real question for determination was whether the resignation was because of the discrimination in any real causative sense. The conclusion that it was not was one of fact: a robust approach has to be taken by courts and tribunals to determining whether of not a particular act has caused or materially contributed to a given effect, for the purposes of determining which of two parties should suffer a given loss – here, the damage caused to the claimant by the discrimination for which he could claim compensation. The Tribunal thought carefully about whether, here, for those purposes, the discrimination involved in telling the claimant he was no longer 25 had played any material part in the breach in response to which the claimant resigned. It did so by asking (appropriately) whether it had "tainted" the dismissal. Its conclusion that it did not was one of fact, as to which Mr Leiper is right to say that, in the absence of any error of approach, the high hurdle of perversity would have to be overcome before it could be upset on appeal".

Conclusions

13.1 We deal first with the allegations of discrimination. We will then consider time issues once we have determined the discrimination claims. Finally we will deal with the question of the unfair constructive dismissal. In respect of the discrimination claims, we proceed on the basis that it was accepted that the claimant was a disabled person by reason of his back condition at all material times.

The allegations of discrimination

Issue 8.2: the incident with EF June 2016

13.2 We conclude without difficulty that the conduct of EF towards the claimant on 27 June 2016 was unwanted conduct by the claimant. The claimant did not wish to be addressed in the way he was addressed particularly in an open forum. We conclude the remarks of EF as we set them out at paragraph 9.4 above were related to the claimant's disability. The comment of EF was clearly directed to the fact that the claimant had been absent from work and that his return had been on a phased basis. We conclude that whilst EF did not specifically refer to those matters, those are clearly the matters to which she was referring. The claimant had been absent from work because of his back condition and the respondent accepts that condition amounted to a disability. We conclude the remarks were related to the claimant's disability.

13.3 We have moved on to consider whether the effect of those comments was to violate the claimant's dignity or to create for him one of more of the prohibited environments referred to in section 26 of the 2010 Act. We have considered the perception of the claimant and in particular the submission from Mr Sangha that the claimant did not see the words as words of harassment at the time of the incident but only came to do so after many rehearsals of the incident in his mind. We conclude that it is clear the claimant has allowed the incident with EF to take on in his mind a significance and importance which it does not merit but that does not mean to say he did not perceive the words as words of harassment at the time they were spoken. We conclude that he did so perceive them as he left work early in an upset state. Given that the words were spoken in an open forum by the senior manager on site to a more junior colleague, we conclude that it was reasonable for the claimant to have that perception. EF should not have spoken the words to the claimant in the manner in which she did, let alone in the presence of other colleagues. She ought to have known better. We conclude that the effect of the words of EF amounted to harassment of the claimant related to his disability in that they created for the claimant in the workplace an environment which was in particular degrading humiliating and offensive. Given that is our conclusion we do not need to consider whether that was the intention of EF and we do not need to consider the alternative claim that the words amounted to unfavourable treatment under section 15 of the 2010 Act.

13.4 This incident occurred on 27 June 2016 and a timely referral to ACAS for early conciliation should have taken place by 26 September 2016: in fact that step was not taken until 24 March 2017 some six months later. Therefore, the claim in respect of this matter is prima facie out of time and we will revisit the matter when we have considered all the other allegations of discrimination.

Issue 8.3: the actions of BS in August 2016.

13.5 This allegation was effectively withdrawn by Mr Owen during the course of closing submissions. In any event, we do not accept that the factual or legal basis of this allegation is made out. The claimant had no real complaint at all about the actions of BS in this period, or any other, given that he later described BS in the glowing terms to which we refer at paragraph 9.22 above. If there was any reference by BS at any time to a phased return, we are satisfied that such reference arose from a suggestion in the occupational health report of 19 July 2016. We conclude that the actions of BS were neither unwanted conduct nor unfavourable conduct within sections 26 and/or 15 of the 2010 Act. This allegation is dismissed.

Issue 8.4: alleged failure to provide a wireless headset

13.6 We have looked thirdly at the question of the alleged failure to provide the headset. We refer to our findings of fact at paragraph 9.12 where we conclude that BS did provide a wireless head set to the claimant in August 2016. The factual basis for this allegation is therefore not made out. It may not have been the headset which had been ordered for the claimant, but nonetheless it was a headset which fulfilled the same purpose and we do not accept that there was a failure to provide an auxiliary aid in this matter. The third requirement of a successful claim as set out in section 20(5) of the 20120 Act is not made out. This allegation is dismissed.

Issues 8.5 and 8.8: the sickness absence cautions

13.7 We deal with these two allegations together. We find that these cautions were imposed on the claimant as referred to at paragraphs 9.13 and 9.24 above. The claimant accepted in evidence that the meetings were properly convened and conducted and that he understood the rationale for the imposition of the two cautions. In such circumstances the imposition of the cautions was not unfavourable treatment of the claimant within section 15 of the 2010 Act. In any event these allegations were effectively withdrawn by Mr Owen during closing submissions. We note that there was no case advanced that either or both cautions should not have been imposed by reason of disability related absences.

Issue 8.6: the remark of PY on 8 October 2016.

13.8 We turn then to the question of the remarks made by PY after the claimant had an accident with his chair on 10 October 2016. We refer to our findings of fact at paragraph 9.16 above. We conclude that the words used by PY cannot be said to be unwanted conduct by the claimant given that we conclude the remark made by PY was entirely appropriate. If that should be wrong, then we are satisfied that PY did not intend by her remark to violate the claimant's dignity or to create a prohibited environment and it would not be objectively reasonable for her words to be said to have had that effect. Furthermore we conclude that the words used – directed as they were to the checking of the chair – were not related to the claimant's disability. We accept that the chair had been provided to the claimant because of his back condition (a disability) but even

applying the loose test required in section 26 in respect of "related to", we cannot conclude those words were related to the claimant's back condition. The words could equally well have been used to the claimant if he had had an accident with any ordinary chair. We conclude the remark was not unwanted conduct by the claimant nor unfavourable treatment of the claimant within section 15 of the 2010 Act. This allegation fails and is dismissed.

Issue 8.7: the information contained in the occupation health referral.

13.9 We refer to our findings of fact at paragraphs 9.17 and 9.18 above. We find that the use of the word "whiplash" about which the claimant complained was first used by him in his text message to PY on 10 October 2016. The reference to the claimant having a second job selling bric a brac at weekends was accepted by the claimant in cross examination as not being in any way an inappropriate remark but one which he accepted was being raised in the context of making enquiries about further reasonable adjustments for him. We conclude that the reference to those two matters by PY in the referral was entirely appropriate and did not amount either to unwanted conduct related to disability or unfavourable treatment of the claimant because of something arising from his disability under section 15 of the 2010 Act. Those two allegations are not made out and are dismissed.

Issue 8.9: the grievance process

13.10 The central allegation by the claimant was that the grievance raised by him on 14 November 2016 was not taken seriously by the respondent. We refer to our findings of fact at paragraphs 9.25-9.29 above. Having considered the grievance process followed in this matter, we conclude that the grievance was take seriously. It is clear that the grievance was thoroughly investigated by LT both with the claimant and four other witnesses and then a detailed and rational decision was produced. It could be said that LT's conclusions in respect of the EF incident might have been fuller and more specific but to suggest that the grievance was not take seriously is not an allegation which we can support. We have considered the grievance appeal and conclude that CH conducted a conspicuously fair and reasonable procedure – even though we do not agree with the conclusion she reached in respect of the wireless headset. Given that is so, it cannot be said that the manner in which the grievance was conducted was either unwanted conduct relating to the claimant's disability or unfavourable treatment of the claimant within section 15 of the 2010 Act.

Issue 8.10: lack of support.

13.11 We turn finally to the allegation that the claimant was not supported by the respondent in particular through the grievance appeal process and that its failure to do so amounted to unfavourable treatment within section 15 of the 2010 Act. Again the factual basis of this allegation is not made out. We conclude that the claimant was properly supported by the respondent throughout his absence which began on 10 October 2016 and ended with his resignation some six months later. Our conclusion is that the claimant was supported by PY during that period and there is clear evidence to that effect. It is clear to some extent that the claimant did not wish to be supported by occupational health referrals and the like and that position was respected by the respondent. The respondent was aware that the reason for the claimant's absence from

work was “stress at work” and so had a balance to strike between too much and too little contact and the respondent did not press matters whilst the grievance appeal was ongoing. That is support. There was contact between the claimant and PY as we conclude in detail at paragraph 9.31 above. We find nothing to support the allegation that the lack of support amounted to unfavourable treatment of the claimant within section 15 of the 2010 Act and ,even if there were, nothing to suggest that the lack of support was because of something arising from the claimant’s disability in relation to his back condition.

Time issue

13.12 With those conclusions in place, it is clear that only one act of discrimination has been proved and that was the earliest allegation in time. It was a significant act of discrimination. However, by reference to section 123 of the 2010 Act that matter is some six months out of time given that the claimant filed these proceedings on 18 July 2017 and (disregarding early conciliation) should have filed a claim in respect of that matter by 26 September 2016 some nine months earlier. Given our findings, there is no series of events which could serve to revive earlier acts. Accordingly, if the claimant is to be allowed to advance this claim of discrimination for remedy, he must rely on the provisions of section 123(1)(b) of the 2010 Act and seek an extension of time on the basis that it is just and equitable to allow a longer period for proceedings to be instituted.

13.13 In his submissions, Mr Owen effectively conceded that a case for a just and equitable extension could not be made out. There was no medical evidence adduced to show any medical reason why a timeous claim could not have been advanced.

13.14 We have considered the authorities on the question of an extension of time. We have noted the decision in **British Coal Corporation –v- Keeble 1997 IRLR 336** and the use of the factors contained in **section 33 of the Limitation Act 1980** when considering extensions of time. Time limits are imposed for a reason. They are there first of all to ensure that matters are dealt with promptly before they go stale and particularly before people have had a chance to rehearse events over and over again in their minds and make something of them which perhaps was not present at the outset. Time limits are there to ensure parties are aware of claims against them in good time whilst witness evidence is still fresh and available. We have considered the factors in section 33 (above). The delay in this matter is a long one. There was no reason why the claimant could not have brought a claim relying on the EF incident in time. He was not subject to any impediment of mind which prevented him acting in time. The prejudice to the claimant in not being allowed to advance the claim is not much different to the prejudice to the respondent in having to defend a late claim. The claimant did not advance a grievance in relation to the EF incident until November 2016 when the claim was already out of time with regard to the provisions of section 123 of the 2010 Act. When proceedings were eventually filed by the claimant they were on the cusp of being out of time even in respect of the date of the claimant’s alleged dismissal – let alone an event which had occurred nine months before that dismissal. Having assessed all those factors, we conclude that it would not be just and equitable to allow the claimant to advance a claim for remedy in respect of the EF incident.

13.15 Accordingly it follows that the Tribunal does not have jurisdiction to entertain the claim of harassment in respect of the EF incident and it is therefore dismissed.

13.16 All claims of discrimination howsoever advanced are dismissed.

The claim of ordinary unfair constructive dismissal

13.17 To succeed with this claim, it is for the claimant to show that the respondent was in fundamental breach of his contract. In this matter the claimant relied on the EF incident and also on the implied term of trust and confidence.

13.18 The actions of EF on 27 June 2017 might have given the claimant the right to treat his contract as at an end and claim unfair constructive dismissal relying on an implied term that an employer should not act in a discriminatory way towards an employee and/or on the implied term of trust and confidence. However, the claimant did not resign his employment until some nine months after that incident. In the intervening period, the claimant returned to work for the respondent and was paid for his work, he went away on holiday and was paid holiday pay, he returned to work and was then ill for some six months during which period he accepted both company sick pay and statutory sick pay from the respondent. The grievance procedure was not invoked until November 2016 more than four months after the EF incident.

13.19 We have considered the guidance on affirmation of the contract in **Clements** above and we conclude without difficulty that by allowing nine months to elapse from the EF incident, the claimant waived any breach of contract caused by that incident and affirmed the contract. Thus to succeed in a claim for constructive dismissal the claimant must be able to point to other actions of the respondent which breached the implied term of trust and confidence.

13.20 We note that we must consider the respondent's conduct as a whole and consider reasonably and sensibly whether the claimant could be expected to put up with it. We note it is the effect on the claimant which we are to judge and not what the respondent actually intended. We have considered in detail the letter of resignation and refer to our findings of fact at paragraph 9.30 above.

13.21 The difficulty for the claimant is that he relied on a series of actions by the respondent which he asserted amounted to acts of discrimination. We do not agree that the respondent committed any act of discrimination save in respect of the EF incident. We do not criticise the respondent's conduct in the way it dealt with the claimant. The claimant was supported throughout his two relevant periods of absence from work and proper referrals were made to occupational health. We conclude that no actions of the respondent were in any way improper save those of EF and thus we conclude that the respondent was not in breach of the implied term of trust and confidence in the claimant's contract of employment and that the claimant was not justified in resigning his employment when he did and seeking to convert that resignation into a dismissal either under the provisions of the 1996 Act or the provisions of the 2010 Act. With just one action of the respondent which is criticised and that in June 2016, any breach was affirmed and the claimant lost any right he might have had to treat his contract at an end and claim constructive dismissal. We have considered the effect of it reasonably and

sensibly and we conclude it did not provide the basis of any claim of constructive dismissal.

13.22 For those reasons the claim of constructive dismissal - whether unfair or discriminatory or both - fails and is dismissed.

EMPLOYMENT JUDGE BUCHANAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 30 April 2018

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