EMPLOYMENT TRIBUNALS

Claimant		Respondent
Miss Holly Taylor	v	**The Sheffield Bath Company t/a Spa 1877**

Heard at: **Sheffield** **On:** **8, 9 and 10 April 2019**

Before: **Employment Judge Little**

Members: **Mrs K Grace**

Mrs P Pepper

Appearance:

For the Claimant: **In person**

For the Respondent: **Mr S D Wilkinson (Managing Director)**

JUDGMENT having been sent to the parties on 24 April 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

1. **The complaints**

1.1. In a claim presented on 27 September 2018 Miss Taylor complained of disability discrimination and unfair dismissal.

1.2. At a preliminary hearing for case management conducted by Employment Judge Trayler on 22 November 2018 it was recorded and agreed that the claimant believed that she had been constructively dismissed and that that dismissal was unfair. The disability discrimination complaints were identified to be harassment and direct discrimination.

1.3. The unwanted conduct was said to have been done by the claimant's colleague Ms Lydia Eaton when she allegedly disclosed confidential information about the claimant's medication and referred to the claimant having "lost the plot".

1.4. In relation to the direct disability discrimination complaint, the less favourable treatment was described as the respondent failing to deal properly with the claimant's grievance about Ms Eaton; that the respondent trivialised the claimant's feelings and failed to deal with her grievance in a timely manner.

1.5. As the claimant contended that she had had no alternative but to resign because of the way in which the respondent had dealt with her grievance, the dismissal was alleged to be a further act of less favourable treatment which the claimant appeared to be contending was because of her disability.

1.6. During the course of our hearing it was noted that there was some confusion about when the claimant's employment had ended, particularly with regard to the question of what length of notice she was required to give. This gave rise to the issue of whether the claimant had received the correct or any payment for the notice period. Although this matter was not referred to in the ET1, we note that it was raised by the claimant in a bullet point statement and a document headed 'Time line of events' which it appears she provided to the Tribunal in anticipation of the November preliminary hearing referred to above. In the event we have permitted the claimant to pursue this complaint also as it was intrinsic to the issue of when the employment ended which was a necessary finding for us to make in relation to the constructive unfair dismissal complaint.

2. **The claimant's disabled status**

2.1. The claimant relies upon the mental impairment of anxiety and depression. In Mr Wilkinson's email of 26 February 2019 to the Tribunal he concedes on behalf of the respondent that the claimant had a disability because of that impairment, although there was some question as to when the respondent knew that to be the case.

3. **The issues**

The issues which the Tribunal have been required to determine at this hearing are as follows:

3.1. <u>Harassment</u>

3.1.1. Had the harassment complaint been presented out of time and if so would it be just and equitable to extend time?

3.1.2. If the Tribunal did have jurisdiction, had the alleged unwanted conduct by Miss Eaton occur?

3.1.3. If so, was that unwanted conduct related to disability?

3.1.4. Did Miss Eaton, at the material time, know that the claimant was disabled or should she reasonably be expected to know?

3.2. Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

3.3. If the conduct had that effect, was it reasonable for it to have that effect taking into account the claimant's perception and the other circumstances of the case.

3.4. If harassment had occurred, was the respondent vicariously liable for it?

3.5. Direct disability discrimination

3.5.1. Did the alleged less favourable treatment occur?

3.5.2. If so, was that done because of the claimant's disability?

3.5.3. At the material time, did the respondent know that the claimant was disabled or should it reasonably be expected to have known?

3.6. Constructive unfair dismissal

3.6.1. Did the respondent commit a fundamental breach of the implied term of trust and confidence? The claimant contended that this had occurred for the following reasons:

- The way in which the grievance she had raised was dealt with
- Delay in dealing with the grievance
- Not taking the grievance seriously
- Not focussing on the issues which the claimant had raised and instead introducing extraneous matters which were mainly criticism of the claimant herself.

3.6.2. If there was a fundamental breach, did the claimant resign in response?

3.6.3. If there was a constructive dismissal, was it unfair?

We enquired of Mr Wilkinson whether if we found that there had been a dismissal did he put forward any potentially fair reason for that dismissal. He confirmed that he was not doing that and was simply denying that there had been a dismissal.

4. Attempts to case manage this case and the parties' engagement with it

4.1.1. Only the claimant attended the preliminary hearing for case management in November 2018. Subsequently, the respondent explained that Mr Wilkinson had been unable to attend that hearing because of his own health issues and the Tribunal accepted that explanation. However, this meant that a valuable opportunity for the respondent to get a better understanding of the claimant's case, an explanation of the Tribunal procedure and what was required by the case management orders which had been made was lost.

4.1.2. There have also been communication problems as between the claimant and the respondent during the course of these proceedings. Although naturally two parties involved in litigation are by definition in dispute with each other, that does not mean that they should refuse to cooperate and correspond with each other about essential matters for the progress of the litigation. Regrettably, the claimant apparently could not bring herself to even copy the respondent into emails which she was sending to the Tribunal. Whilst this shortcoming should have been redressed by the Tribunal itself copying all correspondence received from the claimant to the respondent it appears that regrettably in this case

that has not always happened. This has led to the respondent not being in receipt of the claimant's schedule of loss – although it is clear that Mr Wilkinson had had some contact with ACAS who must have given him some indication of what the claimant was seeking by way of compensation. It also appears that the respondent did not receive a single sheet, being an extract from the claimant's GP records. That had initially been submitted by the claimant in support of her contention that she was disabled – at a time when that was in dispute. However, it was also a document which we took into account when considering the level of injury to feelings to be awarded. It became apparent when we were dealing with remedy on the third day of this hearing that the respondent had not seen that sheet which recorded two consultations the claimant had had with her GP. In these circumstances we took a brief adjournment so that Mr Wilkinson had the opportunity to read that note and prepare any questions which he had for the claimant about it. He subsequently raised with the claimant, or at least commented to us, about information in that document which suggested that the claimant's feelings would have been injured by other matters than those at work.

4.1.3. In February 2019 an Employment Judge, no doubt having had regard to correspondence from both parties which suggested that further case management was required, ordered that there be a further preliminary hearing for case management. Notice of that hearing was issued to both parties on 22 February 2019. That hearing was listed before Employment Judge Rostant on 22 March 2019. In the event neither party attended that hearing. Subsequently, the claimant gave as an explanation that she had had a panic attack. Mr Wilkinson sent an email to the Tribunal on 26 March 2019 in which he noted that he had missed the date for the preliminary hearing and went on "I must have missed this date because I was waiting for a reply from the Tribunal. I don't have a copy on file of the date." It follows that the respondent was not citing a medical reason for its non-attendance. Whether or not the respondent was waiting for a response from some enquiry to the Tribunal that is clearly not a good reason for not attending the hearing itself. Despite our comments above about certain letters not being copied to the respondent, it seems fairly clear that the notice of hearing of 22 February, generated by the Tribunal itself, was sent to both the claimant and to the respondent. In the notes which Employment Judge Rostant issued following the abortive hearing on 22 March, among other things he wrote

"The express purpose of this hearing was to deal with the evident confusion on the part of Mr Wilkinson as to the issues that he had to respond to and to deal with any matters that he wished to raise about the claimant's failure to provide relevant information."

4.1.4. Whilst this Tribunal appreciates that both parties have been unrepresented and that neither has had legal advice about this litigation, the net result of both parties not fully participating in the opportunities for case management which have been offered has

resulted in the hearing before us running less smoothly than it could have. In particular, there were difficulties with regard to the absence of anything that could sensibly be called a witness statement, other than one prepared by Mr Wilkinson and the absence of various fairly crucial documents. This has led to the need for the introduction of new and possibly previously undisclosed documents on both the second and third days of this hearing.

4.2. <u>The exclusion of Miss Eaton from the hearing room prior to her giving her evidence</u>

4.2.1. When the Tribunal entered the hearing room on the first day of the hearing we saw that, contrary to our expectation, the claimant was not present. Her mother, who has accompanied her on each day of the hearing, explained that her daughter had had to go to toilet. We adjourned briefly but it then transpired, as we were told by our clerk, that the claimant appeared to have had a panic attack and was now being attended to by a court first aider. It appeared that this had been caused by the presence of Miss Eaton. Unsurprisingly, Miss Eaton was attending as a witness for the respondent on the basis that she was the alleged harasser. However, perhaps the claimant did not appreciate that this would be so. Certainly, she had not been provided with any witness statement from Miss Eaton for the simple reason that Miss Eaton had not made one. The claimant would also no doubt would have read Mr Wilkinson's statement which included at paragraph 36

"with regard to witnesses for this Tribunal I do not want to cause any more stress and disruption to the team than this matter has already caused. I am therefore the sole witness."

The Tribunal was concerned that because of the claimant's reaction to Miss Eaton's presence there was the risk that she would not be able to participate in the hearing at all. It was in those circumstances that we suggested that Miss Eaton should not be present in the hearing room until the time when she was required to give her evidence. Mr Wilkinson did not at the time object to this proposal and so that was the arrangement made. The claimant was able to return to the hearing room and we were able to proceed. Unfortunately, Miss Eaton did have to wait in the respondent's waiting room for most of the day although the slow progress of the case was for the reasons which we referred to earlier and as referred to later.

4.2.2. The Tribunal were concerned to note that on the second day of the hearing (Miss Eaton having completed her evidence towards the end of the first day) Mr Wilkinson complained about Miss Eaton being excluded and the length of that exclusion. He said that that had upset Miss Eaton. We should add that Miss Eaton seemed perfectly composed whilst she was giving her evidence to us. The Tribunal pointed out to Mr Wilkinson that the Employment Judge had been at pains to put to Miss Eaton the salient parts of the evidence which had been elicited from the claimant and certainly

those where there appeared to be a difference between the two women's' evidence.

5. **Documents**

5.1. Seven days prior to the first day of the hearing Mr Wilkinson had delivered to the Tribunal a set of three volume bundles and he indicated that copies had been provided to the claimant on the same date. The claimant told us that she had not received them until the Thursday prior to this hearing beginning on the following Monday. Although this is not a document heavy case (each bundle was modest), it appeared that Mr Wilkinson had prepared the bundles without reference to the claimant.

5.2. The bundle numbered 1 contained Mr Wilkinson's witness statement and after that (unnumbered) were various relevant documents.

5.3. The bundle numbered 2 essentially contained correspondence which the Tribunal had written to the parties and copy orders. It was paginated but there was no index.

5.4. The bundle numbered 3 appeared to be a complete copy of the claimant's personnel file. Again, this was paginated but again there was no index. Among the documents which were not included in these bundles was the employee handbook and any grievance procedure which the respondent had. At the end of the first day of the hearing it was apparent to the Tribunal that various other documents which were relevant were in existence but not in any of the three bundles. We asked Mr Wilkinson to look for these documents and we appreciate that he put in hard work to collate a further three supplements which he brought to the second day of the hearing. However, it has to be said that all of this should have been done well in advance of the hearing. The order made by Employment Judge Trayler in November 2018 required the parties to disclose documents to each other by 14 February 2019 so that the respondent could create an agreed bundle of documents – that is one including both his and the claimant's documents - by 28 February 2019.

5.5. Returning to the supplements, supplement A contains copies of various emails about the claimant's grievance; supplement B refers to matters which may have arisen on 17 May 2018 which had not hitherto featured in the claimant's chronology or the evidence we had heard on day one. Supplement C was a printout of the crucial WhatsApp messaging which occurred between the claimant and Miss Eaton on 6, 7 and 9 May 2018. It is clear that Miss Eaton had provided this to Mr Wilkinson on 7 June 2018 and although this was obviously at the heart of the harassment complaint it was not until we were asking our questions of Miss Eaton on the first day of the hearing that we realised that these messages were still in existence and in fact still on her phone. We had asked the claimant about them but she said that she had deleted them from her phone.

5.6. At the end of the second day, having given our liability judgment to the parties we reviewed with them what documentation appeared to be missing in order that we could properly deal with remedy the following day. This included the most recent payslips in the old employment, proof of what the claimant had earned post-dismissal from self-employment and payslips for her subsequent new employment. Between them both

parties were able to produce most of this documentation at the beginning of day three.

6. **Evidence**

6.1. The claimant obviously was required to give evidence in her own case although she has not called any other witnesses. It transpired that the claimant had not prepared a witness statement, or at least not a sufficient statement. When discussing this with her she reminded us that she had sent the bullet point document and the Time line in anticipation of the November case management hearing. Perhaps understandably, as this was prior to any orders being made those had not been understood by the Tribunal to be the claimant's actual witness statement. The claimant then produced a brief written statement which ran to just over one page. In those circumstances the Employment Judge had to question the claimant in order to elicit the necessary information. This was obviously a rather time-consuming exercise and contributed to the time that Miss Eaton had to wait in the respondent's waiting room.

6.2. The respondent's evidence was given by Mr Wilkinson, who as we have mentioned had prepared a 10 page witness statement which is the first part of volume 1 of the bundle. The respondent's other witness was Miss Eaton and despite her obviously pivotal role in the case, no witness statement had been prepared for her. In those circumstances, again the Employment Judge had to question Miss Eaton in order to elicit her evidence. As noted above the Employment Judge put to Miss Eaton the salient matters raised by the claimant which he felt Miss Eaton needed to comment on.

6.3. The claimant was not really able to cross-examine either of the respondent witnesses and so again the Employment Judge was obliged to put to those witnesses the questions he felt would have been put had the claimant been able to put questions herself and particularly if she had been represented . The same applied, but to a slightly lesser degree, as far as Mr Wilkinson's cross-examination of the claimant was concerned.

7. **The relevant facts**

7.1. The respondent company carries on the business of a Spa and Turkish Baths. It's Managing Director is Mr S D Wilkinson.

7.2. The claimant's employment with the respondent began on or about 3 March 2016. That was employment as a part-time spa therapist. Subsequently, during 2016 the claimant became full time.

7.3. At the beginning of the employment the claimant was issued with a written statement of main terms and conditions of employment and a copy of that appears in volume 3 of the bundle at page 49.

7.4. With effect from 1 November 2017 the claimant was promoted to the position of treatment manager. At the same time another employee, Miss Lydia Eaton, was also appointed as a treatment manager. This was with the intention that the claimant and Miss Eaton would effectively job-share. They were jointly providing maternity cover. The treatments manager who was about to go on maternity leave wrote to the claimant

on 8 June 2017 and a copy of that letter is at page 4 in volume 3. It contains the offer of the promotion. The claimant is informed that her new "salary" will be £10.71 per hour. The letter goes on to say that in all other respects the claimant's terms and conditions of employment remain unchanged, apart from with regard to the notice period. Here the claimant was informed that should she wish to leave the company the notice she had to give notice in this managerial role was to be eight weeks. The claimant signed that letter on 13 June 2017 to signify her acceptance of the terms.

7.5. The working relationship between the claimant and Miss Eaton was initially harmonious. In fact, the two had some social contact outside of work, although that may primarily have been via social media.

7.6. However, unfortunately the relationship began to sour, at least as far as the claimant was concerned. The claimant took the view that Miss Eaton was not popular with some of the staff and she felt that she, Miss Eaton, was trying to manage the claimant rather than recognising that they were joint managers.

7.7. On 3 May 2018 the claimant acknowledges that she may have been rather short tempered with Miss Eaton and as she put it, was snapping at her. The claimant explained to Miss Eaton that a reason for her behaviour could be that she was coming off the anti-depressant medication that she had been prescribed. The claimant expected that that information would be kept in confidence.

7.8. Shortly after 3 May 2018 Miss Eaton went on holiday to France.

7.9. On Saturday 5 May 2018 the claimant was told by a colleague that Miss Eaton had been talking about her, the claimant, behind her back. This led to the claimant sending a WhatsApp message on the same day to Miss Eaton. As noted above, we eventually saw these WhatsApp messages in what we have described as supplement C. In the claimant's first of what would be several messages to Miss Eaton she wrote the following

"heard you've been telling everyone I've not done things … thanks pal thought you would be. We're supposed to be a team and you be been [sic] acting like my manager recently"

Miss Eaton's response to that message was

"What on earth are you on about"

The claimant replied that Miss Eaton had been going into the staff room saying that the claimant had not been doing anything. Miss Eaton responded saying that she had never said that once. The WhatsApp exchange continued along these lines. The claimant made various allegations against Miss Eaton and Miss Eaton continued to express surprise. She pointed out that she had stepped into the breach for the claimant when she could not attend work the previous week and Miss Eaton had gone in on her behalf on the latter's day off.

7.10. On the following day, Sunday 6 May 2018 the claimant was given some more information, this time by a colleague called Bronte and this caused her to send a further WhatsApp message to Miss Eaton. She wrote as follows

"Yeah you've made us all miserable including me thanks for telling Bronte I've come off my meads [sic] you've been talking about some extremely confidential thing about us all and it's got back to us all."

Miss Eaton's initial response was that she could not understand why the claimant was making these allegations and she was worried about the claimant because it was not like her.

In a subsequent message the claimant reiterated that she believed Miss Eaton had told Bronte that she was coming off her meds. Miss Eaton said that she had never said that ever. The claimant queried why did Bronte know then. Eventually Miss Eaton responded with the following message

"I may of (sic) said that tbh in the office so I apologise but my god it was only because I was as concerned about you as a friend."

7.11. The claimant knew that she was due to go on a course (the ELEMIS train a trainer course) in Birmingham together with Miss Eaton in the following month. The course was spread over two weeks and would involve staying in Birmingham during each week. The claimant now felt that she did not wish to spend such a large amount of time in close proximity to Miss Eaton and so she decided that she would not go on the course – although travel and hotel accommodation had already been arranged. Apparently without reference to Mr Wilkinson the claimant tried to make arrangements for a colleague, who was not a manager, to attend instead of her.

7.12. On Wednesday 9 May 2018 the claimant was at work but Miss Eaton was still on leave. The claimant's evidence to me was that Miss Eaton unexpectedly arrived at work that day and demanded to have a meeting with the claimant and to that end backed her into a room having pursued her about the building. However, within the supplement C containing the WhatsApp messages and at page 15 there is a message from Miss Eaton to the claimant at 8:57am on 9 May in which she said that she had just landed having travelled back from France and was coming into work because they needed to talk about the claimant's decision to send another staff member, Georgia Morison on the Birmingham course.

7.13. The claimant's evidence is that she did not want to speak to Miss Eaton that day. She realised that she would have to speak to her at some point but did not feel ready to do so on 9 May. The accounts given by the claimant on the one hand and Miss Eaton on the other about what happened on 9 May at work differ.

7.14. The account which the claimant gave in the grievance which she wrote out that evening was that having arrived unannounced Miss Eaton interrupted the task that the claimant was undertaking and demanded to speak to her straight away. The claimant went on to say that when she declined that invitation and walked away Miss Eaton followed her and backed her into another room. She says that she was then unable to speak or get her opinion across because Miss Eaton was speaking to her very aggressively.

7.15. Miss Eaton's evidence was that she wished to talk to the claimant as she had a genuine concern for her and felt that it was important that they

talked that day. She denied that she had backed the claimant into a room or that she was aggressive. She thought that it was an awful thing for the claimant to say that she had backed her into a room. She had not ordered the claimant upstairs.

7.16. The claimant alleges that at the end of what seems to have been a brief encounter, Miss Eaton said that the claimant had 'lost the plot'. Miss Eaton's evidence to us was that she had not said that but she acknowledged that if it had been said it could have meant that she was saying the claimant had gone crazy.

7.17. Shortly after this encounter between the two the claimant felt that she had to leave work and go home because she was upset.

7.18. Miss Eaton then went to have a meeting with Mr Wilkinson. It appears that Miss Eaton may have requested this meeting with Mr Wilkinson in advance. We were told that this meeting lasted approximately 20 minutes. Mr Wilkinson does not refer to this meeting in his witness statement. No notes were taken of that meeting. When we asked Mr Wilkinson about his recollection of the meeting he agreed that there had been one and he thought that Miss Eaton would have given him the same account which she had given us about the WhatsApp messaging on 5 & 6 May. We anticipate that in fact she was complaining about the claimant and this suspicion is supported by what was set out in what purported to be a subsequent outcome to the claimant's grievance.

7.19. In the evening of 9 May the claimant wrote an email to Mr Wilkinson in which she said that she was raising a formal grievance about Miss Eaton. She complained that among other things Miss Eaton had discussed the claimant coming off her medication in front of Bronte and other staff members. The claimant said that she felt that had been a breach of her personal details and it was "mental health discrimination." She also said that she and colleagues had felt belittled and that Miss Eaton had been "coming down extremely unfairly on us." The claimant went on to explain why she felt she could not go on the training course with Miss Eaton. She went on to complain about Miss Eaton's alleged conduct towards her that day as set out above.

7.20. On 10 May 2018 there was a meeting between the claimant and Mr Wilkinson during which the claimant's grievance was discussed. Notes of that meeting were taken by a Lisa Price and the typed version appears at pages 11 – 13 in volume 1. The claimant agrees that these are a correct record. Among other things the claimant reiterated her concern about Miss Eaton being bossy with her and she said that other employees had left because of the atmosphere. The claimant believed that staff were concerned that Miss Eaton was 'on them' when the slightest thing was done wrong. The claimant had in the WhatsApp communication let Miss Eaton know that she was upset that she had been badmouthing her. She also reiterated that she had been told by Bronte that Miss Eaton had said that the reason why the claimant was in a foul mood was due to coming off anti-depressants. Again, the claimant said that she had the previous day been backed into a corner by Miss Eaton who she felt she could now no longer trust because she was not professional. The claimant went on to say that she had been so distraught the day before that she had had

to leave work and she recorded that Miss Eaton had said that she had "lost the plot". It is noted that Mr Wilkinson said he was going to do some fact finding and having got the claimant's side he would now need to get Lydia's side.

7.21. It appears that the claimant invited Mr Wilkinson to also interview Laura Campbell and Rebecca Hall. There is a note of Mr Wilkinson's meeting with those two individuals. That is at pages 14 – 16 in volume 1. There is also a reference to a letter from another staff member, although we have never been shown this. During the meeting, at which the claimant was not present, Miss Campbell and Miss Hall expressed to Mr Wilkinson their own concerns about Miss Eaton's behaviour and management style.

7.22. It remains unclear when, or perhaps even if, Mr Wilkinson did interview Miss Eaton about the claimant's grievance. No notes of any such interview were in any of the three bundles of documents which the respondent put before us on the first day of the hearing. At the end of the first day one of several documents which we said we needed to see and which Mr Wilkinson should bring to the following day's hearing was the note of any such meeting. In the event Mr Wilkinson was not able to produce any note. His witness statement did not contain any reference to meeting Miss Eaton to take a statement from her. However, in a note which is the first page of supplement B, Mr Wilkinson said that he believed that he would have met Miss Eaton on some date between 26 May but before 4 June 2018. He could not see her within that period because she was on the course in Birmingham. He thought that his notes would have dealt with four points namely, the allegation that Miss Eaton had used the 'F' word towards other staff members; the sharing of confidential medical information; being abrupt with her communication skills and gossiping.

7.23. Miss Eaton was equally vague as to whether or not she had a meeting with Mr Wilkinson about the claimant's grievance. In fact one of the statements she made to us was that she did not think she was told that the claimant had actually put in a grievance, although she subsequently tried to resile from that position.

7.24. Although Mr Wilkinson had given the claimant to believe that there would be an answer to the grievance within a week, the claimant did not actually receive the grievance outcome until 18 June 2018. That was when she found the document, (a copy of which is in volume 1 at pages 17 – 19), in her in-tray. Mr Wilkinson explains the delay by reason of Miss Eaton's absence in Birmingham and waiting to obtain a printout of the WhatsApp messages on 5 & 6 May. However, as we can now see that those were sent to him by email on 7 June by Miss Eaton, it is unclear why she could not have done that earlier.

7.25. The grievance outcome document is dated 13 June 2018 and it is addressed to both the claimant and Miss Eaton, the subject matter of the grievance. It is unclear when Miss Eaton got her copy but having regard to the rather casual approach taken by the respondent there is at least the possibility that Miss Eaton knew the outcome of the grievance against her before the claimant did. The outcome acknowledges that it

was inappropriate of Miss Eaton to have discussed the claimant's personal medical details with other team members. There was also criticism of Miss Eaton for her use of inappropriate language in the workplace – the F word. Other than recording the fact that the claimant had had to leave work early on 9 May no findings were made or conclusions given about the claimant's grievance as it related to Miss Eaton's alleged conduct on that day including the 'lost the plot' comment. The remaining content of the grievance outcome was in fact criticism of the claimant. It was inappropriate that she had made contact with Miss Eaton in the way that she had whilst the latter was on leave. It was inappropriate for the claimant to have tried to rearrange the training event as far as other attendees were concerned. It was inappropriate for the claimant to have been texting or WhatsApping Miss Eaton during working hours. A matter that was obviously not part of the grievance at all was a further area where the claimant was found to have behaved inappropriately. This was in relation to disciplinary or quasi disciplinary steps which the claimant may have taken or threatened against Georgia Morison and there was criticism, again it was 'inappropriate', for the claimant to have contacted Miss Morison on a Sunday whilst the latter was not at work.

7.26. In the summary part of the document Mr Wilkinson wrote -

"*On this occasion they (the claimant and Miss Eaton) have both shown errors of judgement and their management skillset has been lacking in these key areas and has caused friction amongst each other and the team.*

I recommend that each party reads this note and learns from the errors of judgement and that we continue to work as a team going forward and put these errors behind us."

7.27. In the supplement B document Mr Wilkinson referred to a sign which he had put up on the staff door and there is a copy of the text of this on page 2 & 3 of supplement B. It is directed at all staff asking them to be considerate, keep the volume of their conversation down and to refrain from using swear words at work. They are also reminded that during the course of their work and because of the nature of it, they might become privy to information that is of a sensitive and confidential nature but such matters should not be discussed outside of work or be gossiped about. It appears that Mr Wilkinson considers this sign to be in response to and possibly a remedy for the grievance which the claimant had raised.

7.28. The claimant was dissatisfied with this outcome, to say the least. On 19 June 2018 she wrote a lengthy letter to Mr Wilkinson (volume 1 pages 20 – 22). She felt that the original content and subject of her grievance had been completely overlooked and dismissed. She complained about the time it had taken. She went on to write

"I feel my grievance has been overlooked and dismissed as in your reply you make one statement regarding the original subject of the grievance raised with Lydia and four statements aimed at my own personal performance."

In another part of the letter the claimant went on to reiterate that Miss Eaton had used the phrase 'lost the plot' on 9 May and that this was in front of another manager. The claimant complained that she had had no apology. In the outcome document Mr Wilkinson had referred to Miss Eaton having apologised to all parties. During the course of evidence, it was established that the only apology which Miss Eaton had given to the claimant was in WhatsApp message "I may of (sic) said that…so I apologise."

7.29. The claimant's letter went on to note that within the grievance outcome Mr Wilkinson had addressed two other issues which were unrelated to the subject of the original grievance. The claimant went on to point out that she would be returning to work the following day and was anxious about interaction with Miss Eaton. She complained that Mr Wilkinson had not addressed the severity of Miss Eaton's actions.

7.30. In the event the claimant wrote her letter of resignation the following day.

7.31. That letter, dated 20 June 2018 appears at page 23 in the bundle and, addressed to Mr Wilkinson it reads as follows

"It is with regret I write this, but please accept this as my resignation from Spa 1877. I feel I can no longer continue working here because of the current workplace atmosphere and the reasons mentioned in my grievance letter."

7.32. The claimant worked on for a few more days but her last day at work was 26 June 2018. On that day she attended her GP and was issued with a fit note which signed her off from 27 June to 11 July because of anxiety and depression. A copy of that note is at pages 24 – 25 in volume 2.

7.33. The grievance outcome document had not indicated whether there was a right of appeal but we understand from a passing reference in the contract of employment that the employee handbook, a further document we have not seen, contained an appeal procedure. Whilst it is fairly clear that the claimant's letter of 19 June was an appeal letter the respondent took no steps to deal with that appeal and it is to be bourne in mind that because of the lengthy notice period the claimant was technically still employed by the respondent until 15 August 2018. At the time of resigning the claimant was unsure about what notice pay she had to give and there is no reference to this in the resignation letter. She received no letter confirming receipt of her resignation and therefore was in some doubt about what notice she was required to give or when it would expire. At the material time she believed that she only had to give four weeks with the result that the employment she thought would have ended about 11 July 2018. However, the parties now accept that because of the 8 week notice period it did not end until 15 August 2018. The claimant would not have been fit to work during that period but only submitted the one fit note to which we have referred. There was a second fit note but she did not submit that as she did not believe she was employed at that time.

8. Our conclusions

<u>The time issue with regard to the harassment complaint</u>

8.1. The last date when alleged harassment occurred was 9 May 2018 and accordingly the ordinary 3 month time limit for presenting a complaint about that would have expired on 8 August 2018. The claimant sought ACAS early conciliation on 26 September 2018 and an Early Conciliation Certificate was issued on the same day. It follows that the claimant is not entitled to any extension of time under the so called 'clock stopping provisions' because the limitation period had expired before the ACAS early conciliation commenced which was, of course, only a day's duration. It follows that as the claimant did not present her ET1 until 27 September 2018 it was, in relation to the harassment complaint, but not otherwise, out of time.

8.2. We have asked the claimant for an explanation of this. We note that she was not in receipt of legal advice at this time, or it seems, at all. The claimant told us that she believed that time would run from the end of her employment. It is also relevant that the claimant was not in the best mental health at this stage, that is to say, immediately following her resignation. We did not consider that the delay was significant and certainly not so as to affect the cogency of the evidence. Insofar as the cogency of the respondent's evidence has been affected that is due to the failure of the respondent to properly document its investigation of the claimant's grievance. In these circumstances we concluded that it was just and equitable to extend time with the result that we do have jurisdiction to hear this aspect of the claim.

<u>The merits of the harassment complaint</u>

8.3. The first question is whether there was unwanted conduct. We noted that initially when giving evidence to us Miss Eaton had denied making any disclosure of the claimant coming off medication to third parties. We observe that is what her initial reaction to the original accusation was in May 2018. However, by reference to the WhatsApp messaging we observe that there is a virtual admission about this when Miss Eaton apologises eventually for what she may have said. We also take account of the contemporaneous account provided by the WhatsApp messages from the claimant.

8.4. As we have noted Miss Eaton denies making the 'lost the plot' comment but we note that there is a virtually contemporaneous reference to this comment having been made in the minutes of the grievance interview on the following day (see page 13 in volume 1). On the balance of probability, we are satisfied that Miss Eaton did make this statement and as she herself acknowledged in evidence it could be regarded as a reference to the claimant's mental health.

8.5. We find that the disclosure of confidential information and the 'lost the plot' comment in each case violated the claimant's dignity and created a humiliating environment for her.

8.6. Whilst we do not find on balance that that was the purpose of the conduct we are satisfied that it had the effect and that it was reasonable for it to have that effect. A certain stigma still attaches to mental illness and it would clearly be very unwelcome to a person who suffers from mental ill health and is in a vulnerable position when coming off medication to have that fact, which was disclosed in confidence,

disseminated to others. That it was being put forward by Miss Eaton as an explanation of the claimant's behaviour is no excuse. We are satisfied that the conduct was related to the claimant's disability because obviously the medication was for her condition. Further we accept that in the context, the 'lost the plot' comment has connotations in respect of mental health.

8.7. Accordingly, we find that the harassment complaint succeeds.

Constructive dismissal

8.8. Whilst we accept that to a certain extent Mr Wilkinson had good intentions we find that the way in which the grievance process was conducted and the outcome of that process communicated to the claimant (and the person grieved against) were highly irregular. An employee is entitled to have trust and confidence in her employer to the extent that the employer will deal fairly thoroughly and in a focussed way with a grievance that has been raised. That would apply even where the employer is of modest size and with limited resources. Even in those circumstances an employee is entitled to expect that the basic minimum principles of good employee relations practice will be followed when a grievance is raised. That is particularly so where, as in this case, the grievance contained a serious allegation that there had been discriminatory treatment.

8.9. The short-comings in the way in which the respondent dealt with the claimant's grievance can be summarised as follows

- There is no clear evidence that the person grieved against, Miss Eaton, ever formally interviewed as part of the essential fact finding exercise in any grievance procedure. As we have found the respondent cannot produce any notes of such an interview and that is in contrast with the relatively sophisticated notes which were prepared in respect of the interview with the claimant herself. As we have also noted, that has led to both Mr Wilkinson and Miss Eaton being vague about when there was a meeting and if there was such a meeting as to what was discussed.
- The delay – Whilst some of that is explicable by reason of Miss Eaton's absence in Birmingham, it is unclear why she could not have been interviewed before she went on that course or why it took so long for the provision of the WhatsApp printout.
- The grievance outcome failed to address in anything like the appropriate detail the matters which the claimant had grieved about. In fact, several significant aspects of the grievance were not referred to at all. These failures were aggravated by the inclusion of criticisms of the claimant. Those were not only in relation to matters which had arisen in the context of the grieved about matters, but also included some completely extraneous matters. If during the course of a grievance investigation an employer discovers matters which it considers

need to be raised with the employee, or even matters which could ultimately lead to a disciplinary process, the correct course would be to deal with the grievance itself and then once the outcome of that was delivered to consider any further steps that needed to be taken. Unfortunately, in this case the respondent effectively combined both of those processes. The result was that there is more about the claimant's allegedly inappropriate actions within the grievance outcome than there are findings about Miss Eaton's alleged conduct.

- It is also completely inappropriate to issue the grievance outcome simultaneously to the person who has raised the grievance and the subject matter of the grievance. The proper course would have been to communicate solely with the claimant about her grievance and then subsequently to do no more than inform the grieved against of the broad outline together with any guidance or steps the grieved against person should take. Whilst we suspect that Miss Eaton may have made her own informal grievance about the claimant, it was not apt to try to deal with the matter as some sort of joint grievance.
- A further short-coming is that the outcome was delivered in such a way that there was every chance that Miss Eaton would learn about the outcome before the person who had raised the grievance.
- Putting up the sign or notice in the staff room cannot sensibly be regarded as a means of resolving the claimant's specific grievance against Miss Eaton.
- Failing to inform or remind the claimant that she had a right to appeal against the grievance outcome.

In these circumstances we find that the implied term of trust and confidence was fundamentally breached and that the claimant resigned in consequence. We therefore find that she was constructively dismissed. As the respondent has not sought to show that any dismissal we might find was fair then the inevitable result is that this is regarded as an unfair constructive dismissal.

Direct disability discrimination

8.10. As we have noted above, the claimant has sought to distance herself from the analysis which Employment Judge Trayler carried out at the November 2018 case management hearing. In any event whilst we find that the respondent was aware of the claimant's disability at the material time we also find that whatever the shortcomings in the grievance process set out above those were not because of the claimant's disability. We also take into account that Mr Wilkinson who has frankly admitted that he too suffers from poor mental health, is unlikely as to treat employees who share a similar condition less favourably because of that condition.

8.11. Whilst the result of the grievance process was well below standard we accept that as someone without advice or support Mr Wilkinson was

doing what he thought was right at the time. His failings can be explained by the fact that as he candidly admitted he had never conducted a grievance procedure before; the respondent does not have a HR department; the respondent did not have access to external HR support and Mr Wilkinson's approach to the resolution of the grievance displays some undue optimism not to say naivety. In those circumstances we find that there was no direct disability discrimination and that complaint fails.

The Wages complaint

8.12. In correspondence prior to the hearing the respondent had wished to bring its own counter-claim to recover training costs, but, as we believe the employer was notified by the Tribunal at the time, and as we have reiterated to Mr Wilkinson, such a counter-claim can only be brought when a claimant has invoked the Tribunal's contractual jurisdiction. Miss Taylor has not done so.

8.13. However, a further matter arose in relation to the wages complaint which was a contention by the respondent that there had been an overpayment of holiday pay and that the claimant may not have been recording her own holidays accurately. This was a further area where there was no documentation. At the end of day 2 we explained to Mr Wilkinson that in order to determine this issue we would need to see records of the holiday log and see the final payslip issued to the claimant. Mr Wilkinson believed that a payslip was issued for July but the claimant denied receiving such a payslip. As noted above, as of the second day of the hearing there were no payslips available for us to look at. On the third day Mr Wilkinson produced some further documentation and that included correspondence from his accountants in which they stated that the claimant had been overpaid £439.76 for holiday and that as a result deductions had been made from the claimant's final pay so in fact there was no pay due to her, but the accountants advised that resulted in only £347.35 of the allegedly overpaid holiday being recovered by deduction.

8.14. Mr Wilkinson was not able to provide any holiday records to substantiate the overpayment. The Tribunal were also provided with copies of the payslips, at least in the format which they appeared in the accountant's records for the months March to July 2018. The Tribunal noted that within the contract of employment, at page 51, there was a heading 'Deductions from Salary' which read as follows

"On occasions the company may need to deduct from your salary overpayments or other money owing to the company such as holiday pay in excess of your entitlement. You agree that such deduction may be made after the reason for the deduction and the timing of the deduction has been communicated to you in writing."

Assuming for present purposes that the accountant's statement of overpayment is correct, we found that the respondent's own conditions, as set out in the contract, in fact preconditions for a deduction to be made, had not been satisfied in the circumstances of the claimant's case. It is obvious that the intention of the relevant contractual term is that an

employee should be given advance notice that a deduction is to be made with an explanation of why and an indication of when. All the respondent can point to the last payslip. We have not seen the actual version of the payslip as issued to the claimant and of course in any event the claimant says that she did not receive it. The payslip could have had some notes or explanation attached to it. However, even if it had, and if the claimant had received it, the pre-conditions would not have been met because she would only be advised of the deduction after it had been made.

In these circumstances, and again relying upon the figure given by the accountants we found that the deduction of £347.35 was an unauthorised deduction from the claimant's wages contrary to the Employment Rights Act 1996 section 13 and the respondent could not bring itself within the exception to that section.

9. **Remedy**

Injury to feelings

9.1. In her schedule of loss the claimant sought £10,000 as compensation for her injured feelings. Although the claimant may have intended that to cover any direct discrimination complaint she was pursuing, we considered that that figure was inappropriate for the part of her discrimination complaint which had succeeded, harassment. Here there were two discrete acts over a brief period of time. The claimant has given us an eloquent explanation of how she felt as a result of those comments. We have given consideration to an extract from her GP notes which refers to her attendance with her GP on 27 June 2018. This refers to the claimant mentioning that a co-worker had informed colleagues of her reduction in medication. It refers to the claimant having suicidal thoughts but no plans. There is also a reference to her being angry and agitated with her partner and that she had moved out of a property shared with the partner and had now returned to live with her mother. There were also references to money worries. The claimant was prescribed an increased dose of medication. The other consultation is 11 July 2018 which reads *"patient better. Is now split with boyfriend. Work unable to face this at the moment may contemplate other employment"*. In these circumstances we consider that although no doubt the claimant was quite upset by the behaviour of Miss Eaton there were also other stressors in her life. There was of course the fact also that she had resigned her employment after what she felt to be a wholly unsatisfactory grievance process. As those matters have not been found to be discriminatory they cannot feature in our consideration for award of injury to feelings. We also note that the claimant was able to undertake some self-employment in July albeit that she told us that she got very upset at that work after completing her first day. In all the circumstances we considered that an award of £3500 was appropriate in respect of injury to feelings and we have, as is usually the case, awarded interest on that.

Loss of Earnings

9.2. Once in receipt of payslip information which includes two payslips for the claimant's new direct employment which began on 3 February 2019, we were able to calculate that the claimant's gross weekly pay with the respondent had been £423.00 and the average net weekly payment £338.76. Although only one payslip is available for the new employment we will have to assume that that will be typical and that means that the net weekly pay there will be £274.97. That is £63.79 less than the old job.

9.3. We consider that the claimant has sufficiently mitigated her loss by obtaining the self-employment which provided an income from a business known as 'Indulgence' and subsequently further self-employment from a business called 'Duo Dronfield'. The claimant has provided her bank statements which show the monies she has received during the period of employment and, as we have mentioned, there are the two payslips which indicate her income from her subsequent direct employment. Mr Wilkinson has complained that the claimant has not been able to produce any invoices submitted for the self-employment. The claimant says that the reason for that is because she did not submit any such documents. We accept that explanation.

Future Loss

9.4. We have asked the claimant whether she thinks it is possible for her to get promotion or a pay rise with her new employer, Sunkiss UK Limited, and the claimant says that this is unlikely. There are no management positions available. We have also asked the claimant whether she is looking for better paid employment for instance something at managerial level. The claimant's job title is team leader. The claimant indicated that she was not intending to look for higher paid work because she was happy in the current working environment. Whilst of course that is entirely a matter for the claimant we considered that in those circumstances it would not be appropriate to award her 12 months' future loss which is what she was seeking in her schedule. Instead we considered that it was likely that if she had wished to do so she would have been able to obtain equivalent employment to that she had with the respondent and therefore equivalent pay within 6 months. Accordingly, we have limited the future loss calculation to that period.

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Employment Judge Little

25th June 2019