EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
A	**V**	**MAINSTAY FACILITIES MANAGEMENT**

HELD AT: **CARDIFF** **ON:** 29, 30 & 31 JULY 2019

BEFORE: **EMPLOYMENT JUDGE: N W BEARD** **MEMBERS: MRS BISHOP**
MRS MANGLES

Representation:
For the claimant: In Person
For the Respondent: Mr Lovejoy (Solicitor)

PRELIMINARY HEARING JUDGMENT

1. The claimant's Identity is anonymised as "A" and the identity of others and of place names which could lead to the identification of the claimant are anonymised pursuant to rule 50 of the Employment Tribunal Rules 2013.
2. The claimant's claim of disability discrimination is well founded.
3. The claimant's claim of unfair dismissal not well founded and is dismissed.
4. The respondent is ordered to pay to the claimant the sum of £6,000 (six thousand pounds) in compensation.

REASONS

Preliminaries

1. The claimant complains of constructive unfair dismissal and disability discrimination relying on a failure to make reasonable adjustments. The respondent concedes that the claimant is a disabled person within the meaning of the Equality Act 2010 and that there are no time limit issues to consider.
2. In respect of the claimant's complaint of unfair dismissal the claimant relies on a breach of the implied term of trust and confidence and argues that a series of events, culminating in the last straw that she suffered a faecal incontinence episode on the 8 August 2018 when no toilet facilities were provided by the respondent, the claimant relies on a multitude of events leading up to that point. The respondent argues that the claimant resigned on 7 August 2018 because she did not wish to work Mondays which was a requirement of her contract. The respondent contends that this could not amount to a "straw" and the earlier

matters relied upon were not the reason or any significant part thereof, for the claimant resigning.

3. In respect of disability discrimination, the claimant contends that the respondent failed to make a reasonable adjustment/provide an auxiliary aid to the claimant. The claimant disabilities are diabetes and IBS, the claimant contends that one aspect of this disability is unpredictable bowel movement with episodes of faecal incontinence. The respondent provided no specific toilet facilities at the workplace the claimant contends that the respondent was under a duty to provide them. The respondent contends that the respondent imposed no provision criterion or practice in not providing a toilet and/or that a toilet does not amount to an auxiliary aid. In addition, the respondent contended that it would not be reasonable for the respondent to have to provide a toilet in the circumstances.

4. The tribunal heard oral evidence from the claimant and her domestic partner. The respondent called oral evidence from Julie Griffiths, the area manager, “B” the claimant’s line manager and “C” the supervisor on site. The tribunal was also provided with a bundle of documents running to more than 200 pages and additional documents were provided during the course of the hearing. The tribunal informed the parties that it would only consider those documents referred to in witness statements, during the evidence or in submissions.

The Facts

5. The claimant was employed as housekeeper. Her job was to clean and to report issues in the common areas of blocks of flats for which the respondent provided cleaning and caretaking services under contract to some of the owners. The site was not owned by one individual or organisation. The claimant commenced her employment 20 March 2016. The claimant has provided evidence which the respondent denies in relation to events from the start of her employment. These complaints the claimant told us were her listing, at the behest of the Employment Judge who conducted the preliminary hearing. However, because of our conclusions the last straw it is unnecessary for the tribunal to resolve those disputes. However, it is clear that from the outset of her employment the fact that there was no toilet on site for the respondent’s staff was an issue of which the respondent was aware; the respondent had made some attempts at finding a solution to the problem.

6. The site has a number of blocks of flats, the claimant was required to work in a number of them every day. The respondent had no office or toilet facilities on site, it did not own the site and was permitted to occupy a small room (which was in fact designed as the electric meter area for the flats in that block). This room was situated in the underground car park to that block. In 2017 the respondent had approached one of the site owners which had an office on site with toilet facilities asking if the respondent’s staff could use those facilities. The owner refused citing the fact that the toilet was only accessible through an office with computer equipment and that it was concerned about confidentiality and data protection. Julie Griffiths also had a conversation, on one occasion, with a company which acted as agent for a group of owners about the siting of a toilet with a negative response, she did not pursue this further. The respondent’s employees were told to use the toilet facilities in a supermarket half a kilometre from the site. The respondent’s case was that there was an “arrangement” to use the facilities, however the evidence was that this was not arranged with the owners of the

supermarket but an understanding amongst the respondent's staff. It was common ground that it would take minutes to walk to the supermarket: the claimant said up to eight the respondent up to seven minutes.

7. In January 2018 the claimant had been absent from work for 15 days and an absence review meeting was held with the claimant by "B". In this meeting the claimant made "B" aware that she had IBS and diabetes and that one consequence was disruption of bowel movements and the urgency with which the claimant would need to use toilet facilities. "B" did not seek advice from HR on this nor did he inform Julie Griffiths, he did not seek to send the claimant to occupational health. The claimant was simply expected to continue her employment as before. The claimant told us, and we accept, that she continued to mention her needs to "B" when he was present in informal conversations. "B" did not accept this but in our judgment the claimant's recollection is likely to be accurate as it was a particular issue for her, but "B" would not have considered it important given his reaction to the information he was provided in January 2018.

8. In a further absence review meeting between the claimant and "B" on the 11 April 2018 the claimant was specifically asked what might assist her to work and avoid absences. The claimant informed the respondent that a "toilet would help". Again, on this occasion, this information was not passed to Julie Griffiths. Neither were any steps taken to assess the claimant's condition such as with an occupational health appointment. "B" did nothing about this issue on this occasion.

9. In August 2018 the claimant sought to change her working hours, and a meeting to discuss this with "B" was held on 7 August. The claimant had always worked on a Monday, she sought to change so that she would have Monday's off. In evidence before us the claimant contended that it would assist with her disability. When asked to explain in which way having a Monday off in particular would assist, she said that it would give four consecutive days off work. However, when explored further the claimant accepted that she would have four consecutive days off work if she worked Mondays, but that this would commence on Thursday instead of Friday. Finally, the claimant conceded that the underlying reason was that she would have less contact with "C" and another employee. The claimant did not find working with these employees congenial. "B" told the claimant he could not permit her to have a Monday off for logistical reasons.

10. The claimant contended that at the end of this meeting "B" walking out had said to the claimant that she was the worst employee he had. We did not accept the claimant's evidence on this. It seems inherently unlikely that "B" who had sought on a number of occasions to avoid holding absence meetings with the claimant (and had done so only at the insistence of HR) because he understood her absences were genuine, would have made such a comment. We consider that the claimant, who would have been upset at the outcome of the meeting, misheard or misconstrued any comment by "B".

11. In the evening of 7 August 2018, the claimant tendered her resignation by email, the claimant requested a reduction in the notice period from four weeks to one. The claimant gave her reason for reducing the notice as a lack of facilities on site, she gave no reason for the resignation. From the oral evidence and the proximity of the email to the meeting we have drawn the conclusion that the reason for the claimant resigning was the respondent's refusal to accede to her request that she should not have to work on Mondays. The claimant suffered an episode of faecal

incontinence on the 8 August 2018 and, on 10 August, informed the respondent by email that she would not work her notice. However, the claimant had already resigned by this point, her leaving work at that stage was a reason for not working her notice period, it was not the res

The Law

12. The law that has to be to applied is Section 95 of the Employment Rights Act 1996 which provides so far as is relevant:

> *Circumstances in which an employee is dismissed*
>
> *(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—*
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> *--------*
>
> *(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.*

13. Schedule The approach to constructive dismissal is set out by Lord Denning in ***Western Excavating (ECC) Ltd v Sharp [1978] 1 All ER 713, [1978] QB 761, [1978] 2 WLR 344, CA*** in which he defined constructive dismissal in the following way:

> *"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, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once."*

14. The guidance given for deciding if there has been a breach of the implied term of trust and confidence is set out in ***Malik v. Bank of Credit; Mahmud v. Bank of Credit[1998] AC 20; [1997] 3 All ER 1; [1997] IRLR 462; [1997] 3 WLR 95; [1997] ICR 606*** where Lord Steyn said that an 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 employer and employee."*

15. The In this case, we must also pay mind to the fact that the claimant relies on the last straw principle, in that she argues that the conduct of the respondent throughout her employment caused her to resign. In ***Lewis v Motorworld Garages Ltd [1986] ICR 157***, Glidewell LJ pointed out that at p 169 F-G that the

last action of the employer which leads to the employee leaving need not itself be a breach of contract. In ***Omilaju v Waltham Forest London BC [2005] 1 All ER 75*** Dyson LJ said at paragraph 21:

> *"If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."*

16. I The tribunal is therefore required to decide whether the respondent's conduct in this case could objectively be said to be calculated, or in the alternative likely, to seriously damage confidence and trust between the claimant and the respondent. Thereafter we are required to examine whether the claimant resigned in response to that conduct, and that conduct must include a final event which contributes to earlier actions so as to make the entirety of the conduct, taken together, sufficiently serious so as to damage the relationship of confidence and trust between employer and employee.

17. In dealing with the claim of discrimination the tribunal must consider section 20 and 21 of the Equality Act 2010 which provide:

> ***20 Duty to make adjustments***
>
> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
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> *(2) The duty comprises the following three requirements.*
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> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
>
> *----------.*
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> *(5) The third requirement is a requirement, where a 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.

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(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

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(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

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21 Failure to comply with duty

(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 purpose 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.

18. In disability discrimination relating to a failure to make reasonable adjustments, the Tribunal has in mind the decision of the Employment Appeal Tribunal in the ***Environment Agency v Rowan UK EAT/0060/07/DM***, it is indicated that a Tribunal must identify the provision criterion or practice applied by or on behalf of an employer, the identity of non-disabled comparators where appropriate, and the nature and extent of the substantial disadvantage suffered by the Claimant, indicating that it is clear that the entire circumstances must be looked at, including the cumulative effect of the provision criterion or practice, before going on to judge whether an adjustment was reasonable. The Tribunal are aware that it is its duty in the light of the decision in Rowan, to identify the actual provision criterion or practice on the facts of the case, and, therefore, extending this to the third requirement of an auxiliary aid we conclude that there is no burden on the claimant to propose what auxiliary aid ought to be provided. If this were not so then an employer aware of a claimant's disability but which failed to carry out its duty under the act would avoid liability if the claimant, through a lack of ability to research identified an auxiliary aid wrongly but it would have been reasonable for the respondent to have to provide a different auxiliary on the weight of the evidence. We are reminded of the words of Elias J in ***Tarbuck v Sainsbury's Supermarkets [2006] UKEAT 0136/06/0806***

> *"There can be no doubt that any employer would be wise to consult with a disabled employee in order to be better informed and fully acquainted of all the factors which may be relevant to a determination of what adjustment should reasonably be made in the circumstances. If the employer fails to do that, then he is placing himself seriously at risk of not taking appropriate steps because of his own ignorance. He cannot then pray that ignorance in aid if it is alleged that he ought to have taken certain steps and he has failed to do so. The issue for the Tribunal will then be whether it was reasonable to take that step or not."*

19. What is an auxiliary aid? Mr Lovejoy asks us to confine that to the type of examples as are mentioned in guidance provided by the Equality and Human Rights Commission (both in respect of employment and services). However, in our judgment those are just that, examples, the principal definition shows a much broader intent both paragraph 7.47 of the employment code and paragraph 6.13 of the services guidance read in similar terms that "*an auxiliary aid or service is anything (something in 6.13) which provides additional support or assistance to a disabled person*". It appears to us that the limitation placed on this definition must lie in the concept of the reasonableness of provision rather than the description of the aid. If that were not right the absence of a physical feature (which cannot be litigated as being a physical feature under the statute) could not then be dealt with as an auxiliary aid, and in those circumstances something which it would be reasonable for the respondent to have to provide would not be provided because of a lacuna in the legislation. We could not read the legislation that way if we apply a purposive approach to construction. If the purpose is to enable disabled people to work, then the lacuna described would frustrate that purpose. We adopt the employment description of anything that provides assistance to a disabled person.

Analysis

20. The claimant must establish that the event which led to her resignation is sufficient to amount to a "straw". All other previous events she has relied upon in evidence were, in essence, her gathering of all the complaints about her employment that she had. The claimant's reason is that the respondent would not change the terms of the claimant's contract to permit her to not work on a Monday. It would be possible for an unreasonable refusal of a change in flexible working could amount to a straw. However, in this case the request

21. The difficulty for the claimant, in factual terms, revolves around the question of whether the medication and the changing diet was influencing what would otherwise have been permanent or frequent symptoms. The claimant has described intermittent symptoms which he says are controlled by those steps. However, there is no means for me to know whether, in the alternative, whether gallbladder symptoms naturally fluctuate. I have had no medical evidence put before me on that issue.

22. It is of importance to my decision that the claimant was sufficiently unwell to attend and be admitted to hospital on two occasions. When he did it was with significant and disabling symptoms. However, between those times he appears to

have been able to carry on his normal activities in attending work and caring for his wife.

23. The question of fact for me to address is whether the claimant's absence of symptoms through much of this second period were due to his taking medication and/or the change in diet, or whether their absence was simply a feature of the natural fluctuations in symptoms for this condition? I have no medical evidence that addresses this point. Therefore, I am required to consider, in the words of Lord Hope, if it could well happen that, in the absence of medication and diet, the significant symptoms were likely? Would the claimant would have had further episodes of acute pain requiring admission to hospital, or at the least symptoms which prevented him from undertaking ordinary daily tasks.

24. I am not able to decide about the effect of that medication and diet; I would need some evidence put before me about causation. It is possible that the claimant could have had further episodes or continuing difficulty in the absence of these changes and medication. However, it is equally possible that this is the natural course of this condition. In his submissions Mr Baker referred to gallstones having recurring issues, but in the absence of medical or indeed other evidence, I cannot say that such recurrence could well happen. Certainly the operation the claimant underwent has cured the problem of gallstones for the claimant but I am not in a position to say that the medication used in the meanwhile controlled symptoms.

25. Can acute admission to hospital resulting from the same impairment on two occasions one year apart amount to substantial adverse effect on day to day activities? In my judgement they cannot. Day to day activities refers to an ongoing situation in my judgment not isolated incidents.

26. I cannot hold that a recurrence could well happen, I cannot say that it could well be that this impairment in terms of impact on day-to-day activities could well have lasted for a year. The requirement for a long-term condition is not met in my judgment. I am drawn to the conclusion that the claimant cannot establish that he was disabled within the meaning of the Equality Act. The claimant is not disabled.

Judgment posted to the parties on

……17 August 2019…….

For the staff of the tribunal office

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EMPLOYMENT JUDGE W BEARD

Dated: 15 August 2019