EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4120674/2018

Held in Glasgow on 4, 5, 6 & 7 March 2019, 4 April 2019 & 28 May 2019 (Members Meeting)

Employment Judge S MacLean
Tribunal Member K Thomson
Tribunal Member J Burnett

Mr J A Kennedy	**Claimant** **Represented by:** **Ms E Drysdale** **Student Advisor**
The Glasgow Angling Centre Limited	**Respondent** **Represented by:** **Mr R Eadie** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal was that (1) the respondent discriminated against the claimant on the ground of his disability and (2) the claimant was constructively unfairly dismissed.

REASONS

Introduction

1. In the claim form sent to the Tribunal's office on 21 September 2018, the claimant complains of constructive unfair dismissal under section 98 of the Employment Rights Act 1996 (the ERA); age and disability discrimination under sections 13, 15 and 26 of the Equality Act 2010 (the EqA) and failure to pay holiday pay. The claimant seeks compensation.

2. On 8 February 2019, the claimant's representative wrote to the Tribunal to confirm that the claimant was no longer claiming direct discrimination on the grounds of age and disability and payment of holiday pay claim.

3. The respondent admitted the claimant was disabled in terms of section 6 of the EqA. The respondent did not dispute that it knew that the claimant was a disabled person at the time of the alleged discriminatory acts. The respondent disputed that it discriminated against the claimant because of something arising from his disability or that the claimant was subject to harassment because of her disability or age. The respondent denied being in fundamental breach of contract entitling the claimant to resign and claim constructive unfair dismissal. Alternatively, the dismissal was fair under section 98(4) of the ERA.

4. It was agreed that the final hearing would be restricted to determining liability.

5. The parties prepared a joint set of productions. The claimant gave evidence on his own account. For the respondent, the Tribunal heard evidence from Alexander Martin, Mail Order Manager; Andrew Mackay, Supervisor; Paul Devlin, Managing Director and Gordon Armour, retired General Manager.

The relevant law

6. Section 15 of the EqA provides that A person (A) discriminates against a disabled person (B) if (a)A treats B unfavourably because of something arising in consequence of B's disability, and (b)A cannot show that the treatment is a proportionate means of achieving a legitimate aim. This 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.

7. Section 26 of the EqA provides that a person (A) harasses another (B) if A engaged in unwanted conduct related to a relevant protected characteristic; and 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.

8. Section 123 of the EqA provides that a complaint under section 120 may not be brought after the end of (a) the period of three 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. It also provides that conduct extending over a period is treated as being done at the end of that period and failure to so something is to be treated as occurring when the person in question decided upon it. In the absence of evidence to the contrary, the employer is to be taken as deciding not to do something when it does an act inconsistent with doing it or, if there is no inconsistent act, at the expiry of the period in which the employer might reasonably have been expected to do it.

9. Section 124 of the EqA provides that if an employment tribunal finds that there has been contravention of a provision referred to in section 120(1), it may make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate; (b) order the respondent to pay compensation to the complainant; (c) make an appropriate recommendation

10. Section 94 of the Employment Rights Act 1996 (the ERA) provides that employees have the right not to be unfairly dismissed. Section 95(1)(c) states that a dismissal can include a constructive dismissal where: *"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."*

The Issues

11. The issues to be determined by the Tribunal are as follows:

    a. Are any of the claims time barred; if so is it just and equitable to consider them?
    b. Did the respondent treat the claimant unfavourably because of something arsing in consequence of his disability?
    c. Did the respondent engage in unwanted conduct related to disability and/or age and did the conduct have the purpose or effect of violating

the claimant's dignity or creating an intimating, hostile degrading humiliating or offensive environment for him?

d. Was there a fundamental breach of contract by the respondent?

e. Did the respondent's breach cause the claimant to resign; and

f. Did the claimant delay too long before resigning thus affirming the contract and losing the right to claim constructive dismissal?

Findings in fact

12. The Tribunal makes the following findings in fact.

Background

13. The respondent is a limited company which sells a selection of fishing gear, angling equipment, clothing and other accessories. It employs around 120 people and operates stores in Glasgow, Edinburgh, Scunthorpe and Hull as well as business online business.

14. Paul Devlin is the respondent's managing director and sole shareholder. He was married to the claimant's cousin.

15. Gordon Armour was the general manager until he retired on 15 January 2018. As general manager Mr Armour had a broad spectrum of responsibility including human resources and health and safety. He oversaw the day to day running of the business and was based in Glasgow along with Mr Devlin where around 70 employees worked.

16. Alex Martin is the mail order manager based in Glasgow. He is responsible for a team of approximately 15 employees and manages orders including booking items, packing and dispatching them.

17. Until he left the business in November 2016 Stephen Bowyer was one of the senior sales managers, reporting to Mr Martin. Andrew Mackay, who was also a senior sales manager, took over Mr Bowyer's responsibilities.

18. The respondent employed the claimant on 1 May 2004 originally as a full-time warehouse worker.

19. The claimant underwent an ileostomy procedure in August 2008. He has an ileostomy bag and inoperable abdominal hernias. The claimant requires to take medication which can cause dryness requiring an increasing intake of fluids. He has restricted movement as he risks the strangulation of his abdominal hernias if he overstretches. The claimant is unable to lift heavy or bulky items due to the physical restrictions caused by his disability. The claimant is often unable to sleep through the night due to his need to tend to his ileostomy bag. The claimant has a disability in terms of section 6 of the EqA.

20. The claimant returned to work in 2009. The respondent adjusted his role. The claimant was transfer to the mail order department as a mail order packer with light duties; his hours of work were reduced to 16 hours per week with flexibility as to how these hours were worked. He reported to Mr Bowyer. The claimant carried out his duties with these adjustments without encountering any issue.

21. Around July 2015 the respondent issued the claimant with a contract of employment which he and Mr Armour signed (the Contract). The Contract referred to: the claimant being full time; being entitled to 28 days annual leave (including statutory holidays); entitlement to statutory sick pay; the requirement to undergo medical examination; discipline and grievance procedures which are for guidance and have no contractual effect.

22. The respondent has an anti-bullying and harassment policy. It refers to complaint being treated seriously and in confidence. The informal approach is to speak to the person concerned or the general manger. A formal complaint is in writing. The person conducting the investigation will be impartial and if possible, have no prior involvement in the allegation who will meet separately the person a making the complaint and the alleged harasser. Where the complaint is not upheld, or the harassment continues there is a right of appeal or to bring a grievance.

23. The respondent's grievance procedure states that it can be used about a wide range of matters including dissatisfaction with terms of employment and

working relationships. If grievances cannot be resolved on an informal basis a written grievance is to be sent to the general manager who will invite the employee to a meeting to discuss it. There is a right of appeal where possible the appeal will be heard by another appropriate senior manager who was not involved in the decision from which the appeal is made.

July 2015 Email/Comment's about holidays

24. Mr Armour managed employees' allocation of holidays and authorised annual leave. He calculated the claimant's entitlement as 17 days per year based on the claimant working three days (24 hours) per week rather than two days (16 hours) per week.

25. Mr Armour realised his mistake around July 2015 and told the claimant. Mr Armour said that as it was his mistake which had occurred over time, the clamant would continue to receive the same allocation of leave.

26. On 15 July 2015, the claimant emailed Mr Martin, who was at that time his line manager, mentioning the mistake and asking for clarification that certain weeks were available for him to take his remaining 12 days leave. Mr Martin forwarded the claimant's email to Mr Armour on 19 July 2015 with the following comments (the July 15 Email):

"Here is that email I was talking about! In addition can you please stick these dates on below for him. Don't worry too much if they clash with others, as you know my thoughts on him, he would be as well in the house!"

27. Mr Armour met the claimant and handed him a piece of paper containing the claimant's confirmed dates for leave. On the reverse was a copy of the July 15 Email.

28. On 21 July 2015, the claimant sent an email to Mr Armour requesting a transfer to another department because of the content of the July 15 Email. The claimant indicated that he could not work in an environment where slanderous comments were being made about him. The claimant also stated:

"My reason for light duties are, since having my bowel removed, I physically do not have the stamina to carry out procedures that may be strenuous to me. Also during and since my surgery I have developed hernias behind my stoma and my abdomen."

29. Mr Armour acknowledged the email and said that he would consider the request. Mr Martin then sent an email to the claimant on 21 July 2015 apologising for his "stupid statement". The email continued:

"I have no issue with the quality or indeed the thoroughness of your work, however did have slight concerns previously with your quantity output and never approached you in relation to this as I knew your physical ability restricted you.

Having said that, I have checked the packing stats of recent times and I must say your output has greatly increased and yes I have to hold my hands up, you are of great help to my department."

30. The claimant accepted Mr Martin's apology and confirmed that he would be happy to continue in the dispatch section.

31. On 30 July 2015, the claimant sent an email to Mr Armour as follows:

"Will you please note that I do have a disability. Also, Alex is aware of my capabilities and give me recorded and mail pack items to do and not any larger or heavier jobs where pulling and lifting could possibly cause me further injury. Other members of the mail order management i.e. Nick or Stevie etc may not be fully aware of my circumstances of what I can and what I can't do. But rather than me getting embarrassed and repeating myself, could you do me a favour and update them on this? As this would be a great help for me, that way I don't have to explain myself over again."

32. Mr Armour acknowledged the email and confirmed that he would pass on the comments to the relevant staff.

33. Mr Martin resented Mr Armour's decision to allow the claimant holidays to continue to be based on working three days rather than two days. Mr Martin

did not have authority to refuse the holidays but tended to prevaricate when the claimant was making requests for leave and make sarcastic remarks insinuating the claimant was taking too many holidays.

The 22 February Incident

34. In late 2016/early 2017, Andrew Mackay who worked in the dispatch department became the claimant's line manager. The claimant was not advised of this. Mr Mackay is very organised and took steps to make the dispatch department more efficient and tidier.

35. On 22 February 2017, the claimant took two bags from one packing bin and returned them to the wrong bin. Mr Mackay spoke to the claimant in a tone and manner that the claimant perceived as condescending. The claimant complained to Mr Martin who in Mr Mackay's presence, told the claimant that he was fed up with him complaining and that if the job was not suitable, he should think of moving on.

The 27 February Email

36. The claimant sent an email to Mr Armour on 27 February 2017 expressing his concern that Mr Martin had a problem with him because of his delay in confirming the claimant's annual leave entitlement and the manner and nature of Mr Martin's response to the claimant's complaint. The claimant asked Mr Armour if he could find "solution to resolve this at this point rather than it deteriorating any further".

37. Within two hours of the claimant sending the email, Mr Armour replied by email confirming the claimant's holiday allocation of 16 days (the 27 February Email). Mr Armour went on to explain that he had spoken to Mr Martin and Mr Mackay and narrated their version of events. Mr Armour stated that Mr Martin said, "this is your immediate line manager and I can't have you questioning a legitimate instruction from him". Mr Martin also confirmed that he did say "if you're going to react this way maybe this job isn't for you". Mr Armour's response continued:

"As far as I am concerned, YOU should be doing what you are told by your line manager or any other manager for that matter. They are there to manage staff and are given instructions by me or PD. If their instructions are not being carried out correctly THEY ARE ENTITLED TO QUESTION YOU ABOUT IT… TO POINT OUT YOUR ERRORS… AND MAKE SURE YOU ARE ALL DOING YOUR JOBS CORRECTLY.

As far as your remarks about the cameras are concerned, they have been very useful in sorting out issues like the above and have helped solve issues with the wrong items being picked and sent in the past. So no one is picking on you or looking at you in particular. THIS PART OF THE SYSTEM IS NOT ONLY THERE FOR SECURITY FOR ALSO TO HELP CORRECT ERRORS AND MAKE SURE THIS PART OF THE DEPARTMENT IS RUNNING EFFICIENTLY. Every other department including my office has cameras, so I don't see an issue here.

Just to let you understand Ian, things are pretty quiet at the moment and all department managers, myself and PD included, are all under a wee bit of pressure to get sales through the door as efficiently as possible… so you will find EVERYONE including you will have to work to the best of your abilities over the coming weeks/months and when you are told to do something by a manager it should be done without question."

The 28 February Incident

38. On 28 February 2017, Mr Armour was out of the office. The claimant assessed a job which he considered would be too bulky for him to pack without risk to his health. The claimant told Mr Mackay that he was leaving the job for a colleague to do. Mr Mackay spoke Mr Devlin who came down to the warehouse floor to speak to the claimant o. Mr Devlin asked the claimant if he was joking as a five-year-old could pack and lifted the bag in question with his pinkie. Mr Devlin considered the claimant should pack the bag and commented about the claimant sending emails with complaints. The claimant felt this incident seemed to have followed the complaint made to Mr Armour the previous day of which both Mr Mackay and Mr Martin were aware.

39. Mr Devlin subsequently spoke to the claimant by telephone. Mr Devlin told the claimant that if he had any further issues, he should speak directly to him rather than sending emails. If anyone had any problem with the size of the jobs that the claimant could do, the claimant should speak to Mr Devlin.

40. The claimant was upset by the incident. On 1 March 2017, the claimant sent a text message to Mr Devlin about the 28 February Incident. Mr Devlin replied saying that if everyone admitted their mistakes and communicated like adults, they would not have these problems (1 March Text). Mr Devlin was directing this comment at the claimant.

Imposition of Targets/May Meeting

41. Following the February incidents, Mr Martin regularly approached the claimant asking him how many jobs he would complete. The claimant felt that he was being put under increasing pressure.

42. On 22 May 2017, the claimant asked Mr Martin about his holiday entitlement. Mr Martin said that he would have to speak to Mr Armour because he was not sure what the holiday entitlement was.

43. On 23 May 2017, Mr Martin told the claimant that Mr Armour wanted to speak to the claimant in his office about holidays. The claimant attended Mr Armour's office where both Mr Martin and Mr Armour were present. Mr Armour on this occasion indicated that the claimant's holiday entitlement was now 17 days (rather than 16 days referred to in the email response of 27 February 2017). The conversation then turned to the claimant's statistical output. The claimant was told that the "stats" would be monitored over the next couple of months.

The 28 May Text Exchange

44. On 27 May 2017, the claimant sent a text message to Mr Devlin in which he raised concerns about his treatment by Mr Armour and Mr Martin at the meeting on 23 May 2017. The claimant explained that the working environment was having an effect on his stress level that he was worried about Mr Martin's management of his statistical output. Mr Devlin considered

that the claimant was a "stress monkey" and replied as follows (the 28 May Text):

"Hi Ian as you know I don't get involved with individual staff problems as I have too much to do as u can imagine. All I can say is that Alex and Gordy are fair to EVERYONE and everyone is treated SO instead of getting yourself stressed as you seem to very easily why don't you say that you will try a wee bit harder and see how you get on."

45. The claimant considered that Mr Devlin was not taking his concerns seriously and was being dismissed out of hand. The claimant felt that he was being pushed over the edge. The claimant consulted his general practitioner and was signed off work for work related stress.

Absence Management

46. Throughout his sick absence, the claimant sent the respondent fit notes by recorded delivery every four to six weeks. These were not acknowledged. There was no contact from the respondent.

Removal of Vitality Policy

47. On 8 November 2017, the claimant received a letter from Vitality Health Insurance informing him that he was no longer on the respondent's health policy. As the claimant had not heard directly from the respondent, he had no information why he was removed from the policy. This caused him stress and anxiety when coupled with the general lack of contact by the respondent.

48. On 30 November 2017, Mr Armour sent a standard letter to the claimant advising him that his statutory sick pay would expire on 13 December 2017. The letter stated that the claimant's employment would continue subject to "ongoing discussions on the claimant's capability and likely to return to work". There was no ongoing discussion. The claimant continued to send his medical certificates to the respondent.

The Grievance Process

49. After taking advice from the Citizens Advice Bureau the claimant raised a grievance with Mr Armour on 2 February 2018 about the lack of contact from the respondent during his absence and requested information about his removal from the Vitality insurance policy while on sick leave. The claimant confirmed that he was aggrieved by the respondent's treatment, particularly that of Mr Martin and Mr Devlin. The grievance asked for the concerns to be addressed in writing as he was unfit to attend a workplace meeting.

50. Mr Martin wrote to the claimant on 19 February 2018 confirming receipt of the letter of 2 February 2018 which would be responded to but meantime inviting him to an absence review meeting on 27 February 2018 at 10am. The caused further stress and anxiety to the claimant as Mr Martin was the subject of the grievance

51. The claimant replied on 22 February 2018 commenting that attending an absence review meeting two weeks after raising a grievance which was unanswered was unreasonable in the absence of any contact from the respondent. The claimant indicated that he was not able to continue with correspondence himself and in future he may involve a third party.

52. Mr Martin contacted Julie Barnett, the respondent's external HR advisor before responding to the grievance. On 22 February 2018, Mr Martin sent the claimant a letter advising that the grievance was not upheld (the Grievance Outcome). While Mr Martin said that a "full" investigation had been carried out, Mr Martin had not read the respondent's grievance procedure; he confused the 22 February Incident and the 28 February Incident; he did not obtain copies of the text messages between the claimant and Mr Devlin to which he referred; no statements were prepared; and he was unable to comment on the claimant's removal from the Vitality health policy.

53. On 23 February 2018 Mr Martin wrote to the claimant informing him that Mr Armour retired and was no longer employed by the respondent.

54. On 6 March 2018, the claimant appealed against the Grievance Outcome on several grounds including Mr Martin having investigated it and failing to address several points raised in the grievance. based on the grievance. Despite Ms Barnett having assisting Mr Martin with the Grievance Outcome she dealt with the appeal.

55. Around 22 March 2018 Ms Barnett spoke to the claimant over the telephone. She said that she would have to investigate his grievance. There was no written record of any investigation by her. She did not take written statements from Mr Martin, Mr Mackay or Mr Devlin.

56. On 12 April 2018 Ms Barnett sent an email to the claimant advising that his appeal was unsuccessful (the Appeal Outcome). She stated that the respondent thought it was illegal to contact the claimant while he was sick absent and that was why the respondent had not been in touch. Ms Barnett stated that the respondent would write to the claimant separately about the Vitality policy. The respondent did not do so.

57. From Appeal Outcome the claimant felt that his concerns were being dismissed out of hand.

The Handling of the Claimant's Request for Information

58. The claimant heard no further from the respondent. His last pay slip was received on 14 March 2018. The claimant was concerned that this was further evidence of the respondent trying to manage him out of the business.

59. On 8 May 2018, the claimant's representatives, University of Strathclyde Law Clinic (USLC) wrote to the respondent, enclosing a mandate and highlighting that the claimant had not received payslips for the past five weeks although to his knowledge he was still employment and had not received notification of dismissal. USLC asked for confirmation that the claimant was still employed by the respondent and requested a copy of his contract of employment.

60. The claimant was sent a copy of his payslips directly by an external payroll company. There was no response to any of his other requests. The explanation given for not receiving payslips was because he was on zero pay.

This had been the situation since January 2018. The claimant therefore remained confused about his employment status which exacerbated his stress levels.

61. USLC sent another letter to the respondent on 4 June 2018 asking for all correspondence to be sent to them. The respondent did not reply.

The Resignation

62. The claimant resigned on 21 June 2018 with immediate effect stating due to the ongoing discrimination by the respondent he felt it was not possible to return to work as the working relationship had become untenable (the Resignation Letter). The claimant considered that the respondent would take no action facilitate his return to work and it had succeeded him leaving.

63. The claimant contacted ACAS on 9 August 2018 and an ACAS certificate was issued on 16 August 2018. The claim form was sent to the Tribunal on 21 September 2018.

Observations on witnesses and conflict of evidence

64. The Tribunal considered that the claimant gave his evidence in a dignified manner to the best of his recollection. His evidence was consistent with his contemporaneous documentary evidence. The claimant endeavoured to assist the Tribunal and did not embellish his evidence. He made appropriate concessions. The Tribunal considered him to be a credible and reliable witness.

65. By contrast, the respondent's witnesses were unimpressive, lacked credibility and reliability. While the Tribunal acknowledged that most of the significant events took place in 2017 it considered that the respondent's witnesses were senior employees with lengthy service who had known and worked with the claimant for more than ten years. Although Mr Armour retired from the business in January 2018, he was an experienced general manager with the responsibility including HR for 100 employees. The respondent had been taking advice from an employment consultant from at least February 2018. According to the respondent there was a "full" investigation into the claimant's

grievance by Mr Martin and separately Ms Barnett in February/March 2018. The respondent knew of these proceedings in September 2018 and has been represented throughout. The productions mostly comprised of contemporaneous documents which the respondents' witnesses created but to which they had access.

66. The Tribunal was also mindful that Mr Devlin was the owner of the business; he is related to the claimant through marriage and said that he was also friendly with the claimant. Mr Martin was involved in most of the issues which were the subject of the claimant's grievance and Mr Martin claimed to have carried out an investigation into these matters in February 2018. Despite Mr Armour's experience as a general manager, he had on no previous occasion cause to write to an employee to advise that the statutory sick pay had expired. Mr Mackay said that he was aware of the claimant's relationship with Mr Devlin and deliberately took the decision to speak directly to Mr Devlin albeit that other employees had chosen not to do so. Therefore, it seemed to the Tribunal that despite the passage of time, each of the respondent's witnesses had reasons to specifically recall events and they were unusual. It was therefore surprising that the recollection was contradictory and unconvincing.

67. The Tribunal noted that during his evidence in chief, the claimant did not refer to being related to Mr Devlin. In cross examination the claimant said that he was related to Mr Devlin through marriage. The evidence of the respondent's witnesses was that the claimant used his family connection with Mr Devlin when dealing with his line managers.

68. The Tribunal had no doubt that the claimant's family connection with Mr Devlin was a significant factor in the adjustments that were made to facilitate the claimant returning to work in 2009 on part-time hours. The Tribunal was not satisfied on the evidence before it that the claimant relied upon this relationship in dealing with line manager. To the contrary, the documentary evidence suggested that the claimant dealt with line managers and did not approach Mr Devlin. It was Mr Mackay who escalated the 22 February

Incident to Mr Devlin who then subsequently told the claimant to liaise with him direct.

69. That said, the Tribunal considered from the evidence that Mr Martin and Mr Mackay perceived that the claimant had preferential treatment because of his family connection with Mr Devlin. Mr Martin particularly had issues with the claimant having more favourable holiday entitlement than he was entitled. The Tribunal considered that Mr Martin resented this and therefore it was more probable than not that he did prevaricate with the claimant's application for leave and make sarcastic comments in relation to the claimant's absence on annual leave. The Tribunal therefore preferred the claimant's evidence in relation to these comments over that of Mr Martin.

70. Mr Mackay in the Tribunal's view was a competent task orientated manger. The Tribunal felt that his appointment coincided with the business being under pressure and the need to perform. The Tribunal considered that it was probable that Mr Mackay's management style was more hands on than that of Mr Bowyer.

71. There was conflicting evidence in relation to the 22 February Incident. The claimant alleged that Mr Mackay spoke to him in a condescending manner which resulted in the claimant complaining to Mr Martin. Only Mr Armour, was able to recall an event on 22 February 2017. The respondent's other witnesses appeared to confuse or conflate events on 22 February 2017 with events on 28 February 2017.

72. From the contemporaneous correspondence the Tribunal had no doubt that there was an incident on 22 February when the claimant had taken two bags from one packing bin and returned them to the wrong bin. Mr Mackay drew this to the claimant's attention in a manner which the claimant considered was condescending and resulted in him speaking to Mr Martin. Mr Martin spoke to the claimant on the warehouse floor, in Mr Mackay's presence during which Mr Martin told the claimant the job might not be for him.

73. There was confusing evidence from the respondent's witnesses whether the claimant was shown CCTV footage of the 22 February incident. Given that

only Mr Armour and the claimant could specifically recall the 22 February Incident, and their evidence was that the claimant was never shown CCTV footage in relation to it the Tribunal preferred their evidence on this point.

74. In relation to the 28 February Incident, the Tribunal considered that Mr Armour was not present and Mr Martin's involvement appeared to be peripheral. It was agreed that an issue arose between the claimant and Mr Mackay because the claimant did not pack a job. Mr Mackay chose to escalate this issue to Mr Devlin. The claimant was unaware of this until he was approached by Mr Devlin.

75. There was conflicting evidence about the cause of the 28 February Incident and whether the claimant was shown CCTV footage. The Tribunal considered that the evidence of the respondent's witnesses was confusing; they could not recall what happened or when. In the Tribunal's view, the claimant's evidence was more reliable and credible. The Tribunal had no doubt that while the respondent's witnesses may have looked at CCTV footage, it was not convinced that this was shown to the claimant. The Tribunal also considered that Mr Devlin was only involved in one of the incidents and that appeared to relate to the weight of the job given that Mr Devlin referred to a five-year-old being able to pack it and swinging the bag, from his pinkie.

76. There was also disputed evidence about whether there was any expectation on the claimant completing a certain a number of jobs. The claimant's evidence was that there was an increasing expectation from Mr Martin to complete 100 jobs which culminated in a meeting with Mr Armour and Mr Martin on 23 May 2017 during which there was reference to the claimant's statistical output and that his statistics would be monitored over the next couple of months. The respondent's position was that there were no performance expectations of the claimant. The Tribunal found the claimant's position more plausible. From Mr Armour's email sent on 27 February 2017, there were commercial pressures on the business. This was supported by Mr Mackay and Mr Devlin's evidence. The Tribunal also considered Mr Devlin's response to the claimant, when he expressed concerns about the statistics

supported the claimant's position that there were performance expectations of the claimant.

77. The Tribunal considered that the respondent's evidence about the cancellation of the Vitality policy on 8 November 2017 was contradictory. The response stated that the claimant was no longer on the policy as a period of cover had expired. Mr Devlin's evidence was that he took the decision to remove the claimant from the policy because he was a part time member of staff. The Tribunal considered that given the business pressures, it was more likely than not that Mr Devlin was reviewing cost saving measures and that Mr Devlin took the decision to remove the claimant and other part time employees from this benefit.

78. The claimant's position was that the respondent did not contact the claimant throughout his absence until the letter of 30 November 2017 which referred to ongoing discussions with the claimant regarding his absences. Mr Armour said in his evidence that he had tried to contact the claimant and on more than one occasion had spoken to his wife. The Tribunal did not consider this evidence persuasive particularly when it contradicted the respondent's position as set out in the Appeal Outcome that the respondent believed given the claimant's absence due to stress of work it should not contact him during his absence. The Tribunal found the respondent's position incredible. Given that the respondent's standard terms of conditions of employment envisage the respondent may write to an employee's requiring the employee to undergo a medical examination and discuss the result with the respondent or any matters that might affect the employee's ability to carry out the proper performance of their duties. It also appeared inconsistent with Mr Martin's response on receiving the grievance was of writing to the claimant inviting him to attend an absence review meeting. The Tribunal considered it highly unlikely that the respondent would not be aware that it was able to manage the claimant's absence and endeavour to facilitate him back to work and following due process terminate his employment if he was unable to do so.

79. In relation to the grievance investigation and Grievance Outcome, the Tribunal considered that Mr Martin's evidence was implausible. Mr Martin said that he

could investigate himself independently and impartially, although he did subsequently concede in cross examination that he might not be the best person to investigate the grievance. He said that Ms Barnett was involved and helped him write the Grievance Outcome. The Tribunal was not convinced that Mr Martin properly investigated the claimant's grievance. The Grievance Outcome was factually incorrect. The extent that there was any investigation, it appeared to the Tribunal, to be cursory. Mr Martin did not seek to clarify the facts which could have been done by looking at the contemporaneous documents which were produced to the Tribunal (such as the email to Mr Armour of 27 February and the text exchange between the claimant and Mr Devlin) nor did he ascertain the reason for the claimant's removal from the Vitality policy.

80. The Tribunal did not hear any evidence from Ms Barnett. There was no evidence produced of any investigation undertaken by her other than one telephone call with the claimant. There were no notes of any investigation carried out or copies of statements taken as part of her investigation. The Tribunal considered that the Appeal Outcome was also inaccurate. Had there been any investigation, the Tribunal considered that Ms Barnett should have ascertained the reason for the claimant's removal from the Vitality health policy. The Tribunal considered that the grievance process was indicative that the respondent was going through the motions.

Submissions

81. The parties provided detailed submission in writing which were exchanged, and supplementary comments were provided followed by oral submissions. The following is a summary.

The Claimant's Submissions

82. The Tribunal was referred to section 15 of the EqA and the following cases for guidance: *Trustees of Swansea University Pension & Assurance Scheme v Williams* [2015] IRLR 885; *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* [2016] ICR 306; *Hall v Chief Constable of West Yorkshire Police*

[2015] IRLR 893; *Pnaiser v NHS England [2016] 170; Hardy and Hansons Plc v Lax* [2005] ICR 1565*; and City of York Council v Grosset* UKEAT/0015/1*.*

83. The Tribunal was invited to prefer the claimant's evidence and find that the respondent's actions and inactions were unfavourable treatment were in consequence of the lighter duties and reduced hours the claimant had to work because of his disability. The claimant's need for lighter duties and reduced hours caused the respondent to devalue the claimant as an employee, viewing him with contempt and derision. The respondent's unfavourable treatment of the claimant was not a proportionate means of achieving a legitimate aim.

84. The claim is in time as the treatment is a course of conduct under section 123 of the EqA. The respondent's unfavourable treatment amounts to discrimination arising from disability.

85. The Tribunal was referred to section 26 of the EqA. The claimant argued that the respondent's conduct was unwanted conduct related to disability or alternatively age. The respondent did not value the claimant as an employee due to his disability and its effects, which led the respondent to harass the claimant by treating him and his concerns with complete disdain. The ongoing failure to even communicate with him shows the level of disrespect and contempt that the respondent had for the claimant, which was further by the evidenced from the respondent's witnesses, and by Mr Devlin, at the final hearing. Alternatively, the claimant had turned 60 in February 2017, which is when the problems he was experiencing at work appeared to gather momentum.

86. The claimant gave evidence to the profound effect these actions have had on him emotionally and mentally. From his numerous emails, texts and grievance, he did not want any of these actions to be carried out against him and wanted matters to be resolved. The unwanted conduct clearly had the prohibited effect.

87. The claims brought under the EqA are in time. The actions and inactions of the respondent amounted to a course of conduct extending over a period. This period ended with the claimant's resignation on 21 June 2018, in response to this ongoing course of conduct. The last omission in this ongoing course of conduct over the relevant period was the respondent's ongoing omission to confirm the claimant's employment status, send his contract of employment, or confirm the reason for his removal from the Vitality Policy. The claimant had been advised by Ms Barnett on 12 April 2018 that the respondent would contact him about his removal from the Vitality Policy. The last communication that was sent to the respondent by SULC was on 4 June 2018, which was a follow up to the letter of 8 May 2018, which requested information about the claimant's employment status and employment contract. The claimant cannot know or be expected to know when the respondent's decision, or decisions, not to respond to the claimant's requests for clarification regarding his employment status, reason for removal from the Vitality Policy, and employment contract was, or were, taken. In the absence of evidence to the contrary, the employer is to be taken as deciding not to do something when it does an act inconsistent with doing it or, if there is no inconsistent act, at the expiry of the period in which the employer might reasonably have been expected to do it.

88. The respondent decided not to respond to SULC at some point after receiving the letter dated 4 June 2018 by second-class post. Given that the respondent spoke to Ms Barnett regularly regarding HR issues, it is likely that this decision would have been taken after seeking advice from Ms Barnett, Ms Barnett is an external adviser and it is not apparent to the claimant how long it would have taken the respondent to seek her advice in this matter.

89. Following letter of 4 June 2018, it would have been reasonable to have expected a response on or before 21 June 2018. Some information had been provided to the claimant by way of third-party on 15 May 2018, from which it might be inferred that further information would be forthcoming from the respondent to SULC. However, by 21 June 2018, it was apparent that no further clarification would be provided.

90. As the claim was lodged on 21 September 2018, the claim is within the time limits set out at section 123(1)(a) and accordingly, is not time-barred.

91. Alternatively, if the Tribunal finds that this act or omission renders the claimant's discrimination claims out of time, it would, nonetheless, be just and equitable to allow the claims in out of time. The respondent failed to respond to reasonable requests for information and clarification from the claimant and SULC. The claimant should not be unfairly prejudiced by allowing time for the respondent to address the relevant issues, even if in fact the respondent was doing nothing at all over this period. If there was a delay .it was not excessive, and the cogency of the evidence has been unaffected. There is no prejudice to the respondent as the matters raised would have to have been investigated and addressed anyway as part of the claimant's constructive unfair dismissal claim, which pertains to the same facts and circumstances as his discrimination claims.

92. Reference was made to section 95(1)(5) of the ERA and the following cases *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221 *Malik & Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 462*; Woods v WM Car Services (Peterborough) Ltd* [1981] IRLR 347*; Lewis v Motorworld* [1985] IRLR 465)*; Morrow and Safeway Stores* 2002 IRLR 9 *Nottingham County Council v Meikle* 2004 IRLR 703; *Nottingham County Council v Meikle* 2004 IRLR 703; *Bahir v Brillo Manufacturing* 1979 IRLR 295; *El-Hoshi v Pizza Express Restaurants* UKEAT/0857/03; *Chindove v William Morrisons Supermarket plc* UKEAT/0201/13; *Adjei-Frempong v Howard Frank Ltd* UKEAT/0044/15 *;WE Cox Toner* 1981 IRLR 443; *Buckland v Bournemouth University Higher Education Corporation* 2010 IRLR 445,

93. The claimant referred to his resignation and argued that the respondent's ongoing conduct had made his position untenable. The acts and omissions of the respondent, taken together, form a repudiatory breach, going to the heart of the claimant's contract of employment as they amount to a gross breach of the respondent's implied duty of trust and confidence.

94. The combined failure of the respondent to confirm the claimant's employment status, send the claimant's contract of employment, or confirm the reason for his removal from the Vitality Policy, was the last straw for the claimant which meant he could no longer continue his employment with the respondent. The claimant's resignation was proximal to the last act. He gave the respondent a reasonable opportunity to respond to his requests for information and resigned as soon as it became clear that no such response was forthcoming. The claimant resigned without unreasonable delay and did not affirm the contract by waiting a reasonable time for a response.

95. The respondent did, without proper or reasonable cause, conduct itself in way that amounted to a repudiatory breach of the claimant's contract of employment by breaching their duty of trust and confidence towards him. Accordingly, it is submitted that the claimant was constructively unfairly dismissed. The claim of constructive unfair dismissal was brought in time, which is undisputed by the respondent.

The Respondent's Submissions

96. The Tribunal was invited to prefer the respondent's evidence and dismiss the claims in their entirety.

97. The claimant being disabled does not mean that everything that happened to him during his employment was because of that disability or is something arising from it. All the treatment was fair and reasonable and would have happened anyway regardless of any of his protected characteristics. All dealings with the claimant arose because of his performance issues and any employee would have been treated the same way by the respondent.

98. The respondent accepted the claimant's restricted ability to perform his role and allowed the claimant to carry the role out in a manner that suited him. There was simply no evidence of the respondent developing a negative perception of the claimant's work ethic. The respondent did not devalue the claimant as an employee or subject him to unfavourable treatment. If anything, he was treated more favourably.

99. The respondent argues that even by reference to the incidents provided by the claimant was subjected to harassment of any sort, whether because of his disability or his age. The respondent accepted that discussion with him took place but none of those were of a type that could be classed as harassment for the purposes of section 26 of the EqA.

100. There was no continuing course of discrimination; there was an incident in July 2015, an incident in February 2017 and nothing else. These incidents were not discriminatory and there is no basis for the claimant arguing that there was conduct extending over time. Nor is it just and equitable to extend the period, the claimant had ample opportunity to lodge a claim sooner and that the respondent should not be prejudiced by his failure to do that. No evidence was led before the Tribunal on this point and the respondent argues that a large part of the claimant's case is time-barred as a result.

101. There was no treatment of the claimant which amounted to a breach of the implied contractual term of trust and confidence as between an employer and an employee which justified the claimant resigning and terminating his contract without notice. The conduct of the respondent was entirely fair, reasonable and proper and could be entirely justified by the respondent in terms of managing an employee who was disabled and was absent from work on a long-term basis. On any independent assessment of what happened against that background, the respondent acted properly and should not be criticised.

102. Even if the Tribunal has any reservations about the conduct of the respondent during the period leading up to the claimant's resignation and considers that this may be a breach of any term of the contract between the parties, the respondent argues that the breach was not so serious or fundamental to the relationship that it could be classed as a repudiatory breach allowing immediate termination.

103. Even if there was a material breach of his contract the claimant delayed his resignation for far too long and that it cannot truly be classed as something done in response to that alleged breach. The reality is that all that happened

in the months prior to his resignation was the handling of his grievance and that was a long and involved process which the respondent took seriously. While the claimant may have been disappointed by the fact that the grievance was unsuccessful, and his appeal was similarly unsuccessful, that did not entitle him to resign and bring a claim. The respondent argues that there were certainly no acts of discrimination during the three-month period prior to his resignation on 21 June 2018

104. Notwithstanding any criticisms of the grievance process a fair procedure was followed and that the claimant had a reasonable opportunity to present his grievance in detail and to appeal against the initial findings which rejected his grievance. The respondent instructed an external advisor (Julie Barnett of Holly Blue) to give them expert HR advice to deal with matters properly and the Tribunal should recognise that they behaved reasonably in following that advice and dealing with the grievance by the claimant on that basis. As an employer, the respondent was entitled to assume that the advice given to them was correct and it would be unfair and unreasonable for the Tribunal to criticise them for doing that. Had they simply ploughed ahead with the grievance based on their own views of what was fair, a finding against them would be appropriate but that is clearly not what happened in this instance.

105. The Tribunal should recognise that the claimant did not attend any meeting with the respondent to deal with his grievance and it was handled entirely by written submissions and by telephone. The respondent allowed the procedure to be modified on that basis in recognition of the fact that the claimant was unwell and signed off from work and the Respondent should not be penalised as a result in those circumstances.

106. Even if the Tribunal is critical of the grievance procedure the Tribunal must consider that the claimant was unaware of that at the point he resigned in June 2018 and that cannot have been a factor in his decision. The Claimant was aware that Mr Martin had dealt with his grievance even although he was the subject of part of that grievance but that had been known to the claimant since February 2018. It was not reasonable for the claimant to try and rely on that issue four months later when he finally resigned from his employment.

107. The respondent considers the terms of the letter of 4 June 2018 to be significant. Less than three weeks before the claimant resigned, that letter acknowledges that information requested by the claimant was provided to him and that is clear evidence of the fact that the respondent was not ignoring the claimant. In circumstances where nothing else happened in the intervening period, the Tribunal is entitled to ask why the claimant felt he was being ignored and has to resign. The claimant indicates in his letter he did not feel it was possible for him to return to work but as referred to above, there was no ongoing discrimination such that the claimant's logic in this regard is flawed.

Discussion and Deliberation

Discrimination arising from disability

108. The Tribunal referred to the statutory definition under section 15 of the EqA. The provision requires there to be (a) unfavourable treatment (b) because of "something" (c) the "something has to have arisen from the claimant's disability; and (d) which the respondent cannot show was a proportionate means of achieving a legitimate aim.

109. The Tribunal noted that case authorities requires an investigation of two issues (a) did the respondent treat the claimant unfavourably because of an (identified) something; and (b) did that "something" arise in consequence of the claimant's disability. The first issue requires an examination of the respondent's state of mind to establish whether the unfavourable treatment in issue occurred by reason of the respondent's attitude to the relevant "something." The second issue is an objective matter: whether there is a causal link between the claimant's disability and the relevant "something."

110. Next the Tribunal considered each alleged act of discrimination and investigated each issue.

July 2015 Email/Comment's about holidays

111. The Tribunal understood the claimant's position was that the unfavourable treatment was not being a valued member of staff. In the Tribunal's view the

unfavourable treatment was the way in which Mr Martin processed the claimant's annual leave. Mr Armour was responsible for authorising employees' annual leave. He determined the allocation and timing of leave. Despite working 16 hours per week since 2009 the amount of leave to which the respondent considered the claimant was entitled each year was unclear. In July 2015 the claimant realised that he had received more than his statutory entitlement over the years although this was Mr Armour's mistake; when calculating the holiday entitlement Mr Armour erroneously based this on 24 hours rather than 16 hours work per week. The claimant drew this to Mr Martin's attention. Mr Armour initially continued to authorise more leave to the claimant than he was entitled statutorily as Mr Armour considered that it was his error and it had become custom and practice. Mr Martin resented the claimant having more holidays than he was entitled to and prevaricated when processing the claimant's holiday entitlement and made sarcastic remarks.

112. The Tribunal considered that Mr Martin treated the claimant unfavourably in the way he processed the claimant's requests for annual leave because the claimant was allocated more holiday that he was entitled. The "something" was the claimant's continued allocation of more leave which did not arise out of the claimant's disability but Mr Armour's error.

The 22 February Incident

113. The Tribunal found that on 22 February 2017 the claimant was upset and raised concerns with Mr Martin about the manner and tone in which Mr Mackay spoke to him about a mistake the claimant had made when returning an order to the wrong bin. The claimant's mistake was not related to his disability. Mr Martin went to speak to Mr Mackay then told the claimant in front of Mr Mackay that the claimant should not question a manager's legitimate instruction and that maybe "the job is not for you."

114. In the Tribunal's view the unfavourable treatment was Mr Martin dealing with the claimant's concern publicly. This was Mr Martin wanted to deal with the matter quickly. The Tribunal was not satisfied that the unfavourable treatment was because from something arising from the claimant's disability.

The 27 February Email

115. The Tribunal found that when investigating the claimant's grievance Mr Armour accepted the versions of events from Mr Martin and Mr Mackay without discussing the grievance with the claimant contrary to the respondent's grievance policy. The Tribunal considered that the respondent treated the claimant unfavourably by not following the grievance procedure. In the Tribunal's view this was because he was under pressure and had already concluded that the claimant should be following managers' instructions. That "something" did not arise in consequence of the claimant's disability.

The 28 February Incident

116. The Tribunal found that the claimant set aside an order because he considered that he was unable to pack it because of the restricted capability arising from his disability. Mr Mackay escalated the matter to Mr Devlin who spoke to the claimant and said that, "a five-year old could pack it" while swinging the packet from his pinkie. Mr Devlin disregarded the claimant's explanation and commented about the claimant sending an email to Mr Armour. Mr Devlin suggested that the claimant might want to think about going to see his doctor if he was not fit to work there anymore.

117. The Tribunal considered that Mr Devlin treated the claimant unfavourably treatment in the way he spoke to the claimant about his work. In the Tribunal's view Mr Mackay and Mr Devlin considered that the claimant was capable packing the order that he had set aside. The claimant's abilities to pack items arose in consequence of his disability.

118. The respondent's submissions did not address the issue of any unfavourable treatment being a proportionate means of achieving a legitimate aim. The respondent's witnesses referred to business needs and the claimant's performance expectations but then said that there were no targets and no statistical evidence was produced. The Tribunal considered that if the respondent had issues about the claimant performance these should have

been addresses by way of a performance management/capability procedure, including a referral to occupational health.

Imposition of Targets/May Meeting

119. The Tribunal found that from around February 2017 the respondent was under pressure to get sales through the door as efficiently as possible. Everyone including the claimant was to work to the best of their abilities; and the claimant was to follow managers' instructions without question. The claimant was told that his "stats" would be monitored. The Tribunal considered that the respondent treated the claimant unfavourably by telling him that his statistics would be monitored over the coming months. This was because the respondent did not consider that the claimant was completing enough jobs per shift. The number of jobs that the claimant can complete arose in consequence of his disability. The respondent did not argue that any unfavourable treatment was a proportionate means of achieving a legitimate aim.

The 28 May Text Exchange

120. The Tribunal found that the claimant raised concerns with Mr Devlin about his stress levels; Mr Martin's expectation that the claimant doing 100 jobs and the management of his statistical output which he had been told were too low. Without any investigation Mr Devlin told the claimant that he did not get involved; Mr Armour and Mr Martin were always fair to everyone and everyone was treated the same.

121. The Tribunal considered that the respondent treated the claimant unfavourably by disregarding his concerns. This was because Mr Devlin thought that the claimant was a "stress-monkey" and the discussion was about how much work the claimant was doing. The volume of work undertaken by the claimant arose in consequence of his disability.

122. The respondent's submissions did not address the issue of that any unfavourable treatment being a proportionate means of achieving a legitimate aim. The respondent's witnesses referred to business needs and the

claimant's performance expectations but then said that there were no targets and no statistical evidence was produced. The Tribunal considered that if the respondent had issues about the claimant performance these should have been addresses by way of a performance management/capability procedure, including a referral to occupational health.

Absence Management

123. The Tribunal found that contrary to its procedures the respondent did not contact the claimant to manage his sick absence until he raised a grievance. The respondent treated the claimant unfavourably. The Tribunal did not accept that this was because the respondent did not know that it could contact him. The Tribunal considered that the reason was that the respondent did not want the claimant to return to work because he was not prepared to be follow management instructions about the amount and type of jobs to be done without question. This arose in consequence of his disability.

124. The respondent's submissions did not address the issue of any unfavourable treatment being a proportionate means of achieving a legitimate aim. The respondent's witnesses referred to business pressure and the need for every to work to their best ability and follow instructions. The Tribunal considered that if the respondent had issues about the claimant's ability to perform and following manager's instructions these should have been addressed by way of managing the claimant's return to work; performance management/capability procedure, including a referral to occupational health and disciplinary proceedings.

Removal of the Vitality Policy

125. The Tribunal found that the respondent removed the claimant from the Vitality Policy because he worked part-time. The Tribunal considered that the respondent treated the claimant unfavourably when it removed the claimant from the Vitality policy because the claimant worked part time. The claimant working part-time arose as a consequence of his disability.

126. The respondent's submissions did not address any legitimate aim nor did the respondent set out the details of any legitimate aim in its response. Mr Devlin said in evidence that it was his decision to remove part-time employees from the Vitality insurance policy and this was for cost alone. The Tribunal considered that cost alone cannot amount to a legitimate aim. In any event there were other proportionate means of achieving that aim such as exploring other means of reducing the cost which were less discriminatory not only to the claimant but to part-time workers or whether the claimant could remain covered but pay some or the premium himself.

The Grievance Process

127. The Tribunal found that Mr Martin was partial and did not investigate the claimant's grievance. The grievance appeal process effectively rubber-stamped Mr Martin's decision without further investigation. The respondent unfavourably treated the claimant by failing to investigate and consider his grievance and facilitate his return to work. In the Tribunal's view the reason for the way in which the respondent dealt with the grievance was that the respondent had no interest in addressing the claimant's concerns and facilitating his return to work because it had issues about his performance. The claimant's ability to perform the volume and type of jobs requested by managers arose out of his disability.

128. The respondent's submissions did not address the issue of any unfavourable treatment being a proportionate means of achieving a legitimate aim. Mr Armour had retired but there were other managers who could have dealt with the investigation who had no previous involvement. Ms Barnett could have been instructed to investigate and reach an independent decision.

The Handling of the Claimant Request for Information

129. The Tribunal found that other than providing payslips the respondent did not reply to the claimant's request for information. This was unfavourable treatment. The Tribunal considered that the reason was that the respondent did not want the claimant to return to work because he was not prepared to

be follow management instructions about the amount and type of jobs to be done without question. This arose in consequence of the claimant's disability.

130. The respondent's submissions did not address the issue of any unfavourable treatment being a proportionate means of achieving a legitimate aim. The respondent's witnesses referred to business pressure and the need for every to work to their best ability and follow instructions. The Tribunal considered that if the respondent had issues about the claimant's ability to perform and following manager's instructions these should have been addressed by way of managing the claimant's return to work; performance management or capability procedure, including a referral to occupational health and disciplinary proceedings.

131. The Tribunal concluded that the claimant was treated unfavourably by the respondent because of something arising from the claimant's disability; and the respondent has not shown that it was a proportionate means of achieving a legitimate aim.

Harassment

132. The Tribunal then turned to the harassment claim. There are three essential elements: unwanted conduct; that has the proscribed purpose or effect; and which relates to a relevant characteristic. The unwanted conduct can include a range of behaviour including spoken or written words or abuse. The claimant relied upon disability or alternatively age as relevant characteristics.

133. The Tribunal then considered the essential elements in relation to each allegation of harassment. The Tribunal noted that the respondent's position was that although there was day to day management of the claimant performing his role there was no harassment that related to a relevant characteristic.

July 2015 Email/Comment's about holidays

134. The claimant position was that Mr Martin's comment about the claimant being as well in the house was unwanted conduct related to his disability or age which of violating his dignity when he read it.

135. The Tribunal agreed that this comment was unwanted and from the apology the comment was written in the context of the quantity of the claimant's output which related to his disability but not his age. The Tribunal was satisfied Mr Martin did not intend the claimant to read the July 15 Email but the effect was to violate the claimant's dignity. Mr Martin did apologise to the claimant in writing within half an hour of the matter being raised with Mr Armour and within the hour the apology was accepted by the claimant. Accordingly, the Tribunal did not consider that it was reasonable for the conduct to have the effect.

136. The Tribunal found that subsequently when processing the claimant's holiday entitlement Mr Martin prevaricated and made sarcastic remarks. While these remarks were unwanted the Tribunal considered they related to the claimant being allocated more holidays to which he was entitled. This view related to an error by Mr Armour not the claimant's disability or age.

The 22 February Incident

137. The Tribunal accepted that the claimant was upset and raised concerns with Mr Martin about the manner and tone in which Mr Mackay spoke to him about a mistake the claimant had made when returning an order to the wrong bin. The Tribunal was not satisfied that this unwanted conduct related to the claimant's disability or age. Mr Martin went to speak to Mr Mackay then told the claimant in front of Mr Mackay that the claimant should not question a manager's legitimate instruction and that maybe "the job is not for you." In the Tribunal's view Mr Martin dealing with the claimant's concern publicly was unwanted conduct but did not arising from the claimant's disability or age.

The 27 February Email

138. The Tribunal considered that some of the content and tone of the 27 February Email was intimidating and amounted to unwanted conduct. However, the content was in response to the claimant complaint and was not in the Tribunal's view related to the claimant's disability or age.

The 28 February Incident

139. The Tribunal found that the claimant set aside an order because he considered that he was unable to pack it because of the restricted capability arising from his disability. Mr Mackay escalated the matter to Mr Devlin who spoke to the claimant and said that, "a five-year old could pack it" while swinging the packet from his pinkie. Mr Devlin disregarded the claimant's explanation and commented about the claimant sending an email to Mr Armour. Mr Devlin suggested that the claimant might want to think about going to see his doctor if he was not fit to work there anymore.

140. The Tribunal considered Mr Devlin's conduct was unwanted. The conduct was in response to the claimant's ability to pack a job and related to the claimant's disability but not his age.

141. The Tribunal did not consider that the 1 March Text was unwanted conduct. This was part of a message exchange instigated by the claimant about the 28 February Incident. While Mr Devlin's reply was condescending the claimant, it was not related to the claimant's disability or age.

Imposition of Targets/May Meeting

142. The Tribunal found that from around February 2017 the respondent was under pressure to get sales through the door as efficiently as possible. Everyone including the claimant was to work to the best of their abilities; and the claimant was to follow managers' instructions without question. The claimant was told that his "stats" would be monitored. Mr Martin regularly approached the claimant asking him how many jobs he would complete because he thought that the claimant was not completing enough jobs per shift. The number of jobs that the claimant completed related to disability but not his age. This was unwanted conduct which had the effect of creating an intimidating and hostile environment for the claimant given his subsequent text to Mr Devlin. While the Tribunal considered the 27 February Email inferred that all employees were being encouraged to work to the best of their abilities, the Tribunal took account of the fact that the respondent's assessment of the claimant appeared to be based on "low" statistics to which

the claimant was not privy and had no input or discussion as to whether there were reasonable and achievable given his disability. The Tribunal found that this was harassment related to disability.

The 28 May Text Exchange

143. The Tribunal found that the claimant raised concerns with Mr Devlin about his stress levels; Mr Martin's expectation that the claimant should be doing 100 jobs and the management of his statistical output which he had been told was too low. Without any investigation Mr Devlin told the claimant that he did not get involved; Mr Armour and Mr Martin were always fair to everyone and everyone was treated the same and to say that he would try a bit harder.

144. The Tribunal considered that Mr Devlin was dismissive of the claimant's concerns. The Tribunal accepted that this was unwanted conduct. The volume of work undertaken by the claimant related to his disability but not his age.

Absence Management

145. The Tribunal found that contrary to its procedures the respondent did not contact the claimant to manage his sick absence until he raised a grievance. The Tribunal considered that the respondent was ignoring the claimant which was unwanted conduct. The respondent did not want the claimant to return to work because he was not prepared to follow management instructions about the amount and type of jobs to be done without question which was related to the claimant's disability but not his age.

Removal of the Vitality Policy

146. The Tribunal found that the respondent removed the claimant from the Vitality policy because he worked part-time. This was unwanted conduct and the claimant working part-time related to his disability but not his age.

The Grievance Process

147. Mr Martin's involvement in writing to the claimant on 19 February 2018; and his partial investigation of the claimant's grievance; the grievance appeal process which effectively rubber-stamped Mr Martin's decision without further

investigation was unwanted conduct. The respondent had no interest in addressing the claimant's concerns and facilitating his return to work because it had issues about his performance. The claimant's ability to perform the volume and type of jobs requested by managers arose out of his disability.

The Handling of the Claimant Request for Information

148. The Tribunal found that other than providing payslips the respondent did not reply to the claimant's request for information. This was unwanted conduct. The Tribunal considered that the reason was that the respondent did not want the claimant to return to work because he was not prepared to be follow management instructions about the amount and type of jobs to be done without question. This was related to the claimant's disability.

The Series of Complaints

149. The Tribunal then considered the purpose or effect. In relation to effect, the Tribunal noted that it was necessary to look at the effect on the claimant and whether it was reasonable for the claimant to claim that it had that effect.

150. Given the separate incidents of unwanted conduct related to the claimant's disability from 28 February 2017 onwards the Tribunal considered that when assessing the effect, it was appropriate to consider the cumulative effect. In the Tribunal's view the impact of each incident accumulated and violated the claimant's dignity.

151. The Tribunal considered that given what was said at the 28 February Incident in public and Mr Devlin's lifting the package with his pinkie it was reasonable for the claimant to claim it violated his dignity.

152. This was followed by the imposition of targets and the May Meeting which the claimant said created a hostile environment. The Tribunal considered that in the absence of the statistics being made available and discussed with the claimant it was reasonable to have had that effect.

153. In relation to the 28 May Text the Tribunal considered that having been told by Mr Devlin to raise such issues with him and then for the matter to be

dismissed is such a cavalier manner, it was reasonable for the claimant to feel that his dignity had been violated.

154. The claimant said that the effect of the respondent's management of his absence was that his dignity was violated. He felt discarded. The Tribunal considered that given the circumstances leading up to his sick absence and the absence of communication from the respondent, including Mr Devlin it was reasonable for the conduct to have that effect.

155. The respondent did not inform the claimant that he was being removed from the Vitality Policy. The claimant was on long term sick absence. Despite requesting an explanation for this during and after the grievance process none was provided by the respondent until the raising of these proceedings. The claimant felt that this violated his dignity and the Tribunal considered that in the circumstances it was reasonable to that effect.

156. By treating his grievances with disdain, the claimant felt his dignity was violated. The Tribunal considered that the respondent having sought independent advice and acting in the way that it did it was reasonable for the respondent's conduct to have that effect.

157. The clamant felt that the respondent's failure to provide information made him feel that the respondent was not trying to get him back to work and he felt discarded and treated and if he did not matter. This violated his dignity. The Tribunal considered that the respondent's failure to communicate with the claimant showed a disrespect and disregard for the claimant and it was reasonable for the claimant to feel that his dignity was being violated.

Time Bar Issues

158. The respondent said that the discrimination claims were time barred. It accepted that the claim was presented within three months of the claimant's resignation in 21 June 2018. Its position was that there was no act of discrimination within the three-month period before the resignation. That is not what the Tribunal found.

159. The respondent also said that there was no ongoing course of action or discrimination; the claimant was absent from work on health grounds and was being dealt with on that basis. The Tribunal's conclusion as explained above was that the respondent was not dealing with the claimant's absence but ignoring him and paying lip service to his concerns. The Tribunal considered that this was ongoing conduct culminating in the respondent's failure to provide information and communicate with the claimant.

160. The Tribunal was unable to make a finding about then the respondent decided that it was going to ignore the correspondence from SULC. Despite providing a mandate the respondent disregarding the content of the letter dated 15 May 2018 and asked a third party to correspond with the claimant direct. The Tribunal felt that at this point the claimant might have expected the respondent to reply separately to SULC. However, this did not happen notwithstanding the follow up letter dated 8 June 2018. The Tribunal agreed with the claimant's submission that it was reasonable to have expected that the respondent might have been taking advice given Mr Barnett's previous involvement and for a reply to be sent by 21 June 2019. The Tribunal therefore considered that the discrimination claim was not time barred.

161. In any event given the respondent's failure to acknowledge or reply to the correspondence, the minimal delay (if any); the unaffected cogency of evidence; and the claimant's health the Tribunal considered that it would have been just and equitable to have extended the time limit.

Constructive Unfair Dismissal

162. The Tribunal referred to the statutory provisions. The test is whether the employer's conduct constitutes a significant breach, going to the root of the contract, or shows an intention no longer to be bound by an essential term of the contract. Also, the employer's conduct must be serious enough to entitle the employee to resign with or without notice.

163. The claimant's position was that he resigned following a "last straw" and relied upon a series of acts by the respondent which he said amounted to a fundamental breach of contract.

164. The Tribunal considered that a course of conduct could cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a "last straw" incident even though the "*last straw*" by itself did not amount to a breach of contract.

165. The claimant relied upon the implied term of mutual trust and confidence which is found in every contract of employment. The Tribunal referred to the House of Lords Judgment in *Malik* (above) where their Lordships concluded that there was an implied contractual term that an employer "will not, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee."

166. An act constituting the last straw does not have to be of the same character as the earlier acts, and nor must it constitute reasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

167. The Resignation Letter stated that the claimant was resigning immediately. It continued, "Due to the ongoing discrimination I have been subjected to by GAC I do feel it is possible for me to return to work as the working relationship had become untenable". The claimant submitted that his resignation was prompted by a last straw.

168. The Tribunal noted that the essential quality of the last straw was that when taken with the earlier acts upon which the claimant relied it amounted to the breach of the implied term of trust and confidence. When viewed in isolation the last straw may not always be unreasonable, still less blameworthy. An entirely innocuous act on the part of the employer cannot be a last straw.

169. The Tribunal considered whether the respondent's failure to reply to SULC's correspondence requesting clarification that the claimant was still employed was a last straw.

170. The request was set against the background of the claimant being on long term sick absence with limited contact initiated by the respondent; not receiving payslips from March 2018; the Appeal Outcome sent on 12 April 2018 stating the decision was final and Ms Barnett would ask the respondent to write to the claimant about the Vitality Policy which it failed to do. The Tribunal accepted that the claimant was sent payslips around 15 May 2018 via a third party, but the explanation provided was unsatisfactory given that the claimant had received payslips for nil amounts previously. The Tribunal considered that against the grievance procedure being exhausted and the claimant remaining sick absent the failure to provide the clarification sought led the Tribunal to conclude that this was not an entirely innocuous act by the respondent. The Tribunal concluded that this was capable of being a final straw.

171. Having reached this conclusion, the Tribunal went on to consider the earlier acts. The Tribunal considered that the final straw principle did not allow the claimant to rely on all the respondent's historical acts in support of his claim. Accordingly, any conduct by the respondent which did not play a part in his decision to resign was in the Tribunal's view not relevant.

172. From the evidence the Tribunal was of the view that respondent's conduct which played a part in the claimant's decision to resign started with the decision to remove the claimant from the Vitality Policy without notice or explanation.

173. The Tribunal appreciated that before the claimant's period of sick absence commencing in May 2017 he was upset by Mr Martin's attitude and management style and Mr Devlin's handling of the claimant's concerns about targets and raised these issues with the respondent before receiving the letter from Vitality he did not raise a grievance about them until 2 February 2018.

174. The claimant alleged that the respondent's decision to remove him without notice from the Vitality Policy while sick absent and failure to contact him for six months while off work breached the implied duty of trust and confidence.

175. The Tribunal considered that the benefit of Vitality Policy was discretionary, and the respondent was contractually entitled to cease to offer private medical insurance. However, the Tribunal considered that the respondent's failure to give the claimant notice of its intention and failure to provide the claimant with any explanation for it to was likely to destroy or seriously damage the relationship of trust and confidence between them. The Tribunal considered that this was particularly so when the respondent had not discussed with the claimant his capability and likely return to work despite writing to the claimant about such discussions on 30 November 2017 in the context of informing him that his statutory sick pay entitlement expired on 13 December 2017. While the Tribunal acknowledged that contacting employees while absent for work related stress requires sensitivity the Tribunal did not consider that the respondent had reasonable and proper cause not to contact the claimant at all because he was absent due to work related stress. Even if that was what the respondent understood, Ms Barnett clarified the position in February 2017, yet the respondent did not engage directly with the claimant's representative.

176. In relation to the grievance procedure the Tribunal did not consider that it was appropriate to consider each allegation and record what conclusion it would have reached in respect of each allegation.

177. The Tribunal was satisfied that the relationship between the claimant and Mr Martin had deteriorated significantly in early 2017 and he was the focus of much of the claimant's grievance. The Tribunal considered that the appropriate approach was to consider the respondent's conduct in handling the grievance which included Mr Martin's involvement and the way the claimant's appeal was handled.

178. Mr Martin took a fortnight to acknowledge the claimant's formal grievance which was address to Mr Armour. While the Tribunal acknowledged that Mr Armour had retired viewed objectively the Tribunal could not understand why

there was no mention of that in Mr Martin's reply or any explanation why the claimant was now being invited to an absence review meeting when there had been no contact from the respondent other than Mr Armour's letter of 30 November 2017. There was no evidence that Mr Martin was acting General Manager and, in any event, given that Ms Barnett was advising Mr Martin about the grievance and there were other departmental managers the Tribunal did not consider that there was reasonable or proper cause for Mr Martin to have been involved in corresponding with the claimant.

179. The Tribunal accepted that the respondent had reasonable and proper cause to invite the claimant to a meeting to review his absence. However, the Tribunal's impression from the timing was that this was prompted by the grievance rather than a genuine attempt to facilitate the claimant's return. Again, the Tribunal did not consider that it was necessary or indeed appropriate for Mr Martin to have been the author of the letter. The Tribunal considered that it was significant that following the Appeal Outcome the respondent did contact the claimant or his representative to review the claimant's absence and likely return.

180. Viewed objectively the Tribunal did not considered that it was necessary for Mr Martin to have investigated and considered the grievance. Mr Martin had the benefit of professional advice and other departmental managers were available who had not been previously involved. The Tribunal found that Mr Martin was partial and did not investigate the claimant's grievance. The Tribunal could understand why on receiving the Grievance Outcome by Mr Martin, two days after it had been acknowledged which contained inaccuracies and did not address all the issues the claimant believed that the respondent did take his grievance seriously.

181. The Tribunal considered that given Mr Delvin's involvement in May 2017 the respondent had reasonable and proper cause to ask an independent third party to conduct the grievance appeal. Ms Barnett was involved in the grievance outcome letter. There was no evidence that the decision was Ms Barnett's but rather she was assisting in writing Mr Martin's decision. The Tribunal considered that at the very least should have alerted her to Mr

Martin's lack of investigation and impartially. Objectively given Mr Martin's involvement and the claimant being "interviewed" by telephone it was particularly important for Ms Barnett to keep notes of interviews and ensure that her Appeal Outcome was factually accurate. The claimant's absence did not in the Tribunal's view prevent Ms Barnett from interviewing witnesses. However, the Tribunal's impression was that she given was effectively rubber-stamping Mr Martin's decision without speaking to the respondent's employees and fact checking the information that he had provided.

182. While the Tribunal acknowledged that the respondent was entitled to reach it own conclusion on the claimant's grievance, but it did not have reasonable and proper cause to do so without reasonable investigation and to so do was acting in a manner that was likely to destroy or seriously damage the relationship of trust and confidence between the claimant and the respondent.

183. The Tribunal could understand that the claimant wanted to appeal Mr Martin's decision. In the Tribunal's view the absence in the Appeal Outcome of Ms Barnett's approach to the grievance appeal; explanation of the investigation undertaken by her and removal of the Vitality Policy the Tribunal could understand the claimant's reservations about the respondent taking his grievance seriously and its intention to facilitate his return to work.

184. To compound matters, in the Tribunal's view, once the grievance process was complete the respondent did not contact the claimant or his representative. Viewed objectively the Tribunal did not consider that the respondent had reasonable or proper cause for so doing. The respondent had corresponded with the claimant during the grievance process; the respondent did not write to him about the removal of the Vitality Policy; he remained sick absent but the respondent did not write to him to review his absence; his representative sought clarification of his status but the respondent did not reply.

185. The Tribunal's reading of the Resignation Letter is that the claimant felt that it was not possible to return to work because his position was untenable. While the claimant referred to ongoing discrimination he did not allude to a protected characteristic and appeared to be referring to unfavourable treatment by the

respondent. As explained above the Tribunal considered the respondent's treatment of the claimant was discriminatory

186. The Tribunal looked at the respondent's conduct as a whole in order to determine whether it was such that its effects, judged reasonably and sensibly were such that the claimant could not be expected to put up with it.

187. In the Tribunal's view the claimant had been a valued employee who in 2017 had a long-term absence from work due stress at work. During his absence the respondent had little if any contact until he raised a grievance following the removal from the Vitality Policy. The claimant had little regard for Mr Martin who appeared out of his depth when dealing with grievance about which he was partial and did not investigate. The appeal process was rubber stamping and the claimant was left in abeyance. The impression was that the respondent was not interested in managing his return to work and wanted the claimant to leave.

188. The Tribunal was satisfied that the respondent's conduct as a whole was a breach of the implied term of trust and confidence entitling the claimant to resign.

189. The Tribunal was satisfied that the claimant's resignation was in response to the respondent's breach of contract. The claimant had done all that he could to involved the respondent in facilitating his return, but the respondent was not interested in engaging with him or SULC. For the reasons previously stated that Tribunal did not consider that the claimant delayed in resigning. The claimant was constructively unfairly dismissed.

190. Having reached these conclusions, the Tribunal considered that the case should be listed for a remedy hearing.

Employment Judge **S MacLean**

Date of Judgment **31 May 2019**

Entered in register and copied to parties **5 June 2019**