Case Number: 3328486.2017

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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs B Zamikula	and	Sawston Childcare Limited

Held at Cambridge on 23, 24, 25 July, and, in Chambers, 27 August, 2019

Representation	**Claimant:**	Mr G Sims, Counsel
	Respondent:	Mr J Demeza-Wilkinson, Consultant
Employment Judge Kurrein	**Members:**	Miss L Feavaryear Mr V Brazkiewicz

JUDGMENT

1 The Respondent has unfairly dismissed the Claimant and is ordered to pay her:-

1.1 A Basic Award in the sum of £7,506.24; and

1.2 A Compensatory Award in the sum of £300.00.

The Recoupment Regulations have no application in this case.

2 The Respondent has discriminated against the Claimant, because its dismissal of the Claimant was unjustifiable unfavourable treatment that arose from her disability, and is ordered to compensate her by payment of the following sums:-

2.1 £5,273.16 for loss of earnings;

2.2 £11,000 for injury to feelings;

2.3 £2,194.74 in interest on the latter sum.

3 The Tribunal has no jurisdiction to hear:-

3.1 the Claimant's claims alleging a failure to take steps to make reasonable adjustments;

3.2 the Claimant's other claims alleging unjustifiable unfavourable treatment arising from her disability.

REASONS

The Claims and Issues

1 On 20 October 2017 the Claimant presented a claim alleging she had been unfairly dismissed and discriminated against.

2 On 4 December 2017 the Respondent presented a response in which it denied those allegations.

3 A preliminary hearing took place before Employment Judge Ord on 11th May 2018 during which the issues were clarified and further directions given for the conduct of the case.

4 On 25 May 2018, in accordance with those directions, the Claimant provided details of the unfavourable treatment she relied on for her claim pursuant to section 15 Equality Act 2010. She also provided an impact statement concerning her disability, asthma, following which, on 18 June 2018, the Respondent conceded the Claimant was a disabled person for the purposes of the Equality Act 2010.

5 The Claimant's claims were of:-

5.1 Unfair constructive dismissal

5.2 Disability Discrimination contrary to Ss.15, 20 Equality Act 2010.

Procedural Matters

6 In the course of reading the witness statements and relevant documents it appeared that the Claimant's claims were potentially out of time. This was raised with the parties and, following discussion, we resolved that the issue should not be dealt with until we had heard all the evidence. However, the Claimant, who by the time we adjourned for the day was still under cross-examination, was given leave to talk to her legal representatives so that they could provide a supplemental statement for the benefit of the Respondent and the tribunal to deal with the out of time issue, her statement as presented containing no evidence of why it would be just and equitable to extend time in her favour.

7 Unfortunately, the statement that was produced the next day did not deal with why the Claimant asserted it would be just and equitable to extend time in her favour if her claims were out of time. Instead it sought to reprise and support the submissions made on her behalf on the previous day to the effect that there had been a sequence of linked events such that the last event her dismissal, was in time and no out of time point arose.

8 We thought that to be very close to an abuse of what we had directed. The sequence of events argument had to rely on the pleadings and further particulars. It was unfair to permit the Claimant to adduce new evidence on this issue at this stage of the proceedings.

9 We ruled that statement inadmissible.

The Evidence

10 We heard the evidence of the Claimant on her own behalf and the evidence of her husband, Mr Gregory Zamikula, and her former colleague, Ms Deborah Oglesby, in support of her case.

11 We heard the evidence of Ms Tina Spencer, Nursery Manager; and Ms Vivien Rowell, Chair of Directors/Trustees on behalf of the Respondent.

12 We considered the documents to which we were referred and heard the submissions on behalf of the parties. We make the following findings of fact

Findings of Fact

13 The Claimant was born on 24 February 1955. She started her employment with the Respondent as an Assistant Cook on 16 January 2003. The Claimant had considerable previous experience in such a role from when she worked for Volvo.

14 The Respondent is a company limited by guarantee and a registered charity. It made a five figure loss in the year to June 2018, but has net assets approaching a six figure sum. It offers nursery and early years childcare to the local community. Its premises have four large rooms for this purpose, together with ancillary provision for special needs, laundry, kitchen, staffroom, reception and office. It can accommodate up to 68 children and there is a substantial waiting list for places. The five trustees/directors are unpaid volunteers. It employs about 42 staff, many of whom are long-term. OFSTED imposes stringent requirements regarding staff/child ratios. All its records relating to finance and children are computer-based and backed up every three hours.

15 At the time the Claimant started work her manager was Sue Brown. She worked in her original role for about two years before she indicated to Ms Brown that she would like to work directly with the children. She transferred into a childcare role in about 2005, and studied successfully for relevant NVQ qualifications.

16 At the time with which we are concerned the Claimant had been appointed as a "Senior Nursery Practitioner", a position in which she was "No.2" in the room in which she usually worked. There were approximately 17 children cared for in that room and the Claimant was responsible for 8 of them.

17 Her job description set out that: –

17.1 In the absence of the room leader she was responsible for the room management

17.2 She was required to assist in establishing, maintaining and developing a safe, educational "learning through play" environment.

17.3 She was required to assist in the planning and recording of activities/resources offered to each child.

17.4 She was required to implement policies and practices concerning child care to ensure individual needs were met.

together with other ancillary duties.

18 We took the view that this was a relatively senior and important role with significant levels of responsibility.

19 We find as a fact that throughout her appointment the Claimant was a well-regarded member of staff. Her ability was respected by her colleagues and her competence and performance was never called into question prior to the events with which we are concerned.

20 Shortly after the Claimant transferred into her childcare role she noticed that she was suffering from a tightness in her chest on occasions. She consulted her GP and was diagnosed with asthma. This was believed to be caused

by paper dust in the Respondent's premises generated by the shredding of documents and the subsequent use of the resulting product by the Respondent's staff in "paper play" with the children. This was a popular choice of activity because of its low cost.

21 The Claimant informed Ms Brown of this diagnosis, who immediately took steps to solve the problem. She ensured that paper was only shredded when the Claimant was not present and paper play did not take place in areas where the Claimant was working. As a result of those changes the Claimant's health issues arising from paper shredding and paper play were well known to all the staff from this date onward.

22 That change in operations had the desired effect: the Claimant did not record any further asthma attacks for several years.

23 In about 2014 the Respondent was gifted a large industrial shredder. The Claimant foresaw difficulties with the use of this machine in the building and, following discussions, the shredder was located to a shed outside the premises. Any confidential waste was placed in a designated box and shredded from time to time.

24 The Claimant had two further asthma attacks after this, in April and October 2015. The Claimant has attributed these to the paper play that was taking place in areas adjacent to those in which she worked. She spoke to the relatively recently appointed manager, Katie Draper, who took steps to ensure the paper play did not take place in any areas close to where the Claimant might be working.

25 On 2 February 2016 the Claimant was signed off for five days with a chest infection.

26 Ms Spencer was appointed the Manager, replacing Claire Snell-Smith (who had been acting-up) from 22 February 2016. It appears that during the period Ms Snell-Smith was acting up she introduced Bradford Factor scoring for sickness absence assessment.

27 We accepted the Claimant's evidence that Ms Spencer questioned why paper play was not carried out more often, and was told by staff that it was because of the Claimant's asthma.

28 This was confirmed by Ms Spencer in her evidence to us, although that appeared to be directly contrary to what she said in her statement.

29 On 8 March 2016 the Claimant was signed off for 10 days after an operation for cataracts.

30 On 11 May 2016 the Claimant was signed off for five days for a shoulder injury which had resulted from her lifting a child at work

31 On 26 June 2016 a member of staff approached the Claimant, put an arm across her shoulders, and told her that paper play was taking place in one of the rooms. It appears that he had been in the room and the paper dust he was inadvertently carrying caused a severe reaction resulting in an asthma attack for which the Claimant saw her GP. She was off work the next day but this appears to have been misattributed in the Respondent's records to a bad back.

32 On 6 July 2016 the Claimant was signed off with asthma for a period of two weeks. The MED3 for this period has not been produced, although the Respondent has recorded receiving one.

33 There is a letter on file from the Respondent to the Claimant concerning this absence dated 12 July 2016 referring to a meeting that had taken place the previous day. The Claimant believes those dates to be incorrect, because she thought it highly unlikely that she would have attended a meeting with Ms Spencer when she was signed off. She thought the meeting was on 21 July, after she returned to work.

34 We took the view that this was not a significant issue, but the Claimant was more likely to be correct. What was significant was the content of that letter.

35 It confirmed that the meeting had been to discuss the Claimant's "absenteeism due to your ongoing ill-health.", and went on to refer to the Claimant's asthma, in particular. It offered OH assistance and told the Claimant her Bradford Factor score at 99 was such that, attention was required and it was a concern that "must be addressed".

36 It is the Claimant's case that during that meeting she expressly told Ms Spencer that paper dust from shredding and paper play were the only causes of her asthma.

37 It was Ms Spencer's evidence, as set out in her witness statement, that she was unaware of the cause of the Claimant's asthma until shortly after the Claimant completed a health questionnaire in November 2016. In cross-examination, however, she resiled from that position and accepted that she knew what caused the Claimant's asthma at this time.

38 We thought it unfortunate that there were a number of significant differences between the evidence set out in Ms Spencer's witness statement and what she said under cross-examination. We did not think she was lying. She simply had a very poor recall of events. As a consequence, where there was a dispute between her evidence and that on behalf of the Claimant as to what happened we preferred the evidence on behalf of the Claimant.

39 We preferred the evidence of the Claimant on this issue. It is our assessment of her character that she is a no-nonsense individual who is not backward in coming forward. One Member thought her to be "feisty": we concurred. We thought it highly unlikely that the Claimant would not have raised the cause of her asthma in such a meeting.

40 That aspect of her character is also evidenced by the fact the Claimant immediately disputed the accuracy of her Bradford Factor score, and raised it with Ms Spencer and her Deputy, Ms Snell-Smith. As a result, by a letter of 1 August 2016, Ms Snell-Smith confirmed to the Claimant that her score had been re-set to zero as the absences relied on had all been certified and should not have been scored.

41 In about October 2016 the Governors took a decision that a shredder should be acquired for use in the office. When Ms Spencer asked Mrs Oglesby to purchase one she was immediately told of the problem this would create for the Claimant, but her protests were overruled and the shredder was installed in reception on 25 October 2016.

42 Ms Spencer used that shredder the next day, and it immediately provoked an asthma attack in the Claimant. She had to use her reliever some 6 times before she could function, and took it easy for the rest of the day. She self-certificated one day of absence the following day with asthma as the reason. We accepted her evidence that she might have taken more time off but for her concern that her absences were already being questioned and raised as an issue.

43 A similar incident occurred on 9 November 2016 when Ms Spencer used the shredder, now located in her office, but with the door open, while the Claimant was nearby using a cloakroom. We accepted both the Claimant and a colleague, Michelle Williams, asked or told Ms Spencer to stop shredding. The Claimant had a serious asthma attack which require a colleague to go to her locker to get her reliever. She sat in a cupboard for some time to try and recover and then went out to the garden to get fresh air. While there Ms Spencer approached her with a box of shredded paper and said words to the effect that she hadn't realised paper dust affected the Claimant to such an extent. The Claimant was off work the next day, having seen her GP, but did not self-certify that absence until 16 November when she misattributed it to a torn muscle.

44 On 20 November the Claimant completed a health questionnaire that had been issued to all staff some time before. She made express reference to her asthma and paper dust as the cause.

45 On 30 November 2016 the Claimant was signed off by her GP for 10 days because she had her other cataracts corrected.

46 On 21 December 2016 Ms Spencer again used the shredder in her office with the door open, apparently in the belief the Claimant was not at work. She had not checked this. The Claimant had an asthma attack, but returned the next day although she was having trouble breathing. When Ms Spencer saw her she said something like, "Oh no, not again!", to which the Claimant responded, "Tina, please stop shredding papers it's affecting my health." The Claimant was told to go home. She did and was unwell over the Christmas period and did not return to work until the New Year.

47 In the interim, on 21 December 2016, Ms Spencer emailed all staff to tell them to do their own shredding, but not to use the shredder in the office, because it had an impact on some of the staff member's health. They were advised to keep documents in a box until they could be shredded in the shed.

48 On 6 February 2017 the Claimant was absent for two days and self-certified if as being for a kidney infection, something the Claimant is prone to because of her diabetes.

49 She was then in receipt of a MED3 from her GP for "back pain" from 9 to 16 February 2017, which arose from her kidney infection.

50 Ms Spencer wrote to the Claimant on 16 February 2017 to invite her to a meeting on 20 February to discuss her absence record She did not inform her of her right to be accompanied so that meeting was postponed to 24 February.

51 That meeting took place and the Claimant was accompanied by Mrs Oglesby. The Claimant's recent absences were only discussed for a short

period, during which the Claimant asserted that Ms Spencer had known for some time she should not use a shredder. Ms Spencer responded to say she had used it as there was no risk assessment at that point.

52 That was contrary to her evidence under cross examination when she said there was a risk assessment and she had directed it be compiled after the 9 November incident. This was later produced on our direction.

53 After the Claimant again reminded Ms Spencer she had been told that shredding paper causing her asthma attacks the previous year Ms Spencer changed tack.

54 It is apparent from the notes she prepared before this meeting that she had always intended to do so. She wanted the Claimant to take on a role as a "floater", a peripatetic job that required the staff member to move from one room and role to another as needs dictated. She would not be a "No. 2", would have fewer responsibilities for planning and no assigned children. This proposal took up most of the meeting, and was something of which the Claimant had no notice.

55 The Claimant felt that she was being penalised for asthma related absences caused by Ms Spencer, and said so. Ms Spencer reiterated her wish the Claimant take on a floating role, and the Claimant asked if she had any choice. Ms Spencer did not reply save to say the Claimant's salary and other benefits would be unchanged and the Respondent had the right to move the Claimant between rooms. The Claimant felt she was being penalised for something she had no control over and indicated she wanted to take time off to seek legal advice. Ms Spencer indicated she would report to the Directors and arrange time off for the Claimant. At the end of the meeting the Claimant agreed to see an OH adviser.

56 At this time the Claimant felt that Ms Spencer wanted to get rid of her. She had been called to two meetings concerning her absence. One should not have taken place, because the Bradford Factor had been applied incorrectly, and the other was more about an alternative role. In addition Ms Spencer had remarked to the Claimant more than once about her taking retirement.

57 The consultation with the OH adviser took place by telephone. The Claimant was not given the opportunity to take the call at home. She was told about this when she was in the garden, when other staff were present. She followed Ms Spencer to her office to ask her not to deal with such issues in public as the Claimant did not want everyone to know her business. Ms Spencer called out from her office to the reception staff to tell them to make sure the Claimant was not disturbed when she took the call. A "Do Not Disturb" sign was hung on an office door which was allocated for the call. Ms Spencer told the Administrator and her two Deputies what was taking place.

58 The OH report is dated 24 March 2017 and is in unremarkable terms. It recites the Claimant's previous and existing medical conditions and finds that the Claimant is fit to undertake her substantive work role, "with specific adjustments as detailed… " The principal adjustment related to avoiding the risk of paper dust, such as from shredding, causing an acute asthma attack "which may be life threatening."

59 The Claimant was invited to attend a meeting on 24 April 2017 by a letter from Ms Spencer dated 18 April to discuss the OH Report, the floater role, the Claimant's ability to perform her duties in the foreseeable future and any further necessary adjustments. The Claimant was advised of her right to be accompanied.

60 We thought it unfortunate the Claimant was not advised that it was to be, in part at least, an investigation meeting concerning an allegation of inappropriate conduct toward an SEN child.

61 On the same date as that letter a junior member of staff, Ms Birtwhistle, wrote out a form headed "Report of Complaints Log" in which she alleged that on 13 April, five days earlier, she had witnessed the Claimant behave inappropriately to an SEN child by putting the same question to him "17 times". The Room Manager, Ms Williams, who had returned from holiday that day, made a statement the same day, in similar terms, entirely based on what Ms Birtwhistle had said.

62 The meeting on 24 April 2017 took place as planned. The Claimant was accompanied by Mrs Oglesby and a Deputy Manager took notes for Ms Spencer. After a very short discussion about asthma and paper shredding Ms Spencer moved the subject to the float role, It was the second question she asked. The Claimant made it clear she believed such a change of role would be a demotion and that she felt victimised. Ms Spencer said the float role issue would be referred to the Directors and the Claimant said she had been advised of what her next step would be, but would wait for written confirmation of the Respondent's position. She was then told there would be a short break.

63 When the meeting reconvened Ms Spencer told the Claimant, referring to notes on a yellow Post It note, that she had received two complaints concerning the Claimant's conduct "last week" (which she corrected to the week before last when the Claimant told her she had been on holiday) that the tone the Claimant used when reading to "preschools" was very monotonous and she had asked a SEN child the same question 17 times.

64 That was clearly inaccurate as to there being two complaints. There was one complaint based on what one witness alleged.

65 This allegation came as a complete surprise to the Claimant, who immediately contested that version of events, and did so again shortly afterwards, "no way would I ask him the same question 17 times.", and again after that, at least twice. In the course of this meeting there was no reference to this incident being logged by anyone at any time.

66 We were not surprised that the Claimant was extremely upset at these allegations. She went back to work and in her lunch break asked for a copy of the notes of the meeting. She read them while lunching in the local park. She was very distressed and broke down crying. She spoke to her husband on her phone and upon returning to work she went to see Ms Spencer and told her she was leaving, did not want to be a floater and could not take any more of the way she had been treated. She told Ms Spencer, "You have gone too far this time" and left the premises.

67 We accepted that she was upset that there was no clarity about what was happening concerning the allegation and what her position was. She

thought her position to be untenable due to the way she had been treated: her absences had been questioned, the cause of her asthma ignored and she was subjected to serious allegations of misconduct without notice.

68 The Claimant received a letter the next day from Ms Spencer criticising her for leaving work without permission and causing difficulty with staff/child ratios. The Claimant was invited to raise a grievance and inform Ms Spencer if she wished to exercise her "full rights under the Grievance Procedure", a document that we have not seen. In the alternative, she was told, her absence was unauthorised and she should inform Ms Spencer of her intentions regarding returning to work.

69 The Claimant raised a grievance in writing concerning:-

69.1 Ms Spencer's treatment of her concerning her health issues.

69.2 Ms Spencer's repeated requests that she become a floater.

69.3 The manner in which the alleged complaint had been dealt with.

69.4 Ms Spencer questioning her administrative abilities.

70 The Claimant's GP sent a letter addressed "To Whom It May Concern" on 27 April 2017. She confirmed receipt of the OH report and of the occasions on which the Claimant's asthma had been exacerbated, on two occasions being close to requiring hospital admission. She confirmed the link to paper dust.

71 On 3 May 2017 Ms Rowell wrote to the Claimant to invite her to a Grievance Meeting on 10 May at a neutral venue. The Claimant was advised of who would be present and of her right to be accompanied. Arrangement were made to allow Mrs Oglesby to accompany the Claimant.

72 That meeting took place as planned. Somewhat remarkably, we thought, Ms Rowell was not provided with:-

72.1 a copy of the Claimant's grievance;

72.2 a copy of the OH Report

72.3 copies of the Log Reports made on 18 April 2017 concerning the SEN child, or even made aware of their existence, her conclusion being that the complaint would not be taken into account as, "… these had not been properly documented ..".

73 The Claimant therefore explained her grievance in detail, including Ms Spencer's failure to accept the link between paper shredding and her asthma, her alleged breaches of confidentiality and her attempts to make the Claimant become a floater, which the Claimant saw as a demotion. She felt she had been targeted, but wished to return to work although she was concerned as to how she would be treated. She was asked if she would take part in mediation, to which she agreed.

74 Ms Rowell's letter of outcome dated 17 May 2017 upheld the Claimant's complaints regarding use of the shredder and her complaint that becoming a floater could be seen as a demotion. The Claimant was happy with these findings, but was concerned that the complaint had been left unresolved. She felt that was unsatisfactory.

75 The Claimant attended the proposed mediation meeting on 7 June 2017. She was accompanied by her husband and Mrs Oglesby. Ms Rowell and Ms Spencer were also present.

76 We were surprised that this meeting had been arranged without ensuring the presence of a neutral person, preferably with some training, at least, to act as a mediator.

77 Prior to that meeting Ms Spencer prepared a document for it setting out what appear to have been her concerns regarding the Claimants performance in her role as a "No. 2". Those concerns were numerous and appear to have arisen from her discussions with other members of staff and her consideration of the Claimant's Job description. In the context or a mediation meeting the document prepared by Ms Spencer was wholly inappropriate: it was not something that was likely to assist the resolution of the issues that existed, but rather exacerbate them.

78 We were surprised to hear that neither Ms Rowell nor Ms Spencer made any other preparation for this mediation meeting. There was no agreement by them as to the parameters of the meeting, what the agenda should be, what resolution should be sought or who should take the lead.

79 The meeting did not progress well. The Claimant made it clear that the grievance outcome had not resolved issues because Ms Spencer, as her manager, had failed to accept any responsibility for what had taken place previously. Ms Spencer, for her part, made it clear that she did not accept that she had acted inappropriately at any stage in respect of the shredder, issues of confidentiality or the complaint made concerning the Claimants conduct. The Claimants immediate response was that her attitude would make it difficult for her to return to work.

80 We accepted that at this point Ms Spencer had raised her voice and spoken in a confrontational manner . That was the evidence of the Claimant and Mrs Oglesby. We thought it be corroborated by Ms Rowell's intervention at that point when she said, "Everyone needs to remain professional".

81 Shortly after this Ms Spencer sought to pursue her agenda, as intimated by the note she had made previously, to raise concerns regarding the manner in which the Claimant performed her duties. That line was pursued virtually to the end of the meeting. The Claimant explained that she did not wish to continue working in the room which she had been working in, and the Respondents indicated that they would give her support but she was asked how she saw things moving forward. The Claimants response was that would be depend on where the Respondent placed her, and Ms Spencer indicated that there might be a possibility of work in the blue room.

82 Ms Rowell asked the Claimant whether she might not come back and resign, and the Claimant responded to say that she did not know because she needed time to reflect and absorb all the information that she had been given. She confirmed that she would be happy to be moved as a No. 2 in accordance with her contract. The meeting concluded with the Claimant indicating that she would let the Respondent know her position when she knew what the Respondents offer was.

83 The Claimant had not heard from the Respondent before by, a letter of 17 June 7 2017, she resigned in the following terms,

> "Further to a mediation meeting on the 7 June 2017 and after obtaining legal advice I feel that my position with Sawston Nursery has become untenable and I have been advised to pursue a claim for constructive dismissal.
> You state in your correspondence that you have discussed with the manager breaches of confidentiality and health and safety but in the meeting on the 7th June she has denied any responsibilities for her actions, if the manager is prepared to lie in front of you and my witness you must be aware that I would have no faith in being treated fairly should I return to work so it is great reluctance I have to resort to the next step and this has not really been an easy decision to make."

84 Ms Rowell responded on 25 June 2017 to invite the Claimant to a meeting to discuss her resignation. No such meeting took place. On 30 June 2017 the Claimant's solicitors sent a letter before action, at considerable length, setting out the Claimants complaints.

Submissions

85 We heard the submissions made on behalf of the parties. It is neither necessary nor proportionate to set them out here.

The Law

86 In respect of the Claimant's claims alleging discrimination we are primarily concerned with the provisions of section 15, 21, 123, and 136 Equality Act 2010.

87 In respect of the Claimant's claim alleging unfair constructive dismissal we are concerned with sections 95 and 98 Employment Rights Act 1996.

88 We were referred to the decisions in the following cases

Berry V Ravensbourne NHS Trust [1993] ICR 871

Rathakrishnan v. Pizza Express (Restaurants) Limited UKEAT/0073/15/DA

Kaur v Leeds Teaching Hospitals NHS Trust 2018 EWCA 978

Further Findings and Conclusions

89 Our primary findings of fact are set out above and we do not repeat them. We deal with each of the Claimant's claims in turn, so far as possible chronologically, but in considering any one claim we have also taken into account our findings in respect of all other claims.

Reasonable Adjustments

90 The Claimant's claims alleging a failure by the Respondent to take steps to make reasonable adjustments relate to its use of the paper shredder and/or paper play which had an adverse effect on her asthma. That difficulty first came to light in about 2005, and the Claimant accepts that at that time the line manager, Sue Brown, took steps to ensure that paper shredding only took place in the building when the Claimant was not present and that the Claimant was able to avoid paper play activity. That appears to us to have been an entirely reasonable adjustment.

91 The Respondents were later gifted a large shredder, which was housed in a shed outside the premises. That was in about 2014, and it appears to us to have been a reasonable adjustment to locate it outside the premises. The Respondent set up its system so that confidential waste was stored until it

could be taken to the shed for shredding. That process did not appear to cause the Respondent any difficulty.

92 However, the Claimant had further asthma attacks at work in April and October 2015, which she attributed to paper play taking place in the nursery. The Respondent then instigated a policy of there being no paper play activity in rooms near where the Claimant was working. That again appears to have been a reasonable adjustment.

93 It is clear from our above findings of fact that the Respondent, including Ms Spencer, were aware of the Claimant's disability and of the triggers likely to prompt an asthma attack from at least July 2016.

94 Against that background we are at a loss to understand why the decision was taken by the Governors, and implemented by Ms Spencer, to install a shredder in the reception/office area of the Respondent's premises in late 2016.

95 There can be no doubt that at that date the Respondent was subject to a duty to take steps to make reasonable adjustments to prevent paper shredding causing the Claimant the substantial disadvantage of suffering an asthma attack. The Respondent was clearly in breach of the duty at that time by in effect revoking the earlier adjustments that had been in place and installing this shredder.

96 That revocation started on 25 October 2016 and continued to 21 December 2016. It was only on the latter date, and after the Claimant had suffered at least three further asthma attacks, that the Respondent re-imposed the reasonable adjustments it had applied previously by instructing staff that no shredding should take place within the office premises.

97 We are, in consequence, unanimous in finding that the Respondent breached its duty to take steps to make reasonable adjustments from 25 October to 21 December 2016.

Unfavourable treatment

Absences

98 The Claimants complaints of unfavourable treatment because her absences were questioned relate to meetings arranged by Ms Spencer that took place in late July 2016 and on 28 February 2017.

99 We are unanimous in finding that it was unfavourable treatment of the Claimant for the Respondent to call her into meetings to discuss her absences:-

99.1 The first meeting should not have taken place at all because it resulted from a mis-application of the Bradford factor.

99.2 The second meeting resulted from absences for asthma and a kidney infection, both of which was self certified, and absences for a cataract operation and for back pain, both of which were certified. However, it appeared from what took place in the second meeting that it was far less about the Claimants absences then about the wish of Ms Spencer to assign the Claimant to other duties. We believe that wish arose, at least in part, from the Claimant's asthma absences and her complaints concerning them and Ms Spencer's causative conduct.

100 There can be no doubt that the Claimant was concerned at having her absences called into question. We consider that to have been objectively reasonable in the circumstances of this case.

101 The Claimant has satisfied us on the balance of probabilities that these meetings, and what took place during them, arose from the Claimant's disability. It was that which gave rise to her absences for asthma. It is not in dispute that the Claimant's absences for asthma were the subject of discussion at both these meetings. It also appears to us highly relevant that Ms Spencer's wish to assign the Claimant to a "floating" role also arose from her concern at the Claimant's absences.

102 In those circumstances the onus is on the Respondent to establish on the balance of probabilities that the unfavourable treatment of the Claimant in calling her absences for asthma into question was a proportionate means of achieving a legitimate aim.

103 We are unanimous in our conclusion that the Respondent has failed to do so:-

103.1 The first meeting was wholly unjustified: there was no good reason for it at all.

103.2 The second meeting is advanced as having been necessary because of Ms Spencer's perception that there were shortcomings in the Claimants performance, in part attributable to her absences for asthma. In our view that position was fundamentally undermined by Ms Rowell's findings in upholding the Claimants grievance.

103.3 The absences that were called into question only occurred because the Respondent failed in its duty to take steps to make reasonable adjustments.

104 We therefore find that the Claimant was subject to unfavourable treatment, by having her absences called into question, for a reason arising from her disability that was not justifiable.

<u>Demotion</u>

105 The Claimant's complaints alleging unfavourable treatment by the Respondent's attempts to demote her arise from the meetings of 28 February and 24 April 2017 and the letter of 18 April 2017.

106 Once again, we are satisfied on the balance of probabilities that the Claimant has established that that treatment arose from her disability. We refer to our above findings on this issue. In addition, the Respondent has failed to provide any adequate explanation for the decision to try and demote the Claimant. The Claimant's alleged lack of performance was wholly unevidenced.

107 We are also unanimous in our view that the Respondent has failed to show on the balance of probabilities that these attempts to persuade the Claimant to accept a demotion were a proportionate means of achieving a legitimate aim. Quite the contrary: such a finding would be contradictory of the outcome of the Claimants grievance.

108 We therefore find that the Claimant has been subjected to unfavourable treatment by the Respondent's attempts to demote her which arose from her disability and were not justifiable.

109 In the course of the hearing before we pointed out to the parties that the Claimant had not identified her dismissal as an alleged act of unfavourable treatment contrary to S.15 Equality Act 2010. We heard the parties submissions on that apparent omission. We preferred those on behalf of the Claimant. In our view it was clearly implicit from the claim itself, the further particulars that had been given of it and the basis on which the Claimant's case was presented that the Claimant was contending that her dismissal was itself an act of discrimination relating to her disability. We deal with that issue further, below.

Time

Reasonable adjustments

110 As noted above, we were concerned that the Claimant's claims alleging failure to make reasonable adjustments and/or of unfavourable treatment (other than her dismissal) were potentially out of time. Our analysis is as follows: –

110.1 The last date on which the Claimant complains of having an asthma attack as a consequence of the Respondents failure to take steps to make reasonable adjustments was the 21st December 2016.

110.2 The appropriate adjustment, the memo to staff forbidding shredding on the premises, was made the same day.

110.3 In those circumstances the Claimant should have started early conciliation no later than 20 March 2017 in order for those claims to be in time.

111 We take the view that these complaints are of such a different nature to those relating to the questioning of her absences and/or the attempts to demote her that they cannot be considered to be a series of similar events in this context. This was not a case in which the Claimant alleges that there was an overarching discriminatory state of affairs.

112 The Claimant did not start early conciliation until 16 August 2017. In those circumstances those aspects of her claim are nearly five months out of time.

113 The onus is on the Claimant to establish, on the balance of probabilities, that it would in all the circumstances of the case be just and equitable to extend time in her favour. Unfortunately, despite being given the opportunity to give additional evidence on this issue, the Claimant failed to do so. Nevertheless, we have had regard to all the circumstances of the case and, in particular, the guidance provided by the decision in British Coal Corpn v Keeble [1997] IRLR 336. We have also had regard to our later findings on the other aspects of the Claimants claims.

114 It is clear that the Claimant had the benefit of legal advice from before the date on which she resigned. She has given no evidence as to her own knowledge of time limits and employment tribunal procedures. She has not told us what advice, if any, she sought or received. No blame can attach to the Respondent for the delay. It must be laid at the door of the Claimant.

115 The delay in respect of these claim is almost five months, which in a case with a three month limitation, is substantial. No explanation at all has been given for that delay.

116 Such a delay inevitably affects the cogency of the evidence. We cannot attribute the discrepancies in Ms Spencer's evidence to that delay, but it is clear that her memory is less than perfect.

117 Whilst there is some prejudice to the Claimant in not permitting these aspects of her claim to proceed she is not left with out a remedy, including a potential remedy for discrimination arising from the termination of her employment. There is also prejudice to the Respondent in permitting claims to proceed out of time. We accept that is not great, but we cannot be confident that is has not had an adverse effect on Ms Spencer's recall.

118 We have considered the decision in Robertson v Bexley Community Centre [2003] IRLR 434, but consider it no more than guidance. It is not a rule.

119 Having regard to all the circumstances of the case we have concluded that the Claimant has failed to establish on the balance of probabilities that it would be in the interests of justice to grant her an extension.

Unfavourable treatment

120 We have come to the same conclusions in respect of the Claimant's complaints of unfavourable treatment arising from the Respondent calling her absences into question and its attempts to demote her. The last date when her absences were in issue was 28 February 2017 and the last attempt to demote her was on 24 April 2017.

121 As noted above, however, we take the view that these are not all part of a single series of events. There are two series, one relating to each set of claims and they must be considered separately.

Absences

122 The last meeting was on the 28 February 2017. In order for those claims to be in time early conciliation should have started no later then 27 May 2017, when it was not in fact started until 16 August 2017. Whilst we accept that the delay in respect of these claims is rather shorter the onus has remained on the Claimant to establish it would be just and equitable to extend time in her favour and she has failed to do so.

Demotion

123 The last attempt was on 24 April 2017. Early conciliation should have started no later than 23 July 2018, but it was not started until 16 August 2017. Once again, we accept this delay is shorter, but the onus remains on the Claimant and she has failed to discharge it.

Dismissal

Was there a dismissal?

124 We go on to consider the Claimant's claim alleging unfair constructive dismissal. We are familiar with and have had regard to the decisions in Western Excavating (ECC) Ltd v Sharp [1978] QB 761 and Omilaju v. Waltham Forest London Borough Council [2005] ICR 481

125 We refer also to the case of *Kaur,* a recent decision of the Court Of appeal where the following appears from the Judgment of Underwood LJ at para 55:-

> "In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
>
> (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory)[6] breach of the *Malik* term ? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)
>
> (5) Did the employee resign in response (or partly in response) to that breach?

126 Adopting and applying those principles:-

126.1 The last act that the Claimant complains of was the conduct of Ms Spencer during the mediation meeting on the 7 June 2017.

126.2 No act of the Claimant after that date can be said to have been an affirmation of the contract of employment.

126.3 We have given careful consideration whether or not the conduct of Ms Spencer during that meeting was itself repudiatory of the contract of employment. Whilst we thought her conduct to the most unfortunate, we cannot find it to have been so serious as to be a breach of the implied term relating to trust and confidence.

126.4 However, we are unanimous in concluding that her conduct that day was part of a course of conduct involving all the acts that the Claimant has set out as acts of alleged discrimination that cumulatively undoubtedly constitute a breach of the implied term relating to trust and confidence. It is clear from the Claimant's evidence that that is how she felt and, in our view, had been unswayed by any advice she might have received. We thought that to be entirely objectively reasonable.

126.5 It is clear on the facts that the Claimant did resign in response to the conduct of Ms Spencer, and she did so promptly.

127 We are therefore unanimous in finding that the Claimant was dismissed within S.95(1)(c) Employment Rights Act 1996.

Fairness

128 The Respondent has not sought to advance a fair reason for the Claimant's dismissal. As the onus is on it to establish that the Claimant was dismissed for a potentially fair reason it has failed to discharge that burden and we are unanimous in finding that the Claimants dismissal was fair.

Discrimination

129 We have gone on to consider whether that dismissal was unfavourable treatment contrary to S.15 Equality Act 2010.

130 The onus lies on the Claimant to establish on the balance of probabilities, that that treatment arose from her disability

131 We have concluded that the Claimant has successfully discharged that burden. Each of the events of which she complains, including Ms Spencer's comments in the course of the mediation meeting, was a direct result of the Claimant's asthma related absences. Whilst we accept that Ms Spencer may have had other reasons for some of the treatment complained of we are confident that the Claimant's issues with her asthma, her absences arising from it and her accusations aimed at Ms Spencer of failing to make adjustments were a significant cause of that treatment.

132 In those circumstances the onus lies on the Respondent to establish that the Claimant's dismissal was a proportionate means of achieving a legitimate aim. It did not attempt to do so.

133 We are therefore unanimous in finding that the Claimant has been subjected to unfavourable treatment arising from her disability that is not justified and was discriminatory.

Remedy

134 We have gone on to consider remedy. The schedule of loss provided by the Claimant was at page 19 of the bundle.

135 We have accepted the following figures from that schedule of loss: –

136 Date Claimant commenced 16 January 2003

137 Date appointment terminated 17 June 2017.

138 Length of service 14 years

139 Date of birth 24 February 1955

140 Age at dismissal 62

141 We did not accept the pay figures set out in that schedule of loss which appeared to have the same sum for both gross and net pay. By reference to the claim form, the response and the other documents before us we concluded that the Claimants gross pay was £357.44 per week, which is less than the statutory cap, and her net pay was £304.22 per week

142 We take the view that apart from the basic award and an award for loss of statutory rights the balance of any sums in compensation due to the Claimant should be paid in respect of her claims for discrimination.

Unfair dismissal

143 We award the Claimant a basic award of 21 weeks gross pay in the sum of £7,506.24.

144 We make a compensatory award in her favour for the loss of her statutory rights in the sum of £300.

Mitigation

145 The Claimant appears to have only made one application for employment since the termination of her employment with the Respondent. She has not registered with any agencies and there was no evidence that she researched employment either online or locally. Whilst we accept that she might have continued her employment with the Respondent until retirement

we do not accept that obviates the requirement that she take reasonable steps to mitigate her loss. She was skilled in childcare and had experience as a school cook. It was her evidence that she had lost confidence and decided, in effect, to take early retirement.

146 The Schedule of Loss sought compensation for four months loss of income, up to 18 October 2017, a figure of £5,273.16, to which the Respondent took no exception. In all the circumstances of the case any award for loss of earnings must be limited in light of the Claimant's decision to retire. We consider the sum claimed to be reasonable.

Injury to feelings

147 We were concerned that the Claimant gave almost no evidence of the extent of the injury to her feelings caused by this dismissal. It is clear, however, that this was a job she enjoyed over many years and was reluctant to leave. We accepted she lost her confidence.

148 We have had regard to the decision in *Vento* and the Presidential Guidance. We remind ourselves that we must only make an award in respect of the dismissal, not the events that led up to it which are out of time. This was a single event, but of the most serious nature. In all the circumstances of the case we consider an award in the sum of £11,000 to be appropriate.

149 We have calculated interest due on that award at the statutory rate of 8%, being equivalent to a daily rate of £2.74, for a period of 801 days, in the sum of £2,194.74.

Employment Judge Kurrein

Date: 29 August 2019

Sent to the parties and
entered in the Register on

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For the Tribunal