

sb



***Claimant***

***Respondent***

**Ms S Adewale**

**AND**

**Chestertons Global Limited**

**HELD AT:** London Central                      **ON:** 3-5 September 2019

**BEFORE:** Employment Judge Welch  
**Members:** Mr R Pall  
Ms G Gillman

***Representation:***

**For Claimant:** Mr R Comet, PSU  
**For Respondent:** Ms S Dickinson, Solicitor

## **WRITTEN REASONS**

1. The Judgment in this case was sent to the parties on 2 October 2019; the reasons having been provided orally at the hearing on 5 September 2019. The Respondent made an application for written reasons on 19 September 2019.

### Introduction

2. This is a claim for constructive unfair dismissal and disability discrimination, namely harassment and victimisation, brought by the Claimant against the Respondent.

3. The claim was submitted on 14 December 2018 following a period of early conciliation from 1 October to 15 November 2018. The claim was not sufficiently detailed as to allow a proper response to be submitted. At a preliminary hearing for case management before Employment Judge Norris on 23 April 2019 the Employment Judge took the opportunity to clarify the

Claimant's complaints and these were set out in the Case Management Order dated 23 April 2019 in the list of issues as follows:

Unfair Dismissal Claim

1. The Claimant complains that she was having ongoing issues, which she had been raising, but the Respondent had done nothing about them. She says this had the cumulative effect of irretrievably breaking the employment relationship. The last straw was when she was told by DW in a meeting in [April] 2018 that she was to forget about her issues. This meant that nothing would change and she should look for another job.
2. Did the acts or admissions complained of by the Claimant occur?
3. If so, did they or any of them amount to a breach of any express or implied term of the Claimant's contract of employment, including that of mutual trust and confidence? In other words, was any conduct that has been proved, calculated, or likely, to destroy or seriously damage the employment relationship?
4. If so, was the conduct sufficiently serious to entitle the Claimant to treat the contract as at an end, and to resign, with or without, notice?
5. If so, did the Claimant resign in response to the breach, or for some other reason e.g. because of concerns that she would face disciplinary action over a client complaint or because she had secured a better job elsewhere? If the Claimant did resign in response to any breach of contract by the Respondent, did she do so promptly or did she waive the breach and affirm the contract? If the Claimant was entitled to treat the contract as terminated by the Respondent's conduct did the Respondent have a fair reason for the dismissal?

Harassment

4. Did the Respondent engage in unwanted conduct as follows:
  - a. DIF telling the Claimant in February 2018 that she was not fit to return to work when the Claimant's GP (Dr Ralph) had said she was;
  - b. DIF telling the Claimant in April 2018 that colleagues in her team had reported the Claimant for going home early, when the Claimant had reported to two senior members of the team that she felt unwell and was going to work from home;
  - c. DIF telling CA in April or May 2018 about the Claimant's disability without the Claimant's consent, even though the HR adviser had raised this point with DIF;
  - d. DIF having a meeting in May 2018 with all the other members of the department, which the Claimant was not able to attend, regarding the Claimant's disability;
  - e. DIF asking Dr Smith prior to the May assessment to assess whether the Claimant was mentally stable/ fit to be working, even though he had already confirmed that the Claimant was fit to go back to work;
  - f. AB, CA and/ or OA complaining to DIF that the Claimant had misused her flexible working arrangements (working from home) because (they said) the Claimant had not been working from home, but was hungover from partying over the weekend; DIF accusing the Claimant and questioning her as to her whereabouts when the Claimant had been in hospital for a disability related reason;
  - g. SD on an unknown occasion saying to the Claimant words to the effect of, "look at you going home, part timer" when the Claimant had authorisation to come in and leave earlier than her colleagues because of her insomnia caused by her disability; and

h. DW failing to support the Claimant at 2 meetings in [April] 2018, at which the Claimant says she raised bullying and was told and made to feel that as though she should not pursue her complaints.

5.If so, was the conduct related to the protected characteristic of disability?

6.Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

7.If not did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?;

8.In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Victimisation

9.Has the Claimant carried out a protected act, or more than one? The Claimant relies upon the following: raising complaints about the bullying and harassment she claims to have suffered from DIF on a number of occasions from February 2018 onwards, and at her two meetings with DW in [April] 2018?

10.If there was a protected act, or more than one, did the Respondent subject the Claimant to a detriment by telling her to leave on 4 July 2018 rather than working her notice in full (and paying her in lieu)?

11.If so, what was the reason for the detriment? Was it because the Claimant had done a protected act, or more than one?

12. The Claimant had been asked to submit a definitive list detailing the allegations made. Unfortunately, this had not reached the Employment Tribunal file, but the Claimant had provided a chronological schedule of events which appeared at pages 37-43 of the agreed bundle referred to below.

13. The Claimant confirmed at the start of the hearing that the chronological schedule of events expanded upon the matters identified by Employment Judge Norris in the list of issues, but that she agreed that the allegations were as contained within the list of issues.

14. There was one additional item which, in cross examination, the Claimant confirmed formed part of her harassment complaint, and that was the meeting between herself and DIF on 2 May 2018 following a team meeting, which will be referred to below.

15. The Respondent accepted that the Claimant was disabled within the meaning in section 6 of the EqA at all material times.

16. The parties had agreed a bundle of documents and references to page numbers in this judgment relate to documents within that bundle. There was, very helpfully, an agreed chronology and a cast list provided, together with a provisional timetable. The Tribunal heard evidence from the Claimant herself, SD a former colleague and DIF the Claimant's former Line Manager. The statements were taken as the witnesses' evidence in chief, with cross examination and questions from the panel.

#### Findings of Fact

17. The Claimant was employed in the Tenancy Renewals Team within the Respondent's organisation as a Senior Renewals Consultant. The Claimant's contract provided for payment to be made in lieu of notice.

18. The Claimant commenced employment from 14 November 2014 until the last day of employment on 4 July 2018. She was noted by her Line Manager to have been an excellent worker. She was line managed by DIF, the Head of Tenancy Services, who managed 25 employees across the Claimant's and one other department.

19. The department in which the Claimant worked also had an Associate Director (CA), who was DIF's number 2, and was more senior than the Claimant. CA also carried out a deputising role when DIF was absent from the office, which she often was.

20. The Claimant was signed off from work with a viral infection in July 2017 and it seemed to us that she struggled with her health from this time. She was then signed off from work on 23 January 2018 with anxiety and stress [page 79], not 'severe/clinical depression' as stated by the Claimant in her chronology and her witness statement. Although this page was not legible in

the agreed bundle, it was agreed by both parties that she had been signed off at that point with anxiety and stress.

21. DIF emailed HR with a copy of that fit note on 23 January 2018 and copied in CA [pages 81-85]. It is mistakenly referred to in the list of issues as having occurred in April or May 2018. HR queried whether the Claimant had authorised the sending of the fit note to CA, which she had not specifically done. However, the Claimant was not aware of this until she received a response to her subject access request some months after her departure from the Respondent's employment.

22. The Claimant submitted a further fit note on 2 February 2018 [page 80], which confirmed that she was suffering with anxiety with depression and was not fit for work. She was signed off until 12 February 2018.

23. On 9 February 2018 there was a telephone conversation between the Claimant and DIF concerning her return to work; during this conversation there was a discussion about whether the Claimant was fit enough to return at this stage. The Claimant's evidence was that DIF had said during the conversation that she did not see how she was fit to return due to the severity of her illness, and that DIF would rather her take more time off until she was fully recovered. Also that DIF had pressurised her into giving more information regarding her illness. DIF's recollection of the conversation was that she did not pressurise the Claimant, as the Claimant was very forthcoming about her illness. DIF stated that she did not tell the Claimant that she would rather she took more time off from work, but did say that she should not come back until she felt fully well enough to do so. She went on to discuss possible adjustments for the Claimant's return to work, including working from home and coming in late and leaving early. DIF's email to HR of the same date, namely 9 February 2018 [page 87], supports DIF's recollection of the conversation, since it discusses the Claimant coming back to work despite ongoing health issues, both physically and mentally.

24. We understand how the Claimant may have felt that the discussion made her feel unwelcome, and it may have implied to her that the Respondent was not ready for her to return, however we are satisfied that DIF was

managing someone with a health condition in what we consider to be a reasonable way.

25. Following this the Claimant had a further conversation with her GP who confirmed that she should return, and she did in fact return to work on 19 February 2018.

26. At the end of her first week back, on 23 February, the Claimant stated in conversation with colleagues that she may attend a friend's birthday party at the weekend. Over the weekend the Claimant was ill to such an extent that she attended hospital. On Monday 26 February, the Claimant called DIF to say that she would be working from home. On her return to work the following day, 27 February, DIF had a catch up with the Claimant. These informal catch ups appear to have been regular occurrences between DIF and all of the individual members of her team. During this catch up, DIF explained that some of the team members had expressed concerns about the Claimant's behaviour the previous Friday. A note DIF sent to herself of the conversation on 26 February reflects the telephone conversation of the same day. DIF also raised the point that some of the team were concerned that the Claimant was taking advantage of the flexibility afforded to her, having worked from home on Monday after saying she was going to a party over the weekend.

27. We are satisfied that the team at this time were constantly flagging issues about the Claimant's behaviour to DIF. Also, that the team raised concerns that the Claimant's behaviour was different when DIF was not there. It should be noted that, at this time, the team were unaware that the Claimant had a mental health condition. They were aware that she had been unwell and had returned to work on a flexible basis, but did not have any additional information concerning this.

28. The Claimant's evidence was that DIF stated that the team members were accusing her of being dishonest. We accept that DIF was not suggesting that the Claimant was being dishonest or that the hospital visit had not occurred. DIF was explaining to the Claimant how her actions were being perceived by the members of her team.

29. The Claimant gave DIF a birthday present the next day, on 28 February 2018, being a gift from a shop DIF particularly liked.

30. On 5 March 2018, two of the Claimant's colleagues complained to DIF that the Claimant was taking advantage of the special arrangement she had. She discussed plans for the weekend and then worked from home due to illness on the Monday. On 6 March, DIF met with the Claimant on a return to work meeting, during which she provided her with some feedback from the team. The Claimant was upset about this and said she considered some of AS's actions, being one of the complainants, to be verging on bullying; notes of this meeting appeared at page 122.

31. The Claimant was referred to Occupational Health for a report which was received on 7 March [pages 113-114]. This stated, "whilst I am sure she does not have any form of any serious mental disorder she does appear to be genuinely in the throes of a mild clinical, anxiety/depressive disorder". This went on to suggest ongoing Occupational Health surveillance and suggested a further referral in six to eight weeks.

32. The Claimant met with DIF and CA on 7 March 2018 in a local coffee shop. During this conversation, the Claimant openly discussed her health. The meeting was prompted by the Claimant's complaints that the team were treating her unfairly or bullying her. However, the Claimant provided no evidence concerning this meeting.

33. After meeting with the Claimant, DIF met with AS and EW separately to discuss the allegations of bullying that the Claimant was making. AS was extremely upset and sent an email concerning this to DIF on 9 March 2018.

34. On 29 March 2018, the Claimant was leaving early for an appointment as had been agreed with the Respondent. SD, one of the Claimant's colleagues, said to her "part timer" which was a running joke within the team whenever anyone was leaving early, whether for holiday or appointments. At the time, SD was not aware of the Claimant's condition or the reason for the Claimant's appointment.

35. On 6 April 2018, the Claimant left the office early as she felt unwell. The Claimant had informed two senior people in the department that she was going home, one of whom was on the telephone at the time. DIF was on holiday on that Friday and was telephoned by a member of the Claimant's team to say that she had left early. DIF could not recall whether approval had



been given or whether she might have missed an email from the Claimant, therefore having checked when she got back on 9 April, DIF met with the Claimant to discuss her absence the previous Friday afternoon.

36. DIF's evidence was that the Claimant became angry during this meeting. DIF informed the Claimant she was not in trouble, but asked her to let DIF and CA know, by email to her work email address, if this was to happen in the future. An email from the Claimant to DIF on 11 April 2018 following this meeting [page 134] supports this.

37. On 10 April 2018 the Claimant asked to meet with DIF and was much calmer. It was agreed that the Claimant would be kept off the out of hours rota. The Claimant raised concerns that she had been asked to do work by a team member (AS) which she did not consider appropriate. DIF explained that AS was acting in accordance with her own instructions, a copy of this conversation appears at page 114. The Claimant said that she had been considering complaining to HR, but did not want to 'rock the boat'. DIF thought this was sensible and was happy to be a buffer between the Claimant and her team members. The Claimant thanked DIF for being "voice of reason" in an email dated 10 April 2018 page 132 and at page 133 said that DIF had "been very supportive in the last few months and really do appreciate all you have done for me". DIF sent an email half an hour later to say, "let's just keep this one between us, don't want anything getting back to the wrong people and causing problems when you are trying so hard to improve relationships" [page 131]. We do not know if this was in direct response to the Claimant's email. DIF's evidence was that she wanted to help the Claimant in building relationships with her colleagues and did not consider that accusing colleagues of bullying would contribute positively to that aim.

38. The Claimant acknowledged this a few minutes later and said at page 130a "OK that's a deal, I appreciate your response. I know you are my manager and I do respect and look up to you". It went on to say, "I do also talk to you as not just my manager but a friend or perhaps older sister or even mother like you put it sometimes".

39. On 11 April 2018 the Claimant met with DIF regarding an Occupational Health assessment. At this meeting it was agreed that DIF would have a meeting with the Claimant's team to explain her health condition to them so that they could fully understand the effects of the condition on her. DIF's evidence was that the Claimant specifically agreed to this and told her to tell the team. We are satisfied that the Claimant agreed to this meeting. DIF's evidence was clear that the Claimant had given her full agreement to this happening.

40. Prior to the meeting, the Claimant emailed DW in the Respondent's HR department to ask for a one to one meeting to discuss a few things and asked for this to be kept confidential between them.

41. At the team meeting on 12 April 2018 the Claimant did try and attend, as we believe she saw people going to the meeting room. We are satisfied that the Claimant mistook the reason for the meeting, thinking that this may have been a general team meeting rather than the meeting relating to a discussion about her condition. At the meeting the team were informed of the Claimant's mental health condition. After the meeting DIF emailed the Claimant to say that it had gone well [page 151], but there were a couple of minor points which needed discussion. The Claimant replied, "OK great, nice to hear" which suggests that she was happy that the team had been informed and thanked DIF for "taking the time to discuss it with them"[ page 150].

42. The Claimant's email went on to express the wish that she hoped this would settle the relationship, but was concerned about the other minor points which she feared may not be relevant. On 16 April, the Claimant emailed DIF about the comment made to her about being a 'part timer' on 29 March; she also met with DW but there were no records of this meeting. The Claimant confirmed in evidence that she raised the issue of being harassed by the team and that she did not feel DIF was handling the matter effectively, but did not want her to raise an official complaint. There was a follow up meeting later in April between the Claimant and DW, the only known outcome from the meeting was that the Claimant's suggested team building sessions to try and build relationships, which was being considered. These team building

sessions typically occurred in October when the Respondent was historically less busy which would have been after the Claimant's resignation.

43. In evidence the Claimant confirmed that DW had suggested arbitration, although this might not resolve the issues. The Claimant also confirmed that she was told of the possibility of raising a grievance if she wished.

44. The Respondent referred the Claimant to Occupational Health for a further assessment in line with the initial Occupational Health report. DIF requested that the Claimant's mental health was assessed, but did not want the Claimant to be told that this was the case [page 156]. The Claimant was not aware of these comments until months after her employment had ended, when the emails were provided. However, the emails should be placed in context with the earlier Occupational Health report which identified mental health issues and suggested follow up referrals.

45. There was a team meeting on 2 May 2018 during which the Claimant appeared to be very tired and disengaged. The evidence of SD was that the Claimant was sprawled across the desk, whilst the Claimant disputed this. We are satisfied that the evidence from the Respondent's witnesses was correct. After the meeting ended, the Claimant was asked to stay behind and speak with DIF. DIF suggested that if she was feeling tired the Claimant might wish to go home; the Claimant said that DIF accused the Claimant of making the team feel uncomfortable which was refuted by DIF. DIF said that the team were concerned, and that she offered the Claimant the opportunity to go home, but did not force her to do so. The Claimant subsequently emailed to say that she had had a very difficult night and was struggling [page 171] and was therefore going to go home.

46. We accept DIF's evidence concerning the meeting between her and the Claimant after the team meeting on 2 May 2018.

47. A further Occupational Health report was obtained on the Claimant. On 21 June 2018, a complaint was received from a customer about the Claimant [pages 205-206]. DIF emailed the Claimant attaching the complaint on 27 June confirming that the complaint had been dealt with, but that it would need

to be discussed at some point. A meeting was held on 28 June between DIF and the Claimant. The complaint was discussed and DIF raised the concern that the Claimant was becoming behind with her work. At the end of the meeting, the Claimant handed in her letter of resignation [page 210]. She had obtained an alternative role, which was offered to her on 18 June 2018 [page 192]. It was not clear when this job offer was accepted by the Claimant.

48. DIF subsequently emailed her manager, the Head of Lettings, about the Claimant's resignation [page 211]. It was clear that DIF was pleased for the Claimant, as she considered the job to be a perfect fit for her. She did say she was very relieved and that the Claimant had agreed that it had been difficult to manage the situation.

49. Following on from the Claimant's resignation, the Claimant was due to work her notice period. DIF suggested a plan of action for the Claimant to work through the most pressing matters prior to her departure, particularly as she was on annual leave for the last part of her notice.

50. It became apparent that the Claimant was getting more behind with her work, and the team expressed to DIF that they thought that she was going to leave earlier than the end of her notice period. DIF therefore met with the Claimant to agree the plan for the Claimant's work and also to discuss the team's view that they thought she was going to leave her employment early. On 3 July, the Claimant was also warned about her failure to reply to people.

51. DIF then met with the Claimant on 4 July 2018 and confirmed that she thought it would be better if the Claimant were to leave immediately and that she would be paid in lieu of the remainder of her notice. DIF's evidence was that the Claimant thanked her and hugged her; something which the Claimant could not recollect. The Claimant stated that DIF had said that she had found her rather difficult to manage. DIF said that they agreed that it had been a difficult situation to manage. We accept DIF's evidence on this.

52. DIF emailed HR and her manager just after to say that they were “both relieved” [page 226] and that the Claimant had herself informed DIF that her in-box was a mess.

### Submissions

53. The Respondent contended that the Claimant had not made out a claim for either constructive unfair dismissal or disability discrimination. Her claim for discrimination, save for the one alleged act of victimisation, were all out of time and the Claimant had provided no reason to extend time on a just and equitable basis. The Claimant had done no protected act upon which to base her victimisation complaints; the allegation of bullying allegedly told to DW was not a protected act, but, even if it were, there was no credible evidence that this played on the mind of DIF when deciding to pay the Claimant in lieu of notice on 4 July. Considering whether the meeting on 4 July was an act of harassment, the Claimant said she was shocked but not degraded or humiliated and the Claimant’s own evidence was that she was relieved and could not recollect but we contend that she had hugged her manager. The basis for the constructive dismissal claim was unclear, including what the last straw, relied upon by the Claimant, was. In any event, in the Respondent’s case there was no breach and, if there was one, the Claimant had affirmed it and/or did not resign in response. She knew that she was to be performance managed and that there was a complaint and she chose to leave; therefore, we were requested to dismiss the Claimant’s complaints.

54. The Claimant’s submissions were that the Claimant felt, following her return to work in February 2018, that she had been treated differently by DIF and her team due to her disability. She had been harassed on an ongoing basis, had been bullied and that this was all connected and led up to the final act on 4 July 2018, when told that her employment would end that day. Her resignation was only due to the environment, which she felt to be hostile against her and that with the meetings that were held with her, she felt harassed and bullied. She did not feel that people were listening to her, and

having been discouraged from raising matters further, that this was a breach of contract giving rise to the constructive dismissal complaint.

Law

55. Turning firstly to the discrimination complaints, the Tribunal needs to consider whether the complaints have been brought within the necessary time limits. Section 123(1) of the Equality Act 2010 ('EqA') which provides: ".....proceedings on a complaint within section 120 may not be brought after the end of -

- (a) the period of three months starting with the date of the fact which the complaint relates; or
- (b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section -

- (a) conduct extending over a period is to be treated as done at the end of that period."

Harassment s.26

"(1) A person (A) harasses another (B) if—

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
- (b) the conduct has the purpose or effect of—
  - (i) violating B's dignity, or
  - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B....."

"(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

- (a) the perception of B;
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect."

56. We reminded ourselves that there is no need for a comparator for harassment claims and that a one-off incident can amount to harassment.

There is also no need for a Claimant to have made clear to the perpetrator that the conduct is unwanted. The test of whether conduct is related to a protected characteristic is wider than the test for direct discrimination which requires less favourable treatment because of a protected characteristic.

57. In the case of Richmond Pharmacology v Dhaliwal 2009 IRLR 336 the EAT observed that harassment focuses on three elements; firstly, there is the question of unwanted conduct; secondly the Tribunal should consider whether the conduct has the purpose or effect of either violating the Claimant's dignity or creating an adverse environment for him or her; thirdly, was the conduct on prohibited grounds? The EAT observed in that case that the motivation for the harassment was not always relevant.

58. For the purposes of the Equality Act, anything done by an employee in the course of their employment is treated as having also been done by the employer by virtue of section 109 EqA.

### Victimisation

59. This need not be consciously motivated. The House of Lords in Nagarajan v London Regional Transport and others [1999] IRLR 572 upheld the Tribunal's decision confirming it had been entitled to find, in the circumstances of that case, that the interviewer's decision in rejecting Mr Nagarajan's application for a role had been affected by his previous proceedings regardless of whether the interviewer consciously took the protected act into account.

60. Victimisation occurs when the Claimant is subjected to a detriment because the Claimant has done a protected act, or the Respondent believes that he/she has done, or may do a protected act. Therefore, there is no need to consider a comparator.

61. The Tribunal had to consider whether the Claimant's complaints about bullying to DW amounted to protected acts and, then, whether the Claimant was subjected to detriments in which the contents of those complaints played

any significant part in a decision to subject her to those detriments.

62. We noted that detriments can take many different forms. It could simply be general hostility; it may be dismissal or some other detriment. Also, failures to act may also constitute unfavourable treatment. We noted that an unjustified sense of grievance is not a detriment.

#### Burden of proof and discrimination claims

63. The Tribunal had regard to the burden of proof, which initially lies with the Claimant. However, if there are facts from which a Tribunal could decide, in the absence of another explanation, that the employer contravened the provisions of the Equality Act, the Tribunal must hold that the contravention occurred from section 136(2) EqA.

#### Constructive dismissal

64. The Claimant also complains that she has been constructively unfairly dismissed. Section 95 of the Employment Rights Act 1996 ('ERA') provides the circumstances in which an employee is dismissed and that includes where the employee terminates the contract under which she is employed with or without notice in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct.

65. It does not matter, therefore, whether the employee terminates the contract with or without notice providing that she was entitled to terminate it without notice.

66. An employee must show that the employer was in repudiatory breach of contract. If there is a repudiatory breach, then the employee must resign in response to that breach and not for some unconnected reason. Also, the employee must not have accepted the breach by continuing to work and waiving the breach.



67. The Tribunal reminded itself that the breach does not have to be the only cause of the employee's resignation. The repudiatory breach may be of an express or implied term, including the implied term of trust and confidence, which is relied upon by the Claimant in this case. It can consist of a one off act or a continuing course of conduct culminating in a last straw for the employee. The last straw does not have to be a fundamental breach in its own right but must not be innocuous. Should there be a fundamental breach, the Tribunal is then required to consider what the reason was for the Claimant's deemed dismissal and whether this was a potentially fair reason and whether the employer acted reasonably in all the circumstances in accordance with section 98(4) ERA.

### Conclusion

68. Dealing with the discrimination complaints first. The latest possible act of alleged discrimination was the Claimant being sent home and paid in lieu of notice on 4 July 2018. If we considered that to have been an act of discrimination, then this was brought within time. If that was not an act of discrimination, then the earlier alleged acts of discrimination were brought out of time.

69. For reasons that follow, we do not consider that the events of 4 July 2018 were an act of victimisation and, therefore, potentially the other claims were presented out of time.

70. We considered whether we should extend time on a just and equitable basis in order to properly consider the complaints brought by the Claimant. We decided to do so, since a failure to do so would have caused severe prejudice to the Claimant, whereas the Respondent had already suffered the prejudice of having a three day Employment Tribunal hearing and had called evidence on the issues for which we provide reasons below.

71. So, turning to the Claimant's complaints of harassment, we had to firstly consider whether the alleged acts took place. We refer to each in turn taken from the agreed list of issues:

- (a) DIF telling the Claimant that she was not fit to return to work. We do not accept that this took place since we consider that DIF was discussing the Claimant's return to work with her and wished to make sure that the Claimant felt well enough to return at that time. We do not accept that DIF told the Claimant that she was not fit to return; instead there were discussions concerning adjustments which would be made to assist her in her return, namely flexible working times and working from home.
- (b) We accept that the Claimant was told that colleagues had reported the Claimant for going home early when she had informed two senior members of the team that she was unwell and was going to work from home.
- (c) We also accept that DIF did copy in CA when sending a fit note to HR by email [page 81], although this did not state the Claimant's disability; it stated that the Claimant had been signed off with anxiety and stress.
- (d) DIF did hold a meeting with the Claimant's team on 12 April 2018 (not May as suggested in the list of issues). However, this was with the Claimant's explicit consent. We do not consider that the Claimant was stopped from attending this meeting, rather it was seen as preferable for the meeting to go ahead in her absence in light of the subject matter of conversation. There was no evidence that she was refused admittance when she declared an interest in attending, therefore we do not accept that this amounted to unwanted conduct.
- (e) It is accepted that DIF asked the Occupational Health advisor to assess the Claimant's mental stability/fitness in April (and not in May as suggested) 2018.

- (f) It is not accepted that the Claimant was told by DIF that she was too stressful to manage. Whilst it is accepted that she was told that she should leave and be paid in lieu of notice, this was not because of being 'too stressful to manage'.
- (g) Colleagues of the Claimant had complained that she was misusing her flexible working arrangements due to having worked from home after believing that she had gone to a party at the weekend. There was no evidence that any allegations of being hungover were made. It is not the case that DIF accused the Claimant and questioned her over her whereabouts; DIF merely explained the complaint that had been raised.
- (h) It is admitted that SD called the Claimant 'part timer' when she was leaving the office early.
- (i) We do not accept that DW failed to support the Claimant at two meetings held with her in April (not May) 2018. Whilst there was little evidence over what had been said, the Claimant confirmed in evidence that DW had suggested arbitration, the possibility of a grievance and was looking into team building activities. It is not accepted therefore the DW made the Claimant feel as though she should not pursue her complaints.

72. We do not find that paragraph (c) above amounted to unwanted conduct, since whilst the Claimant had not specifically agreed to DIF sending the fit note to CA, we consider that the Claimant had made CA aware of her mental health condition herself.

73. In relation to those acts which we found did amount to potential unwanted conduct, namely (b), (e), (g) and (h) above, we do find that the conduct was related to the Claimant's disability.

74. We went on to consider whether the conduct had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading,

humiliating or offensive environment for the Claimant. In relation to all of the allegations we do not consider that any of them had this purpose, or effect. Whilst we consider that the Claimant's perception was that she was being bullied or harassed, we are satisfied that this may have, at least, been in part due to her condition or her perception, due to her illness, of how she was being treated. We did not consider that the conduct would have been viewed that way by any other employee. We do not consider that it was reasonable for the conduct to have had that effect as is required by section 26(4)(c) of the Equality Act.

75. In relation to the complaints of victimisation, we need to consider firstly whether there was a protected act. It was not clear from the Claimant's evidence, despite questions during the hearing, what was specifically said to DW in the meetings in April 2018.

76. It was clear that the Claimant complained about bullying and harassment but it was not clear that she linked these complaints in any way to her disability. It appeared to us that she had complained that she was being unfairly treated by her team, but not that this was because of her depression. Therefore, we are not satisfied that these conversations were sufficient to be classed as protected acts under the Equality Act 2010.

77. However, for completeness, we went on to consider whether her complaints of victimisation would have succeeded had there been one or more protected acts. We were satisfied that not allowing someone to work their notice might be a detriment under the Equality Act, even though we accept DIF's evidence that the Claimant hugged her at the end of the meeting in which she was told that she was leaving that day and was happy about being paid in lieu.

78. We found that the reason for the Claimant being paid in lieu of notice and being sent home was her disruptive influence in work and the affect this was having on her team together with her failure to carry out her work during the notice period. It was clear that DIF was seriously concerned by this, as

evidenced by her email after the meeting on 4 July saying, amongst other things, that the Claimant had admitted that her inbox was in a mess. Therefore, even if the discussions with DW amounted to protected acts, there was no victimisation of the Claimant.

79. Turning to the constructive dismissal complaint, we need to consider whether there had been a fundamental breach of contract by the Respondent. This, as we have said, can be a series of breaches resulting in the last straw causing the employee to resign.

80. Having found that there have been no acts of discrimination, discrimination itself cannot form the basis of the Claimant's constructive dismissal complaint. However, we went on to consider whether the treatment of the Claimant in the lead up to her resignation could amount to a breach of the implied term of trust and confidence.

81. The case management order suggested that the Claimant considered the last straw to be when she was told by DW in meetings in April (stated to be in May in the Order) to forget her issues. The Claimant confirmed in cross examination that this was not in fact the case and that she had resigned in response to the ongoing issues and harassment to which she alleged she had been subject to and the failure to do anything about this.

82. The Claimant confirmed in cross examination that DW had suggested some form of arbitration and the possibility of a grievance, and therefore we do not accept that DW's conduct amounted to any kind of breach of contract. We are therefore unsure of the last straw relied upon by the Claimant, but in any event, we do not find that there was any breach, and certainly no fundamental breach of the Claimant's contract of employment by the Respondent.

83. The Respondent, and DIF in particular, was trying to manage the Claimant through a very difficult period for her. We do not find their treatment of the Claimant to have been unfair or unreasonable in the circumstances

prevailing at the time. Therefore, there was no breach upon which to base a constructive dismissal claim and therefore this claim is also dismissed.

84. As a result of findings, all of the claims against the Respondent are dismissed in their entirety.

---

Employment Judge Welch

Dated: 16 November 2019

Judgment and Reasons sent to the parties on:

20 November 2019

For the Tribunal Office