EMPLOYMENT TRIBUNALS

Claimant: Ms K Pease

Respondent: Extras Ltd.

Heard at: Leeds

On: 18,19 and 20 September 2019
Deliberations: 6 November 2019

Before: Employment Judge Shepherd

Members: Mr Q Shah
Mr K Lannaman

Appearances:

For the Claimant: Ms Cakali
For the Respondent: Mr Searle
Interpreter: Ms Ward.

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim brought by the claimant of unfair dismissal is not well founded and is dismissed.

2. The claim brought by the claimant of disability discrimination is not well founded and is dismissed.

REASONS

1. The claimant was represented by Ms Cakali and the respondent was represented by Mr Searle.

2. The Tribunal heard evidence from:

Angela Sutcliffe, Job Retention Specialist;
Kit Ling Judy Pease, the claimant, with the assistance of an interpreter, Ms Ward;
Richard Smith, Director and Chief Administrative Officer;
Debbie Taylor, Office Manager.

3. The Tribunal had sight of a bundle of documents which was numbered up to page 410. The Tribunal considered the documents to which it was referred by the parties. There had been some documents included within the bundle of documents which were unredacted and it was agreed that redactions should have been in place. The unredacted documents were removed from the bundle and replaced with redacted documents. The Tribunal had already read some of the documents in their unredacted form. The issue was discussed and it was agreed that the hearing would continue on the basis that Tribunal would only take into account the contents of the redacted documents.

4. The claims brought by the claimant were for unfair dismissal, and disability discrimination. At a preliminary hearing on 23 April 2019 the complaints of discrimination were identified as harassment related to disability, failure to make reasonable adjustments and discrimination arising from disability.

5. The claims of discrimination arising from disability and harassment relating to disability were withdrawn and the appropriate dismissal judgment was made. The remaining claims were of constructive unfair dismissal and failure to make reasonable adjustments pursuant to section 20 and 21 of the Equality Act 2010. The disability alleged was anxiety and depression. The respondent did not accept that the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010.

6. The issues to be determined by the Tribunal were:

6.1. Whether the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 i.e. did the mental impairment of anxiety/depression have a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities?

6.2. Did a provision, criterion or practice (PCP) of requiring the claimant to complete her workload within 4 days per week put the claimant at a substantial disadvantage in comparison with persons who are not disabled because she was unable to function to her usual standard and/or because it exacerbated her mental health?

6.3. Did a PCP requiring the claimant to work in the same room as NM put the claimant at a substantial disadvantage in comparison with persons who are not disabled because she was unable to function to her usual standard and/or because it exacerbated her mental health?

6.4. Did the respondent know or could it reasonably be expected to know that the claimant had the disability and that she was at those disadvantages?

6.5. If so, what steps was it reasonable for the respondent to have to take to avoid those disadvantages?

The suggested steps are:

6.5.1. Arranging for the claimant and NM to work in separate offices;

6.5.2. Providing the claimant with management training;

6.5.3. Providing the claimant with support to help her manage a junior member of staff;

6.5.4. Increasing the claimant's hours to 5 days per week;

6.5.5. Decreasing the claimant's workload; and/or

6.5.6. Providing the claimant with a dedicated assistant.

6.6. Did the respondent fail to take those steps?

Unfair Dismissal

6.7. Did the respondent dismiss the claimant, i.e.

6.7.1. Did it breach the implied term of mutual trust and confidence as described in the claim form?

6.7.2. If so, did its actions amounted to repudiatory of the claimant's contract of employment?

6.7.3. If so, did the claimant resign in response and without affirming the contract?

6.8. If so, the respondent does not contend that there was a potentially fair reason for dismissal, i.e. for fundamental breach of the implied term of mutual trust and confidence and it would follow that the claimant was unfairly dismissed.

Findings of fact

7. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings the Tribunal made from which it drew its conclusions:

7.1. The claimant was employed by the respondent as Group Accounts Manager from 16 June 1999 to 5 December 2018. Her role included managing the accounts for the group and supervising the daily activities of an accounts assistant.

7.2. The respondent is a company producing fashion collections of bags and accessories with customers in national and international markets.

7.3. In February 2016 the respondent informed the claimant that, due to financial difficulties, the respondent needed to make cuts throughout the business and the claimant was requested to reduce her hours from 37.5 to 30 hours. The

claimant did not agree to reduce her hours at that time but a number of other employees agreed to a reduction.

7.4. In March 2016 the claimant's accounts assistant (who was not present at the Tribunal hearing to give evidence and will be referred to as NM in these reasons) was required to assist with work in the warehouse. Her hours working in the accounts department were reduced. She then worked half a day in the accounts department and half a day in the warehouse.

7.5. In June 2016 Richard Smith, Director and Chief Administrative Officer, was informed of an incident in which it was reported by a number of members of staff that the claimant had been heard shouting at NM. Following a disciplinary hearing, the claimant was given a first written warning for behaviour towards other members of staff.

7.6. In February 2017 there had been a reduction in the respondent's customer base and a number of members of staff were made redundant. The claimant agreed to reduce her hours to 30 hours per week. The claimant said that her mental health deteriorated to such a point that she felt she could no longer cope with constant pressure to reduce her hours and had no choice but to reduce her hours to 30. At the same time, two members of staff were made redundant, leaving only the claimant and NM in the Accounts Department.

7.7. Richard Smith said that there had been a significant downturn in business. The workload was less and this justified the reduction in hours. He said the claimant continued carrying out her work on time and to a good standard. She very rarely asked to work any overtime hours. Any extra hours were always prearranged and the claimant always took time off in lieu for them. He said that the claimant was a very valued member of the team and raised no concerns at this time.

7.8. The claimant's medical records show that the claimant had a history of work-related stress and, on 24 July 2017, there is an entry in which it was indicated that the claimant's work hours had reduced and there was an increased workload due to redundancies. It is recorded that she was considering resigning. Following a referral to IAPT (Improving Access to Psychological Therapies), the claimant undertook a six-week stress control course commencing at the end of August 2017.

7.9. The claimant said that the workload was too much for her to complete and she said that she was bullied by NM on a regular basis and NM would shout at the claimant, undermine the claimant and ignore instructions. The claimant said that this negatively affected her mental health.

7.10. On 26 July 2017 the claimant sent an email to Richard Smith. She referred to an incident that had happened between her and NM and that, after that incident she was unhappy and feeling very low. In the email she said she went to see a GP and it had been diagnosed that she was suffering "…the stress of work. It seems develop a year ago and building it up. She referred me to psychological therapist. I don't feel I fit to work right now. I need a few days off

to stay away of work…" Richard Smith said that the claimant, despite him asking, did not provide any further details about this incident.

7.11. Richard Smith said that the claimant did, on occasion, say that she was feeling stressed. She gave the impression that she was stressed about a particular task or change in routine. He said there was no indication that the claimant's stress was in any way long-term or persistent or anything beyond the normal stresses of a professional role.

7.12. Issues between the claimant and NM continued. The claimant said that NM would complain to Richard Smith and threaten the claimant that her relatives would raise a complaint against the claimant.

7.13. On 8 August 2018 the claimant met with Richard Smith in respect of an incident in relation to an incident involving NM and a transfer of US dollars. The claimant said that she was hurt that Richard Smith had given NM, her junior, authority to purchase US dollars when the claimant had never been given that authority. Richard Smith confirmed to the claimant that he did not give authority to NM but he was angry at the claimant for not teaching NM how to purchase the dollars and conduct the inter-company transfer. Richard Smith said that it appeared that the claimant was hoping that the request would have been processed twice so that she could criticise NM for coming to him directly. Richard Smith said that he gave a verbal warning to the claimant indicating that he did not consider this acceptable, they were one team and should be working together. The claimant said that Richard Smith told her that he 'could give her a warning'.

7.14. On 9 August 2018 Debbie Taylor, Office Manager, went into the office shared by the claimant and NM at around 8:00 am. She said she saw claimant sitting in NM's chair with her head down. She saw that the claimant was crying and when Debbie Taylor asked what the matter was she saw that the claimant was holding a knife. She also had a pair of industrial scissors on the desk near her. Debbie Taylor removed the knife from the claimant. Richard Smith telephoned the claimant's husband and asked him to come and pick her up from work. Richard Smith suggested that the claimant should go home, rest and see a doctor.

7.15. The claimant attended her GP practice on 10 August 2018 and was provided with a fitness for work certificate indicating that she was not fit for work for one week. The claimant's medical records show that the claimant visited the Advanced Nurse Practitioner together with her husband. The notes referred to the claimant having recently been seen for emotional outbursts and referred to her as perimenopausal and that she felt it was a work-related and denied depression or anxiety.

7.16. On 12 August 2018 Richard Smith sent an email to the claimant indicating that he hoped she was well and feeling better having had a few days away from work. He referred to the doctor's note and asked the claimant to take the time over the week to help alleviate the stress as much as possible. He also indicated

that there may be some questions with regard to work-related issues but he would try to keep them to an absolute minimum.

7.17. There were some work queries that were raised with the claimant during her absence. She indicated in a number of messages that, although she was off sick, Mr Smith could still contact her to clarify anything he needed. She stated that he could email or call her any time if he needed to. She stated it didn't matter how many times and he should not hesitate to contact her.

7.18. Richard Smith carried out an investigation into the events. He spoke to NM who raised a number of concerns about the claimant's line management of her. The claimant provided a statement on 9 September 2018. This statement raised issues with regard to NM, Richard Smith and the respondent's management of the claimant.

7.19. On 19 September 2019 a meeting took place between the claimant and Richard Smith. The claimant was accompanied by Angela Sutcliffe, Job Retention Specialist at Workplace Leeds. The discussion at the meeting was with regard to the claimant's relationship with NM.

7.17. On 20 September 2018 Richard Smith wrote to the claimant setting out the issues raised by the claimant with regard to NM.

7.18. There was correspondence between Richard Smith and the claimant. Angela Sutcliffe suggested to Mr Smith that it would be helpful to involve a professional mediator to help resolve the issues between the claimant and NM. Richard Smith indicated that Debbie Taylor would be a good mediator.

7.19. On 10 October 2018 Richard Taylor sent the claimant a detailed email covering six incidents and NM's version of events and suggesting a meeting should be arranged including the claimant, NM, Richard Smith, Angela Sutcliffe and Debbie Taylor.

7.20. A meeting took place on 18 October 2018. A note of the meeting prepared by Angela Sutcliffe included the following:

> "However, the meeting was not successful in drawing a line under past events and looking forwards in how Judy and (NM) could communicate better going forwards. Towards the end of the meeting Judy became very upset and said that she just does not want to work with (NM) at all. Richard explained that this makes for a very difficult situation for him because Judy is employed to do the role of managing their accounts department, which includes managing (NM). He said that if she is unable to do that then he needs to consider whether she can return to work at all. Judy stood up after this point was made as she was too upset to continue with any further discussion and said that she wanted to leave."

7.21. On 19 October 2018 Angela Sutcliffe met with the claimant and within the notes of that meeting Angela Sutcliffe stated:

> "I was honest with Judy that the message from Richard at the end of the meeting seem to suggest she could lose her job if she is unable to find a way to resolve her issues with (NM) and work with her as her manager. Judy does not think that she is being unreasonable in asking to sit in a different room to (NM), at least for a short time to give them some space. I tried to get her to see this from Richard's perspective, that she is employed as the manager of the accounts department, which includes managing (NM) so to sit in a different room will not solve anything as she will still be expected to communicate on a regular basis with her."

7.22. The notes also show that Angela Sutcliffe indicated to the claimant that, from her perspective, she had not been bullied by (NM) but that there had been a breakdown in their communication and that she had misinterpreted some of the things (NM) had said. It was also stated:

> "Discussed that as her manager, it is her responsibility to manage a situation where a member of staff is either underperforming or she feels there are issues with conduct..."

7.23 On 25 October 2018 Angela Sutcliffe had a telephone conversation with Richard Smith. In the notes of that telephone conversation Angela Sutcliffe indicated that she agreed that she didn't feel (NM) had been bullying the claimant but their issues stemmed from a breakdown in communication. She did not agree with Richard Smith that Judy had been bullying (NM). Angela Sutcliffe asked Richard Smith whether he would consider some form of management training for the claimant as it was evident that she was lacking in her capability to manage (NM). Richard Smith had replied 'maybe' and indicated that his concern was greater than that as the claimant had managed NM for four years and others for 10 years prior to that.

7.24. On 12 November 2018 the claimant's GP practice wrote to the respondent. In that letter it was stated that if the work-related issues causing the stress and anxiety were dealt with then she could return to provide an efficient service.

7.25. Richard Smith said that he wished to arrange another meeting and that it was imperative that the issues between the claimant and NM were resolved. However, before he could arrange such a meeting the claimant resigned.

7.26. In a note of a meeting at WorkPlace Leeds with the claimant it is stated:

> "Judy's GP did not feel it necessary to continue with sick notes and informed Judy that she needs to make a decision regarding returning to work."

The note goes on to state that the claimant shared a copy of her resignation letter and indicates that the claimant had been discharged from IAPT as:

> "It is 'workplace stress related' and not ongoing mental health difficulties."

7.27. The claimant agreed that she had been told that she had got to sort the work situation out and that she was not able to work due to stress at work and that she had been told that the practice nurse could only treat her if she was sick and that she could not help her if her boss could not sort out the situation.

7.28. The claimant's letter of resignation was dated 5 December 2018. The claimant stated that she been left with no option but to resign from her position:

> "The manner in which I've been treated over the past two years has been nothing short of appalling. I have been ostracised, bullied, discriminated against, and have had my employment unjustly threatened by the Company. The Company has completely failing in its duties towards me as an employee.
> This behaviour has caused me to lose all trust and confidence in the Company as my employer and I therefore consider myself constructively dismissed."

7.27. The claimant presented a claim to the Employment Tribunal on 25 February 2019 following a period of ACAS early conciliation. She brought claims of unfair dismissal and disability discrimination.

The Law

Disability discrimination

8. Section 6 of the Equality Act 2010 states:

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, an

(b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Schedule 1 provides:

Long-term effects

(1) The effect of an impairment is long-term if—

(a) It has lasted for at least 12 months,

(b) It is likely to last for at least 12 months, or

(c) It is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

Section 212 provides that substantial" means more than minor or trivial.

Duty to Make Reasonable Adjustments

9.Section 20 of the Equality Act 2010 states:

> "(1) Where this Act imposes a duty to make reasonable adjustments of a person, this Section, Sections 21 and 22 and the applicable schedule apply; and for those purposes a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements,
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (5) The third requirement is a requirement, where the disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid".

10. Paragraph 20 (1) of Schedule 8 provides:

> " 20 (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
>
> (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;
>
> (b) In any other case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

11. Under sections 20 and 21, discrimination by reason of a failure to comply with an obligation to make reasonable adjustments, the approach to be adopted by the Tribunal was as set out in **Environment Agency v Rowan [2008] ICR 218**, where it was indicated that an Employment Tribunal must identify the provision, criterion or practice ("PCP") applied by or on behalf of the respondent and also the non-disabled comparator/s where appropriate, and must then go on to identify the nature and extent of the substantial disadvantage suffered by the claimant. Only then would it be in a position to know if any proposed adjustment would be reasonable.

12. Consulting an employee or arranging for an Occupational Health or other assessment of his or her needs is not in itself a reasonable adjustment because such steps do not remove any disadvantage: **Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664, EAT; Project Management Institute v Latif [2007] IRLR 579, EAT**.

Burden of Proof

13. Section 136 of the Equality Act 2010 states:

> "(1) This Section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.
>
> (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.
>
> (5) This Section does not apply to proceedings for an offence under this Act.
>
> (6) A reference to the court includes a reference to –
>
> (a) An Employment Tribunal."

14. Guidance has been given to Tribunals in a number of cases. In **Igen v Wong [2005] IRLR 258** and approved again **in Madarassy v Normura International plc [2007] EWCA 33.**

15. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against her. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of **Madarassy** the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: "They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

16. In **Project Management Institute v Latif (2007) IRLR 579** The EAT gave guidance as to how Tribunals should approach the burden of proof in failure to make reasonable adjustments claims. The burden of proof only shifts once the claimant has established not only that the duty to make reasonable adjustments has arisen, but also that there are facts from which it could reasonably be inferred, in the absence of an explanation, that it has been breached. It was noted that the respondent is in the best position to say whether any apparently reasonable amendment is in fact reasonable given its own particular circumstances. Therefore, the burden is reversed only once a potential reasonable adjustment has been identified. It will not be in every case that the claimant would have to provide the detailed adjustment that would have to be made before the burden shifted, but "it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not". The proposed adjustment might well not be identified until after the alleged failure to implement it, and in exceptional cases, not even until the Tribunal hearing.

17. In **Romec v Rudham (2007) All ER 206** the EAT held that if the adjustment sought would have had no prospect of removing the substantial disadvantage then it could not amount to a reasonable adjustment. However, if there was a real prospect of removing the disadvantage it may be reasonable. In **Cumbria Probation Board v Collingwood (2008) All ER 04** the EAT stated "it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage" the finding of a failure to make a reasonable adjustment which effectively gave the claimant a chance of getting better through a return to work was upheld.

18. In **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10/JOJ** the EAT held that when considering whether an adjustment is reasonable it is sufficient for a Tribunal to find that there would be a prospect of the adjustment removing the disadvantage.

19. In **Noor v Foreign and Commonwealth Office 2011 ICR 695** Richardson J stated "Although the purpose of a reasonable adjustment is to prevent a disabled person from being at a substantial disadvantage, it is certainly not the law that an adjustment will only be reasonable if it is completely effective"

Constructive dismissal

20. Section 95(1)(c) of the Employment Rights Act defines constructive dismissal as arising when "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct". The conduct must amount to a breach of an express or implied term of the contract of employment which is of sufficient gravity to entitle the employee to terminate the contract in response to the breach. In this case, the breach of contract relied upon by the claimant is a breach or breaches of the implied term of trust and confidence. That is expanded upon in a well known passage from the judgment

of the EAT in **Woods v WM Car Services (Peterborough) Limited [1981] IRLR page 347**:-

> "It is clearly established that there is implied in the contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation of the contract since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The employment tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it".

21. Next, there is the significance of what is colloquially called a final straw. This was considered in the Court of Appeal judgment in **London Borough of Waltham Forest v Omilaju [2005] IRLR page 35**:-

> "In order to result in a breach of the implied term of trust and confidence, a final straw, not itself a breach of contract but must be an act in a series of earlier acts which cumulatively amount to a breach of the implied term. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial. The final straw, viewed in isolation, need not be unreasonable or blameworthy conduct. However, 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 trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective".

22. Further clarification of the objective nature of the test is provided in the Court of Appeal judgment in **Bournemouth University Higher Education Corporation v Buckland [2010] IRLR page 45**:-

> "The conduct of an employer who is said to have committed a repudiatory breach of the contract of employment is to be judged by an objective test rather than a range of reasonable responses test. Reasonableness may be one of the tools in the employment tribunal's factual analysis in deciding whether there has been a fundamental breach but it cannot be a legal requirement".
>
> to its employees to obtain regress of any grievance they may have".

23. In **Meikle v Nottinghamshire County Council [2005] ICR page 1**, Keane LJ said:-

> "The Appeal Tribunal there pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job. It is suggested that the test to be applied was whether the breach or breaches were the 'effective cause' of the resignation. I see the attractions of that approach but there are dangers in getting drawn too far in questions about the employee's motives. It must be remembered that we are dealing here with a contractual relationship, and constructive dismissal is a form of termination of contract by repudiation by one party which is accepted by the other … The proper approach therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the circumstances of the repudiation. It follows that, in the present, it was enough that the employee resigned in response at least in part, to fundamental breaches of contract by the employer".

24. The test was put in slightly different terms in **Wright v North Ayrshire Council UKEATS 0017/13 (27 June 2013)**, in which Langstaff P endorsed a test first propounded by Elias P in **Abbey Cars West Horndon Limited v Ford UKEAT 0472/07**:-

> "The crucial question is whether the repudiatory breach played a part in the dismissal … it follows that once a repudiatory breach is established, if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon".

27. On the final day of the oral hearing, there was insufficient time to hear oral submissions. The parties' representatives stated that they wished to provide written submissions to the Tribunal. It was indicated that this was not the usual practice but, bearing in mind the difficulties of arranging a further day to hear oral submissions and, the indication by the representatives that written submissions would be more cost-effective for the parties, the Tribunal acceded to the request and written submissions were provided. These were helpful. They are not set out in detail in these reasons but both parties can be assured that the Tribunal has considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

Disability

28. The first issue the Tribunal considered is:

Whether the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 i.e. did the mental impairment of anxiety/depression have a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities?

29. The Tribunal gave very carefully lengthy consideration to this issue and found, on balance, that the claimant was not a disabled person within the meaning of section 6. The Tribunal considered the disability impact statement provided by the claimant. This was largely a list of things the claimant said she was suffering from but it did not address the point of how the claimant was affected during the material time.

30. The claimant had work-related stress issues but it was not established that she had a long-term impairment that had a substantial effect on day-to-day living activities. The medical evidence indicated that work-related issues were causing stress and anxiety and that, if these issues were dealt with, the claimant could return to provide an efficient service.

31. Stress is common in the workplace and affects many people to varying degrees. It may reach a stage where it results in a substantial effect on day-to-day living activities. This may last weeks or months and, in some cases, it does develop into a long-term condition.

32. In this case the Tribunal is satisfied that the claimant was suffering from stress. It was not established that this had a long-term substantial effect on the claimant's day-to-day living activities.

33. The claimant was discharged from IAPT on or around 5 December 2018 and had no ongoing mental health difficulties. The claimant's GP had indicated that it was not necessary to continue with sick notes. The report obtained by the respondent from the GP practice referred to work-related stress, depression and anxiety. It also indicated that, presuming the work-related issues causing the stress and anxiety are dealt with then she could not see any reason why the claimant was not able to carry on her duties. The claimant had not been formally diagnosed by a doctor. She was seen by the practice nurse.

34. The claimant had visited her GP on 24 July 2017 and referred to work-related stress as there had been reduced hours and increased workload due to redundancies. It also referred to the claimant having a meeting with her boss and that she was considering resigning. The claimant had been referred to a stress control class.

35. If it had a substantial effect on the claimant's day-to-day living activities this was from on or around 8 August 2018 to 5 December 2018, around four months. The medical notes showed that the claimant indicated that she felt it was all work-related and she denied depression or anxiety on 10 August 2018. During her evidence to the Tribunal, the claimant said that her condition became substantial in August 2018. The

claimant indicated that she was fit to return to work on 6 December 2018 if she was placed in a separate room to NM.

36. The substantial impairment had not lasted 12 months and it was not shown that it had been likely to last 12 months at the material time which was identified as from 19 September 2018 to 18 October 2018.

Failure to make reasonable adjustments

37. Did a provision, criterion or practice (PCP) of requiring the claimant to complete her workload within 4 days per week put the claimant at a substantial disadvantage in comparison with persons who are not disabled because she was unable to function to her usual standard and/or because it exacerbated her mental health?

38. The claimant was required to complete her workload within four days after the redundancies. The respondent said that there was a decrease in workload. The claimant's case was that the decreased workload did not have a proportionate reduction in the work in the accounts department. Richard Smith said they did not need two full-time employees in the accounts department – the claimant rarely worked overtime and the respondent said they found that the work could be done in much less time after the claimant had left. The Tribunal is not satisfied that this was a PCP that caused the claimant to have an increased workload. If That had been the case, it did not exacerbate the claimant's mental health. The difficulty the claimant had was related to her relationship with NM. Her inability or refusal to work with NM was not as a result of any medical condition. The claimant had difficulties managing NM and said that her accounts assistant bullied her.

39. Did a PCP requiring the claimant to work in the same room as M put the claimant at a substantial disadvantage in comparison with persons who are not disabled because she was unable to function to her usual standard and/or because it exacerbated her mental health?

40. It has not been established that the requirement to work in the same room as NM was a substantial disadvantage as a result of the alleged disability. It was as a result of personal issues and difficulties the claimant experienced in managing her assistant.

41. Did the respondent know or could it reasonably be expected to know that the claimant had the disability and that she was at those disadvantages?

42. The respondent was aware that the claimant had issues with stress at work and difficulties in managing her assistant. This does not amount to knowledge of the alleged disability and substantial disadvantage.

43. If so, what steps was it reasonable for the respondent to have to take to avoid those disadvantages?

44. The suggested steps are:

1. Arranging for the claimant and NM to work in separate offices;

2. Providing the claimant with management training;

3. Providing the claimant with support to help her manage a junior member of staff;

4. Increasing the claimant's hours to 5 days per week;

5. Decreasing the claimant's workload; and/or

6. Providing the claimant with a dedicated assistant.

Did the respondent fail to take those steps?

45. The Tribunal is not satisfied that there was any failure to make reasonable adjustments. The claimant was the manager of the accounts department and her accounts assistant, NM and it was not reasonable for them to work in separate offices. The claimant had been managing staff for a considerable time. Richard Smith agreed that the claimant could be provided with management training and this would happen anyway as a new system was coming in soon. His concern was that the claimant had been in a management role for 10 years and had been managing NM for 4 years.

46. The Tribunal is not satisfied that increasing the days the claimant worked to 5 days or decreasing her workload was a reasonable adjustment. The evidence of the respondent was that, after the claimant had left, it was found that the work she had done could be completed in less time.

47. There was no duty to make reasonable adjustments and, in any event, it was acknowledged by the claimant's witness, Angela Sutcliffe, Job Retention Specialist at WorkPlace Leeds, that there was a breakdown in communication and she did not feel that NM had been bullying the claimant. The respondent had taken steps to resolve the difficulties between the claimant and NM and was prepared to take further steps at the time of the claimant's resignation. The claimant had a dedicated accounts assistant in NM for half of the week and it was not established that she required any further assistance.

48. It was notable that, during the claimant's evidence, in a moment of misunderstanding in respect of a hypothetical question, the claimant thought that it had been indicated that NM was leaving, or had left, the respondent's employment and the sense of relief exhibited by the claimant gave a clear indication that the claimant would have been happy to return to work for the respondent had the obstacle of NM been removed. The claimant was unwilling or unable to work with NM and that was not as a result of any medical condition.

Unfair Dismissal

48. Did the respondent dismiss the claimant, i.e.

1. Did it breach the implied term of mutual trust and confidence as described in the claim form?

2. If so, did its actions amounted to repudiatory of the claimant's contract of employment?

3. If so, did the claimant resign in response and without affirming the contract?

49. The Tribunal is not satisfied that the respondent breached the implied term of mutual trust and confidence

50. The claimant's work-related difficulties were as a result of her relationship with her accounts assistant. The claimant said that she was bullied by NM and that Richard Smith took NM's side. It is notable that, in her witness statement, Angela Sutcliffe referred to Richard Smith as making a point of defending NM repeatedly throughout the meeting on 19 September 2018. However, when giving evidence to the Tribunal she agreed that the claimant had refused to see any other perspective but her own. Angela Sutcliffe said that it was her opinion that neither the claimant nor NM were bullying each other and Richard Smith was trying to find a solution. She agreed that Richard Smith was hoping that the claimant would agree to a training plan and she said that the claimant had to work closely with NM as it was part of the job.

51. The Tribunal is not satisfied that there was a repudiatory breach of contract by the respondent. There was a difficult situation in that the claimant did not wish to return to work and manage her assistant. The respondent made reasonable attempts to resolve the situation.

52. The claimant resigned as a result of her unwillingness to work with NM as her assistant.

53.In the circumstances, the claims brought by the claimant of unfair dismissal and disability discrimination are not well-founded and are dismissed.

Employment Judge Shepherd
7 November 2019

Sent to the parties on
20 November 2019