EMPLOYMENT TRIBUNALS

Claimant: **Mrs Lambert**

Respondent: **EXPD8 Limited**

Heard at: **Cardiff** **On: 22nd, 23rd & 24th July 2019**

(Chambers discussion: 19th August 2019)

Before: **Employment Judge Howden-Evans**
Mr Charles
Ms Mason

Representation:

Claimant: In person, supported by Mr Lambert

Respondent: Mr M Blitz (Counsel)

RESERVED JUDGMENT

The unanimous decision of the Employment Tribunal is that the claimant's claims of constructive unfair dismissal, disability discrimination and breach of contract are not well founded and are dismissed.

Judicial Note:

During the course of this hearing, the tribunal learnt the claimant was an exceptionally capable, hardworking, enthusiastic and valued employee that was rapidly promoted. She was one of the respondent's most successful team leaders and merchandisers. The claimant resigned from her employment with the respondent at a time when she was unwell. The tribunal hopes the claimant is

able to establish a rewarding new career in the near future as she clearly has a great deal of skills and talent to offer to future employers.

REASONS

Introduction

1. The claimant, Mrs Lambert, commenced employment with the respondent, eXPD8 Limited, on 15th October 2014, as a field merchandiser. On 6th January 2015 she was promoted to the post of Team Leader and on 20th June 2016 she was promoted to the post of Regional Field Manager. The claimant's role meant she worked from home covering an agreed geographical area, meeting team leaders and visiting retailers. The claimant lived in Poole, Dorset. Following a restructure in June 2018, the claimant's role entailed managing up to 50 people, covering a geographical area which had been extended to include Oxford, Reading and Swindon. The claimant's annual salary was circa £21,000 per annum before tax

2. eXPD8 Limited is a field marketing agency, that goes into shops and supermarkets, setting up merchandising promotions, for instance launching a new DVD or particular book. It has more than 1,200 employees working across the UK and Ireland.

3. During a conversation with Ms Pilling, Field Operations Director, on 10th July 2018 the claimant verbally resigned from her employment with the respondent. By letter of 10th July 2017, she confirmed her decision to resign with 3 months' notice. The claimant was signed off work with anxiety attacks and work-related stress during the period 6th August 2018 to 9th October 2018, at which her employment with the respondent ended.

4. Following a period of ACAS early conciliation (11th July 2018 to 11th August 2018), on 19th August 2018, the claimant presented an ET1 claim form alleging constructive unfair dismissal, disability discrimination and breach of contract. By ET3 response, the respondent denied all allegations.

5. A telephone preliminary hearing took place on 17th January 2019, at which point, it was agreed the case would be transferred to Cardiff. The case was listed for a 4-day final hearing.

The Issues

6. The claimant contends her condition of stress and anxiety amounts to a disability (as defined in S6 Equality Act 2010 "EqA") and that the respondent subjected her to harassment related to her disability and failed to make reasonable adjustments. She contends the respondent's actions cumulatively

amounted to a breach of the implied term of trust and confidence and lead to her resignation on 12th July 2018.

7. The respondent does not concede the claimant's condition amounts to a disability. Further the respondent contends it did not have knowledge of the claimant's disability, nor could it reasonably be expected to have knowledge of the claimant's disability. The respondent denies it has breached the implied term of trust and confidence.

Constructive Unfair Dismissal claim

8. During the telephone preliminary hearing on 17th January 2019, the employment judge assisted the claimant (who has at all times represented herself) to set out the alleged breaches of the implied term of trust and confidence. These were identified as being:

    8.1. The respondent failed to provide any or adequate support despite requests made by the claimant;
    8.2. The respondent failed to provide adequate training specifically on HR matters;
    8.3. The respondent required the claimant to work long hours (62 hours per week);
    8.4. The respondent failed to pay contractual sick pay although her absence was a result of work-related stress;
    8.5. During its restructure, the respondent allocated the claimant the worst region in spite of the claimant having only recently returned to work following absence due to stress;
    8.6. The respondent instigated disciplinary proceedings and issued a final written warning, having upheld a grievance in circumstances that the claimant alleges amounted to a witch hunt;
    8.7. The respondent subjected the claimant to prolonged interrogation and criticism on her return to work on the 2nd July 2018 following sickness absence despite being asked to stop. This was said to be the "last straw" in a series of breaches.

9. The rest of the issues to be determined were identified as being:

10. If there has been a breach of the implied term of trust and confidence, did the claimant resign because of this breach?

11. Did the claimant delay before resigning and affirm the contract?"

Disability

12. Did the claimant have a physical or mental impairment at the material time, namely stress and anxiety?

13. If so, did the impairment have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

14. If so, was that effect long term? In particular, when did it start and:

    14.1. had the impairment lasted for at least 12 months?
    14.2. is or was the impairment likely to last at least 12 months or the rest of the claimant's life, if less than 12 months?

15. Were any measures being taken to treat or correct the impairment? But for those measures would the impairment have been likely to have had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

Harassment (s26 Equality Act 2010)

16. Did the respondent engage in unwanted conduct as follows:

    16.1. On the 10th July 2018, Sarah-Jane Piling interrogating the claimant at length as to the reason for her sickness absence and criticizing her at length about her work, despite knowing of the claimant's anxiety issues.

17. Was the conduct related to the claimant's disability?

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

Failure to make reasonable adjustments (s20 & 21 Equality Act 2010)

19. Did the respondent apply any of the following alleged provisions criteria or practices ("PCP") to the claimant and to others not sharing her disability:

    19.1. A requirement to manage a full workload without support;
    19.2. A requirement to drive long distances as part of her work; and/or
    19.3. A requirement to take on the worst region in the respondent's restructure.

20. Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:

20.1. She was unable to manage her workload without support and this increased her stress and anxiety ultimately leading to her resignation;
20.2. She was unable to drive long distances due to her condition;
20.3. Managing the respondent's worst region increased her stress and anxiety.

21. Did the respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

21.1. Provision of support;
21.2. Lightening of workload by allocating some duties to others;
21.3. Allocating the claimant to another region.

22. Did the respondent not know, or could the respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above?

Breach of Contract

23. As the claimant's final absence was caused by work-related stress, should contractual sick pay have been paid?

The Hearing

12. Throughout the Hearing, the claimant represented herself and was supported by Mr Lambert. The respondent was represented by Mr Blitz, counsel.

13. The tribunal had the benefit of a bundle of circa 220 pages. Detailed witness statements were prepared for each of the 5 witnesses.

14. The hearing originally had a time estimate of 4 days. We were delayed in starting the hearing on the first day, as one of the tribunal non-legal members that had been due to sit on this hearing, was suddenly not available. Mr Charles kindly arranged to sit at short notice but was only available for 3 of the 4 days. With the agreement of the parties we started hearing evidence at lunchtime on Day 1. As it was, by the end of the Day 3, we had heard all the evidence and closing submissions and were able to arrange a chambers day for the tribunal to meet to consider its decision.

15. The tribunal read the witness statements in their entirety and key documents from the bundle of documents, before witnesses gave evidence. All witnesses gave evidence on oath. In relation to each witness, the procedure adopted was the same: there was:

15.1. opportunity for supplemental questions (or for Mrs Lambert to explain anything she felt she had omitted from her statement) before
15.2. questions from the other side;
15.3. questions from the tribunal; and
15.4. any re-examination (or final opportunity for Mrs Lambert to explain something she felt she hadn't been able to clarify previously).

Mindful of the claimant's health, and the health and needs of other witnesses, the tribunal ensured there were regular comfort breaks and that all witnesses felt able to stop at any time they needed to take a rest.

16. During the hearing, we heard evidence from:

16.1. The claimant on Days 1 and 2 of the hearing;
16.2. Mr Thurgood, the respondent's Managing Director, on Day 2;
16.3. Ms Garland, the respondent's Zone Manager and the claimant's line manager from June 2018, on Day 2;
16.4. Mrs Monahan, the respondent's HR Manager, on Day 2; and
16.5. Mrs Pilling, the respondent's Field Operations Director, on Day 3.

17. Following the hearing, the tribunal were able to meet to consider their decision on 19th August 2019. The employment judge sincerely apologises for the delay in promulgating this judgment.

Findings of Fact

The claimant's health

18. The tribunal note the claimant's evidence that she first experienced symptoms of work-related stress illness in early 2017, in response to a situation with a particular lady that she had been managing. The claimant experienced "slight anxiety" and difficulty sleeping at that time but did not seek medical help.

19. In mid-July 2017, the claimant experienced difficulty managing a different team leader. The claimant was concerned this team leader was committing acts of misconduct and tried to respond to this appropriately. The claimant's efforts were thwarted as she struggled to get practical advice on how to handle the situation, from HR and her then line manager, Mr Bray. The tribunal note the claimant appears to have received no formal training on how to handle HR matters. Whilst templates for particular documents may be available on the respondent's intranet, this is not the same as receiving HR training on how to respond to particular situations, whether that training is delivered as part of "on the job" training by line managers like Mr Bray or delivered in training workshops by the respondent's HR team. In the absence of proper HR training, the claimant conscientiously tried to respond to the situation, made mistakes

along the way and ended up personally receiving a final written warning as a result of her handling of the situation. The claimant describes this having a significant impact on her health. The claimant felt her stress levels were getting worse, she was sleep walking, prone to being tearful and felt she had hit rock-bottom. At the same point in time, her father-in-law was diagnosed with cancer and tragically died within 3 weeks of his diagnosis. The claimant was signed off work with work related stress between 27th November 2017 and 27th December 2017.

20. The claimant returned to work after Christmas 2017 and continued to work until 29th June 2018. On 29th June 2018, the claimant was signed unfit to work for 7 days as a result of complications following dental surgery.

21. In the claimant's letter of resignation on 10th July 2017, she describes *"In the past year I have also suffered from stress caused by a lack of support within the company and with the new changes in place, I feel that this stress and anxiety is coming back and I am not prepared to go through such a horrible time again."*

22. On 6th August 2018 the claimant was signed unfit to work with anxiety attacks and work-related stress and continued to be unfit for work until the end of her contract on 9th October 2018.

The claimant's experience as field merchandiser and team leader

23. The claimant was such a good employee that within months of her commencing work with the respondent, she was promoted to the position of Team Leader. The claimant was very happy working as a field merchandiser and subsequently as a team leader. She excelled in these roles and had excellent relationships with those around her.

The claimant's promotion to the post of Regional Field Manager

24. On 20th June 2016 the claimant became a Regional Field Manager and Mr Bray became her line manager. Unfortunately, there doesn't appear to have been a comprehensive training programme for the claimant on how to undertake her new role. The claimant found she was out of her depth in this new role; the tribunal accept she was left to make mistakes and after the event was told how it should have been handled. For instance, in January 2017, the claimant crashed her car after being 'told off' by a different manager for mistakes she had made in the administration of a particular store refit. As she explained in her email to Mr Bray, she had not had training in the processes involved in a store refit. Mr Bray was supportive after the event - he spoke to the manager concerned to explain the circumstances and arranged future training to assist the claimant.

25. Another example of this was later in 2017, when the claimant was having difficulty managing individual team leaders. The claimant was given advice from HR or from Mr Bray, but often this was too late or on a piecemeal basis. What the claimant really needed was comprehensive training in how to manage difficult individuals and training in HR matters, such as how to action suspected misconduct. It was clear from the tone of the claimant's emails to Mr Bray, that the claimant was finding the situation very difficult. However, the tribunal also notes that in 2018, whenever the claimant asked Ms Monaghan, the Head of HR for advice, Ms Monaghan did respond with clear guidance in relation to that specific query; the claimant referred to Ms Monaghan's advice as being "wonderful".

26. The lack of comprehensive training meant the claimant, who is a proactive person and was trying to resolve situations, was exposed and had a grievance submitted against her in November 2017. At this time, the claimant's father-in-law was dying with cancer and the claimant was at 'rock bottom'. The claimant was signed unfit for work for a month. During her sick leave, the respondent had to investigate and respond to the grievance. Ms Pilling was clearly concerned about the impact this might have upon the claimant's health and did write to the claimant encouraging her to switch off from work and explaining even if the grievance was upheld, there would be a separate process in relation to any disciplinary action during which the claimant would be able to present evidence and it was likely to be at the level of reflect and apologise rather than being at dismissal level.

27. The claimant returned to work on a phased return to work at the end of December 2017. On 29th December 2017, Ms Pilling emailed the claimant to arrange a disciplinary hearing in relation to the grievance findings. The claimant confirmed that 8th January 2018 was *"fine with me".* At the time, the claimant did not raise any objection in relation to the proposed time or venue for the disciplinary hearing.

28. Prior to the disciplinary meeting, the claimant had already admitted to having done something that she regretted and as an outcome of the disciplinary meeting, the claimant wrote an apology to the person that had brought the grievance. The claimant was also given a final written warning, for unsatisfactory conduct which was to remain on her personnel file for 12 months. The claimant did not appeal this outcome. The tribunal are satisfied that this could not be said to be a "witch hunt"; rather it was the respondent properly complying with its responsibility to both employees.

29. In June 2018, as part of its restructure, the respondent altered the claimant's region to include Oxford Reading and Swindon. The tribunal accept that the respondent was trying to allocate regions as fairly as possible. The claimant didn't raise a grievance or complaint about the new regions at the time. It was unfortunate that at the time of the restructure, the claimant had difficulty

contacting and arranging meetings with her new line manager, Ms Garland. Ms Garland was on holiday but perhaps could have been more proactive in communicating this to her team in advance of the holiday.

30. The tribunal accept the claimant was probably having to work long hours to manage her region following the restructure, however, the claimant was managing her own diary and indicated to her team that her working hours were 8am and 6pm. The claimant did on occasions offer to help the HR team, indicating that she did have some spare capacity. In addition, the claimant requested and was given permission to take on a new role with a different employer whilst still working for the respondent, to supplement her income.

31. On Tuesday 26th June 2018 the claimant emailed the respondent's Ms Edwards, indicating she was going to be away from work for a few hours as she was having a wisdom tooth removed. Unfortunately, the procedure did not go as well as anticipated and the claimant had to have her jaw dislocated as well as having stitches. The claimant sent a further email to Ms Edwards and copied in her line manager Ms Garland, explaining she was likely to need the rest of the week off on sick leave.

32. On 29th June 2018, the claimant was signed off for a further 7 days by her GP as she was having to take strong painkillers for the pain following the dental procedure. She sent an email to Ms Edwards and Ms Garland indicating she was still very unwell and would put the GP sick note in the post. The claimant thought she had attached a copy of the sick note to her email, but the sick note was not attached, so Ms Edwards replied by enquiring the date the claimant was signed off until, to be able to arrange cover. The claimant responded by email confirming she would not be in work until Monday 9th July; Ms Edwards replied by email explaining the sick note signed the claimant off until Thursday 5th July and asking her to contact her on Thursday evening to let her know how she was feeling. The claimant returned to work on Friday 6th July 2018.

33. The tribunal were pleased to note that when the claimant mentioned her long working hours (in her email of 3rd July 2018) to Mr Thurgood, the respondent's managing director, his response (by email of 4th July 2018) was to ask Ms Pilling to review the claimant's working hours and tasks when the claimant returned to work.

34. Ms Pilling asked the claimant to provide her with an account of a typical working week, so they could discuss the claimant's workload. On 9th July 2018, the claimant sent Ms Pilling a detailed account of a typical week.

35. On 10th July 2018 the claimant and Ms Pilling had a lengthy telephone conversation (lasting approximately an hour). The tribunal found this was a conversation or discussion rather than an interrogation (as has been suggested). During the course of the conversation, Ms Pillling discussed the

claimant's recent absence following her dental procedure as well as talking about the claimant's workload. The claimant explained that she didn't have enough flexible merchandisers in her region and was having to undertake calls herself to be able to complete the region's work. At one point, the claimant explained the system she was using for recording time on each job. Ms Pilling said the claimant was recording this incorrectly and the respondent was going to have to investigate this as it potentially could be a very serious error. The tribunal accept the claimant was honestly applying the system she understood she was supposed to use, having been taught this by Mr Bray. The tribunal do not accept that the claimant would have faced disciplinary action over this, as any investigation would have found the claimant was following the guidance she had received, or the claimant had been given conflicting advice on the procedure she ought to have adopted. However, during the course of the conversation on 10th July 2018, the claimant reasonably perceived she was being criticised again, both in relation to her absence following the dental procedure and in relation to her time recording on jobs. The claimant had a panic attack halfway through the telephone conversation and verbally resigned from her post. The claimant then said as she had resigned there was no point in continuing the discussion. Whilst Ms Pilling realised the claimant was upset, she didn't realise the claimant was having a panic attack. Ms Pilling asked if the claimant could carry on the conversation and the claimant agreed. The conversation continued for a further 20 to 30 minutes. Ms Pilling said that whilst it was something the respondent would not normally allow, to help with the claimant's financial position, the claimant could work for competitors, whilst still working for the respondent. Ms Pilling asked the claimant to reconsider her resignation and to let the respondent know her decision in the next few days.

36. Later that day, the claimant sent the respondent her resignation letter. This started with *"After great consideration I have decided to step down as Regional Field Manager for eXPD8 Ltd"* and ended with *"I understand that I am to give 3 months' notice, which I will try to honour, but I will be actively seeking other full time employment as of Monday, so therefore may need to go sooner, but I will keep you informed of any decision made.*" During the course of her evidence, the claimant explained that her intention had been to step down as Regional Manager, but she was hoping the respondent would offer her a job as a Team Leader or Merchandiser; it was the job of Regional Field Manager that she wanted to end, rather than employment with the respondent. She explained other regional field managers had stepped down and become merchandisers again. She described enjoying the Team Leader and Merchandiser roles and explained she still continued to have a strong bond with her teams in those roles. Unfortunately, she did not explain this clearly enough to the respondent at the time.

37. Also on 10th July 2018, as she was unaware of the claimant's resignation, Ms Garland, the claimant's line manager, had sent the claimant an email inviting her to a meeting to look at "*forward managing sickness absence (where*

possible); emails – content and how tone can be interpreted; and future – working together". In part, the reason for this email was that the claimant had referred to a team member *"being on sick leave"* in an email that was circulated to the rest of the team and that member of staff had objected to the breach of his confidentiality. This was another example of the claimant needing comprehensive Management and HR training, rather being allowed to make mistakes and being given after-the-event advice.

38. The claimant replied to Ms Garland's email *"There is no need to meet up tomorrow as I have just resigned so there is no point in wasting both our time."* Subsequently Ms Garland continued to try to arrange the meeting, as the respondent was keen to try to encourage the claimant to reconsider her decision.

39. In response to the claimant's resignation, Ms Pilling wrote to the claimant encouraging her to reconsider her decision and suggesting they meet to discuss it further. On 2nd August 2018, the claimant announced her resignation to other colleagues during a conference call.

40. On 6th August 2018, the claimant visited her GP and was signed unfit for work and didn't return to work with the respondent. As the claimant was serving her notice, the respondent applied clause 8 of her contract which states *"Any payments over and above SSP shall be entirely at the company's discretion and would not be paid during any notice period".* The respondent paid the claimant SSP during this period of absence.

The Law

Constructive Unfair Dismissal

41. The leading authority on constructive dismissal is *Western Excavating (ECC) Ltd v Sharpe* [1978] IRLR 27 CA, which requires the tribunal to consider whether there is a significant breach, on the part of the employer, which goes to the root of the employment contract or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

42. There is an implied term in every employment contract, that an employer will not conduct itself, without reasonable and proper cause, in a manner calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence between employer and employee (*Malik v BCCI* [1997] IRLR 462).

43. A breach of the implied term of trust and confidence will amount to a repudiatory breach of contract i.e. will justify the claimant regarding herself as being discharged from the employment contract.

44. If there has been a repudiatory breach of contract by an employer, the employer cannot "cure" this breach, to preclude the employee from accepting the breach as terminating the employment contract. All that an employer can do following its repudiatory breach of contract is invite affirmation from the employee by making amends. (*Bournmouth University Higher Education Corporation v Buckland* [2010] IRLR 445, CA)

45. It is possible for a course of conduct to cumulatively amount to a fundamental breach of contract. In such a "last straw" case, the act constituting the last straw does not have to constitute unreasonable or blameworthy conduct, but it must contribute, however slightly to the breach of the implied term of trust and confidence. (see *Omilaju v Waltham Forest London Borough Council* [2005] OCR 481).

46. The employee must not affirm the breach (i.e. by her actions/words indicate she is prepared to "let bygones be bygones"), nor should she delay her resignation, as this in itself is persuasive evidence of an affirmation. In the words of Lord Denning MR in *Western Excavating (ECC) Ltd v Sharpe* [1978] IRLR 27 CA, the employee *"must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged".*

Discrimination claims

47. EqA protects employees from discrimination based on a number of "protected characteristics". These include disability (Section 6 EqA).

"Disability"

48. Section 6 of the Equality Act 2010 provides a person has a disability if they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

49. Schedule 1 to the same Act explains that an impairment is "long-term" if it has lasted or is likely to last for at least 12 months or the rest of the life of the person affected.

50. The Guidance On Matters To Be Taken Into Account In Determining Questions Relating To The Definition Of Disability (2011), was issued following the Equality Act 2010. This explains in detail, the intended meaning of "substantial adverse effect". A substantial adverse effect is one that is more than a minor or trivial effect.

51. The 2011 guidance also provides helpful guidance on determining whether the impairment affected the claimant's ability to carry out normal day-to-day activities.

Disability Discrimination

52. As Baroness Hale explained in *Archibald v Fife Council [2004] UKHL32,* disability discrimination is different from other types of discrimination, as the difficulties faced by disabled employees are different from those experienced by people subjected to other forms of discrimination,

> **"…[the Disability Discrimination Act 1995] is different from the Sex Discrimination Act 1975 and the Race Relations Act 1976. In the latter two, men and women or black and white, as the case may be, are opposite sides of the same coin. Each is to be treated in the same way. Treating men more favourably than women discriminate against women. Treating women more favourably than men discriminates against men. Pregnancy apart, the differences between the genders are generally regarded as irrelevant. The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment."**

53. This element of more favourable treatment is reflected in the types of protection that are unique to disability: Section 20-21 EqA (failure to make reasonable adjustments) which requires an employer to take action in certain circumstances.

Failure to make reasonable adjustments

54. Disability discrimination can take the form of a failure to comply with the duty to make reasonable adjustments (see Sections 20, 21(2), 25(2)(d) and 39(5) EqA).

55. Section 20 EqA imposes, in three circumstances, a duty on an employer to make reasonable adjustments. They include, at Section 20(3) EqA, circumstances where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage in comparison with those who are not disabled. The duty then requires an employer to take such steps as it is reasonable to have to take to avoid the disadvantage (Section 20(3) EqA).

56. Section 212(1) EqA defines "substantial" as "more than minor or trivial"; it is a low threshold. However, this exercise requires the Tribunal to identify the nature and extent of the claimant's substantial disadvantage in meeting the PCP, because of their disability (see *Chief Constable of West Midlands Police v Garner EAT 0174/11*).

57. Ms Lambert bears the burden of proving each PCP put her at a substantial disadvantage in comparison with non-disabled colleagues. As the EAT stated in *Project Management Institute v Latif [2007] IRLR 519*:

We very much doubt whether the burden shifts at all in respect of establishing the provision, criterion or practice, or demonstrating the substantial disadvantage. These are simply questions of fact for the tribunal to decide after hearing all the evidence, with the onus of proof resting throughout on the claimant. These are not issues where the employer has information or beliefs within his own knowledge which the claimant cannot be expected to prove. To talk of the burden shifting in such cases is in our view confusing and inaccurate.

58. When assessing whether there is a substantial disadvantage, the Tribunal must compare the position of the disabled person with persons who are not disabled. This is a general comparative exercise and does not require the individual, like-for-like comparison applied in direct and indirect discrimination claims (see *Smith v. Churchill's Stairlifts plc [2006] IRLR 41 CA* and *Fareham College Corporation v. Walters [2009] IRLR 991 EAT*). The House of Lords confirmed in *Archibald v Fife Council [2004] UKHL 32* that an employer is no longer under a duty to make reasonable adjustments when the disabled person is no longer at a substantial disadvantage in comparison with persons who are not disabled.

59. There are supplementary provisions in Schedule 8 EqA. Paragraph 20 of that Schedule provides that the duty to make reasonable adjustments only arises where an employer knows (or ought reasonably to know) of both the disabled person's disability and that they were likely to be at that disadvantage.

The Equality and Human Rights Commission Code of Practice on Employment (2011) ("the EHRC Code of Practice") provides at paragraph 6.19

"**an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.**

Example: A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements."

60. Once the duty has arisen, the Tribunal must consider whether the respondent has complied with it by taking such steps as it was reasonable to have to take

to avoid the disadvantage. The Equality and Human Rights Commission Code of Practice on Employment (2011) ("the EHRC Code of Practice") sets out a list of possible adjustments that might be taken by employers in paragraph 6.33. In many cases, the question of compliance with the duty will turn on whether a particular adjustment was (or, if not made, would have been) "reasonable". This is an objective test to be determined by the Tribunal and can be highly fact sensitive. It is a rare example of Tribunals being permitted to substitute our own views for those of the employer where we consider, in effect, that it ought to have reached a different decision. Lord Hope explained in *Archibald v Fife Council [2004] IRLR 651*, that sometimes the performance of this duty might require the employer to treat a disabled person, who is in this position, more favourably to remove the disadvantage attributable to the disability.

61. It is important to assess whether a proposed adjustment would have avoided the disadvantage – in lay terms, whether it would have worked. The EHRC Code of Practice sets out some of the factors that may be taken into account when determining whether an adjustment was reasonable at paragraph 6.28. They include: whether the steps would be effective; the practicability of the steps; the financial and other costs of making the adjustment; the extent to which it would disrupt the employer's activities; the extent of the employer's financial or other resources; the availability to the employer of financial and other assistance to help make the adjustment (such as advice through Access to Work) and the type and size of the employer.

62. In *Leeds Teaching Hospital NHS Trust v Foster [2011] UKEAT/0552/10/JOJ* Keith J confirmed that it was not necessary for the Tribunal to find there was a "real prospect" of the adjustment removing the particular disadvantage; it was sufficient for the tribunal to find that there would have been "a prospect" of that.

Harassment

63. S26 EqA provides,

Harassment
(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.

64. The effect of s26 is that a claimant needs to demonstrate 3 essential features: unwanted conduct; that has the proscribed purpose or effect; and that relates to disability. There is no need for a comparator.

65. The EHRC Employment Code explains that unwanted conduct can include a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.

66. "Unwanted" is the same as "unwelcome" or "uninvited."

67. When considering whether the conduct had the proscribed effect, the tribunal undertakes a subjective/objective test: the subjective element involves looking at the effect the conduct had on the claimant (their perception); the objective element then considers whether it was reasonable for the claimant to say it had this effect on him. The EHRC Employment Code notes that relevant circumstances can include those of the claimant, including his/her health, mental health, mental capacity, cultural norms and previous experience of harassment; it can also include the environment in which the conduct takes place.

Burden of proof

68. S136 EqA provides,

> **Burden of proof**
> **(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 subsection (2) does not apply if A shows that A did not contravene the provision.**
> **…(6) A reference to the court includes a reference to—**
> **(a) an employment tribunal;**

69. S136 Equality Act 2010 establishes a "shifting burden of proof" in a discrimination claim. If the claimant is able to establish facts, from which the Tribunal could decide, in the absence of any other explanation that there has been discrimination, the Tribunal is to find that discrimination has occurred, unless the employer is able to prove that it did not. In the well-known *Igen Limited and others v Wong and conjoined cases 2005 ICR 931*, the Court of Appeal gave guidance on how the shifting burden of proof should be applied.

70. However, it is also established law that if the Tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious discrimination, then it is not improper for a Tribunal to find that

even if the burden of proof has shifted, the employer has given a fully adequate explanation of why they behaved as they did and it had nothing to do with a protected characteristic (e.g. disability). (see *Laing v Manchester City Council 2006 ICR 1519*)

Conclusions

Constructive Unfair Dismissal

71. Having considered each of the alleged breaches of contract, the tribunal do not find there has been a breach either individually, or collectively, that is so serious as to be a repudiatory breach of contract. At its highest, the claimant has demonstrated the respondent had failed to provide comprehensive training and partly as a result of this the claimant kept making mistakes which led to a final written warning in January 2018. However, the claimant was able to access advice on individual matters from the HR Manager and described her advice as 'wonderful'. Further in relation to the final written warning, the claimant accepted she had acted inappropriately and had written a letter of apology.

72. The tribunal did not identify any other breaches of contract on the part of the employer. The employer did not "*conduct itself, without reasonable and proper cause, in a manner calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence"* and there was no breach of the implied term of mutual trust and confidence. The claimant recognises this herself, as she has repeatedly said she wanted to continue employment with the respondent and still does, just not in this particular role.

73. Further and in the alternative, if the tribunal had been satisfied there was a fundamental breach of contract on the part of the employer, we were also satisfied that this was not the reason for the claimant's resignation. The claimant was clearly dissatisfied with and was finding it difficult to manage on the salary that came with this job. The claimant was already looking at alternative jobs prior to the phone call with Ms Pilling. The tribunal are satisfied that this was the real reason behind the claimant's resignation.

Disability

74. The last date on which any of the alleged discriminatory acts occurred was 10th July 2018, so the tribunal has asked itself whether, by 10th July 2018, the claimant had a physical or mental impairment that had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities.

75. The tribunal first considered whether the claimant could be said to have a physical or mental impairment at that time. The EqA Guidance on the Definition of Disability (2011) notes at A5 that a disability can arise from a wide range of impairments including mental health conditions with symptoms such as anxiety,

low mood, panic attacks as well as from mental illness such as depression. The tribunal found that up until 10th July 2018, the evidence was that each time the claimant had experienced mental health illness it had been in reaction to a discrete event, for instance in early 2017 and again later in 2017 the claimant's illness was triggered by difficulties managing staff (and her father-in-law's illness). There was no evidence of the claimant having an underlying condition such as generalised anxiety disorder by 10th July 2018. The tribunal accept that after 10th July 2018, the claimant may have gone on to develop an ongoing condition, but at that particular date, the tribunal do not find the claimant had a mental impairment.

76. Further and in the alternative, if the tribunal had found the claimant had an impairment by 10th July 2018, the tribunal would not have found it to have a substantial adverse impact on her ability to carry out normal day-to-day activities. The tribunal note that prior to 10th July 2019, the claimant was largely able to work, without difficulty, in a demanding job. The only symptoms referred to up until that point have been sleepwalking and being prone to tearfulness. Having regard to The EqA Guidance on the Definition of Disability (2011) the tribunal were satisfied this was not an impairment that was having a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities.

77. Further and in the alternative, we did not find that there was a long-term adverse effect on the claimant's ability to carry out normal day-to-day activities.

78. Schedule 1, Part1, Para 1 of the EqA defines "long-term" as

(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.

79. By 10th July 2018, the claimant had not had an impairment that was lasting or likely to last for 12 months. At that stage there was no evidence that any impairment that had existed in late 2017 (when the claimant was on sick leave) was likely to recur. The claimant's illness had been in response to specific events and so it is not possible to say by 10th July 2018, the claimant had a physical or mental impairment that had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. The tribunal concluded that by July 2018 the claimant did not have a disability, as defined in s6 Equality Act 2010.

80. Further and in the alternative, the tribunal were satisfied that, by July 2018, the respondent was not aware of the claimant's disability, nor could they reasonably be expected to know that the claimant had a disability.

81. As the claimant did not have a disability, the claimant's claims of disability discrimination (harassment and failure to make reasonable adjustments) are not well founded and are dismissed.

82. Finally, the tribunal considered whether there was any obligation on the respondent to pay contractual sick pay rather than SSP during the claimant's final absence. The tribunal are satisfied the respondent was entitled to rely on clause 8 in the claimant's contract which stated payments over and above SSP would not be paid during any notice period. At this time the claimant was serving notice and so the respondent was entitled to apply this clause. The claimant's claim of breach of contract is not well founded and is dismissed.

EMPLOYMENT JUDGE HOWDEN-EVANS

Dated: 25th November 2019

Judgment posted to the parties on
28 November 2019
…….

…….

For Secretary of the Tribunals