EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MRS M FLEET	AND	BAILEY CARAVANS LTD

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 6TH / 7TH / 8TH / 9TH JANUARY 2020

EMPLOYMENT JUDGE MR P CADNEY (SITTING ALONE) **MEMBERS: MR H LAUNDER, DR J MILLER**

APPEARANCES:-

FOR THE CLAIMANT:- **IN PERSON**

FOR THE RESPONDENT:- **MS L SHAW (SOLICITOR)**

JUDGMENT

The unanimous judgment of the tribunal is that:-

a) The claimant's claims of:-

1. Constructive Unfair Dismissal

2. Direct Disability discrimination (s13 Equality Act 2010)

3. Failure to make reasonable adjustments (s20/21 Equality Act 2010)

4. Harassment s26 Equality Act 2010) (save as set out below)

Are not well founded and are dismissed.

b) The claimant's claim of harassment (s26 Equality Act 2010) in relation to the "raspberry ripple" comment is well founded.

c) The claimant is awarded £5,000 in respect of injury to feelings.

Reasons

1. By this claim the claimant brings claims of unfair dismissal and disability discrimination the details of which are set out below.

2. The tribunal has heard evidence from the claimant and read the witness statement of Mr R Westcott whose evidence was not challenged; and on behalf of the respondent from Wayne Wilkinson (Health and Safety Manager) , Louise Redman (HR Manager), Simon Howard (Marketing Director) and Nicholas Howard (Managing Director).

3. The respondent manufactures caravans and motorhomes. The claimant was employed from 21st January 2013 until her resignation on 4th September 2018 as Senior Customer Service Manager. Her resignation was submitted the day after she received the grievance outcome. It is not in dispute that the claimant was at all material times a disabled person by reason of fibromyalgia.

4. The facts and our findings in relation to the individual claims are set out in in the discussion of them below.

Relevant Discrimination Law

5. Discrimination Claims – The relevant law as it relate to the discrimination claims is:-

S 20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on 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´s 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

s13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others

s26 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.

(2) A also harasses B if–

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if–

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B´s rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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

The Claims

6. The case came before EJ Midgely for a case management hearing on 10th October 2019, at which he gave directions, set down the case for hearing and identified the issues as follows (the numbering is not as set out in EJ Midgely's decision but the issues set out are as identified by him). As the purpose of detailed case management is to allow both parties to know precisely what issues the tribunal will decide, and the claims they have to prove or meet we have addressed the claims exactly as they are set out below (In this section we will deal only with the discrimination claims. The agreed issues in relation to the constructive dismissal claim are set out below) :-

S26 Equality Act – Harassment

1.1. Did the Respondent engage in unwanted conduct as follows:

1.1.1. Mr Howard's reference to the claimant's disabled parking space as one for 'raspberry ripples'. (The respondent accepts the comment was made).

1.1.2. Miss Redman's conduct in advising claimant not to pursue a formal grievance against Mr Howard in respect of that comment. (The respondent avers that Miss Redman agreed with the claimant that she should raise the matter informally).

1.1.3. Requiring the claimant to undertake an increasing workload, which became unsustainable, whilst failing to provide a written job description detailing her duties. (The respondent disputes that the workload was unsustainable, but avers that it was discussed and agreed between Mr Howard and the claimant in regular weekly meetings. Further the respondent avers that it removed some responsibilities from the claimant).

1.1.4. Unreasonable delay in the conduct of the grievance investigation between June and September 2018;

1.1.5. The conduct of Nick Howard during the grievance hearing on 14 August 2018 (as set out at paragraphs 37(d) to (g) of the grounds of complaint) in particular, the claimant alleges that Mr Howard failed to consider her written submissions, approached the hearing with a closed mind and without proper consideration of the evidence, refused to address questions presented by the claimant, did not permit claimant to make note the hearing, and was cold and dismissive throughout in his manner in dealing with claimant. (The respondent denies that Mr Howard acted as alleged)

1.2. Was the conduct related to the Claimant's protected characteristic?

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

S13 Equality Act – Direct Discrimination

1.4. Did the Respondent subject the Claimant to the following treatment falling within section 39 Equality Act, namely:-

1.4.1. Failing to take robust disciplinary action against Mr Howard in respect of his comment in or about October 2017. (the respondent avers that it took informal action against Mr Howard with the agreement claimant)

1.4.2. Declining to exercise its discretion to award claimant full contractual sick pay for the two months sick leave in June 2015 (the respondent accepts it did not pay the contractual sick pay but avers that the discretion to do so was only exercised in exceptional circumstances which did not apply)

1.4.3. failing to conduct a home visit when the claimant was absent from work between 21st of May and 14 June 2018. (The respondent accepts that there was no home visit but denies that it was requirement of the sickness absence policy)

1.4.4. Unreasonable delay in the conduct of the grievance investigation between June and September 2018; (the respondent accepts that the delay occurred).

1.4.5. The conduct of Nick Howard during the grievance hearing on 14 August 2018 (as set out at paragraphs 37(d) to (g) of the grounds of complaint) (The respondent denies that Mr Howard acted as alleged)

1.4.6. instructing a solicitor to draft questions to present to the occupational health nurse in respect of the referral in August 2018.*[The claimant agreed to reflect upon whether or not she wish to pursue this claim]*

1.5. Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies upon the following comparators; and/or hypothetical comparators.

1.5.1. In respect of 1.4.1 a hypothetical comparator
1.5.2. in respect of 1.4.2 Joanna Barrington
1.5.3. in respect of 1.4.3 Joanna Barrington
1.5.4. in respect of 1.4.4 Denise Sampson
1.5.5. in respect of 1.4. 5 a hypothetical comparator

1.6. If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

1.7. If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

S20/21 Equality Act 2010 – Reasonable Adjustments

1.8. Did the Respondent apply the following provision, criteria and/or practice ('the provision') generally, namely the requirement to use a computer to fulfil functions of her role

1.9. 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 use of the computer in particular the keyboard and mouse, occasioned the claimant pain in her hands, wrists and shoulders as a consequence of her fibromyalgia.

1.10. 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 the adjustments asserted as reasonably required and they are identified as follows:

1.10.1. Providing the auxiliary aids that were identified in the occupational health report in November 2016. (The respondent denies that the report recommended the provision of a high backed chair, and avers that it did not fail or refuse to make reasonable adjustments, but rather advice claimant where and how she could order the relevant auxiliary aids, but she failed to do so and make no complaint that she did not have them).

1.11. The respondent is not relying upon a knowledge defence.

Claims Summary

7. The claims set out above fall broadly into a number of factual areas:-

i) The alleged failure to implement the adjustments recommended by Occupational Health in December 2016;

ii) The "raspberry ripple" comment made in July /August 2017 and its aftermath;

iii) The increase in the claimant's workload to "excessive" levels;

iv) The reduction in sick pay to half pay in May/June 2018

v) The alleged delay in hearing the claimant's grievance; the conduct of Mr Howard during the grievance hearing; the grievance outcome (all June to August 2018)

Reasonable Adjustments (Allegations 1.8 – 1.11 above)

8. As set out above in June 2016 the claimant was diagnosed with fibromyalgia and following a period of sickness absence in October/November 2016 she was referred to the respondent's Occupational Health advisor. No formal report was received although in an email of 29th November 2016 it was recommended that the respondent provide a gel mat and suitable mouse for the claimant. The claimant's evidence is that at the occupational health appointment the provision of a high-backed chair was also recommended, but if this is correct it is not referred to in the email as a specific recommendation.

9. It is not in dispute that, with the exception of the high-backed chair these adjustments were not made. In relation to the chair the respondent's evidence is that as it did not appear in the email it was not a recommendation that had been made to them. However, in a conversation with Mr Wilkinson after the appointment he accepts that the claimant referred to the chair and he suggested that she contact "Back In Action", a shop which provided chairs, to obtain a suitable one she needed. In relation to the gel pad and mouse he suggested she order online or go to Staples to find the ones she needed and suggested that she use the company credit card for which she should contact the office manager Bridget Orchard. His evidence is that she asked if she could use her own card which he assumed was a reference to her own company card, and he agreed. Accordingly, Mr Wilkinson's evidence is that it was agreed that the claimant could order the items, including the chair irrespective of the specific recommendation of Occupational Health, and that the company would pay for them. Thereafter he regularly saw the claimant and she did not at any stage indicate that any of the items were outstanding.

10. Similarly, the evidence of Louise Redman is that the items recommended were not expensive and that she too told the claimant to purchase them using the company credit card. At some point later she saw the claimant using a high-backed chair and recommended that if she needed anything else she contact Posturite, a company she had used before. Her evidence is that she regularly saw the claimant with whom she had a good relationship and the claimant never suggested that any of the adjustments were outstanding.

11. The evidence of Mr Simon Howard, the claimant's line manager was that although he was not specifically involved with the provision of the equipment she never raised with him in their weekly meetings any difficulties in acquiring it; and the evidence of Nick Howard, is that he regularly saw the claimant and she never mentioned it to him. All the witnesses make the point that the claimant was a senior manager with a high degree of autonomy and discretion, and very proactive, "upfront" as both the claimant and Mr Nick Howard agreed, and that if it had not been provided and was genuinely needed she could have and would have acquired it herself even without the specific agreement of Ms Redman and Mr Wilkinson.

12. The disputes as to this are that the claimant asserts that the conversations described by Mr Wilkinson and Ms Redman never took place; she never agreed to purchase the items herself whether or not using the company credit card; and that she did raise the

issue with Mr Simon Howard in October 2017. In addition, she points to an email she sent to Mr Wilkinson on 6th December 2016 which she asserts is inconsistent with any agreement that she would acquire the equipment herself, and to which she received no reply.

13. We have concluded on the balance of probability that we accept the respondent's evidence, and in particular the evidence of Mr Wilkinson and Ms Redman and that the claimant was given specific authorisation to buy the recommended equipment using the company credit card. As a senior employee this was not in our judgment an unreasonable course to take but, for some reason she did not do so.

14. It follows that in our judgement, in giving her permission to purchase the items and in light of her seniority that the respondent had taken reasonable steps to avoid the disadvantage.

Harassment/Direct Discrimination

15. Before dealing with the specific harassment and/or direct discrimination claims we should make a general comment. As a general proposition a number of the claimant's claims rest on the basis that she is a disabled person and that she was treated in an unfavourable or unreasonable way by the respondent. What this analysis misses is that, in the case of harassment, the unwanted treatment must be "related to" the protected characteristic (disability); and in relation to the direct discrimination claims that the less favourable treatment must be "because of" the protected characteristic (disability). In the absence of that causal link irrespective of whether the treatment or conduct was unwanted or less favourable the claims are not made out. Although we have dealt with each claim on its merits individually, in respect of most of them we have concluded that the actions complained of were neither "related to" nor "because of" the protected characteristic, save in relation to the "raspberry ripple" comment as is set out below.

Harassment - "Raspberry Ripple" comment (Allegation 1.1.1 above)

16. There is no factual dispute as to the primary events in relation to this allegation. Although initially said have occurred in October 2017 in evidence it was agreed that it was in fact in July/August 2017. The claimant had a parking permit which permitted her to park on the premises. The claimant asserts that she had this as of right as a senior manager. The respondent's evidence is that the situation was more complicated. Essentially three categories of people, directors, senior managers, and those with company cars were in principle entitled to park on the premises. However, stock was stored there and the amount of parking spaces available at any given time varied. The evidence of Ms Redman in particular was that she regularly sent emails restricting parking to for example directors only as a result of the restriction in space. In our judgment this in essence must be correct for if it were not the conversation which led to the "raspberry ripple" comment would never have taken place.

17. Mr Westcott's account, which was not challenged by the respondent was that in August 2017 he heard a discussion about car park spaces between Mr Simon Howard and the claimant. Mr Howard asked the claimant not to use the spaces directly outside the main office but said "you can park in the raspberry ripple space", and subsequently repeated the phrase when the claimant did not understand what he meant. Whilst there may not be exact agreement as to the events Mr Howard does not now, and has never, denied that he said words to that effect; nor that he was using "raspberry ripple" as a form of rhyming slang meaning "cripple". His evidence is that it was an expression he had used in school and that he used it and intended it to be understood in a "jokey" way.

18. As set out above (and as the respondent has correctly pointed out at paragraphs 36 and 37 of its skeleton argument) there are three essential elements of a harassment claim a) unwanted conduct which b) has the proscribed effect and which c) relates to a protected characteristic. In deciding whether the conduct has the effect referred to each of the following must be taken into account a) the perception of B b) the other circumstances of the case and c) whether it is reasonable for the conduct to have that effect. In this context we have been referred to the guidance of Underhill P (as he then was) *in Richmond Pharmacology v Dhaliwal 2009 ICR 724*, and a decision to similar effect of Langstaff P in *Betsi Cadwaladr University Health Board v Hughes and others*; and the judgment of Elias LJ in *HM Land Registry v Grant.* Based on the guidance in those authorities the respondent essentially submits that the comment although not disputed, falls within the description of a trivial or transitory remark, particularly as the claimant should have appreciated at it was not intended seriously; and that it should be regarded as of insufficient seriousness to have created the proscribed effect; and that as a one off comment it was insufficiently serious to create the proscribed environment.

19. For the reasons set out below we do not accept those submissions. There is no dispute that the comment was made, nor that the term is rhyming slang for "cripple", nor that it was made in reference to the claimant in that it was said in the context of her being permitted to use the disabled parking space, nor that the claimant complained to Ms Redman about it. It follows that in our judgement it was clearly unwanted conduct, and it clearly relates to a relevant protected characteristic. Thus, the question for us is whether it had the proscribed purpose or effect. The respondent's evidence, and of Mr Simon Howard in particular, is that it was not intended to be offensive and that creating the proscribed environment was not the purpose of the remark. Whilst we accept that evidence, in that we accept that Mr Howard had no intention of offending or insulting the claimant, we have to consider its effect applying the tests set out above. In our judgement the remark is a deeply offensive remark and we have no doubt that it would be so regarded by any person whether disabled or not. It is in our judgement unquestionably reasonable even taken as a single one-off remark, for the conduct to be regarded as having the proscribed effect. Accordingly, the claimant has made out her claim of harassment in respect of that allegation.

20. However, that claim is out of time in that it occurred in July or August 2017. We will have to consider later whether or not to extend time.

Harassment - Ms Redman's Conduct in advising the claimant not to pursue a formal grievance (allegation 1.1.2 above)

21. The claimant complained to Louise Redman, whose evidence is that she explained to the claimant the options of dealing with it formally or informally. The claimant chose to deal with it informally and so she apologised to the claimant for the use of the term and spoke to Simon Howard. Until the claimant lodged her grievance in June 2018 the issue was not raised with her again with her. Similarly, Mr Howard's evidence is that after this incident he and the claimant continued to work together and have their regular weekly meetings and that he understood the incident to have been dealt with.

22. As part of her complaint the claimant contends that while she did agree to the matter being dealt with informally that was because Louise Redman had told her of the "implications" of taking it further. She understood this to mean (although it is not suggested that Ms Redman ever expressly said this) that if she formally pursued the allegation she would be subject to "further, bullying, harassment, discrimination, it would result in me either being dismissed or driven out of the business". As a matter of fact therefore, it is not the case that it is alleged that Ms Redman advised the claimant not pursue a formal grievance. The question is the more nebulous one of whether the claimant's interpretation of her remarks was correct, and if so whether that was unwanted conduct; and if so whether it was related to the claimant's disability, and if so whether it had the proscribed effect.

23. We accept Ms Redman's evidence that she explained the process to the claimant and did not either implicitly or explicitly threaten her if she chose to pursue a formal allegation. Whilst we do not doubt that the claimant genuinely interpreted the remarks as set out above, it follows from our acceptance of Ms Redman's evidence that she explained the process to the claimant that even if the remarks were unwanted, that they were not related to the disability and this allegation must be dismissed.

Direct Discrimination - Failing to take robust disciplinary action against Mr Howard (allegation 1.4.1. above)

24. This is a difficult allegation to sustain in the light of our findings above. If Ms Redman's evidence is correct, which we accept it is, the choice of not pursuing a formal grievance was that of the claimant. Indeed, the claimant accepts this, albeit in the circumstances set out above. Her case is that even if that is correct the respondent should have ignored her wishes and pursued disciplinary action in any event. The difficulty for the claimant is that even if this assertion is correct the evidence, which we accept, is that no further action was taken because of the claimant's own wishes. It was not "because of" her disability but because of her expressed intentions and this claim must fail on that ground alone.

Harassment – Excessive Workload (Allegation 1.1.3 above)

25. It is not in dispute that over time the claimant's workload significantly increased. She describes starting out managing a team of three, and ending being responsible for two teams and twenty members of staff. The respondent does not essentially dispute this but the evidence of Simon Howard in particular is that this came about through the regular weekly meetings and came in part from suggestions made by her and is reflected in the increase in salary from £28,000 when she started to £40,000 when she left. We accept the respondent's evidence as to the process by which the claimant's workload came to be increased.

26. The respondent also points out that at point neither in her grievance or her witness statement has the claimant ever identified what she means by excessive; and that it was not until her oral evidence and until she was asked by the tribunal itself that she stated that she was working long hours and at the weekend.

27. In addition, this a process which necessarily began before the claimant became a disabled person and increased afterwards. As a consequence, it cannot be alleged that any increase in workload prior to June 2016 was related to the claimant's disability, as prior to that point she was not disabled. Equally there is no claim that as a consequence of her becoming disabled that the respondent should have made the reasonable adjustment of reducing her workload or a least of no longer increasing it; but very specifically that the increase in workload was an act of harassment. It follows that the task for us is to determine whether there is evidence (sufficient to satisfy stage1 of the Igen v Wong test) from which we could properly draw the inference, in the absence of an explanation from the respondent that the increase in workload after June 2016 was for a reason related to the claimant's disability. The difficulty for the claimant is that there is in our judgement no evidence that could support such an inference. Indeed if the respondent's evidence is accepted, which we do, the claimant's disability had no bearing on the increase in work.

28. In our judgment the issue of a job description is subsidiary to the question of workload, in that the claimant's case is that if she had had an accurate job description it would not have been possible for the respondent to increase her workload. Whilst this is in any event a doubtful proposition, there is no suggestion and certainly no evidence us from which we could draw the inference that in the absence of a job description was itself related to the claimant's disability.

29. For completeness sake, even had this allegation been pursued as a claim for the failure to make a reasonable adjustment of reducing workload, there is not any medical or other evidence that the claimant's disability required a reduction in workload; and any such claim would also have failed in any event.

Direct Discrimination - Sick Pay (Allegation 1.4.2.above)

30. It is not in dispute that in May/June 2018 whilst she was off sick the claimant's pay was reduced to half from full pay in accordance with the respondent's sick pay policy, which provides for the reduction after four weeks absence on full pay. The dispute is

as to whether they should have exercised the discretion under the policy to continue to pay full pay. The claimant relies on a comparator JB who was paid full pay for a number of absences which exceeded one month. The exact reason for some of the absences is not entirely clear as they are referred to both as compassionate leave whilst also being covered by fit notes. However, in broad terms the respondent asserts that she had suffered three separate bereavements in a very short space of time and was very badly affected. On any analysis, and the claimant does not dispute this, these were exceptional circumstances and they elected to exercise their discretion to continue to pay full pay.

31. They contend that the claimant's sickness absence which is variously described as being related to fibromyalgia or stress is not exceptional. The fact of disability related absence does not necessarily require an extension of full pay (there is no allegation that doing so would amount to a reasonable adjustment in this case) and there was nothing exceptional about this case. Accordingly, the respondent submits that the comparator selected by the claimant is not an appropriate comparator as the circumstances are entirely different; and that in any event that there is no evidence that the decision to pay ordinary contractual sick pay and not exercise the discretion was in any way "because of" her disability.

32. In our judgement this is correct. We accept the respondent's evidence that it did not regard the absence as exceptional and therefore did not exercise the discretion. The decision was not, therefore, made "because of" her disability and this claim must fail.

Direct Discrimination (Absence of Home Visit during sickness absence 21st May 2018 -14th June 2018)

33. The claimant complains that there was no home visit made to her whilst she was off sick in May and June 2018. Whilst this is not in dispute the respondent submits that firstly the sickness absence policy only provides that for longer absences a home visit "may" take place but there is no obligation to do so. They therefore submit that the absence of a home visit during a reactively short period of absence of some three and a half weeks is in and of itself unremarkable. Moreover, if the inference that the claimant invites the tribunal to draw is that she was being deliberately ignored that that is not the case in that they were seeking to arrange an Occupational Health meeting so as to obtain an update as to her health. However, the claimant submitted by a grievance on 21st June 2018 and would not agree to attend an Occupational Health meeting until the grievance was concluded.

34. The first question for us is whether the absence of a home visit is in and of itself sufficient to allow us to draw an inference in the absence of an explanation from the respondent, that the reason for it not taking place was "because of" the claimant's disability. The difficulty is that in our judgement that would not be taken in isolation sufficient to draw that inference.

35. Even if we had concluded that it was sufficient to transfer the burden of proof we would in any event have accepted the respondent's explanation as set out above.

Direct Discrimination/Harassment – Delay in the grievance process

36. On 21st July 2018 the claimant submitted her grievance. It had been sent to Mr Nicholas Howard who dealt with the grievance. The grievance policy provides that a grievance meeting will "usually" take place within 10 days. In this case the grievance meeting took place on 14th August 2018 just less than 8 weeks later, with the grievance outcome being provided on 31st August 2018.

37. In addition to that delay the claimant relies on a comparator DS who lodged a grievance on 6th April 2017 with the grievance meeting being held on the 24th April 2017. The first question for is whether the delay taken together with the comparator's treatment would be enough to satisfy stage 1 of the Igen v Wong test before considering the respondent's explanation. The respondent makes the point that the comparator did not have a grievance meeting within ten days which makes it difficult for the claimant to rely on the failure to adhere to the policy itself. In our judgement the fact that the grievance process was a lengthy one and outside that which the policy provides as the usual timescale would not be sufficient to allow us to draw any inference in any event that the reason for that was the fact of the claimant's disability.

38. If we are wrong about that and the delay is in and of itself sufficient to transfer the burden of proof we would need to consider the respondent's explanation. Mr Howard's evidence is that the reason for the delay was that for various reasons he was away from the business from 6th to 9th July, 16th to 20th July, and from then to 13th August as he was on annual leave. In addition, the respondent had its annual shutdown from 26th July to 10th August. The grievance meeting took place immediately on his return on 14th August 2018. In the interim he had asked Lauren Farquharson to interview various witnesses. Moreover, it was, at least in his view, incumbent on him to hear the grievance as it was against Louise Redman (Head of HR) and Simon Howard (his brother and Marketing Director). There was therefore no one else of sufficient seniority who could hear it and the delay was unavoidable. If we accept this evidence, which we do, it once again follows that the reason for the delay was neither "because of" nor "related to" the claimant's disability and it follows this claim must be dismissed.

Direct Discrimination/Harassment – Mr Howard's conduct of the grievance meeting.

39. As set out in the list of issues above the claimant's specific complaints are set out at paragraphs 37 d) -g) of her Grounds of Complaint. They are in summary that Mr Howard did not properly consider the claimant's written submissions; he did not remain impartial but made it clear that he had already decided the issue, and in particular refused to address questions posed by the claimant, was cold and dismissive and gave the impression that he did not believe the claimant or cared about the issues, and asked the claimant not to take notes of the meeting.

40. Once again one of the central difficulties for the claimant is that even if these allegations are true (and we will deal with them factually below) what is the evidence

that would allow us to draw the inference that the reason for the behaviour was because of or related to her disability?

41. In any event Mr Howard denies the allegations. To take them in turn the first two are the connected allegations that he did not properly consider the claimant's written submissions, and had pre-determined the issues. On the face of it this would more naturally form part of the complaint about the outcome rather than the grievance meeting itself. However, whilst it is impossible to capture tone or mood in the notes, they do not reveal in our judgment anything to suggest that Mr Howard had pre-judged the issues nor that his behaviour was in any way unreasonable. For the reasons set out below in respect of the outcome it is clear that Mr Howard did take the allegations seriously in that he produced considered, detailed and rational conclusions.

42. In respect of the third allegation that he refused to answer questions posed by the claimant, it is clear from the notes of the meeting that the claimant asked numerous questions which he asked her to put in writing and said he would investigate. The claimant in her witness statement takes issue with this approach. From the oral evidence it is equally clear that the claimant and Mr Howard had radically different expectations of the meeting. His was that it was to investigate and understand the grievance, not to give conclusions as to the underlying complaints; the claimant's appears to have been that he would answer her questions as to the matters complained of. In our judgement this difference of expectation underlies the different perception of the meeting, but we accept Mr Howard's evidence that that is why he conducted and approached the meeting as he did, and that is approach was not "because of" or "related to" the claimant's disability.

43. The complaint that he asked the claimant not to take notes of the hearing is curious given that she had a notetaker present. Moreover, if this complaint refers to the allegation that in the hearing he agreed with the claimant that the raspberry ripple comment was discriminatory but asked for that not to be minuted, that appears to be a curious allegation given that that part of the grievance was subsequently upheld.

44. Our conclusions are that there is very little evidence to support any of the claimant's factual allegations and in reality none from which we could conclude that anything said or done by Mr Howard or the manner in which he conducted the hearing was because of or related to the claimant's disability.

<u>Direct Discrimination - Instructing Solicitor to draft questions for Occupational Health (Allegation 1.4.6 above)</u>

45. It is not entirely clear whether is allegation is still being pursued but for completeness sake we cannot see firstly how this could be less favourable treatment, nor any evidence that it was "because of" her disability and must fail in any event.

Time Limits

46. The only allegation of disability discrimination that we have upheld in principle is that of harassment in relation to the "raspberry ripple" comment. It is however clearly out of time in that it occurred in July or August 2017 some fifteen months before the ET1 was submitted on 21st October 2018, and given that it is the only allegation we have upheld it cannot of necessity be part of a continuing act. As a result, we have to consider whether it is just and equitable to extend time.

47. The principles for doing so are well known and derive from British Coal Corporation v Keeble. These are (in so far as they are relevant for our decision) the length of and reasons for the delay; the effect on the cogency of the evidence; the promptness with which the claimant acted once she knew of the facts; the steps taken by her to obtain advice. Considering those factors, we have as the overarching question to decide where the balance of hardship lies in extending or refusing to extend time.

48. In respect of the cogency of the evidence here was in our judgement no significant effect at all. The respondent was able to call the author of the remark, and place before us all the evidence it wished to; and the facts were not essentially in dispute. Accordingly, there was no prejudice to the respondent in any delay. Balanced against that is the fact that the claimant was aware of the underlying facts in July/August 2917 and decided to take no further action even internally; she did not therefore act promptly once she knew of the facts nor take any steps to obtain advice at that stage. Balancing the two competing elements of the fact of delay and the absence of prejudice we have concluded that the balance of hardship favours the claimant and that it would be just and equitable to extend time. Accordingly, judgement will be given for the claimant in respect of that allegation.

Constructive Dismissal

49. The claimant relies on a number of factors as individually or cumulatively amounting to a breach of the implied term of mutual trust and confidence, which is the fundamental term relied on. Those reasons were agreed at the Case management hearing before EJ Midgely as follows:-

    Constructive Unfair Dismissal

    a. The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence. The breaches were as follows;
        i. Harassment (as set out above);
        ii. direct discrimination (as set out above);
        iii. the failure to make reasonable adjustments; and further the alleged failure to implement a phased return to work in June 2018.
        iv. the decision to limit the payment of contractual sick pay to 1 month's full pay, and one month's half pay (the respondent accepts that the

claimant was paid as alleged, but avers that this was consistent with the normal exercise of the discretionary power)

v. the failure to conduct a home visit whilst the claimant was on sick leave
vi. the delay in concluding the claimant's grievance (the respondent accepts that there was a delay in dealing with the grievance, but avers this was due to annual leave and the respondent's closure over the summer)
vii. the manner in which the grievance hearing in August 2018 was conducted by Mr Nick Howard (the respondent denies that Mr Howard acted as alleged)
viii. the decision to reject the claimant's grievance which was communicated on 3 September 2018.

(The last of those breaches was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law).

50. The claimant has identified the last straw as the grievance outcome. For the reasons set out below the respondent submits that the grievance outcome is not capable of being a last straw.

51. The leading authority on the application of the "last straw" doctrine is Omilaju v Waltham Forest LBC [2005] ICR 481. At para 14.5 of the Judgment Lord Dyson states "*A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents (he goes on to set out with approval a passage from Harvey*), and at paragraph 16 states ""*Although the final straw may be relatively insignificant it must not be utterly trivial…"* In addition to the passage from Omilaju set out above at paragraph 21 Lord Dyson held " *If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect*.", and at paragraph 22 "*Moreover, 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 his employer. The test …. Is objective*."

52. In addition in Kaur v Leeds Teaching Hospitals NHS Trust Underhill LJ (at para 75 in reference to a disciplinary process) stated " *Such a process properly followed, or its outcome , cannot constitute a repudiatory breach of contract, or contribute to a series of acts which cumulatively constitute such a breach. The employee may believe the outcome to be wrong; but the test is objective, and a fair disciplinary process cannot, viewed objectively , destroy or seriously damage the relationship* of trust and confidence …" (Our underlining). In our judgement there is no distinction in principle between a disciplinary and grievance process and that principle must apply equally to a grievance outcome. The respondent submits that that principle does apply in this case and that as a result the grievance outcome is not capable of amounting to a last straw.

53. As set out by Underhill LJ the question is objective and thus (if we are correct that the principle applies to a grievance as much as a disciplinary process) a fair grievance outcome cannot objectively constitute or contribute to a breach of the implied term of mutual trust and confidence. Was therefore the grievance outcome objectively fair? In our judgement it was. Mr Howard upheld the grievance in respect of the "raspberry ripple" comment which was necessarily reasonable. He did not uphold any other part of the grievance for the reasons set out in detail in the grievance outcome letter. In our judgement he had obtained sufficient information properly to determine the issues, and the conclusions he drew were considered detailed and reasonably and rationally open to him. It must follow that the outcome was objectively fair in our judgement even if the claimant does not agree with it.

54. It follows that the last straw was not capable in these circumstances of contributing to any earlier breach of the implied term and that the claim for constructive dismissal must also be dismissed.

Remedy

55. Having given judgement as to liability we expressed out provisional view as to where the appropriate award for injury to feelings would be subject to any further submissions from either party. Neither sought to make any further submissions and accepted the proposed award of £5,000 for injury to feelings.

EMPLOYMENT JUDGE CADNEY

Dated: 30th March 2020