



EMPLOYMENT TRIBUNALS

Claimant: Mrs V Connell

Respondent: A.S Kitching (Oakengates) Ltd

Heard at: Birmingham **On:** 17, 18, 19 March 2020

Before: Employment Judge Hindmarch
Members: Mrs Petrulis
Mrs Keene

Claimant: In Person
Respondent: Mr Clarke (Consultant)

RESERVED JUDGMENT

1. The Claimant is a disabled person for the purposes of the Equality Act 2010.
2. The complaint of disability discrimination is not well founded and is dismissed.
3. The complaint of constructive unfair dismissal is not well founded and is dismissed.

Hearing and Issues

1. This case came before the Tribunal for a 3 day substantive hearing commencing on 17 March 2020. On 17 March 2020 the Tribunal identified the issues with the parties and read the witness statements and related documents. We heard evidence from the Claimant in the afternoon. On 18 March 2020 we heard evidence from the Respondent's witnesses and heard submissions. Towards the end of the day the Tribunal was directed by the Regional Employment Judge to send the parties home on account of the need to halt face to face hearings due to the risks associated with COVID-19. The third day of the hearing (19 March 2020) thus involved the Tribunal deliberating by telephone conference. The Tribunal reached a unanimous judgment on that day.

2. By an ET1 filed on 27 January 2019 the Claimant brought complaints of disability discrimination, for notice pay and for constructive unfair dismissal. By an ET3 filed on 7 March 2019 the Respondent, a family owned and run pharmacy, indicated its intention to resist the claims.
3. On 5 June 2019 Employment Judge Hindmarch had case managed this case at a Preliminary Hearing. On that date the issues were agreed and recorded. Those issues remained in play and were as follows:-

Constructive unfair dismissal & wrongful dismissal

- (i) *Was the Claimant dismissed, i.e. (a) was there a fundamental breach of the contract of employment, and/or did the Respondent breach the so-called 'trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the Claimant? (b) if so, did the Claimant affirm the contract of employment before resigning? (c) if not, did the Claimant resign in response to the Respondent's conduct (to put it another way, was it a reason for the Claimant's resignation – it need not be the reason for the resignation)? If the Claimant was dismissed, they will necessarily have been wrongfully dismissed because they resigned without notice.*
- (ii) *The conduct the Claimant relies on as breaching the trust and confidence term is:*
 - a. *The Respondent failing to address complaints of bullying,*
 - b. *The manner by which the Respondent conducted the meeting on 3rd August 2018,*
 - c. *Comments made by Diane Kitching to the Claimant whilst the Claimant was on sick leave,*
 - d. *Failing to deal reasonably and promptly with the Claimants grievance.*
- (iii) *If the Claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and, if so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the Respondent in all respects act within the so-called 'band of reasonable responses'?*

Disability

- (iv) *Was the Claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the following condition: Ehlers Danlos Syndrome.*

EQA, section 13: direct discrimination because of Disability

- (v) *It is not in dispute that the Respondent met with the Claimant on 3rd August 2018. The Claimant alleges she was subjected to the following treatment:*
 - a. *At that meeting the Respondent spoke to the Claimant about her disability in front of a perpetrator of bullying, and/or*
 - b. *Asked the Claimant about her disability in detail, and/or*
 - c. *Accused the Claimant of being quiet when unwell, and/or*
 - d. *Told the Claimant she needed to tell colleagues about her condition.*

- (vi) *Was that treatment “less favourable treatment”, i.e. did the respondent treat the Claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances?*

- (vii) *If so, was this because of the Claimant’s disability and/or because of the protected characteristic of disability more generally?*

Findings of fact

4. The Claimant commenced employment with the Respondent on 18 November 2013 in the role of Pharmacy Technician. The Respondent has 3 Directors and we heard evidence from 2 of these Directors, Diane Kitching and Kevin Kitching. Diane Kitching, along with a long term member of staff Linzi Pooler, were involved in the interview and appointment of the Claimant. The Respondent has 14 staff members. The Claimant’s duties involved dispensing prescriptions and her tasks could involve standing or sitting for long periods, and bending and stretching to retrieve medicines.

5. The Claimant was issued with a statement of Main Terms of Employment which she signed on 3 December 2013. A copy of this was at pages 28-31 of the agreed bundle used at the hearing. The Statement records the Claimant’s working hours of 37.5 per week, Tuesday to Saturday. In a section of the Statement headed ‘*Grievance Procedure*’ it records ‘*Should you feel aggrieved at any matter relating to your employment, you should raise the grievance with your manager, either verbally or in writing. Further information can be found in the Employee Handbook*’.

6. A copy of the Employment Handbook was at pages 103-144 of the bundle. The grievance procedure (page 134) records as follows:-

‘if you feel aggrieved at any matter relating to your work (except personal harassment, for which there is a separate procedure following this section), you should first raise the matter with the person specified in your Statement of Main Terms of Employment, explaining fully the nature of the grievance. You will then be invited to a meeting at a reasonable time and location at which your grievance will be investigated fully. You must take all reasonable steps to attend this meeting, you will be notified of the decision, in writing, normally within ten working days of the meeting, including your right of appeal.’

7. Prior to commencing employment with the Respondent, the Claimant had been diagnosed with Fibromyalgia and possible Hypermobility. About a year after the commencement of her employment she was diagnosed with Hypermobility type Ehlers-Danlos Syndrome, Spinal Stenosis, benign Hypermobility Syndrome and SAPHO Syndrome. In her impact statement at pages 71-77 of the bundle she describes the effects of these conditions and her medication and other coping strategies as follows:-

'... Hypermobility type Ehlers-Danlos Syndrome (hEDS) is a genetic condition, which is a group of connective tissue disorders, with no cure. It causes my joints to be too elastic, in turn causing subluxations, dislocations, pain, chronic fatigue, gastro-intestinal issues, stress incontinence and other symptoms. Fibromyalgia is a long-term condition that causes widespread pain throughout the body. It also causes increased sensitivity to pain, fatigue, muscle stiffness, trouble sleeping, problems with mental processes such as memory and concentration (fibro-fog), headaches and Irritable Bowel Syndrome (IBS). Benign hypermobility syndrome is hyperextension at the joints caused by shallow joints, which I was born with, and it causes dislocations, subluxations and pain. It presents similarly to hEDS, but is mainly joint pain during exercise together with hypermobility of the joints. SAPHO syndrome is a disorder that affects bone and skin. For me, it affects the sterno-clavicular joint (saddle joint found on the collar bone), where I get severe swelling, infection and pain. My combined conditions are a constant presence in my life. I take prescribed medications, see a specialist on a regular basis, undergo treatments such as intravenous infusions, I take supplements such as multivitamins, glucosamine, chondroitin, evening primrose oil and cod liver oil, and I use supports and do stretches and exercise to help me...'

8. In the impact statement the Claimant listed the various medications she takes and also referred to physical aids used such as leg compression sleeves, ankle supports, compression gloves, and keeping quiet to assist with concentrating and physical therapy exercises.
9. In the bundle were letters from the Claimants medical advisers. At pages 101-102 was a copy of a letter from the Consultant Rheumatologist treating the Claimant which is dated 3 November 2015 and records '(the Claimant)... has a long history of arthralgia and hypermobile joints... She struggles with lower back pain and also pain around her knees with stiffness on prolonged sitting... Clinically I agree she has benign hypermobility syndrome and fibromyalgia'. The same Consultant Rheumatologist met again with the Claimant on 30 March 2016 and a copy of his letter following that meeting is at pages 99-100 of the bundle. It records 'I wonder if she (the Claimant) has SAPHO for which I have arranged blood tests'. At pages 91-97 and 80-81 were copies of further such letters confirming the Claimant's symptoms and treatment from 2016 to 2018. At pages 78-79 was a letter from the Claimants Consultant Rheumatologist dated 10 April 2019 confirming her conditions as Ehlers-Danlos Syndrome (hypermobility) and Fibromyalgia and recording that the Claimant was suffering in particular with fatigue.
10. The Claimant says she was honest with the Respondent about her health issues from the outset. Ms Kitching in her evidence told us she was aware of

the Claimant 'suffering from fibromyalgia and had hypermobility of some joints which made her prone to dislocations' and that she knew the Claimant was taking medications as the Respondent was her nominated pharmacy and Ms Kitching would be involved in dispensing those medications. Ms Kitching was aware the Claimant was taking time off work for medical appointments and that the Claimant used a foot stool, back support and a hand reacher/grabber which the Respondent paid for. Ms Kitching also told us she was aware the Claimant was under investigation for SAPHO and that the Claimant had made mention of Ehlers-Danlos Syndrome. Ms Kitching acknowledged she and the Claimant had discussions about the side effects of the Claimants medication namely drowsiness and accepted that the Claimant became tired in the afternoons and that she 'suffered discomfort, especially when bending'.

11. Mr Kitching in his evidence accepted the Claimant had told him she had Ehlers-Danlos Syndrome and he was aware she had attended medical appointments.
12. In the bundle were some text message exchanges between the Claimant and Ms Kitching. On 18 April 2019 the Claimant texted Ms Kitching as follows:-
'Thanks Di. I have a few things that I discussed with Dr al-hassan today, so I will chat to you about it Friday. Hopefully occupational health will give me more and I can get back to more of a normal life! Thanks again and see you Friday xxx' (page 62c of the bundle). Ms Kitching replied *'let me know if you need to change anything for you at work'*. The Claimant replied (62a) *'... My conditions haven't got any worse, so that's good. My vitamin D level is now finally above the minimum level as well. I am being referred to occupational health as I am struggling a lot at home and work with workload and pressure, so they will teach me some coping techniques and assist me with applying for a blue badge and PIP. Hopefully it will really help! Thanks for thinking of me! xx'*.
13. On 2 November 2018 the Claimant was awarded Personal Independence Payment (PIP) by the Department of Work and Pensions. A copy of the letter the Claimant received confirming this award was in the bundle at pages 82-90. Whilst this award was made after the Claimants employment with the Respondent had ended, the award was backdated to 22 August 2018. The Claimant was awarded PIP for 'help with daily living needs' (the Claimant was assessed as needing assistance with preparing food, needing an aid or appliance to wash or bathe, managing toilet needs and dressing or undressing) and for 'help with mobility needs' (the Claimant was assessed as 'you can stand and then move unaided more than 20 metres but no more than 50 metres').
14. Ms Kitching works for the Respondent 2 days a week. She only therefore had Fridays in common with the Claimant. In 2017 she became aware of a clash of personalities between the Claimant and another employee Chloe Pooler. The Claimant believed that Miss Pooler was bullying her. Ms Kitching told us Miss Pooler could be *'loud and domineering'* but she believed the issues were really down to a lack of communication. Ms Kitching suggested that the Claimant and Miss Pooler meet and air their differences. The meeting took place and Ms Kitching believed it to have been successful.
15. On 19 July 2018 in the evening the Claimant sent Ms Kitching an email raising concerns about Miss Pooler. The email, made the following observations (page 32 of the bundle):

'I am needing yo (sic) write this to you, as if I don't talk about it, I feel as though I might erupt. I am sick and tired of being pushed around by chloe, with her bullying tactics. She is rude and puts down our qualifications all the time... qualifications don't matter... she is late every morning, coming in through the front counter... other staff are making comments about her over the top bossiness and how she speaks to People, but no one come forward, so she is allowed to get away with it ...'

16. Ms Kitching replied the same evening (page 32A of the bundle);

"Thanks for this Vikki. Leave it with me. I'll have a chat to Chloe on Monday and then ask Dad and Kev to get involved. Enjoy the rest of your evening. Thanks for all your help. Di"

17. On Monday 23 July 2018 Ms Kitching spoke with Miss Pooler (the Claimant was not at work that day) and suggested holding a mediation meeting with the Claimant. Miss Pooler agreed and Ms Kitching asked Mr Kevin Kitching to conduct the mediation. Ms Kitching informed the Claimant by email that the mediation meeting would be taking place.

18. On 1 August 2018 Mr Kitching conducted a mediation meeting. The Claimant and Mr Kitching both agreed the meeting went well and at the end the Claimant and Miss Pooler hugged. Mr Kitching believed that to be the end of the matter. However, later that day the Claimant overheard her name being mentioned, and believed there was some criticism (by Miss Pooler in conversation with other staff members) being made of her. The Claimant challenged these staff members. Mr Kitching was not on the premises at the time but was made aware that evening by Ms Kitching that 'it had all blown up again' (Ms Kitching had been made aware of this by another staff member).

19. The following day, 2 August 2018, Mr Kitching spoke with the Claimant then with Miss Pooler to ascertain what had occurred the previous afternoon. In short the 'disagreement' had concerned the taking of staff breaks. He reported his findings to Ms Kitching who agreed to speak to the Claimant and Miss Pooler herself whilst at work the next day.

20. On 3 August 2018 Ms Kitching first met with Miss Pooler. She did so in the presence of Linzi Pooler another employee who is also Miss Pooler's mother. As 3 August was not usually a working day for Miss Pooler, the previous day Ms Kitching had contacted her and asked her to come in for the meeting. Ms Kitching believed the meeting she held with Miss Pooler to have been successful.

21. Later that day Ms Kitching and Linzi Pooler met with the Claimant. Ms Kitching told us she intended the meeting to be a welfare meeting; to allow her to investigate why the 'disagreement' [between the Claimant and Miss Pooler] had 'flared up' and to offer any solutions and support. The Claimant was not given any notice about the meeting and felt this unfair given that Miss Pooler had been contacted the previous day and been given advance warning.

22. The Claimant felt it inappropriate that Linzi Pooler was present, although she made no objection at the time. She felt that the Respondent should not have had the mother of the person she was in dispute with present. Further the Claimant alleged Linzi Pooler had previously bullied her. Ms Kitching's view was that Linzi Pooler had over 25 years employment with the Respondent so was very experienced, she was in the workplace on the same working days as the Claimant and Linzi Pooler so could assist if issues arose, and Linzi Pooler could offer support to both Ms Kitching and the Claimant during the meeting. Ms Kitching also explained she believed the Claimant had been untruthful with her on a previous occasion in June when the Claimant had misled her about being in possession of the keys to the Respondent's premises and thus she wanted a witness present. Ms Kitching explained in evidence that as the Respondent is a family business she saw nothing inappropriate in Linzi Pooler's attendance despite the fact she was the mother of Chloe Pooler.
23. The meeting lasted 1 hour and 40 minutes. No one present took any notes. The Claimant made some notes afterwards and these appear at pages 33-37 of the bundle. Ms Kitching accepts that she started the meeting by saying to the Claimant *'I don't think you are very well'*. She accepts she *'could have started the conversation more tactfully'* but says she was conducting a welfare meeting, she had concerns for the Claimant's wellbeing and that she was keen to understand whether the Claimant was experiencing any medical or personal issues that might have contributed to the workplace issues in recent times. The Claimant's notes record either Ms Kitching or Linzi Pooler saying to her *'we both are (the notes are unclear which) just worried about your health'*.
24. At the meeting the Claimant mentioned she suffered with depression and her notes record a discussion about the taking of anti-depressants. Ms Kitching accepts she sought to encourage the Claimant to talk to her colleagues if she was *'feeling less than 100%'*. The Claimant says she felt she was being instructed to report her condition daily and she was made to feel her health condition was an inconvenience for others at her workplace.
25. The Claimant continued to attend work but on 8 August 2018 she went on sick leave. A copy of the fit note she obtained from her GP on that date was in the bundle at page 38 and records the absence as being for a *'stress related problem'* and that the Claimant should absent herself from work until 22 August 2018. Mr Kevin Kitching received the fit note and informed Ms Kitching that the Claimant would be absent for 2 weeks. Ms Kitching did not see the fit note herself.
26. On Friday 17 August 2018 Mr Kevin Kitching finished work to take annual leave returning on Tuesday 28 August 2018.
27. On 22 August 2018 the Claimant did not attend work as she remained on sick leave by reason of the aforementioned fit note. This was a day when Ms Kitching was not working at the Respondent business. Ms Kitching received a text message from a member of staff informing her the Claimant had not attended for work. As Ms Kitching had been informed by Mr Kevin Kitching that the Claimant's fit note covered a period of 2 weeks she had (mistakenly) expected the Claimant back at work on 22 August 2018. She therefore telephoned the Claimant to enquire about her whereabouts. The Claimant informed her the fit note had not in fact expired and that she did not feel ready

to return the following day. Ms Kitching told her she could not take annual leave as the Respondent was already short staffed due to other staff absences.

28. On 23 August 2018 the Claimant obtained a further fit note to 9 September 2018.
29. On 18 August 2018 the Claimant prepared a grievance letter a copy of which is at pages 39-47 of the bundle. She addressed this to Mr Kevin Kitching and Mr Richard Kitching and the letter was delivered in hard copy to the Respondent's premises. Mr Kevin Kitching was on annual leave (having started his leave the previous day) and Mr Richard Kitching is registered blind so did not himself read the letter. It therefore went unacknowledged for a period of time.
30. Mr Kitching returned to work on 28 August 2018. He found the grievance letter waiting for him. He forwarded it to Ms Kitching who herself was on annual leave at the time (her leave was from 25 August 2018 to 3 September 2018) and asked her for her comments. She provided him with a written response, a copy of which is at pages 52-56 of the bundle.
31. On 3 September 2018 Mr Kevin Kitching responded to the grievance in hard copy by post to the Claimant. He included Ms Kitching's written response. His letter is at page 51 of the bundle and records:-

'The directors have now seen your grievance dated 18th August 2018 I apologise for the delay in coming back to you but I have been on annual leave.

We felt Diane was in a better position to respond to the grievance. Please find enclosed her factual response.

At your request the grievance has remained confidential between directors, however if you would like that events of Tuesday 7th August formally investigated please contact me with your consent so that we can inform staff on duty on the 7th August of the grievance & get formal statements of events.

... if you would like to discuss the response in a formal meeting with myself and Richard please contact me at kitchingschemist@outlook.com'.

32. Later in the day on 3 September 2018 Mr Kevin Kitching began answering his emails. He received 2 relevant emails on that day. One was from a prospective new employer of the Claimant seeking a reference for her (page 50 of the bundle). The other was a letter of resignation from the Claimant (page 49). The letter of resignation stated the following:-

'It has now been 10 working days since I filed my letter of grievance, and I have received no indications that this has been dealt with. As a result, I am writing to you today to amicably tender my resignation as the position of Pharmacy Technician, with immediate effect. I have thought long and hard about my position within the business, and believe my role there is now untenable. I have no career advancement prospects, and with recent events, I have been forced to consider whether I believe it is possible for me to come back at all, and for all parties involved, I believe the answer to this is no. I have been forced to seek employment elsewhere, as I have not heard back about the grievance I was

forced to make, and feel it has not been taken as seriously as I would have wished. I do not feel I am able to come back at all, and feel the fairest option is to offer my immediate resignation, rather than the company having to organise Statutory Sick Pay for the remainder of my contract. If this is unsatisfactory, I can provide a further Sick Note for the period required, as stress has unduly affected me, and I do not wish to worsen my personal situation.

.. I truly wish everyone the best in the future, but feel my future just isn't with Kitching's. I'm hoping an amicable and dignified parting of ways can be an agreeable way to move on for both parties'.

33. The Claimant accepted she had applied for another job whilst on sick leave but told us she did not receive any contract until 11 October 2018 and took up that post on 15 October 2018.

34. Mr Kitching replied to the Claimant on 3 September 2018 by email (page 57 of the bundle) stating;

'Many thanks for your email...

Please be aware that a response was posted to you this morning, as I didn't see your letter until 29th August and Richard had to wait for me to narrate the letter to him as he is registered blind.

I feel I have replied as quick as I could. I trust my response will answer all your questions.

With regards to your resignation letter I have spoken with all directors and can confirm that we accept your resignation with immediate effect and waive the notice period in your contract. September 3rd 2018 will be your final employment date with A. S. Kitching (Oakengates) Ltd.

I would like to wish you all the best for your future endeavours and thank you for your hard work and commitment that you have given us'.

35. The Claimant responded the same date (page 58) of the bundle;

'Thank you all for this amicable departure. I do believe it is that best for all involved. Thank you for having me at Kitchings for the past five years, and for everything, ... I truly wish everyone the best in the future, and wish all success to Kitching's chemist.'

36. The 3 September 2018 was thus agreed by the parties as the Claimant's last day of employment.

37. The following day (4 September 2018) an ex-colleague of the Claimant sent her a screenshot of a Facebook post apparently made by Chloe Pooler (page 62 of the bundle) stating;

'Chloe Pooler is feeling fucking fantastic. Truth will always come out and true colours will show. Received some wonderful news today, what a weight lifted off my shoulders'

The Claimant believed this post to be about her.

Submissions

38. We heard oral submissions from Mr Clarke for the Respondent and from the Claimant. We summarise these now. In brief Mr Clarke contended the Claimants health issues did not meet the Equality Act 2010 definition of disability and, whilst the Respondent had some knowledge of the conditions, it did not have knowledge that the Claimant was a disabled person.
39. Mr Clarke submitted Ms Kitching had no discriminatory malice at the 3 August 2018 meeting, she was trying to support the Claimant. Mr Kevin Kitching had dealt with the grievance as quickly as possible and the Claimant had, instead of exercising patience, got another job which was her true motive for resigning.
40. The Claimant submitted she had been subjected to bullying and the Respondent had failed to properly address this. Ms Kitching had harassed her on 3 August 2018 by speaking about her mental health. Mr Kevin Kitching had not properly investigated her grievance.

The Law

41. S6(1) Equality Act 2010 provides;

'A person (P) has a disability if :

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

42. The definition poses 4 questions for the Tribunal to consider.

- Does the person have a physical or mental impairment?
- Does that impairment have an adverse effect on their ability to carry out normal day to day activities?
- Is that effect substantial?
- Is that effect long-term?

43. The Tribunal must ensure that each step is considered separately and sequentially (Goodwin v Patent Office (1999) IRLR 4 (EAT))

44. The Guidance on matters to be taken into account in determining questions relating to the definition of disability (Equality Act 2010 Guidance) gives some assistance on the question of day to day activities (which must be normal activities) and provides;

'in general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities'.

45. Goodwin v The Patent Office gives guidance as to what is meant by a substantial impairment:-

'The Act is concerned with a person's ability to carry out activities. The fact that the person can carry out some activities does not mean that his ability to carry them out has not been impaired and the focus of the Act is on the things that the Claimant either cannot do or can only do with difficulty rather than on the things that the person can so as that the word substantial means more than minor or trivial'.

46. 'Substantial' means 'more than minor or trivial'. We need to focus on what the employee cannot do because of their impairment, rather than what they can still do. (Aderemi v London and South Eastern Railway Ltd UK EAT/0316/12).

47. An impairment will be treated as having a substantial effect on a person's ability to carry out normal day to day activities if:

- Measures are being taken to correct it, and
- But for these measures, the impairment would be likely to have that effect.

48. In short, the Tribunal must ignore the beneficial effect or any treatment or supportive measures.

49. An impairment will have a long term effect only if:

- It has lasted at least 12 months;
- The period for which it lasts is likely to be 12 months, or
- It is likely to last for the rest of the life of the person affected.

Direct Disability Discrimination

50. S13 Equality Act 2010 provides;

'Where, because of a disability, a person (A) treats another (B) less favourably than A treats or would treat others'.

51. An employee claiming direct disability discrimination must show that they have been treated less favourably than a real or hypothetical comparator whose circumstances are not materially different to theirs (section 23(i) Equality Act 2010). The '*relevant circumstances*' to be ascribed to the comparator expressly include the Claimant's abilities (S23 (2)).

52. The Claimant must show they have been treated less favourably in some way other than the comparator. The Claimant must prove some evidential basis to

demonstrate an actual or hypothetical comparator would not have been treated in the same less favourable manner.

53. The fact that a Claimant has been treated less favourably than an actual or hypothetical comparator will therefore not be sufficient to establish that direct discrimination has occurred unless there is 'something more' from which the Tribunal can conclude that the difference in treatment was because of the Claimant's protected characteristic (*Madarassy v Nomura International plc* [2007] IRLR 246(CA)). However, if there are facts from which the Court or Tribunal could conclude that discrimination occurred, the burden of proof shifts to the Respondent to provide an adequate non-discriminatory reason or explanation for its actions.

Constructive Dismissal

54. The statutory definition is found in section 95(1)(c) of the Employment Rights Act 1996 (ERA 1996) which provides:

'(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection(2) ... only (if) –

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct'.

Constructive Dismissal

55. Lord Denning in *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221 to stated:

'If the employer is guilty of conduct which is significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, the he terminates the contract by reason of the employer's conduct. He is constructively dismissed'.

56. In *Kaur v Leeds Teaching Training Hospitals NHS Trust* [2018] EWCA Civ 978 the Court of Appeal listed five questions that it should be sufficient to ask in order to determine whether an employee was constructively dismissed:

- What was the most recent act (or omission) on the part of the employer which the employee days caused, or triggered, his or her resignation.
- Has he or she affirmed the contract since that act?
- If not, was that act (or omission) by itself a repudiatory breach of contract?
- If not, was it nevertheless a part (applying the approach explained in *Waltham Forest v Omilaju* [2004] EWCA Civ 1493 of a course of conduct comprising several acts and omissions which, viewed cumulatively,

amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign).

- Did the employee resign in response (or partly in response) to that breach?

57. A breach of an implied contractual term will serve as a basis for a constructive dismissal in the same way as the breach of an express term, provided that the breach in question is repudiatory. The most obvious example of this is where the term broken is the implied term of mutual trust and confidence first identified in *Woods v WM Car Services (Peterborough) Ltd [1982] ICR 693*. Due to the nature of the trust and confidence term, every breach of it goes to the root of the contract and is therefore repudiatory (*Morrow v Safeway Stores [2002] IRLR 9*).

Conclusions

58. We have concluded that the Claimant is a disabled person for the purposes of the Equality Act 2010. We have had due regard to her own evidence, the medical evidence provided by her and the fact she has been awarded PIP. She has a number of complex conditions which affect both her physical and mental health and which amount to impairments. These impairments have an adverse effect on her ability to carry out normal day to day activities including, but not limited to, her ability to sit, stand and concentrate. These effects are clearly substantial and would be even more so if she did not employ the range of coping strategies, physical aids and medications. The effect is clearly long term in that it has lasted more than 12 months. As our findings of fact demonstrate the Respondent knew about at least some of these conditions with which the Claimant had been diagnosed and some of the effects of these and the steps employed by the Claimant to ease her symptoms at work.

59. Turning to the issue of disability discrimination, the Claimant relies on 4 matters which she says occurred at the meeting with Ms Kitching and Mrs Pooler on 3 August 2018. The first allegation is that Mrs Pooler was a *'perpetrator of bullying'* and hence should not have been present. We do not accept that Mrs Pooler was a *'perpetrator of bullying'*. We have identified in our findings of fact that the Claimant had made allegations against Miss Chloe Pooler, but there was no evidence that Mrs Linzi Pooler was a bully. Indeed Mrs Linzi Pooler had been one of those at the Respondent who had interviewed the Claimant and appointed her so presumably was well disposed generally towards her.

60. Turning to the second allegation that the Respondent *'asked the Claimant about her disability in detail'*, we have found that the Respondent did say to the Claimant *'I don't think you are very well'* and *'we are... just worried about your health'*. We do not however accept this amounts to *'asking the Claimant about her disability in detail'*. Over the preceding few weeks the Claimant had engaged in a dispute with Chloe Pooler. This had escalated despite the Respondent's attempts to mediate. We believe the Respondent would have asked any staff member in these circumstances about any potential underlying issues. We do not accept the comments were made because of the Claimant's health.

61. The third allegation is that *'the Respondent accused the Claimant of being quiet when unwell'*. Whilst this allegation was in the list of issues agreed at the Case Management Preliminary Hearing in June 2019, it did not appear in the Claimant's witness statement and we heard no evidence on it.
62. The fourth allegation was that the respondent *'told the Claimant she needed to tell colleagues about her condition'*. We accept Ms Kitching encouraged the Claimant to tell her colleagues *'if she was not feeling 100%'*. This was not an instruction, but rather the Respondent seeking to avoid future staff disputes by encouraging the Claimant to tell team members if she was unwell. This was not the Respondent instructing the Claimant to disclose personal private information about her disability. We believe the Respondent would have encouraged other staff members likewise in a similar situation.
63. For the reasons above we do not find the Respondent discriminated against the Claimant.
64. Turning to the complaint of constructive unfair dismissal. The Claimant relies on four matters which she says amount to a breach of the implied term of trust and confidence.
65. The first is the Respondent failing to address complaints of bullying. We do not accept that Respondent failed to do so. As our findings of fact demonstrate when the Respondent became aware of the Claimant's allegations against Chloe Pooler, it spoke with both parties, it arranged a mediation which all agreed a success, and when matters 'blew up' once more, welfare meetings were held with both parties.
66. The second allegation concerns the Respondent's conduct of the meeting on 3 August 2018. The Claimant appears to complain about Linzi Pooler being present and about things that were said to her at the meeting. We have made findings of fact about these matters. We find the Respondent was motivated to resolve issues between the Claimant and Chloe Pooler. We find, given its size and the fact it is a family business, there was nothing sinister in Linzi Pooler being present. We find the things said by the Respondent were motivated by a desire to have harmonious working relationships for all.
67. The third allegation concerns the telephone call between Ms Kitching and the Claimant on 22 August 2018. We have found Ms Kitching mistakenly believed the Claimant's sick leave ended that day. It was not therefore unreasonable for her to call the Claimant and enquire why she had not attended work. The Claimant appears to object to the fact Ms Kitching said to her that she could not take annual leave, when in fact her absence was covered by a sick note. Whilst we find this conversation took place it was entirely motivated by Ms Kitching's mistake and we find there was nothing untoward.
68. The fourth and final allegation is that the Respondent failed to deal reasonably and promptly with the Claimant's grievance. The Respondent is a small business with 3 Directors. The grievance was about one of these Directors (Ms Kitching) and was addressed therefore to Mr Kevin Kitching and Mr Richard Kicthing. It arrived when Mr Kevin Kitching was on annual leave so of course he was unable to action it until his return. Mr Richard Kitching is registered blind

so was unable to action it. On Mr Kevin Kitching's return from annual leave he read the grievance, asked Ms Kitching to prepare a written response, and then wrote to the Claimant on 3 September 2018 the same day on which she resigned. On balance we find the Respondent acted promptly given the circumstances. We also find it acted reasonably. Whilst it did not offer the Claimant a grievance hearing in the usual way (and as per its grievance procedure) in advance of writing to her on 3 September 2018, in that letter it did offer the Claimant a formal meeting with Mr Kevin and Mr Richard Kitching.

69. We accept the Claimant resigned not because she had received another job offer, but rather because she believed she could not return to the workplace given her perception of the treatment she had been subjected to. Nevertheless we do not accept the Respondent had breached the implied term of trust and confidence, entitling her to resign and view herself as constructively dismissed. We note the language used by the Claimant at the time of resignation, regarding wanting to be '*amicable*'. In our conclusion, the Respondent was seeking to resolve matters and the Claimant did not give it sufficient chance to do so.

70. We conclude by dealing with the Facebook post made by Chloe Pooler. This did not form any issue for us to determine, but it was part of the evidence before us. Whilst we can fully understand why the Claimant was upset about it and believed, given the timing and nature of the post, that it was about her, she only discovered its existence after her resignation so it cannot have been a factor leading to that resignation.

71. For the reasons above the complaints fail.

Employment Judge **Hindmarch**
02 April 2020