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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4107266/2019

Held in Glasgow on 24, 25 and 26 February 2020

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Employment Judge: L Doherty

15 **Mr J Clarke**

**Claimant
Represented by:
Ms Drysdale –
Trainee Solicitor**

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GMS Engineering Limited

**Respondent
Represented by:
Mr Eadie –
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that:-

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- (1) the claimant was unfairly dismissed;
- (2) the claimant was discriminated against contrary to Section 26 of the Equality act 2010
- (3) the respondents are ordered to pay the claimant compensation in the sum of Twenty Two Thousand, Three Hundred and Sixty Four Pounds, Forty Two Pence (£22,364.42).

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REASONS

1. The claimant presented claims of constructive unfair dismissal and discrimination on grounds of his disability contrary to Section 26 of the Equality Act 2010 (the EQA) on 7 June 2019.
- 5 2. The respondents deny the claims. The claimant's disability status in terms of the EQA is in dispute.
3. The issues for the Tribunal are therefore firstly to consider whether the claimant is disabled in terms of the EQA; secondly in the event that it is satisfied the claimant is disabled in terms of the EQA, to consider whether he
10 was subject to harassment contrary to Section 26 of that Act; and thirdly, to consider whether the respondent's breached the implied term of mutual trust and confidence in the claimant's contract of employment, entitling the claimant to resign, and whether he resigned in response to that breach.
4. In the event the claim succeeds the Tribunal will also have to consider the
15 issue of remedy. The parties had helpfully produced a schedule of loss which was agreed to the extent that the figures for past and future wage loss and pension loss were agreed, albeit the quantification of the claim was not agreed.
5. The hearing took place over three days. The claimant was represented by
20 Ms Drysdale, trainee solicitor and the respondent's by Mr Eadie, solicitor.
6. The claimant gave evidence on his own behalf. For the respondent's evidence was given by Mr Stephen Gall the Managing Director of the respondent company ; Mrs Teresa Gall, his wife and the Operations Director of the company; Mr White, a supervisor who worked alongside the claimant
25 from time to time; Mr Wilson, the Operations Manager.
7. The parties produced a joint bundle of documents.

Findings in Fact

Disability Status

8. The claimant, whose date of birth is 15 October 1985, was employed by the respondents from 6 October 2016.
- 5 9. On 17 August 2018 the claimant completed a respondent's health questionnaire which was asked if he had ever suffered from severe anxiety, depression, or other psychiatric disorder. He answered no to this question.
- 10 10. The claimant had attended his GP in around August 2015 complaining of anxiety with depression, but forgot to include this when completing the questionnaire.
11. Around November 2018 the claimant began to experience symptoms of depression. He experienced low mood and found difficult to get up in the morning and to motivate himself.
12. The claimant attempted to commit suicide on 6 December 2018.
- 15 13. The claimant attended his GP, Dr Boyd, on 7 December 2018. The GP records record the claimant's attendance on 7 December and his reporting his attempted suicide. The claimant was diagnosed as having depression at that time.
- 20 14. The GP noted that the claimant had no ongoing suicidal intent, but that he felt 'lost and empty'. She noted that the claimant reporting that his previous low mood had ever been as bad as this and she prescribed medication in the form of Mirtapine - 15mg. Dr Boyd also made an urgent referral to the Community Mental Health team, and the claimant was given an appointment to attend on 10 January. Dr Boyd issued the claimant with a fit note certifying him as unfit
25 for work on account of depression for the period from 6 December to 3 January 2019.

15. The claimant attended his GP again on 14 December where he was reviewed, and some improvement was noted. The GP records note the claimant reporting that he had spoken to his boss, and his boss said not to worry about his job but to focus on getting better, and that this was a great relief to the claimant as he was worried about losing his job. It was noted that the claimant had told his partner about the situation.
16. The claimant's medication was not increased at this point.
17. The claimant attended again for review with Dr Boyd on 3 January. His medication was not increased.
18. The claimant attended his GP again on 10 January.
19. The GP records (page 104) states;
- In to ask for fit note. Much the same as when reviewed 1/52 ago, but went back to work on Monday and on Tuesday one of the boys said 'not sure how I feel working with you and your suicidal thoughts'. Patient quite taken aback by this is only person who knew was boss, feels let down confidentiality was broken, now difficult atmosphere. Left work after this, wasn't back yesterday feels need some time away from environment. Had appointment with CMHT today sounds like they have referred him to life link for one-to-one counselling they had also suggest increase in mirtazapine.'*
20. The claimant felt that this episode set him back, his symptoms worsened, and his recovery was set back. His medication was increased to 30mg dose to counter his symptoms, and he was issued with a fit note covering the period from the 8 until 29 January.
21. The claimant was thereafter certified as unfit for work on account of depression until his employment terminated in March 2019.

22. The claimant attended two appointments with the Crisis Management team, and was then referred to counselling. The claimant regularly attends counselling sessions with a self-help counselling group, Men Matter Scotland. He attends these sessions on a weekly basis, and finds these sessions helpful as they give him an opportunity to talk to people about how he feels.

23. The claimant was discharged by the community psychiatric nurse on 31 January 2019, with a recommendation that he would benefit from one to one counselling. The discharge letter (page 94) includes the following;

‘James also feels that his work as a source of anxiety, as when he returned to work he discusses mental health with his Line Manager. His Line Manager subsequently broke confidentiality and James feels that he cannot return to work at the moment.’

24. Since his attempted suicide in December 2018 the claimant has continued to experience a number of symptoms.

25. The claimant suffers from low mood. He has good days and bad days, and on bad days, he experiences low mood, and at times anger. The claimant finds it difficult to motivate myself to get out of bed. He suffers from the side-effects of his medication.

26. The claimant can become tearful at times without a trigger . The claimant finds it difficult to regulate his emotions when he is struggling with depressive symptoms.

27. The claimant has always had low self-confidence, but since his diagnosis of depression he is felt more self-conscious than ever. The claimant continues to experience low mood. He does not eat when is experiencing low mood due to his condition. The claimant has lost around 2 stone in weight as a consequence of this.

28. When the claimant is experiencing low mood, he does not want to bathe himself or maintain his appearance. He tends not to shower or shave. When he is experiencing low mood, the claimant finds it difficult to get out of bed.
29. The claimant's condition has impacted upon a social life significantly. He does not want to socialise, and does not want to go out. His partner will arrange outings, for example cinema trips, which he finds himself unable to take part in and will cancel at the last moment. The claimant avoids seeing family and friends, and has distanced himself from his friendships. The claimant does not want his friends to know about his mental health issues.
30. The claimant's condition impacts on his relationship with his family members; he can become irritable and takes out his frustration on his partner when his experiencing depressive symptoms.
31. The claimant finds it difficult to plan ahead for the future, and deals with each day as it comes.
32. Since attempted suicide in December 2018, the claimant has experienced thoughts of suicide. At times he has made plans to take his own life. On 6 February 2020 the claimant attempted to take his own life by taking an overdose of morphine. He did this as an impulsive act at a point of extremely low mood.
33. On 8 February 2020 the claimant attempted to hang himself. His partner stopped this attempt. The claimant's father became involved, and told claimant to go to the doctor, and he was referred to the Crisis Team. The claimant has seen the Crisis Team four times since 8th February 2020.

Employment

34. The respondents at the company engaged in the provision of fire sprinkler systems. They are a small business; Mr and Mrs Gall are directors of the

company. The company works on jobs across the UK. It has approximately nine employees. Mr Wilson, who is the claimant's cousin is the Operations Manager, and Mr White is employed as a Supervisor. The claimant and Mr Wilson and Mr White have known each other from childhood.

5 35. The company outsources its HR function to an independent provider, who they can refer to for advice.

36. The claimant commenced working with the respondents as a pipefitter, moving up to the position of Supervisor at some stage.

10 37. In the main the claimant did not work away from home, however he spent around three days working in Aberdeen in August 2018, and he spent some time working in Southampton in November 2018.

15 38. There were issues with the claimant when he initially went to Southampton, in that he failed to turn up for work on one occasion due to excessive drinking, and he used money provided by the respondents for the purchase of food, to buy alcohol. Around the same time, the claimant also used the company phone for purposes which were not legitimate to the business. The respondents however considered the claimant to be good worker, and chose not to take disciplinary action against him on account of this behaviour.

20 39. The claimant began to experience low mood at some point in November 2018, and on 6 December he attempted to commit suicide. The claimant's attendance with his GP, the relevant content of the GP records, and the treatment which he received are set out above.

25 40. The claimant submitted a fit note covering the period from the 6 December to 3 January. He telephoned Mr Gall on the 7 December, to advise that he would not be attending work. The claimant sounded apologetic, and fed up on that telephone call.

41. The claimant then went to see Mr Gall at his office, and he told Mr Gall that he had tried to commit suicide. Mr Gall was shocked to hear this. The claimant asked him to keep this confidential, and Mr Gall agreed to do so. Mr Gall was supportive of the claimant and told him to go and get well and to keep in touch.

42. The claimant had only told his doctor, his partner, and Mr Gall about his attempted suicide.

43. Despite the fact that the claimant had been certified as unfit for work, he texted Mr Wilson, and asked if he could return to work. Mr Wilson referred the claimant to Mr Gall, and the claimant returned to work in the period from 10 until 21 December, when the respondents closed for the Christmas shutdown, reopening on 7 January.

44. Mr Gall allocated each of his employees their job for after New Year before the Christmas shutdown, so that as of 21 December employees knew where they were scheduled to work after the holiday. The claimant was scheduled to work in Southampton. Mr Gall approached the claimant on 21 December and asked him if he was okay to work in Southampton commencing the New Year, the claimant said that he was.

45. The claimant subsequently contacted Mr Gall on 3 January to advise that because of hospital appointments he could not work in Southampton. This caused Mr Gall a good deal of inconvenience as he had to reorganise his workforce, and the claimant is not being able to go to Southampton meant he was a man short for that job.

46. Mr Gall spoke with both Mr Wilson and Mr White advising that the claimant was unable to work at Southampton and that he would be allocated to a site at Miller Hill, where Mr White was based.

47. At some point after his conversation with the claimant in December, Mr Gall told Mr Wilson and Mr White that the claimant had attempted suicide.

48. The claimant attended work on 7 January at Miller Hill. The Miller Hill site was a three-man job, with the claimant, Mr White, and a Mr Daniel O'Neill working on the site. On his return to work the claimant had a conversation with Mr White when he told him that he had been feeling low and that he had medical appointments which he had to attend.

49. On 9 January Mr White said to the claimant words to the effect that he did not know how he felt about working alongside the claimant with his suicidal thoughts.

50. The claimant was shocked when he heard this, and felt embarrassed and annoyed; it made him feel 'down' and low. He felt that the breach of confidence created a difficult atmosphere for him at work; he was concerned about his confidence being breached and was worried about who else knew about his attempted suicide, if Mr. White knew about it.

51. The claimant felt that this breach of his confidence resulted in a setback in his recovery. He attended his GP on 10 January. Her record of that meeting is noted above. The claimant's medication was increased as of 10 January to combat his symptoms.

52. The claimant texted Mr White advising he was unable to return to work, signing off the text 'bud'.

53. The claimant emailed Mr Gall on 10 January, copying Mrs Gall into this on 11 January (page 48) stating;

'I have been to see my psychiatrist today and she advised me to go and see my doctor who gave me a sick line for a couple of weeks, as I feel I have been set back due to speaking to you in confidence to then

discover by another staff member that he knows. This has made me feel uncomfortable in work under the circumstances. I have attached my copy of my sick line and I will post the original to you.'

54. On the receipt of this email the respondents sought advice from the external HR adviser. Mrs Gall dealt with this. She wrote to the claimant on 14 January stating:-

'I have responded to your email dated 11 January 2019 under separate cover, however I have issued this letter just in case you access your work email address during your time off, this is a backup communication to ensure your issue is dealt with in a timely manner.'

I'm sorry to hear that you have been signed off from work and I wish you a speedy recovery, I will lodge the sick line with the account for payroll purposes.

I note from your email you have made an accusation of breach of confidence against the Managing Director Stephen Gall, can you confirm how you want this matter to be dealt with, do you want this to be raised as a formal grievance (a copy of the formal procedure is attached), alternatively if you would like this to be dealt with as an informal matter. Either way I will be responsible for the investigation into the allegation in my role as Operations Director. Please let me know if you have any objection to my role in the investigation.

....

Please confirm how you would like to proceed in this matter to me either via email or in writing to the office address below, all future correspondence should be directed to myself in writing to the address below.

55. As part of the outsourced HR service the respondents could have arranged for an independent person to deal with an internal grievance.

56. The claimant did not respond to that letter as he did not consider there was any point in pursuing a grievance against Mr Gall which would be investigated by his wife.

57. Mrs Gall undertook an investigation with Mr Gall and Mr White on 14 January. She took statements from both, which are produced (pages 51 to 54).

58. In his statement, Mr Gall states;

I can confirm that at no point did I discuss with anyone at the reasons behind the cause of James Clarke's absence from work. I did however make the Operations Manager (John Wilson) and the Supervisor (David White) that James would be absent in order to reorganise the workforce

I had instructed TG to raise this issue with James at the time of the allegation which she did but Mr Clarke did not respond to the letter, I have therefore not had a discussion with Mr Clarke on this allegation.

59. Mr White's contained a denial that there had been a discussion with Mr Gall about the reasons behind the claimant being absent from work. Mr White stated that Mr Gall told him the claimant would be off for some time and that he discussed who would be working with both John (Wilson) and him, going forward. Mr White stated it was the claimant himself who made him aware of his problems, and that all he knew was the claimant said he was feeling down.

60. Both of these statements are dated 14 January 2014.

61. The claimant continued to be absent from work on account of his depression

62. A Facebook message was exchanged between the claimant's mother and her sister, (Karen), Mr Wilson's mother on 16 February (page 58) in which Karen asked the claimant's mother if she knew that the claimant had been off work since Christmas, saying that John had told her this yesterday. Karen asked
5 what was up with him. The claimant's mother responded that she didn't not know, to which Karen responded '*John said he tried to top himself*'.

63. On or around 16 February the claimant was told by his mother, who had been unaware of his suicide attempt, that her sister (Karen) Mr Wilson's mother, had told her that Mr Wilson told her the claimant had attempted to commit
10 suicide.

64. The claimant felt very embarrassed about the fact that his family knew what had happened, he started to drink heavily.

65. By 1 March the claimant decided that he no longer wish to work with the respondents, and he emailed Mrs Gall tendering his resignation because of
15 the breach of confidentiality as to his attempted suicide.

66. The claimant's email stated;

*Hi Teresa I'm sorry to be writing this email but I wish to hand in my notice from today as I don't know when I'll be back at work and I have lost confidence in speaking to management in confidentiality as my
20 situation is known by the whole company and others outside the company. I will hand my phone into John over the weekend thanks.*

67. Mrs Gall wrote to the claimant on 4 March asking to clarify if he was tendering his resignation with notice. She also referred him to her earlier correspondence in relation to lodging a grievance, pointing out she had not
25 received a response to this and asked him to confirm if you would like to raise a grievance. The claimant did not respond to this point, but did confirm that he would give a weeks' notice.

68. Subsequent to the claimant's resignation, the respondent discovered that he had incurred charges totalling £839.39 on his company phone, which were not legitimate business expenses. They asked for reimbursement of these charges by 18 April 2019, but to date have not received these.

5 69. While in employment with the respondent the claimant's gross income was £581 per week which is £459 per week net. He enjoyed a pension, whereby the employer's pension contribution was 2%.

70. The claimant did not receive benefits after his employment came to an end, but he began to look for other work. He did so by looking on the 'Indeed ' website, which is a job search website. The claimant looked for any type of employment.

71. The claimant found work and began working with AFC Logistics on 24 April 2019, where he earned £344.49 per week. The claimant continued in the employment until 17 November. He then obtained a better paid job commencing on 18 November 2019 with Spoke Deliveries from which he earns £364 per week. The claimant is continuing in that employment, and is not looking currently for other work.

72. On 28 February 2019 Mr Wilson had a WhatsApp exchange with his sister in which she reported to him that the claimant had been in a local pub saying that he had suicidal thoughts. The exchange included the following passage;

Tilt Debbie he wanted to come back to work but couldnae coz u you told everyone what was up wi him and set him back. Said a jogger stopped him and sent him to hospital.

73. Mr Wilson responded:-

25 *That's a new one since I didn't know what was up with him cause he never told me he tilt the work it to start with it was Stevie that set him*

back then emailed saying that Stevie told everyone was up with him when he never.

Note on Evidence

5 74. There was a very significant conflict in the evidence before the Tribunal. Effectively the claimant's case turns on whether Mr Gall breached his confidence, and whether Mr White said to the claimant something to the effect that he was not sure about working alongside the claimant with his suicidal thoughts.

10 75. There was direct conflict between the evidence of the claimant and Mr White as to whether he made the comment attributed to him, and there was a vigorous denial by Mr Gall that he had breached the claimant's confidence. It was also denied by Mr Wilson that Mr Gall had told him about the claimant's attempted suicide.

15 76. The Tribunal did not find this an altogether easy conflict to resolve. The claimant gave his evidence in a measured and straightforward way, as in the main did the respondent's witnesses. Both the claimant and Mr Gall on occasions made appropriate concessions. For example, the claimant accepted that he had had a conversation with Mr White in which he told Mr White that he was feeling low. Mr Gall readily accepted that he had assured the claimant that he would keep the conversation about his attempted suicide confidential. The Tribunal also accepted that Mr Gall valued the claimant as an employee, and that because of this the respondents had not taken disciplinary action against him because of the incident in Southampton, when it would have been open to them to do so.

25 77. In the circumstances the Tribunal had regard to the contemporaneous documents in order to assist it in resolving the fundamental conflict on which this case turned.

78. In this regard, the Tribunal firstly took into account the terms of the claimant's medical records.

79. The Tribunal attached very significant weight to the fact that the claimant attended his doctor on 10 January, the day after the comment attributed to Mr White was said to have been made, and reported the comment made and the effects it had on him, which resulted in his medication being increased. The claimant's version of what happened on 10 January is also reflected in his discharge letter from the Community Psychiatric Nurse.

80. Mr Eadie in his submissions suggested that the Tribunal should be careful around attaching weight to the medical records, as they were simply a record of what the claimant told his doctor. The Tribunal recognises that that is the case, however in the Tribunal's view it lacked plausibility to suggest that the claimant simply made up what Mr White said to him when he attended his doctor on 10 January.

81. Support for this is found in that the claimant attended on 3 January 2019 for on review it was noted that he was feeling and doing better. It was therefore credible that something happened (Mr White's comment to him on 9 January from which he understood his confidentiality had been breached) which caused the claimant to re-attend his doctor on 10 January to report a setback in his condition, which resulted in an increase in his medication.

82. Support for the conclusion that the GPs entry from 10 January accurately reflects what happens to the claimant, is also found in that the medical records of 14 December which contain an accurate record of the conversation which the claimant had with Mr Gall when he was first absent. The medical records record the claimant being reassured by Mr Gall supportive comments to him, and there was no dispute that Mr Gall had been supportive of the claimant at that time.

83. The fact that the claimant emailed the respondents on 10 January in the terms set out above in the Findings in Fact is also consistent with his version of events. Again, the Tribunal considered it lacked plausibility to suggest that the claimant would have sent this email had Mr White not made the comment to him. There was be no plausible reason for him to do so.

84. Mr Eadie suggested that the claimant's credibility was damaged by virtue of the fact that he had omitted to include his treatment for anxiety and depression in the respondent's Health Questionnaire. The Tribunal accepted that the claimant honestly forgot about treatment for that condition which occurred in August 2015, when he completed the questionnaire in 2018, and did not consider a great deal turned on this.

85. The Tribunal also considered the potential conflict between the claimant and respondent's evidence as to whether the claimant worked in the period from 10 to 21 December. The Tribunal was satisfied that the claimant did work between these dates. In reaching this conclusion, the Tribunal take into account that all the respondent's witnesses gave convincing evidence on this point, particularly Mr Gall, who spoke about a conversation he had with the claimant on 21 December just before the Christmas shutdown, in which he checked with the claimant that he was able to work in Southampton after the New Year.

86. The Tribunal notes that in evidence in chief the claimant's fit note covering the period to from 6 December to 3 January was put to him, and he was asked if he returned to work after 3 January to which he responded yes. In cross examination it was put to the claimant that he was signed off in December, and went back to work in January. The claimant said he tried, but felt 'down'. He was asked who he spoke to, he said that he spoke to John. It did not appear in this context that there was clear evidence from claimant to the effect that he had not worked in the period from 10 the 21 January. The fact this was the case caused the Tribunal to conclude that while some weight attached to the apparent inconsistency about the dates worked by the

claimant, this could not be considered determinative in assessing the credibility of the claimant on the central issue in the case.

5 87. The Tribunal also considered Mr Eadie's submission to the effect that the claimant's denial of an alleged comment to Mr Wilson to the effect that he was not returning to work because he got more money on the 'bru', impacted on the credibility of his evidence overall.

10 88. Mr Wilson's evidence was that he phoned the claimant after he resigned, and the claimant told him he was resigning because he would get more money on the 'bru', than he would if he continued to work. The Tribunal was not persuaded the claimant made this comment. Firstly, it is inconsistent with the reason he gave for resigning in his email of 1 March, and secondly the claimant did not apply for benefits when his employment came to an end .

15 89. On the balance of probabilities, the Tribunal concluded that Mr White made the comment attributed to him on 9 January to the claimant, as set out in the Findings in Fact.

20 90. The Tribunal also had to determine whether Mr Gall breached the claimant's confidence by telling Mr Wilson and Mr White about the claimant's conversation with him about his attempted suicide. The claimant is unable to identify when that alleged breach of confidence took place, but asks the tribunal to draw the inference that it must have occurred at some point between the claimant's conversation with Mr Gall in December and Mr White's comment on 9 January.

91. Mr Gall denied having breached the claimant's confidence.

25 92. The Tribunal found it significant that the claimant had only told his doctor, his partner, and Mr Gall about his attempted suicide. There was no challenge in cross examination to the claimant's evidence on this point, and the Tribunal accepted this evidence. While it was not accepted by the respondents that Mr

Gall breached the claimant's confidence it was not part of the respondent's case that Mr White could have found, or did find out about the claimant's suicide attempt from some other source. Their position simply was that neither Mr White nor Mr Wilson knew about it, until in Mr Wilson's case his sister told him in February 2019. The Tribunal was however satisfied that Mr White had made a comment to the claimant about his suicidal thoughts, which strongly supported the fact that he knew about the claimant's attempted suicide. In the absence of any plausible explanation from Mr White as to how he became aware of his, and in light of the Tribunal's conclusion that the claimant had told no one about his attempted suicide apart from his doctor, his partner and Mr Gall, the Tribunal was prepared to draw the inference that he had been told by Mr Gall about the claimant's disclosure to him that he had attempted suicide.

93. In reaching this conclusion the Tribunal also attaches some weight to the respondent's response to the claimant's email of 10 January, and the investigation which was carried out on 14 January. The claimant's email does not suggest that he is looking to pursue a complaint or a grievance. The fact that the respondents acted so promptly is not of itself a matter which the Tribunal attaches a great deal of weight to, but it is an adminicle of evidence which suggests that there was a concern on the part of the respondents about the allegation made. Added to this is the fact that Mrs Gall interviewed Mr White. Mr White was not identified in the claimant's email complaining about a breach of confidentiality. Mrs Gall said that she interviewed Mr White because some further information was received from the claimant either via email or text at some point in the period between 11 and 14 January identifying Mr White. This, however, was not produced to the Tribunal, and the Tribunal did not consider it plausible that the claimant provided additional information (which he had not been asked for), within such a short time frame, or that the respondents had not produced this additional information for the purposes of this hearing, had they in fact received it.

94. The fact that the respondents interviewed Mr White, who it subsequently emerged was the person the claimant said made reference to his suicidal thoughts, suggested that the respondents had some awareness of the fact that Mr White was privy to information about the claimant's attempted suicide.
- 5 95. Mr Eadie referred to the fact that the claimant had not responded to the invitation to lodge a grievance. The Tribunal however found the claimant's reason for this to be entirely plausible, in that it was credible he did not consider it was worth lodging a grievance against Mr Gall, which would be investigated by his wife. While Mrs Gall said there was an external means of
10 investigating the grievance, this was not information which she imparted to the claimant in her letter of 14 January; inviting the claimant to indicate if he had a difficulty with her undertaking investigation, would not necessarily alert the claimant to the fact that his grievance could be investigated independently.
- 15 96. The Tribunal also considered Mr Wilson's evidence. Mr Wilson denied having any knowledge of the claimant's attempted suicide until he was told about it in a WhatsApp exchange with his sister on 26 February. In support of this position he relied on the terms of his response to his sister's comment, which are noted above in the findings of fact.
- 20 97. Mr Wilson could offer no explanation for his mother's comment on her Facebook exchange with the claimant's mother.
98. In assessing this evidence, the Tribunal take into account that it has not heard from Mr Wilson's mother or indeed from Mr Wilson's sister.
- 25 99. The Tribunal however has to reach a conclusion on the balance of probabilities. Mr Wilson's mother's Facebook exchange contains what on the face of it is a clear statement to the effect that she has been told by Mr Wilson about the claimant's attempted suicide. Mr Wilson had no explanation for this, suggesting that his mother would need to answer questions about that. He did not know however deny that this was the Facebook exchange between

his mother and his aunt. Nor did he suggest that the reference to John in the message was not a reference to him.

100. Mr Wilson's WhatsApp exchange with his sister contains a denial about him knowing what was wrong with the claimant, however that denial is made in the context of WhatsApp exchange in which an accusation is being reported to Mr Wilson to the effect that the claimant was alleging that Mr Wilson told everyone what was wrong with the him. The Tribunal considered this may have impacted on the stance which Mr Wilson took in his response to his sister, rendering it more likely that he would deny any knowledge of the claimant's mental health issues.

101. Furthermore, Mr Wilson's WhatsApp message details the fact that the claimant had made a complaint to the respondents. Albeit the information which Mr Wilson imparts appears to be incorrect, it is clear that he was aware that the claimant had lodged a complaint of some kind about breach of confidentiality, and that Stevie(Mr White) and Mr Gall were involved in this in some way. When asked how he knew about this, Mr Wilson said that Mr White had told him, but he could not recall the detail of how this information was imparted to him. Mr Gall on the other hand is said that Mr Wilson should not have known anything about the claimant's complaint, or the investigation carried out with Mr White.

102. The fact that Mr Gall's position was that Mr Wilson should not have any knowledge of the complaint or the investigation, and that Mr Wilson could not recall exactly how he came to be aware of the investigation, added to the Tribunal's impression that Mr Wilson's knowledge about the claimant's attempted suicide was not based solely on information imparted to him by Mr White about the investigation carried out by Mrs Gall, and that he knew from Mr Gall about the claimant's conversation with him in December and his attempted suicide.

103. The Tribunal also take into account the terms of the Facebook message from Mr Wilson's mother which clearly on the face of it suggest he imparted information to her about the claimant's attempted suicide, and it's overall impression of his credibility, and did not accept his denial of any knowledge
5 of the claimant's attempted suicide, and concluded on balance that Mr Wilson had told his mother the claimant's attempted suicide.

104. The Tribunal, taking into account all of these elements, also concluded on the balance of probabilities that at some point after his conversation with the claimant in December, and before 9 January, Mr Gall told Mr White and Mr
10 Wilson about the claimant's attempted suicide.

Submissions

105. Both parties helpfully produced written submissions which they supplemented with oral submissions.

Claimant's Submissions

15 106. Ms Drysdale took the Tribunal to the relevant law on disability status and constructive unfair dismissal. She urged the tribunal to reject the evidence of the respondent's witnesses, submitting the claimant's evidence should be preferred.

107. In connection with the complaint of constructive unfair dismissal she identified
20 that the breach of the implied term of mutual trust and confidence is Mr Gall's disclosure about the claimant's attempt to take his own life. She submitted that it was not unreasonable for the claimant not to pursue a grievance.

108. Ms Drysdale commented on the evidence around whether there had been a disclosure by Mr Gall, or the statement attributed to Mr White. She also
25 submitted that Mr Wilson had told his mother about the claimant's attempted suicide.

109. Ms Drysdale submitted that the claimant had resigned in response to what was a fundamental breach of contract, and that he had not delayed too long before resigning. She pointed to the fact that the claimant was off ill, and his evidence was that he was focusing on getting himself better.
- 5 110. Ms Drysdale submitted that the claimant was disabled in terms of the EQA. He had an impairment, and in the light of the evidence the Tribunal should find that the effect of that impairment was a substantial adverse and long-term effect. This was borne out by the claimant's attempts to take his life in December 2018 and two attempts again in February 2020.
- 10 111. She submitted that Mr Gall's breaching the claimant's confidence amounted to unwanted conduct, as did Mr White's comment, and Mr Wilson's telling his mother about the claimant's attempted suicide all of these she submitted had the effect of violating his dignity and creating a hostile degrading humiliating or offensive environment for the claimant.
- 15 112. She submitted that Mr Wilson telling his mother could be regarded as something done in the course of his employment as he had acquired the knowledge which he imparted about the claimant in the course of his employment.
- 20 113. In relation to remedy, Ms Drysdale referred to the Vento Bands and an Employment Tribunal decision at first instance. The figures in relation to past and future loss were agreed, although quantum was not . She submitted there was no failure to mitigate loss on the part of the claimant.
114. Ms Drysdale submitted that injury to feelings should be assessed at the top end of the lower rental band at £8,800.

Respondent's Submissions

115. Mr Eadie submitted that the claimant alleged he resigned in response to Mr Gall's breaching his confidence, and this was a last straw.
116. He submitted that throughout the period, principally from December 2018 to
5 March 2019, the respondents behaved fairly and reasonably, and they deny that they had done anything that could have amounted to a material breach of contract. He asked the Tribunal to accept and prefer the respondent's evidence as to what had occurred, and he made submissions as to the factors which the Tribunal should take into account in assessing the claimant's
10 credibility.
117. Mr Eadie referred to the fact that the claimant was invited to lodge a grievance about the incident in January 2019, but he failed to do so. This was not acceptable, and the respondents should not be punished as a result of this failure.
118. Mr Eadie made submissions as to the timing of the claimant's resignation and
15 the fact that it took almost 2 months for him to resign after Mr White's alleged comment in January. He submitted it was significant that Mr Wilson gave evidence about a conversation he had with the claimant when he resigned, in which the claimant gave a different explanation for the reason for his
20 resignation. Mr Eadie also asked the Tribunal to consider how serious the alleged conduct was, in the context of the claimant's relationship with Mr White.
119. In relation to disability status this was not accepted by the respondents. All
25 the medical records do is demonstrate the claimant has received treatment due to his mental health and that he submitted fit notes for work; this is insufficient to establish a qualifying condition. It is accepted that the claimant was prescribed medication that was not enough to amount to a qualifying condition.

120. Mr Eadie submitted the claimant had given some evidence about how he felt but he has remained in employment since April 2019 and there are no records of ongoing treatment. Other than his attendance at Men Matters there has been no evidence of ongoing treatment. He also referred to the fact that there were no up-to-date medical records produced.

121. The respondents deny any of the allegations of harassment made by the claimant.

122. In relation to remedy Mr Eadie submitted future loss should not continue until six months beyond the date of the hearing and a shorter period of a year after resignation was appropriate.

123. Mr Eadie submitted that the Tribunal should ask if the claimant had properly mitigated his loss. Had he taken appropriate steps when he resigned to find other work? He questioned why nothing happened which had been produced to substantiate the claimant's evidence that he had been applying for jobs. Mr Eadie submitted the claimant knew he was going to resign and could have been applying for jobs in advance of doing so; two months was not a reasonable timescale for the claimant to find another job. Secondly it was unreasonable for the claimant to applying for any job when he could have applied for a job using his technical skills. That therefore calls into question whether he had mitigated his loss by working at a lower level of salary.

124. Further Mr Eadie submitted any award of compensation should be reduced to reflect the circumstances of the claim and make an award that is just and equitable with reference to section 123 (6) of the Employment Rights Act 1996, to reflect that the dismissal was caused, or at least contributed to by the claimant's conduct and that should be reflected in a reduction in compensation by proportion which the Tribunal believes is just and equitable.

Consideration

Disability Status

125. The first matter which the Tribunal considered was the claimant's disability status in terms of section 6 of the EQA.

5 Section 6 (1) 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.

10

Section 6 (5)

A minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purpose of subsection (1).

15 The 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (the Guidance) does not itself impose legal obligations on the Tribunal but it must take it into account where relevant (Part two of Schedule one, paragraph 12 of the EQA).

The Guidance at paragraph B1 deals with the meaning of '*substantial adverse effect*' and provides;

20 *The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability*

which may exist among people. A substantial effect is one that is more than a minor or trivial effect.

Paragraph B4 provides that;

5 *An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day to retain isolation. However, it is important to consider whether it's effect on more than one activity, when taken together, could result in an overall substantial adverse effect*

10 *B5. For example, a person whose impairment causes breathing difficulties may, as a result, experienced minor effects on the ability to carry out a number of day-to-day activities such as getting washed and dressed, going for a walk or travelling on public transport stop but taken together, the community effect would amount to a substantial adverse effect on his or her ability to carry out normal day-to-day activities.*

15 Paragraph B1 should be read in conjunction with Section D of the Guidance which considers what is meant by '*is normal day-to-day activities*'.

Paragraph D 2 states that it is not possible to provide an exhaustive list of day-to-day activities.

20 Paragraph D3 Provides that; *in general, day-to-day activities are things that 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.*

25 D16 provides that normal day-to-day activities include activities that are required to maintain personal well-being. It provides that account should be taken of whether the effects of an impairment have an impact on whether the

person is inclined to carry out or neglect basic functions such as eating, drinking, sleeping, or personal hygiene.

Schedule 1 of the EQA contains supplementary provisions in relation to the determination of disability.

5 Paragraph 2 of schedule 1 provides;

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

(a) it has lasted 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 life of the person.

10 126 The Tribunal was satisfied that the claimant was diagnosed with depression in December 2018. The Tribunal was also satisfied that Depression is an impairment as defined by section 6 (1) of the EQA and that the claimant had an impairment.

15 127 The claimant's evidence as to the effects of his impairment was not significantly challenged, and the Tribunal's findings in fact as to the effects of that impairment are set out above.

20 128 The Tribunal concluded that the claimant suffers from low mood and has good days and bad days, and that on bad days he finds it difficult to get out of bed or motivate himself, to eat, or to maintain personal hygiene. The Tribunal also found that the claimant's social life had been significantly impacted in that he no longer wishes to socialise, he avoids social outings, does not want to go to the house, and that he avoids friends, and he has distanced himself from his friendships. Further, the Tribunal found that the claimant finds it difficult to plan ahead for the future. The Tribunal concluded that the claimant has

experienced these symptoms since December 2018 to date and is continuing to experience them.

129 The Tribunal was also satisfied that the claimant has experienced thoughts of suicide since the incident in December 2018, and the Tribunal accepted his unchallenged evidence that on two occasions in February 2020 he has again attempted suicide.

130 The Tribunal was satisfied that eating, maintaining personal hygiene, and socialising were day-to-day activities in line with the provisions in the Guidance.

10 131 The Tribunal considered the effects of the claimant's impairment in on his self-care in terms of motivation, eating, and his personal hygiene. While the tribunal takes into account that the claimant has, as he put it good days and bad days, it was satisfied that the effect of the claimant's impairment went beyond the normal differences that exist between people, that it was not trivial and minor, and that it was a substantial adverse effect.

132 In reaching this conclusion the Tribunal take into account that the claimant has continued to experience low mood and thoughts of suicide and has recently made two attempts to take his own life. This supports the conclusion that the 'bad days' which the claimant give evidence about make have a substantial adverse effect on his functioning in terms of motivation and self-care, which effects his eating and personal hygiene. The Tribunal also take into account the claimant's evidence was that his condition has significantly impacted his social life and he no longer wants to socialise. He avoids family and friends and has distanced himself from his friends. Socialising is a day-to-day activity, and therefore the claimant's impairment which results in him he no longer wishing to socialise or go out, or interact with family or friends, has a substantial adverse effect on that activity.

133 The Tribunal was not persuaded, as suggested by Mr Edie, that the claimant's ability to remain in employment in the period from April 2019 to date was a significant indicator that there was no substantial adverse effect as a result of his impairment, in light of the other facts found by the Tribunal. This is particularly so, as there was no challenge to any of the claimant's evidence as to the effects of his impairment.

134 In reaching these conclusions, the Tribunal also take into account Mr Eadie's submission to the effect that there was no up-to-date medical evidence to support ongoing treatment or the claimant's evidence as to recent events. The claimant however was not cross-examined on his evidence as to his suicide attempts on 6 and 8 February, and the Tribunal found his evidence on these matters convincing and had no difficulty accepting it.

135 Further, the fact that there was no medical evidence from February 2019 is not inconsistent with the claimant's evidence that the only treatment he has received since then until recently when he has attended the Crisis Team, is counselling, and he has attended weekly counselling sessions. The claimant's evidence was not inconsistent with terms of the letter from the Psychiatric Nurse discharging the claimant at the end of January 2019 and recommending counselling, which the claimant has regularly attended. The Tribunal therefore did not draw any adverse inference from the fact that up-to-date medical evidence was not produced, particularly taking into account the proximity of this hearing, to the events in early February.

136 The Tribunal also considered whether the effects of the impairment were long-term. Taking into account the claimant's evidence as to the ongoing effect of his impairment and his most recent suicide attempts in February 2020, the Tribunal was satisfied that that the effect of the claimant's impairment had lasted for at least 12 months.

137 The effect of these conclusions is that the Tribunal was satisfied that the claimant was a disabled person section 6 of the EQA.

Claim under Section 26 of the EQA

138 Section 26 of the EqA which provides:

“26

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

5 (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*

10 (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).*

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(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;*

20 (b) *the other circumstances of the case;*

(c) *whether it is reasonable for the conduct to have that effect.”*

139 The claimant alleges three acts of harassment. The first is Mr Gall's breach of confidentiality in telling Mr Wilson, and Mr White about the claimant's

conversation with him in which the claimant disclosed that he had attempted to commit suicide. The second act is Mr White saying to the claimant on 9 January words to the effect '*I don't know how I feel about working alongside you and your suicidal thoughts*'. The third act is Mr Wilson disclosing to his mother that the claimant had attempted to commit suicide.

5

140 For the reasons given above the Tribunal was satisfied that Mr Gall had breached the claimant's confidentiality and had told Mr Wilson and Mr White about his conversation with the claimant in which the claimant disclosed he attempted to commit suicide. The Tribunal was also satisfied, for the reasons given above, that on 9 January Mr White commented to the claimant that he did not know how he felt about working alongside the claimant with his suicidal thoughts.

10

141 The Tribunal was also satisfied that Mr Wilson had told his mother about the claimant's attempted suicide. The Tribunal however considered the terms of section 109(1) of the EQA, which provides that anything done by a person (A), during the course of his employment must be treated as being done by the employer.

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142 The Tribunal was not satisfied that Mr Wilson's disclosing to his mother that the claimant attempted to commit suicide was something done by him in the course of his employment. The fact that Mr Wilson acquired this knowledge during his employment is not sufficient as suggested by Ms Drysdale, to render a communication with his mother, something which was entirely out with the sphere is out of his employment, something done in the course of his employment. In reaching this conclusion, the Tribunal considered Ms Drysdale submission as to the need to apply a purposive approach and the meaning of '*in the course of employment*' in the case of *Chief Constable of the Lincoln Shire Police v Stubbs (1999) IRLR*. That case applied the test explained by the Court of Appeal which concluded that the words in the course of employment are to be construed in the sense that every person would understand them. A disclosure made to a family member, entirely outside the

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work sphere, who is not a fellow employee cannot, applying that test, cannot be construed as something done in the course of employment.

5 143 The Tribunal considered whether the other two acts amounted to unwanted conduct related to relevant protected characteristic, which in this case is the claimant's disability on the basis of depression.

10 144 The Tribunal concluding that each of acts complained of did amount to unwanted conduct and that that conduct related to the claimant's disability. There was no issue that the claimant did not want Mr Gall to disclose his attempted suicide, and indeed Mr Gall accepted that he had told the claimant that he would keep his conversation with him about this confidential. The information disclosed, and the basis of the comment made by Mr White was directly related to his disability. The claimant's reaction to Mr White's comment supported the conclusion that this was unwanted conduct.

15 145 Having reached that conclusion, the Tribunal then went on to consider whether the conduct had the proscribed purpose or effect in terms of section 26 of the EQA.

146 The Tribunal could reach no conclusion as to the purpose of the conduct, as there was no evidence to support a conclusion in relation to this, but it did consider the effect of the conduct.

20 147 In deciding whether the conduct has the proscribed effect, the Tribunal applied the tests set out in Section 26 (4) of the EQA . It took into account firstly, the claimant's perception; secondly the circumstances of the case; and thirdly whether it was reasonable for the conduct to have that effect.

25 148 The tests which the Tribunal has to apply have both subjective and objective elements to it. The subjective element requires the Tribunal to look at the effect of the conduct of the alleged harasser on the claimant. The objective part requires the Tribunal to consider whether it was reasonable for the

claimant to claim that the conduct had that effect. The Tribunal also takes into account the overall circumstances of the case.

149 The Tribunal was satisfied, applying a subjective test that the breach of
confidence by Mr Gall and the comment made by Mr White had the effect of
5 violating the claimant's dignity, and creating a humiliating and degrading
environment for him. The Tribunal's conclusion on this this is supported by
the claimant's reaction to Mr White's comment's, on the basis of the comment
itself, and also on the basis that he discovered by virtue of this comment being
10 made that his confidentiality had been breached. This prompted him to attend
his doctor again, where he was prescribed increased medication because of
a setback in his recovery. The Tribunal accepted the claimant's evidence that
he felt socked, annoyed and embarrassed and that he felt 'down' and low,
and that he felt there was a difficult atmosphere work and he was worried
15 about who else knew about his attempted suicide, as he did not want people
to know about his mental health issues. All of these elements support the
conclusion, that subjectively the conduct complained of had the prescribed
effect.

150 The Tribunal also considered whether objectively it was reasonable for this
conduct to have that effect. The information disclosed by the claimant to Mr
20 Gall was a very sensitive and personal nature and objectively, it was
reasonable for the claimant to want this to be kept confidential. Again,
applying an objective test, it was reasonable for the claimant to feel shocked
and embarrassed and 'down', and to feel that that the atmosphere work was
difficult for him, as a result of Mr White's comment to him on 9 January, not
25 only on the basis of the comment itself, but also on the basis that it altered
him to the fact that his confidence had been breached.

151 The Tribunal therefore concluded that the conduct complained of did have the
prescribed effect, and the claim under Section 26 succeeds.

Constructive unfair dismissal claim

152 Section 94 of the Employment Rights Act 1996 (the ERA) provides that an employee has a right not to be unfairly dismissed. Section 95(1) (c) provides'

5 '*The employee terminates the contract under which he is employed (with or without notice) in circumstances in which she is entitled to terminate without notice by reason of the employers conduct*'.

153 The leading case to which the Tribunal was referred is *Western Excavating (ECC) Ltd v Sharp (1978) ICR 221*. Lord Denning found the conduct which gives rise to a repudiated breach of contract in the following terms;

10 *If employer is guilty of conduct which is a 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 the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, he terminates the contract by*
15 *reason of the employers conduct. He is constructively dismissed.*

154 The employee must not delay too long before resigning in response to the breach. If the employee does delay, then they will be taken to have affirmed the contract. Whether there has been affirmation of the contract depends on the circumstances of the case.

20 155 There is an implied duty of trust and confidence between the parties to any contract of employment *Malik & Mahmud v Bank of Credit and Commerce International SA (1977) ICR 606*.

156 Any breach of the implied term of trust and confidence will amount to a repudiated breach (*Morrow v Safeway Stores (2002) IRLR 9*).

157 The contract term relied on is the implied term of mutual trust and confidence. There is no issue that there was such a term implied into the claimant's contract of employment.

5 158 In order for the claim to succeed however the Tribunal also has to be satisfied that the claimant resigned in response to that breach and that he did not delay too long in resigning, thus affirming the contract.

10 159 Mr Eadie made submissions as to the reason for and the timing of the claimant's resignation. He submitted that the claimant relied upon what happened in early January, but took almost 2 months to resign, emailing his resignation on 1 March and there was no explanation for such a delay. Mr Eadie submitted that other than the submission of fitness to work certificates there is no contact between the parties which calls into question the reference by the claimant to a last straw and what he says amounts to a last straw.

15 160 Mr Eadie also asked the Tribunal to consider how serious the alleged conduct was, subject to it being denied, against the background where the claimant had tried to commit suicide in December 2018, but was yet able to come back to work in less than a week, and he questioned whether in a discussion with his friend and colleague Mr White, was the alleged comment so serious that he had to resign from his employment? Mr Eadie submitted it was important to bear in mind that the claimant had known Mr White for more than 15 years, and that in the claimant's text to him shortly after this discussion he did not raise the point about the alleged suicide comment but this is now relied on as a reason for dismissal.

25 161 The claimant however does not rely upon multiple breaches culminating in a last straw as suggested by Mr Eadie. He relied upon a single breach, which is Mr Galls breach of his confidence in telling Mr White and Mr Wilson about the claimant's disclosure to him that he had attempted to commit suicide.

162 Mr Gall accepted that the claimant disclosed information about his attempted
suicide to him in confidence that he had agreed not to disclose this
information. The Tribunal was satisfied that Mr Gall's disclosing this
information to others in the workplace amounted to a breach of the implied
5 term of mutual trust and confidence entitling the claimant to resign.

163 The Tribunal considered the timing of the claimant's resignation and whether
there had been a delay between the claimant discovering the breach, and his
resignation, such that he could be taken to have affirmed the contract. The
period between the claimant discovering the breach and his resignation from
10 his employment is from 9 January until 1 March.

164 The Tribunal derived assistance in considering this question from the
judgment of the president of the EAT, Mr Justice Langstaff in the case of
the case of *Chindove v William Morrisons Supermarkets PIC UKEAT*
0201/13/BA referred to by Ms Drysdale. Paragraphs 25/26/27 of that
15 judgement;

*25. This may be interpreted as meaning that the passage of time in itself
is sufficient for the employee to lose any right to resign. If so, the question
might arise what length of time is sufficient? The lay members tell me that
there may be an idea in circulation but four weeks is the watershed date.
20 We wish to emphasise that the matter is not one of time and isolation.
The principle is whether the employee has demonstrated that he has
made the choice. He will do so by conduct; generally by continuing to
work in the job from which he need not, if he accepted the employer's
reputation is discharging him from his obligations, have had to do.*

*26. He may affirm a continuation of the contract and other ways; by what
he says, by what he does, by communications which show he intends the
contract to continue. But the issue is essentially one of conduct and not
time. The referenced to time is because if, in the usual case, the
25 employee is at work, then by continuing to work for a time longer than the*

time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; it all depends on the context.

...

5 27. *An important part of the context is whether the employee was actually at work, so that it could be concluded that he was honouring his contract and continuing to do so in a way which was inconsistent with his deciding to go. Where an employee is sick and not working, that observation has nothing like the same force.*

10 165 The Tribunal took into account the length of time between the claimant discovering that there had been a breach of his confidence, 9 January, and his tendering his resignation on 1 March. Clearly this is not an inconsiderable period. It also took into account that the claimant was not working during this period, and was only in receipt of statutory sick pay. There was no contact
15 between the claimant and the respondents such as to suggest that the claimant was affirming the contract and intended to continue to be bound by its terms. The Tribunal accepted the claimant's evidence that in the period from January until 1 March his focus was on trying to get better, rather than dealing with issues arising from his employment.

20 166 The Tribunal had regard to the length of time between the claimant discovering the breach and his resignation, but considering that against these other factors it concluded that the claimant had not affirmed the contract and had not delayed too long in tendering his resignation.

167 The Tribunal also considered whether the claimant resigned in response to
25 the breach.

168 The Tribunal concluded that the claimant resigned in response to the breach. For the reasons given above it did not accept that a conversation took place between the claimant and Mr Wilson in which he told Mr Wilson that he was

going to resign because he was better off on the 'bru'. In addition, significantly, the claimant's letter of resignation identified the breach as a reason why he was resigning.

5 169 The Tribunal also considered Mr Eadie's submissions that the claimant should have pursued a grievance, and that simply ignoring the grievance procedure matter was unacceptable and the respondent should not be punished as a result of him doing that. The Tribunal however was satisfied with the claimant's explanation as to why he did not pursue a grievance, and did not conclude anything current and this.

10 170 The effect of these conclusions is that the claimant's complaint of unfair dismissal succeeds.

Remedy

15 171 The claimant has succeeded in his complaint of unfair dismissal and disability discrimination, however there is no double counting in assessing remedy. Section 126 of the ERA provides that where compensation falls to be awarded in respect of any act both under the provisions of the ERA relating to unfair dismissal and the EQA the Tribunal shall not award compensation under either of those Acts in respect of any loss or other matter which is it has really been taken into account under the other act by the tribunal awarding
20 compensation.

172 The Basic Award is assessed under the principles of the ERA , and was agreed as £1,016.

25 173 Tribunal assessed the other elements of compensation under the principles outlined in the EQA. It is appropriate to take this approach, as there is no limit on the compensatory award under the EQA, as it is under the ERA.

174 Section 124 of the EQA provides at section 124 (2) (1) that a Tribunal may order the respondent to pay compensation to the complainant.

175 Subsection (6) provides that the amount of compensation which may be awarded under subsection 2 (b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119.

176 The parties had very helpfully agreed the following elements of the claimant's loss relating to income;

1.	Compensatory Award – Past Losses	£8,226.68
2.	Future loss (6 months future loss of earnings)	£2,799.61
3.	Loss of statutory rights	£350

177. Albeit these figures were agreed, quantification of the claim was not and Mr Eadie submitted that the claimant had failed to mitigate his loss.

178. The figure for past loss of earnings reflects the difference between what the claimant would have earned had he remained in the respondent's employment until the date of the hearing, and what he has earned from the employment which he has obtained since his dismissal. The claimant obtained work commencing on 21st April. He then sought and obtained a better paying job commencing on 18 November. The claimant's earnings from that employment are £364.06 per week.

179. It is for the claimant to establish his loss, but it is for the respondent to establish that he has failed to mitigate that loss. There was no evidence before the Tribunal as to what kind of work the claimant could have obtained either at an earlier stage, or which would have secured a better rate of pay, to enable it to assess when the claimant might have obtained a better paying job, and what earnings he might have earned from that employment, which are steps necessary to consideration of failure to mitigate loss.

180. The Tribunal was not satisfied that the claimant had failed to mitigate his loss in circumstances where he obtained work less than two months after his employment came to an end, and thereafter secured a job which gave a better income.

5 181. The Tribunal was also satisfied that a period of six months from the date of this hearing is a reasonable assessment of the claimant's future loss of earnings. The claimant gave evidence to the effect that he was not currently looking for other employment, and applying a broad brush to matters the Tribunal considered six months a reasonable period within which it could be
10 expected that the claimant might achieve the same income as he had received with the respondents.

182. No argument was made in relation to the assessment of loss of statutory rights.

15 183. Mr Eadie suggested that the Tribunal should reduce any award for compensation for loss of earnings on the basis that the claimant contributed by his conduct to his dismissal.

20 184. In order to reduce compensation on the grounds of contributory conduct under Section 123(6) of the ERA the tribunal would require to be satisfied that the claimant's conduct caused or contributed to his dismissal. There was no evidence before the tribunal that the claimant's conduct had contributed to his dismissal and therefore the Tribunal declined to make any deduction on the basis.

25 185. The Tribunal therefore shall award compensation for loss of earnings, to include the basic award, as the claimant succeeded in his claim of unfair dismissal claim, of £11,976.29.

Injury to Feelings

186. The Tribunal then turned to assessment of injury to feeling. Awards for injury to feeling are designed to compensate the injured party, but not to punish the guilty party.
- 5 187. The leading guidance on the quantification of this head of claim is contained in the case of *Vento v Chief Constable of West Yorkshire Police 2003 ICR 318*, referred to by Ms Drysdale which set out what has come to be known as the 'Vento Bands'.
188. There are three bands, described in paragraph 65 of the judgement.
- 10 189. The Vento guidelines have been adjusted to take account of inflation. In June 2019 when this case was presented, the lower Vento band sat at £900 to £8,800; the middle band at £8,800 to £26,300; and the top band at £26,300 to £44,000.
- 15 190. It was stated in Vento that the top band should be awarded in the most serious cases such as where there has been a lengthy campaign of discriminatory harassment, and that only in the most exceptional cases should not award exceed the top of the top band. It was said the middle band should be used for serious cases, which do not merit an award in the higher band, and at lower band was appropriate for less serious cases such as where an act of
20 discrimination is an isolated one-off occurrence.
191. Ms Drysdale submitted that an appropriate award was £8,800. She submitted that this was a case with the bottom band award was appropriate, as although the harassment was serious it was not a lengthy campaign as seen in cases where the middle or upper band appropriate. She submitted however the
25 harassment involved was not an isolated one-off occurrence and therefore an award at the top of the lower band would be appropriate.

192. Ms Drysdale referred to the case of *Ms James v Capital (Care), Service (London East)* which is a decision of an Employment Tribunal at first instance, and where she submitted the facts were similar to this case. Clearly however the Tribunal was not bound by this.

5 193. In assessing damages for injury to feeling the Tribunal take into account the extremely personal and sensitive information which was disclosed in breach of the claimant's confidence, and the nature of the comment then made to him by Mr White. It also took into account the claimant's reaction to this. The Tribunal accepted that the claimant was shocked, disappointed and annoyed
10 and embarrassed, that he felt very 'down' and low and that he felt the atmosphere at work was made difficult for him (to the extent he did not actually return to work), and he was worried about who else within the workplace may have known about his attempted suicide. The Tribunal also take into account that as a result of Mr Gall's breach of confidence, and Mr White's comment,
15 the claimant's recovery was set back. He required to attend his doctor and his medication was increased, and he was unfit for work until March.

194. In assessing these elements, the tribunal was satisfied that while there were only two incidents, they were of a distressing nature, and their impact on the claimant was as described above, and was not insignificant. The tribunal
20 therefore assessed damages at the top of the lower Vento band, and shall make an award of for injury to feeling of £8,800.

Interest on Award

195. While the Tribunal was not specifically addressed on the calculation of interest on the award it was raised with parties, and they both agreed that the
25 principle to be applied was that for the purposes of injury to feelings award interest would run at 8% from the date of the act of discrimination until the date of the hearing, and on the loss of income element from the midpoint between date of the act of discrimination, and the date of calculation of interest which is 27 February.

196. It is a peculiarity in this case is that while the Tribunal having concluded that Mr Gall disclosed confidential information, it could not identify a specific date for this. The Tribunal therefore considered that the appropriate way to deal with this in the purpose of calculation of interest was to treat the date of discrimination as 9 January.

197. The period from 9 January to 27 February is one year and seven weeks.

198. Interest, at 8% on the injury to feeling award of £8,800 for that period amounts to £798.77.

199. Interest at 8% runs on the award for past loss of earnings of £8,226.68 from the midpoint between 9 January 2019 and 27 April 2020, which is a period of 29.5 weeks, and amounts to £373.36.

200. The claimant's total award is therefore calculated as follows;

Basic award	£1,016
Compensatory award past losses	£8,226.68
Future loss	£2,799.61
Loss of statutory rights	£350
Injury to feeling damages	£8,800
Interest	£1,172.13
Total	<u>£22,364.42</u>

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201. The total award to the Tribunal shall make is therefore **£22,364.42** .

202. The recoupment regulations do not apply.

Employment Judge:

L Doherty

Date of Judgement:

10 March 2020

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Entered in Register,

Copied to Parties:

16 March 2020

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