Case Number: 1400676/2019

EMPLOYMENT TRIBUNALS

Claimant: **Miss R Whatton**

Respondent: **Bournemouth University**

Heard at: **Bristol Employment Tribunal Via CVP** **On: 27, 28, 29, 30 and 31 July and 3 and 4 August 2020**

Before: **Employment Judge Hargrove sitting alone**

Representation
Claimant: **Mr Bidnell-Edwards, Counsel**
Respondent: **Mr P Keith, Counsel**

JUDGMENT having been sent to the parties on 10 August 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By an ET1 received on 27 February 2019, the claimant made claims of discrimination on the protected characteristic of her disability in respect of her treatment as a member of the team of ALS Coordinators at Bournemouth University. She commenced her employment on 4 June 2018 and resigned on a week's notice on 13 January 2019. She had previously been employed at Leicester University, although I accept that there were differences in the work and the way in which she was required to perform it at Bournemouth compared to Leicester.

2. The claims which were identified at a case management hearing on 26 September 2019 following the submission by the claimant of amended grounds of claim were of:

(i) Indirect discrimination contrary to Section 19 of the Equality Act.

(ii) Failure to make reasonable adjustments contrary to Sections 20 – 21.

(iii) Discrimination arising from disability contrary to Section 15 of the Act.

(iv) Victimisation contrary to Section 27 of the Act.

3. The claim of unfair dismissal contrary to the Employment Rights Act was earlier struck out on the basis that the claimant had insufficient length of service to bring such a claim. Very late in this hearing Mr Bidnell-Edwards for the claimant indicated in response to some prompting from the Tribunal that the claimant would only be relying on claims three and four and would therefore not be pursuing any further claims one and two. That was a sensible decision based on the proposition which is made clear in a decision of Lord Justice Elias in **Griffiths v Secretary of State for the Department for Work and Pensions.** Claims of indirect discrimination, failure to make reasonable adjustments very frequently overlap with claims of unfavourable treatment because of something arising from disability under Section 15. It is unnecessary to bring all 3 heads of claim.

4. The specific issues relating to each head of claim were identified in paragraph 9 – 14 of the Case Management Orders at pages 52 – 55 of the bundle. Paragraph 10 is now of particular significance as setting out all of the detrimental acts about which she claims under Section 15, including constructive dismissal However, the respondent was given leave thereafter to submit and amend its grounds of resistance, which it did on 14 November 2017 (see pages 74 – 81). The respondent asserted that that if there were any disadvantageous acts under Section 15 they were justified as pursuing a legitimate aim as identified in paragraphs 23 and 28. In respect of the claim of victimisation it was originally denied that the claimant had done a protected act, although that is now conceded, but it was and is now disputed that she had been subjected to any detriment because of it. The respondent also claimed that if the claimant was constructively dismissed, the claimant's employment would have ended at some stage in any event under the principles in **Abbey National v Chagger 2010 ICR 397**.

5. As to disability, the respondent had admitted that the claimant's impairment of ADHD constituted as disability as defined in Section 6 Schedule 1 to the Equality Act. The claimant was first diagnosed with the condition in November 2017 at the age of 47 and at a time when the claimant was still employed by Leicester University. There was at the start of this hearing no medical or other expert evidence before the tribunal concerning the specific adverse effects of the condition upon her normal day-to-day activities. The claimant described what the adverse effects were upon her in paragraph 3 of her witness statement. She said "it can impact on a person's emotions, behaviour and the ability to learn new things." (see also paragraph 2 of the amended particulars to claim at paragraph 42). It particularly affects her ability to concentrate and significantly alters the duration of time it takes for the claimant to complete normal everyday activities. It was only at the

submission stage of this hearing that the claimant's original disability impact statement and diagnosis report of November 2017 were disclosed together with some GP records. These are of some significance. I do not blame either Counsel for the failure to have included them. It was clearly an oversight and was not in any sense deliberate on either side. It is also agreed that the claimant notified the respondent at her competitive interview on 10 April 2018, in the equal opportunity monitoring form at page 100,and in the oral interview attended by the respondent's witnesses, TJT, her subsequent line manager Ms Scholes and Jackie Besant (one of the team of ALS Coordinators) that she had that condition. It is also not in dispute that she was told that the condition would be an advantage to her and the University interacting with students with learning difficulties who accessed the respondent's ALS service, many of whom were themselves disabled. She was notified that she would be offered an academic mentor. This was confirmed to her in a telephone call from TJT when she was notified that she had been successful and was offered the job. There were however, undisclosed limitations on that offer, in particular as to when the mentor would be available.

6. During the course of the hearing the Tribunal acceded to the claimant's application for adjustment of the process to permit her to take breaks at least five minutes every thirty-five minutes when she was giving her evidence, later altered to ten minutes every forty-five minutes when she had finished.

7. Notwithstanding the claims of discrimination the parties consented to the proceedings being heard by an Employment Judge sitting alone and by CVP during the currency of the COVID restrictions.

8. A hard copy of the bundle of documents constituting 550 pages was couriered to me to which a further 35 or so pages were added at the outset of the hearing and more pages during the submission stage.

Chronology

9. The Tribunal now sets out a chronology of the main events n the course of which the Tribunal will identify the issues which the Tribunal has to decide. The initial burden lying upon the claimant subject to the burden of proof provisions in Section 136 of the Equality Act, the claimant began. The respondent's witnesses were:

    (i) Mr T J Thomas, referred to as TJT, The Operations Manager of ALS who took over as Head of ALS on Ms Scholes retirement in September 2019.

    (ii) Ms Sue Morgan (SM), ALS Student Coordinator.

    (iii) Ms Paula Callaghan (PC), ALS Student Coordinator who principally worked at a different campus from where the claimant worked.

    (iv) Ms Mandy Barrack (MB), Director of Student Services including supervision of the ALS function

    (v) Ms Christo Lippold (CL), HR Manager for ALS.

10. I am grateful to Mr Keith for providing at short notice a chronology but it was not sufficient in itself to provide an overall view of the relevant background. In addition, the claimant's witness statement contains a series of errors as to the dates on which important events occurred and refers to the contents of some emails about which she could have had no knowledge before she made her decision to resign. It also omits some relevant detail.

    10.1 The claimant had been previously employed at Leicester University in a capacity which was similar to her employment as an ALS Coordinator with the respondent, although there were differences in the procedures adopted. In particular Leicester used a system which was principally paper based whereas Bournemouth relied much more on a computer based system.

    10.2 I accept that the claimant was notified at the time of her successful interview, with the knowledge of her ADHD, that she would be appointed an academic mentor.

    10.3 She commenced the employment on 4 June 2018 on 18.5 hours per week working principally Monday, Wednesdays and Fridays. She worked in an open plan office at the Talbot campus in particular with a team of coordinators which included Jackie Besant (JB), Jackie Watkins and SM. SM, I accept, worked the summer months on Tuesdays and Thursdays and was on annual leave for three weeks during the long vacation and thus did not usually work with the claimant during this period. PC habitually worked at another campus although she did occasionally during the summer months, work at Talbot campus.

    10.4 There are significant factual issues as to the degree of training the claimant received in the application procedures relating to the management of students accessing the ALS system, who were, for example, in need of financial support under the DSA system and were eligible for adjustments to their exam arrangements (see the summary of main duties on the reference request at page 108 which sets this out). As to training, the issue is whether or not the claimant received sufficient training to be able to perform the important tasks of an ALS Student Coordinator taking into account her disability. The relevant documents are set out in the bundle at page 147 – 149 which is the induction checklist and iterative documents which recorded the dates when various induction events took place from 6 June 2018 – 5 September 2018 and which were signed on that date by the claimant and TJT and further, pages 549 – 582. The claimant's case is that she was not given any sufficient face to face training in particular by the two Jackies and , sometime in late August, JB told her that her training was "shit" and she and the other Jackie gave her documents from the I drive in hard copy which she had not previously accessed. These documents are the supplementary documents at page 550 – 582 and included materially the document at page 573. The claimant says that this lack of training was aggravated by her inability to have access from the start of her employment to the academic mentor, who was Lesley Laver (LL).

10.5 The respondent's case is that the claimant was buddied by the two Jackies from the start and was instructed how to access the online procedures on the I drive. If and insofar as she was given hard copies of the procedures in August 2018, these were merely reminders of what she had been taught before; that the claimant had not asked for mentoring before September 2018 and the mentor was not contracted, as it later transpired to provide mentoring during the summer vacation and was only contracted in any event to provide assistance for students and not staff.

10.6 The claimant claims that for the first seven weeks she was principally involved in the sifting of student files in a back office. She would sort out those which were no longer relevant because the student was no longer a member of the University and/or had completed their course. This was a quiet period after the end of the previous academic year. Matters became more busy later in the summer, from August onwards and, in particular, at the beginning of September when the new students started to register for ALS either by email or telephone.

10.7 Mentoring It is necessary to mention that the term mentor had two meanings in different contexts. The "academic mentor" (LL) who had the traditional role of supporting the employee outside the management structure; and what was called the "work mentor", more appropriately called a buddy, identified in the case of the claimant in the induction checklist as being the two Jackies, SM and PC. It only became apparent during the evidence given orally by TJT that the University only had a contract with the academic mentor,LL, during term time and for students only. This had the result that she was not available to the claimant during the important period beginning with the start of her employment and ending with the beginning of term which meant that she did not in fact see the mentor until 28 September 2018 which was, in the particular circumstances of this case, too late to be able effectively to support the claimant in her ADHD at a critical period. She herself had ADHD and there is an email from her which demonstrates that she had considerable insight into that condition and its likely effects upon the claimant, although she has not been called to give evidence.

10.8 Mistakes and the alleged bullying of the claimant in consequence of them. It is the claimant's case that, with greater regularity from August to September when the new intake students starting arriving for the year beginning the third week in September, she was subjected to email and face to face criticisms for making mistakes in the input of data and the booking of appointments for students, from the two Jackies and on three occasions over a five minute period on one day from PC. There are examples of mistakes contained in a series of emails in particular set out in SM's witness statement at paragraph 17. In summary, the claimant does not deny that she made some mistakes but asserts that it was due to her lack of training, in particular in the folder on the I drive dealing with student information. She also asserts that at least two of the mistakes were due to insufficient information or inaccurate information in the system which she drew to TJT's attention

when he starting managing her directly, after 20 September 2018 and he corrected. In particular, and it is an important issue in the case, she claims that the mistakes which she made were a manifestation of her ADHD.

10.9 In the first week in September 2018, SM was asked by CS and TJT to take over the sole responsibility for the buddying of the claimant. It is to be noted that SM had habitually worked Tuesdays and Thursdays during the summer vacation but only worked on Mondays during term time. The claimant's non working days were Mondays, Wednesdays and Fridays although she sometimes swapped shifts with other coordinators on other days. In addition, SM did on occasions work on other days during the week. SM was aware that the claimant made mistakes and had difficulty attending to detail. She was also aware that the claimant sometimes had difficulties with her hearing.

10.10 When she was given the responsibility for buddying the claimant in September, it was arranged that she would collate issues about the claimant's performance, obtained from other coordinators including the two Jackies.

10.11 SM had two meetings with the claimant. The first on 12 September 2018, the second on 19 September 2018. The feedback notes of the first meeting was sent to the claimant on the same day (see pages 156 – 157). There are fourteen specific bullet points of topics or points raised.

10.12 The notes of the second meeting on 19 September are at pages 167 – 168. The topics raised in the second meeting included:

(i) A reminder to copy in all the student calls status to the emails she had sent out to students;

(ii) That she can be conscious of what the priorities were for her in managing her caseload;

(iii) To use her phone amplifier to help with her hearing;

(iv) To respond to enquiries from students coming to the office in a timely manner given that they were stressed;

(v) Not to interrupt other coordinators when they were dealing with their students in an open plan office;

(vi) The importance of double checking e-folders for existing students before creating new folders, to avoid duplication.

10.13 Another issue she raised was the issue of missed red flags. The background of that issue was that the administration earmarked red flag emails received from students accessing ALS for the urgent attention of the coordinators, who acted on a daily rota. The claimant was responsible for dealing with red flags on Mondays and other coordinators on other different days. One of the mistakes which the

claimant was alleged to have made was that she failed to deal with all of her red flags. The claimant claims however, that she did do all of her red flags but was criticised, unfairly she claims, for not dealing with the non red flag emails. I do not accept her evidence on this particular aspect of her case. At this meeting SM claims, and I have no reason to doubt her evidence on this point, that she rearranged the claimant's inbox so that all red flag emails appeared first in priority.

10.14 It is to be noted that other coordinators were also copied into these emails. In addition, in paragraph 17 of her witness statement SM catalogues from July 2018 – 20 September 2018, a series of emails sent by coordinators in which they had raised errors with the claimant.

10.15 Specifically, the claimant asserts in paragraph 10(vii) of her witness statement that in early September 2018 PC unfairly criticised her three times in five minutes for not answering messages concerning ALS enquiries (red flag items). PC very rarely worked at the same time as the claimant in the Talbot office as she was based at a different campus. PC agrees that she did raise with the claimant on one occasion only in September, a failure by the claimant to respond to a red flag on a Monday which she, PC ,had picked up on, on a Tuesday and raised with the claimant on the Wednesday when they happened to be working together. I accepted there was criticism in the sense of PC bringing it to her attention, but I do not accept that it was repetitive in the way indicated by the claimant.

10.16 On 20 September the claimant responded to the meetings of feedbacks from SM in an email addressed to SM and copied to TJT at page 119. This is an important document for a number of reasons. First, while it expressed gratitude to SM for taking on a mentoring role, it referred to her ADHD in some detailed and continued "I am trying my hardest to remember everything you have told me not to do that finding your constant criticism quite draining on my mental health". She also said that she was awaiting a referral to the ADHD clinic to look at her medication needs and raised apparently for the first time in writing that she was waiting for CS to assign her an academic mentor specialising in ADHD. She also raised that she had received an email from SM on 19 September, after their meeting had ended, raising two complaints about her performance (page 193): that she had not copied an email to two of the other coordinators that she had booked an appointment with a student contrary to instructions she had been given to book by telephone.

10.17 SM was upset by the context of this email and notified TJT and CS that she would no longer be prepared to be the claimant's buddy. In consequence it was arranged that TJT would take over communication with the claimant as her buddy. SM had no further contract with the claimant at least as a buddy. On the same day 20 September the claimant removed herself from the coordinators contact group, although on 23 September she sent a placatory email to the group (page 195).

10.18 There is a chronology of the meetings which TJT had with the claimant and of other events at pages 224 – 225. In particular TJT had a first meeting with the claimant on 21 September, a second meeting on 28 September, a twelve week probationary initial meeting on 3 October and a final meeting on 5 October, on which date the claimant went off sick and never returned to work (apart from a meeting with CS and CL on 16 November) at least until her resignation on 13 January 2019.

10.19 Other events intervened. The claimant's email of 20 September above was copied by CS to LL, the academic ADHD mentor who had belatedly arrived on the scene, on 21 September (see page 119) and LL responded stating that she had been in contact and that a meeting had been agreed. The response from LL is a lengthy one (pages 189 – 190) which contained some insights into ADHD and its likely effects on the claimant, on the basis of the contents of the claimant's email and the conversation which she had had with the claimant. The meeting with LL was originally arranged for 27 September but the claimant was ill and it was rearranged for 28 September. However, the claimant does not describe it in her witness statement. LL has not been called as a witness having since left the University under a compromise agreement. TJT's reference to that meeting at page 225 states "reports from RW and LL that this went well".

10.20 On 25 September PC emailed TJT and SM reporting an error by the claimant which she had detected in a student file resulting in duplication and enquiry whether she should still be reporting these to SM. SM responded on the same day but mistakenly emailed it to the student coordinator's email where it was read by the claimant (page 276).

10.21 On 26 September, there was an exchange of emails between the claimant and TJT initiated by the claimant entitled "Leaving" (see pages 197 and 196). She said she was going to be leaving and enquired about her notice period and that she was very poorly and home in Leicester and feeling suicidal. TJT responded in a sympathetic manner.

10.22 A meeting took place between TJT and the other coordinators on the same day which was described by TJT in an email to the individual members but not the claimant on 28 September (page 198). The content of that email is of some importance.

10.23 On 2 October JB responded to TJT referring to the probation meeting due the next day with some observations critical of the claimant's conduct (page 210). This was not copied to the claimant and could have only been disclosed to her after she had commenced the Employment Tribunal proceedings, and thus cannot have played any part in her decision whether or not to resign.

10.24 On 5 October the claimant emailed TJT, CS and MB under the subject heading "Not Well" (see page 242). This is admitted by the respondent as being a protected act on the part of the claimant. It complains of bullying and harassment by the four student coordinators. She said

she was under the care of her GP and Adult Mental Health Services and had been prescribed antidepressant medication. In the final paragraph she said "I feel I am being discriminated against (because of) my disability as yes I may not be doing so well with some of the admin side of the role (possible symptom of my ADHD). I am good with the students and ran the office on my own on Tuesday afternoon but under constant criticism every minute of the day it is hardly surprising. I am making mistakes. I am petrified".

10.25 MB (page 238) notified the claimant of the contact details of the Dignity and Respect (Harassment) procedures available on the University intranet and asked for details from the claimant of the identity of any witnesses. She also asked for a sick note to be sent to the admin. She also gave details of support services available. MB was on annual leave from 11 October – 23 October. The claimant provided sick notes from 8 October onwards from her GP which reported variously depression, bullying at work and stress related problems.

10.26 The events which occurred after 5 October when the claimant went off sick are related to the claimant's further complaints of victimisation but are also relevant to the claimant's alternative claims of additional detriments. The claimant asserts and identifies that there were two detriments to which she was subjected while off sick because of her protected acts on the 5 October and in her letters to the Vice Chancellor on 30 October (page 325) and to the Chief Operating Officer on 26 November. The two complaints which she made were:

(i) Not permitting the claimant to have access to her desktop computer while off sick

(ii) Not permitting the claimant to raise a grievance while off sick.

10.27 This part of the chronology begins with a conversation the claimant had with JB on 21 October, although the claimant does not identify the date, but describes it at paragraph 14 of her witness statement. JB has not been called to give evidence but MB spoke to JB after the claimant raised the issue in an email to MB on 26 October (page 278). MB replied on the same day (page 279). This exchange confirms that the claimant was now seeking to raise a grievance. It was clearly envisaged at this stage that the respondent intended to refer the claimant to Occupational Health subject to her GP indicating that the claimant would be fit to return to work.

10.28 In her letter to the Vice Chancellor on 30 October which was copied to Karen Butters of HR the claimant clarified that she was claiming disability discrimination in respect of the criticisms of other coordinators; that she was wishing to raise a grievance; that she needed to have access to her desktop for work in order to do so; and that she was being denied access to do so. She also said that her GP and her Mental Health Nurse would confirm in writing that the sooner she was allowed to raise a grievance the lesser of the impact on her mental health.

10.29 An Occupational Health referral was completed by Karen Butters on 8 November 2018 but not seen by the claimant until 15 November. The respondent relies upon a passage at page 299 referring to the information received from the claimant about her state of health at the start of her employment and contained in her pre-employment checklist. The latter is one of the documents disclosed to the Employment Tribunal during closing submissions (pages 585 – 587).

10.30 On 16 November a meeting took place between the claimant, CS and CL. There are, disappointingly, no notes of that meeting and having regard to the gravity of the allegations being made by the claimant in her letters to the Vice Chancellor at that time there ought to have been notes. The claimant's only description of that meeting is at paragraph 17 of her witness statement. The claimant claims that she was subjected to criticisms of her performance particularly in the number of mistakes she made; that CS said that others who had ADHD also made mistakes, but not such as to cause damage to the respondent's business CL's description is at paragraph 8 of her witness statement but CL also refers to the meeting in her subsequent email of 6 December at pages 331 – 332 which was a response to the claimant's further letter on 22 October. By that stage the claimant had returned to Leicester "due to a deterioration in my health". This is claimed as detriment 3. (Detriments 4 and 5 being those identified in paragraph 10.26 above, claimed also as acts of victimisation).

10.31 On 13 January 2019, the claimant submitted a resignation letter which is to be found at page 340. "Please accept this as one week's notice as stated in my contract of employment as I am still in my probationary period termination of my employment with Bournemouth University. After suffering with my mental due to bullying and harassment from the team members I feel unable to return to an organisation that allows this kind of treatment to happen to a member of their staff knowing the impact it was having on their mental health". There was a request for three payslips to be sent to them.

10.32 That completes the chronology.

Discrimination Proceedings

11 Section 136(2) provides as follows:

> "If there are facts from which the court could decide in the absence of any other explanation that a person A contravened the provision concerned the court must hold that the contravention occurred" but Subsection (2) does not apply if A shows that A did not contravene the provision.
>
> It is initially for the claimant to prove facts from which the Tribunal could reasonably conclude that a contravention of the Act occurred; in this case, that the claimant was treated unfavourably because of something arising from disability and/or that she was subjected to a

detriment as an act of victimisation for having raised a complaint of disability discrimination. (see **Madarassy v Nomura International Plc [2007] ICR 867).**

12 In this connection I have considered the twelve point guidelines set out in **Igen Ltd v Wong** particularly related to the drawing of inferences.

13 The burden then shifts to the respondent to prove that the reason for the treatment had nothing whatsoever to do with the particular protected characteristic that the claimant relies upon, in this case, disability.

14 The next provision is Section 15 of the Equality Act.

"Section 15(1) provides that "a person A discriminates against a disabled person B if

(a) A treats B unfavourably because of something arising in consequence of B's disability.

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim. That is the justification defence.

15 Section 15(2) provides however that

> "Subsection (1) does not apply if A shows that A did not know and could not reasonably have been expected to know that B had the B had the disability".

16 The issues I have to decide in this connection are:

(i) Did the respondent know or could it reasonably be expected to know, that the claimant had the particular disability and in this connection, I have referred to paragraphs 5.14 and 5.15 of the ECHR Code of Practice on discrimination. 5.14 reads "It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not informally disclosed as for example, not all workers who meet the definition of disability may think of themselves as a disabled person". Paragraph 5.15. "An employer must do all they can reasonably expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

(ii) Was the claimant treated unfavourably? It does not say that she has to show that she was treated less favourably than someone who was not disabled. The effect of that is explained in another passage in the ECHR Code at paragraph 5.7. As to the meaning of the word unfavourably, this means that he/she must have been put at a disadvantage. Often the disadvantage will be obvious and it will be

clear that the treatment has been unfavourable. For example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. Sometimes unfavourable treatment may be less obvious.

(iii) It has to be shown that the unfavourable treatment was because of something arising from the employee's disability or in consequence of that disability.

(iv) I refer to paragraphs 5.8 – 5.10 of the ECHR Code of Practice. This means that there must be a connection between whatever lead to the unfavourable treatment and the disability. The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious such as inability to walk or inability to use certain work equipment. Others may not be obvious and there is an example which may be of some assistance. A woman is disciplined for losing her temper at work. However, this behaviour was out of character as a result of severe pain caused by cancer of which her employer is aware. The disciplinary action is unfavourable treatment. This treatment is because of something which arises in consequence of the worker's disability, namely her loss of temper. There is a connection between the 'something', that is the loss of temper that led to the treatment, and her disability. It will be discrimination arising from disability if the employer cannot objectively justify the decision to discipline the worker".

17 Next, I turn to Section 39 of the Equality Act of the Equality Act. There are various heads of claim at which victimisation and discrimination arising from something to do with disability. They are incorporated into the employment field in Section 39 which describes prohibited conduct. Section 39(2) states that:

> "an employer must not discriminate against an employee by dismissing the employee or by subjecting the employee to any other detriment".

18 Detriment is not defined in the Act, but is in the Code of Practice as "anything which the individual concerned might reasonably consider changed their position for the worst or put them at a disadvantage."

19 Dismissal includes constructive dismissal. Section 39(7) provides that the reference to dismissing the claimant includes a reference to the termination of the employment by any act of the employer, including giving notice, in circumstances such that the claimant is entitled because of the employer's conduct to terminate the employment without notice.

20 In this particular case the claimant's case is that there were actions by the respondent which collectively breached the implied term of trust and confidence, and that she resigned as a result. There is an implied term in all contracts of employment that the employer will not act in such a

way as to be calculated or likely to cause a breakdown or seriously damage trust and confidence. Calculated implies a deliberate act/acts on the part of the employer, but there may be a breach of the term if there are unintended actions by the employer which are likely to destroy or seriously damage trust and confidence. The claimant must resign in response at least in part to the repudiatory conduct without affirming the contract. It need not be the main reason for the resignation but it must play a significant meaning more than minor or trivial part in the decision to resign. The authority for that proposition is **Wright v Ayrshire Council 2014 ICR p.77** and, as Mr Bidnell-Edwards identified, **Meikle v Nottingham City Council ICR p. 1.**

21 The next relevant provision is victimisation, contained at Section 27 of the Act. That provides that a person victimises another person if he subjects the employee to a detriment because the employee has done a protected act or believes that the employee has done or may do a protected act.

22 A protected act is defined in Section 27(2) which includes making an allegation that the employer or an employee of the employer has contravened the Act, and it is not in dispute now, that the claimant has done at least two if not three protected acts.

23 I then have to decide whether or not the acts said to constitute detriments were done because the claimant had complained of being discriminated against. There is a causation issue here. The test of causation is not the ' but for' test. The correct test is whether or not the doing of the act in question was significantly influenced by the making of the protected acts (victimisation) or the detrimental act was significantly influenced by something arising from the claimant's disability (Section 15 claim). That is the test set out by Lord Nichols in **Nagarajan v London Regional Transport [1999] ICR 877.** In relation to the constructive dismissal claim, the acts upon which she relies as constituting a breach of the terms of trust and confidence must also be significantly influenced by the claimant's disability or something arising in consequence of her disability.

24 I now turn to the particular issues in this case. The first issue to deal with is the issue of knowledge of disability. I conclude on the balance of probabilities that the respondent had constructive knowledge of the claimant's condition of ADHD being a disability from the start of her employment. This was a point only raised by the respondent in closing submissions and was not directly addressed during cross examination. I find that the claimant was asked by the respondent at interview, and said, that she was disabled with ADHD. This is in her witness statement. Furthermore, far from assisting the respondent, I conclude her responses to the pre-employment checklist left open the issue of additional adjustments and support in respect of her disability. Certainly, by mid September 2018, the claimant was struggling with her work and making mistakes which should have put the respondent on enquiry as to the cause of this and its relation to ADHD, about which they were certainly aware, but there was no reference to Occupational Health until November.

25 The second question is whether she was put at a disadvantage in the terms of the list contained at paragraph 10.1 of the Case Management Orders of 26 September 2019.

26 The first matter to be dealt with is lack of training. I find as a fact that the claimant was not initially trained by the two Jackies on the relevant parts of the I drive, probably because she was not expected to use that part of the process at that time and the work of inputting information on the ALS system from students did not start until late August/September 2018. The claimant was only handed a sheet of paper by JB in late August at which time JB described as the training previously received as "shit". JB has not been called to deny that version of events. It would have been open to the respondent to have applied to call JB following receipt of the claimant's witness statement if they were taken by surprise.

27 The second link is that as a result of the lack of training, the claimant started to make mistakes which were notified to her in a series of emails from early September onwards. I find that that there was a causative link between her lack of training, and her consequent mistakes with her ADHD.

28 I now turn to the detriments themselves. I accept that detriment 1 was that set out at paragraph 10.1.1 between August 2018 and October 2018 SM, the two Jackies and PC criticised the claimant's work as being a detriment in the particular circumstances of the case. However, I do not find that these errors were notified to her in an obviously offensive way and I do not accept the claimant's claim that PC repeated a criticism a number of times over five minutes. The effect of these criticisms was however, a disadvantage and a detriment to the claimant which did arise from something to do with her disability because the claimant was particularly sensitive to criticism and was struggling in completing her tasks because of the lack of training and generally poor concentration. I find that detriment to be proved.

29 I also find that detriment 2, forming a negative view of the claimant's capabilities, to be proved. I found that the team had formed a negative view of the claimant's performance and while I do not find that they expressed the view openly in the office in front of her, she was aware not only from the fact of the emails pointing out mistakes from her and from their conduct generally, that they were talking about her behind her back. TJT noticed this in a visit in late September and took steps in his email of 28 September to the coordinators at p.212 to alleviate what he recognised as being a practice which was a problem, namely, by requiring any issues to be raised with the claimant by SM and ensuring that the individual coordinators were not copying the errors themselves to the claimant. He also stated that talking about the claimant's performance in the open office whether she was there or not was unacceptable. I found TJT to be an honest witness who did his best to try to alleviate the difficulties. He conceded in cross examination that the difficulties that the claimant was having were in part in consequence of her ADHD.

30 I do not accept that the claimant had any valid ground for complaining about the conduct of TJT. He readily acknowledged that there were errors in the system which he corrected and thanked the claimant for. I am also satisfied that the approach by SM at the meetings on 12 and 19 September coupled with the follow up emails after 19 September did also constitute detriments. However, I accept that SM's approach to the claimant was moderated by a wish to correct the claimant's errors in the interests of the students. So far as detriment 3 is concerned, I accept that at the meeting on 16 November the claimant was subjected to particular criticism

31 All of the matters up to 10.1.4 in the Order which concerns not providing the claimant with access to a grievance and denying her access to the desktop computer. I do not accept that either MB or PC sought to prevent the claimant from raising a grievance or, with that in mind, denied her access to a work desktop to access relevant documents. I accept MB's evidence that she was not aware that the claimant wanted access to a desktop in order to find information to give details of her grievance and of other matters of complaint including discriminatory treatment. I accept that PC was aware, at least when she saw the claimant's email to the Vice Chancellor that she needed access for that purpose. However, she and MB were minded to deny her access for the time being, to the computer and thus to being able to present a grievance because they believed that it was appropriate and in the claimant's interest to give her time to recover and return to work at which point she would be able to pursue her grievance. That was nonetheless in the circumstances of this case a detriment to the claimant because as she said in her email to the Vice Chancellor she needed to have her access, at least to have her grievance dealt with before she returned to work and offered to provide medical evidence to that effect which was not taken up. I do not accept that there is evidence from which I could reasonably conclude that either MB or JB or CL acted in the way they did because the claimant had done a protected act. I am satisfied by the evidence of both MB and CL that they did not victimise the claimant, in other words refuse access because she was raising complaints of discrimination. They did so because they wrongfully concluded that it was not in her best interests to pursue her grievance while off sick. There was a causative link, or series of links, with her disability.

32 I have considered the case of **Pnaiser v National Health England 2016 IRLR P.170.** This is authority for the proposition that the "something" that causes the unfavourable treatment need not be the reason or sole reason, but must have a significant influence (more than trivial) on it. In addition it accepts that there may be more than one causal link or consequence of the disability . Nor is it necessary that the employer should be aware of the link. See **City of York Council v Grosset 2018 ICR page 1492 Court of Appea**l There are sufficient links in the chain from the lack of training, to the onset of criticism of the claimant; its effect upon the claimant's performance and upon her health and her difficulties in concentrating upon tasks and in performing tasks accurately and organising her work. All of which is set out in her

disability impact statement. There are sufficient links therefore to constitute disadvantages by acts on the part of the respondent which did arise from something to do with the claimant's disability. I also accept that the claimant resigned in consequence of all of these matters found proved put together.

33 As to the claims that the claims or any of the claims of detriment were out of time, I reject that. There was a single course of conduct extending over a period ending with the last act on 16 November 2018. She is entitled to succeed on the detriment claims as well as the constructive dismissal claim Even if any of the detriment claims were presented out of time I would have extended time under just and equitable grounds on the basis that the respondent has not shown particular prejudice, and the claimant was in a vulnerable state of health from September 2018 onwards. I reject the respondent's justification defence. The claimant should have been referred to Occupational Health to identify adjustments. There was a legitimate aim in trying to ensure that students were adequately provided with information but there were alternative means by which it could have been achieved. They did not require the claimant to be subjected to discriminatory criticism arising from the respondent's failures to train her and to provide her with a mentor until too late.

34 The issue of remedy was discussed at the end of the hearing with the parties. It resulted in the remedies being resolved by agreement.

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Employment Judge Hargrove

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Date 30 September 2020.

REASONS SENT TO THE PARTIES ON

.....30 October 2020.....

FOR THE TRIBUNAL OFFICE