



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs A Field

v (1) Steve Pye and Co. (KL) Limited;
(2) Mr S E Pye;
(3) Mrs C Pye;
(4) Mrs M R Stollery

Heard at: Norwich
Heard On: 27, 28, 29 and 30 July 2020
Discussions in Chambers: 18 and 19 August 2020

Before: Employment Judge Postle

Members: (delete if not required)

Appearances

For the Claimant: Mr D Brown, Counsel

For the Respondents: Mr J Gilbert, Employment Law Consultant

RESERVED JUDGMENT

1. The Claimant's claims under the Equality Act 2010 are not well founded.
2. The Claimant was not constructively unfairly dismissed.
3. The Claimant did not suffer a detriment under Section 80F of the Employment Rights Act 1996.
4. The Claimant did not suffer detriments for having time off under Section 57A of the Employment Rights Act 1996.

RESERVED REASONS

1. The Claimant brings claims under the Equality Act 2010 for the protected characteristic of disability. The Respondents accept the Claimant was disabled and that they had the requisite knowledge of the Claimant's

disability at all material times. The Claimant's disability is: arthritis; carpal tunnel syndrome; and / or ankylosing spondylitis.

2. Specifically, the claims under the Equality Act 2010 involve failure to make reasonable adjustments under Sections 20 and 21, direct discrimination under Section 13, harassment under Section 26 and victimisation under Section 27. There are further claims of detriments for having time off under Section 57A of the Employment Rights Act 1996, a claim under Section 104C Flexible Working, of the Employment Rights Act 1996 and also a claim for discriminatory constructive dismissal and constructive dismissal.
3. The specific issues have been agreed between the parties and were set out in a document provided to the Tribunal at the outset of the hearing consisting of 7 pages. The Tribunal will not rehearse those as they are agreed and in writing for all to see.
4. In this Tribunal we heard evidence from the Claimant through a prepared witness statement and a further supplemental witness statement. The Claimant called no further witnesses. For the Respondents we heard evidence from Mrs C M Pye who was employed by Steve Pye and Co. Limited in the role of Director, that company provides the Management Services to the Respondent, Mr S E Pye, the Managing Director of Steve Pye and Co. Limited and Mrs M Stollery also employed by Steve Pye and Co. Limited as a Director. There were a further two statements from Christine Pye regarding specific disclosure. All the Respondents' witnesses giving their evidence through prepared witness statements.
5. The Tribunal also had the benefit of a Bundle of documents consisting of 787 pages.

Findings of Fact

6. The Respondent is a general accountancy practice. The Claimant was employed as an Accounts Assistant from 12 April 2016 to 11 January 2019, the Claimant having resigned by letter of 12 December 2018 giving one month's notice.
7. The Respondents were not aware throughout the Claimant's employment that the Claimant's daughter suffered from any medical condition that required frequent admissions to hospital, this was not raised with the Respondent, nor that she would be required to assist her daughter in caring for her grandchild.
8. The Claimant was required as part of her job role to draft and finalise accounts for checking by a Supervisor.
9. It is clear that the premises at which the Claimant worked had a disabled access which the Claimant could have accessed at any time.

10. The Claimant refers to a verbal request to work from home sometime in March / April 2018 which she says was made to Mrs Stollery. Mrs Stollery has no recollection of such a request at the time, and there is no evidence of such a request being made, or that the Claimant followed such a request at that time. However, the Respondent is aware the Claimant made a request around 11 June 2018, for flexible working due to her disability and wanted, as far as the Respondents were aware, to work from home as and when her disability prevented her from coming in to the office (pages 130 and 131 of the Hearing Bundle). This was addressed to her Manager who then referred it to Mrs Pye as the Claimant's Manager would not have the authority to approve such a request.
11. On 20 June 2018, Mrs Pye responded by inviting the Claimant to a meeting on 21 June 2018 to discuss the request for flexible working. It is interesting to note that in the Claimant's application of 11 June 2018, she suggests that she has not made a request to work flexibly for the past 12 months which rather defeats the Claimant's view that she had made an application historically previously. The application said that she wanted help because of her disability, particularly when she was unable to drive if herself to the office due to the pain in her wrist and neck. The Claimant wanted the working arrangement to start from 25 June 2018.
12. Mrs Pye and Mrs Stollery attended the meeting and made minutes of that meeting and the outcome is at page 135 and 136 of the Hearing Bundle. Particularly, the outcome was that it was not in the best interests of the company to work from home and the request was refused. However, Mrs Pye / Mrs Stollery went on to say, if there was anything else that the Respondents could do to help the Claimant's disabilities, they would assist and they were also of the opinion that working at a computer screen for 7.5 hours a day during a period of recuperation from the Claimant's planned operation that she was due to have, would not be beneficial to the Claimant's overall health. They were prepared to discuss reviewing the Claimant's duties, such as answering the phone and scanning etc. The Respondents asked if there was anything else they could do to assist with the Claimant's disability, however, the Claimant had indicated at the meeting that she had everything she needed at her office desk, but if there was anything further she would let them know. The Claimant did not appeal against this decision.
13. It does appear, at the time, other employees were allowed to work from home from time to time on occasions, although the exact amount of time employees worked from home was unclear from the evidence.
14. On 26 July 2018, the Claimant asserts that after she had made a mistake on a piece of work, Mr Pye made an issue of the mistake in front of the Claimant's colleagues which upset the Claimant. However, Mr Pye disputes the date as he says that week he was not in the office, having taken the week off with his family to holiday in Sherwood Forest and at this Hearing he produced a booking confirmation of this fact. Clearly the Claimant may be mistaken with the date. What is accepted is that an

incident did take place between the Claimant and Mr Pye over an issue with the Claimant's work on another date. The Claimant was upset by being brought to task by Mr Pye. It is clear the Claimant was upset over this incident.

15. On Thursday 9 August 2018, the Claimant having received calls initially from her daughter to say her granddaughter had gone missing, then spoke to her Manager Beth Meacham about the occurrence. Ultimately, the grandchild was found, the Claimant was clearly upset by the whole episode and had to make urgent arrangements for the care of her grandchild, as it would appear temporarily the grandchild had been placed in the Claimant's care by Social Services. In the end the granddaughter was returned to the care of the Claimant's daughter on the following Monday evening.
16. At the time of the above incident the Claimant had informed Beth Meacham she would need urgent leave to deal with the episode and would be returning to the office on Tuesday 14 August 2018 the following week. However, it would appear in the meantime, the Claimant has a flare up of her carpal tunnel syndrome and was signed off sick.
17. On 24 August 2018, the Claimant was written to by Mrs Pye (page 140 and 141 of the Hearing Bundle) in which concerns were now being raised about the Claimant's attendance and her performance. It is accepted this was the first time the Claimant was made aware formally of any issue relating to her performance or attendance. The issues relating to her performance covered not following office procedures, consistently making losses on client jobs and time recording on jobs with more detail provided in the letter. The letter made it clear these matters were to be discussed on the Claimant's return to work after her period of sickness absence.
18. The Claimant's response to the above email from Mrs Pye on 24 August 2018 (at page 142 of the Hearing Bundle) dealing with the reasons for her attendance / sick leave and acknowledged that the performance issues raised can be discussed on her return to work.
19. It is accepted what Mrs Pye said in a meeting on 29 November 2018, with the independent investigator looking into the Claimant's grievance letter, that the email to the Claimant of 24 August 2018 was prompted because Mrs Pye was irritated and annoyed by the Claimant's attendance,

"...she was winding me up something chronic..."

And yeah – lost my rag". (Page 267 of the Hearing Bundle)

Mrs Pye admitted in another interview with her advisers (page 405) reference to her email to the Claimant of 24 August 2018,

"I am not proud of it".

20. It was then on 31 August 2018, the Claimant makes a formal written request for reasonable adjustments for the first time, in writing, due to her disabilities (page 145 – 147 of the Hearing Bundle). The adjustments requested were:
- To work from home as and when necessary;
 - A different keyboard that was suitable; and
 - A different mouse that was suitable.

The Claimant ended her request in her letter by saying,

“I look forward to receiving your response in writing within 14 days from receipt of this letter or in line with the Company’s grievance procedure”.

21. The Claimant was away on holiday from 3 to 16 September 2018 and it was during that period of holiday that the Claimant sustained an injury following a fall. The Claimant was therefore off work again due to this injury.
22. The Claimant then provided sick notes from 12 September 2018 to 1 October 2018.
23. On Wednesday 5 October 2018 (page 151) the Respondent Christine Pye writes to the Claimant in the following terms,

“In reviewing our records, I note that you’ve been on sick leave since Wednesday 12 September because of a fall and diagnosed as soft tissue injury to right knee on 28 September 2018. Naturally we are concerned about you and I am therefore writing to request your attendance at an informal welfare meeting on Monday 8 October at 11am at 49 Castle Rising Road, South Wootton, Kings Lynn. We are happy for the meeting to take place either at our premises or your home address. Please confirm your choice of location by return.

I have arranged for a consultant from H Face to Face at Peninsula to conduct this meeting. The meeting will be audio recorded and a copy of the transcript will be made available to you.

The purpose of this meeting is to establish the nature and extent of your illness, how long it is likely to be before you are well enough to return to work and what arrangements we might need to make to ensure your safety.

Please rest assured that any meeting will be purely informal and if you wish you may be accompanied by a family friend, relative or fellow colleague.

I shall be grateful if you'd contact me either by telephone, letter or email to confirm your attendance at the meeting and to agree a location.

In the meantime, I wish you well.

Christine Pye”

24. Ultimately, the meeting was arranged in the afternoon at the Claimant's request and at the Claimant's home.
25. The meeting duly took place at the Claimant's home with the Claimant's husband in attendance. Minutes of that meeting are at pages 152 – 167. Mr Silvey was there on behalf of the Respondents. By the time of this meeting, the Claimant had now been signed off work until 9 November 2018 with soft damage to her knee. At the outset of the meeting, it was explained the purpose by Mr Silvey and what recommendations he might make to the Respondents in order to assist getting the Claimant back to work and discussions took place about a realistic time scale for returning to work. The Claimant had indicated that much depended on tests from the hospital and outcomes which she was waiting on. The Claimant suggested working from home would assist. The Claimant also indicated that she was waiting for an operation on her carpal tunnel but a date for that was still unknown. She did reiterate reasonable adjustments that she had requested at the end of August; namely keyboard and mouse. The Claimant indicated that she could not drive at the present time and could not access the building because of working upstairs. The Claimant refers to other staff being allowed to work from home, particularly: Morgan Langham who worked overtime at home, Ian Threlfall and 'Holly' who had done some work but not very much at home, likewise 'Kesha'.
26. Having discussed all the above, it is accepted that Mr Silvey turned off the recording device he used at the meeting and then discussed how much the Claimant would require in order to resign, at which point Mr Silvey offered the Claimant £2,000. The Claimant was surprised by this sudden turn of events. She felt this was not consistent with the purpose of the meeting being a welfare meeting. The meeting concluded and the Claimant requested on 19 October 2018 a copy of the transcript of the meeting. On 22 October 2018, Mrs Pye responded by email (at page 169) advising that she had not seen a copy of the transcript, Mr Silvey was now on holiday until 30 October 2018 and that it would be sent in due course.
27. On 2 November 2018, the Claimant was clearly contemplating Employment Tribunal proceedings as that is the date of her confirmation notification to Acas.
28. On 21 November 2018, the Claimant raises a grievance (pages 187 – 192) in which she raises a number of issues about working from home and the refusal in June to her flexible working request. She complains about the email from Mrs Pye of 24 August 2018 containing performance and

attendance issues and about the welfare meeting on 8 October 2018 with Mr Silvey and the offer to terminate her employment. In that grievance she suggests she is being treated less favourably, in particular,

“There has been no attempt to make any adjustments since I started working there on 12 April 2016, this has had a big impact on my mental and physical health.”

29. The letter then goes on to set out certain legal statements which had clearly been drafted by a Lawyer and repeats the adjustments the Respondents have allegedly failed to make:

- Working from home as and when necessary;
- A different key board suitable for those who suffer with arthritis and carpal tunnel tendonitis;
- A different computer mouse which is suitable for those who suffer from the medical conditions such as those mentioned above;
- Monitor stand riser and arm stand; for the first time
- No parking in front of steps to give easier access to the office building.

30. In response to the grievance, Mrs Pye did gather a number of statements from staff, particularly Mrs Stollery, Ian Threlfall, Morgan Langham, Sharon Page and Steve Pye (pages 528 – 533) which appear to be in relation to what Mrs Pye describes as,

“In relation to Andrea’s performance that had previously been brought to my attention”.

31. There were clearly further interviews taken by the Respondents’ advisors with Beth Meacham the Claimant’s Manger, Ian Threlfall, Katarzyna Bieniek, Morgan Langham and Sharon Page (at pages 249 – 281) again centring on the Claimant’s performance. Some as to whether anybody witnessed an altercation between Mr Pye and the Claimant. There were also enquiries in the statements as to whether other employees were working from home.

32. On 23 November 2018, Mrs Pye invites the Claimant to a grievance hearing on 29 November 2018, the meeting is to be conducted by an independent HR Consultant from Peninsular. The meeting did take place on 29 November 2018, the minutes of that are at pages 207 – 248 of the Hearing Bundle. Following that meeting on 30 November 2018, Mrs Pye writes to the Claimant offering reasonable adjustments to facilitate the Claimant’s return to work, which included:

- Working from home as and when necessary;
- Modified IT equipment; and
- Relocation to the ground floor.

33. It was to be a temporary variation and to be reviewed in 4 to 6 weeks in relation to the working from home. There was further reassurance that if the Claimant was struggling with the working arrangements at any time, she could inform the Respondents immediately and not wait until a review meeting. The letter also included Mr Silvey's report of the welfare meeting (page 283).
34. In the meantime, on 21 November 2018 the Claimant had been asked for her consent to engage Occupational Health to carry out an independent report on behalf of the Respondent. The Claimant's consent was not forthcoming. The purpose of the Occupational Health Report was to establish whether anything further could be offered to the Claimant to facilitate a return to work. It is clear that when Occupational Health telephoned the Claimant to arrange an appointment, the Claimant declined such an appointment.
35. On 12 December 2018, by letter (pages 307 – 310) the Claimant resigns (giving one month's notice) relying on the matters raised in her grievance letter as to the reasons for her resignation. In particular, stating she felt she had been discriminated against and alleging there had been no attempt to make reasonable adjustments that she had requested. This resignation, it is noted, came before the outcome of the grievance. In fact, the outcome of the grievance was sent to the Claimant in a letter dated 17 December 2018 (page 311). However, by the time this had been sent, the Respondents had already agreed the reasonable adjustments, save for the car parking arrangements.
36. On the same day, 17 December 2018, Mrs Pye also writes to the Claimant stating she was surprised by the resignation, believing the Claimant had reached the decision in the heat of the moment and questioned whether this is really what the Claimant wanted to do. In that letter, Mrs Pye goes on to offer an apology as to the problem of the car park which the Claimant had said prevented easy access to the office and suggests this will be a further adjustment. Mrs Pye goes on in the letter to ask the Claimant to consider the Respondent's outcome to her grievance and if she wished to reconsider her decision to resign, and would hold her resignation in abeyance until 24 December 2018.
37. Despite Mrs Pye's offer to accept a retraction of the resignation, the Claimant confirms by letter of 24 December 2018, she did not wish to retract her resignation.
38. The Claimant was offered an opportunity to appeal the outcome of the grievance which the Claimant took up on 24 December 2018 (pages 319 – 324) and was acknowledged on 3 January 2019 by Mrs Pye advising that the appeal would take place on 11 January 2019.
39. The Appeal Hearing took place on 11 January 2019 and was conducted again by an independent HR Consultant from Peninsular; the minutes of that meeting are at pages 337 to 389. The Consultant then interviewed

Beth Meacham, Mrs Pye, Katarzyna Bieniek and Sharon Page. The report is at pages 429 to 499 and dismisses the Claimant's appeal with very detailed reasons given in support.

Law

Flexible Working

40. Section 80F of the Employment Rights Act 1996 provides:

- (1) A qualifying employee may apply to his employer for a change in his terms and conditions of employment if –
 - (a) the change relates to –
 - (i) ...
 - (ii) ...
 - (iii) where, as between his home and a place of business of his employer, he is required to work, or
 - (iv) ...
- (2) An application under this section must –
 - (a) state that it is such an application,
 - (b) specify the change applied for and the date on which it is proposed the change should become effective, and
 - (c) explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with.
- (3) ...
- (4) If an employee has made an application under this section, he may not make a further application under this section to the same employer before the end of the period of twelve months beginning with the date on which the previous application was made.

41. Section 80G of the Employment Rights Act 1996 provides:

80G Employers duties in relation to application under section 80F

- (1) An employer to whom an application under section 80F is made –
 - (a) shall deal with the application in a reasonable manner,
 - (aa) shall notify the employee of the decision on the application within the decision period, and
 - (b) shall only refuse the application because he considers that one or more of the following grounds applies –
 - (i) the burden of additional costs,
 - (ii) detrimental effect on ability to meet customer demand,
 - (iii) inability to re-organise work among existing staff,

- (iv) inability to recruit additional staff,
- (v) detrimental impact on quality,
- (vi) detrimental impact on performance,
- (vii) insufficiency of work during the periods the employee proposes to work,
- (viii) planned structural changes, and
- (ix) such other grounds as the Secretary of State may specify by regulations.

42. The Acas Code of Practice on handling in a reasonable manner requests to work flexibly, set out the basic requirements of a reasonable procedure in relation to flexible working requests, recommending that employers adopt the following basic steps upon reasoning a flexible working request:

- Discuss the request with the employee;
- Consider the request carefully; and
- Deal with the request promptly.

The decision period is the period of three months beginning with the date upon which the application is made, or such longer period as may be agreed by the employer and the employee.

Leave for Family and Domestic Reasons

43. Section 47C of the Employment Rights Act 1996 provides that:

- (1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by the employer done for a prescribed reason.

The prescribed reasons are ones set out in the Regulations which cover time off under Section 57A of the Employment Rights Act 1996, namely time off for dependents:

- (1) An employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary –
 - (a) to provide assistance on an occasion when a dependant falls ill...
 - (b) to make arrangements for the provision of care for a dependant who is ill or injured,
 - (c) ...
 - (d) because of the unexpected disruption or termination of arrangements for the care of a dependant, or
 - (e) to deal with an incident which involves a child of the employee and which occurs unexpectedly...
- (2) Subsection (1) does not apply unless the employee –
 - (a) tells his / her employer the reason for his absence as soon as reasonably practicable...

Direct Discrimination

44. Section 13 of the Equality Act 2010 provides that,
- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, (A) treats (B) less favourably than (A) treats or would treat others.
45. Under Section 136 of the Equality Act 2010, the burden of proof required under sub-section (2) is as follows:
- (2) If there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Tribunal must hold that the contravention occurred.

Under sub-section (3):

- (3) sub-section (2) does not apply if (A) shows that (A) did not contravene the provision.
46. Therefore, the Tribunal is looking to see whether the Claimant has been treated less favourably than a real or hypothetical comparator.
47. The comparator being a person not having the particular disability of the disabled person whose relevant circumstances including his disabilities are the same as those of the disabled person.
48. The Tribunal then has to consider whether the Claimant has proved facts on which the Tribunal could conclude that the treatment was on the grounds of the disabled person's disability. If the answer to that is yes, has the Respondent proved that it did not treat the Claimant any less favourably in any sense whatsoever on the ground of the Claimant's disability.

Discrimination Arising from Disability

49. Section 15 of the Equality Act 2010 provides:
- (1) 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, and
 - (b) (A) cannot show that treatment is a proportionate means of achieving a legitimate aim.
50. In essence, this Section provides that it will be unlawful for an employer or other person to treat a disabled person unfavourably not because of that person's disability itself (which would amount to direct discrimination under s.13), but because of something arising from, or in consequence of, the person's disability.

51. Therefore, in order to succeed with the claim of discrimination arising from disability, the Claimant must establish the following:
 - 53.1 that he or she has suffered unfavourable treatment; and
 - 53.2 that the treatment is because of something arising in consequence of his or her disability.
52. Clearly, if the Claimant can establish the above, the employer will be liable unless it can show:
 - 54.1 that the unfavourable treatment is a proportionate means of achieving a legitimate aim; and / or
 - 54.2 that it had no knowledge of the Claimant's disability.
53. Under this claim there is no need for a comparator in order to show unfavourable treatment.

Failure to Make Reasonable Adjustments

54. Section 20 of the Equality Act 2010 sets out the general scope of the duty on employers to make adjustments. It comprises of three elements,
 - (3) The first requirement is a requirement, where a provision, criterion or practice of (A)'s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
 - (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
 - (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
55. Failure to comply with any of the requirements is a failure to comply with a duty to make reasonable adjustments. Therefore, (A) discriminates against the disabled person if (A) fails to comply with that duty in relation to that person.
56. In reaching their decision, the Tribunal have also had regard to the Equality and Human Rights Commission Statutory Code of Practice on Employment 2010.

57. The basic question is,

59.1 has the employer taken such steps as is reasonable to take in all the circumstances in order to avoid or prevent the provision, criterion or practice having the disadvantageous effect?

Harassment

58. Section 26 of the Equality Act 2010 provides:

- (1) A person (A) harasses another (B) if –
 - (a) (A) engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of-
 - (i) violating (B)'s dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for (B).

59. Conduct shall be regarded as having the effect referred to if, having regard to all the circumstances including in particular the perception of the person, it should reasonably be considered as having that effect.

60. The liability for harassment requires an investigation either into the alleged perpetrator's state of mind or into the form their conduct takes. If the behaviour is not related to her disability, then the perpetrator must engage in conduct of a discriminatory nature. The conduct must be unwanted and have the same negative consequences for the victim.

61. The fact that the individual is peculiarly sensitive to the treatment recorded, does not necessarily mean that harassment will be shown to exist.

62. It remains for the Claimant to prove their case and the first stage is that she must raise a prima facie case. First the Claimant must prove the facts actually happened. Which means for example, if the complainant's case is based on particular words or conduct by the Respondent, she must prove on the balance of probabilities that such words were uttered and that the conduct did actually take place.

Victimisation

63. Section 27 of the Equality Act 2010, provides:

- (1) A person (A) victimises another person (B) if (A) subjects (B) to a detriment because –
 - (a) (B) does a protected act, or
 - (b) (A) believes that (B) has done, or may do, a protected act.

- (2) Each of the following is a protected Act;
 - (a) bringing proceedings under this Act;
 - (b) ...
 - (c) doing any other thing for the purposes of or in connection with this Act;
 - (d) making an allegation (whether or not express) that (A) or another person has contravened this Act.
- (4) This section applies only where the person subjected to a detriment is an individual.

Unfair Constructive Dismissal

64. Section 95(1)(c) of the Employment Rights Act 1996 states,

- (1) An employee is dismissed by his employer if –
 - c) the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

This form of dismissal is commonly referred to as constructive dismissal.

65. In the leading case on the subject Western Excavating (ECC) Limited v Sharp [1978] ICR 221, CA, the Court of Appeal ruled that,

"...the employer's conduct which gives rise to a constructive dismissal must involve a repudiatory breach of contract."

As Lord Denning MR put it,

"...if the 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 essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's contract, he is constructively dismissed."

66. In order to claim constructive dismissal, the employee must establish:

- That there was a fundamental breach of contract on the part of the employer;
- That the employer's breach caused the employee to resign;
- That the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

67. In other words, the conduct must impinge on the relationship of the employer and the employee in the sense that, looked objectively it is likely

to destroy or seriously damage the degree of trust and confidence the employee is entitled to have in his employer.

Conclusions

68. For the avoidance of doubt, it is accepted by the Respondents that the Claimant was disabled and that they had the requisite knowledge of the Claimant's disability; the Claimant having the following medical conditions:

- Arthritis;
- Carpel Tunnel syndrome; and
- Ankylosing spondylitis.

69. The Claimant asserts that the following PCPs were applied, namely:

- a. The Respondents' requirement for the Claimant to work at the Respondents' office;
- b. The Claimant was required to enter the office via steps;
- c. The Respondents permitted vehicles to be parked in a manner that restricted access to the pathway step and / or entrance to the office; and
- d. Was required to use the internal stairs at the office.

Further, that the Claimant required the following auxiliary aids:

- a. A different keyboard to that supplied;
- b. A computer mouse; and / or
- c. A monitor stand riser or arm stand.

70. The Claimant asserts that she was put at a substantial disadvantage in comparison with persons who were not disabled by one or more of the above PCPs.

71. Further, or alternatively, that the Claimant was put at a substantial disadvantage in comparison with persons who are not disabled by a physical feature of the premises.

72. Further, or alternatively, that the Claimant was put at a substantial disadvantage in comparison with persons who are not disabled due to the absence of auxiliary aids.

73. Considering the above, did the Respondents fail to make reasonable adjustments? The Claimant contends that the Respondents ought to have:

- a. Allowed her to work from home;
- b. Allowed her to work from home when the symptoms of her disability were acute;
- c. Provided her with downstairs work space at the office;

- d. Changed the parking arrangements such that access to the pathway steps and / or entrance to the office were kept clear of vehicles, thereby giving the Claimant easy access to the office; and / or
 - e. Provided her with equipment / aids she had rightfully requested.
74. It would appear that the Respondents accept the PCPs the Claimants claims are save for the requirement of the Claimant to enter the office via steps.
75. The Tribunal agrees in that respect as the Claimant was not required to access the office via steps and the Claimant did indeed accept in cross examination, that First Respondent's office had a disabled access in the sense that the office could be entered without using any steps.
76. Furthermore, if the parking of vehicles in front of the steps by Mr Pye or others had really been a major problem, it is surprising that the Claimant did not raise this prior to her grievance on 21 November 2018. That appears to be the first time it is ever raised as an issue. The car park is apparently very small and everybody parks where they can, the only reserved parking space is for Mrs Stollery and Mr Pye because of their need to obtain access in and out of the car park to see clients. It was a matter for the Claimant where she parked and if she needed to park much closer to the building, she certainly had not asked for this previously. Again, if the step was a problem she could simply walk around to the entrance and avoid going down the step which would not take more than a minute or so. This claim is simply not made out.
77. The Claimant contends that she made several requests to Mrs Stollery to work from home in March and April 2018. Mrs Stollery clearly had no recollection of such a conversation taking place and it is surprising if this had been made as a formal application and had not been responded to, then why did the Claimant not follow it up at that time. There is simply no evidence that such an application, formally or informally, was made in February, March or April 2018. This claim is simply not made out.
78. The Claimant, it is accepted did, on 11 June 2018, make a request for flexible working to start from 25 June 2018 due to her disability. This was to work from home as and when the Claimant's disability prevented her from coming into the office (pages 130 and 131). Up until this point, the Claimant had not to the Respondent's knowledge made a request for the adjustment to work from home or that would have aided the Claimant. There is no documentary evidence suggesting otherwise. The Claimant had in the event, the use of a modified chair which she had brought with her when she commenced her employment with the Respondents. During time from 2016 to 2018, the Claimant had not made a request for reasonable adjustments, whether working downstairs or in the form of aids.

79. A meeting was due to be held on 21 June 2018 to discuss the request for flexible working, (note, in that application the Claimant confirmed she had not made a request to work flexibly in the past 12 months). The Claimant explained that the reason for the request was in particular she was unable to drive herself to the office due to the pain in her wrist and neck. The Claimant wanted these working arrangements to start almost immediately on 25 June 2018. The application at that stage was refused on the grounds that it was not in the best interests of the company to work from home. Mrs Pye and Mrs Stollery considered the Claimant's application and requested the Claimant provide details of any further adjustments she might require. Further, they were prepared to discuss reviewing the Claimant's duties as working at a computer screen for seven and a half hours a day in the period of recuperation from the Claimant's planned operation, may not be beneficial whether working from home or in the office. The Claimant did not indicate at this meeting that she required any further adjustment or aid to her office desk. The Claimant did not appeal against the decision and it would appear, she continued to work at the office without difficulty until the 9 August 2018 when the Claimant commences a period of absence and never returning to the office and resigning in December. That claim is not made out, the Claimant was not put at a disadvantage.
80. The Claimant does, whilst absent from work, make a specific request for reasonable adjustments on 31 August 2018 (pages 146 – 147), bearing in mind the Claimant is now absent from the office.
81. As a result of this formal request for reasonable adjustments, the Claimant attends a meeting to discuss those on 8 October 2018 with the Respondents' independent HR Consultant.
82. After a delay as a result of the Respondents' HR Consultant being on holiday (Mr Silvey) the Respondent confirmed in a letter to the Claimant that the following adjustments would be made:
- a. A trial period for the Claimant to work from home as requested;
 - b. Supply of modified keyboard as requested;
 - c. Supply of modified computer mouse as requested;
 - d. A monitor stand riser or arm stand; and
 - e. Relocation of the Claimant's work station to a ground floor location as requested.
83. However, the Claimant did not return to work and resigned on 12 December giving one month's notice.
84. Clearly, the Respondents were prepared to accommodate all the Claimant's requests for reasonable adjustments had the Claimant returned to work. The Claimant clearly would not have been put at a substantial disadvantage and would have been accommodated and able to work with the adjustments the Claimant had specifically requested.

85. The claim of failure to make reasonable adjustments clearly is not made out in the circumstances.

Discrimination Arising from Disability

86. It would appear that the Claimant's case is:
- 86.1 Did any of the following matters arising in consequence of the Claimant's disability:
- a. the Claimant's absence from 13 August 2018 onwards; and
 - b. the difficulties the Claimant experienced in relation to attending the First Respondent's office.

87. The Respondents accept that the Claimant's absence and the difficulties she experienced in relation to attending the Respondent's office arose as a consequence of her disability.

88. The Respondents deny that the Claimant was treated unfavourably because of the acts complained of above.

89. Clearly, the Respondents' refusal of the Claimant's original flexible working request in June was communicated prior to the Claimant's absence on 13 August 2018. There was no evidence that the Claimant was experiencing difficulty in attending the Respondent's office prior to 13 August 2018.

90. In fact, some of the Claimant's absence following 13 August 2018 was occasioned by a fall whilst on holiday and had nothing to do with the Claimant's disability.

91. Further, in any event, by 30 November 2018 following a meeting in October to discuss the Claimant's reasonable adjustments while she was still absent, the Respondents were clearly prepared to accommodate all the requests, therefore there would have been no difficulty certainly from that date, in the Claimant attending the First Respondent's office, all obstacles had been removed and aids provided.

92. What is surprising in this case is that if there had really been these major difficulties prior to August, the Claimant had not made them known from an early stage in her employment which had commenced in 2016.

93. The Tribunal concludes there has been no unfavourable treatment because of something arising in consequence of the Claimant's disability.

Direct Discrimination

94. It would appear this is advanced in respect of refusing to allow the Claimant to work from home as and when necessary due to her disability, as compared to some of her work colleagues who were permitted to work from home, namely 'Kasia', Ian Threlfall and Morgan Langham.

95. It is clear from the evidence, there were no clear or regular arrangements for Kasia, Ian Threlfall or Morgan Langham to work on a regular basis during their contractual working hours from home. It is accepted there may have been limited occasions where these individuals worked from home, but that was clearly on an ad hoc basis.
96. Clearly, the Claimant did not receive less favourable treatment as this was not an ongoing or a regular occurrence with other employees. Further and in any event, whilst the Claimant was absent from August, the Respondents confirmed to the Claimant on 30 November 2018 that the Claimant could work from home as and when necessary due to her disability and that would be discussed as to how it would work when she returned.
97. A further claim is that Mr Pye humiliated the Claimant in front of her colleagues on 26 July 2018, that claim simply is not made out. Firstly, the Tribunal is satisfied with the holiday booking confirmation that Mr Pye was not even present in the office on that date; he was away on holiday during that week in Nottingham. It is clear there was at some other date a discussion that took place over a mistake on a piece of work by the Claimant, the Claimant was upset, but this was no more than an every day work issue which a Line Manager would be expected to take up with someone they are supervising if there are errors in their work. There is simply no less favourable treatment. Furthermore, if it was of such a major concern to the Claimant at the time, whenever it took place, it is surprising that the first time this incident was ever raised was some four months later in her grievance at the meeting on 29 November 2018.
98. It also appears to be raised as an issue of direct discrimination, the performance issues raised with the Claimant on 24 August 2018 whilst the Claimant was absent. It may not have been the best time to raise performance issues, but clearly the Claimant was aware of at least one of the issues raised, which she accepted in cross examination. The Tribunal did not believe they were fabricated, they seemed to be supported by specific client accounts.
99. The Tribunal does not conclude that the letter containing the performance issues in August was because of the Claimant's disability and in any event, the Claimant was not invited to a disciplinary or capability meeting. The Claimant was not treated differently to an employee absent with performance issues who was not disabled. This claim is therefore not made out.
100. There is a further allegation that the offer to terminate the Claimant's employment on 8 October 2018 in the course of the Welfare Meeting amounts to direct discrimination. The Tribunal concluded that it is not unusual where someone has been off for a period of time, for 'without prejudice' negotiations to take place about the ending of their employment.

That could take place with persons absent for a similar period who are not disabled. This claim is simply not made out.

101. A further allegation is on or around 28 November 2018. The Respondents invited the Claimant's colleague to comment on the Claimant's performance at work. In relation to Mrs Stollery's statement, that merely deals with the flexible working meeting on 21 June 2018 and for reasonable adjustments, it is not a criticism of the Claimant.
102. Mr Threlfall merely commented on reasons why he very occasionally worked overtime at home. There is one small paragraph in which he comments if the Claimant makes a mistake, when it is raised with her, it is never her fault.
103. Morgan Langham merely commented on working from home for overtime purposes only.
104. Sharon Paige provides a very, very short statement confirming that all members of staff had been asked to monitor the amount of time spent working on each job. The Claimant seemed reluctant to do this and exceeded the time allowed for jobs which of course was one of the performance issues raised previously with the Claimant.
105. The Tribunal could not conclude the taking of the statements amounted to less favourable treatment which was related, or because of the Claimant's disability. This claim is not made out.
106. Finally, in relation to direct discrimination, the letter of 30 November 2018, in which the Respondents accommodate all of the Claimant's requests for reasonable adjustments, and suggesting working from home would be temporary and that the Claimant would be expected to work towards a return to full duties amounted to direct discrimination is simply not made out.
107. Clearly, if a non-disabled person had been absent for some time but wanted to work from home, that would be potentially of a temporary nature and to be reviewed with the hope of returning to full duties. That is not an unreasonable expectation. This claim is not made out as less favourable treatment.

Harassment

108. In part this is already dealt with under direct discrimination above and this allegation appears to relate to the refusal of the Claimant's request for flexible working. Clearly, the refusal to permit the Claimant to work from home cannot amount to unwanted conduct given the Respondent is obliged to provide the Claimant with a written outcome in respect of her request.

109. The Claimant does not suggest in her response to the refusal in her letter of 24 August 2018, that by the Respondents refusing in their letter of 22 June 2018 that amounts to in some way harassment. That claim is simply not made out.
110. In relation to the alleged incident that occurred between Mr Pye and the Claimant on 26 July 2018, the position is set out under the conclusion for direct discrimination, Mr Pye was not in the office on 26 July 2018; the booking confirmation of his holiday in Sherwood Forest, Nottingham was provided to the Tribunal. The Claimant is mistaken that such an incident took place on 26 July 2018.
111. It is accepted, there was a discussion between Mr Pye and the Claimant at some date unknown, in which the Claimant was brought to task over an error in her work. No more and no less. The Claimant was upset, but it had nothing to do with her disability. It would have been the same for a non-disabled person.
112. Further, if the Claimant was so humiliated or her dignity was violated at the time, it is surprising this was not raised until some four months later in November at a grievance meeting.
113. If it is being contended as harassment, the offer to mutually terminate the Claimant's employment on 8 October 2018, clearly that offer was not related to the Claimant's disability. It would have been exactly the same had a non-disabled person been absent for a period of time and not unusual to discuss terminating a person's employment in those circumstances. This claim is simply not made out.

Victimisation

114. It would appear this is advanced as a protected act whereby in March or April, the Claimant made verbal requests for reasonable adjustments, i.e. working from home during periods when her disability became worse. The first point to make here is that the Claimant did not make any request to Mrs Stollery for flexible working arrangements in March and April 2018, there is no evidence to support it. Interestingly enough, the Claimant makes a further request (reasonable adjustments) and extraordinarily makes no mention of the fact that she previously requested flexible working in March and April. In those circumstances the Claimant could not have suffered any detriment.
115. The Claimant also seems to rely on 11 June 2018 written request for reasonable adjustments, i.e. working from home, and 31 August 2018 making formal requests for reasonable adjustments. The Tribunal accepts they are protected acts; indeed, the grievance of 21 November 2018 was regarding the handling of the request for reasonable adjustments.
116. It is difficult to understand what the Claimant advances as the specific detriment in making the request or in the handling of the grievance. As

following meetings in October and the communication in November, the Claimant was granted all her requests for reasonable adjustments. Where is the detriment? The grievance was dealt with, it may not have been the outcome the Claimant required, but it was dealt with. There was no detriment. Claims for victimisation are simply not made out.

Detriments for having made, or propose to make an Application for Flexible Working – under s.80F of the Employment Rights 1996

117. This seems to be advanced on the basis as to whether the Claimant made a, or proposed to make, an application for flexible working under s.90F when she:
- a. On 11 June 2018, made a request for reasonable adjustments and they were working from home during periods when her disability symptoms were acute; and
 - b. On 31 August 2018, made a formal request for reasonable adjustments.
118. Clearly, the Claimant made applications for flexible working, that is not in dispute on 11 June 2018 and 31 August 2018.
119. However, the Tribunal does not accept the Claimant suffered detriment. Looking at the same detriments relied upon under direct discrimination, the factual basis of the Tribunal's conclusions is exactly the same.

Detriments for having time off – under s.57 of the Employment Rights Act 1996

120. Here this is advanced on the basis that the Claimant had time off for her daughter / grand daughter between 9 and 13 August 2018. As a result of that, did the Respondent subject the Claimant to one or more detriments because she had time off?
121. It is clear that the Respondent had not been informed of any Emergency Order from Social Services in relation to the Claimant's absence on 9 – 13 August 2018. That document was only provided during the course of disclosure.
122. What the document informed the Respondents of on 9 August 2018, was that the Claimant's grandchild had gone missing and seemingly before the Claimant left the office, informed the Respondents that her grandchild had now been found.
123. The Respondents refusal of the Claimant's flexible working request on 22 June 2018, together with the incident that had occurred between the Claimant and Mr Pye on 26 July 2018, in any event predate 9 August 2018, therefore could not have occurred as a result of the Claimant taking time off for a dependent.

124. In any event, it is the case that the Respondents were not aware that the Claimant had taken time off to care for her grandchild and therefore the alleged acts complained of could not have occurred simply because the Claimant had taken dependent's leave. This claim is simply not made out.

Unfair constructive dismissal / discriminatory dismissal

125. The first point to make here is the Claimant can only rely on her reasons for her resigning based on the actual knowledge she had at the time of her resignation. It may or may not have come out in subsequent disclosures the Respondents were annoyed by the Claimants continued absence, but that could have no bearing on the reason why the Claimant resigned.
126. The question is, at the time the Claimant took the decision to resign, were the Respondents in some way in fundamental breach of the Claimant's contract?
127. The fact of the matter is quite simply this, by the time the Claimant gave notice in writing of her resignation with one month's notice on 12 December 2018, the Claimant had been informed quite clearly in a letter of 30 November 2018, that all of the Claimant's requests for reasonable adjustment would be accommodated, including auxiliary aids and parking arrangements. The Claimant had been off since around 9 August 2018 and continued to be absent from the office, in part for problems arising from her disability and also from a fall whilst on holiday which appears not to be disability related and caused, certainly, the absence onwards in September 2018.
128. It was not a fundamental breach by the Respondent to have a caveat in the reasonable adjustments, that in some way they would be of a temporary nature to be reviewed after six weeks. This is not a fundamental breach of the Claimant's contract. It is not unrealistic to expect at some stage an employee with or without a disability to return to their normal contractual duties.
129. Furthermore, the Tribunal could not conclude that in the meeting in October with the Respondents HR Consultant Mr Silvey, that to suggest a compromise agreement ending employment was in some way a fundamental breach. I repeat, that is not unusual. If the Claimant felt it was such a fundamental breach at that stage, then again, why did she not resign in October immediately? The fact of the matter is, the issue was never raised again or pursued. Arguably, if it was a breach, which the Tribunal do not believe it was, did the Claimant, in any event, affirm it by not resigning until some months thereafter.
130. To conclude, the Tribunal find it difficult to understand why, following the letter from the Respondents of 30 November 2018 which states all reasonable adjustments would be accommodated, the Claimant felt that the Respondents were in some way at that stage in fundamental breach of the Contract of Employment. The claim for constructive unfair dismissal is

therefore not made out as a result of the Claimant's disability or under the Employment Rights Act 1996.

131. Finally, the Judge apologises for the late provision of this Judgment, this is due to a bereavement in the Judge's family followed by the Judge having to isolate for 14 days as a result of a Covid test.

Employment Judge Postle

21/12/2020

Date:

Sent to the parties on: 12/01/2021.....

T Henry-Yeo

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For the Tribunal Office