EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Eleanor Stevenson	**v**	**Eden Beck Ltd**

Heard at: Watford by Cloud Video Platform

On: 25-27 November 2020
21 December 2020 (in chambers)

Before: Employment Judge S Bedeau
Ms Jane Weaver
Mr Adarsh Kapur

Appearances

For the Claimant: Mr J Davis, Solicitor
For the Respondent: Mr J Munroe, Employment Consultant

RESERVED JUDGMENT

1. The claimant was, at all material times, a disabled person suffering from Post -Traumatic Stress Disorder.

2. The claim of direct sex discrimination is well-founded.

3. The claim of discrimination arising in consequence of disability is well-founded.

4. The claim of harassment related to sex is not well-founded.

5. The claim of harassment related to disability is not well-founded.

6. The claim of constructive unfair dismissal is well-founded.

7. The case is listed for a remedy hearing on Monday 8 March 2021 by Cloud Video Platform, if not settled earlier.

REASONS

1. By a claim form presented to the tribunal on 17 June 2019, the claimant, Ms Eleanor Stevenson, claims against the respondent of: constructive unfair

dismissal; direct sex discrimination; discrimination arising in consequence of disability; and harassment related to sex and/or disability.

2. She asserts that she resigned from her employment on 4 June 2019, after she received an invitation to attend a disciplinary hearing while on sick leave. This was the last straw in a series of discriminatory acts perpetrated by her male colleagues on her.

3. In the response presented to the tribunal on 2 August 2019, the claims are denied. The respondent asserts that the claimant was given a pay rise in 2018; the collective grievance submitted in February 2017, was investigated and an outcome given; the claimant had been absent from work from 5 May 2019 without authorisation; and she raised several issues in her resignation letter alleging discriminatory treatment, which were investigated, and a few were partially upheld. It further asserts that what the claimant describes as discriminatory treatment was in reality banter in which she was an active participant.

The issues

4. At a preliminary hearing held by Employment Judge Alliott on 27 February 2020, the issues were clearly set out and agreed between the parties. They are replicated below in paragraph 5.

5. The issues are as follows:-

<u>The claimant's employment</u>

5.1 When did the claimant's employment begin?

<u>Time Limits/limitation issues</u>

5.2 Were all of the claimant's complaints presented within the time limits set out in the Equality Act 2010? Dealing with this issue may involve consideration of whether there were acts or conduct extending over a period of time and whether time should be extended on a just and equitable basis.

<u>Disability</u>

5.3 Was the claimant a disabled person in accordance with the Equality Act 2010 at all relevant times because of the following condition, namely post-traumatic stress disorder?

<u>Equality Act s.13 direct discrimination because of sex</u>

5.4 Has the respondent subjected the claimant to the following treatment?

5.4.1 Not providing her with appraisals.

5.4.2 Not providing her with a performance review.

5.4.3 Not providing the claimant with an opportunity for personal progression.

5.4.4 Not offering the claimant training.

5.4.5 Not giving the claimant regular salary increases without requesting them.

5.4.6 Failing to deal with a grievance raised by the claimant in 2017 complaining of sex discrimination.

5.4.7 Leaving sexually explicit notes on the claimant's computer.

5.4.8 Throwing items at the claimant.

5.4.9 Ordering the claimant to pick up dog faeces.

5.4.10 Swearing and shouting at the claimant.

5.4.11 Bullying the claimant on a regular basis.

5.4.12 Denying the claimant opportunities, wages, and perks.

5.4.13 Sending the claimant an email on 20 March 2019 informing her she was being considered for redundancy.

5.5 Was that treatment less favourable treatment, ie did the respondent treat the claimant as alleged less favourably than it treated, or would have treated others (comparators) in not materially different circumstances. The claimant relies on the following comparators, namely other male employees.

5.6 If so, was this because of the claimant's sex?

<u>Equality Act s.15 Discrimination arising from disability.</u>

5.7 Did the following arise in consequence of the claimant's disability, namely,

5.7.1 The claimant's intermittent sickness absence form 15 December 2018 until 21 March 2019 and thereafter?

5.8 Did the respondent treat the claimant unfavourably as follows?

5.8.1 Not responding to the claimant's request for support made on 19 March 2019?

5.8.2 Being subjected to the disciplinary process?

5.8.3 Being paid statutory sick pay rather than her full salary whilst sick?

5.9 Did the respondent treat the claimant unfavourably in any of those ways because of that sickness absence?

5.10 If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

5.11 Alternatively, has the respondent shown that it did not know and could not reasonably have been expected to know that the claimant had the disability?

EQA, section 26: harassment related to sex and/or disability

5.12 Did the respondent engage in conduct as follows? The claimant relies on the conduct alleged in relation to the sex and disability discrimination claims.

5.13 If so, was that conduct unwanted?

5.14 If so, did it relate to the protected characteristics of sex and/or disability?

5.15 Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Constructive unfair dismissal

5.16 Was the claimant dismissed, ie did the respondent breach the implied term of mutual trust and confidence?

5.17 Did the respondent, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant?

5.18 If so, did the claimant affirm the contract of employment before resigning?

5.19 If not, did the claimant resign in response to the respondent's conduct?

5.20 The conduct the claimant relies on as breaching the trust and confidence term is the treatment as alleged in relation to the sex and disability discrimination claims.

5.21 If the claimant was dismissed, what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and 98(2) of the Employment Rights Act 1996, and, if so, was the dismissal fair or unfair in accordance with s.98(4), and, in particular did the respondent, in all respects, act within the so-called band of reasonable responses?

5.23 In addition, issues relating to contribution and compliance with the ACAS Code of Conduct may arise.

Remedy

5.22 If the claimant succeeds, either in whole or in part, the Tribunal will be concerned with issues of remedy and, in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

The evidence

6. The tribunal heard evidence from the claimant. On her behalf evidence was given by: Ms Lauren Amie Fox, former health and safety manager; Mr Charles Graves, former trainee; and Mr J Mark Carnow, former supervisor.

7. On behalf of the respondent, evidence was given by: Mr Stuart Mayall, director/shareholder; Ms Jenny Mayall, quality, safety, health and environment manager; Mr Billy Porter, former contract manager; Mr James Day, contracts manager; and Mr Daniel Long, administration manager.

8. In addition to the oral evidence, the parties adduced a joint bundle of documents comprising of 256 pages. Further documents were adduced during the hearing. References will be made to the documents as numbered by the parties in the joint bundle.

Findings of fact

9. The respondent's business is the provision of environmental services, facilities management, diamond drilling, hazardous waste, as well as asbestos removal. It was incorporated in 2011.

10. The claimant worked for the respondent initially as an agency worker from 1 March 2016 to 11 April 2016, after which she spent time travelling outside of the United Kingdom. She re-applied for work and was re-employed as a personal assistant/office manager, from 13 June 2016 until her resignation on 4 June 2019. She worked full-time, 40 hours a week, at an initial annual salary of £30,000 gross. She mainly worked for Mr Chris Mayall, director, who is the son of Mr Stuart Mayall, finance director and shareholder. Mr Stuart Mayall had ultimate control of the company.

11. Having heard the evidence from the claimant, her witnesses, and the respondent's witnesses, we find the claimant's evidence to be very credible.

She was able to support her main assertions by referring to documents in the joint bundle, in the WhatsApp messages and email correspondence. She was cross-examined at length by Mr Munroe, on behalf of the respondent, and did not depart her account of events. We, therefore, accept her evidence. Her case is that the work environment was sexist, and she was the victim of sexist and violent behaviour. Little regard was given to her suffering from Post-Traumatic Stress Disorder, following an unprovoked attack, and without prior consultation or warning, the respondent wanted to make her redundant.

Appraisals

12. One of the issues raised by the claimant is that she had not been appraised. In the course of his evidence, in respect of appraisals, Mr Stuart Mayall told the tribunal that since 2013 there had been no system of appraisals. However, in the evidence given by Mr James Day, contracts manager, he said that over the past seven years Mr Chris Mayall consistently appraised his performance on an ongoing basis and he, Mr Day, was rewarded for his efforts.

13. Mr Billy Porter, contracts manager, who was not called gave oral evidence and be cross-examined but whose statement was put in evidence for this tribunal to give whatever weight we considered appropriate, stated in paragraph 5,

> "Despite being constantly appraised, I can say that at all times I had the full support of Chris (Mayall) and know that he and the company are well thought of in the industry with the employer."

14. The above statement by Mr Porter lends support to the claim that male members of staff were involved in some form of an appraisal system, whether that be formal or informal. In contrast, evidence given by the claimant supported by Ms Fox's evidence, was to the effect that female members of staff, who were based in the open plan office, were not appraised nor were their performance reviewed on a regular basis.

15. The male members of staff, Mr Stuart Mayall and Mr Chris Mayall, had separate offices.

Promotion

16. In relation to promotion, Mr Porter who was asbestos supervisor, was promoted to contract manager and later to operations manager. Mr James Day was promoted from rail contracts manager to operations manager. Mr David Mayall, the son of Stuart Mayall, was promoted on three occasions. Mr Ollie Newland was an asbestos operative and was promoted on three occasions with a commensurate increase in salary to, eventually, contracts manager.

17. Another aspect of the claimant's case is that only when she asked for a salary increase in 2018, was it given to her in October of that year. We

accept her evidence that Mr Daniel Long, administration manager, received an increase in salary of £5,000 during the first six months of his employment.

18. From our findings it is clear that the male members of staff were treated more favourably when compared with the female members of staff who included the claimant, Ms Fox, and Ms Lauren Springle, account manager, with regard to appraisals, performance reviews, promotion, and salary increase.

Training certificates

19. In relation to training, it is the claimant's case that she had not attended training courses as asserted by the respondent apart from First Aid training on or around 17 August 2018. (77)

20. The respondent stated that she attended Plan of Works, Method Statement, Risk Assessment training conducted by Mr Chris Mayall on 3 October 2016. The claimant's evidence was that she was at work on that day and did not attend training session. (78)

21. She also did not attend the same training on Monday 2 January 2017; Monday 3 April 2017; Monday 3 July 2017; Monday 2 October 2017; Monday 2 April 2018; Monday 2 July 2018; 1 October 2018; and Monday 7 January 2019. (79-86)

22. The claimant took us to the First Aid training. She stated that her signature appears on that certificate but does not appear on the other certificates. Only Mr Chris Mayall's signature appears on those certificates. (82)

23. In relation to training, the claimant adduced during the course of the hearing, documentary evidence in support of her whereabouts on the dates the respondent said she attended training. Her case being that she did not attend on those days. In respect of the certificate dated 2 January 2017, this was a bank holiday, and she was not at work and Mr Chris Mayall was in Bangkok. (New Evidence page 5)

24. In respect of the certificate dated 3 April 2017, she said that she was in the office but did not attend that training.

25. With reference to the certificate dated 3 July 2017, she told us that she was off work on that day and referred us to WhatsApp messages dated 4 July 2017 in which she responded to a question put to her by a female colleague asking how she was feeling. She replied: "Awful, been off work for two days". That reply was sent at 1.38pm on 4 July 2017 and must cover the previous day, 3 July. We, therefore, find the claimant was not at work on 3 July 2017. (New Evidence page 12)

26. In respect of the certificate dated 2 October 2017, she took us to WhatsApp messages between her and Mr Chris Mayall in which he instructed her to reset his password. She stated that she was not on site on the day in question. We accept her evidence.

27. In relation to the certificate dated 2 April 2018, we again accept her evidence that this was Easter Monday, a bank holiday. She was not at work but was with her family at her aunt's house.

28. In relation to the certificate dated 2 July 2018, she told us that Mr Chris Mayall was not in the office as he was with his family at a caravan park in Oxford. (New Evidence (004) page 24)

29. In relation to the certificate dated 1 October 2018, we find that Mr Mayall was in Faro, Portugal, with his wife on that day as the claimant had arranged his boarding pass. He was sent an e-ticket with his booking reference number. (New Evidence (004) page 27)

30. In relation to the certificate dated 7 January 2019, the claimant told us that on that day she was on sick leave following an assault after the respondent's Christmas party in December 2018. The respondent did not produce any evidence that she returned to work either on that day or prior to that date. We, again, accept her evidence.

31. In relation to asbestos training, the respondent uses an outside contractor, Asbestos Training and Consultancy Ltd. This is a company in which Mr Christopher Bishop is the managing director. He would personally undertake asbestos training. He was not called to give evidence and be cross-examined, but stated in his witness statement that on 17 July 2018, he gave training on Licence Asbestos Manager Refresher Training for the respondent's staff at its Uxbridge offices. He stated that he could confirm that the claimant participated in the one-day course.

32. Of note was that the respondent did not produce any documentary evidence showing that the claimant did attend the course on the day in question. She denied that she attended and adduced, in evidence, WhatsApp messages which pictured herself and a baby on holiday in Corfu on the day in question. In reply to a question, she messaged that she was still "on the boat" and was not sure what time she would be back as was waiting for another group to return from their dive.

33. We are satisfied that on the day in question the claimant was in Corfu. (New Evidence (003) page 3)

34. The respondent's case is that the certificates may have been produced by the claimant. We do not accept such an assertion as being credible. Why would she produce the certificates only challenge the dates on them?

<u>Trip to Las Vegas and the collective complaint</u>

35. On or around 9 March 2017, the male members of staff went on a trip to Las Vegas. We were told by Mr Stuart Mayall that about 10 males went on the trip which was paid for by him and Chris Mayall. They were Billy Porter; James Day; David Mayall; Mr Stuart Mayall, and about six more. The cost was about £7,000 and was a reward to those who personally contributed to

the company's profitability. The female members of staff, however, did not go on the trip, nor were they invited to do so. Mr Stuart Mayall said in evidence that he did not want any "hanky panky" between the men and the women, hence the female staff did not go.

36. The female staff were aware of the impending trip and Ms Lauren Springle wrote a letter of complaint addressed to Stuart and Christ Mayall, on 21 February 2017. This was an email complaint supported by both the claimant and Ms Fox. Ms Springle wrote:

> "This email is one I am not wanting to write, but I feel I need to. First of all, I would like this to be taken confidentially as I would not like to cause further friction in the office. I am happy to say all the below points in a meeting in the office.
>
> Chris following on from the discussion we had prior to the Christmas party with myself, Elle, and Lauren, we are finding the situation in the office is still getting a bit too much, and possibly feel the actions that you said you would take have not been taken?
>
> Fortunately, as women, we don't live in the Dickensian times, but very occasionally in the office, it comes across as we do. And when I say this, I mean that we feel we are not treated as equals to the men in the work environment.
>
> Please see below some examples:
>
> - The Las Vegas trip (we feel left out, to put it simply. We weren't invited and have been told that the guys aren't even having to take annual leave. This has been rubbed into our face time and time again and emphasises a clear distinction between favourable treatment of the men and women in the office. I completely understand that I myself have not been working long for the company and would not expect to be invited to such a trip, but find it unfair that neither Elle or Lauren Fox were considered to be invited.)
>
> - Expected to take calls – I don't believe this is in mine or Lauren Fox's contracts and the men treating Elle like their receptionist. We do not mind taking these calls as part of our roles but we are not receptionists and should not be expected to answer phones just because we are women.
>
> - The men taking hours off and commenting on our annual leave – which we are entitled to! – they continuously take additional hours off for hair cuts amongst other outings and despite our concerns raised in our last meeting, continue to make snide comments about our lunch breaks/time off.
>
> - Having to clean the kitchen in the week – we are not cleaners and we are the only ones who do this.
>
> - Items claimed under expenses are constantly flaunted in the office. Whether it be new cars, laptops, or phones. We feel this is inappropriate and encouraging a divide in the office.
>
> - The general language in the office, the way Elle is spoken to especially.
>
> - The lack of teamwork/cohesion – trying to get the guys to do easybop etc is ridiculous – I feel like we are having to try to enforce this and the arguments that ensue are outrageous.

- Language and anger in the office is very unprofessional – in my opinion even when speaking to yourselves as managers.

- Elle picking up George's 'remains' on a daily basis – again she is not a cleaner.

- I think I got home today and realise how much all of the above and more has been bothering me, Lauren Fox, and Elle too.

I really like the company and my role but I am finding these aspects a bit too much to handle and it is making me not want to stay.

I hope you take our points into consideration and we can arrange a meeting, first of all with both of you and then also with the whole office. Kind regards" (66-67)

37. George was the name of a dog.

38. Upon receipt of the grievance, Mr Stuart Mayall had an informal discussion with Mr Chris Mayall. Stuart Mayall then emailed Ms Springle copying the claimant and Ms Fox, in which he wrote:

"Noted, all points will be fronted.

As you are aware we are a small company and there needs to be a collective way forwards." (66)

39. Ms Springle responded to Stuart Mayall's email the same day. She stated:

"I don't think it was related to us being a small business?

Would we be having a meeting or anything about it?" (65)

40. In Mr Stuart Mayall's evidence, in answer to a question put to him by a member of the tribunal as to what "fronted" meant, his response was that there would have been a team meeting, but he was not sure whether one had taken place. He would need to check to see what happened. At the end of the hearing there was no further evidence given on whether a meeting did in fact take place.

41. What was clear was that Mr Stuart Mayall had offered the female members of staff £3,000 to go on a spa break in September but it did not take place, and he did not follow it up. He also said that he did not send, nor did Chris Mayall, a memorandum to all staff on how to behave towards each other.

42. We find that this issue was not handled in a sensitive and detailed manner. It was clear from the female employees that they strongly felt that they had been discriminated against because of their sex and simply saying that it was a small business and that there needed to be a collective way forward without setting out in detail how that would be achieved, did not address the serious concerns the female staff had expressed. Furthermore, there was no enquiry into why the offer of £3,000 was not taken up, or whether or not such an offer satisfied their concerns.

43. Mr Stuart Mayall said in evidence that there were two different factions at work. He described them as the "girls and the boys" and that the atmosphere was "bad" from June 2016 to September 2017. We were unable to find what steps management took to alleviate this apparent breakdown in relations between the two groups.

Sexist and aggressive behaviour

44. We further find that the work environment was male dominated with the use of blatantly sexist and offensive language. The claimant was born on 25 May 1993 and was 23 years of age when she re-joined the respondent in June 2016. She was comparatively young, and we find that she felt she had to put up with the behaviour of her male colleagues.

45. The tribunal viewed a video recording taken by David Mayall of the claimant and Mr James Day. It does not have sound. Mr Day is much taller and much stronger than the claimant. The video depicts him grabbing the claimant around the upper part of her body forcing her to bend forward and trying to trip her up in the process. She then pushes him away and made her way to her desk whereupon she sits down. Seconds later Mr Day approaches her, lifts her off her chair and wrestles her to the ground using his height and strength. While she is on the ground, Mr Ollie Newland pretends to be a wrestling referee, and slams the palm of his hands on the floor, several times, simulating a referee the counting out of the claimant. The claimant then gets to her feet and makes her way to her chair. At the same time Mr Newland lifts the right hand of Mr Day to indicate that he had won the wrestling match. Mr Newland then shows off his strength and physical prowess.

46. We do not accept that this was horseplay as contended by the respondent, nor do we accept that the claimant was full and active participant. Although she is seen laughing and playing along, it was up to a point. She made her way to her desk and sat down. Mr Day, however, was anxious to demonstrate his strength over that of a young woman.

47. We also find that Mr David Mayall and Mr James Day referred to the claimant as "Elle at fat club". Elle being short for the claimant's first name, Eleanor. Mr Day, Mr D Mayall and Mr O Newland hid her car as well as her keys on, at least, one occasion.

48. The claimant and most of her work colleagues were part of the work's WhatsApps group called EBK Office Crew. She showed the tribunal a number of WhatsApp messages referring to her in either a sexually explicit or offensive way. In some, Mr Day commented: "Winner sends Elle to get coffee." "Shit employee" "Couldn't arrange a period in a vagina". This was sent when the claimant queried the names of Mr Chris Mayall's triplets.

49. The claimant appeared on The Apprentice programme on the BBC, and is a vegetarian. On one occasion she offered to collect pizza, Mr J Day messaged that he hoped they cut the vegetarian pizza with the same knife

used on the meat pizza. D Mayall then wrote: "No wonder you were shit on The Apprentice."

50. While the claimant was on holiday Mr J Day called her "dirty tramp" and that she should "hit the gym". This was a reference to her weight at the time.

51. D Mayall wrote that her life was a "car crash and no bloke would touch her".

52. She had an allergic reaction on her face and in response to D Mayall's question how she was, sent him a photograph of her face. Upon seeing it, Mr J Day, not D Mayall, commented: "Still ugly – need you ask" "Swelling an improvement", and "You are a pig in shit".

53. Mr Billy Porter wrote that she looked like "elephant man".

54. Mr D Mayall wrote, "Poor Elle still getting abused when on holiday". He also wished that she would "go out a window".

55. Mr J Day also wrote that the claimant should not eat food because she was already too fat and her waistline had increased.

56. We further find that Mr D Mayall threw a hard dog ball at the claimant's head which resulted in her crying.

57. On another occasion when the claimant was getting coffee, she messaged that the coffee shop was shut and wrote: "It's shut". To which Mr James Day responded: "Your vagina or the coffee shop?" (213-214)

58. We were show a photograph of a sticker on the top right-hand corner of the claimant's computer monitor with the word "cunt" printed. We do not accept the respondent's assertion that the claimant must have put it on her monitor. We accept the evidence given by her that when she turned up at her desk, she saw it on her monitor. This is in keeping with the language used and we bear in mind the evidence given by Ms Lauren Fox who said that the claimant and Ms Springle were referred to by D Mayall as "a cunt". (254)

59. She did not respond in kind and, indeed, there was no evidence that the female members of staff used swear words and/or referred to male private parts.

60. The claimant is a lover of animals and Mr D Mayall or his partner, would bring their puppy to work and leave it there during the day. We do not accept the respondent's account that the claimant would volunteer to look after the puppy or any other animal brought to work, but that she would be instructed to clean up their faeces on the floor notwithstanding the fact that cleaning was not in her duties. Ms Springle also referred to the claimant being instructed to clean up faeces.

61. Most of the above-described behaviour was in 2016-2017 but the claimant told us that the atmosphere in the workplace did not change as she was still spoken to in the manner described. The difficulty here was that we were not referred to any later behaviour of a rude, violent, and/or sexually offensive

nature. According to Mr Stuart Mayall, after the departure of Ms Springle everything had settled down on the workplace. That may have been the position in terms of the female staff not exerting their rights, but there was still discriminatory behaviour because of sex, in that, the claimant was still not appraised; did not attend training courses; she only had one salary increase during her most recent employment with the respondent; had not been promoted; had been the subject of discreet redundancy discussions; and had been invited to a disciplinary hearing.

Assault on the claimant

62. On 16 December 2018, the respondent held a Christmas party at a venue in the centre of London. The claimant attended the function and left when it had finished. She and another female made their way to a nightclub and from there were on their way home when she said she was assaulted by two strangers sustaining injuries to her face and head. It was unprovoked and was taken to the nearest hospital for treatment. She suffered lacerations to her face and a hairline fracture to her left cheek. There was extensive bruising to her left elbow. She also had injuries above the left and the right eyes. She was referred to the Maxillofacial Unit for further examination and treatment. (Exhibit ES-1 Part 2 130-134)

63. She then went on sick leave after having been signed off by her doctor as unfit for work.

64. On 18 December 2018, she received a text message from Mr Stuart Mayall asking when she would be returning to work and a further message on 20 December 2018. She sent text messages to Mr Mayall in January 2019 about her injuries and absence but was told to communicate with Mr Chris Mayall which was what she did.

65. By April 2019, upon review at the Clinic, the facial swelling had more or less disappeared and, clinically, there was no evidence of any fractures.

66. She was seen on 26 March 2019, by Dr MB Watts, from the Datchet Health Centre, when she was diagnosed as suffering from Post- Traumatic Stress Disorder. It is recorded that prior to the assault she had suffered anxiety since the death of a close friend and since the assault, she had become unhappy going out into open areas, such as large shopping centres. She said that she had curtailed her social activities and had only ventured out on one occasion in the previous two months. She felt scared of strangers in open spaces because of the assault. She reported flashbacks and nightmares. As a result, she was struggling at work and had discussed the matter with her line manager. Dr Watts noted that, prior to the assault, the claimant was on a low dose of anti-depressants for anxiety and low mood triggered by the loss of her friend. On 26 March 2019, her Sertraline medication was increased to 150mg. She was referred to Common Point of Entry, Community Mental Health Team, for an assessment. We understand that CMHT suggested Talking Therapies, but the claimant chose not to engage with that service.

67. On 21 July 2019, she was conveyed by ambulance to the Accident and Emergency Dept following an overdose.

68. On 6 July 2020, she reported to Dr Watts that things were much better, but she still had an irrational fear of people, that they may hit her. She was happy in her new job and was coping. She was neither suicidal nor depressed and remained less confident.

69. Dr Watts then wrote in the final paragraph, the following:

> "It is clear from our records that PTSD was diagnosed and has resolved gradually over a few months. She still has mild symptoms that do not significantly affect her quality of life. The balance of probability is that she was suffering with PTSD when she resigned from her job on 4/6/2019." (290-291)

70. The claimant had scar reduction treatment and has been left with a two-inch scar above her brow bone.

71. She returned to work on 22 March 2019 from sick leave but only worked for half a day. Thereafter she remained on sick leave.

72. From 26 March to effectively 4 May 2019, she was absent from work due to PTSD.

73. She told the tribunal that she was struggling mentally to cope with the aftermath of the assault. She found daily tasks difficult. She would go upstairs and forget what she went there for. She would forget to do her usual tasks and spent a lot of time just wanting to sleep but was unable to do so. She sent texts to the respondent saying that she would try to go into work to do the wages but in the end felt unable to do so.

74. She suffered from panic attacks whenever she ventured out in public, convinced that every person she walked past was going to attack her. She stopped driving for a period of time because she found herself panicking all the time and had to pull over to calm herself down.

75. It is clear from Dr Watts' report that on 6 July 2020, the claimant said that she was still struggling in social circumstances and felt strangers may assault her.

76. The claimant sustained a serious unprovoked attack by two strangers during the night of 16 December 2018, which resulted in her injuries being treated. She suffered from PTSD. By July 2020, she was still experiencing, although mild, symptoms of that condition. Socially, she has an irrational fear that people will hit her. The inability to relate to strangers has affected her social skills. Her ability to walk and interact with strangers being particularly difficult. It is more than minor. In our view it is substantial. She has been suffering with that condition since 26 March 2019, over a year. Accordingly, we have come to the conclusion that the claimant is a disabled person having regard to section 6, schedule 1, Equality Act 2010, by reason of her Post-Traumatic Stress Disorder.

Events leading up to the claimant's resignation

77. On Tuesday 19 December 2018, the claimant sent a text message to Mr Stuart Mayall about the assault on 16 December and the injuries she sustained. She also sent a picture of her blackened right eye and a cut to her right eyebrow. She stated that her head was not "good yet" and she was getting very confused but may work for a couple of hours to prepare the wages as her parents told her that they would drop her off and pick her up from work. That turned out to be overly optimistic. Mr Mayall replied by thanking her and that she should take care. (Exhibit ES-1-Part 1 Pages 57-58)

78. We were satisfied that the respondent was informed shortly after her assault and hospital treatment, of her injuries and the fact she would be on sick leave. Such was her loyalty and commitment to the company that she was prepared to go in to work to carry out her duties preparing the wages.

79. Having texted Mr Stuart Mayall informing him that she would not be in a position to return to work, she received an email from him sent to someone called Faisal, Peninsula, dated 23 March 2019 at 08:56. The subject was: "Forthcoming redundancy" and it stated the following:

> "Strictly Private and Confidential
>
> Hi Faisal, Hope you are well.
>
> Kindly deal directly with me on this one (or Chris if you have any particular issues).
>
> Chris and I have decided we have no choice but to go through the redundancy process with Elle Stevenson. 50% of her work is/has been built around organising labour supply with a key client. Unfortunately this …?... is slowing 'dropping through the floor'.
>
> The rest of her work has revolved around business development (without much success due to the marketplace), personal PA to Chris (which we can no longer afford) and office admin routines.
>
> As Chris recently commented to me, we nearly have as many people in the office as are out on site. It's been a difficult decision of which she is currently unaware (she is off sick at the minute and has taken something like 80% of her 2019 entitlement already) No rush, she will be included in the March salary run, and I'm away for two weeks come this Friday."

80. Mr Mayall then gives his mobile number if Faisal wished to engage in a discussion overview. (Exhibit ES-1 – Part 1 Page 59)

81. The claimant had no prior communication with the respondent about redundancy and the possibility of her becoming redundant.

82. There was a response from Mr Craig Kirkpatrick, of Peninsula, sent at 11:26 on 20 March 2019, advising Mr Stuart Mayall on what to consider and on how to apply a redundancy procedure. (Exhibit ES-1 – Part 1 Page 62)

83. On 21 March 2019, at 09:41, Stuart Mayall wrote to Mr Fitzpatrick giving details of the claimant's start date, current gross salary of £35,000 per annum, her entitlement to one month's notice and that the respondent was proposing to move offices far away from the claimant's home within six months. The annual cost to the respondent of employing her was £39,200 which required a turnover of £392,000 each year to cover the cost incurred in employing her. (Exhibit ES-1 – Part 1 Page 63)

84. The respondent requested a meeting with the claimant on 2 April 2019, but she was not well enough to attend. She emailed Mr Stuart Mayall, on 11 April 2019 at 10:38, copying Chris Mayall, stating that she was still not well enough to attend work and was very distressed. She stated that she was told by her doctor that she was not fit for work and attached a fit note of her unfitness until 26 April 2019. She then wrote that she was disappointed that she had not heard from Mr Stuart Mayall regarding some earlier points she had made which only added to her stress and anxiety. She then repeated her earlier points about suffering from PTSD; that she had reached out to Mr Mayall about her illness; instead of offering her support, he decided to end her employment making her redundant; the email was sent to her which was a deliberate act; this was after she had raised serious grievances on several occasions highlighting the discrepancy between the treatment of males versus females in the office but nothing was done; without any warning her email access had been revoked while on sick leave; she did not feel comfortable attending a meeting given her current mental health and believed it was more appropriate for a mediator to be involved. She then wrote that she would visit her doctor and would be in touch with the respondent about a return to work. The uncertainty was only adding to her ill health. She had notified ACAS and would keep Mr Mayall informed of her progress. (Exhibit ES-1 Part 1 67-68)

85. A fit note dated 4 April 2019 diagnosing Post-Traumatic Stress Disorder stated that she was unfit for work but did not give an end date. The claimant genuinely believed it covered her absence. (108)

86. At 3 o'clock on 11 April 2019, Mr Stuart Mayall replied saying that he and Chris Mayall continued to be extremely worried about her mental state and asked her to forward the original sick note for office purposes. He then wrote: "In the meantime we sincerely hope you are getting the right treatment and look forward to discussing further when you are better." (Exhibit ES-1 Part 1 67)

87. Mr Stuart Mayall emailed her on 18 April, stating that the respondent had not received the sick note by post, but he was prepared to meet with her and her representative to discuss the situation.

88. She replied on 23 April to Stuart Mayall, stating that she was sorry to hear that the respondent had not received her sick note and that she had taken a copy and would post the copy and have it tracked. She also stated that she provided a note from her doctor on her mental health informing the respondent that she was suffering from PTSD. She did not feel well enough to meet and invited Mr Mayall to meet with Sam Oliver who was willing to mediate. (ES-1 Part 1 66)

89. She received a letter dated 28 May 2019, from Stuart Mayall confirming receipt of two medical notes but was unable to pay her statutory sick pay or company sick pay.

90. In his letter of 28 May 2019, he wrote to the claimant:

> "Further to our attempts to contact you in relation to your unauthorised absence we are now left with no alternative but to deal with this through our formal procedures.
>
> You are therefore required to attend a disciplinary hearing on Friday 7 June at 10am, Eden Beck House. This is to give you the opportunity to provide an explanation for the following matters of concern:
>
> - Your persistent and unexplained absence from work on the following dates: 5 May 2019 to date
> - Your alleged failure to respond personally to a reasonable written management request on 28 May 2019 to contact us by pm 31 May 2019 to discuss your unauthorised absence.
> - Your alleged failure to return one Tag Heuer watch with a value of £4,000. Your response stating a return via Perform Worldwide cannot be substantiated
> - Your alleged failure to repay a company loan of £4,000 made in good faith on 18 September 2018 to assist your mortgage application
>
> I enclose, for your information, copies of the documents that will be used at the hearing, (itemised below) together with a copy of our disciplinary rules and procedures.
>
> 1. Sick note dated 4 April 2019
> 2. Email trail referring to £4,000 loan
>
> If you are unable to provide a satisfactory explanation for the matters of concern set out above, your employment may be terminated in accordance with our disciplinary procedure.
>
> You are entitled, if you so wish, to be accompanied by a fellow employee.
>
> If you do not attend the disciplinary hearing without giving advance notification or good reason, I will treat your non-attendance as a separate issue of misconduct.
>
> If you have any queries regarding the contents of this letter please contact me." (119-120)

91. Another letter was sent to the claimant on 28 May 2019 stating that the respondent had received two medical certificates for PTSD dated 26 March and 4 April 2019, covering her absence up to 4 May 2019. Mr Mayall then went on to write that no further sickness certificates had been submitted after 4 May 2019, as required in her terms and conditions of employment. She was instructed to contact him by Friday pm 31 May 2019 to discuss the situation but as the respondent had not received the medical certificate, it could not pay statutory sick pay nor company sick pay from 5 May 2019.

She was advised that if she failed to provide the medical certificate or to discuss the reasons for her absence, the respondent may proceed against her by taking action. (118)

92. It seems logical that the letter requesting medical certificates after 4 May 2019 was sent to the claimant first.

93. On 3 June 2019, she received an email stating that there would be a disciplinary hearing.

The claimant's resignation

94. The claimant told the tribunal that she was shocked to receive notification of her disciplinary hearing on 11 June. On 4 June 2019, following medical checks stating that she required surgery to her cheek bone, she found it difficult to cope with the thought of returning to work and/or being faced with redundancy. She felt that she had no option but to resign immediately from her position. She wrote a letter of resignation on 4 June 2019 to Stuart and Christopher Mayall in which she set out the chronology of events, the unprovoked violent attack on her and her Post-Traumatic Stress Disorder. She stated that she had never received an appraisal nor a contract of employment, nor a company handbook and in paragraph (i) of her letter, she wrote the following:

> "(i) Edenbeck have breached my trust and confidence beyond repair by treatment I have and continue to receive. Instead of offering me support as is your duty as an employer, you send me bullying emails inviting me, a post-traumatic stress sufferer, to a disciplinary hearing on accounts of an expired sick note. Again, I reiterate my sick note has not expired. I have been in hospital with Norovirus of which there is evidence, and during this period I am still trying to cope with a serious mental health – not to mention my ongoing physical treatments since the attack."

95. She also wrote that the email received on 3 June 2019, contained untrue and irrelevant claims and that she had been left financially unable to rely on the respondent in the month of May as she was paid £75.40 after three years' loyal service, hard work, and dedication. She informed the respondent that she would be issuing claims of discrimination in the Employment Tribunal. (121-123)

96. On 11 June 2019, Mr Stuart Mayall replied expressing disappointment that having received her letter of resignation, he believed she may have reached that decision in the heat of the moment and asked whether it was what she really wanted to do. If she decided not to retract her resignation the respondent would proceed with termination. He then took issue with the matters she raised in her letter and invited her to attend a grievance meeting with a representative of Face2Face Consultant to discuss her grievance. (125-127)

97. After receiving about £75 in May 2019, she applied through a recruitment company for work. She was put in touch with a Belgium company towards the end of May 2019. She secured employment on or around 5 June 2019.

The claimant's grievance investigation

98. The claimant's grievance was investigated by Ms Connie Kypta, Face2Face. This company seems to be part of Peninsula. Ms Kypta met with the claimant on 28 June 2019.

99. The grievance does not form part of the claims against the respondent. The report is dated 11 July 2019 in which Ms Kypta provided a fairly detailed outcome (128-197).

Loan of £4,000 to the claimant

100. During the course of the hearing evidence was given in relation to a loan of £4,000 to the claimant. It was given to bolster her application for a mortgage. The respondent expected it to be repaid by her. The discussion was between her and Mr Chris Mayall. The respondent did not want this matter to be determined by this Tribunal, whereas the claimant submitted that it had already come out in evidence and asked the tribunal to make a finding of fact and come to a conclusion on whether she still owed this money to the respondent.

101. We were taken to a text exchange between the claimant and Chris Mayall. Following is the account of the exchange:

> "Chris Mayall
>
> How do you want me to send that money back? Just let me know so I can sort it.
>
> What money? Can you do a method please.
>
> Will call you for my mortgage to help with me buying the house.
>
> Yeh that's fine I'm in the office. Don't worry keep it.
>
> Really? That would help me out a lot so thank you if you're sure?
>
> I'll speak to Dad, call it a bonus.
>
> Okay that's amazing. Thank you so much?
>
> You don't ask for anything unlike the others and I know you know what they get lol
>
> I just would never want to take the piss etc so thank you." (Exhibit ES-1 Part 2/129)

102. Mr Chris Mayall did not give evidence before us. As a director, we are satisfied that the claimant's intention was to repay the money, but Mr Mayall decided that she should keep it. Unlike her work colleagues, she did not ask for much from the respondent. It follows from this that the claimant was not required to repay back the money but to keep it.

Submissions

103. We have considered the submissions by Mr J Davis, solicitor on behalf of the claimant, and by Mr J Munroe, employment consultant on behalf of the respondent. In addition, we have taken into account the authorities they have referred us to. We do not propose to repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended.

The law

104. Section 6 and Schedule 1 of the EqA 2010 defines disability. Section 6 provides:

> "(1) A person (P) has a disability if –
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

105. Section 212(1) defines substantial as "more than minor or trivial." The effect of any medical treatment is discounted, schedule 1(5)(1).

106. Under section 6(5), the Secretary of State has issued Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011), which an Employment Tribunal must take into account as "it thinks is relevant."

107. The material time at which to assess the disability is at the time of the alleged discriminatory act, Cruickshank v VAW Motorcast Ltd [2002] IRLR 24

108. In Appendix 1 to the Equality and Human Rights Commission, Employment: Statutory Code of Practice, paragraph 8, with reference to "substantial adverse effect" states,

> "A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people."

109. Under section 13, EqA direct discrimination is defined:

> "(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."

109. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

110. Section 136 EqA is the burden of proof provision. It provides:

> "(1)This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred."
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

111. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions have an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other.

112. In Madarassy v Nomura International plc [2007IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In Madarassy, the claimant alleged sex discrimination, victimisation and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

113. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more , sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

114. The Court then went on to give a helpful guide, "Could conclude" now "could decide", must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence

as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

115. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting, or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

116. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, either race, sex, religion or belief, sexual orientation, pregnancy, or gender reassignment.

117. The tribunal could pass the first stage in the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex, Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.

118. In relation to discrimination arising in consequence of disability, section 15 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 the treatment is a proportionate means of achieving a legitimate aim.

> (2) 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 disability."

119. In paragraph 5.7, Equality and Human Rights Commission Code of Practice on Employment (2011), unfavourable treatment means being put at a disadvantage. This will include, for example, having been refused a job; denied a work opportunity; and dismissal from employment, paragraph 5.7.

120. In paragraph 4.9 it states the following,

> " 'Disadvantage' is not defined by the Act. It could include denial of an opportunity of choice, deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, was something that a reasonable person would complain about - so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker could reasonably say that they would have preferred to be treated differently."

121. In the case of Pnaiser v NHS England [2016] IRLR 170, the EAT, Mrs Justice Simler DBE, held that the "something" that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant or more than trivial, influence on the unfavourable treatment and amount to an effective reason for or cause of it. A tribunal should not fall into the trap of substituting motive for causation in deciding whether the burden has shifted. A tribunal must, first, identify whether there was unfavourable treatment and by whom in the respects relied on by the claimant. Secondly, the tribunal must determine what caused the treatment or what was the reason for it. An examination of the conscious and unconscious thought processes of the alleged discriminator will be required. Thirdly, motive is irrelevant as the focus is on the reason or cause of the treatment of the claimant. Fourthly, whether the reason or cause of it was something arising in consequence of the claimant's disability. The causation test is an objective question and does not depend on the thought processes of the alleged discriminator. Fifthly, the knowledge required in section 15(2) is of the disability.

122. A similar approach was taken in the case of City of York Council v Grosset UKEAT/0015/16 relying on the guidance in Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305, Langstaff P.

123. In determining justification, an Employment Tribunal is required to make its own judgment as to whether, on a fair and detailed analysis of working practices and business considerations involved, a discriminatory practice was reasonably necessary and not apply a range of reasonable responses approach, Hardy & Hansons plc v Lax [2005] ICR 1565.

124. Harassment is defined in section 26 EqA as;

> **"**26 Harassment
>
> (1) A person (A) harasses another (B) if-

> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of-
>
> (i) violating B's dignity, or
>
> (ii) creating and intimidating, hostile, degrading, humiliating or offensive environment for B"

125. In deciding whether the conduct has the particular effect, regard must be had to the perception of B; other circumstances of the case; and whether it is reasonable for the conduct to have that effect, section 26(4).

126. In this regard guidance has been given by Underhill P, as he then was, in case of Richmond Pharmacology v Dhaliwal [2009] ICR 724, set out the approach to adopt when considering a harassment claim although it was with reference to section 3A(1) Race Relations Act 1976. The EAT held that the claimant had to show that:

> (1) the respondent had engaged in unwanted conduct;
>
> (2) the conduct had the purpose or effect of violating his or her dignity or of creating an adverse environment;
>
> (3) the conduct was on one of the prohibited grounds;
>
> (4) a respondent might be liable on the basis that the effect of his conduct had produced the proscribed consequences even if that was not his purpose, however, the respondent should not be held liable merely because his conduct had the effect of producing a proscribed consequence, unless it was also reasonable, adopting an objective test, for that consequence to have occurred; and
>
> (5) it was for the tribunal to make a factual assessment, having regard to all the relevant circumstances, including the context of the conduct in question, as to whether it was reasonable for the claimant to have felt that their dignity had been violated, or an adverse environment created.

127. Whether the conduct relates to disability and or sex "will require consideration of the mental processes of the putative harasser", Underhill LJ, GMB v Henderson [2016] EWCA Civ 1049.

128. Section 95(1)c Employment Rights Act 1996, provides,

> "(1) For the purposes of this Part an employee is dismissed by his employer if …..
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

129. It was held by the Court of Appeal in the case of Western Excavating (ECC) Ltd-v-Sharp [1978] IRLR 27, that whether an employee is entitled to terminate his contract of employment without notice by reason of the employer's conduct and claim constructive dismissal must be determined in accordance with the law of contract. Lord Denning MR said that an employee is entitled to treat himself as constructively dismissed 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 of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.

130. It is an implied term of any contract of employment that the employer shall not without reasonable cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee, Malik-v-Bank of Credit and Commerce International [1997] IRLR 462, House of Lords, Lord Nicholls.

131. In the case of Lewis-v-Motorworld Garages Ltd [1985] IRLR 465, the Court of Appeal held in relation to the "last straw" doctrine that,

> "…the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?", Glidewell LJ.

132. Dyson LJ giving the leading judgment in the case of London Borough of Waltham Forest-v-Omilaju [2005] IRLR 35, Court of Appeal, held:

> "A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with earlier acts on which the employee relies, it amounts to a breach of the implied term of mutual trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.
>
> I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be…. .
>
> If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.", pages 37 - 38.

133. The test of whether the employee's trust and confidence has been undermined is an objective one, Omilaju.

134. In the case of Tullett Prebon plc v BGC [2011] IRLR 420, on the issue of whether the first instance judge had applied a subjective test rather than an objective one to the actions of the alleged contract breaker, the Court of Appeal held, reading from the headnote,

> "The question of whether or not there has been a repudiatory breach of the duty of trust and confidence is a 'question of fact for the tribunal of fact'. It [is] a highly specific question. The legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract-breaker has clearly shown an intention to abandon and altogether refused to perform the contract. The issue is repudiatory breach in circumstances where the objectively assessed intention of the alleged contract breaker towards the employees is of paramount importance.
>
> In the present case, the judge had approached the issue correctly. He had not applied a subjective approach. He had objectively assessed the true intention of Tullett and had reached the conclusions that their intention was not to attack but to strengthen the employment relationship. That was a permissible and correct finding, reached after a careful consideration of all the circumstances which had to be taken into account in so far as they bore on an objective assessment of the intention of the alleged contract breaker."

Conclusion

Disability discrimination

135. We have already made findings and came to the conclusion in paragraph 76 above, that the claimant, at all material times, was suffering from a disability, namely Post-Traumatic Stress Disorder, from 26 March 2019 and is protected as a disabled person under section 6, schedule 1, Equality Act 2010. From the fit notes sent in March and April 2019, the respondent knew of her mental condition and upon questioning of the claimant would have know that she suffered from a disability.

Direct sex discrimination

136. In relation to the direct discrimination claim because of sex, we have made findings of fact in relation to the acts complained of by the claimant. We have found that she was not given appraisals or performance reviews; she was not given the opportunity of personal progression and regular wage increases; she had to argue for a wage increase and it was given to her once during her more recent employment; apart from First Aid training, no other training was offered to her; the collective grievance submitted on 21 February 2017, was not properly investigated; sending rude, offensive and sexually explicit messages and a note; being instructed to clean up dog faeces; throwing a dog's hard ball at her; and moving her car and her keys. This was in stark contrast to the way in which the respondent treated its male members of staff and the way in which the male members of staff treated the female staff, including the claimant.

137. Mr Munro invited the tribunal to accept that what occurred, particularly in relation to the video, was horseplay and in relation to the messages, work banter in an office environment. He said that the claimant did not complain at the end of the video although she and Mr Day were physical with each other. There was also a gap in time from the video recording and the collective complaint in February 2017 and with little evidence to prove that conduct continued thereafter. She could have gone to either Stuart or Chris Mayall to complain but she did not do so, thereby depriving Stuart Mayall of the opportunity of addressing her concerns.

138. We bear in mind that the behaviour of the male members of staff identified was not reciprocated in kind either by the claimant or by her female work colleagues, in particular, using gratuitously offensive language and sexually explicit words.

139. What happened to the claimant was much more than banter, and in relation to the video recording, more than horseplay. This was the respondent allowing its male employees to take advantage of the few female employees, in particular, the claimant. As an example of the respondent's attitude towards its female members of staff we need to look at the circumstances surrounding the trip to Las Vegas. The female staff were neither consulted nor invited to go roughly, but about 10 males staff went to Las Vegas at the respondent's expense. Only £3000 was offered to the female members of staff for a spa treatment. They neither were consulted nor asked for the treatment. It was not taken up and there the matter rest without further enquiry by the respondent. It was a take it or leave it approach.

140. It was clear to the tribunal, that how the respondent conducted itself evinced a clear dichotomy in the treatment between male and female members of staff. We take into account the male members staff as the claimant's comparators. Her treatment continued during the time she was absent following the assault on her in December 2018. She did not meet with either Chris or Stuart Mayall for a welfare update despite her loyalty and commitment to the respondent. All Mr Stuart Mayall required of her was that she should submit her fit notes and come to work for a meeting. As a female member of staff, she was expendable because unbeknown to her, steps were taken to make her redundant. She genuinely believed that her sick note covered her beyond May 2019. The position was not accepted by Mr Stuart Mayall who invited her to a disciplinary hearing. Her position was costing over £300,000 each year, no similar approach was taken in relation to some of the male staff.

141. Even if the tribunal is in error in treating the male employees as comparators, we will apply the hypothetical male personal assistant, and having regard to the male dominated office environment, would conclude that the hypothetical male comparator would not have been treated in a similar way as how the claimant had been treated by the respondent.

142. Applying Madarassy, we have come to the conclusion that the claimant has establish less favourable treatment because of sex. The burden shifts on the respondent, and as we have already found, her treatment was not banter nor was the interaction with Mr Day, horseplay. This was a case of men taking full advantage of her and her two former female colleagues in the workplace. They were all managers whereas the claimant was not a manager but in a subservient position. We were not satisfied with the respondent's explanation. This claim is well founded.

Discrimination arising in consequence of disability

143. In relation to discrimination arising in consequence of disability, we have concluded that the claimant's disability is a mental impairment, namely Post-Traumatic Stress Disorder. She was absent from 16 December 2018 to 21 March 2019. On 22 March 2019, she attended work for half a day. Thereafter she remained on sick leave. We do find that while on sick leave because of her disability, the respondent did not engage in offering her practical, welfare support she had expected from 19 March 2019, but instead she was subjected to the disciplinary process after sending fit notes. There was no home welfare visit bearing in mind that she had not been disciplined before and had an excellent work record. After sending in a fit note in April 2019, stating that she would be on sick leave for an indefinite duration, it was not accepted, and the disciplinary process was invoked. This fit note was dated 4 April 2019 diagnosing Post-Traumatic Stress Disorder stating she was unfit for work but did not give an end date.

144. The claimant genuinely believed that she was covered by the fit note.

145. She received statutory sick pay. There was no reason why the respondent could not have relied on the fit note dated 4 April 2019 and, if necessary, seek clarification from the claimant. The claimant insisted that that fit note was current and relevant.

146. Unfavourable treatment includes putting someone at a disadvantage. The claimant was disadvantaged, in that, she had not been paid her full salary during the period of her sickness from May 2019, but £75 statutory sick pay which could not cover her regular monthly outgoings.

147. Furthermore, she was told that she had to attend a disciplinary hearing for unauthorised absence when she was relying on the 4 April 2019 fit note and had a clean disciplinary record. This threat caused her further anxiety and stress which led to her resignation. According to Chris Mayall in the email exchange about the £4,000, the claimant was not someone who would request that certain benefits be given to her. What she wanted was for the respondent to be sympathetic towards her in relation to her sickness absence and accept that the reason for her absence being Post-Traumatic Stress Disorder, a disability. From the emails there appear to have been a lack of sympathy and support. Instead, Mr Stuart Mayall, on the advice from Peninsula, was seeking to make the claimant redundant.

148. We have come to the conclusion that the claimant has establish that she had been discriminated in the three with respects referred to in the list of issues, in consequence of her disability. We were not told of the justification defence for her treatment. If the legitimate aim was to ensure that the respondent fairly applied its disciplinary policy, it has to be proportionate. The claimant was a good employee without a disciplinary record. She was committed to the respondent as a loyal employee and had sent in fit notes. There was no welfare meeting at her home or a neutral location as she was unable to attend work due to being unfit. To have threatened her with disciplinary action with the intention of terminating her employment was disproportionate. Accordingly, this claim is well-founded.

Harassment related to sex

149. In relation to harassment related to sex, the offensive messages and comments relating to the claimant's private parts and her period, were in 2017. Although the claimant said that the conduct continued, we were not referred to any later unwanted conduct related to sex, Richmond Pharmacology v Dhaliwal. Mr Davis, solicitor for the claimant, in his very brief submissions to us, did not refer to evidence supportive of this claim. We accept that in relation to lack of promotion, appraisals, salary increases, training, redundancy, and disciplinary proceedings, these continued but they are relevant to direct sex discrimination.

150. Accordingly, we have come to the conclusion that this claim is not well-founded and is dismissed.

Harassment related to disability

151. The claimant became disabled on 26 March 2019. On or around that date, the respondent knew from the fit notes, that she was suffering from PTSD. However, there was no evidence that it engaged in unwanted conduct related to the claimant's disability or to disability. We, therefore, were unable to make findings of fact upon which we could decide that such conduct took place. This claim is not well-founded and is dismissed.

Constructive unfair dismissal

152. As regards the constructive unfair dismissal claim, bearing in mind our positive findings in respect of direct sex discrimination and discrimination arising in consequence of disability, the last straw was the threat of disciplinary action and she tendered her resignation. It was clear at that time, that the respondent was anxious to terminate her employment having prepared the case for her dismissal by reason of redundancy. Many of the claimant's concerns had not been addressed prior to her resignation and they formed most of the reasons for her resignation. Applying Western Excavating (ECC) Ltd-v-Sharp, and Omilaju, the respondent had breached the implied term of mutual trust and confidence entitling the claimant to resign following an unblemished disciplinary record, Malik-v-Bank of Credit and Commerce International.

153. The claimant was able to secure for herself employment in June 2019. She took up her new post on or around 5 June 2019. It was reasonable for her to look for employment elsewhere as the respondent had demonstrated that it was going to terminate her employment by reason of redundancy. She had bills to pay at the end of each month and could not live on £75 a week sick pay.

154. Mr Munro submitted that the claimant had set up the respondent in order to pursue proceedings against it for personal financial benefit. We do not accept this contention. It is clear from the evidence that the claimant has been the victim of appalling sexual abuse, and the discriminatory behaviour because of sex continued up to and including her resignation. She also suffered discrimination arising in consequence of disability. She is to be treated as having been dismissed by the respondent. We look to see what explanation for her dismissal has been provided and whether a fair procedure had been followed?

155. We were not given a reason or, if more than one, the principal reason for the claimant's dismissal. Accordingly, the claimant's constructive unfair dismissal claim is well-founded.

Out of time issue

156. In relation to whether the discrimination claims have been presented in time, we have come to that conclusion that they form a continuing course of conduct. It was the same office environment. The key individuals were The Mayalls and Mr Day. The conduct ended with the claimant's resignation which is in time, section 123(3)(a) EqA.

157. The case is listed for a remedy hearing on Monday 8 March 2021, for one day, by Cloud Video Platform.

_____
Employment Judge Bedeau
7 February 2021
Date: ……..

Sent to the parties on: .....22/02/2021....

.....T Henry-Yeo.....
For the Tribunal Office