



## REASONS

### Introduction

1. By a claim form dated 23 December 2019, the Claimant indicated that she wished to pursue a claim for unfair constructive dismissal, wrongful dismissal, discrimination arising from disability and harassment related to disability.
2. At a preliminary hearing held by telephone before Employment Judge Brace on 8 February 2021, the Claimant was given permission to amend her claim of harassment to include harassment related to sex as well as disability.
3. At the same preliminary hearing, the Claimant was given permission to amend her claim to include a complaint of victimisation under section 27 of the Equality Act 2010. However, Employment Judge Brace stated that such a claim was substantially out of time, the application to include the claim of victimisation not having been made until September 2020. The permission to amend was granted subject to a determination to be made at the final hearing whether time should be extended.
4. A list of issues to be determined by the Tribunal had been included in the case management order made following the initial preliminary hearing on 28 February 2020 before Employment Judge Beard. An amended list of issues was included in the order made at a preliminary hearing before Employment Judge Jenkins on 23 July 2020.
5. At the preliminary hearing before Employment Judge Brace, there was a further discussion with regard to the list of issues. It was directed that the parties were to provide an agreed and updated list of issues to the Tribunal prior to the final hearing.
6. In the lead up to the final hearing, the representatives of both the Claimant and the Respondent had submitted an amended list of issues, both of which were described as "not agreed".
7. At the commencement of the hearing, Mr Randle indicated, on behalf of the Respondent, that the amended list of issues produced by the Claimant dated 8 March 2021 were agreed save for paragraph 1(c)(i). The list of issues is set out below.

### Issues

#### **1. *Constructive unfair dismissal and wrongful dismissal***

- a. Was the Claimant constructively dismissed?
  - i. Did the Respondent breach the implied term of mutual trust and confidence, ie did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the Claimant?
  - ii. If so, did the Claimant "affirm" the contract of employment before resigning? (To "affirm" means to act in a manner that indicates the Claimant remains bound by the terms of the contract.)
  - iii. If not, did the Claimant resign in response to the breach of contract (was the breach a reason for the Claimant's resignation – it need not be the only reason for the resignation)?

- b. If the Claimant was dismissed, she will also have been wrongfully dismissed, as she resigned without notice.
- c. The conduct the Claimant relies on as breaching trust and confidence is:
  - i. That set out for disability and / or sex discrimination below.
  - ii. That the Respondent concluded, as part of the grievance process, that the Claimant did not have a panic attack when she had.
  - iii. Suggesting mediation with Mr Roberts despite his promotion and move to London.
  - iv. The outcome of the grievance process triggered the Claimant's resignation, but the Claimant took account of all of the above in deciding to resign.
- d. If the Claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and if so, was the dismissal fair or unfair in accordance with Section 98(4) ERA, and in particular, did the Respondent in all respects act within the "band of reasonable responses"?

**2. Equality Act 210 ("EqA") section 6 disability**

- a. Did the Claimant have a physical or mental impairment, namely PTSD, at the relevant time?
- b. If so, did the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?
- c. If so, is that effect long term? In particular, when did it start and did the impairment last for at least 12 months?
- d. Were any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have had a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?
- e. The Respondent has accepted that the Claimant had the impairment of depression and anxiety at the relevant time, and that it had the required substantial, long-term adverse effect on her ability to carry out normal day-to-day activities.

**3. EqA, section 15: discrimination arising from disability**

- a. Did the Respondent treat the Claimant unfavourably as follows (no comparator is needed):
  - i. By the manner in which Mr Roberts (the Claimant's manager) spoke to the Claimant when she was exhibiting symptoms of distress / panic attack and an inability to work on the afternoon of 27 September 2019?

- ii. By expecting the Claimant to resume work in circumstances where she had demonstrated distress / panic attack and an inability to work at that point?
- b. Did the following thing arise in consequence of the Claimant's disability:
  - i. The distress / panic attack and inability to work on the afternoon of 27 September 2019?
- c. Did the Respondent treat the Claimant unfavourably because of any distress / panic attack and the ability to work on the afternoon of 27 September 2019?
- d. If so, has the Respondent shown that the unfavourable treatment relied upon by the Claimant was a proportionate means of achieving a legitimate aim? The Respondent will be given the opportunity to provide details of any such defence.
- e. 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?

**4. EqA, section 26: harassment related to disability**

- a. Did the Respondent engage in conduct as follows:
  - i. Pressurising the Claimant to return to work online on the afternoon of 27 September 2019?
- b. If so, was that conducted unwanted?
- c. If so, did it relate to the protected characteristic of disability?
- d. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliation or offensive environment for the Claimant?
- e. Did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? (Whether conduct has this effect involves 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.)

**5. EqA, section 26: harassment related to sex**

- a. Did the manner in which the Claimant treated the Defendant on 27 September 2019 relied on under disability discrimination above constitute unwanted conduct?
- b. If so, did it relate to the protected characteristic of sex?
- c. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- d. Did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for

the Claimant? (Whether conduct has this effect involves 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.)

**6. EqA, section 27: Victimisation**

- a. Have the Claimant's allegations of discrimination been presented outside of the three month time limit (s.123(1)(a) EqA)?
- b. If so, does this amount to a continuing act (s.123(3)(a) EqA)?
- c. If any allegation is determined to have been brought out of time, is it just and equitable to extend the time limits pursuant to s.123(1)(b) EqA?
- d. Did the Claimant's act of raising a grievance on 7 October 2019 constitute a Protected Act?
- e. Was the Respondent's rejection of the grievance on 22 November 2019 a detriment to which the Claimant was subjected?
- f. If so, did the Respondent subject the Claimant to this detriment because she had done the protected act?

**7. Remedy**

If the Claimant succeeds, in whole or 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.

8. There was a discussion regarding the scope of the one issue which was not agreed, namely paragraph 1c i. As currently drafted, the conduct on which the Claimant relied as supporting an allegation of a breach by the Respondent of its implied term of trust and confidence was as set out at issue 3a i and ii. However, Mr Partridge submitted that the Tribunal should infer that this included the discriminatory nature of such conduct. The Tribunal reminded itself that this was the amended list of issues submitted on behalf of the Claimant and that it would restrict its deliberations to the conduct alleged at issue 3a i and ii. It also concluded that it did not consider that such an approach would make a material difference to the Claimant's case.

**Evidence**

9. The Claimant gave evidence on her own behalf.
10. The Claimant also called Ms Kirsty Hopkins, a current employee of the Respondent, and Ms Jade Vaughan, a former employee of the Respondent, to give evidence on her behalf.
11. The Respondent called:
  - i. Mr Gareth Rees Roberts, who continues to be employed by the Respondent and who was employed as a team leader at the material time, and

- ii. Ms Donna Awford, employed by the Respondent and who, at the material time, was seconded to the role of Operations Manager that subsequently became her substantive role.
12. The Claimant and her witnesses had provided written witness statements.
13. Both Mr Roberts and Ms Awford had provided both a witness statement and a supplementary witness statement.
14. An agreed bundle had been prepared by the Respondent and submitted together with an index running to 445 pages.
15. In the course of the hearing, certain additional documents were incorporated into a supplementary bundle that contained 15 pages. Unless otherwise stated, any page references in this judgment refer to pages in the main bundle. References to any documents in the supplemental bundle will be identified with the prefix SB.

### **Submissions**

16. Prior to making their oral closing submissions, Mr Randle had provided a document entitled "*Respondent's written submissions*" and Mr Partridge had provided a document entitled "*Closing note prepared by Counsel for the Claimant*".

### **Findings of Fact**

#### **Background**

17. The Respondent is a company that provides telecommunications and broadband services throughout the UK. It operates from a number of offices throughout the UK, one of which is based at Merthyr Tydfil in South Wales.
18. On 31 October 2013, the Respondent sent to the Claimant a letter containing an offer of employment together with the terms and conditions of her employment (pages 98 to 114) and her role was as a Tech Level Two Adviser (Customer Service Representative). Her employment commenced on 11 November 2013, working three days one week and four days the next. The Claimant would work 12 hour shifts, Wednesday, Thursday and Friday one week and Saturday, Sunday, Monday and Tuesday the following week.
19. The Claimant's role as a level two technical customer adviser was to deal with complex queries from customers over the phone, a query having been escalated from a level one technical customer adviser.
20. The call centre is open plan and the floor is split into "pods" which are set up in the shape of a C with team members sitting on the inside and outside of the pod. There were approximately 10 or 11 in the Claimant's team and there was also an Admin team that was of a similar number. The pods are divided by aisles or walkways and there are also breakout rooms. Two of those breakout rooms were called the "Zest" room and the "Caerphilly" room.
21. Whilst there was a dispute with regard to whether or not members of staff were allowed, on occasion, to eat food at their desks, the general rule was that eating at the desk in the pod was prohibited; there were numerous signs throughout the office that made that clear.

22. Mr Roberts would ordinarily sit in a pod on the other side of the aisle to the pod where the Claimant worked as there was insufficient room for him to sit in the same pod.
23. Mr Gareth Roberts has worked for the Respondent for just under 10 years. For eight of those years, he was employed as a team leader in the Respondent's Consumer Directorate.

#### Events prior to 27 September 2019

24. In about July 2019, Mr Roberts was requested by his Operations Manager to support the Level 2 Technical Department.
25. At the end of August 2019, Mr Roberts was asked to temporarily act as team leader to one particular team that required additional support and this team included the Claimant.
26. At the time of Mr Roberts' appointment as team leader, the Claimant was in fact working within another team. It was only at the beginning of September 2019 that the Claimant and Mr Roberts started to interact with each other in the course of the days on which the Claimant was working.
27. However, the Claimant and Mr Roberts did know of each other prior to him becoming team leader of the team in which the Claimant worked. The Claimant had been interviewed by Mr Roberts approximately a month or so earlier when the Claimant applied for a position in the Admin team. The Claimant was not successful but Mr Roberts was aware of her continued interest in such a role. Indeed the Claimant sent an email to a number of individuals at the Respondent, copied to Mr Roberts, in relation to proposals regarding customers' use of SIM cards abroad. In his response, Mr Roberts stated:

*"This is an excellent bit of work and massively fixes a real customer pain point. If you have an interview for admin in future – remember this example of time you've done great work or really improved the customer experience."*

28. In the course of a typical shift, the Claimant would probably interact with Mr Roberts on three or four occasions about a customer or other work-related issues. The length of each interaction would vary from a couple of minutes up to 10 minutes. The need for such interaction would also vary but would ordinarily relate to a particularly difficult customer or a circumstance in which a proposed credit to be given to the customer required the team leader's authority. Mr Roberts confirmed that the social interaction with the Claimant was very limited and the Claimant confirmed that there was little or no contact outside work-related issues.
29. On 16 September 2019, the Claimant and Mr Roberts met for what is described as a "Coaching" session.
30. In advance of their meeting, the Claimant sent Mr Roberts an email (page 149). In that email, the Claimant stated as follows:

*"Now I know you will be our manager for the foreseeable future there is some stuff you should probably know just in terms of support."*

*There has been a lot of stuff going on with me over the last year. Things have been particularly bad over the last 6 months. I have already been referred to Rehab Works back in July but due despite me following up with them several times I only started counselling on Friday. ...*

*With all the stuff going on in my personal life and all the stress with work I have found actually being here in work really difficult. It is especially difficult when I have not been able to sleep properly, I usually end up crying all the way to work and feeling down most of the day.*

*In the past it isn't something that I have even discussed with my manager but after I came back to work and had a catch up with Allison she said it was really important for me to talk with whoever ended up being our manager. I really don't like talking about things and it does make me really uncomfortable, but I do understand the importance of letting you know what's going on." (sic)*

31. Later that day, the Claimant and Mr Roberts met and Mr Roberts subsequently prepared a note of their meeting (page 150). Mr Roberts recorded:

*"Bethan & I spent this coaching session off the floor at her request due to the sensitive nature of what she wanted to discuss. We spoke about her life outside of work was increasingly difficult and stressful and how whilst she was seeking support for this, the recent changes in work hadn't helped her mental state, with her often feeling teary and emotional at times. We spoke about the mechanisms in place now to help her (fixed TL, regular coaching / reviews, RehabWorks) as well as I would feedback her comments about how change is typically communicated within the operation as she feels this has increased her overall state of anxiety."*

32. They also discussed an issue relating to "ticket feedback" when the Claimant made a recommendation of how matters can be improved with which Mr Roberts agreed.

33. The Respondent accepted, and the Tribunal found, that the Claimant was disabled within the meaning of the Equality Act 2010. The acceptance by the Respondent was on the basis that the Claimant suffered from anxiety and depression. However, the Claimant also claimed that she was disabled within the meaning of the Act as a result of suffering from post-traumatic stress disorder ("PTSD"). Whilst this had not been accepted by the Respondent, it was not substantially challenged in the course of the hearing.

34. Indeed, the Claimant had been referred by the Respondent to RehabWorks and had been assessed by a clinician. In the treatment notes (starting at page 294), the "*working diagnosis*" is described as PTSD and the treatment goals at section 3 are described as "*to manage symptom of ptsd, to resolve intrusive thoughts about father's death, to reduce avoidance of reinders and to reduce sensitivity / emotional upsets that occur out of blue*" (sic). Under section 4 entitled "*Work conducted in session*", the notes state:

*"Beth explained feeling emotional and sensitive, that she cries for no reason and becomes overwhelmed and upset at small things like partner being separated / lost in supermarkets. This has been the case for a number of years, feels constantly distracted and this leads to lapse in concentration. Beth also reporting nightmares; which are spcific and most nights, about her dads death.*

*Reviewed dads death: Beth was present, it was sudden, she delivered CPR. Beth avoids where ashes are spread, avoids reminders of his death, specific films where characters die as she becomes too upset / reminded. Discussed intrusive thoughts, Beth reports thinnking about her dads death alot and does not want to.*

*Completed ies-r for complicated grief / PTSD, scored 55 (cut off 33).*

*Beth has also had 12 sessions of CBT last year through RehabWorks for stress.*

*Plan; to discuss step up to f2f PTSD treatment."(sic)*

35. In a document entitled "*Response to medical questions 2*" (starting at page 297), the Claimant responded to questions with regard to her PTSD to illustrate that the criteria to satisfy the definition of a disability within the meaning of the Equality Act had been met. There was a reference to a GP letter being attached to the document but this was not included in the bundle prepared by the Respondent.
36. However, the Tribunal had also taken account of the medical history obtained from the Claimant's GP practice (pages 287 to 290). On 8 May 2018, there was an entry which said the Claimant had lost her father two years ago and that she had not really recovered. There was then another entry on 25 June 2019 that said that she still had visions of her father dying and she performed CPR on him.
37. Taking account of the evidence which had been presented by the Claimant which was not challenged to any material extent in the course of the hearing, the Tribunal found, on the balance of probabilities, that the Claimant was disabled within the meaning of the Equality Act 2010 as a result not only of anxiety and depression but also PTSD. Indeed, it was not possible, on the evidence before it, for the Tribunal to distinguish between the conditions, and the nature of the impairments, from which the Claimant suffered.
38. It was accepted by Mr Roberts in the course of oral evidence that he knew the Claimant was disabled under the Equality Act. He knew of the RehabWorks treatment notes and the occupational health programme that was in place. Such information would, or could, be made available to him as team leader to enable him to manage the team. Indeed, he stated that the role of RehabWorks was to assist managers.
39. Mr Roberts said that he knew the Claimant was disabled within the meaning of the Act from his conversation with the Claimant on 16 September 2019. Mr Roberts also accepted that the description at section 4 of the RehabWorks mental health treatment notes (page 294) stating that the Claimant, "*cries for no reason and becomes overwhelmed and upset at small things ...*" were the same symptoms described in the note that he prepared following the coaching session on 16 September 2019, i.e. "*... the recent changes in work hadn't helped her mental state, with her often feeling teary and emotional at times*".
40. The Tribunal had listened carefully to the evidence of Mr Roberts and found that, in areas which were material, his account was not credible.
41. As stated, Mr Roberts had accepted that he knew that the Claimant was disabled within the meaning of the Equality Act as a result of anxiety and depression. He also said that he knew that the Claimant had been referred to RehabWorks and that he was entitled, as team leader, to have access to those documents to enable him to manage the Claimant effectively. However, he confirmed that he had not called for those documents. Further, he described the email sent by the Claimant to him on 16 September 2019 (page 149) as illustrating "*an improving picture*" and also that the summary of the coaching session which he prepared (page 150) did not suggest there were current problems. The Tribunal did not consider that any such conclusions could be drawn from those two documents. Indeed, the content of the email and meeting note suggested the opposite was the case. It was also not consistent with Mr Roberts then saying that he was going to put, "*more mechanisms in place to help her*" although he did not indicate what those mechanisms may have been.

42. It was accepted by Mr Roberts that there was reference to PTSD in the RehabWorks' notes and the symptoms were the same, namely the Claimant could become teary and emotional.
43. Up until 27 September 2019, albeit a short period of approximately 10 days, there were no concerns with regard to the working relationship between the Claimant and Mr Roberts. Whilst the Claimant stated she had heard reports about Mr Roberts and what he had said or done to other people in the past, the Claimant appreciated that the environment within which they worked was prone to gossip and that there would always be two sides to a story. As for Mr Roberts, he confirmed that he considered the Claimant to be a very good employee.

#### **Events on 27 September 2019**

44. There were only two witnesses to the entirety of the events that took place on 27 September 2019, namely the Claimant and Mr Roberts. There were two other witnesses who had seen and heard part of what took place, namely Ms Samantha Keohane and Gareth Norris, neither of whom attended to give oral evidence to the Tribunal.
45. There were other members of staff who had been interviewed during the grievance process, primarily at appeal stage, who were aware of the Claimant's distress and had overheard certain of the exchanges which took place between the Claimant and Mr Roberts.
46. On 27 September 2019, the Claimant was supposed to attend a review meeting. However, on the same day, a fellow employee, Ms Kirsty Hopkins, had to attend a stage one sickness meeting and she asked the Claimant to attend with her for moral support. The stage one sickness meeting of Ms Hopkins was to be chaired by Mr Roberts. The Claimant knew Ms Hopkins well and also her background history. Mr Roberts gave the Claimant the choice of attending her review meeting or attending the stage one sickness meeting with Ms Hopkins. The Claimant chose to support Ms Hopkins. It was due to take approximately one hour and therefore the Claimant decided that she would purchase her lunch from the canteen after the meeting had concluded. It transpired that the meeting took over two hours. Furthermore, Ms Hopkins suffered with anxiety and depression and the interview that was conducted by Mr Roberts covered topics of a highly personal and sensitive nature.
47. In his closing submissions, Mr Randle invited the Tribunal to conclude that Ms Hopkins presented as an entirely credible and reliable witness. The Tribunal did find her to be credible and reliable. Whilst Mr Roberts asked questions that Ms Hopkins considered to be appropriate questions, she confirmed that she found them difficult to answer and she became distressed *"crying and unable to form any coherent sentences. There are things that I consider extremely personal and do not wish for any employer to know but I found that my personal matters were stripped bare"*.
48. At paragraph 5 of her statement, Ms Hopkins says:

*"5. During the meeting I did state to Mr Gareth Roberts that I was grateful for his understanding during this time. And that I did believe him to be a fair TL. This was dramatically changed in one instance by Mr Gareth Roberts."*
49. Despite describing to Mr Roberts matters of a highly sensitive and serious nature, Mr Roberts concluded at the end of the two hour interview that Ms Hopkins had not

sufficiently asked for help to ensure that the sickness absence could be avoided and therefore decided to place her on a stage one sickness.

50. Ms Hopkins used expressions such as, "*I had never felt so belittled and worthless*" and, "*The meeting left me feeling as though I was nothing.*"
51. Ms Hopkins could not understand how, after two hours of questioning, Mr Roberts could conclude that she had not adequately asked for help when she had indicated to a previous team leader that she was considering harming herself.
52. Ms Hopkins indicated that before this meeting with Mr Roberts, she had been doing well in her recovery but, in one instance, and following one single meeting, she was back to where she began with doubt that she would get any help from her team leader. Indeed, on returning to work, she requested that Mr Roberts should no longer be her team leader. Ms Hopkins was told that she would have to move rotation or wait for Mr Roberts to transfer to his new role with BT. Ms Hopkins decided to wait for two weeks.
53. In her oral evidence, Ms Hopkins accepted that prior to this meeting, Mr Roberts was quite understanding and she did not feel "badgered". She also confirmed that, at first, the questions asked by Mr Roberts seemed to be designed to find out why Ms Hopkins' mental issues had not been addressed but then they became more invasive and he also sought to blame Ms Hopkins' GP even though Ms Hopkins was looking for help.
54. Furthermore, whilst Mr Roberts may have been entitled to ask the questions that he did, the same questions had been asked by others in a way that did not make her feel like running from the room. Indeed, Ms Hopkins said that she would have said anything to get out of the room and out of the building. Her partner found her in the middle of the road.
55. Mr Roberts accepted that the stage one sickness absence meeting with Miss Hopkins was emotional and sensitive and that it lasted two hours which was well over the scheduled time but it was suggested by Mr Roberts that Ms Hopkins's demeanour was not out of kilter with the reaction of other employees in similar circumstances. Taking account of the nature of the issues discussed at the stage one sickness absence meeting with Ms Hopkins, the Tribunal did not accept Mr Roberts's evidence that this was typical although he subsequently conceded that 'theoretically' this could be more upsetting than most.
56. With regard to Katie Hopkins, who had been described by Mr Randle as a reliable and credible witness, Mr Roberts was referred to her letter of appeal (which was successful) in which she described how she was made to feel by Mr Roberts in the course of the sickness absence meeting. Ms Hopkins said that she felt bullied, persecuted, and made to feel small and that it was an interrogation.
57. Following what must have been a very emotional and difficult meeting between Ms Hopkins and Mr Roberts which was attended by the Claimant, there were five interactions between the Claimant and Mr Roberts. It was the conduct of Mr Roberts as alleged by the Claimant in the second, third, fourth and fifth interactions which had led to these proceedings.

### **Interaction One**

#### **Immediately following the meeting with Ms Hopkins**

58. As stated, the stage one sickness meeting relating to Ms Hopkins that the Claimant had attended in a supportive role lasted for over two hours which was much longer than was anticipated. By the time the meeting finished at approximately 3.50 p.m., the canteen was closed. Therefore, the Claimant asked Mr Roberts if she could take her lunchbreak and she was allowed 30 minutes as it would be necessary for the Claimant to go outside the office to buy food. Ms Hopkins was very distressed; the Claimant walked her out of the building and spent approximately 10 minutes with her to make sure that she was alright before going to McDonalds to purchase her lunch.

### **Interaction Two**

#### **The Claimant returning to her desk with her lunch**

59. On her return, the Claimant walked to her desk and it was her intention to eat her food when at her desk whilst at the same time going through her callbacks and emails before logging on to continue her calls.
60. Mr Roberts approached her desk and told the Claimant to leave the floor as eating hot food at the desk was not allowed. The Claimant did as she was told, collected her food, and went to a breakout room called the Zest Room to finish her lunch.
61. Mr Roberts said that it did not occur to him to ask the Claimant what she had been doing in the 30 minute period she had been allowed for lunch but knew that she had not eaten all of her lunch.

### **Interaction Three**

#### **The Zest Room**

62. Mr Roberts stated that both he and his manager, Ian Shuck, had noticed that the Claimant was late back from lunch. Mr Roberts anticipated it was three to five minutes after the Claimant had gone into the Zest Room that he went in to tell her that she was late back from lunch. Mr Roberts also stated that the team's performance in relation to returning and dealing with calls had fallen below target and therefore it was important for the Claimant to get back online.
63. Although denied by Mr Roberts, the Claimant stated, and the Tribunal found, that Mr Roberts said, "*What is going on?*" in a forceful manner. He described it as being in a, "*friendly enquiring manner*" but the Tribunal did not accept his evidence.
64. The Claimant confirmed that she did not realise she was late and apologised. She began to collect up her belongings. She said that Mr Roberts came and stood over her and challenged her with regard to being late and also raised again the fact that she intended to eat her food at her desk. The Claimant suggested to Mr Roberts that, whilst there was a rule in place, there had been an occasion recently when the Admin team walked right past his desk with boxes of KFC or McDonalds but Mr Roberts denied ever having seen that take place. However, the Claimant's account that staff did eat food at their desks from time to time was supported by the written account of Daniel Clifford (page 245-6).
65. The Claimant maintained that Mr Roberts became aggressive towards her even though she assured him that she would have eaten her food between calls. Mr Roberts stated

that they were very busy and that the Claimant was in the Zest Room not doing her job. At this point, the Claimant became very upset and felt as if she was going to cry. She said that she did not like the way that Mr Roberts was speaking to her, stating that she had apologised for being late which was most unusual for her.

66. At this point, Mr Roberts told her to *"get a grip"*.
67. As the Claimant was clearing the table and about to put the rubbish in the bin, Mr Roberts said *"come on then you're late"* and *"you need to hurry up"*.
68. Mr Roberts stated that when he confronted her in the Zest Room about eating her food at her desk and that she could not have eaten her food whilst speaking with customers, the Claimant rolled her eyes saying that she would not have eaten whilst speaking with customers. He responded by saying how could she have avoided doing so because there was no time between calls. At that stage, Mr Roberts suggested that the Claimant had dropped her burger and put her hands in her face saying *"I really don't need this"* to which he said that she needed *"to get a grip"*.
69. Mr Roberts accepted that, *"anything is possible and that her upset was due to her disability."* and the expression *"get a grip"* was in response to her demeanour and her responses.
70. Mr Roberts also said that he was standing some distance from her and then opened the door. He stated that, at this time, there was nothing being said and to cut the tension, he said *"come on"*.
71. Mr Roberts maintained that the questions that he put to her in the Zest Room were necessary, namely why she was late and why she was looking to eat hot food at the desk. However, he accepted there came a point when he could see that she was upset.
72. Mr Roberts suggested that he would use this sort of language to previous employees such as Nikita Long who had provided a supportive testimonial (SB14).
73. He did not *"necessarily"* agree that this was humiliating.
74. On balance, the Tribunal preferred the account provided by the Claimant.
75. The Claimant had gone into the Zest Room to finish her lunch. She had done so at the request of Mr Roberts. Mr Roberts went in to speak with her because she was late back from lunch and brought up the issue of eating food at her desk.
76. As was said a number of times in the course of the hearing, the tone used by Mr Roberts was as important as the words themselves.
77. Mr Roberts's approach in standing close to the Claimant and taking her to task about being late and also eating food at her desk had clearly caused the Claimant to become upset. Were that not the case, there would have been no basis on which Mr Roberts would have felt the need to tell her to *"get a grip"*.
78. The Tribunal found that, based on its findings, rather than being incredulous at the Claimant's behaviour, he was no doubt irritated and frustrated taking account of his concern that the team was not meeting its targets. The Tribunal therefore did not accept that he said *"come on"* just to break the tension but that he said, *"come on then you are late"* and when the Claimant asked him to stop telling her to go he said *"well you need to hurry up"*.

## Interaction Four

### **At the Claimant's desk**

79. The Claimant returned to her desk and logged on but found that there were no calls in the queue. However, shortly afterwards, she took a call from a customer.
80. When dealing with the call, Mr Roberts came back again to her desk. It was suggested by Mr Roberts that he offered the Claimant "*an olive branch*" by suggesting that she brought forward her next break of 15 minutes that was due to take place in approximately 45 minutes time.
81. Mr Roberts confirmed that he went to the Claimant's desk and, whilst not his intention to interrupt her, he accepted that he did so as she was on a call. He also said that because of what had happened, he did not stop speaking to her. He said that he knew that she had been upset due to the conversation and also that she was disabled and vulnerable and so Mr Roberts accepted that he needed to treat the Claimant with care.
82. When his offer of bringing the break forward was declined, he accepted that he once again brought up the issues of lateness and of hot food being eaten at the desk.
83. The Tribunal found that Mr Roberts must have known that the Claimant was upset when she went back to her desk as a result of the exchanges between them in the Zest Room and the manner in which he had spoken to her.
84. The Claimant muted the call long enough to say that she did not wish to take her break. It was also accepted by both that the Claimant indicated that she had not been spoken to in that way before and that she did not want to speak to Mr Roberts.
85. However, Mr Roberts continued to argue with the Claimant about the fact that she had been late back from lunch and also that eating hot food at desks was not allowed. In effect, this was the third occasion on which Mr Roberts had raised both issues.
86. The Claimant stated that she became very anxious, emphasising that she had had to go out for lunch following the meeting which had run over and Mr Roberts interrupted her saying that it was a meeting that she had chosen to attend and she had chosen to go to McDonalds for food.
87. The Claimant asked Mr Roberts to leave her alone and he walked away saying words to the effect "*why don't I do me and you do you then*". Whilst those precise words were not accepted by Mr Roberts, he did admit that he said to the Claimant, "*you do your job and I'll do mine*". Whilst he suggested that he attempted to use neutral language, he accepted that this could be interpreted harshly.
88. At that point, Mr Roberts left and returned to his desk.
89. Mr Roberts accepted the fourth interaction at the desk made the Claimant upset and, in the five-minute period after that exchange, he had not asked anyone to see if the Claimant was alright.
90. After Mr Roberts had left her, the Claimant stated that she started to shake and had difficulty breathing, taking off her headset. She could see other members of the team looking at her and that she said that she could not breathe. At this point, her colleague, Samantha Keohane came to her assistance. Ms Keohane was requested to provide an

account of what took place. She said as follows in an email to Donna Awford dated 25 November 2019:

*"On the date in question I was sat at my desk when I noticed that Bethan Oakley was crying and hyperventilating on a call. I walked over to Bethan and offered my assistance which she gratefully accepted. I talked her through managing her breathing and she felt a lot better. As she was still visibly upset I offered to take over her call and for her to go and take a short break, Bethan agreed with this, handed me her headset and went into the Caerphilly Room to calm down. Gareth Norris and Gareth Roberts then followed her into the room and I carried on with the call to Bethan's customer.*

*I received a message off Bethan later that evening thanking me for helping her through her panic attack. Her message read:*

*Thanks for today.*

*I haven't had a panic attack that bad before.*

*I literally felt like I was going to die.*

*That means so much to me.*

*You were very good in calming me down X*

*In my personal opinion I don't believe that a first aider was necessary as by the time that Bethan went in the room she had stopped hyperventilating and was just upset. Neither Gareth Roberts nor Gareth Norris were present when Bethan was hyperventilating only myself and to the best of my knowledge I helped her through it."*

91. This account was supported by Daniel Clifford who stated in his interview with Ms Watkins on 29 January 2020 (page 248), *"I thought she was having a coughing fit, thought she may be choking as she was coughing a lot. Sam went on the phone instead of her and then came into a side room."* Later he stated, *"she started coughing a lot. I turned around she was in tears as well, she had a customer on hold."* Further down, he stated *"she never said anything, she went straight home after it. Probably more a panic attack because of the tears and everything."*
92. The distress of the Claimant was also witnessed by Ms Katy Thomas who stated (page 248) *"when she came back he came over and he said do you want me to change your break. She said don't talk to me Gareth I'm getting ready to leave and referred to the way in which he had spoken to her in the Zest Room."* Ms Thomas states: *"then she just had a panic attack. I was on a call and I didn't know what to do."* Later Ms Thomas says: *"I don't know I have never seen someone having a panic attack before. I didn't know what she was doing, she couldn't breathe and talk. Sam tried to calm her down, watch how you're breathing. Sam finished off the call for her."*
93. Whilst there was no medical evidence to support the Claimant's assertion that she had suffered from a panic attack, there was sufficient lay evidence as outlined above for such a conclusion to be reached. As well as the Claimant, Daniel Clifford, Aaron Davies (page 234), Katie Evans (page 238) and Katie Thomas all express the view that the Claimant had suffered a panic attack. It was clear from the account of Sam Keohane that the Claimant was very distressed, as she was hyperventilating.

## Interaction Five

### **The Caerphilly Room**

94. At the suggestion of Ms Keohane, the Claimant, who continued to be very upset, left her desk and went to the Caerphilly Room in order to try and calm down. A short while later, Mr Gareth Norris came into the room to ask if the Claimant needed anything and she asked him to bring her drink which was on her desk. The Tribunal found that the Claimant had not specifically requested first aid at this stage.
95. On his return, Mr Norris asked whether she wished to see Mr Roberts but she told him that he was the one who had caused her panic attack. However, having left the room, Mr Norris returned shortly afterwards with Mr Roberts.
96. Mr Roberts had not witnessed the Claimant's distress when at her desk after he had returned to his own desk. He had then gone to collect some printing from the other side of the floor.
97. On entering the Caerphilly Room, Mr Roberts accepted that the Claimant said, "*Go away I don't want to speak to you*" and that this was the third time that day that she had asked Mr Roberts not to speak to her. Despite that fact, Mr Roberts emphasised that he was the Claimant's manager and said that she would have to listen to what he had to say and if she did not like it, he would leave. He also accepted that, for the third time, he raised the issues of her being late and eating hot food at the desk, stating that targets were being missed and customers would suffer. Mr Roberts accepted that, as part of the conversation, he referred to customer pressure and, whilst he could not recall referring to customers suffering, he would have referred to the impact on customers.
98. Having given her some time, Mr Roberts then indicated that, after five minutes, he expected the Claimant to go back online. The Claimant said that she could not. Mr Roberts asked whether she could not or would not and the Claimant said that she could not. Mr Roberts stated that this could not be taken as annual leave but that it would have to be sick leave and the Claimant construed this as further pressure being brought to bear.
99. The Claimant was unable to return to work. Having contacted her partner, she was collected and returned home.
100. Mr Norris said that he considered Mr Roberts had acted appropriately when speaking with the Claimant in the Caerphilly Room. Mr Norris also stated in his interview on 6 November 2019 that he had experienced conversations with the Claimant that he considered to be appropriate but which had led to the Claimant saying that she had not been happy with the way in which he had dealt with a particular matter (page 182). However, he witnessed the Claimant crying and looking very upset and he also confirmed that, when he asked her whether he should go and get Gareth Roberts, she said no (page 180). Furthermore, Mr Norris had not witnessed any of the previous interactions between the Claimant and Mr Roberts that afternoon.
101. Later that evening, Mr Roberts sent an email to his Operations Manager, Mr Shuck (page 151) which provided a report of what he maintained had taken place. Even on this account, there seemed to be no resistance from the Claimant to Mr Roberts's indication that she should not eat food at her desk and, on his account, he raised the issue of eating food at the desk. He said:

*"When I said she needed to go back online, she started to collect her lunch together. I asked, as one of my most customer focused people, what was she thinking?"*

102. It was at that point that the exchanges between the Claimant and Mr Roberts became more confrontational and having said that she needed, *"to get a grip and go back and service our customers."* It was at that stage that Mr Roberts noticed that the Claimant, *"became visibly upset and said she couldn't believe I spoke to her in that way."*
103. Despite acknowledging the Claimant had become visibly upset, Mr Roberts still said that, *"she needed to go back online."* It was at that stage that he walked to the door and beckoned *"come on"*.
104. Even though he knew that the Claimant was upset, he stated that he said to her, *"our customers were the most important people here and she had kept them waiting."* Mr Roberts accepted in his email that the Claimant stated she was on the verge of going home and did not want to speak to him. He wrote, *"I said that was fine, and that I would leave and I expected her to carry on. Some ten minutes later, she's left during the middle of a call which Sam Keohane has kindly stepped in to speak to the customer."* There was no mention made by him of the state of the Claimant's distress or the reason why the Claimant had been forced to leave during the middle of a call which Sam Keohane took over.
105. Furthermore, in the final paragraph, he did not consider the way that he had communicated with the Claimant was inappropriate, despite having told her to *"get a grip"* when she became upset. Further, despite knowing that the Claimant was disabled within the meaning of the Equality Act as a result of anxiety and depression, and having received an email from the Claimant and attended a Coaching session on 16 September 2019, just ten days before 27 September 2019, Mr Roberts stated:

*"My intention was never at all to upset her, but her conduct needed to be addressed and as I told her later on, I addressed it the way I would with any other employee."*

#### **Events following 27 September 2019**

106. On 30 September 2019, the Claimant sent a letter of resignation to the Respondent (page 152). The Claimant made reference to the events on 27 September 2019 as being the *"final straw"* stating, *"I was humiliated in front of everyone, being harassed and bullied into experiencing the worse panic attack of my life, something that I have never had happen to me previously in work."*
107. On 1 October 2019, Mr Shuck wrote to the Claimant asking to speak with her or her solicitor to discuss the points raised in her letter (page 153). On 3 October 2019, Mr Shuck wrote again to the Claimant, suggesting that she may have acted hastily in deciding to resign inviting her to discuss her decision and some of the points raised in her letter (page 157).
108. On 7 October 2019, the Claimant sent an email to Mr Shuck (page 161) confirming that, on reflection, she wished to give the Respondent another chance and she retracted her resignation letter on 30 September 2019. In the same email, she raised a grievance, requiring an investigation of the following issues:
  - *"Gareth Roberts' harassment of myself on 27/09/2019 leading to my panic attack."*

- *Gareth Roberts' historical cases of abuse / harassment of other female staff with mental health issues / vulnerabilities in the work place which have been covered up / neglected.*
  - *Why I was denied first aid care when I had my panic attack that I have a right to receive from EE when a medical situation arises."*
109. The Claimant stated that she was not comfortable returning to work until these further issues were addressed. She also indicated that she would like to see certain outcomes from the grievance, to include disciplinary action against Mr Roberts and for safeguards to be put in place with regard to team leaders being subject to the same disciplinary procedures that advisers would be subject to if another female colleague was abused or harassed, and damages. She also made it clear that, throughout the grievance process, she did not wish to have any face-to-face contact with Mr Roberts.
110. During October, absence review meetings took place and the reason for absence was described as anxiety.
111. Unbeknownst to the Respondent, at the end of October, another company, Keytree Limited, made contact with the Claimant via LinkedIn inviting her to apply for a position of employment with them.
112. The Claimant confirmed that, on 1 November 2019, she attended an interview and, on 4 November 2019, was informed by Keytree that the company wished to offer her a job as a Service Desk Analyst.
113. The offer of employment was sent to the Claimant (page 268). Whilst it was an undated document, it indicated a start date of 2 December 2019 and, on 6 November 2019, the Claimant signed to confirm that she accepted the offer of employment and that she could start on 2 December 2019 (page 270).
114. The Tribunal accepted the Claimant's evidence and found that she had not looked for another position but had responded to the approach from Keytree Limited due to the uncertainty as to the outcome of the grievance procedure. This was found to be entirely plausible. The Tribunal also accepted the Claimant's account and found that her preference was to remain with the Respondent if she was able to receive the reassurances she needed regarding the future. In reaching its findings, the Tribunal took into consideration its finding that the Claimant's account was credible and that she had already been employed at the Respondent for six years.

## **Grievance**

115. Ms Donna Awford was tasked with the role of conducting the grievance investigation and hearing. Ms Awford had been employed by the Respondent since 30 December 2000 and, at the material time, was an Operations Manager. This was the first formal grievance meeting that she had conducted. In advance of hearing the Claimant's grievance, Ms Awford was provided with documents relevant to the grievance by the Respondent's HR department.
116. Having invited the Claimant to a grievance meeting by letter of 15 October 2019, the meeting took place on 28 October 2019, Ms Awford having carried out further preparation.

117. The Claimant confirmed that she had been informed by her union representative before the grievance meeting that Ms Awford was a nice person and fair.
118. The Claimant accepted in her oral evidence that Ms Awford *"was supportive in the meeting and I felt she'd listened to me and the hearing was fair."* In the course of the meeting, Ms Awford went through each of the allegations made by the Claimant in her grievance letter and listened to the Claimant explaining her version of events. Furthermore, Ms Awford invited the Claimant to provide her with further evidence following the hearing if she wished to do so in support of any of the allegations.
119. Following the hearing, the Claimant submitted further evidence to include written statements from former employees to include Jade Vaughan. Indeed, Ms Awford agreed to investigate a complaint which was not included in the grievance, namely that her time off had been changed from sick leave to unpaid leave. Ms Awford indicated that this may have changed because she had resigned but that she would look into the matter.
120. Following the grievance meeting, Ms Awford interviewed: Mr Gareth Roberts; Mr Gareth Norris; Ms Samantha Keohane; Ms Linda Thomas; Ms Alison McCarthy, and Mr Ian Shuck. The records of those interviews were produced in typed form.
121. The Claimant indicated that, as it was disputed that she had sustained a panic attack and as she maintained that she had been denied first aid, Ms Awford should speak with someone called Philippa who was a first aider. She would say that, had the Claimant become very upset, it should have been logged, as symptoms of a panic attack could in fact indicate heart problems. However, Ms Awford concluded that she had interviewed those who were present. The person, Philippa, had not been present at the incident and therefore did not consider it was necessary to speak with her. Having carried out her investigation, Ms Awford reached a decision that was set out in a grievance outcome letter dated 22 November 2019 (page 197).
122. Taking each allegation in turn, Ms Awford upheld the Claimant's grievance that it was inappropriate for Mr Roberts to have said *"get a grip"* during the third interaction on 27 September 2019 when both were in the Zest Room although she found that Mr Roberts apologised immediately. Ms Awford concluded that Mr Roberts's actions were not discriminatory nor did they amount to harassment.
123. The Tribunal noted that the findings of Ms Awford in respect of the alleged harassment by Mr Roberts was restricted to that comment and did not deal in any detail with the entirety of the events which took place on 27 September 2019.
124. Ms Awford did not find in the Claimant's favour with regard to the remaining allegation and gave reasons for the decisions that she reached.
125. As stated, Ms Awford partially upheld the Claimant's grievance and then responded to the outcomes the Claimant expected to see from the grievance procedure. As part of her recommendations, it was suggested by Ms Awford that, whilst Mr Roberts was moving to a different position within the company which would take him to London, a process of mediation may be appropriate. Ms Awford outlines the process and then stated:

*"Mediation is voluntary and confidential. You can change your mind at any point and attempting mediation does not affect your right to appeal the grievance outcome if that's what you want to do."*

126. Ms Awford then explained to the Claimant her right to appeal against any part of the outcome.
127. There was some dispute about when Ms Awford had drafted the outcome letter incorporating her decisions with regard to the Claimant's grievance. It was suggested that the letter, and thereby her decisions, had been taken without taking account of the email from Ms Keohane to Ms Awford of 25 November 2019 (page 230-1) as this made reference to the Claimant crying and "hyperventilating".
128. Ms Awford confirmed that she started to draft the outcome letter on Friday 22 November 2019 and, as a consequence, that date was automatically included on the letter. However, she had no intention of sending the letter until she had obtained a statement from Ms Keohane. Ms Awford had already met with Ms Keohane and had gone through her account. It was clear that Ms Keohane was a caring and responsible employee and Ms Awford asked her to confirm what she had said in writing. Ms Awford stated that she would be reviewing her draft letter with HR but would not be sending it until she had received Ms Keohane's statement. Before the outcome letter of 22 November 2019 went out, Ms Awford ensured that what had been said by Ms Keohane in their meeting was consistent with the statement that she provided and Ms Awford insisted that she did not ignore Ms Keohane's statement before the outcome letter was sent.
129. The Tribunal found Ms Awford to be a credible witness and found that the outcome letter, even though dated 22 November 2019, was sent on 25 November 2019, once Ms Awford had received the email from Ms Keohane.
130. Ms Awford also confirmed that she had only spoken to Ms Keohane with regard to the Claimant's assertion that she had suffered a panic attack. Those other people named by the Claimant in the course of her appeal were not included in Ms Awford's list save that she spoke with Dan Clifford who confirmed that Ms Keohane was on the scene straightaway. Therefore, Ms Awford decided to speak to Ms Keohane who supported the Claimant and decided not to speak to other team members. Ms Awford did not consider who else to interview but knowing the layout of the office, and in the absence of the Claimant naming anyone except Daniel Clifford and Ms Keohane, she decided to interview Ms Keohane alone.
131. On 1 December 2019, the Claimant sent an email to Ms McCarthy and Mr Shuck confirming that she was resigning from her position with the Respondent, suggesting the grievance outcome letter was not only inaccurate but that she was never given a chance to rebut the false statements made by Mr Roberts.
132. On 2 December 2019, the Claimant commenced her employment with Keytree Limited.
133. On 12 December 2019, the Claimant sent an email to Mr Shuck confirming that she intended to take her complaint forward but confirming that she would not be returning to work. The Claimant pursued a grievance appeal.
134. On 23 December 2019, the Claimant lodged her claim form at the Tribunal claiming that she had been unfairly constructively dismissed and also discriminated against on the grounds of disability.
135. On 9 January 2020, a grievance appeal hearing took place. An Operations Manager, Nicola Watkins, had been tasked with conducting the grievance appeal. This included the hearing on 5 January 2020 and also subsequent investigations to include interviews with: Aaron Davis (page 233); Katie Adams (page 237); Owen Williams (page 241);

Daniel Clifford (page 244); Katie Thomas (page 247) and Ian Shuck (page 250). In the outcome letter dated 20 February 2020, Ms Watkins upheld the decision of Ms Awford and dismissed the appeal (SB1).

136. On 21 September 2020, the Claimant applied to amend her claim to include harassment on the grounds of sex and a claim of victimisation. The Claimant stated that she had sought advice at the outset from her trade union representative who indicated to her that she would be able to amend her claim at any stage. The Claimant then experienced difficulty in obtaining advice from various organisations but it was only in September that she was referred by the CAB to a solicitor and was informed of her ability to pursue such a claim. She made the application to amend her claim promptly thereafter. She stated that she had looked at the CAB website and, when giving her evidence, accepted that it made reference to the various types of claim which can be pursued, to include victimisation.

### **The Law**

137. The Tribunal had considered carefully the legal principles to which both Mr Partridge and Mr Randle had referred in their written submissions.

### **Unfair Constructive Dismissal**

138. The fundamental questions which the Tribunal must ask itself have been settled since the case of *Western Excavating Ltd v Sharp* [1978] 1 All ER 713. They are as follows:
- i. Did the Respondent breach a fundamental term of the contract?
  - ii. Did the Claimant resign in response to the breach?
  - iii. Did the Claimant delay too long before resigning, thereby affirming the contract?
139. In this case the Claimant relies on an allegation that the Respondent breached the implied term of trust and confidence. The concept of the duty of trust and confidence was clearly set out in *Mahmud v Bank of Credit and Commerce International SA* [1997] IRLR 462. The contractual term was described there as follows: “The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee”.
140. More recent case law has clarified that it is not necessary for the employer to act in a way which is both calculated and likely to destroy the relationship of trust and confidence, instead either requirement need only be satisfied – see *Baldwin v Brighton & Hove City Council* [2007] IRLR 232.
141. When a claim relates to a series of acts, the question for the Tribunal will be “does the cumulative series of acts taken together amount to a breach of the implied term?” (*Lewis v Motorworld Garages Ltd* [1985] IRLR 465, per Glidewell LJ).
142. In cases where a series of acts is relied upon the Tribunal must consider the “last straw” which caused the Claimant to resign. The last straw must not be an innocuous act – it must be something which goes towards the breach of the implied term (see *London Borough of Waltham Forest v Omilaju* [2005] ICR 481).

143. Tying together the case law identified above, the Court of Appeal in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978 clarified the approach to be taken by the Tribunal as follows:
144. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a Tribunal to ask itself the following questions:
- (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
  - (2) Has he or she affirmed the contract since that act?
  - (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
  - (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach? (If it was, there is no need for any separate consideration of a possible previous affirmation)
  - (5) Did the employee resign in response (or partly in response) to that breach?
145. As held by Lord Summers (albeit, obiter) in *Gordon v J&D Pierce (Contracts) Ltd* UAEATS/0010/20 (12 January 2021, unreported) (paras 24):
- “Although pragmatic considerations are not always a sure guide, it would be unsatisfactory if an employee was unable to accept a repudiation because he or she wished to seek a resolution by means of a grievance procedure. While a breach of contract may have the effect of releasing the parties from their obligation to perform those obligations that are counterparts of one another (having regard to the principle of mutuality of obligation) it should not have the effect of dissolving all obligations (*McBryde The Law of Contract in Scotland* para. 20-49 and 20-53).”
146. In *Harvey on Industrial Relations and Employment Law*, it states (para 523.01): “Even where there is a breach, the employee may choose to give the employer the opportunity to remedy it.”

## **Disability**

147. Pursuant to s.4 Equality Act 2010 (**EqA**), disability is a protected characteristic as defined in s.6 EqA.

## **Discrimination arising from disability**

148. The Claimant brings a claim pursuant to s.15 EqA which states as follows:

### **15 Discrimination arising from disability**

- (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.

...”

149. The Tribunal had taken account of the guidance to be found in the judgment of Simler J in *Sheikholeslami v University of Edinburgh* [2018] IRLR 1090.

## Harassment

150. Section 26 of the EqA sets out the definition of harassment:

### *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 an intimidating, hostile, degrading, humiliating or offensive environment for B.*

*(2) A also harasses B if—*

*(a) A engages in unwanted conduct of a sexual nature, and*

*(b) the conduct has the purpose or effect referred to in subsection (1)(b).*

...

*(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*

*(a) the perception of B;*

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

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

151. In *Grant v HM Land Registry* [2011] EWCA Civ 769 the Court of Appeal said that in that case even if the conduct was unwanted, and the Claimant was upset by it, the effect could not amount to a violation of dignity, nor could it properly be described as creating an intimidating, hostile degrading, humiliating or offensive environment. It said that Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.

152. In *Richmond Pharmacology v Dhaliwal* [2009] ICR 724 it was said that dignity is not necessarily violated by things said or done which are trivial and transitory, particularly if it should have been clear that any offence was unintended. ... It is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.

### **Victimisation**

153. S.27 of the 2010 Act is in the following terms:-

"(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) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not expressed) that A or another person has contravened this Act

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule".

### **Analysis Conclusions**

154. In respect of the issues between the parties, the Tribunal had carried out an analysis of the facts that it had found and, having applied the relevant law, had reached the following conclusions.

#### **1. *Constructive unfair dismissal and wrongful dismissal***

##### **a. Was the Claimant constructively dismissed?**

i. **Did the Respondent breach the implied term of mutual trust and confidence, ie did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the Claimant?**

ii. **If so, did the Claimant "affirm" the contract of employment before resigning? (To "affirm" means to act in a manner that indicates the Claimant remains bound by the terms of the contract.)**

- iii. **If not, did the Claimant resign in response to the breach of contract (was the breach a reason for the Claimant's resignation – it need not be the only reason for the resignation)?**
        - b. **If the Claimant was dismissed, she will also have been wrongfully dismissed, as she resigned without notice.**
        - c. **The conduct the Claimant relies on as breaching trust and confidence is:**
          - i. **That set out for disability and / or sex discrimination below.**
          - ii. **That the Respondent concluded, as part of the grievance process, that the Claimant did not have a panic attack when she had.**
          - iii. **Suggesting mediation with Mr Roberts despite his promotion and move to London.**
          - iv. **The outcome of the grievance process triggered the Claimant's resignation, but the Claimant took account of all of the above in deciding to resign.**
        - d. **If the Claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and if so, was the dismissal fair or unfair in accordance with Section 98(4) ERA, and in particular, did the Respondent in all respects act within the "band of reasonable responses"?**
155. Following the series of events which occurred on Friday 27 September 2019, the Claimant sent her first letter of resignation to the Respondent on the following Monday, 30 September 2019 (page 152).
156. In her letter of resignation, the Claimant stated that the reason for her, "*... immediate resignation is due to harassment, bullying, and discrimination in the workplace by members of the leadership within the Merthyr Contact Centre.*"
157. Later in her letter she stated, "*Friday was the final straw.*"
158. However, other than reference to, "*the experience with Jon*" which is not particularised either in the Claimant's grounds of complaint or her statement, the entirety of her complaint related to the conduct of Mr Roberts on 27 September 2019.
159. Whilst the Claimant made reference to the alleged treatment of Mr Roberts of other women, the Tribunal had found that the Claimant had not experienced any issues or concerns with regard to Mr Roberts's conduct prior to 27 September 2019 although this effectively only amounted to a period of some 10 days.
160. The Tribunal accepted that there was no delay between the events on 27 September 2019 and the date of the Claimant's resignation on the following Monday.
161. On the basis of its findings of fact, and considered objectively, the Tribunal found that Mr Roberts's conduct towards the Claimant on 27 September 2019 amounted to a repudiatory breach by the Respondent of the Claimant's contract of employment. It was a breach of the implied term that the Respondent shall not, without reasonable and

proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. His conduct had caused the Claimant to become extremely distressed and such conduct continued despite the Claimant's distress. He also exerted unreasonable pressure on her to resume work even though he accepted that she was suffering considerable distress.

162. Nevertheless, following initial exchanges with the Claimant, Mr Shuck then wrote to the Claimant on 3 October 2019 inviting her to reconsider, suggesting that she may have acted hastily in reaching her decision to resign, inviting her to discuss with him her decision and some of the points raised in her letter. She was also referred to the Respondent's Employee Assistance Programme.
163. There was nothing to suggest that the Claimant took up Mr Shuck's offer of a discussion. However, on 7 October 2019, the Claimant wrote to Mr Shuck confirming that she had decided to retract her resignation letter. In the same email, the Claimant raised a grievance (page 161) to investigate Mr Roberts's harassment of her on 27 September 2019 leading to her panic attack, historical cases of abuse / harassment of other female staff by Mr Roberts and why the Claimant was denied first aid care when she had the panic attack on 27 September 2019.
164. The Claimant did not return to work whilst the grievance took place.
165. On the basis of her grievance and her decision to stay away from the workplace until the outcome of the grievance, the Tribunal concluded that the Claimant had made it perfectly clear that she did not resile from the allegations she had made and had not waived the breach. Furthermore, there was no indication that the Claimant would return to work irrespective of the outcome of the grievance. Indeed, she says, "*.....I have decided on reflection that I would like to give the company another chance to fix things and that if reassurances can be given that I may return.*"
166. Consequently, the Tribunal found that there had been a breach but the Claimant had chosen to give the Respondent an opportunity to remedy it.
167. The Tribunal had considered carefully the manner in which Ms Awford conducted the Claimant's grievance and the scope of her investigation. The Tribunal had found Ms Awford to be a credible and reliable witness and that she had approached her obligation to investigate the Claimant's grievance with the aim of being fair to the Claimant. Ms Awford had interviewed those individuals who were directly involved in the events of 27 September 2019, although not the wider team, and she also asked for information about any previous complaints made against Mr Roberts.
168. The Tribunal had reached a different conclusion to Ms Awford with regard to whether or not Mr Roberts's conduct amounted to harassment. Whilst, on the evidence she had gathered, the Tribunal found that the conclusions that she reached were genuinely held, the Tribunal determined that there was too great a focus on the comment made by Mr Roberts, "*get a grip*" and insufficient analysis of the effect of the overall conduct of Mr Roberts towards the Claimant on her return to the office. Furthermore, those members of staff who had been interviewed for the appeal had also been able to provide further information of what happened on the day and their assessment of the Claimant's distressed state.

169. By letter of 22 November 2019 (page 197), Ms Awford wrote to the Claimant informing her of the outcome of the grievance. This was only sent out to her on 25 November 2019.
170. By email of 1 December 2019, the Claimant informed the Respondent of her resignation and suggested that the grievance outcome letter was not only inaccurate but she had no faith in the Respondent implementing best practice around mental health and equality.
171. In all the circumstances, it is the Tribunal's judgment that, even though she withdrew her first resignation, the Claimant's conduct in simultaneously lodging a grievance, her decision not to attend the office until its outcome, and her indication that she wished to give the Respondent an opportunity to rectify the situation, meant that she had not affirmed her contract of employment. Furthermore, in waiting for the outcome of the grievance in such circumstances, the Tribunal did not find that the Claimant delayed too long in resigning from her position as a result of the breach.
172. Even if it had held that the Claimant had affirmed the contract following the withdrawal of her first resignation, the Tribunal was satisfied that the unsatisfactory basis on which Ms Awford had decided the outcome of the grievance was sufficient to entitle the Claimant to terminate the deteriorating relationship with the Respondent.
173. In reaching this decision, the Tribunal had taken account of the Claimant's conduct in applying for another position during the grievance process and whether this had an effect on its decision. The Tribunal had found that the Claimant was approached, as opposed to actively looking for another role. It was also reasonable for the Claimant to take steps to safeguard her future in the event that she had to leave the Respondent. It was further evidence that the events of 27 September 2019 had undermined the Claimant's faith in the Respondent although her preference would be to remain in a job she had occupied for six years.
174. The Tribunal also took into consideration the fact that, as indicated by the Claimant in that email, she did pursue an appeal against the decision of Ms Awford. Following further investigations undertaken by the person who was given responsibility for that appeal, Nicola Watkins, Ms Awford's decision was upheld.
175. Consequently, the conduct on which the Claimant relied as breaching trust and confidence as set out for disability and/or sex discrimination in the Claimant's list of issues related to the events of 27 September 2019. Whilst the Claimant resigned as a result of such conduct, she withdrew her resignation, and, for the reasons outlined above, the Tribunal decided that, in so doing, the Claimant did not affirm her contract of employment.
176. As for the issues raised at paragraphs 1c.ii. and iv. of the issues, the Tribunal found that Ms Awford had reached the conclusion that the Claimant had not been harassed and did not experience a panic attack on the basis of too narrow a focus on the events of 27 September 2019. The Tribunal also found that her investigation should have included interviews of the members of the team who were present for certain of the events of the afternoon on that day.
177. Finally, the Tribunal did not consider that the suggestion of mediation with Mr Roberts can have contributed to the breach of the implied term of trust and confidence. The process of mediation is a non-binding process with the aim of seeking resolutions to disputes. It was a reasonable suggestion to make even taking account of the fact that

there would be no prospect of future contact between the Claimant and Mr Roberts due to his move to London.

178. The Claimant's claim for unfair constructive dismissal therefore succeeds. It must follow that her claim for wrongful dismissal also succeeds.
179. It was suggested by the Respondent that, even if the Claimant was constructively dismissed, the Respondent had a fair reason for dismissal, namely capability or some other substantial reason. The Tribunal rejected this submission.
180. In respect of capability, the Respondent relied on the absence of the Claimant due to sickness between 30 September 2019 and 1 December 2019. However, the Claimant was absent from work due to the events of 27 September 2019. The Tribunal has found that the Claimant's claims of discrimination and harassment succeed. Her return to work was dependent on the Respondent responding adequately to the issues she had raised. It cannot be right that the Respondent was entitled to dismiss the Claimant due to the Claimant being absent from work consequent on the conduct of the Respondent.
181. As for the suggestion that the Respondent was entitled to dismiss the Claimant on the grounds of some other substantial reason due to the Claimant applying for another job, in the Tribunal's experience, it was extremely common for an employee to seek alternative employment without telling his or her current employer. The Tribunal had already found that the Claimant's preference was to remain with the Respondent as long as reassurances were given with regard to the future.
182. Consequently, the Tribunal was satisfied that neither ground on which the Respondent asserted it was entitled to dismiss the Claimant would fall within the band of reasonable responses.

**2. Equality Act 2010 ("EqA") section 6 disability**

- a. **Did the Claimant have a physical or mental impairment, namely PTSD, at the relevant time?**
  - b. **If so, did the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?**
  - c. **If so, is that effect long term? In particular, when did it start and did the impairment last for at least 12 months?**
  - d. **Were any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have had a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?**
  - e. **The Respondent has accepted that the Claimant had the impairment of depression and anxiety at the relevant time, and that it had the required substantial, long-term adverse effect on her ability to carry out normal day-to-day activities.**
183. The Tribunal relied on its findings of fact and had considered the medical records of the Claimant together with the information provided by RehabWorks to whom the Claimant was referred by the Respondent.

184. RehabWorks had diagnosed the Claimant with PTSD in its assessment dated 7 July 2019 and that such symptoms had been experienced "for a number of years" (page 298).
185. Furthermore, it was not disputed by the Respondent that the Claimant was disabled within the meaning of the EqA as a result of suffering from anxiety and depression which, of themselves, were symptoms of PTSD and that her symptoms led to the Claimant struggling to cope with her work.
186. In his evidence, Mr Roberts accepted that the Claimant was disabled within the meaning of EqA and recognised the symptoms described in the report from RehabWorks in July 2019.
187. The Respondent accepted that the Claimant suffered from the impairment of depression and anxiety at the relevant time, and that it had the required substantial, long term adverse impact on her ability to carry out normal day to day activities. The fact that such symptoms may be linked with PTSD was at no stage seriously challenged by the Respondent and the Tribunal was satisfied that the Claimant was disabled within the meaning of section 6 of the EqA as a result of impairment, namely PTSD, anxiety and depression.

**3. *EqA, section 15: discrimination arising from disability***

- a. **Did the Respondent treat the Claimant unfavourably as follows (no comparator is needed):**
  - i. **By the manner in which Mr Roberts (the Claimant's manager) spoke to the Claimant when she was exhibiting symptoms of distress / panic attack and an inability to work on the afternoon of 27 September 2019?**
  - ii. **By expecting the Claimant to resume work in circumstances where she had demonstrated distress / panic attack and an inability to work at that point?**
- b. **Did the following thing arise in consequence of the Claimant's disability:**
  - i. **The distress / panic attack and inability to work on the afternoon of 27 September 2019?**
- c. **Did the Respondent treat the Claimant unfavourably because of any distress / panic attack and the inability to work on the afternoon of 27 September 2019?**
- d. **If so, has the Respondent shown that the unfavourable treatment relied upon by the Claimant was a proportionate means of achieving a legitimate aim? The Respondent will be given the opportunity to provide details of any such defence.**
- e. **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?**

188. The Tribunal relied on its findings of fact and was satisfied that the Respondent treated the Claimant unfavourably as a result of the way in which Mr Roberts spoke to, and behaved towards, the Claimant. Such conduct not only caused the Claimant to exhibit symptoms of distress/panic attack which led to her being unable to continue to work on the afternoon of 27 September 2019 but he continued to talk to her in an unacceptable way during the time that the Claimant was exhibiting symptoms of distress.
189. The Tribunal also considered that the Respondent treated the Claimant unfavourably by Mr Roberts expecting the Claimant to resume work in circumstances where she had demonstrated, and continued to demonstrate, symptoms of distress and panic attack and an inability to work.
190. Furthermore, the Tribunal was satisfied that the Claimant's distress/panic attack and her inability to work on the afternoon of 27 September 2019 arose as a consequence of the Claimant's disability of PTSD, anxiety and depression, of which the Respondent was fully aware. In reaching this conclusion, the Tribunal relied on the Respondent's admission that the Claimant was disabled within the meaning of the EqA and, more specifically, the admission by Mr Roberts in the course of his evidence that he was aware that the Claimant was disabled. It must have been evident to him that the Claimant was a vulnerable individual. However, it was significant that, whilst he admitted that he knew the Claimant was disabled, Mr Roberts stated that he would treat every employee under his leadership in exactly the same way.
191. It was accepted by the Tribunal that the Respondent's activities were such that it was a high-pressure environment, with challenging targets to be met. As such, the Claimant's return to work would assist the Respondent in trying to meet those challenging targets. Mr Roberts had stated that the team was falling short of those targets on the day. However, the Tribunal concluded that the Respondent had applied undue pressure to the Claimant to return to work at a time when she was clearly very distressed. Consequently, on an objective analysis, the application of such pressure to the Claimant in a very distressed state cannot be described as a proportionate means of achieving the legitimate aim of endeavouring to meet the team's target and dealing with customers' enquiries.
192. The Tribunal therefore found that the Claimant was discriminated against arising from her disability.

**4. EqA, section 26: harassment related to disability**

- a. Did the Respondent engage in conduct as follows:**
- i. Pressurising the Claimant to return to work online on the afternoon of 27 September 2019?**
- b. If so, was that conducted unwanted?**
- c. If so, did it relate to the protected characteristic of disability?**
- d. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliation or offensive environment for the Claimant?**
- e. Did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive**

**environment for the Claimant? (Whether conduct has this effect involves 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.)**

193. The Tribunal relied on its findings of fact and concluded that the Respondent, through the conduct of Mr Roberts, had exerted pressure on the Claimant to return to work online on the afternoon of 27 September 2019.
194. In the course of his interactions with the Claimant, Mr Roberts had caused the Claimant to become very distressed. Despite her condition, Mr Roberts exerted pressure on her to return to work online, making reference to the team falling short of its targets and the fact that customers were suffering and that the Claimant's absence from her desk was adding to the problem.
195. The remark during the fifth interaction when Mr Roberts said to the Claimant, "*I want you back online in five minutes*" when the Claimant had already said that she was unable to return to work, that she did not wish Mr Roberts to speak with her, and when Mr Roberts knew of her distress and upset, was inevitably going to apply further pressure on the Claimant to return to work.
196. Indeed, comments such as, "*Get a grip*" and "*come on hurry up*" during the third interaction when Mr Roberts already knew that he had caused the Claimant to be upset and distressed was also going to lead to the Claimant feeling under pressure to return to work online.
197. The Tribunal was satisfied that such conduct was unwanted and that it related to the Claimant's disability of PTSD, anxiety and depression which would make her considerably more vulnerable. Further, Mr Roberts was fully aware of the Claimant's vulnerability following her email to him and the coaching session of 16 September 2019, just 11 days before the events of 27 September 2019.
198. Whilst the Tribunal did not find that Mr Roberts's conduct had the purpose of violating the Claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for the Claimant, the Tribunal found that such conduct had that effect.
199. In reaching this conclusion, the Tribunal had taken note of the guidance to be found in *Grant v HMLR* and *Richmond Pharmacology v Dhaliwal*.
200. The Tribunal took into account the Claimant's perception, which it had assessed on a subjective basis. It was evident from the Claimant's evidence that she had found Mr Roberts's conduct to be degrading, intimidating, hostile, humiliating and offensive.
201. The Tribunal had then assessed the other circumstances of the case and whether it was reasonable for the conduct to have that effect. In carrying out that assessment it did so on an objective basis. As stated, the Tribunal acknowledged that the nature of the work being undertaken was inherently pressurised; targets, both for individuals and teams, were measured in terms of minutes, and the work could be stressful as many of the calls would require employees to deal with very difficult customers.
202. Nevertheless, Mr Roberts, and thereby the Respondent, were fully aware of the Claimant's disability and vulnerability. Despite that fact, Mr Roberts had stated that he dealt with everyone in exactly the same way.

203. The Tribunal referred to its findings of how Ms Hopkins had described the way in which Mr Roberts had treated her on the afternoon of 27 September 2019 before the events relating to the Claimant, and how this had made Ms Hopkins feel. It had also taken account of the written evidence of certain of the witnesses such as Linda Thomas, but also the opposite view expressed in the written reference of Nikita Long. This related to the mental health of those individuals. Needless to say, such evidence had not been tested but the Tribunal accepted that Ms Long's written account represented some evidence to support the Respondent's case that Mr Roberts could be supportive of those who were struggling with anxiety and depression. Again, it has to be stressed that there was no evidence to indicate that any of these individuals were comparable with the Claimant in terms of being disabled within the meaning of the EqA.
204. However, whilst the Tribunal was not critical of Mr Roberts for being demanding and strict, it was satisfied that, taking account of the Claimant's disability, it was reasonable for Mr Roberts's conduct to have had the effect of violating the Claimant's dignity and creating an intimidating, hostile, degrading and humiliating environment, particularly as interaction four took place in front of a number of the team. Whilst the team members may not have known precisely what was being said, the fact remained that a number of them witnessed the Claimant becoming very distressed as a result of the exchanges between her and Mr Roberts. Furthermore, the Claimant believed that a number of the team members were aware of Mr Roberts' conduct towards her.
205. Such overall conduct could not be described as trivial or causing a minor upset, nor can it be described as transitory. The conduct of Mr Roberts persisted over a number of engagements when he had every opportunity to take a different approach. Having seen the level of distress, he could have refrained from persisting with confronting the same topics and he could have dealt with any issues on a different day.
206. It was suggested that an apology can have an ameliorating effect on an allegation of harassment and whether it meets the necessary threshold. However, even if Mr Roberts had offered such an apology, which was denied by the Claimant, it did not stop him persevering with the behaviour which had caused the Claimant to become distressed.
207. The Tribunal therefore found that the Claimant succeeds in her claim of harassment related to her disability.

**5. EqA, section 26: harassment related to sex**

- a. **Did the manner in which the Claimant treated the Defendant on 27 September 2019 relied on under disability discrimination above constitute unwanted conduct?**
- b. **If so, did it relate to the protected characteristic of sex?**
- c. **Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?**
- d. **Did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? (Whether conduct has this effect involves 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.)**

208. The Tribunal repeated its findings in support of its conclusion that the manner in which the Respondent treated the Claimant on 27 September 2019 amounted to unwanted conduct.
209. However, whilst it had found that such conduct related to the protected characteristic of disability, it did not consider that it related to the protected characteristic of sex.
210. The Tribunal had considered the evidence from other women who had provided accounts in the course of the grievance process. It had also listened carefully to the evidence of Kirsty Hopkins but considered this related more to her health issues rather than the fact that she was a woman. Finally, it had listened to the evidence of Ms Jade Vaughan but had not placed reliance on this evidence as it related to events some considerable time ago. Finally, the Tribunal placed some weight on the evidence of Nikita Long although again, such evidence was untested.
211. There was evidence to suggest that Mr Roberts could be equally strict and demanding of the team members who were men. For example Aaron Davis stated, "*he does get quite nasty ...*" and "*he got nasty in his tone of voice. It was a while ago. The way he would speak to me, felt I was in school and was like a teacher. I expect to be spoken to like an adult in work.*"
212. The Tribunal also rejected the submission made on behalf of the Claimant that the expression, "*get a grip*" was a "*gendered word*". In its judgment and experience, such an expression has wide application, irrespective of gender.
213. The Tribunal concluded that there was insufficient evidence to support a conclusion that Mr Robert's conduct, which was unwanted, was related to the fact that the Claimant was a woman.

**6. EqA, section 27: Victimisation**

- a. **Have the Claimant's allegations of discrimination been presented outside of the three month time limit (s.123(1)(a) EqA)?**
- b. **If so, does this amount to a continuing act (s.123(3)(a) EqA)?**
- c. **If any allegation is determined to have been brought out of time, is it just and equitable to extend the time limits pursuant to s.123(1)(b) EqA?**
- d. **Did the Claimant's act of raising a grievance on 7 October 2019 constitute a Protected Act?**
- e. **Was the Respondent's rejection of the grievance on 22 November 2019 a detriment to which the Claimant was subjected?**
- f. **If so, did the Respondent subject the Claimant to this detriment because she had done the protected act?**

**Jurisdiction**

214. It was accepted, and the Tribunal found, that the Claimant's claim of victimisation had been presented outside of the three month time limit. Indeed, it was claimed that the

protected act which gave rise to the claim for victimisation was the rejection of the grievance by Ms Awford by her decision of 22 November 2019.

215. Whilst proceedings were issued on 23 December 2019, the claims were restricted to unfair constructive dismissal and disability. It was not until 27 September 2020 that the Claimant applied to amend her claim to include one of victimisation. The Claimant had stated that she had not had representation although in January 2020 she had obtained representation from her trade union representative who said he was there for support, indicating it would be possible, if necessary, to amend her claim in the future. However, at the end of May 2020, the trade union indicated that it was unable to assist the Claimant. Between May and September 2020, the Claimant said that she contacted numerous bodies but they were not able to assist as a result of the pandemic.
216. In July 2020, the Claimant spoke with Disability Law but was told they could not assist.
217. At the beginning of September 2020, the Claimant contacted the CAB who referred her to a solicitor who then provided her with advice.
218. By this time, there had been two case management hearings on 28 February 2020 and 23 July 2020.
219. The Tribunal was not satisfied that it was not possible for the Claimant to seek advice as a result of the pandemic. Whilst the arrangements in order to obtain such advice may have changed, nevertheless, such advice could and would have been available throughout the period.
220. The Claimant had also confirmed that she had accessed the CAB website and, whilst the Claimant said that she could not recall having seen reference to the different types of claims, the extract from the website clearly shows the different heads of claim to include victimisation.
221. At the case management hearing on 8 February 2021, the Claimant was given permission to amend her complaint under section 26 EqA to include a claim of harassment relating to sex as well as disability. This was on the basis that this claim was reflected in the grounds of complaint attached to the ET1 Claim Form and was considered to be an amendment to the labelling of the claim.
222. Whilst the Claimant was given permission to amend her claim to include a complaint of victimisation, Employment Judge Brace confirmed that she would not determine that time should be extended and this remained an issue to be determined at the final hearing.
223. In reaching its decision, the Tribunal considered the guidance to be drawn from **Abertawe Bro Morgannwg University LHB v Morgan [2018] EWCA Civ 640**. The Court of Appeal held that the lengths and reasons for the delay were relevant factors and also the Tribunal should take into account whether the Respondent has been prejudiced. The Tribunal's discretion was described as "broad and unfettered" (paragraph 25).
224. There was no doubt that the application was made substantially out of time; indeed, it was some seven months out of time. However, having regard to the balance of hardship, this weighs in favour of the Claimant. There were no new matters requiring investigation by the Respondent. They were well informed of the objections made by the Claimant with regard to the findings of Ms Awford as set out in her outcome letter of 22 November

2019 (page 197) and this formed part of the Claimant's claim for unfair constructive dismissal which would have had to have been investigated by the Respondent in any event. To this extent, there were no new matters requiring investigation by the Respondent. At the time, the Claimant was a litigant in person and it would appear that she had received erroneous advice from her trade union. In the Tribunal's judgement, there was less prejudice to the Respondent in permitting the amendment than prejudice to the Claimant in refusing it.

225. In those circumstances, the Tribunal's judgment was that it was just and equitable to extend time for the inclusion of the claim of victimisation.

**The merits of the claim of victimisation**

226. The Tribunal was satisfied that the Claimant's act of raising a grievance on 7 October 2019 constituted a protected act and that Ms Awford's rejection of that grievance on 22 November 2019 represented a detriment to the Claimant.

227. However, the Tribunal had made no findings of fact which would lead it to conclude that the Respondent had subjected the Claimant to this detriment because she had raised a grievance.

228. The Tribunal had reached different conclusions to that of Ms Awford and had been critical of the approach to her findings in terms of the conduct of Mr Roberts and the effect of that conduct on the Claimant. Nevertheless, the Tribunal was entirely satisfied that Ms Awford approached the investigation of the Claimant's grievance in an objective way, had conducted the investigation and the hearing with the Claimant in a supportive and fair manner and the conclusions that she had drawn from her investigation were genuinely held.

229. The Tribunal therefore found that the Respondent did not subject the Claimant to a detriment because she had done a protected act.

230. The claim of victimisation was therefore dismissed.

Employment Judge R Havard  
Dated: 13 May 2021

JUDGMENT SENT TO THE PARTIES ON 17 May 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS