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EMPLOYMENT TRIBUNALS

Claimant: Ms. F. Khalique
Respondent: Portico Corporate Reception Management Ltd

London Central Remote Hearing (CVP) On: 5,6, May 2021

Before: Employment Judge Goodman
Mr D. Schofield
Mr S. Godicharle

Representation

Claimant: Mr M. Khan, lay representative
Respondent: Ms. M. Bayoumi, counsel

JUDGMENT

1. The reasonable adjustments claim fails
2. The disability related harassment claim fails
3. The claimant was not dismissed and the unfair dismissal claim fails.

REASONS

1. The claimant worked for the respondent as welcome host/receptionist from 22 December 2015. She was often absent from work sick, and between June 2016 and August 2020 was taken through various stages in the respondent's absence management procedure. She suffered a bad back and from depression. In 2019 and in 2020 complaints were made by her about colleagues and by them about her were investigated. On 14 September 2020 she resigned because she was unhappy that the "behaviour of certain individuals" continued to contribute towards her anxiety and depression.
2. She brings claims of failing to make reasonable adjustments for disability, disability related harassment, and constructive unfair dismissal. The

respondent admits she is disabled by reason of back pain and depression, but the tribunal must decide when the respondent knew or ought to have known she was disabled. Apart from disability, the claims are denied.

3. There are two claim forms, presented 10 days apart, but differing very little in their accounts. The claims were clarified and listed at a preliminary hearing for case management on 26 January 2021, for which the respondent had prepared a draft list of issues, when the claimant was asked to provide more information. Mr Khan did so on 25 February 2021.

4. The reasonable adjustments claim was specified to relate to arrangements and provisions which the claimant wanted adjusted for disability were (1) a supportive chair, and (2) the way the sickness absence management policy was applied to her.

5. Mr Khan, who had assisted the claimant at the preliminary hearing as well as this final hearing, also said at the start of this hearing, when the issues were being discussed (no final list having been agreed) that the respondent should have done more to mitigate the effect of work stress on her condition, such as shorter working hours. This was treated as an application to amend, and was refused. Hours of work, and their effect on her mental health, did not feature in the claim forms, the claimant's witness statement, or any documents recording discussions with the claimant, although there had been several meetings about her health during the years. It would prejudice the respondent, and was likely to lead to postponement, if introduced at this stage.

6. On harassment, there is a claim under section 26 of the Equality Act of harassment related to disability. Similar conduct, and the way the respondent handled it, is also relied on as repudiatory conduct causing the claimant to resign.

7. The conduct was identified in Mr Khan's 25 February email. First the claimant alleged the respondent had failed to follow its own absence management policy, in particular that from August 2017-19 she was not provided with a chair, the letters of concern 19 December 2016 and 23 June 2017, a stage 2 warning on 17 June 2019, the extension review on 17 July 2019, a letter of concern about conduct on 15 October 2019, and the stage 3 decision on 3 August 2020. It also comprised some undated examples of manager action and inaction (Cauley and Qiatek) which according to the claimant's witness statement date from the early years of employment, then the handling by Mr Caredda of a request in 2018 for time off because her father was ill, refused after a delay of 8 weeks, then the subject and handling of a complaint and grievance on 4 October 2019, in

particular that it was not investigated properly, failure to investigate a complaint of 24 August 2020 about another colleague, and her line manager's handling of a uniform issue in early September 2020.

8. The respondent had identified on its draft list of issues that many matters complained of were out of time. In this respect, the tribunal has to decide firstly whether they were presented out of time, or whether they were part of some conduct extending over a period, secondly, if they are out of time, whether it is just and equitable to allow them to proceed out of time.
9. In our preliminary reading the tribunal had noted references in the notes of investigation of the October 2019 grievance to remarks related to religion and possibly ethnicity, and so from caution asked at the outset of this hearing whether this formed any part of the claims. Both the claimant and her representative were clear that there was no claim for discrimination or harassment because of or related to religion and belief or race.

Evidence

10. The tribunal heard evidence from:

Farzana Khaliq, the claimant.

Catherine Palm, regional manager, who investigated the 2019 complaints
Wesley Arnold, general manager for a related group company, who spoke to the claimant on a leave request in 2020, and asked the claimant if she wanted to discuss anything after she resigned.

Joanne Newton, manager on the PWC contract, to whom Ms Palm and Mr Arnold reported. She chaired the stage 3 absence meeting in August 2020.

11. There was a 380 page bundle of documents. Tribunals often have cause to complain about bundles, but this one was well organised, and importantly had the page numbering aligned with the pdf. thumbnails, saving much time.
12. At the conclusion of the evidence, each side made an oral submission. The respondent supplied a written skeleton as well.

Findings of Fact

13. The respondent supplies "guest services" such as reception staff, office and meeting support, and technical audio-visual support at client's offices. There are 800 employees. There were 28 people in the claimant's team.

14. The claimant was a welcome host/receptionist paid £ 27,000 per annum. She started on 22 December 2015. She was assigned to the team supporting the respondent's client PWC.

The Absence Management Procedure

15. The respondent has an attendance management procedure, which applies to all employees who have passed the probationary period. Its purpose is to help managers work to achieve a reduction in sickness absence levels. There must be a return to work interview after each absence within five days of return to work. Managers must also monitor incidents at work, problems with the physical working environment and employee motivation, monitor and support employees on long-term sickness absence, including those with underlying medical conditions, and consider permanent or temporary reasonable adjustments to achieve a return to work and regular attendance. They must also monitor short-term sickness absence, including patterns and reasons for any persistent short-term absence, such as specific days, non-busy days, days following or prior to a bank holiday, and so on. Once an employee has reached five working days sickness absence in any 12 month period, they must implement an attendance monitoring procedure. They must keep notes of meetings on these matters, and also refer employees to occupational health services where appropriate. The procedure expressly states it is not to be treated as a punitive or disciplinary measure, although where sickness absence is prolonged or there is a high incidence of separate periods of absence which impact on service delivery, their continued employment may be reviewed. On disability, the policy provides:

“we are aware that sickness absence may result from a disability. Particular consideration will be given as to whether there are reasonable adjustments that could be made to the requirements of the job, or other aspect of working arrangements, that will provide support at work and/or assist a return to work. Such assessments will always be made following medical advice. If an employee considers that they are affected by disability or any medical condition, which affects their ability to undertake work, they should inform their line manager.”

16. When off work sick, employees were on statutory sick pay terms, that is, they were not paid at all for the first three days of absence, and thereafter paid at the statutory rate for up to 28 weeks.
17. The company could withhold sick payments where they believed an employee was abusing the scheme or not genuinely ill, or when subject to internal or external investigations, or during any dismissal disciplinary process, or is being investigated, and is signed off work with “stress”

during disciplinary proceedings they would be asked to provide confirmation from their doctor that they were too sick to work. There were many other examples where payment could be withheld, but these are those material to this case.

18. After any sickness absence, if there was absence of up to 5 days in total in the last 12 months, the line manager to discuss the causes with the employee, and if appropriate, issue a letter of concern. Where absence exceeded 5 days in the past 12 months, there was a stage 1 meeting to discuss underlying causes and issues, absence patterns, reasonable adjustments where appropriate, with further monitoring after four weeks. If satisfactory then, they remained at stage 1, and if not, the procedure moved to stage 2. Absence arising in consequence of the disability could be excluded from the five days.
19. The same provisions applied at stage 2 as at stage 1, with a four-week review, with a further four weeks added on if there was no improvement in the first four weeks. If matters improved they could either stay at stage 2 for the next two years, when the procedure would be reinstated if there was still cause for concern, or they could drop back to stage 1. At stage 2 there might be a referral to occupational health if there was no medical opinion, or recurring absences due to the same condition, and these adjustments could be considered. At stage 2, a manager could either extend the monitoring period for a further three months, or move on to stage 3.
20. A stage 3 meeting must be conducted by a senior manager, who considers an attendance management report, and whether there should be continued employment. Employees can be accompanied at this meeting. At a stage 3 meeting the manager has the options of dismissing on capability grounds, transferring to suitable alternative work with a one month trial period, postponing a decision three months, making reasonable adjustments in line with medical or health and safety advice, or drop back to stage 2, subject to a two-year period in which attendance management can be reinstated and returned to stage 3.

The Claimant's Sickness Pattern

21. The summary of the claimant's active problems, taken from the GP records, has few significant entries of any kind until July 2016, when there is an entry for depression. Then in July 2018 there is a record of "anxiety states", and in August 2018, cervical disc prolapse with radiculopathy. In August 2019 the GP has recorded bereavement, and in September 2019 low back pain. The next item in this list is in February 2020, severe depression, and then on 11 August 2020, sciatica.
22. 12 months after starting work, in December 2016 the claimant was issued with a letter of concern under the attendance policy, having been off work on seven occasions in the past 12 months. The recorded reasons work

through, food poisoning, sore throat, reaction to medication, migraine, and tooth abscess, as well as her mother being ill. The records of the return to work meetings in 2016 make no mention of backache or depression.

23. On 30 June 2017 the claimant's general practitioner Dr Z. A. Thebo, wrote a letter at the request of the claimant "in order to help her in her employment affairs". He described an episode of depression, moderate to severe, for which he had treated her from July 2016, with a telephone review in August 2016. Reviewing her now in June 2017, she was still on a dose of sertraline, feeling much better, with the depression well controlled and maintained on sertraline and exercise. He then noted that she had told him of a number of infections over the past years, and he added that due to her depression and associated mental stress "she may have suffered an increased frequency of infections over the past year, some of which have required time off from work". We know that this was uploaded to the respondent's human resources file, but not to what use it was put. We also know that when in February 2020 the claimant was called to stage 3 meeting, Ms Newton had only reviewed the file for the last 12 months (the review period) and only when the claimant then emailed her this June 2017 letter did she become aware of it. Ms Newton conceded however that it was on the respondent's file.
24. A year later, in mid- 2018, the claimant was diagnosed with back pain, the cervical disc prolapse. In a fit note dated 7 August 2018, the GP certified she had been off work with anxiety and depression, and cervical disc prolapse with radiculopathy, and commented that she was to "avoid heavy lifting, awkward lifting e.g. high objects, prolonged standing (longer than one hour at a time), repetitive bending over, access work stress. Needs flexibility with work schedule in order to attend appointments to manage her medical problems". The claimant has not suggested that she was required to carry out any of these tasks, nor that there was difficulty attending appointments. It is however evidence that the respondent was on notice that there might be difficulty with the neck or back.

Stage 1

25. In December 2018, the claimant triggered stage 1 of the absence procedure. Working through the documents, it can be seen that there had been short absences on 17 January 2018, 9 February 2018, we could not trace the cause of either; on 17 May 2018 she self certified that her feet hurting, and 21 May 2018 she self certified with leg pain, on 6 June 2018 she was away with a stomach bug, and on 2 July 2018 the back injury. She then had an eight-day absence from 25 July to 5 August with panic attacks, which she described at return to work interviews as being because her father was ill. On 28 August she was away with a shoulder strain, and on 17 December with food poisoning.
26. The tribunal comments that if the panic attacks are removed from the list, because they may be related to her previous depression, the claimant's

days of absence still triggered that stage of the procedure. If the days for back injury and shoulder strain (because it *might* be linked to cervical disc damage), she still triggered the threshold. She was issued with a stage 1 written warning, she was to be monitored for four weeks, and then reviewed after 12 months.

27. There were no further absences during the four-week monitoring.

Stage 2

28. As already noted, in August 2018 the claimant's father's health had given cause for concern. In October 2018 she was refused unpaid leave because the father still. We do not know why there was delay responding to her request for unpaid leave for this.
29. In spring 2019 her father died, and another manager arranged for her to have eight days compassionate leave, followed by another week or so unpaid leave, with the explicit intention (stated to her) that this done so that the absence would not count towards the absence records for sickness monitoring.
30. However, there was still enough absence to trigger a review at stage 2 on 17 June 2019. It is not easy to follow from the records what her absence had been exactly in this time. The claimant's witness statement was silent on this. We could see that on 3 June 2019 she was absent with gastroenteritis, and on 12 July 2019 had taken time off to accompany her mother to hospital. At this stage her manager interviewed her; the claimant said that her sister was registered as her mother's carer, and that the claimant would take steps to do this as well. There is no suggestion therefore that anything to do with mental health or back pain triggered stage 2. The claimant was given a second written warning. At the four week review on 17 July 2019 she was told the stage 2 would be extended by another three months because of improvement since the meeting.
31. The claimant was then off sick with back pain from the 2 to 15 September 2019.
32. The claimant eventually progressed to stage 3 of the sickness absence management procedure, with notice of the meeting to discuss this issue being sent to her on 13 February 2020. However, for various reasons this did not take place until 3 August.

The Chair

33. Before going on to discuss stage 3, we set out the position about providing the claimant with a special chair for her work.
34. As a receptionist, quite a lot of her time spent sitting with colleagues at a

desk, although other duties would have her walking from place to place as well. In December 2017 a routine risk assessment was carried out for staff using display screen equipment, and it was noted that the claimant needed a more supportive chair. A PWC health and safety adviser made a request for one; in her request for the chair she noted that the claimant had had a lot of time off with back pain, and was under her GP for pain relief, but we could not find anything in the GP summary or in the sick notes or absence management notes that referred to time off with back pain, and, noting that PWC was not her employer, we wondered if this information was accurate. The claimant was then given a chair, but there is a note on 21 December 2017 that the claimant said it was the wrong one, too stiff and hard.

35. In 2018 she left that building, and moved to offices on the embankment, where she moved around a great deal, using different chairs. The fit note of 7 August 2018, (the one reporting cervical disc radiculopathy for the first time, and recommending the list restrictions on lifting), is silent on the issue of the chair. Nor could we see mention of the chair in the discussion with a manager at the stage 1 meeting in December 2018. We conclude from this lack of complaint that she probably had a suitably supportive chair at the time. It was not mentioned in the stage 2 meeting in June 2019.
36. However in June 2019 the claimant had a further risk assessment for display screen equipment work, and mentioned that she had an unsuitable chair. Following discussion with the health and safety adviser, she was provided with a “another welcome style” chair, which was comfortable. On 13 August 2019 she was told to ensure that this type of chair was available at each desk location. There was then a further period of assessment, and she was signed off as having a suitable chair on 3 October 2019.
37. In January 2020 there was a further risk assessment. She commented that she did not always get the suitable chair. It seems the problem was that this was the standard high backed adjustable chair provided to reception staff, which could be adjusted, and the claimant sometimes found that where she wanted to sit others had adjusted it to suit their size. A few days later a note was issued to the team saying that one of the black leather welcome style chairs had been permanently assigned to the claimant. It had a label at the back of the headrest with her initials, and a support pillow, and if anyone used it, they were not to adjust it. If she had to relocate, people should help her move it.
38. In mid-February 2020 the claimant went sick, and then travelled to Pakistan. In the meantime lockdown occurred because of the Covid-19 pandemic. PWC used the opportunity to refurbish their premises, and all Portico furniture was moved into a storeroom. When Portico staff (including the claimant) returned to work on 4 July 2020, there was difficulty locating the claimant’s particular chair. The difficulty was raised

and discussed at the stage 3 meeting on 3 August 2020 (there is no evidence from the claimant or in the documents that it was mentioned until then). The chair was restored and relabelled.

39. We can also see from the memorandum issued to staff on 20 August 2020, that an orthopaedic chair had been delivered, which was reserved for the claimant.
40. Having regard to these findings we are sceptical of the sweeping assertion by the claimant's representative that from the risk assessment in December 2017 until August 2020 no steps were taken to provide her with a suitable chair.

Conflict with colleagues

41. In the witness statement the claimant complains of being rebuked in 2016 for the way she spoke to managers. We have the documents about this, and there is no further complaint about these individuals after 2016.
42. On 4 October 2019, an employee called Sally Glaister resigned, saying that she did so because she could no longer work with the claimant. On the same day, the claimant lodged a grievance about Sally Glaister, which also mentioned earlier remarks made to or about her by Donna Jamieson.
43. Catherine Palm was assigned to investigate. She interviewed 11 people, including the claimant and Sally Glaister. The episode that prompted the claimant's grievance was that Ms Glaister had moved her chair back as the claimant was walking behind, and knocked her. When the claimant objected, Ms Glaister said she should watch where she was going. The claimant conceded at investigation that the incident was probably an accident, but objected to the sarcastic remark. The claimant also agreed that three weeks before this, she had apologised to Ms Glaister and two others in the team for making remarks that had hurt their feelings. This indicated some ongoing friction between the claimant and colleagues. The claimant also objected that in an episode when she had been taken to hospital by ambulance (we have not been able to identify the date except it was probably 2019), it had been reported to her that in her absence Donna Jamieson had made fun of her saying she had back pain. Finally she reported that some time before (no date), Donna had asked why the claimant wore black tights and on being told it was cultural, had commented on her drinking when she was a Muslim. The claimant said at investigation that she had preferred to brush it under the carpet, by way of explaining why she had not mentioned this before.
44. On 15 November the claimant was issued with a letter of concern for leaving shift early without permission.
45. On 8 November, three weeks after the investigation meetings, the claimant asked about the outcome. Catherine Palm concluded, in the light

of what had been said in many of the meetings about relations between the claimant and other team members, that she should issue the claimant with a letter of concern about her conduct towards them.

46. On 18 November she was asked not to share negative feedback on other team members in a public environment such as team meetings, not to engage in accusatory comments, raised voices, threatening senior management involvement and pointing to other team members, as these were perceived by them as aggressive, and she was asked to be more discreet about confidential communications with management. Further, if she had concerns about anything at work she must escalate it to managers privately, not discuss it with colleagues, and not follow it up directly with the team members involved. Discussing colleagues' shortcomings, she was told, other than with managers, was "gossiping, which itself is recognised as a form of workplace harassment".
47. The claimant refused to sign this, and replied disputing the facts. There was no evidence about aggressive communication, she said, and the team meeting had been arranged by a previous team leader to clear the air about her concerns, so feedback had been invited.
48. It does not appear Ms Palm investigated any further, but Wallace Arnold, another manager, spoke to the claimant on 29 November about it, and followed up with an email to say that there had been a full investigation leading to the letter of concern, and it would remain unchanged. He added that the letter was not disciplinary action.
49. On 10 February 2020 the claimant asked about the outcome of her grievance. On learning that she had only had verbal feedback on this from Wesley Arnold, Joanne Newton spoke to her for about an hour, and then forwarded a summary of Catherine Palm's findings, including that an episode of a ticket or business card being thrown at the claimant had not been supported by the witnesses whom the claimant said had been present, Donna's remarks about the claimant's visit to hospital were denied by Donna and a colleague, and the colleague who had reported the remarks back to the claimant had not raised it with any manager then or later. On the conversation on "cultural issues", Ms Palm had recommended that Donna was to be advised to avoid topics where there is potential for misunderstanding. The witness had not perceived any "nastiness" behind the comments. She therefore recommend no further action, because of the conflicts between the claimant's evidence and the evidence of witnesses present on site at the time. There should however be a separate conversation with Donna.
50. The claimant replied about the comments from Donna that security would have seen what happened with Sally Glaister, and there was also CCTV footage to check. Ms Palm said that the claimant had not mentioned any of this in her interview on 2 September, and that CCTV footage is only

retained for 28 days.

Absences in 2020

51. These discussions in February 2020 about the grievance outcome took place against a background of negotiations between the claimant and respondent about taking time off work (not related to any health difficulty) in February.
52. In January 2020, the claimant had just returned from two weeks holiday. She asked if she could take a further four weeks holiday in February and March to visit Pakistan with her mother on the anniversary of her father's death. On 22 January 2020 she was told that the request could not be granted. There was statement of reasons. If she took all her annual leave at once, she would not accrue any more during the rest of the year, and there was concern that she might then have to take more time off without pay, or that she might not return, not having accrued leave beforehand. She was however told on 24 January 2020 that she could take four weeks leave *without pay*.
53. The on 13 February 2020 the claimant was told that she had now triggered the stage 3 absence procedure, given her sickness absence level over the past 12 months. There was also to be a separate welfare meeting.
54. Next day, 14 February 2020, the claimant went sick, and sent in a fit note from 14 February until 27 March 2020 for "severe depression, work-related stress contributory". In her covering email she said she been signed off work for six weeks "due to the events that have taken place this week". As recorded those events were being refused 4 weeks paid time off (though permitted unpaid time off) and being called to a stage 3 meeting.
55. The stage 3 meeting was therefore postponed, although Joanne Newton did urge the claimant to attend a welfare meeting to discuss if any support or adjustments were required, either now or shortly before she was due to return to work.
56. On the same day the claimant was told that for the current period of sickness sick pay would be suspended until the company was satisfied it was genuine illness, in accordance with the terms of the policy. The claimant then responded with a copy of Dr Thebo's letter of June 2017 about depression in 2016.
57. In fact, while the client claimant was off sick with severe depression, she travelled to Pakistan with her mother as originally planned. Due to lockdown, a return flight on 21 March was cancelled, and she did not get back until 8 April.
58. On 14 April, now back in the UK, although not at work because the

premises were shut in lockdown, the claimant had a return to work meeting by telephone with Joanne Newton. She spoke about personal issues she had had with work colleagues who had since left. She was offered access to the employee assistance programme for counselling. Meanwhile, the respondent had agreed to pay her 3 weeks' holiday pay from 30 March to help her return from Pakistan.

Stage 3 Meeting

59. The stage 3 meeting was postponed for the time being, because the claimant wanted it to take place face-to-face rather than by telephone. Following return to the premises on 4 July, and a postponement by Ms Newton for a diary clash, it eventually took place on 3 August. The claimant was accompanied, and there is a full minute. She spoke of her depression, and that there was no support from Portico, referring to the time when the father died. She had not had depression before joining Portico. She asked if Octavian (then her manager) could check in with her for 5 to 10 minutes a month, it "would be nice to speak to someone who cares to have a conversation". Ms Newton explained that the respondent had two members of staff were mental health first aiders she could speak to, but she arranged a monthly chat with Octavian. The claimant declared that the sickness absence management procedure should not have got to this stage: "someone should have stepped in and the absence wouldn't have got to the stage. It hasn't helped and highlighted I've been bullied at work but it was brushed away and if it was addressed earlier more than 75% of those absence could have been avoided".
60. Ms. Newton's plan of action at the end of the meeting was to check she was not doing any lifting, and would get her own chair, and have the monthly coffee chat with Octavian, and she was to use the employee assistance programme, and the mental health first aiders as she felt the need.
61. The absences triggering stage 3 in February 2020 were reported as: "mainly back pain, non-health-related". The notes show gastroenteritis in June 2019, low back pain and abdominal pain August 15 September, then low back pain from 18 to 22 December 2019. Ms Newton's evidence was that she had discounted two weeks back pain required to trigger stage 3, but this still crossed the threshold. The claimant did not suggest in evidence or by submission that this was wrong. The outcome was that the claimant was told she would be held at stage 3 for monitoring over the next 24 months.

Resignation

62. On 14 September 2020 the claimant resigned with immediate effect, saying that she had been:

"unhappy for quite a while now and the behaviour from certain individuals

that continues to contribute towards my anxiety and depression isn't changing".

When Wesley Arnold contacted her to ask if she wanted to discuss this or raise a grievance, the claimant did not explain. She replied to a message that he was going to phone her about it by saying:

"I understand from Clayton that you'd like to reach out to me. That I've had to leave after fighting a battle for the nearly over three years."

She went on to refer to an attempt at on her own life in February "due to the mess up of the previous investigation", and a fear that if she stayed she would "cause more damage to myself". This is the only evidence whether in documents or a witness statement, that the claimant had attempted self-harm. It indicates that what precipitated the resignation is likely to have been conflict with team members and fear of another letter of concern. "Three year battle" would go back to 2017, and she may have had in mind the stage 1 warning in December 2018.

63. Wesley Arnold replied next day saying that her resignation was accepted, and that her concerns were taken very seriously, and that they would discuss this with her informally or as part of a full complaint. There was no reply.
64. In the witness statement, the claimant recites the matters that led her to lodge a grievance in October 2019, but does not mention any episodes closer to her resignation in September 2020, although as there is a passing mention to a dispute about uniform. In fairness to the claimant, bearing in mind she is without professional representation, the tribunal has examined the documents to try to see what the claimant meant when she spoke of "behaviour from certain individuals", to see if there was more than the complaints of 4 October 2019 and 24 August 2020, or the uniform episode.
65. On 14 August 2020 the claimant was told that she could not claim expenses for Sunday night hotel bill in order to attend work at a site in Uxbridge for which she had volunteered, because it had always been company policy that staff must travel to work on morning. The claimant replied that she would not be volunteering in future.
66. On 20 August Octavian Papa issued the memorandum (already mentioned) to all team members about the new chair. This was one of the outcomes planned at 3 August stage 3 meeting.
67. On 24 August claimant the claimant made a complaint about a colleague, Shauna McGrath, and it seems from the documents that at the same time there was a complaint about the claimant from Charlie-Ray Mitchell, another colleague. The claimant said explicitly she did not want to make a formal grievance.

68. On 2 September the line manager, Clayton Caradda, interviewed a large number of team members, including the claimant about these matters. The notes show that it arose from a dispute about the time that reception staff were going to lunch, and Shauna McGrath had asked who had told Clayton (the manager) that a group had gone to lunch at 12. (It is not stated but in context it makes sense if the claimant saw this as directed at her; we did not gather who had reported anything to the manager). The claimant described Ms McGrath's remark as "a small thing, not swearing or physical". It is clear from various things that were said by others in the investigation interviews that this was a tense, rather bad-tempered team. There is no reference by anyone (including the claimant) of anything to do with the claimant's disability, whether back pain or depression. There is nothing about this episode in the claimant's witness statement.
69. We do not have any record of Mr Caradda's conclusions, or whether any decision had been taken before the claimant resigned. He is no longer employed by the respondent, and there is no signed witness statement from him.
70. On 10 September 2020, there was an exchange between Mr Caradda and the claimant about her uniform jacket. As it emerged in the evidence, the claimant had lent her uniform jacket to another employee in 2019. When Ms Newton started work for the company in September 2019, she wanted to tighten up on the wearing of uniform. As a result, either in late August or in early September 2020, the claimant was asked by Mr Caradda, in line with the new emphasis on following the appearance code, not to wear a long-sleeved T-shirt which showed under her uniform tunic. The claimant retorted that she was cold without it, (and complains now that she had worn it for 3 years without being told about it), and she arranged to have her jacket back. In the meantime Mr Caradda had ordered her a new jacket. When it arrived, learning on 10 September that her old jacket had now turned up, he arranged for the company to dry clean the old one, and wanted to keep the new jacket in stock. The claimant was disappointed. She had understood she was going to get the new jacket.
71. As noted, the resignation email on 14 September mentions only "certain individuals". The tribunal does not know what in particular weighed on her mind. We can understand that the claimant was worried about reaching stage 3, where further sickness absence could lead to dismissal. She firmly believed, rightly or wrongly, that unrelated absences were caused by depression. We can also understand that she was disappointed that she was treated as the one at fault in the matters aired in the grievances and complaints of October 2019, and she may have been fearful of the outcome of the investigations of 2 September, especially when in the earlier grievance she had been given a letter of concern in November but not told the outcome until February. She was further aggrieved at her hotel expenses, and at not getting the new jacket.

72. Since leaving she has been ill with depression.

Relevant Law
Adjustments for Disability

73. Section 21 of the Equality Act provides that failing to discharge the duty to make reasonable adjustments for disability is discrimination. The nature of the duty is set out in section 20:

(2)The duty comprises the following three requirements.

(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4)The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5)The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

74. By schedule 8, it is a defence that the employer did not know or could not reasonably be expected to know that a person was disabled.

Reasonable Adjustments – Discussion and Conclusion

75. To start with the chair, as an adjustment of the physical place of work, namely the reception desk, or as an auxiliary aid, our conclusion on the facts was that the respondent was alive to the need for a chair to support the claimant's head and neck. It is clear that by October 2019 a chair had been supplied, and if (which is *not* clear on the scant evidence) there had been any earlier delays, they are well out of time, that is, these failures occurred a great deal more than three months before the claim was presented.

76. After that date, in our finding the respondent did discharge the duty. When a problem with the chair supplied was made known to them, they took action, by asking other team members not to adjust the chair earmarked for her. When this particular chair went missing in lockdown, they ordered a replacement and issued a general team instruction that it was the claimant's.

77. Moving on to the sickness absence policy, the respondent had already incorporated into the policy a provision for excluding disability related absence, although that does not remove the need to check whether they followed their own policy. At stages 1 and 2 neither disability was relevant, because there was sufficient other absence to trigger reviews. We are not persuaded that any infections, gastroenteritis, migraines, hurting feet, and so on, are because of underlying depression. Stages 1 and 2 were properly triggered without a disability-related absence.
78. As for stage 3, nothing associated with depression arose in the period to February 2020 when it was triggered, (although *after* February 2020 she had 6 weeks with depression over the period of the planned trip to Pakistan). Some of the absences associated with the back (the 2 week absence in autumn 2019) were discounted, but that still left the claimant at stage 3. In our finding, the respondent discharged the duty to make adjustments to its absence management policy to take account of underlying back pain. We note in any case that lower back pain is unlikely to be related to a cervical disc injury.

Harassment

79. By section 26 (1):

A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant (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.

On “effect”, section 26(4) provides:

“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”.

Where a series of actions is relied on, a tribunal should look at the totality to decide to decide if there was harassment related to the protected characteristic, rather than by taking each action separately – **Reed v Stedman 1999 IRLR 299**

Harassment - Discussion and Conclusion

80. The only conduct complained of which may have been related to disability was the allegation that a colleague had mocked the claimant in summer 2019 when she was taken to hospital. The respondent investigated and could not substantiate this. In the circumstances it is difficult to see that they should have done more about a one- off incident. If (which is not established) this did occur, it is long out of time. If there was a failure to

investigate it adequately (which the tribunal does not accept) the claimant knew that at the latest by 10 February 2020, and is still out of time. Even if time is suspended while she was ill with depression to the end of March 2020, it is still out of time.

81. As for the sickness absence management procedure, this was conducted carefully, and the claimant was not blamed, only told to improve. In the circumstances its purpose was the stated one, to improve reliable attendance. Nor was it applied to the claimant with any other purpose that we could see. While the claimant experienced its effect as hostile, as it might eventually lead to dismissal, we did not think it was reasonable to have that effect. The policy was applied to all staff, and the claimant met its conditions, even adjusting for her back.
82. We could not understand how conflict over paid time off to visit Pakistan, or wearing her uniform jacket, or holding her to an expense policy, was related to disability.

83. Constructive Dismissal- Relevant Law

This is a case where the employee resigned and so must establish that in law this amounts to a dismissal. By section 95 of the Employment Rights Act 1996, a dismissal can occur where:

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

As made clear in **Western Excavating (ECC) Ltd v Sharp (1978) IRLR 27**, it is not enough that the conduct is unreasonable. It must amount to a fundamental breach of the contractual employment terms such that the employee can treat the contract as at an end by reason of the employer's repudiatory conduct. **Woods v WM Cars (Peterborough) Ltd (1981) IRLR 347**, upheld in the Court of Appeal, and approved by the House of Lords in **Malik v BCCI** makes clear there can be:

"implied in the contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract. The Industrial tribunal's function is to look at the employer's conduct as a whole and to determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it".

84. Where there are a series of actions they can be looked at cumulatively. The precipitating cause may not be weighty of itself but prove to be the last straw – **Omilaju v Waltham Forest (2005) ICR 481**.
85. The reason for the dismissal may be discriminatory as well as unfair. Guidance on deciding whether the employer's conduct leading to

dismissal amounts to a discriminatory dismissal is given in **De Lacey v Wechsels Ltd UKEAT/0038/20**:

“Where there is a range of matters that, taken together, amount to a constructive dismissal, some of which matters consist of discrimination and some of which do not, the question is whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory. In other words, it is a matter of degree whether discriminatory contributing factors render the constructive dismissal discriminatory. Like so many legal tests which are a matter of fact and degree, this test may well be easier to set out than to apply”.

Dismissal – Discussion and Conclusion

86. To take the last point first, as found, only the alleged mocking remarks in 2019 about the claimant’s back could have been discriminatory. So the focus is on the duty of mutual trust and confidence.
87. The tribunal was concerned that there had been no written resolution of her October 2019 grievance. Ms Palm evidently felt it was over when she issued her letter of concern without findings. Mr Arnold may have thought he had dealt with it in his meeting at the end of November, but it was a loose end. We could understand the sense of grievance about the way the grievance had been handled. The investigations on 2 September seem to have appeared to the claimant to be a repeat of the same scenario - concurrent complaints by and about her colleagues, interviews of all concerned, and so she anticipated she would be blamed and others let off. If so, we do not hold the respondent acted too slowly in not reaching a decision by 14 September on matters the subject of a large number of interviews on 2 September. While prompt resolution of grievances is important if they are not to fester and cause more harm, it was reasonable to take at least 10 days to consider what had occurred, how important it was, and what to do about it. We do not find that the hotel expenses or uniform issues showed any hostility or bad faith toward the claimant. They were dealt with in a business like way by reference to established policies on overnight expenses for volunteers for off-site duty, and on uniform cleaning.
88. The claimant had a sense of grievance that she would not have got as far down the road of the absence management procedure if allowance had been made for back pain and depression, including that the June 2017 letter had not come to Ms Newton’s attention until the claimant forwarded it in February 2020, but in our finding the procedure was properly applied. If she had reached stage 3, it was not “without reasonable and proper cause”.
89. Interwoven with these was a further strand of unhappiness about time off when her father was ill in the autumn of 2018. We have no information on why this was refused. It is possible it related to her poor attendance record

that year. The respondent did behave with sympathy some months later when her father died, allowing about 2 weeks away in a way which did not compromise her sickness record. When annual leave was refused for the February/March 2020 absence, she was still allowed unpaid leave – and in the event she did get three weeks holiday pay to help out when she got into difficulty returning. If there was any ill will towards in 2018, it was superseded by sympathetic treatment, such the conduct ended when the 2018 decision was made, and did not extend over a period.

90. We concluded therefore that the respondent did not act in repudiatory breach of the contract, and that the resignation was not a dismissal.
91. Insofar as we have held any matter out of time, we did not consider it was just and equitable to extend time. The facts of this case have demonstrated more than once how difficult it can be to make factual findings when the events complained of are old. The claimant knew the procedures and policies, and any relevant facts were in her possession.
92. At the conclusion of the hearing we set a date for a remedy hearing should we find for the claimant in any claim. Given our conclusions on all the claims, that hearing is no longer needed, and is cancelled.

Employment Judge Goodman

Date: 10th May 2021

JUDGMENT and REASONS SENT to the PARTIES
ON: 11/05/2021.

FOR THE TRIBUNAL OFFICE