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EMPLOYMENT TRIBUNALS

Claimant: **Mr A Ward**

Respondents: **(1) Arthur Branwell & Co. Ltd.**
(2) Nigel Day

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **6 – 8 and 23 April 2021**

Before: **Employment Judge Housego**
Members: **Mr D Ross**
Ms S Barlow

Representation

Claimant: Louise Mankau, of Counsel, instructed by ELS Solicitors Ltd

Respondent: Jonathan Buckle, of Counsel, instructed by AP Partnership

JUDGMENT

1. **The Claimant was unfairly dismissed by the Respondent.**
2. **The Respondent is ordered to pay to the Claimant the sum of £18,577.09.**
3. **The claim for disability discrimination is dismissed.**

REASONS

Summary

1. Mr Ward was summarily dismissed, the Respondent saying that he was guilty of gross misconduct in not performing his duties adequately, and in failing to attend his place of work, or meetings which he was required to attend. Mr Ward says that this was unfair, because his absence was necessary to attend to his wife's acute health needs (her condition falling

within the definition of disability), that they should have been more receptive to the proposals he made to deal with the problem, and that the way they went about it was harassment contrary to the Equality Act 2010.

Law

2. In respect of a claim for unfair dismissal, the Respondents have to show that the dismissal was for a potentially fair reason[1]. The Respondents say this was conduct which is one of the categories that can be fair[2]. It has to be shown that the dismissal was fair[3]. The employer must follow a fair procedure throughout[4], and dismissal must fall within the range of responses of a reasonable employer[5]. It is not for the Tribunal to substitute its own view of what should have happened, for it is judging whether the actions of the employer were fair, and not deciding what it would have done.

3. There is no claim of automatically unfair dismissal arising leave for family reasons[6], and it is not said that this was time off to care for a dependent[7].

4. The burden of proof as to the reason for dismissal is on the employer, on the balance of probabilities. There is no burden or standard of proof for the Tribunal's assessment of whether it was fair to dismiss[8]. If the dismissal was procedurally unfair the Tribunal has to assess what would have happened if a fair procedure had been followed[9].

5. As it is asserted that the dismissal was by reason of unlawful discrimination the Tribunal must be satisfied that in no sense whatsoever was the dismissal tainted by such discrimination. For the discrimination claim, it is for Mr Ward to show reason why there might be discrimination[10], and if he does so then it is for the Respondent to show that it was not.

6. This is a case where the claim is of associative discrimination, to which the Equality Act 2010 applies[11]. Not all aspects of the Equality Act 2010 apply to claims for associative discrimination. They are limited to direct discrimination[12] and harassment[13] [14].

7. It is not possible to bring a claim for associative discrimination from detriment which is something arising from the disability[15], because such a claim specifically requires the disability to be that of the Claimant.

[1] S98(2) of the Employment Rights Act 1996
[2] Also S98(2) of the Employment Rights Act 1996
[3] S98(4) of the Employment Rights Act 1996
[4] Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA
[5] Iceland Frozen Foods Ltd v Jones [1982] UKEAT 62_82_2907
[6] S99 Employment Rights Act 1996
[7] S57A of the Employment Act 1996 & Qua v. John Ford Morrison Solicitors [2003] UKEAT 884_01_1401
[8] Section 98(4) of the Employment Rights Act 1996
[9] Polkey v AE Dayton Services Ltd [1987] UKHL 8
[10] Igen v Wong [2005] ICR 931, Madarassy v Nomura International plc [2007] EWCA Civ 33, Laing v Manchester City Council [2006] I.C.R. 159, and Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913
[11] EBR Attridge Law LLP & Anor v Coleman [2009] UKEAT 0071_09_301
[12] S13 Equality Act 2010
[13] S26 Equality Act 2010
[14] Coleman (Social policy) [2008] EUECJ C-303/06_O
[15] S15 Equality Act 2010

8. There can be no claim for failure to make reasonable adjustments[16] [17] in a claim for associative discrimination.

9. Harassment is defined in S26 of the Equality Act 2010:

(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.

Evidence

10. The Tribunal heard oral evidence from Mr Ward and from Mr Day (Company Secretary, and who made the decision to dismiss), and from Jennifer Mayes-Tanner (Mr Ward's line manager). An appeal was conducted (in the absence of Mr Ward) by the 1st Respondent's managing director, William Denyer, but he passed away on 13 October 2019, and so the evidence about the appeal was solely documentary. There was a bundle of documents of almost 600 pages. Both Counsel provided written submissions supplemented by oral submissions which are recorded in my typed record of proceedings.

Facts found

11. Mr Ward is an analytical chemist. He was the sole analytical chemist employed by Arthur Branwell & Son Ltd., which is a company which makes food additives. It buys in many ingredients which go into its products, and a substantial portion of them come from China. Records of their purity are required to be kept, both because of regulations and customer contract obligations. Mr Ward had a large part in that work. He worked in a laboratory where about seven others worked, in other aspects of the 1st Respondent's work.

12. Mr Ward is married. His wife has not enjoyed good health. She has diabetes. She has mobility problems. She underwent kidney surgery in 2015 and that was problematic. She fell and broke her leg and had further mobility problems as a result. In February 2019 she was diagnosed with a grade 3 breast cancer. This has required surgery twice, chemotherapy and radiotherapy.

13. Since 2014 Mr Ward has asked for time off to look after his wife. His hours were reduced to 9:00 am to 2:00 pm from 01 September 2014 (126/574).

[16] S20 & 21 Equality Act 2010
[17] Hainsworth v Ministry of Defence [2014] EWCA Civ 763

From 06 October 2014 it was 9:00 am – 3:00 pm, with ½ hour for lunch (127/574).

14. From 06 July 2015 it was 9:30 am – 4:00 pm Monday – Thursday and 9:30 am – 1:00 pm on Friday, for 8 weeks (128/574).

15. He sought unpaid leave for 26 & 27 October 2015 saying his wife had injured herself in a fall (132/574).

16. On 27 November 2015 he was sent a letter requiring him to improve his attendance. He would no longer be allowed time off to care for his wife, paid or unpaid, and he was expected to book holiday in advance, not retrospectively to cover unauthorised absence (133/574).

17. On 19 February 2016 his hours were changed to Monday to Thursday 9:30 am – 5:00 pm with ½ hour for lunch, and no Fridays for 6 weeks (134/574).

18. From 01 August 2016 Mr Ward resumed working Fridays (135/574).

19. In 2018 he was late every day by between 15 and 40 minutes for a sustained until in March 2018 (139/574). A list of the times is at 400/574 et seq.

20. On 23 January 2019 it was agreed that Mr Ward would work 10:00 am to 5:00 pm with 1 hour for lunch, but no break morning or afternoon, backdated to 01 January 2019, by reason of him being late so often (143/574).

21. Mr Ward's wife was told on 06 February 2019 that she probably had breast cancer (222/574), and this was confirmed on 27 February 2019 (222/574).

22. Mr Ward was given the week 01-05 April 2019 as compassionate leave. Company policy is that this is only in cases of bereavement.

23. On 23 April 2019 Mr Day wrote to Mr Ward to say that his working days remained Monday – Thursday, but he would work from home 50% of the hours he usually worked as a temporary measure to facilitate his caring for his wife (151/574). Mr Ward did not attend his place of work again.

24. Ms Mayes-Tanner was expecting Mr Ward to come into work, at least for discussions. For example, on 09 May 2019 she emailed him (228/574) to ask what time he would be coming in the next day.

25. On 30 May 2019 Ms Mayes-Tanner wrote to Mr Ward asking about the repeat tests diary which was not up to date, and asking for detail of what had happened (155/574).

26. On 02 June 2019 Mr Ward emailed a supplier in China about contaminant reports about the goods that supplier sold to the 1st Respondent, copied to Ms Mayes-Turner. Ms Mayes-Turner was unhappy that they all seemed to be a year out of date. On 04 June 2019 she asked Mr Ward to set up a diary for all the similar reports needed for future years (160/574).

27. A treatment plan was worked out for Mr Ward's wife, by 03 June 2019 (229/574), to which she agreed. It was anticipated to last six months

(222/574). On 06 June 2019 Ms Mayes-Tanner's diary recorded that Mr Ward's wife's chemotherapy had not yet started, and that he would be in to work on Friday 14 June 2019 (173/574). He did not attend, and nor did he do so on 11, 15, 16, 25 or 26 July 2019 as had been arranged (181-184/574).

28. On 16 July 2019 Ms Mayes-Tanner emailed to ask Mr Ward about reports known as MSDSs which were on his filing cabinet. They had been recorded electronically, but the paper copies had not been filed. Mr Ward usually asked the receptionist to do this. The files are important for reference in case of emergency, but all save 1 lab assistant had access to the information on the computer system.

29. On 25 July 2019 Mr Day wrote to Mr Ward (186/574). He said that working from home was not working effectively, and expressed concern at the number of meetings Mr Ward had cancelled. They expected him to attend on 26 July 2019, when the temporary arrangement would be reviewed, whether he attended or not. If it was ended he would be required to work in the lab from Monday 29 July 2019 (186/574).

30. Mr Ward did not attend, phoning in to say that his wife was upset from the chemotherapy and hot weather. He said also that one car was not working and the other in the garage, being fixed after overheating. He told Ms Mayes-Tanner that they could come to him, or they could have a conference call.

31. Mr Day and Ms Mayes-Tanner did not want to go to Mr Ward's home. It did not seem appropriate to them to discuss such matters in his home. They did not want to go to his home because his wife would be there. She had previously (and without foundation) accused Mr Ward of having an affair with Ms Mayes-Tanner. She had insulted Ms Mayes-Tanner's stepdaughter on her (the stepdaughter's) Facebook page about a cat Mr Ward and his wife were due to rehome, but did not.

32. The Respondent ceased to pay Mr Ward on 01 August 2019, because he did not return to work.

33. Ms Mayes-Tanner asked Mr Ward to work nonetheless. To access the 1st Respondent's database his work PC had to be switched on. It was sometimes turned off. On 05 August 2019 Ms Mayes-Turner turned it on for Mr Ward to have access (page 224).

The Claimant's case

34. His wife was very seriously ill, and looking after her was his priority. She did not want anyone else but him looking after her. He was not going to insist otherwise. At the very start he offered – asked – for an unpaid sabbatical to do so. He had not realised that it would take so very long for her treatment to complete. In July 2019 it was planned to be 6 months, and in August he had said that he would not be back that calendar year. He had worked there 10 years, and he thought they should have accommodated him. They did, to some extent, in that he was asked to work solely from home, 50% of the

time. That would have worked, but his wife became so unwell after her chemotherapy sessions that he was unable to do anything much.

35. It was deeply distressing to him that he was accused of taking their money while doing no, or little, work and being a 24/7 carer for his wife, because he had asked for unpaid time off.

36. His wife was a private person, and did not want details of her treatment shared with his employer. There was no reason why they should not take his word about the treatment she was receiving, or its effect on her.

37. He was not able to predict when his wife would become unwell, and while she did not need care all day every day, he might be needed at short notice, and so a trip to the office was not possible. Even a half hour meeting, with travel back and forth, was a minimum of 2 hours away from her.

38. If he had been a woman on maternity leave he would have had up to a year away, and in reality the situation was not different.

39. The way they had dealt with him was disability related harassment.

The Respondent's case

40. Over 6 years they had leant over backwards to accommodate Mr Ward's many requests to change his working hours, and put up with him being late to arrive day after day for months. They had given him a week's compassionate leave after the diagnosis, which was not company policy and indicated how helpful they were towards him. They were very sympathetic to his request for time to look after his wife, to the extent of permitting him to work a very small amount – 2½ hours a day for 4 days a week (so only 10 hours a week), nd his work did not require set times. They did not want or think it reasonable to expect them to get in a temporary replacement, who would need training, and would be needed for an indefinite period.

41. It was unacceptable for Mr Ward to fall so far behind his work, and the three things he was to take charge of were important to the whole company.

42. It was disingenuous of him to say he could not attend the office at all from 23 April 2019 until August 2019. It was 30 minutes drive outside rush hour. It was not reasonable for him to refuse all other care, either professional or from relatives. Meetings could have been arranged on a provisional basis, to take place if his wife was well enough to leave. There was no medical evidence that she was so unwell all the time that she could not be left.

43. It was gross misconduct not to return to work when required, and reasonable to end the temporary arrangement in the circumstances.

Conclusions as to unfair dismissal

44. There are many twists and turns in the narrative history over the months leading to the dismissal. The Tribunal considered all the matter put forward by both parties. This decision sets out the matters the Tribunal thought most

relevant so that the parties understand the decision reached and the reasons for it. That the decision intentionally does not deal with every detail does not mean that those details have not been fully considered.

45. This was not a conduct or capability matter. Mr Ward had long prioritised his wife's poor health over his work, and his employer had accommodated that. That is stated factually, and not a criticism of Mr Ward. When his wife was diagnosed with stage 3 breast cancer he devoted his time to caring for her. She required him to do so, and she would not have professional carers. Again, that is simply factual and is not judgmental: the diagnosis was of a condition that might have been fatal, and sadly a similar diagnosis was fatal for a colleague of Mr Ward's at a similar time.

46. Mr Ward asked for an unpaid sabbatical to care for her. The Respondent refused. The analogy of a maternity leave is raised. There are, in reality, no real arguments as to why this might not have been possible: the Respondent could have required this to be of a fixed term, such as a year, to enable a fixed term contract to be entered into with a replacement. The training specific to this role was said to take about 3 months in total, but no evidence was given of that, and a trained chemist would be at least partly effective almost immediately. Finding someone might take a while, but the temporary arrangement the Respondent in fact entered into could have carried them through that period. There is little in the evidence of Mr Day that temporary workers tend to earn money and then use it to go travelling and so could not be relied upon. Many interims have a career of short term employment, and others are happy to take short term contracts in the hope that they become permanent.

47. The issue, then, is whether the Respondent was obliged to grant Mr Ward's request for a sabbatical. The answer is no. There is no obligation on an employer to grant a lengthy sabbatical, possibly of indeterminate length to care for a disabled relative. It is not direct discrimination nor harassment to decline to do so, and it so cannot be associative disability discrimination. (Nor would it be obliged to offer a fixed term sabbatical of (say) a year to obtain certainty of length of absence. This is because even if fixed term it would not be certain that he would return at the end of the period, and in fact would have needed some 17 months.)

48. The Respondent did make great allowances (as it had before) to help Mr Ward. Given that he was not allowed a sabbatical, he accepted those changes. He was to work from home, at 50% of the time he worked before (which was less than full time). It was a couple of hours a day most days of the week, but at any time (or day) he chose.

49. By 03 June 2019 it was clear that Mr Ward's wife's treatment would last a further 6 months (296/574).

50. After a while it became apparent that Mr Ward was doing very little work. This was raised in an email of 29 July 2019 (190/574), which said that he had been required to return to work and that the present arrangement was not working, and that if he did not attend this could lead to disciplinary action and termination of employment.

51. Mr Ward did not respond and the Respondent was not happy about this, and wanted to have a meeting with Mr Ward, saying that he was failing to perform his duties and that this was misconduct. He would not come to a meeting, cancelling many appointments. The Tribunal does not doubt that he intended to attend the meetings, but his wife forbade it. Mr Ward's wife is a very strong willed person, and it is plain that Mr Ward does as she says (this was apparent even during the hearing, as Mr Ward was at home throughout the hearing). This is again not judgmental, and at such a difficult time Mr Ward's wife may have needed him by her constantly.

52. That fact does not oblige the employer to permit the employee to do little or no work. The submission was that Mr Ward was compelled by his employer to decide between his job and his wife. That is undoubtedly true, because he could not both care for his wife constantly and do his job. If so, the employer is not bound to hold the job open.

53. Mr Ward was not doing any laboratory work, and as he was an analytical chemist there was a limited time during which he could be retained without coming to work. The Respondent accommodated him between April and the end of July 2019.

54. On 03 August 2019 Mr Ward emailed Mr Day (197/574) and told him that he would not be able to attend the office (at all) for the rest of the year. This was in response to Mr Day's demand that he come in to discuss matters. While that email said that if his wife felt well on consecutive days he might be able to come in, Mr Day was entirely correct to conclude that whatever day it was, on the day Mr Ward's wife would not let him go. In his oral evidence Mr Ward accepted that this was the case.

55. Unfortunately, Mr Day did not write to Mr Ward, sympathising with his predicament, sending best wishes to his wife, but saying that the present situation was not working out, and that as it was necessary for Mr Ward to devote himself to the care of his wife it now seemed inevitable that his employment would have to be brought to an end as his caring responsibilities precluded him working for the foreseeable future. Had he done so, this case would probably not have been brought. Instead, Mr Day wrote aggressive letters accusing Mr Ward of misconduct in not doing his job, intentionally refusing to attend meetings, and taking the Respondent's money while not working for them and caring for his wife. Not unnaturally, Mr Ward takes exception to this as he had offered to stay at home without pay, and even to do some work for the company if it needed and he could, without pay. Mr Day scoffed at this, on the basis that it was not legal. Pay at NMW rates would have solved that.

56. Then on 07 August 2019 (202/574) he simply revoked the arrangement by which Mr Ward worked at home, and that Mr Ward had refused to follow a lawful instruction to attend for work on 05 August 2019, and this was insubordination. He would not be paid from 05 August 2019. If he did not attend a meeting on 12 August 2019 disciplinary action would be taken. Mr Day said that Mr Ward going to the hospital with his wife on a Thursday was an unauthorised absence and would not be paid, because it was a work day and even though it was accepted that Mr Ward could work any hours of any day he chose.

57. Mr Ward did not attend, the meeting was rescheduled, Mr Ward did not attend. On 24 September 2019 Mr Ward was dismissed summarily (336/574) for alleged gross misconduct.

58. This was that he had not filed paper copies of some reports (MSDS) (they were on a database but not in a ring binder file); that the product testing diary was not updated; and that supplier contaminants information was not up to date. He had refused or failed to attend meetings on seven dates in July and August 2019; had failed to work to the arrangements agreed from 23 April 2019; had failed to return to work from 05 August 2019; had attended hospital appointments during working hours without notifying the Respondent; that he was taking money from his employer while caring for his wife and not working. It was asserted that Mr Ward was assertive and disingenuous and was lying to them, and would not provide evidence of the medical appointments he said he had been attending.

59. The Respondent has been advised by a (non solicitor) advice company throughout. The correspondence from the Respondent was doubtless drafted by them. Their correspondence with the Claimant's solicitor was reprehensible, as detailed in a letter from those solicitors to the Respondent on 25 October 2019 (368/574). The bombastic and petty language used, and the approach taken to this whole case by them, and by Mr Day, is regrettable.

60. What has occurred is not a conduct matter, but *"some other substantial reason"*. There is no fault in Mr Ward looking after his wife, and there is no fault in the employer saying that this means they can't keep his employment open any more. That is the top and bottom of the reality of this case, and had Mr Day and Mr Southwell of AP Partnership had the common sense and humanity to see that this case would never have been brought.

61. However, it is also regrettable that Mr Ward did not himself tell his employer that he really could not do the limited amount of work which his employer asked him to do by reason of the demands of caring for his wife. They had been really helpful to him, as they had been for years. It was not realistic of him to expect them to carry on indefinitely in this way, with him not doing much work and continually calling off meetings at the last minute. It was clear that he was never going to feel able to leave (or be permitted by) his wife to attend meetings. He knew, and they did not, exactly what the situation was. If he could not work and could not attend meetings either he was going to be dismissed or he should have resigned. When he said in August that he was going to be off until the New Year he did not repeat his suggestion of unpaid leave. On the other hand, the Respondent would not have entertained the idea any more than they would earlier.

62. Mr Ward suggested a retirement. The Respondent understandably thought this a request for a pay off to leave. They declined. The Tribunal finds that there was more in Mr Ward's mind than he claimed. He said he wanted only notice pay and accrued holiday pay. If that were the case he would have resigned and then discussed the notice pay and holiday pay. More precisely he would have asked if he could be placed on garden leave during his notice. He asked for a payoff to leave.

63. As to the three matters said to be misconduct, the first was the filing of paperwork which Mr Ward asked others to do. Once the oversight was noticed all that was needed was for someone to be asked to do it. The Tribunal did not take as serious that the paper files were not up to date if they were inspected, for everything was filed in a computer held database. This was not a significant failing. In any event it occurred before 23 April 2019, his last day at work and this was months later.

64. Omitting to check the contaminant testing was indeed unfortunate, and embarrassing to the Respondent. However, when it was discovered, instead of making haste to remedy it, other similar matters were put off by Mr Denyer until December, some months later. Plainly the tests were not that time critical. What was unfortunate was that client expectation was not managed. It is, however, not a conduct matter but a performance issue and not one that could fairly lead to dismissal.

65. The report testing database was said to have been an impossible task in the time available, and to do it properly would have taken some time. However, it was clear from the evidence that Mr Ward had done very little in progressing this task. While he was not supposed to be working many hours it was clear that Mr Ward was not working very much. The Tribunal saw it as clear that he had not been working on this task for more than a few hours. There is no reason to think that he was not doing the work deliberately. He had worked for the Respondent for many years and was not regarded as tardy in his work and was considered competent.

66. Again, this was not a conduct issue, but a performance or capability matter. The root cause of it was that Mr Ward was doing very little work. This means that the Respondent had reason to think that they were getting very little for the salary they were paying, such that they were in effect paying Mr Ward to look after his wife. Mr Ward should have addressed this, but when he did not, the Respondent should have dealt with this as set out above, and not as it did.

67. The Tribunal concludes that the dismissal was not a conduct dismissal and so was unfair, but that had a fair procedure been followed a fair dismissal was 100% certain to result at the same time.

68. Ultimately, had Mr Ward had cancer and been off work, or able to work only very little by reason of illness and the effect of cancer treatment for the same periods as his wife's illness meant he did not work normally, a capability dismissal would have been within the responses of the reasonable employer. It cannot be right that Mr Ward is in a better position when his wife had the cancer and not him.

69. It follows that Mr Ward succeeds in obtaining notice pay, but does not receive a basic or compensatory award, save for notice pay, and pay before dismissal. There was no specific claim for notice pay, but it was clearly in the parties mind as the claim was that this was not a conduct (let alone gross misconduct) dismissal. The *Polkey* reduction of 100% would not apply at all to the notice period, as had there been a fair dismissal it would have been on notice.

Harassment

70. The letters from the Respondent, both Mr Day and later by Mr Southwell from their advisers are hostile and offensive, and entirely misplaced. Mr Day regarded them as simply factual, and says that the facts set out were true, so that was the end of the matter. The letters are not simply factual. They accuse Mr Ward of taking their money under false pretences and say that he was deliberately refusing to do work or attend meetings. These are accusations, not facts. The facts are that the work was not being done and that he was not attending meetings.

71. The Tribunal has taken careful note of the written submission of Ms Mankau starting at the foot of page 17 of her written submission. Dismissing someone however poorly or rudely does not give rise to any additional unfair dismissal award. The Equality Act 2010 at Section 26 introduces the concept of a 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.

72. The first question is whether there was unwanted conduct. Plainly, yes. The Claimant would have wanted a different approach to that taken by the Respondent. What he got was unwanted.

73. Secondly, was it related to a relevant protected characteristic, in this case (his wife's) disability? Ms Mankau submitted that it the unwanted conduct does not have to be *because of*, but it is enough that it *connected to* the protected characteristic. She submitted that as all stemmed from his wife's cancer and its treatment it is all connected to the protected characteristic of disability. She referred the Tribunal to McDonald v Fylde Motor Company Ltd (ET case 2403390/2010, unreported, where a claimant succeeded in such a claim where pressurised to work extra hours which he could not by reason of caring responsibilities. Ms Mankau recognised that this is not a case to which the doctrine of precedent applies, and it is perhaps surprising that there is no more up to date, or higher Court guidance on the topic.

74. The Tribunal was not persuaded by this argument. The difference, of course, is that Mr McDonald was being asked to work more than his contracted hours, and Mr Ward was being allowed to work less than his contracted hours, and to work from home at limited tasks. It cannot be harassment for the Respondent to agree to less than the employee asks for, and that is the reverse of the employer asking the employee to work more than he is obliged.

75. It might be argued that it was the manner in which the Respondent approached the issue, but that is the next point.

76. The harassment claim also falls at the requirement for there to be a violation of dignity or the creation of an offensive and intimidating environment.

77. The letters written were unfortunate, but to receive such letters is not a violation of dignity. They were insulting, but they did not humiliate Mr Ward: no one else saw them. Nor did Mr Ward raise this assertion until after he realised the limits of associative discrimination precluded the claim progressing as he wished, so that he amended to include the harassment claim. He was unhappy, perhaps even angry, that he was accused of deliberately not working and deliberately not attending meetings, and that he was taking their money while caring for his wife. The Tribunal's conclusion is that in this case to show violation of dignity required more than this insulting correspondence.

78. The alternative is that there is a hostile or intimidating environment. As envisaged by the Equality Act 2010 S26, in the employment situation, the *"environment"* is the place of work. Mr Ward did not attend the workplace – that was the issue, or one of them. His home environment was not hostile or intimidating.

79. For these reasons, while deploring the approach and language of Mr Day and of Mr Southwell, the claim for harassment contrary to S26 of the Equality Act 2010 fails and is dismissed.

Remedy

80. Mr Ward's pay ceased on 05 August 2019. He was paid £1,092.77 gross per calendar month, which was £780.98 net.

81. He had worked for the Respondent from 01 December 2008. He was summarily dismissed on 24 September 2019. That is 10 full years, and so he was entitled to 10 weeks' notice. There are 7 weeks between 05 August 2019 and 24 September 2019. The Respondent says this was unauthorised absence as they had unilaterally revoked the working from home arrangement. They were not entitled to do so without consultation, which could have been conducted other than in person (as the hearing, conducted entirely remotely, showed). The failure of such consultation would then have led to dismissal for some other substantial reason.

82. In so far as the pleadings do not encompass a claim under S13 of the Employment Rights Act or for breach of contract in not paying wages due the Tribunal would amend to include such loss: it is clearly pleaded as what happened and loss arising from what is claimed to have occurred. Neither Counsel addressed the issue, which occurred to the Tribunal in deliberation over loss. The claim clearly stated that the Claimant sought to recover loss of earnings (point 5 on the last page of the particulars of claim). The same applies to notice pay.

83. Ms Mankau wanted to cross examine as to *Polkey* reduction, which was not in the list of issues before the hearing before the Tribunal came to any conclusion on the point. Given the Tribunal's conclusions on the facts, there is no point in convening a separate remedy hearing to take further evidence on a *Polkey* reduction: the Tribunal did not accept that this was a conduct dismissal at all, so it would not be relevant. Nor is there any contribution to complicate the calculation, and Ms Mankau accepted that the findings of fact required for the primary decision would determine that issue (were it relevant). In the same way, the Tribunal's findings of fact are determinative of the *Polkey* situation relating to the real reason for dismissal.

84. There is no issue of uplift by reference to the Acas code, because the award relates to pay before dismissal and to notice pay.

85. The loss is 17 weeks which the Tribunal awards gross, leaving the Claimant to make any necessary returns for taxation or national insurance. 17 x £1,092.77 = £18,577.09, and the Tribunal orders the Respondent to pay this sum to the Claimant.

86. If either party considers that there is an error in this decision they are invited to apply for a reconsideration rather than appeal immediately.

Employment Judge Housego

17 May 2021