



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE K ANDREWS

MEMBERS: Ms S Russell-Sharpe
Mr G Mann

BETWEEN:

F

Claimant

and

G

Respondent

ON: 26-30 April 2021

Appearances:

For the Claimant: Miss G Crew, Counsel

For the Respondent: Mr N Henry, Consultant

LIABILITY JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claimant was unfairly constructively dismissed.
2. The claimant was harassed in relation to his disability.
3. The respondent breached the claimant's contract of employment in respect of notice pay and failed to provide written particulars of employment.

All other claims fail and are dismissed.

A remedy hearing is listed for 18 June 2021.

REASONS

1. Oral reasons for this Judgment were given to the parties on conclusion of the hearing. The claimant requested written reasons.
2. In this matter the claimant complains that he was unfairly constructively dismissed and that there were various breaches of the Equality Rights Act 2010 with regard to disability discrimination against him. The fact of the claimant's disabilities – Asperger's and post traumatic stress disorder – were established at a previous preliminary hearing. The detailed issues arising from those claims were identified at that hearing and they appear in the appendix to this Judgment.

Evidence & Submissions

3. We heard evidence from the claimant and his grandmother Ms Eddolls and his mental health care coordinator, Mr Pitchford. Regular and frequent breaks were held throughout the hearing to ensure that the claimant could fully participate and efforts were made to keep the questions put to him short and focussed. He was accompanied by Ms Eddolls throughout most of the hearing.
4. We heard evidence from the respondent as well as Mr F Pasquino (the claimant's former employer) and Mr W Taylor (a regular user of the respondent's restaurant with his own health difficulties both physical and mental). Technical difficulties were experienced during the respondent's evidence (which resulted in a break part way through when we heard from Mr Pasquino). Notwithstanding these difficulties both the respondent and Mr Henry confirmed that the respondent could fully understand and answer the questions put to him.
5. We had an agreed bundle of documents plus additional documents submitted by both parties during the hearing. Both representatives made helpful concluding submissions.

Relevant Law

6. Unfair constructive dismissal: in order to bring a complaint of unfair dismissal it is first necessary to establish that the claimant has in fact been dismissed.
7. If there is no express dismissal then the claimant needs to establish a constructive dismissal. Section 95(1) of the Employment Rights Act 1996 (the 1996 Act) states that an employee is dismissed by his or her employer for the purposes of claiming unfair dismissal if:

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

8. In *Western Excavating (ECC) Limited v Sharpe* ([1978] ICR 221), the Court of Appeal confirmed that the correct approach when considering whether

there has been a constructive dismissal is that:

“if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer’s conduct, he is constructively dismissed.”

9. In *Kaur v Leeds Teaching Hospitals NHS Trust* ([2018] EWCA Civ 978) the Court of Appeal confirmed that in a 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 to so called ‘last straw’ cases explained in *London Borough of Walton Forest v Omilaju* ([2005] IRLR 35)) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (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?

10. The ‘Malik term’ referred to above is a reference to the House of Lords decision in *Malik v BCCI SA (in liquidation)* ([1997] IRLR 462) (as corrected by *Baldwin v Brighton & Hove CC* [2007] ICR 680) which confirmed that to succeed in a constructive dismissal claim the employee needs to show that the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them. This conduct is to be objectively assessed by the Tribunal rather than by reference to whether the employer’s conduct fell within the band of reasonable responses. That conduct must be assessed as a whole (*Woods v W M Car* ([1981] ICR 666)). In *Leeds Dental Team Ltd v Rose* ([2014] IRLR 8) the Employment Appeal Tribunal held that the employer’s subjective intention is irrelevant. It is for the Tribunal to consider objectively whether the conduct complained of was likely to have that effect.

11. The ‘last straw’ cases referred to above are where individual actions taken by an employer which may not in themselves constitute fundamental breaches of any contractual term may nonetheless have a cumulative effect of undermining trust and confidence thereby entitling the employee to resign

and claim constructive dismissal. The last straw complained of must contribute to the breach even if relatively insignificantly but need not in itself be a breach, but nor can it be entirely innocuous.

12. If an employee has been dismissed, constructively or expressly, then it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2) of the 1996 Act. If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.
13. Knowledge of disability: Whether a respondent had actual or constructive knowledge at the material time that the claimant was disabled is an issue for the Tribunal to determine based on its findings of fact and must be answered by considering the individual decision maker(s). The burden of proof lies on the employer to show it did not have constructive knowledge. The focus of the Tribunal's enquiry ought properly to be on the thought processes and motivation of the decision-maker.
14. Direct disability discrimination: section 13 of the Equality Act 2010 (the 2010 Act) provides that a person discriminates against another if, because of a protected characteristic, he treats that person less favourably than he treats or would treat others. The protected characteristic need not be the only reason for the treatment but must be a significant influence i.e. more than trivial and the alleged discriminator's motive is irrelevant. Disability is a protected characteristic (section 4).
15. To answer whether treatment was "because of" the protected characteristic requires the Tribunal to consider the reason why the claimant was treated as he was. The Equality and Human Rights Commission Code of Practice states that whilst the protected characteristic needs to be a cause of the less favourable treatment it does not need to be the only or even the main cause.
16. Direct discrimination is rarely blatant. Notwithstanding the burden of proof provisions referred to below, it is acknowledged that it is usually not easy for a claimant to establish that discrimination has taken place. It is rare for there to be an overt discriminatory act. That is why we look carefully at all the evidence and are willing to draw inferences where appropriate.
17. Discrimination arising from disability: section 15 of the 2010 Act states:
 - (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.

No comparator is needed.

18. The Court of Appeal decision in *City of York Council v Grossett* ([2018] EWCA Civ 1105) confirms that section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) 'something'? and (ii) did that 'something' arise in consequence of B's disability.
19. The duty to make reasonable adjustments: section 20 and schedule 8(20) of the 2010 Act set out the duty to make adjustments. If an employer applies a provision, criterion or practice (PCP) which puts a disabled person at a substantial (meaning more than minor or trivial) disadvantage in comparison with persons who are not disabled, that employer has a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. The duty does not arise if the respondent did not know, and could not reasonably be expected to know, that the claimant was disabled and was likely to be placed at that disadvantage (*Wilcox v Birmingham CAB Services Ltd* UKEAT/0293/10).
20. Harassment: section 26 of the 2010 Act provides that A harasses B if A engages in unwanted conduct related to a relevant protected characteristic and that conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
21. In *Land Registry v Grant* (2011 IRLR 748) Elias LJ said:

"Where harassment results from the effect of the conduct, that effect must actually be achieved. However, the question whether conduct has had that adverse effect is an objective one – it must reasonably be considered to have that effect – although the victim's perception of the effect is a relevant factor for the tribunal to consider. In that regard, when assessing the effect of a remark, the context in which it is given is always highly material.

Moreover, tribunals must not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive environment". They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."
22. In *Hartley v Foreign and Commonwealth Office Services* ([2016] ICR 17), the EAT stated that a Tribunal considering the question posed by s26(1)(a) must evaluate the evidence in the round, and that the alleged harasser's knowledge or perception of the victim's protected characteristic is relevant but should not be viewed as in any way conclusive. Likewise, the alleged harasser's perception of whether his or her conduct relates to the protected characteristic 'cannot be conclusive of that question'. The tribunal should look at the overall picture, including its own findings on the adverse effects of the claimant's disability.
23. Burden of proof: the burden of proof provisions of section 136 of the 2010 Act apply:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

24. It is generally recognised that it is unusual for there to be clear evidence of discrimination and that the Tribunal should expect to consider matters in accordance with these provisions and the guidance set out in *Igen v Wong* and others ([2005] IRLR 258) confirmed by the Court of Appeal in *Madarassy v Nomura International plc* ([2007] IRLR 246). In the latter case it was also confirmed, albeit when applying the pre-2010 Act wording, that a simple difference in protected characteristic and a difference in treatment is not enough in itself to shift the burden of proof; something more is needed (although that something more need not be a great deal – *Deman v CEHR* [2010] EWCA Civ 1279). It is important in assessing these matters that the totality of the evidence is considered.

25. Failure to provide written particulars: section 1 of the 1996 Act provides that:

(1) Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.

(2) The statement ... shall be given not later than two months after the beginning of the employment.

26. Further, section 38 of the Employment Act 2002 provides:

(3) If in the case of proceedings to which this section applies— [*which includes unfair dismissal*]

(a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996,

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase...unjust or inequitable.

27. Breach of contract: the Tribunal has jurisdiction to consider claims of breach of a contract of employment (e.g. unpaid notice whether contractual or the statutory minimum) where that claim arises or is outstanding on termination of the employee's employment. Such claims are determined by reference to usual principles of contract law.

Findings of Fact

28. Having assessed all the evidence, both oral and written, and the submissions made by the parties we find on the balance of probabilities the following to be the relevant facts.

29. The claimant's medical history and non work issues

30. The claimant was diagnosed as having Asperger's syndrome at the age of seven and consequently has difficulties with managing social interaction, change and ambiguity. This was exacerbated by a later diagnosis of post-traumatic stress disorder. He has been under the care of a professional mental health team for some time. Mr Pitchford was his care coordinator from 9 May 2018 to November 2020.

31. The claimant receives – and did at the relevant times - monthly depot injections of anti psychotic drugs.

32. Unfortunately on two occasions claimant has been very unwell on account of his mental health. He was admitted to hospital as a result between 5 & 17 October 2016 (following an intoxicated fight outside a pub and being sectioned) and from 24 April to 10 May 2017.

33. There were also other references in the claimant's medical notes from 2016-2019 to him being intoxicated, through both alcohol and drugs, and aggressive on nights out together with online gambling on his phone which in turn led to use of payday loans and other debts. It is clear that these patterns of behaviour at times detrimentally impacted upon his behaviour at work.

34. Employment history

35. The claimant commenced employment at the respondent's restaurant - then owned by Mr Pasquino - in 2010. Initially he worked only 1 or 2 shifts at the weekends. He was not issued with any contract of employment at this or any later stage. Throughout his employment with both Mr Pasquino and the respondent he was paid minimum wage, often in cash, weekly in arrears. Any tips were shared between the staff. The restaurant and kitchen are open plan with noisy fans in the kitchen area which resulted in voices having to be raised at times to be heard.

36. Because of his Asperger's the claimant benefited from clear instruction and would be anxious about any departure from the norm. We found Mr Pasquino to be a very understanding, patient and respectful employer and it is clear that the claimant worked very successfully with him until he sold the restaurant to the respondent in mid 2018.

37. Soon after commencing employment with Mr Pasquino the claimant started a formal 2-year apprenticeship programme with East Kent College during which he worked 3 evenings per week. Because of his Asperger's the programme was carried out entirely in the workplace which the college tutor

attended from time to time to carry out assessments. Mr Pasquino was involved in this process, signing some of those assessments and giving positive feedback about the claimant and his progress. The limited paperwork available to us regarding the apprenticeship made no mention of the claimant's Asperger's. Mr Pasquino had no recollection of it being mentioned to him at the time or subsequently although he confirmed that he was aware of Asperger's as a condition and understood it is on the autism spectrum. We accept that Mr Pasquino had no actual knowledge of the claimant's Asperger's as a result of the apprenticeship programme.

38. In contrast to his later relationship with the respondent where the claimant says he repeatedly told the respondent about his Asperger's because of criticisms that were being made of him, there was no particular reason for the claimant to tell Mr Pasquino about his Asperger's as their relationship was working so well. We do note that the claimant told Mr Pasquino about his general mental health problems arising from his PTSD, his monthly injections and that he has dyslexia. Ms Eddolls also said that she and the claimant's mother expressly thanked Mr Pasquino for his supportive treatment of the claimant and noted by reference to his Asperger's that the claimant was doing so well at work. Mr Pasquino had no recollection of such conversations although he did remember that Ms Eddolls visited the restaurant. He says that the first time he was expressly told about the claimant's Asperger's was when the claimant and Ms Eddolls visited him after his employment had come to an end and these proceedings had begun.
39. On balance we prefer Mr Pasquino's account and find that he was not expressly told about the claimant's Asperger's. He was a straightforward and open witness who had clearly been very supportive of the claimant in the past. We consider that if he had been told about the Asperger's he would have remembered it and said so notwithstanding that he has a friendship and business relationship with the respondent
40. As mentioned above the claimant was very unwell from October 2016 to April 2017. On 3 October 2016 Mr Pasquino (or his accountant) prepared a P45 for the claimant. This was one of the documents disclosed by the claimant during the hearing and clearly therefore had been given to him at some point although Mr Pasquino had no recollection of that. Mr Pasquino's explanation of why he terminated the claimant's employment at that time varied in his oral evidence but it seems more likely than not that it was because of the claimant's absence rather than there being no work for him to do. In any event, Ms Eddolls queried with Mr Pasquino at the time why the claimant was not receiving any sick pay. Mr Pasquino told her that he was not entitled to it which would be consistent with his employment having been terminated. We find that the claimant was not employed by Mr Pasquino during this period and that his employment restarted, part-time, on 11 April 2017 as evidenced by Mr Pasquino's PAYE records.
41. Unfortunately the claimant was then again absent due to ill health between 26 April and 10 May 2017.

42. By early 2018 the respondent had started to work in the kitchen of the restaurant as a chef having also visited the restaurant occasionally in 2017 to discuss the possibility of buying it from Mr Pasquino. Consequently during 2018 he worked at least to some extent with the claimant before he became his employer.
43. It was during this period that the respondent made a comment about 'putting shit' in the claimant's meal which the claimant understandably found very upsetting. He made no complaint about this however to either the respondent or Mr Pasquino although he did tell Ms Eddolls. He said he did not complain as he did not want to make matters worse even though Mr Pasquino was still then in charge.
44. The respondent bought the restaurant in June 2018 and consequently the claimant became his employee pursuant to a business transfer although there was no consultation or transfer of any employee records/information. Given our finding that Mr Pasquino did not have actual knowledge of the claimant's Asperger's, this cannot have formed part of any discussions or informal handover between him and the respondent. We also find that the respondent did not acquire that actual knowledge himself either during the period that he was working as a chef in the restaurant or in 2017 when he was visiting occasionally. There is no evidence to support such a finding.
45. As to whether the claimant later told the respondent that he had Asperger's, we conclude that he did not. His case is that he did this when the respondent was unfairly criticising him (see below) - for example saying he was speaking too quietly or not engaging with the customers and that the claimant would reply that this was because of his Asperger's. Although it is true that the claimant had been very open about his other health issues, we conclude that against the background of his troubled relationship with the respondent and the fact that he was generally shy, quiet and would retreat from confrontation (for example his explanation of why he did not complain about the shit in the meal comment), we prefer the respondent's evidence that he was not told. This is supported by Mr Taylor's evidence that he had not picked up at all on the claimant having any form of health issue. Mr Taylor was frequently in the restaurant talking to both the claimant and the respondent. He appears to be a very chatty person and open about his own health issues. If the claimant's Asperger's was known by the respondent we conclude that Mr Taylor would have either known or at least suspected.
46. As to whether the respondent had constructive knowledge of the claimant's disabilities, we conclude that he did have constructive knowledge of the claimant's PTSD because of his knowledge of the monthly injections (even if he wrongly believed these were for diabetes). He also knew from an absence in June 2019 that the claimant had suffered from stress affecting his mental health. Just from those facts the respondent could and should - as he himself admitted - have asked more questions and if he had done so would have acquired the necessary knowledge. Added to that is the fact that Mr Pasquino clearly knew of the claimant's long period of absence for serious mental health issues and although there were no employee records

in respect of that, there was a TUPE transfer and that knowledge (as an employee liability) transferred as a matter of law to the respondent.

47. We do not conclude however that the respondent had constructive knowledge of the claimant's Asperger's. Although it seems there were at least some customer complaints about his social interaction and the respondent knew he had dyslexia, those personality traits do not by definition lead to a conclusion of Asperger's, there were no absences from work specifically linked to Asperger's and there were a lot of other matters going on in the claimant's life that the respondent did know about (drinking, drug use, gambling, loans) which could also have led to some of those behaviours.
48. After the claimant started working for the respondent the scope of his duties increased to include cleaning but that was not in itself unreasonable. His hours increased in July/August 2018 to full time - working lunchtime and evening shifts, six days per week.
49. Even though the claimant increased his hours, it is clear that he had a very different relationship with the respondent than he had with Mr Pasquino.
50. The claimant's evidence in general terms was that the respondent was frequently abusive and threatening to him, shouted and swore at him. The specific examples of expressions he says the respondent used were as set out in the list of issues and include matters such as saying he would make him go missing, slap him, chop off his fingers. The claimant also alleged that on one occasion the respondent referred to the claimant and another employee as 'spastic'. He says these comments were made in the context of arguments about the claimant's customer relations skills, taking tips he was not entitled to, using his phone at work, being late etc. The claimant also referred to specific incidents where he says he was unfairly chastised (e.g. the table plan incident and when he says he was left alone to cope with just the chef who did not speak English). The claimant's evidence was consistent throughout. Ms Eddolls' evidence was that she also witnessed the respondent shouting to another employee.
51. The claimant's case is supported by an exchange of texts he had with Ms Eddolls in May 2019 where he said the respondent was being snappy and treating him really badly. He also said he needed to find a new job, and although he would miss it, it was time to move on and leave the respondent to run the restaurant on his own. The next month he was absent for 4 days due to stress.
52. The respondent's evidence initially was that none of these allegations were correct. But he later acknowledged that on occasions he did get frustrated with the claimant and on occasions that he would shout and/or swear because 'these things just come out'. In addition the respondent's evidence generally did vary. There were significant and relevant matters referred to in his oral evidence that were not contained in his written witness statement. There were also significant contradictions between his oral and written evidence and there were also contradictions within his oral evidence. In

assessing the reliability of the respondent's evidence we have expressly taken into account the English is his second language and that at times during the hearing the connection was not as we would wish. However, we are satisfied that the respondent fully understood and fully answered the questions put to him.

53. Mr Taylor's evidence also confirmed that there was a certain amount of swearing in the workplace although he said not in an offensive way.
54. In assessing who was giving us the more accurate version of events, we have also taken into account the apparent change in the claimant's state of mind and his happiness with work between the time when he was working with Mr Pasquino and when the respondent took over. There was a very marked difference and we saw for ourselves that Mr Pasquino and the respondent appear to have very different personalities and approaches. The respondent demonstrated whilst he gave evidence that he has a loud voice, he gets frustrated and expresses that frustration.
55. All of these matters lead us to our conclusion that we prefer the claimant's account of the respondent's behaviour towards him and we conclude that there was a pattern of behaviour by the respondent where he acted intemperately, used the sort of language complained of by the claimant and did make threats (albeit not meant to be taken seriously) and unfairly chastised him.
56. In coming to this conclusion we have taken into account that the claimant's own behaviour was at times unacceptable as he was often late, he turned up for work unfit due to drink or tiredness as a result of late nights and he used his phone at work when told not to (all matters not directly linked to the claimant's disabilities). However, even if the claimant was guilty of misconduct, the respondent clearly should have dealt with that in a more appropriate way. Indeed the respondent did say in his oral evidence, although not in his written evidence, that he had given the claimant a booklet which set out a disciplinary procedure. No copy of that booklet was available to us but it is clear he did not apply any such procedure. He also said more than once that he treated the claimant as a colleague and a mate rather than as a manager. This contrasted with him also saying that he took his responsibilities as a business owner seriously.
57. As for the alleged last straw in the incident on 16 August 2019, and having considered the accounts given to us by the claimant, the respondent and Mr Taylor who was also present, we conclude that on that day the claimant turned up late for work worse for wear for drink, he was not fit to work and was sent home by the respondent. In sending him home the respondent swore but in the sense of peppering his language with swear words rather than swearing at the claimant. Whether or not drying the glasses was expressly mentioned, it is clear that he was angry with the claimant and used offensive language in the way he spoke to him. This incident was more than capable of being a last straw even though it was not referred to in either the claimant's resignation or grievance letters.

58. On 17 August 2019 the claimant resigned by letter which included:

'You are aware of my Mental Health problems, it is logged too on a sickness certificate that I submitted to you on 5/6/2019 citing stress affecting my mental health. You also know that I have a diagnosis of Aspergers, known too by Franco Pasquino, my previous employer. in spite of this I have been subjected to unacceptable behaviour from you, including:

- Threats to 'punch me in the face'
- Threats to 'slap me'
- Threats to 'chop my fingers off'
- Slanderous accusations of stealing, which I strenuously deny and there is no proof of.
- You referred to the waitress who works on my day off as a 'Spastic', then added, 'She's even more spastic than you are'.
- You say to me, 'You'll go missing.'

A customer recently heard how you talk to me and asked if you always speak to me like that! He said it was, "Appalling"

Under Employment Legislation you have a Duty of Care to your employees. In my experience you have not shown this towards me. The oppressive and unsafe conditions that exist at La Scala, and your bullying threats of violence and aggressive behaviour have left me feeling anxious and stressed.

I have spoken to you about your treatment towards me. Recently, on Friday evening 9th August, I was serving a packed restaurant, on my own as usual, you told me to. 'Speak louder, or you "would slap me"'. I left the restaurant after my shift completely exhausted and stressed. The following day, I could not bring myself to attend the restaurant for my cleaning tasks and lunchtime service. However, I did attend for the evening shift because I knew that there was no one else to do it. I told you why I couldn't come into work that morning, citing the physical threat you had made to me to 'slap me in the face'. You did not apologise, have not changed your behaviour towards me and continue to treat me in this way.

I admit that on a few occasions I am not punctual, although never late for service and always completing my tasks. I have, on occasions, used my mobile phone on the premises, which you have reprimanded me for. I have found this confusing because you sometimes say it's ok to use my mobile phone.

I consider myself a good, competent waiter, an opinion supported by the length of service I achieved under the previous ownership of the restaurant and all the positive comments have received from customers, especially regulars, over the years.

I am now forced to put my mental health before the job that I have enjoyed and succeeded at for so many years. It is with great sadness therefore that I find that I have no choice but to tender my resignation with immediate effect, and consider your actions are those of constructive dismissal.'

59. The respondent did not reply to this letter.

60. The claimant submitted a grievance letter on 24 September 2019 in very similar terms. Again the respondent did not reply.

Conclusions

61. Constructive unfair dismissal: for the reasons given we find that the allegations of unacceptable behaviour by the respondent to the claimant are made out and they plainly amounted to a fundamental breach. Although the claimant had, some months before in the text to Ms Eddolls, referred to

wanting to leave it is clear that that was because of the respondent's behaviour. Further, although the last straw incident was not referred to in either the resignation or grievance letter, we find that the claimant did resign in response to it.

62. The claimant was therefore constructively dismissed. The respondent has not put forward any potentially fair reason for that constructive dismissal and there was none. Accordingly that constructive dismissal was unfair.
63. Wrongful dismissal: The claimant was not guilty of gross misconduct. He is entitled to his statutory minimum notice period.
64. Disability discrimination: given our conclusion that the respondent had (at least) constructive knowledge of the PTSD but no actual or constructive knowledge of the Asperger's, the claims of direct discrimination, discrimination arising from disability and breach of the duty to make reasonable adjustments cannot succeed. The alleged treatment and PCPs are such that there is no link between them and the PTSD. If there was a link it was with the claimant's Asperger's. (We also note in respect of the claim of direct discrimination the evidence was that the respondent shouted at a non-disabled waitress in the same way that he shouted at the claimant which undermines the claim of direct discrimination.)
65. As for the claim of harassment related to disability, it follows from our findings above that there was unwanted conduct and it was conduct that had the purpose of, or reasonably had the effect of, creating the necessarily intimidating etc environment. The question is, therefore, was it related to the disability?
66. Adopting the approach set out in *Hartley v Foreign and Commonwealth Office Services*, we conclude that it was. The relevant unwanted conduct was in response both to the claimant's own culpable behaviour (lateness, being hung over, using his phone at work etc) but also in response to how the claimant presented (shy, quiet, not engaging with customers as the respondent wanted) and that presentation was plainly related to the claimant's Asperger's. Accordingly that conduct was related, at least to some extent, to the claimant's Asperger's. Deciding exactly what that extent was and the appropriate compensation will be a matter for argument and resolution at the remedy hearing. For completeness, although the claimant was not cross-examined on this and the respondent does not appear to be pursuing the point robustly if at all, we conclude that the claim of harassment was brought in time as the final act or acts in August 2019 were within the primary time-limit and were the end of a continuing act.
67. Written particulars: Finally, there was plainly a breach by the respondent of the statutory obligation to provide written particulars. Given that we have found the respondent unfairly dismissed the claimant we are required to make an award in respect of that breach of between two and four weeks pay. Again that is a matter upon which we shall invite submissions at the remedy hearing.

Remedy Hearing

68. A remedy hearing is listed for **18 June 2021**. The claimant is ordered to file an updated schedule of loss by **4 June 2021**. If the parties are able to reach agreement without the need for a further hearing, they shall please inform the Tribunal as soon as possible.

Employment Judge K Andrews
Date: 26 May 2021

Appendix – List of Issues

Unfair Constructive Dismissal

1 The Claimant resigned his employment on 17 August 2019 in a letter to Mr Mendonca. The Claimant asserts that he was constructively dismissed and relies upon the following alleged repudiatory breaches of the implied term of mutual trust and confidence by Mr Mendonca:

- 1.1 Unfair chastisement of the Claimant;
- 1.2 Verbal abuse towards the Claimant;
- 1.3 Verbal threats to the Claimant;
- 1.4 Disability discrimination of the Claimant;
- 1.5 The conduct set out in paragraphs 6 and 9 – 15 in the Addendum to the ET1 (see below);
- 1.6 The Claimant claims that the last straw was on 16 August 2019 when he was sworn at and threatened at by Mr Mendonca.
- 1.7 The Claimant shall provide further information about the alleged conduct as set out in the Case Management Orders, below.

2 Do any of the above allegations, if made out on the facts, amount to a repudiatory breach of contract?

3 If so, did the Claimant resign in response to the Respondent's repudiatory breach of contract?

4 Did the Claimant expressly or impliedly affirm the contract by actions and / or material delay, indicating an intention to continue to be bound by it subsequent to the breach such that he 'waived' the breach and treated the contract as continuing?

5 If the Claimant was dismissed, what was the reason for the dismissal and was the dismissal fair in all the circumstances?

6 If not, would the Claimant's employment have been fairly terminated in any event and if so, when (Polkey)?

7 Did the Claimant cause or contribute to his dismissal by reason of his conduct? If so, what reductions should be made to any award to which the Claimant may be entitled?

8 If the Claimant is found to have been unfairly constructively dismissed, what compensation is he entitled to?

Wrongful Dismissal

9 It is agreed that the Claimant resigned without notice.

10 If the Claimant was dismissed by the Respondent, was he wrongfully dismissed in breach of contract without his notice pay?

Disability Discrimination [determined at preliminary hearing]

11 Does the Claimant have a physical or mental impairment, namely Asperger's syndrome and / or PTSD?

12 If so, does the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

13 If so, is that effect long term?

14 Are any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

Direct Discrimination

15 Has the Respondent subjected the Claimant to the following treatment falling within section 39 of the Equality Act 2010, namely:

- 15.1 Unfair chastisement of the Claimant;
- 15.2 Verbal abuse towards the Claimant;
- 15.3 Verbal threats to the Claimant;
- 15.4 The conduct set out in paragraphs 6 and 9 – 15 in the Addendum to the ET1;
- 15.5 Being sworn at and threatened at by Mr Mendonca on 16 August 2019.

16 Has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparator? The Claimant relies upon a hypothetical comparator, namely a full-time waiter without the Claimant's disability.

17 If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

18 If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Harassment

19 Did the Respondent engage in unwanted conduct as follows:

- 19.1 Calling the Claimant a spastic;
- 19.2 Being abusive towards the Claimant;
- 19.3 Threatening the Claimant;
- 19.4 Further detail of this conduct is set out in paragraphs 6 and 19 of the addendum to the Particulars of Claim, as follows:

From the moment the 2nd Respondent took over the restaurant the Claimant was subjected to the following comments on a regular basis, usually if he made a mistake or did not understand instruction on the first occasion:

- I will punch you in the face
- I will slap you
- I will chop your fingers off
- You will go missing
- You are spastic
- The threats to punch the Claimant in the face
- The threats to slap the Claimant
- The treat to chop the Claimants fingers off
- Being called a Spastic
- Being told that “you will go missing”
- Being accused of stealing when given a tip by a customer

20 Was the conduct related to the Claimant’s protected characteristic?

21 Did the conduct have the purpose or effect of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

22 In considering whether the conduct had that effect, the Tribunal will take into account the Claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Discrimination Arising from Disability

23 The allegation of unfavourable treatment as ‘something arising in consequence of the Claimant’s disability’ falling within section 39 of the Equality Act 2010 is:

- 23.1 The Claimant being shouted at;
- 23.2 The Claimant being chastised;
- 23.3 The Claimant being verbally abused and threatened.

No comparator is needed.

24 Does the Claimant prove that the Respondent treated the Claimant as set out in paragraph 27 above?

25 Did the Respondent treat the Claimant as aforesaid because of the ‘something arising’ in consequence of disability? The something arising is said to be the limitations in the Claimant function caused by Asperger’s / PTSD.

26 Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

27 Has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability?

Reasonable Adjustments

Did the Respondent apply the following provision, criteria and / or practice generally, namely:

- 28.1 Employees being unable to ask questions when completing tasks;
- 28.2 Employees instruction of how to carry out work tasks was not repeated.

29 Did the application of these PCP's put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? It is the Claimant's case that he needed to be able to ask questions about his work and to receive repeated instruction on how to complete work tasks because of his reduced level of function caused by his disabilities.

30 Did the Respondent take such steps as were reasonable to avoid the disadvantage? Although the burden does not lie with the Claimant, the Claimant stated the following reasonable adjustments should have been made to alleviate the disadvantage:

- 30.1 Allowing the Claimant to ask questions;
- 30.2 Explaining tasks more clearly and slowly;
- 30.3 Generally having more patience with the Claimant.

31 Did the Respondent not know, or could the Respondent not be reasonably expected to know that the Claimant had a disability or was likely to be placed at the disadvantage set out above?

Time Limits

32 The Claimant commenced Early Conciliation on 18 October 2019, therefore all complaints that occurred on or after 19 July 2019 are prima facie in time;

33 If any complaint occurred prior to 19 July 2019 can the Claimant prove that it was conduct extending over a period which is to be treated as done at the end of the period, the period being 16 August 2019?

34 Alternatively was the complaint presented within such other period as the employment tribunal considers just and equitable?