THE EMPLOYMENT TRIBUNALS

BETWEEN

Ms Maxine Simmons ***Claimant***

and

No 8 Partnership ***Respondent***

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Region: London Central **ON**: 8 and 9 April 2021
Before: Employment Judge Paul Stewart **MEMBERS: Mr Stephen Soskin and Mr Ian Allwright**

Appearances:
For Claimant: Mr Simmons (the Claimant's husband)
For Respondent: Mr Joseph England of Counsel

JUDGMENT

The claims of unfair dismissal and of direct discrimination by association are upheld: the parties are invited to agree the remedy but, in default of reaching agreement, are given leave to apply to the Tribunal no earlier than 21 days after the date upon which this judgment and reasons are recorded as sent to the parties for a date to be fixed for this Tribunal to determine remedy and for a Preliminary Hearing to provide case management on the issue of remedy.

REASONS

1. The Respondent is a private dental partnership with its surgery based in Lower Sloane Street in Chelsea, London SW1. The Claimant is a dental nurse who started working for the Respondent on 27 March 1990 until she resigned on 26 June 2020. The Claimant's home is in Edenbridge, Kent.

2. When she started her employment, the Claimant worked full-time. After the birth of her daughter some 19 years ago, the Claimant's return from maternity leave was as a part-time nurse working one day a week. This increased to two days a week in February 2016.

3. On 23 March 2020, the Respondent's Dental Practice was shut down due to the COVID-19 pandemic. The Claimant and all other staff members were paid in full until the end of March 2020 and then furloughed as of 1 April 2020.

4. Ms Clare Rudman, the Practice Manager for the Respondent, encouraged the Respondent partners to keep staff informed of what was happening during this period of inactivity. On 11 May 2020 Ms Rudman was able to forward to staff an update written by one of the partners, Mr Andrew Harris. This update contained the news that the Respondent was looking at guidance and modes of clinic operation from different countries affected by the pandemic, had sourced and ordered large number of PPE items and intended to reopen "in the near future".

5. Ms Rudman sent the staff a further email on 20 May 2020 informing them of the partnership's plans for re-opening the practice. As from 26 May 2020, the plan was for a soft approach and to re-open the practice for emergences only. Of the various changes that the Respondent was making, one concerned "Care packages to the team for commuting".

6. The Claimant responded the same day asking for information about her return to work with "Rachel and Sarah", the two orthodontists with whom she normally worked, and stating she had "grave concerns about the ability to commute to work (limited capacity) … … And also the safety of doing so." She asked about the care package alluded to in Ms Rudman's email.

7. Ms Rudman responded, still on the same day, saying that she did not have any more information regarding the opening of further clinics and giving detail of the care package for commuting (which amounted to the provision of masks and gloves). Ms Rudman expressed the hope that the Claimant was keeping well "and your dad is doing ok with all this going on."

8. On or about 2 June 2020, Ms Rudman phoned the Claimant and invited the Claimant to state what her ideal preference would be about returning to work so that she could present to the partners for consideration.

9. This led to the Claimant emailing Ms Rudman on 3 June with this message:

> I have given a lot of thought to what you have said around my potential return to work. Clearly I am keen to support the practice as much as possible, having worked there for over 30 years. I do need to also balance this against the increasing need of caring for my 87-year-old father who is becoming worse through Dementia and lives some distance from me. He is very vulnerable given his age and also has a number of health issues. We are endeavouring to ascertain if he can be moved in to care but this, in the current circumstances is proving a very long and drawn out process.
>
> You asked me to consider what I would like to happen so you can present this to the partners on my behalf.
>
> My ideal preference would be to continue to be furloughed by the practice until the end of September. This would allow me to continue to support my father in his difficult position over the coming weeks and hopefully by then he will have been admitted into care more locally to me. I'm hoping this may help the practice also as it will reduce the number of nurses having to social distance etc.

10. Ms Rudman replied on 4 June on behalf of the Partners stating – and here she appears to have adopted the voice of the Partnership:

> We clearly appreciate that you have some challenging decisions to make particularly around the care of your father. We have discussed this extensively amongst ourselves not least of all in the light of your continuing support for the practice over a such a long period of time.
>
> Our conclusion is that at the present moment, we are faced with the immediate and imperative task of trying to revive the business in what you will appreciate is a very unforgiving climate.
>
> To this end we do need to resume the orthodontic services, (with their lower associated risk), as soon as possible and much as we would like to, we are not presently in a position to extend your furlough as you have requested.

11. The Partners, through Ms Rudman, then went on to set out a summary of the measures they had put in place for safety in the time of Covid, should the Claimant consider returning to work forthwith.

12. Later that afternoon, the Claimant responded and said this:

> I fully appreciate that the practice needs to revive the business. This isn't an easy situation I find myself in as I am having to visit and support my father on a number of occasions each week and need to in some way balance this with my wider family and work commitments.
>
> I have carefully considered what you have asked. I am willing to return to work one day a week if that is acceptable to the practice. This is in fact my original hours worked before I took on another day.
>
> I do hope the practice will be able to agree to my request. This would enable me to still support my vulnerable father over the remainder of the week and also allow me to work at No 8.

13. This response was against a background whereby the Claimant knew that one of the two orthodontists that she worked for was on maternity leave thus she perceived that going to one day a week would allow her to continue providing nursing services to the remaining orthodontist as before.

14. On Saturday 6 June, the Claimant attended the premises from where the Respondent ran its practice in Lower Sloane Street to get fitted for Personal Protection Equipment. Although she met some of the partners, there was no conversation concerning the issue of her return to work.

15. On 8 June, Ms Rudman wrote:

> The partners have discussed the matter again in some depth. We do of course appreciate that the situation is very difficult all round and we are mindful of your long-term commitment to the practice.
>
> Unfortunately, however, meeting your request of one day per week would not be logistically possible.
>
> We would of course be very happy for you to continue with us on a two day per week basis, as you have done over the last 4 years. We are however aware, that this may not be possible for you given the circumstances you describe.

> We would be grateful if you could give the matter some thought and kindly let us know how matters stand by the end of the week.

16. The Claimant told us, and we accept, that she cried when she read that email. In her words, she "was trying to do my best to please everyone and every suggestion I made to my employer had been dismissed".

17. But 20 minutes later, the Claimant responded with this message:

> I am disappointed that the partnership will not support me at this very difficult time for me personally. I fully appreciate that it would have led to some potential logistical difficulties, however I have always over the many years I have worked at No.8 done my best to support the practice when it has had "logistical difficulties "itself in the past. It is sad that when I am faced with such circumstances in having to care for my elderly vulnerable father in the short term, that the partnership would not support me through this difficult period.
>
> I feel as if you have placed me in the position of having to consider my position of employment with No.8. Could you please provide me by return with a copy of my contract of employment and also provide me with an explanation of the logistical issues my working only one day a week would have caused.

18. Ms Rudman sent through the contract of employment and, 10 days after the Claimant had requested an explanation of the "logistical issues", Ms Rudman sent through a letter she had signed on behalf of the Respondent. The letter first dealt with the Claimant's expressed preference to remain on furlough until September by pointing out that, given the reopening of the practice, a continuation of furlough would be a misuse of that scheme, a point which the Claimant now accepts.

19. The letter went on to deal with the reduction of hours, saying:

> Whilst we appreciate that you have to assist your father the business simply cannot agree to a reduction in your hours. We need you to return to work to your contracted two days per week. These have been your contracted hours for four years now and we do not agree to change those hours.
>
> We are trying to get the business back up and running. There are already additional costs to the practice in relation to PPE and reduction in appointments to allow for more decontamination time between patients. We need all dentists to be working their contracted hours in order to ensure the business makes sufficient income to cover these costs. As such we need all staff to be working their contracted hours to support the dentists at this time. We therefore cannot afford to reduce your hours.
>
> We have considered whether we can hire a nurse for one day a week. However, it would be extremely difficult to recruit a suitable person at this time, for just one day. Also, we need someone urgently and recruitment of a suitable person takes time, not to mention the recruitment and training costs that would need to be incurred in doing this.
>
> The practice therefore cannot agree to reduce your days to one day per week.

20. The letter ended with this "Conclusion":

> The practice therefore expects you to return to work on Thursday 25 June 2020. This should give you sufficient time to make the necessary arrangements for your father for the additional one day per week.

> I would be grateful if you could confirm by 12 pm on Monday 22nd June that you will be returning to the practice to work 2 days a week.
>
> I must make you aware that you have a right to make a request for flexible working. I attach our flexible working policy. You can make this request at any time and we will consider the request in line with our legal obligations. However, until such request has been dealt with you are still contracted to work 2 days per week.

21. As stated, the Respondent's "Flexible Working Application Policy" was attached. The policy set out Respondent's aim in the first paragraph, that being "to comply with the relevant legislation and to provide employees with opportunities to balance work and family life, whilst being compatible with, and beneficial to, business efficiency. This policy applies to employees who have completed 26 weeks service."

22. The Policy went on to state:

> You can apply to work flexibly and the partnership will consider you [*sic*] application seriously. You can request to change the hours and the times you work as well as requesting an alternative working location.
>
> All requests, including any appeals, will be considered and decided on within a period of three months from first receipt, unless you agree to extend this period. The partnership will consider all applications in the order they are received with each case considered on its merits.

23. The Policy later set out its "Appeal Process":

> If your request is rejected you will be able to appeal the decision by writing to another of the partners, who will arrange a meeting with you during which you can be accompanied by a work colleague.
>
> Following the meeting the partners will inform you of their decision.

24. On 22 June 2020, the Claimant emailed Ms Rudman to advise that she was so disappointed with the tone and content of the Respondent's response that she felt she had no other option than to seek legal advice. On the same day, solicitors acting for the Claimant wrote to Ms Rudman saying:

> Our client explained to you that she is a carer for her 87-year-old father who has advanced dementia. She explained that he is vulnerable and that she has been trying to place him in a care home; however given the current pandemic it was proving impossible to organise this with social services at the current time. Our client requested that she continue to be furloughed until the end of September to allow her to make arrangements for her father's care. On 4 June 2020 you turned down this request and despite further correspondence you on this matter have not altered your stance including a request for unpaid leave. Despite acknowledging that even by returning to work one day a week she would be increasing father's risk of catching Covid-19, she put forward a compromise of returning to work one day a week. Again you declined her request.
>
> Whilst we recognise that you have a business to run and in the absence of agreeing to retain our client on furlough, we would like to take the opportunity to remind you of our client's statutory right to take a "reasonable" amount of unpaid time off work to take "necessary" action to deal with particular situations affecting their dependants as set out in sections 57A and 57B of the Employment Rights Act 1996 (ERA 1996). Given the current pandemic, we consider that it would be reasonable for our client to

> take this time as unpaid dependent's leave or compassionate leave and we ask you to reconsider this. Our client accepts that furlough may not be appropriate if there is work to be done. If our client is able to get a place in care for her father earlier than the end of September then she will inform you
>
> Furthermore due to the risks associated with aerosol generating procedures in dental practice our client has to take her father's vulnerability into account and reasonably believes that by returning to work that her father may be in serious and imminent danger and therefore whilst she had proposed returning to work one day a week clearly this will cause risks and having reflected she would therefore like to delay her return to work until the end of September by which time she will have been able to put in place arrangements for her father's care. This should make it easier to get someone to fill her place two days a week rather than one and if she takes unpaid leave this should also minimise the cost.
>
> In addition we would point out that the Equality Act 2010 introduced the concept of discrimination by association. Our client is clearly looking after her disabled father and the refusal of her reasonable requests could be direct discrimination on the grounds of disability.
>
> Given our client's many years of loyal service and commitment to her work, she is very disappointed by the practices' response to her reasonable requests in the circumstances and your lack of understanding of the very difficult situation in which she finds herself. Our client is also concerned by the noticeable distant manner in which the partners treated her when she attended the practice in her own time to be fit tested for PPE.

25. On the following day, the Claimant saw on the Respondent's Instagram page a photograph of one of the orthodontists for whom she worked alongside a colleague who normally worked full time for one of the other dentists who had not returned to work. She was somewhat taken aback as she had understood the thrust of the Respondent's argument to be that it was essential that she come back to work to allow the work of the orthodontists to re-commence.

26. That same day – 23 June - the Respondent replied through their solicitor. After rehearsing the background facts as it appeared to the Respondent, the solicitor made this statement:

> At no point has your client made a request for unpaid leave until receipt of your letter dated 22° June 2020.

27. We interpose to comment that it appears to us that unpaid leave was implicit in the Claimant's request that she be allowed to reduce her days of work from two to one day a week. We have no doubt that, when in February 2016 the Claimant moved from one day's work to two days' work per week, no one felt the need to spell out that the Claimant would not continue to receive just one day's pay.

28. The letter went on to deal with the issue of "Time off For Dependants". It set out section 57A of the ERA 1996 and then said:

> My client accepts for the purposes of this section that your client's father is a dependant. However, whilst my client appreciates that his health may have deteriorated, he has not suddenly fallen ill. He therefore does not fit within the subsections listed above. I have advised my client that section 57A is therefore not applicable in these circumstances.

> In any event, the purpose of section 57A is to allow time off to make alternative care arrangements in an emergency situation. That is not the case here. Your client has been aware since 2 M ay that the practice was starting to reopen and from 2° June that she was required to return to work. She therefore has had sufficient time to put in place the necessary arrangements to care for her dependant. Also, she had offered to work one day a week; one therefore assumes that she was able to put in place arrangements on this day and it is unclear as to why those arrangements cannot be utilised for two days. Alternatively, why she is unable to put in place other arrangements for one day.
>
> Finally, section 57A only allows for a reasonable amount of time off to make alternative care arrangements. It is not reasonable to expect my client to grant time off until September 2020.

29. We interpose again to say that we would have no difficulty in accepting the proposition advanced in the first of these quoted paragraphs if the only basis for the right given by section 57A to take time off during an employee's working hours was the taking of such action as was necessary to provide assistance on an occasion when a dependant falls ill, a contingency catered for in sub-section (1)(a) of section 57A. However, sub-section (1)(b) allows for time off where the reason is to take such action necessary to make provision of care for a dependent who is ill. It seems to us that the Claimant's request more properly is to be viewed in the context of that sub-section.

30. On 25 June, the Claimant received a WhatsApp message from a colleague passing on the fact that she had heard the Claimant was not coming back to work and asking if this was true. This vexed the Claimant somewhat.

31. The following day the Claimant took a decisive step. She wrote a letter of resignation. In evidence, the Claimant accepted that, in this letter, she had put in writing more information than previously she had done concerning the precise difficulties she had in coping with her father's dementia. She complained that the last message from Ms Rudman before the exchange of lawyers' letters was unfriendly and unnecessary and left the Claimant with no option but to seek legal advice herself. She went on:

> 7. The bottom line was that had I taken 2 weeks summer leave, I was in fact only asking for 10 days away from work to care for my father between now and the end of September. As I advised, if his care had been sorted earlier, I would have been happy to return before then. I accept this would have caused inconvenience to the practice but as can be seen on the practices Instagram site, other nurses have been able to cover working with Sarah this week and I believe arrangements are already in place for the next couple of weeks, clearly anticipating that I am not returning.
>
> 8. Probably what saddens me the most is the fact that no one has had the courtesy or taken the time to call me to discuss my predicament to ascertain whether there were any other options we could explore. I know you will have considered my requests carefully on a number of occasions which I am grateful for, but to have no personal contact or indeed any degree of flexibility shown in your stance is quite frankly unacceptable. I have been desperately worried, stressed and concerned about my father and the acute deterioration in his mental state. Added to this, only last month our family lost my father-in-law. No one has shown any concern for my personal well-being in such a difficult time and to receive such a strongly worded communication from you last week was the last straw. I had naively hoped for some support in my request for temporary emergency care leave from my employer.

> I am saddened to say that after 30 years' service, your actions and stance have left me with no other option but to tender my resignation with immediate effect. This is in order to protect myself from the continued stress and worry you have put me under over the last few weeks and to protect my vulnerable father.

32. Four days later, on 30 June, two of the partners and Ms Rudman on behalf of the Respondent partnership, signed a short email that started with:

> Thank you for your email. We note that you have tendered your resignation, which we accept.

33. Against that background, the Claimant has brought her claims of unfair dismissal and of direct disability discrimination by association. At a Preliminary Hearing (Case Management) conducted on 10 February 2021 by Employment Judge Adkin, a list of issues was set out to give both parties the opportunity to dissent, failing which, the list would be regarded as final.

The law

34. The statute law most relevant to a claim of constructive dismissal is that contained in section 95 of the Employment Rights Act 1996 where the definition of dismissal following resignation is given as where:

> … 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.

35. Essential to understanding how this definition of constructive dismissal is to be construed is **Western Excavating v Sharp** [1978] ICR 221 which sets out that the employer's conduct must amount to a breach of an essential term of the contract. The House of Lords gave its approval to the implied term of trust and confidence in **Malik v BCCI SA (in compulsory liquidation)** [1997] IRLR 462, HL where the term was set out as being that the employer shall not:

> without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

36. Direct discrimination is defined by section 13 of the Equality Act 2010 and, for direct discrimination by association, we are guided by European Court of Justice's decision in **Coleman v. Attridge Law** Case C-303/06.

Discussion

37. We start our discussion by referring to the List of Issues which was set out in Employment Judge Adkin's order and we propose to follow, and answer, the sequence of questions set out therein.

Constructive Dismissal

38. The Respondent did refuse the Claimant emergency care leave, decline her request to work one day a week as "logistically not possible", failed to try and identify a short-term solution to her care difficulties and notified her by email of 18 June that she needed to confirm by 22 June that she would be back at work on 25 June 2020 working her pre-furlough 2 days per week.

39. We consider those actions amounted to a breach of the implied term of trust and confidence. We reach this conclusion for two principal factors. Firstly, there was no attempt by the Respondent to contact its employee of 30 years standing to discuss and to understand her request better. The Claimant had an expectation that the Respondent would contact her personally before any decision was taken. We consider such an expectation on the part of such a long-serving employee was justified

40. Second, there was a statutory duty placed on the Respondent not to discriminate against the Claimant because of an associative protected characteristic. As we will set out later in these reasons, we considered the treatment afforded the Claimant was direct discrimination by association. It seems to us that it is an essential component of the maintenance of the relationship of trust and confidence that ought to exist between employer and employee is the absence of discriminatory treatment of the employee.

41. Counsel for the Respondent urged us, in the event we reached the conclusion that there was a breach of the implied term relating to trust and confidence, to conclude further that the Respondent had reasonable and proper cause for so breaching that term. We were not so persuaded. In our view, direct discrimination by association is inconsistent with there being reasonable and proper cause for a breach of that implied term.

42. We were satisfied that the Claimant resigned in response to the Respondent's breach. There is an issue as to whether the Claimant affirmed the contract. As we understand it, it is said that there was delay on the part of the Claimant. She learned on 18 June the Respondent's requirement of her to confirm by 22 June her readiness to return to work her two days per week but did not treat the contract as discharged until 26 June, a period of 8 days during which time she conducted correspondence through solicitors with the Respondent.

43. Lord Denning in his judgment in **Western Excavating v Sharp**, in setting out the contract test, indicated how an employee might affirm the contract. He wrote at page 226:

> 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. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

44. The editors of the Chitty on Contracts, 33rd Edition at paragraph 24-003 puts the question of how a court is to decide on the issue of affirmation thus:

> When deciding whether the innocent party has affirmed the contract, a court is not conducting a "mechanical exercise" but is exercising a judgment. The acceptance of the repudiation must be "real", that is to say, there must be a "conscious intention to

> bring the contract to an end, or the doing of something that is inconsistent with its continuation". Affirmation may be express or implied. It will be implied if, with knowledge of the breach and of his right to choose, he does some unequivocal act from which it may be inferred that he intends to go on with the contract regardless of the breach or from which it may be inferred that he will not exercise his right to treat the contract as repudiated. Affirmation must be total: the innocent party cannot approbate and reprobate by affirming part of the contract and disaffirming the rest, for that would be to make a new contract. Equally a party cannot affirm the contract for a limited period of time and then abrogate it on the expiry of that period of time. Mere inactivity after breach does not of itself amount to affirmation, nor (it seems) does the commencement of an action claiming damages for breach. The mere fact that the innocent party has called on the party in breach to change his mind, accept his obligations and perform the contract will not generally, of itself, amount to an affirmation:
>
> "… the law does not require an injured party to snatch at a repudiation and he does not automatically lose his right to treat the contract as discharged merely by calling on the other to reconsider his position and recognize his obligation." [*Yukong Line Ltd of Korea v Rendsberg Investments Corp of Liberia [1996] 2 Lloyd's Rep. 604, 608*.]
>
> But if the innocent party unreservedly continues to press for performance or accepts performance by the other party after becoming aware of the breach and of his right to elect, he will be held to have affirmed the contract. Reliance upon a term of the contract (such as a term giving a party the right to claim a refund) will not be held to amount to an affirmation, at least in the case where the party who is alleged to have affirmed the contract has made it clear that it was treating the contract as discharged.

45. The Claimant here made had requested to have time off that was necessary to make arrangements for the care of a dependant, her father, who was ill. Her request was refused on 18 June. Thereafter, she repeated her request through the agency of her solicitor. We do not see her attempt to persuade the Respondent to change its approach and grant her request as amounting to an affirmation of the contract. Neither do we view the three days that elapsed between receipt of the Respondent's solicitor's letter on 23 June and the resignation letter on 26 June as constituting, in Lord Denning's phrase, a continuation of the contract "for any length of time". After learning on 18 June that her request had been refused, the Claimant did not perform some unequivocal act from which it may be inferred that she intended to go on with the contract.

46. Counsel for the Respondent brought to our attention that there was a failure on the part of the Claimant to appeal when her request for time off was refused. Given that the evidence we heard that the decision to refuse the request was one made by all the partners, it seems that the Claimant could properly have regarded an appeal to one of that number would have been somewhat a waste of time.

47. We understood from counsel for the Respondent that, should we arrive at the conclusion that the Claimant had been constructively dismissed, there was no dissent to the proposition that the reason for the constructive dismissal was not a reason for dismissal falling within the provisions of section 98(2) of the Employment Rights Act 1996 or some other substantial reason justifying dismissal.

Discrimination by association

48. The Respondent has conceded the basis for the Claimant's claim, namely, that her father has Alzheimer's disease. The Respondent did refuse the Claimant's request for time off. And, when she renewed her request through her solicitor, she brought to the attention of the Respondent section 57A of the Employment Rights Act 1996.

Time off for dependants.

57A (1) An employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary—

(a) to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted,

(b) to make arrangements for the provision of care for a dependant who is ill or injured,

(c) in consequence of the death of a dependant,

(d) because of the unexpected disruption or termination of arrangements for the care of a dependant, or

(e) to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him.

(2) Subsection (1) does not apply unless the employee—

(a) tells his employer the reason for his absence as soon as reasonably practicable, and

(b) except where paragraph (a) cannot be complied with until after the employee has returned to work, tells his employer for how long he expects to be absent.

(3) Subject to subsections (4) and (5), for the purposes of this section "dependant" means, in relation to an employee—

(a) a spouse or civil partner],

(b) a child,

(c) a parent,

(d) a person who lives in the same household as the employee, otherwise than by reason of being his employee, tenant, lodger or boarder.

(4) For the purposes of subsection (1)(a) or (b) "dependant" includes, in addition to the persons mentioned in subsection (3), any person who reasonably relies on the employee—

(a) for assistance on an occasion when the person falls ill or is injured or assaulted, or

(b) to make arrangements for the provision of care in the event of illness or injury.

(5) For the purposes of subsection (1)(d) "dependant" includes, in addition to the persons mentioned in subsection (3), any person who reasonably relies on the employee to make arrangements for the provision of care.

> (6) A reference in this section to illness or injury includes a reference to mental illness or injury.

49. The solicitor for the Respondent, when refusing that renewed request, asserted that the section did not apply given that the Claimant's father had been ill for some time and had not fallen ill. To our minds, that assertion was misplaced. It may be that, for subsection (1)(a) to apply, the dependant should have only recently fallen ill. However, subsection (1)(b) entitles the employee for a reasonable amount of time off to make arrangements for the provision of care for a dependant who is ill [emphasis added]. The basis for the refusal was an unwarranted interpretation of the section.

50. Was that less favourable treatment? The Claimant did not identify a named comparator, so we have had to consider whether that refusal represented unfavourable treatment when compared to a hypothetical comparator, a comparison in respect of which there must be no material difference between the circumstances relating to each case, see section 23.

51. We have compared the case of the Claimant to two hypothetical comparators, one being an employee who has a child attending school and the other being an employee whose spouse or partner has cancer.

52. We considered both hypothetical comparators to have made a request under section 57A for time off work. The former required time off in order to take action which is necessary because of the unexpected disruption in the arrangements made for the care of the child that has come about because the school had closed because of the lockdown measures which have been taken as a result of the Covid 19 pandemic. The latter required time off to provide assistance to the dependant to attend hospital chemotherapy appointments.

53. In neither case could we envisage this employer refusing the request. In the former case, we derive assistance to how the Respondent might have treated the request by the way in which employers throughout the country had to accept disruption to their workforce by reason of the closure of schools. In the latter case, we derived assistance from the evidence that Mr Eoin O'Sullivan gave to the Tribunal. Speaking of the reopening of the dental practice in the early summer of 2020, he said at paragraph 14 of this statement:

> I cannot remember an exact date, but I recall that the majority of the services offered by the Dental Practice were open by the middle of June 2020. By this time, almost all Dentists were back working with their Dental Nurses apart from the Orthodontist and Maxine. There was one other member of staff (a receptionist) who was not back at that point because they had a medical condition and had been medically advised to shield.

54. The fact that allowance had been made for the receptionist not to return to work because they had a medical condition and had been medically advised to shield suggested strongly to us that time off would have been granted to an employee seeking it for the purpose of providing assistance for a dependent's chemotherapy appointments.

55. Our conclusion that time off would have been granted to these hypothetical comparators means that we assess the Claimant to have been treated less fa-

vourably. Finally, we have to answer the question as to whether the less favourable treatment was afforded to the Claimant because of her father's disability. In that regard, we were assisted by what appeared to us to be a rather dismissive approach on the part of Mr O'Sullivan to the question of the case that aged parents required. Several times, he referred to his mother who is in her nineties and appeared to suggest that everyone with such an aged parent had to make arrangements for their care in their own time. We concluded that the reason the Claimant was treated less favourably was because of her father's disability.

Conclusion

56. We have therefore found that the Claimant was constructively and unfairly dismissed. She was also directly discriminated against on the associative basis of her father's discrimination.

57. We did not hear evidence on remedy. We give the parties the opportunity to reach an agreement as to the compensation that our findings warrant in the Claimant's circumstances. Should there be no agreement reached within three weeks of the date on which this judgment and reasons are sent to the parties, we give permission to either party to seek to have a date set for this tribunal to hear evidence in respect of remedy and for a preliminary hearing to provide case management for the hearing on remedy.

1 June 2021

_____

Employment Judge Paul Stewart

DECISION SENT TO THE PARTIES ON

02/06/2021..
AND ENTERED IN THE REGISTER

FOR SECRETARY OF THE TRIBUNALS