



EMPLOYMENT TRIBUNALS

Claimant:
**Mrs Joan
Hutchinson**

Respondent:
**Asda Stores
Ltd**

Heard at: **Wales CVP** **On: 1st November, 2nd November
and 3rd November 2021**

Before: **Employment Judge A Frazer
Tribunal Member Mrs J Kiely
Tribunal Member Mr C Stephenson**

Representation:
Claimant:
Mr R Downey of
Counsel

Respondent:
Mr A Rozycki of
Counsel

JUDGMENT AND REASONS

JUDGMENT

The Claimant's claims for constructive unfair dismissal, age and disability-related harassment, direct age discrimination and discrimination arising from disability are well founded and shall succeed. The Claimant's claim for a failure to make reasonable adjustments is dismissed.

REASONS

Introduction

1. The Claimant presented a claim form on 3rd December 2020 against the Respondent claiming unfair (constructive) dismissal and age and disability discrimination arising out of her employment at the Respondent's Queensferry branch. The claims were denied by way of a Response dated 14th January 2021. The matter came before Employment Judge Jenkins on 19th May 2021 for a preliminary hearing. He made directions including an order for further information from the Claimant. Full particulars of claim are at p.46 of the hearing bundle. Amended grounds of resistance are set out at p.54. Further and better particulars of claim were then directed by Employment Judge Sharp and are at p.489 of the bundle. At the start of the hearing, given that there had been additional particulars provided since the Order of EJ Jenkins, I directed that both Counsel agree a List of Issues distilled from the pleadings. This was provided before commencement of the evidence and was before us when we made our decision. The Respondent conceded that the Claimant was a disabled person at the material time as she suffered from dementia. Knowledge remained an issue. We identified at the start of the hearing that for the purposes of the age discrimination claims the comparable age group comprised those who were below normal retirement age.
2. Owing to the deterioration in the Claimant's condition we did not hear evidence from her but instead heard from her daughter, Joanne Clitherow, and from Chris Hutchinson, her son. We also heard evidence from Adele Quinn, General Store Manager, Barry Hawkeswood, George and General Merchandise Trading Manager and Stacey Weston-Laing, Section Leader within the George department. We heard closing submission from both parties' representatives and reserved our decision. Our relevant findings of fact are set out below.

Findings of Fact

3. The Claimant's date of birth is 19th October 1946. At the relevant time she was 73 years old. Her normal retirement age was 75 years old which she was due to reach on 19th October 2021. She commenced employment with the Respondent as a Service Colleague at the Queensferry store from 5th September 2000 and resigned on 25th September 2020 in circumstances which she claims amount to a dismissal for the purposes of s.95(1)(c) Employment Rights Act 1996. Her original terms and conditions are at p. 86 of the bundle. There was a revision in 2019 and this contained a provision regarding the pension plan which stated that if the Claimant was already a member of the Asda pension plan, her membership would continue. It stated that the rules of the scheme would override the terms within the letter and that there was no contractual entitlement to participate in the plan. The scheme was expressed to be open to those from aged 16 to aged 75.

4. At the relevant time, the Claimant was employed as a shop floor assistant within the George clothing department working 25.3 hours a week. She enjoyed her role and was well liked by her colleagues. Her responsibilities included stripping deliveries, merchandising on the shop floor, following planograms for new modules, ticketing sale, tidying and sizing the department and delivering customer service.
5. Sadly, in or around 2017 the Claimant's son, Chris Hutchinson, noticed that his mother was exhibiting symptoms of dementia. In the summer of 2019 he observed that her driving was impaired and that on one occasion she went the wrong way around a roundabout. She ultimately gave up driving in March of 2020 and gave Mr Hutchinson her car. In November 2019 the Claimant was hospitalised for a urinary tract infection and contracted sepsis. This appeared to exacerbate her symptoms. We noted that the Respondent's evidence was that her symptoms of memory impairment, confusion and forgetfulness became worse after she had recovered from sepsis. The medical records indicate a presentation to the GP with early symptoms of dementia in September 2019 for which she was referred for a brain scan and memory test. She was seen by the Memory Service and diagnosed with Mild Cognitive Impairment on 30th October 2019. This was not known by the Respondent at that time.
6. However, we noted the evidence of the Respondent that employees had noticed the Claimant's symptoms. Ms Weston-Laing's evidence was that after the Claimant returned from treatment for sepsis in December 2019 she had noticed a deterioration. The Claimant was losing things and she had to take more time explaining things to her. Ms Weston-Laing asked Angela Green, People Trading Manager, to speak to the Claimant.
7. We had regard to a statement that was obtained from Angela Green for the grievance dated 29th August 2020 at p.221 of the bundle. She noticed the Claimant forgetting where she had put her lunch bag or swipe card. In February 2020 she relayed to Angela how she had lost her purse and then found it under the seat of her car. Then she had driven to Mold and ended up on Flint mountain. She informed Angela that her doctor was arranging a memory test for her. Angela reported that around the second week in March Stacey Weston-Laing and a number of other colleagues were concerned about the Claimant appearing confused, losing keys and forgetting things. She reported that the Claimant was reluctant to discuss things further and did not want to make a fuss. There was a further statement that was disclosed to us during the hearing (p.221A) which reported a time in March when the Claimant had walked to work as she could not find the bus stop. The Claimant accepted that she was getting worse and Angela suggested that she arrange an occupational health appointment. The Claimant said that she did not want this. She offered to contact her daughter and the Claimant refused this as well. It was then recorded that the Claimant asked her what she should do and it was at that point that retirement was discussed as an option. It was recorded that the Claimant's wellbeing was at the forefront of discussions around that time. The Claimant's hours were changed on 5th March 2020 so that she did not have to drive in the dark. Prior to the period of self-isolation

Ms Weston-Laing supported the Claimant in work, spending extra time reminding her about things and explaining things to her. She also assigned colleagues to assist her.

8. Chris Hutchinson lives in London. On 7th March 2020 just prior to the national lockdown he spent the night with his mother in Buckley and it was then that he noticed that she was struggling to use certain items such as the hi-fi, ipad and television. She was also unable to use the microwave and the oven. She was observed to press the 'do not disturb' button on the phone or leave the phone off the hook.
9. The Claimant was booked for an in-person follow up in the Memory Clinic but this was cancelled owing to the unfolding pandemic. There was a phone review on 9th April 2020 where she self-reported worsening memory problems and confusion. She was diagnosed with mild mixed dementia on 2nd July 2020 and subsequently prescribed mirtazapine and memantine.
10. The evidence of the Claimant's son was that there was an observation that the Claimant's symptoms had worsened owing to her isolation. She had found it confusing being locked down and on occasions did not know where she was. She was also observed to have lost a lot of weight.
11. On 19th March 2020 the Claimant was obliged to leave work and to shield owing to the unfolding pandemic. The NHS had listed those aged over 70 as clinically vulnerable and had recommended that they stay at home to protect themselves from the Coronavirus. The Claimant was required to stay inside and shield for a period of twelve weeks. Mr Hutchinson reported that ASDA were being supportive of his mother and he even tweeted that her manager, Ms Weston-Laing, brought her shopping while she was isolating and told her that she would be happy to drop groceries off if she needed anything (p.99 of the bundle). We found Ms Weston-Laing to be supportive of the Claimant at this time. During this period of time she contacted the Claimant on a number of occasions to enquire how she was and to check on her wellbeing.
12. Mrs Clitherow's evidence was that during the lockdown period she had telephoned the Claimant and that the Claimant had reported to her that during a telephone conversation Ms Weston-Laing had asked if she wanted to retire. Mrs Clitherow went on to say that the Claimant had said she had told Ms Weston-Laing 'no' in response to this. Mrs Clitherow's evidence was that this had upset her mother as she felt that they did not want her at Asda any more. Mrs Clitherow told the Claimant that they were not supposed to ask her to retire and that she should report it if this happened again. A few weeks later the Claimant reported to her daughter again that Ms Weston-Laing had asked her to retire and that on this occasion she had told Ms Weston-Laing that she should not be asking her that. She said that Ms Weston-Laing had immediately said that the Claimant 'had been seen out and about' and that she should not be going out. Mrs Clitherow reported that the Claimant had felt that this was a spiteful reply and that this had upset her and made her feel unwanted and threatened.

13. The notes of Ms Weston Laing's phone calls with the Claimant during her period of shielding are from p.97 onwards. Ms Weston-Laing denied that she asked the Claimant if she wanted to retire as alleged and stated that it was in fact the Claimant who had initiated the subject as she was scared of coming back to work, having seen things on the news, and wanted to know what would happen if she decided to retire. Ms Weston-Laing's note of this conversation is at p.100 of the bundle.
14. We also had regard to the file note at page 127 which was page 2 of a file note. The first page was disclosed during the proceedings and was entitled '*in store meeting with Barry Hawkeswood*'. This was noted as a discussion regarding the outcome of the Claimant's back-to-work meeting. The page recorded a discussion between Ms Weston-Laing and Barry Hawkeswood about the Claimant having two weeks' holiday before coming back to work and also that her hours would be reduced to accommodate bus times and not travelling in the dark in the interests of her wellbeing. The note stated: '*Barry also informed me Joan's daughter brought up that retirement had been mentioned in a previous phone call to which Barry replied it is an option but it is for the colleague to make that decision. I explained to Barry that I did mention retirement to Joan, she asked me what would happen if she wanted to retire and I had explained that the company are not treating the retirement any different from a normal one and that the colleague wouldn't be penalised for retiring during their isolation.*'
15. Ms Weston-Laing's evidence was that she only had one conversation with the Claimant about being out and about and the requirements of social isolation and that this was in April. There was only one conversation about retirement which was in June. She said that during a phone call with the Claimant she had asked Ms Weston Laing '*what would happen if I retire?*' as she was concerned about what she had seen on the news. Ms Weston Laing said that it was at that point that she said the Claimant could delay her return to work by using her holidays. She denied that she had said '*you had been seen out and about*' as a retaliatory comment after the Claimant had told her she was not permitted to ask her about retirement. Ms Weston-Laing accepted that colleagues had seen the Claimant outside during the lockdown period. When she was asked where the note of this conversation was, Ms Weston-Laing said that some of the phone calls that she had had with the Claimant were not recorded.
16. It was put to Ms Weston-Laing that she wrote the note at p.100 after she had learnt from Mr Hawkeswood that the Claimant's daughter had raised an issue about the retirement discussions. This was why the date was only written as 'June'. Ms Weston-Laing's response was that this was not the case but that she did not know why she had not put a date on it. Ms Weston-Laing was also questioned about why the date on the note at p.127 was overwritten. It appeared to have originally been written as 26th but was overwritten as 29th on both pages. Ms Weston-Laing said that this was simply an error as the discussion between Mr Hawkeswood and the Claimant's daughter took place on 26th and that date had been mentioned. Her evidence was that the note was a contemporaneous note of the conversation that she had had with Barry

on 29th, wherein she was asked what she had said to the Claimant about retirement.

17. We had some concerns about how some of those notes appeared to us. The first note was on a pro forma entitled 'Colleague Call Back'. This listed a number of items for discussion with the colleague, which included the requirement for an explanation of self-isolation and the requirement to tell a colleague about the 25% reduction in holiday entitlement. The subsequent notes were not on a pro forma but were rather in the form of 'general file notes'. Ms Weston-Laing's evidence was that the notes were written up at the time of the phone calls. Ms Weston-Laing was questioned about why she had not used the pro forma for all phone calls and she said that she was not sure, that she had just moved on to using general file notes. We had some doubts about whether the note on p.100 dated 'June' was in fact written up at the time and took into account that there may have been conversations that took place between Ms Weston-Laing and the Claimant that were not recorded.
18. We took into account that the evidence we received was from the Claimant's daughter. We also considered how we should weigh this owing to the fact that the Claimant had some memory problems at that time. Mrs Clitherow's evidence was that her mother never lied and that she believed her about this. We had regard to the surrounding circumstances. The Respondent's evidence was that the Claimant's cognitive deterioration was noticeable upon her return from sepsis treatment. This was to the extent that Angela Green had had a conversation with her and suggested family input, occupational health and retirement as options. We found that Ms Weston-Laing was caring and supportive of the Claimant, as demonstrated by her dropping off shopping for her during lockdown and accompanying her to the bus stop on 9th July. We found that it was highly unlikely that she would have intended to threaten the Claimant in the manner alleged by telling her she had been seen out and about because the Claimant had told Ms Weston-Laing she was not allowed to ask her about retirement. We took into account that the Claimant was spending time on her own and her perception or memory of the conversation may well have been marred by some anxiety.
19. However, we do find that, on the balance of probabilities, Ms Weston-Laing did suggest retirement to her on more than one occasion. This may have been said in a well-meaning way but, nevertheless, we find that it was said. We were concerned that some of the conversations had not been recorded and we had doubts about the credibility of the note at p.100 which had been dated as 'June'. We find it likely that the Respondent had reached somewhat of an impasse as to managing the Claimant as she had refused occupational health input or for the Respondent to contact her family. The suggestion of retirement would therefore be seen as a viable option and, indeed, had been put to the Claimant by Angela Green before she left work to shield.
20. The Respondent did not make any specific findings about whether or not Ms Weston-Laing had asked the Claimant on more than one occasion to retire but, in her outcome letter, Ms Quinn had referred to Mr Hawkeswood's understanding that the allegations that had been raised were not being

pursued. We take into account that this was not just raised with Mr Hawkeswood but that it was raised in the grievance letter as well. We also drew inferences from the fact that a complaint had been raised about this on more than one occasion but that it had not been fully responded to or directly investigated.

21. The Claimant was invited to a meeting on 26th June. Mrs Clitherow attended as moral support. The meeting was conducted by Barry Hawkeswood and was convened to discuss the Claimant's return to work. The Respondent's policy was to carry out a risk assessment and discuss what options were available to support colleagues. The Claimant was provided with a copy of the 'Welcome Back' brochure (p.106). At the end of this pack was a template risk assessment.
22. Before Mr Hawkeswood conducted the risk assessment Mrs Clitherow informed him that the Claimant was unhappy about Ms Weston-Laing speaking to her mother about retirement. His evidence was that he suggested that it might be that the Claimant had broached the subject with Ms Weston-Laing. We found this a strange thing to say as he did not know that this was what Ms Weston-Laing was going to report to be the case. Mrs Clitherow's evidence was that Mr Hawkeswood conveyed to them a number of options including retirement at the start of the meeting and that when the Claimant said that she did not want to retire he moved some papers to one side and said "we won't need these".
23. When it was put to Mrs Clitherow under cross-examination whether she saw the papers that were before Mr Hawkeswood clearly, she said "no". Mr Hawkeswood's evidence was that he only had the documents at pp 65 to 84 and at pp121 to 126 before him. This was manager guidance on COVID and risk assessments and the sample risk assessment. It was accepted that the Claimant was given a Welcome Back brochure. Ahead of the meeting the Claimant had completed the self-assessment and had scored as a moderate risk. We accept that the focus was in fact on the Claimant's return to work during this meeting. There was some discussion about what measures the Claimant would need to take upon her return in terms of PPE and social distancing. We find that Mr Hawkeswood was somewhat removed from involvement with the Claimant given his position and job responsibilities. He did not work closely with the Claimant and his focus was to conduct the COVID19 risk assessments for returning employees. It is likely that he did not know the extent of the Claimant's symptoms of cognitive decline at that point in time. That also makes it unlikely in our finding that he would have raised the issue of retirement with the Claimant and indeed he was not a subject of any complaint about this either at the meeting or afterwards. We accept that neither the Claimant nor her daughter disclosed the fact of her symptoms to Mr Hawkeswood at that time. We find it more likely than not that the only point in time at which retirement was mentioned was the point at which the Claimant said that she wanted to know when her shares were due to mature and what would happen to them should she retire.

24. There is no evidence that there were any retirement papers before Mr Hawkeswood in preparation for the meeting and we accept that there were not. We do find, however, that Mrs Clitherow stated during the meeting that Ms Weston-Laing had asked the Claimant if she wanted to retire and that the Claimant was unhappy about this. Mrs Clitherow, we find, asked Mr Hawkeswood to ensure that the Claimant would not be bullied or harassed going forwards. This is a complaint in our view, while perhaps raised informally. We find that it was sufficiently clear as a complaint because Mr Hawkeswood had later asked Ms Weston-Laing for her version of events.
25. Some adjustments were discussed at the meeting. It was arranged for the Claimant to start work at 0900 and finish at 1500 and it was agreed that she would be reminded to observe social distancing on her shifts. It was agreed that the Claimant would use some holiday entitlement and return to work on 9th July.
26. On 29th June Mr Hawkeswood spoke to Ms Weston-Laing about Mrs Clitherow's concerns regarding her mother having been spoken to about retirement during lockdown. Ms Weston-Laing informed him that the Claimant had broached the subject of retirement with her and not the other way around. It was left at that and Mr Hawkeswood did not convey Ms Weston-Laing's response back to Mrs Clitherow. In essence, therefore, this concern remained unresolved.
27. The Claimant returned to work on 9th July. The Claimant arrived on site an hour before her shift was due to start owing to the restricted bus timetable. The only bus arrived at 0750. Mrs Clitherow and the Claimant agreed that the Claimant could come in and have a cup of tea in the canteen before the start of her shift but this was not communicated to the Claimant's management. Mrs Clitherow had hoped that with fixed shift times the Claimant could get into a routine of getting the bus back and forth to work.
28. The Claimant had a return-to-work interview with Ms Weston-Laing. The minutes are at p.131. The Claimant informed Ms Weston-Laing that she was taking anxiety medication. Ms Weston-Laing informed the Claimant that she would like her to have a consultation with occupational health. The Claimant initially refused but later agreed.
29. Throughout the course of the day Ms Weston-Laing was concerned as it took the Claimant a while to get into her locker as she was flustered. She was concerned that the Claimant was not socially distancing and had to be reminded. Ms Weston-Laing had observed that the Claimant's hearing was not as good and that this might mean she would move closer to customers and colleagues to hear what they were saying. She was observed to take longer to work stock and was jittery trying to hang returns.
30. After her shift the Claimant left the store and came back in to Customer Service. Ms Weston-Laing walked over and the Claimant informed her that she could not remember whether she was getting the bus home or whether her daughter was picking her up. The Claimant called her daughter to pick her

up from the bus stop. Having made these arrangements, the Claimant then said that she was getting the bus home and so Ms Weston Laing walked her to the bus stop as she was concerned the Claimant would get the bus and that then her daughter would arrive to pick her up and she would not be there. When they got to the bus stop Ms Weston Laing stayed with her as she was concerned about the Claimant and believed that this was the right thing to do in the circumstances.

31. Prior to leaving the store, the Claimant had had difficulty finding her keys and bus pass which were in her bumbag. Wendy Jerram, Deputy Store Manager, had therefore rummaged in her bag to find them for her. The Claimant later reported this to her daughter and was upset that someone had rummaged in her bag and that they had thought that she had got the wrong arrival time. In our finding, the rummaging in the bag was done with the best intentions and to genuinely assist the Claimant and despite the Claimant having been grateful at the time, it left her feeling upset. In our finding there may have been a way of assisting the Claimant which preserved her dignity, asking her what she wanted them to do. The conduct was unwanted by the Claimant and it related to her condition as it was brought about by her memory impairment. It had the effect of violating her dignity. We found that it was reasonable for the conduct to have had that effect because it was someone doing something for her without her consent. We found that that act amounted to disability-related harassment.
32. The Claimant returned to work on 10th July and came in again an hour early. Given the context of the other issues that the Claimant was exhibiting with her memory and given that nothing had been communicated to them about her coming in early, it was reasonable for the Respondent to suppose there may have been some confusion on her part. Therefore, while the Claimant may have been upset that this assumption had been made, we find that given the circumstances and the absence of communication about the early arrival time, it was reasonable for the Respondent to have drawn this conclusion and it did not amount to harassment.
33. Ms Weston-Laing decided to hold a meeting with the Claimant out of concern for her and to see if there was anything the store could do to support her at work. Ms Quinn came into the meeting. There was some discussion about the Claimant losing her keys and the bus pass and the events concerning her getting home. The Respondent had raised this out of concern.
34. The Claimant became upset and aggressive in that she said that she did not need help and that if she did need help she would ask for it. Ms Weston-Laing asked the Claimant if she would speak to occupational health and she said "*I can't do my job, I will leave*". She then walked out. Ms Quinn observed the Claimant looking confused outside and then observed her walking down the side of the building as if to walk home. Ms Quinn asked Ms Weston-Laing to drive around to make sure that she was ok. Ms Weston-Laing could not find the Claimant and so returned to store. It later transpired through the grievance investigation that the Claimant's colleague, Mr Ferns, had observed the

Claimant at the bus stop looking lost and had given her a lift home. The Claimant had been grateful to Mr Ferns for this.

35. The Claimant returned home and was upset and agitated. She said Ms Weston-Laing had raised concerns about how her memory was affecting her job and thought that they did not want her there any more. Ms Clitherow telephoned Ms Quinn to find out what had happened and there then ensued a telephone discussion between them which Mrs Clitherow recorded. After these events the Claimant did not return to work and was signed off sick.
36. In our finding, given the background of the Claimant having been asked to retire, we find that when the Respondent raised concerns with her this was unwanted and created a humiliating environment for her. It was related to her disability as it was about the symptoms she exhibited as a result of her mental impairment. Had the Respondent referred the Claimant to occupational health prior to her return to work there would not have been a need for her line managers to talk to her directly about her symptoms, even though this was out of genuine concern. There may have been a recommendation in any occupational health report as to how to communicate with her so as to avoid methering her or making her feel agitated. We find, in the circumstances, that raising concerns about her symptoms to her directly would reasonably have been humiliating to her in circumstances when the Respondent ought reasonably to have referred her to occupational health prior to her return.
37. The Respondent had arranged for the Claimant to have a triage call from occupational health on 16th July 2020 but the Claimant was not contactable. There was some discussion about a meeting taking place sooner but Mrs Clitherow instructed the Respondent not to contact the Claimant for two weeks from 24th July during Mrs Clitherow's holiday in France. She was concerned about her mother's anxiety and wanted to protect her. A further occupational health appointment was arranged for 28th September 2020.
38. On 23rd July the Claimant's son, Chris Hutchinson raised a grievance on behalf of his mother which was signed by her. Within the letter Mr Hutchinson said '*I believe Mrs Hutchinson has solid grounds to resign and claim constructive unfair dismissal due to ongoing bullying, harassment and discrimination on the grounds of age and disability. The action has been placed on hold as advised by the ACAS Code of Practice in an attempt to find a satisfactory resolution.*' Mr Hutchinson raised the following points as complaints: ASDA had created an unsafe working environment for the Claimant; ongoing bullying and harassment; asking the Claimant to retire on numerous occasions; intimidation when Mrs Hutchinson asked for the behaviour to stop; a failure to investigate when Joanne had raised the matter in a meeting and interfering with the Claimant's personal belongings when asked not to do so.
39. A grievance hearing took place on 27th August 2020. Ms Quinn chaired the hearing. The Claimant attended accompanied by Mr Hutchinson and Mrs Clitherow. During the hearing the Claimant became upset. Mrs Clitherow took her home and the hearing carried on with Mr Hutchinson present. Ms Quinn

conducted an investigation afterwards. We noted that she tannoyed for an employee from George without picking anyone in particular and asked this employee about Ms Weston-Laing. She reported that, in her experience, Ms Weston-Laing had shown compassion and care for the Claimant. Another employee had remarked that after the Claimant's return from self-isolation she had observed that the Claimant was not herself.

40. Ms Quinn did not uphold the grievance and her letter dated 22nd September 2020 is at p.255 to 256 of the bundle. It was suggested that the Claimant meet with management again after the occupational health referral so that her return to work could be properly managed. On 25th September Mr Hutchinson wrote a letter on behalf of his mother, resigning with immediate effect on the basis that she had been discriminated on the grounds of her age and disability. Ms Quinn offered the Claimant the opportunity to reconsider but she did not take it and her employment terminated on 6th October 2020.

Submissions

41. On behalf of the Respondent it was submitted that, in this case it was important for the Tribunal to have regard to the Respondent's conduct and not the Claimant's reaction to it (**Tolson v Governing Body of Mixenden Community School [2003] IRLR 842 EAT**). There ought to be an objective analysis of the Respondent's conduct. In terms of whether or not Ms Weston-Laing put pressure on the Claimant to retire, the evidence from the Respondent was the direct version of Ms Weston-Laing while the Claimant's evidence was that provided by her daughter at a time when the Claimant was suffering from a cognitive impairment. It was highly unlikely that the notes of Ms Weston-Laing were written retrospectively. The notes were clear and, despite the one date being unspecific in June, the evidence was broadly reliable. Retirement was discussed because the Claimant had raised it. Ms Weston-Laing reminded the Claimant that she had been seen out and about. It was reasonable for her to have reminded the Claimant of the need to shield as she was concerned about her safety upon her return to work. Mr Hawkeswood did not have retirement paperwork on his desk. Ms Clitherow did not see it. The purpose of the meeting was not to discuss retirement so it was unlikely that he would do so. There was a thorough investigation of the grievance. The tenor of the outcome was that all of the points were considered and that the focus was on helping the Claimant to return to work. The Respondent wanted to maintain trust and confidence. The only issue was that there was a disagreement between Mr Hutchinson and Ms Quinn that there had in fact been bullying and harassment. Although the Respondent was aware that the Claimant had some difficulties with her memory there was a manifest difference between before and after lockdown. The Claimant had a risk assessment and nothing was observed. It was only when she returned that more significant problems became apparent. The Respondent acted reasonably by seeking the assistance of occupational health in line with their own policies. The Respondent had done all that it could. In the alternative, there ought to be a fair reason for dismissal (SOSR) because at the end of the grievance trust and confidence had broken down. The Claimant had not co-operated and if the Respondent was unable to assist her it is difficult to

conceive of what could have been done for her. There ought to be a reduction on a *Polkey* basis (50%) because the Claimant had not engaged with the referral to occupational health. She was in any event unwell and would not have remained at the Respondent much longer and only to the end of the year. There was no unfavourable treatment of the Claimant and she had not established a prima facie case of age discrimination as the Respondent treated everyone the same. It was accepted that the Claimant was disabled, however the duty to adjust did not arise because the Respondent did not have knowledge of her disability. Without OH input the Respondent cannot have known of the substantial disadvantage. There was criticism levelled at the Respondent for not assigning a buddy colleague but the Claimant was strongly against interventions to try and help her. Insofar as it did make adjustments, it reduced her hours and took her off the tills. While the Claimant may have perceived the rummaging in her bag to be offensive the Respondent acted reasonably. Ms Weston-Laing only wanted to assist the Claimant at all times.

42. On behalf of the Claimant, it was submitted that in terms of any breach of the implied term of trust and confidence the Tribunal should have regard to the effect on the Claimant as it can thereby be inferred that the conduct was likely to have damaged trust and confidence. The question is whether there was reasonable and proper cause for that conduct. As for the retirement issues, it is accepted that this was raised with the Claimant by Angela Green. It was raised with the Claimant by Angela and then by Stacey, so more than once. The meetings on 9th and 10th July were not conducted in accordance with the Respondent's mental health policy. The concerns were presented as problems and not from the perspective of the Claimant's welfare. The note at page 144 highlights the attitude insofar as it references '*problems*' which has the effect on a person of leading them to believe that they are incapable of doing their job. It will have this effect whether intended or not. It was hardly surprising therefore that the Claimant reacted in the way that she did. It is questionable as to why there was a need for another meeting on 10th July rather than to wait until the Claimant saw occupational health. In circumstances where the will of the Respondent is trumping the wishes of an employee that would undermine trust and confidence. The dates on Ms Weston-Laing's notes had been altered and the crucial conversation did not have a date. It was consistent with the note being recalled later and the writer not recalling the date. It was likely that the note at p.100 was created after Ms Weston-Laing had given Mr Hawkeswood an explanation. It was after the allegation was made. The Claimant had no reason to make up the suggestion about retirement. When Mrs Clitherow complained on 26th June it was because she wanted the conduct to stop. The Claimant recalls the retirement conversation on two occasions and after the first reports it to her daughter who tells her they are not allowed to mention that. This is why the Claimant says "*you should not say that*" and then Ms Weston-Laing raises the observation that she has been seen out and about. This is a plausible account. Ms Quinn attempted to corroborate the conversation on 10th July when she had already left the room. Her evidence was not reliable. The manner in which the meetings were held undermined trust and confidence. This entitled the Claimant to resign. There was no fair reason. The Claimant

has raised a prima facie case of discrimination and the Respondent has not established a non-discriminatory explanation for the treatment. The Respondent would not have put the retirement question to someone in a younger age group. She says that they should not be asking her that so she has felt threatened. The Respondent did not take the allegations of discrimination seriously and failed to investigate properly and this was age based. As for reasonable adjustments, a younger employee would have been properly assisted. There is an inference that the Claimant has been treated less favourably because of her age. As concerns disability discrimination, the Respondent's intent, however well meaning, does not matter – **Pnaiser v NHS England and Coventry City Council UKEAT/0137/15/LA**. They asked her questions about her condition, the symptoms of which were put to her as 'problems'. She was made to feel as though she was not welcome. The Respondent did have knowledge of her impairment and the substantial disadvantage on the facts. As for reasonable adjustments, one of the recommendations in the mental health policy is the assignment of the buddy colleague. The question is how this is approached. Not to offer it would be a breach of duty. It was irrelevant whether the Claimant would have accepted it. The duty arose when the Respondent became aware of the Claimant's disadvantage upon her return to work. As for harassment it was reasonable for the conduct on 10th July to have had the effect it did. The Claimant had wanted to be at work but then walked out. She had complained about Ms Weston-Laing yet the meetings were held by her. It was reasonable for her to feel unwanted. The conduct persisted until resignation because the Respondent did not address it. The grievance gave the Respondent the opportunity to remedy it but the damage had already been done.

The Law

Unfair Constructive Dismissal

43. Under section 95(1) ERA 1996 an employee is dismissed by his employer if 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 his employer's conduct.
44. Section 95(1) was considered by the Court of Appeal in **Western Excavating v. Sharp [1978] 1 All ER** in which the principles of a constructive dismissal were expounded. The key principles are that there must be a fundamental breach of contract or a breach going to the root of the contract; that the Claimant must resign in response to the breach and that he or she must not delay or it will be said that he or she will have been taken to affirm the contract.
45. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (**Malik v BCCI SA [1998] AC 20**). Any breach of the implied term will amount to a repudiation of the contract. The test of whether there has been a breach is objective (**Kaur v Leeds Teaching**

Hospitals NHS Trust [2018] EWCA Civ 978). In circumstances where there has been a series of events such that there is a last straw the quality of that last straw was considered by the Court of Appeal in the case of **London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493**. Lord Dyson held at paragraph 20 held that when viewed in isolation the final straw does not have to be 'blameworthy or unreasonable' but must contribute, however slightly, to the breach of the implied term of trust and confidence.

Direct Discrimination

46. Under s.13 of the Equality Act 2010 a person (A) discriminates against another (B) if, because of a protected characteristic A treats B less favourably than A treats or would treat others.
47. Under s.5(a) in relation to the protected characteristic of age a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group.

Discrimination arising from disability

48. Under s.15(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. Under s.15(2) subsection (1) does not apply if A shows that A did not know and could not reasonably be expected to know that B had the disability.

Reasonable adjustments

49. Under s.20 Equality Act 2010 the duty to make reasonable adjustments arises when a provision, criterion or practice puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. The duty is to take such steps as is reasonable to have to take to avoid the disadvantage. Under s.21 a failure to comply with the duty amounts to a failure to make reasonable adjustments. Under Schedule 8 paragraph 20 of the Act an employer is not under a duty to make reasonable adjustments if it does not know and could not reasonably be expected to know that the disabled person has a disability and is likely to be placed at a substantial disadvantage.

Harassment

50. Under s.26 Equality Act a person harasses another if a person (A) engages in conduct relevant to a protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. Under s.26(4) in deciding whether conduct has that prohibited purpose or effect each of the following must be taken into account: the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Burden of Proof

51. The 'reverse burden of proof' operates in discrimination cases under s.136 Equality Act. Under s.136(2) if there are facts from which the court could decide, in the absence of any other explanation, that the Respondent contravened the provision concerned, the court must hold the contravention occurred. Under s.136(3) subsection 2 does not apply if the Respondent shows that it did not contravene the provision. In other words, if the Claimant raises a prima facie case of discrimination the Respondent must provide a non-discriminatory explanation for the treatment to discharge the burden.

Conclusions

52. We accept that there were implied terms in the Claimant's contract of employment that: 1) she would be permitted to work until at least the age of 75 in order to accrue her benefits under the ASDA Pension Plan; 2) that the Respondent would not without reasonable cause act in a way that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee and that the Respondent would provide a safe working environment and take reasonable care for the health and safety of its employees.

53. The Respondent accepts that at the relevant time the Claimant was disabled owing to her dementia. We find that before the Claimant went off for a period of shielding during lockdown, the Respondent knew that she was exhibiting symptoms related to her mental impairment. Ms Weston-Laing's evidence was that she had noticed that the Claimant had deteriorated after she returned to work following her treatment for sepsis. She was spending a lot more time assisting the Claimant. The Claimant had been taken off the tills. Angela Green spoke to her in a bid to encourage her to seek assistance either through her family or by going to occupational health. Staff in George were raising concerns prior to lockdown when the Claimant was observed to be forgetting more and getting more confused. Angela Green spoke to her. Her statement indicates that there had been discussions by managers about the Claimant at that time. We have some sympathy for the position that the Respondent found itself in as the Claimant did not want any fuss or a referral to occupational health. She was reluctant to accept assistance.

54. However we find that the Respondent ought reasonably to have known that the Claimant was disabled. Armed with the knowledge that she was forgetting things, getting confused and needing greater assistance to carry out her role we find that the Respondent was on notice that the Claimant had symptoms of a mental impairment prior to the lockdown period. We find that at the very least, it was incumbent on the Respondent prior to her return to work from lockdown to investigate her symptoms via a referral to occupational health. A risk assessment was carried out but this was based to a large degree of the Claimant self-reporting and it concerned the risk relating to COVID19. It was

largely a tick box exercise that would not necessarily have picked up on the Claimant's condition. It was not the same as an occupational health investigation via which the Respondent would reasonably have put certain questions to the adviser pursuant to **Gallop v Newport City Council [2013] EWCA Civ 1583**.

55. Ms Weston-Laing was spending more time with the Claimant. She had been taken off the tills and her hours had been reduced. We find that the Respondent was aware that there was some disadvantage posed by her working arrangements and had even attempted to make some adjustments, albeit without occupational health input. It is correct that neither the Claimant nor her children ever informed the Respondent that the Claimant was suffering from dementia but this did not remove the obligation on the Respondent to make enquiries when they were aware of her symptoms and some of the difficulties that she had at work. We find therefore that the Respondent had constructive knowledge of the Claimant's disability immediately before she went off for her period of shielding.
56. Having found that Ms Weston-Laing raised the option of retirement to the Claimant on more than one occasion we find that this is something that would not have been raised with an employee who was not of retirement age in similar circumstances in terms of presenting medical symptoms. We find, therefore, that the repeated mention of retirement to the Claimant as a possible option was direct age discrimination. It made the Claimant feel as though she was being pushed out of the business or that the Respondent felt that she was too old to be there. On the basis that this was mentioned on more than one occasion we also find that it amounted to age-related harassment. It was unwanted conduct which violated the Claimant's dignity. It was reasonable for her to feel upset at the Respondent having mentioned this as it created an environment where it made her feel unwanted. It was reasonable for her to have this impression in the circumstances.
57. The Claimant alleges that the failure to investigate the complaint made by Joanne Clitherow on 26th June that Ms Weston-Laing pressurised her to retire amounted to harassment. Ms Clitherow mentioned that it was bullying and harassment. We find that this was raised informally albeit it was a serious allegation and the Respondent ought reasonably to have investigated it and provided a comprehensive response to the Claimant or her daughter. In the event while Ms Weston-Laing was spoken to by Mr Hawkeswood this was not fed back to Mrs Clitherow and the Claimant. The Respondent's Diversity and Inclusion Policy states, '*instances of bullying, harassment and discriminatory behaviour must always be taken seriously*' and '*whether a complaint is raised formally or not, we must act quickly and professionally to put a stop to it and appropriately deal with those concerned*'. We do not consider that the discussion that Mrs Clitherow had with Adele Quinn took the matter any further however. This was a comprehensive discussion which culminated in Ms Quinn offering to hold a meeting, which was a reasonable action to take in the circumstances. The Claimant then went off sick and ultimately raised a formal

grievance in July. The Claimant's case was that at that stage there had been a breach of the implied term of trust and confidence but in line with the ACAS Code of Practice the Claimant gave the Respondent the opportunity to answer it by raising a grievance. The outcome was given by letter by Adele Quinn by way of the letter at p.255 of the bundle. The Claimant then resigned.

58. We have found that there was a suggestion made to the Claimant on more than one occasion which would have amounted to age related harassment and direct age discrimination.
59. We did not find that the failure to investigate the grievance created a proscribed environment for the Claimant and so dismiss that claim of harassment.
60. We did not find that the fact that the Respondent enabled or allowed the Claimant to work on 9th and 10th July was harassment as there was no effect on the Claimant. The Claimant reportedly enjoyed being back at work.
61. In terms of the meeting on 10th July, we did find that this was disability related harassment for the reasons given above in our findings.

Discrimination arising from disability

62. The requirement for the Claimant to work a set number of hours per week was a PCP. There was also a requirement to maintain social distancing which was a PCP. However we do not find that the Claimant's impairment put her at a substantial disadvantage on the basis that she would be more likely to contract COVID19 from members of the public or work colleagues than those who did not have any difficulty complying with the requirements. There was no evidence before us that the Claimant was at any greater risk in the circumstances by the measures that were already in place. Ms Weston-Laing was monitoring her social distancing and was engaged in reminding her. In any event we do not consider that the assignment of a buddy colleague would have been a reasonable adjustment. We had some reservations that the Claimant would have consented to this on the basis that she did not want a fuss. We do not see how this would have been any more effective in reducing any risk of contracting COVID19 than the current system that the Respondent had in place. Indeed, it would be difficult evidentially to quantify the respective risks in those circumstances. Similarly, we did not consider that a further reduction in her hours or an assignment to duties away from the public would have been reasonable in the circumstances as there was no evidence that it would have removed any disadvantage.

Discrimination arising from disability

63. The Claimant was treated unfavourably in that she was asked on more than one occasion to retire, that her bag was rummaged in by someone else and that her symptoms were presented to her in a meeting on 10th July which resulted in her becoming agitated. We find that all of this treatment flowed from

the fact that the Claimant was showing signs of a mental impairment which was interfering with her ability to do her job. We consider that the Claimant was a 'high maintenance' employee in the circumstances as we had evidence that Ms Weston-Laing was spending more time with the Claimant than other employees. This was because of the Claimant's forgetfulness, inability to concentrate and confusion which arose from her disability. The Respondent ought reasonably to have known that she had a disability. It did not show that the treatment was a proportionate means of achieving a legitimate aim. It ought to have referred the Claimant to occupational health prior to her return.

Constructive Dismissal

64. The Claimant was, we find, constructively dismissed on the basis that the conduct (which we found amounted to age and disability-related harassment, direct age discrimination and discrimination arising from disability) breached the implied term of trust and confidence. She resigned in response to the breach. She did not waive the breach by raising a grievance because she did so in order to allow the Respondent to answer her grievance in accordance with the ACAS Code of Practice. She raised the grievance on 23rd July. This was some thirteen days after the events of 10th July but we noted that the Claimant had been unwell with anxiety at this time. The outcome was communicated to her on 22nd September and she resigned on 25th September. She had already signalled to the Respondent in her grievance letter that she was of the opinion that the conduct leading up to 10th July was a repudiation. Having discussed with both Counsel whether or not there was any issue of waiver, there was no pressing of this point by Counsel of the Respondent on the basis that the Claimant had raised the grievance and had communicated her position to the Respondent that she believed there was a fundamental breach. We found that therefore there was in fact a constructive dismissal and that this was unfair.

Polkey

65. Having regard to the medical evidence and the evidence of the Claimant's children we found that it was likely that had the Claimant continued at the Respondent, even with reasonable adjustments she would more than likely have been fairly dismissed by the end of 2020 for reasons of incapacity owing to the deterioration in her condition.

Employment Judge A Frazer

Dated: 20th December 2021

JUDGMENT REASONS SENT TO THE PARTIES ON 21 December 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS
Mr N Roche