EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108029/2021 (V)

Held via video conference on 18, 19 and 20 January 2022

Employment Judge R Gall
Tribunal Members: A McFarlane
R McPherson

Mr J Carlyle	**Claimant**
Mary's Meals International	**Respondent** **Represented by:** **Ms S Mackie - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that the claims brought are unsuccessful.

REASONS

1. This hearing took place by video conference (CVP) on 18, 19 and 20 January 2022. It was not practicable to hold an in-person hearing due to the pandemic. Parties did not object to proceeding by way of video conference hearing. The claimant represented himself. The respondents were represented by Ms Mackie, solicitor.

2. Evidence was heard from the claimant. He was the sole witness in this case, although Mr Neil was called by the respondents at the request of the claimant. For the respondents, Ms Woods, (HR Advisor with the respondents), Ms Burnett (head of HR Partnering with the respondents) and Mr Neil (IT Infrastructure Lead with the respondents) gave evidence. A joint file of documents or bundle was lodged.

3. During the hearing breaks were taken at different points. The Tribunal took the view at those times that breaks were required either to assist Mr Carlyle with management of issues arising from the back condition by which he is affected or as Mr Carlyle became upset or found it difficult to think clearly and therefore to question witnesses or make submissions. The respondents took no objection to those breaks. Through this process the Tribunal sought to ensure that Mr Carlyle, as an unrepresented party unfamiliar with the Tribunal process and as someone with health issues, was able to present his case and position as best he could.

4. Witness statements were prepared for those who gave evidence. Those statements were adopted and became the evidence in chief of the witnesses.

5. Mr Carlyle bases his claim upon the protected characteristic of disability. The respondents accepted that he was disabled at the relevant time in terms of the Equality Act 2010 ("the 2010 Act") and that they had knowledge of that.

6. Mr Carlyle alleges that discrimination has occurred. He maintains that the discrimination comprised harassment by Mr Neil by way of a remark and a question which the claimant said occurred on 4 March 2021. Mr Carlyle also brings a claim of constructive unfair dismissal. He relies upon the remark and question. He argues that they were discriminatory and constituted a fundamental breach of contract entitling him to resign and to claim constructive dismissal. He does not have qualifying service to bring a claim of constructive unfair dismissal in terms of the Employment Rights Act 1996. He relies upon Section 39 of the 2010 Act.

7. The respondents dispute that the remark and question were as the claimant alleges them to have been. They also argue that what was said does not constitute harassment in terms of Section 26 of the 2010 Act. They maintain that if the claim is successful, the claimant should not be awarded sums as claimed by him.

Claim of direct discrimination

8. As part of the claim initially advanced the claimant made a claim of direct discrimination. That related to events said to have occurred in early 2020. His claim as set out was that duties which he had on the service desk had been removed from him. That was the less favourable treatment he relied upon. He stated specifically in response to Orders and on at least 2 occasions that he relied on that treatment in this element of his claim. The respondents denied having removed those duties from the claimant.

9. During the discussion prior to evidence being heard, it became clear that the claimant accepted that he had not in fact had the service desk duties removed from him. He described having had his service desk role altered from being one week on the desk, one week on other duties to it becoming a daily task but only between 4pm and 5pm as well as holiday cover for a colleague. That was the less favourable treatment he now alleged. It was what he said in his witness statement. It was not, however what he said in the claim form and in response to Orders. He had therefore changed his position as to the facts.

10. The claimant sought to amend his claim to change the less favourable treatment alleged so that it became the alteration of his service desk duties as described rather than the removal of them. He submitted a proposed amendment. The respondents opposed the application to amend.

11. The Tribunal adjourned to consider the application. It was conscious that the claimant had been unrepresented throughout the case. It appreciated that if it refused the application this element of the claim would be at an end, given that the claim would then be advanced on the basis that the claimant had had service desk duties removed. That was no longer his evidence however. It

had regard to the fact that the claimant was not looking to adjust a detail of his claim but to alter the less favourable treatment he alleged had occurred. He was doing this on the first morning of the hearing. He had specified the less favourable treatment as being removal of service desk duties quite specifically and on at least 2 separate occasions in response to Orders made. The respondents had prepared for the hearing on the basis of the allegation being as set out before the proposed amendment. If the amendment was permitted, time and expense would be involved while they obtained relevant information. It was likely that this hearing would require to be vacated, with fresh dates being set. Prejudice to respective parties was therefore considered. The interests of justice were also considered as an element of key importance.

12. The Tribunal gave full consideration to its decision on this application to amend. Ultimately, the unanimous view of the Tribunal was that the application was refused, applying the principles detailed in *Selkent Bus Co v Moore* 1996 ICR 836. The balance of prejudice and the interests of justice, in the view of the Tribunal, led to the conclusion that application should be refused.

Facts

13. The following were found to be the essential and relevant facts as admitted or proved. The Tribunal does not make findings as to facts where the matters involved are not considered relevant to the claim or response. Where there was a conflict in evidence between the parties the Tribunal has determined that on the balance of probabilities, in other words what it considers is more likely than not to have happened. That is appropriate test in the Tribunal.

Background

14. The claimant was employed by the respondents as a senior IT Support Engineer. There were 2 such posts in the respondents' organisation. Mr Carlyle was employed by the respondents between 30 September 2019 and

4 March 2021. His line manager was Stephen O'Neil, who was the IT Infrastructure Lead.

15. Mr Carlyle is unfortunately very badly affected by an issue with his back. It is a degenerative condition which causes severe pain. Whilst pain is always present for Mr Carlyle, severe pain can be caused by movement or tensing of muscles. Mr Carlyle takes medication to assist with pain management. Mr Carlyle's mental health is also adversely impacted by the chronic pain he experiences. He has attended counselling to assist with his mental health issues.

16. Initially, Mr Carlyle was employed on a probationary basis. His probation period was to be for 3 months. In his probationary period he had a number of absences. Those totalled 13 days at time of consideration of his probationary period as that time drew to a close in mid-January 2020. Absences, until that commencing on 7 August 2020, were not attributed to issues with Mr Carlyle's back. A copy of Mr Carlyle's absence leave information appeared at pages 128 and 129 of the file.

17. The probationary period was initially extended until 23 March 2020. A copy of the Employee Probationary Review Form reflecting the discussion between Mr Neil and Mr Carlyle in March 2020 appeared at pages 202-205 of the file.

18. In that Form in a passage under the heading "*Key Areas"* the following appears:-

> *"Your level of absence however during this period is a concern. You have had 2 blocks of sickness (8 days) in your first two months and have made other requests to work from home or leave early. This was before your period of longer term absence from January to March (the reason for this delayed probation report).*
>
> *Absence has a direct impact on the team which cannot deliver on its promises without full resourcing and we will have to be sure of your ability to perform your duties before substantiating your contract."*

19. The probationary period for Mr Carlyle was extended until 25 June 2020. During that time of extended probation, Mr Carlyle's attendance was satisfactory. A further Employee Probationary Review Form was completed on expiry of the extended probationary period in June 2020. The Review was carried out once more by Mr Neil. A copy of that document appeared at pages 206-208 of the file. Mr Carlyle was confirmed in post at that time.

20. In the Form completed in June 2020, the following passages appear:-

> *"During the review period John's attendance record has been satisfactory.*
>
> *He has continued to experience some back pain during this period however this is generally well managed. There was an acute flair up in the condition between 22-26 May which did result in several clinical appointments requiring time off however he agreed this with me in advance."*

21. The respondents have in the past terminated the employment of an employee who has, during their probationary period, had levels of absence of the nature of those which Mr Carlyle's had during probation. Mr Neil was keen to retain the services of Mr Carlyle. This led to continuation of his probationary period rather than termination of his employment, and ultimately to him being confirmed in post at conclusion of the extended probationary period.

Absence Management Policy

22. A copy of the respondents' absence management policy appeared at pages 94-105 of the file. Passages from that policy include the following:-

> "*Short Term Sickness Absence*
>
> *Whilst Mary's Meals understands that there will inevitably be some short-term sickness absence amongst employees, it must also pay due regard to its operational efficiency. If you are frequently and persistently absent from work, this can damage efficiency and productivity and place an additional burden of work on colleagues.*

Long Term Sickness Absence

During a period of long-term sickness absence you are required to attend any scheduled welfare meetings with your manager. The purpose of these meetings is to discuss your current state of health, how long you expect to be absent and what steps, if any, the charity can take to facilitate your return to work."

23. The respondent have a long-term sickness absence tracker. That is a record of contact with an employee who is absent on a long-term basis. It is updated by the manager of the employee involved to reflect that contact. Mr Neil updated the long-term sickness absence tracker for Mr Carlyle as such contact occurred.

24. When an employee is absent due to long-term sickness, the respondents as a matter of course disable the email account of that employee. Their emails are directed elsewhere within the respondents' organisation. This is done to reduce stress during absence in that it prevents the employee from having any feeling that they should be checking their work emails although absent through ill health. It also means that when that employee returns from long-term sickness leave their email in-box is much reduced from the level at which it would otherwise be.

25. When the claimant was absent in early 2020, the respondents took this step. This occurred on 19 February 2020. Mr Carlyle was at the time engaged, through the respondents, in counselling with Lifeworks. When he realised on 19 February that his work email had been disabled he was concerned that he would miss emails in relation to counselling. Mr Carlyle was aware that Mr Neil had taken the decision to disable the email account He emailed Mr Anson of the respondents. Mr Anson worked in HR for the respondents. A copy of the email appeared at page 141 of the file. The email was sent at 18.13 on 19 February.

26. On 20 February Ms Burnett, Head of HR partnering, emailed Mr Carlyle regarding disabling of his work email account. A copy of that email appeared

at page 143 of the file. The email followed a telephone conversation between her and Mr Carlyle.

27. In her email, Ms Burnett explained that the step taken was one taken in all cases where an employee was absent on long-term sickness leave. She explained the reasons behind that course of action. Given Mr Carlyle's view of the situation and his wish for his work email to be re-enabled, this was done by the respondents on 20 February.

28. During the conversation with Ms Burnett, Mr Carlyle had stated he was unhappy with the management of his absence by Mr Neil. He had asked that Mr Neil was not involved in management of his absence going forward. Ms Burnett noted this in her email and stated that management of Mr Carlyle's absence could be transferred to another manager within the Finance and Operations team. She sought Mr Carlyle's confirmation of his wish to take that step.

29. By email of 24 February, also at page 143 of the file, Mr Carlyle replied to Ms Burnett. He said:-

"Please forgive my late reply.

*Due to my ongoing anxiety, I think I have over reacted when it comes to Stephen (*Mr Neil) *and would have no issue with him being in any meetings with me.*

My apologies if this has caused any issues.

Thanks and kind regards"

30. On 24 February 2020 Mr Carlyle sent a WhatsApp message to Mr Neil. A copy of it appeared at page 135 of the file. The message read:-

"Hi Stephen, I owe you an apology for my actions regarding the suspension of my accounts and saying that I did not want you to be in any meetings with me going forward. My anxiety is really bad right now and in hindsight all you have done is try to help me. I would have no problem with you being

in any meetings going forward and I am really sorry if I have caused you any issues. My anxiety is really bad as you know and I was having difficulty processing everything."

Relationship between Mr Neil and Mr Carlyle

31. There was a good relationship between the respondents and Mr Carlyle. Specifically there was a good relationship between Mr Neil of the respondents and Mr Carlyle. Mr Neil had been keen to recruit Mr Carlyle. He had supported him during his probationary period. He extended that notwithstanding levels of absence on the part of Mr Carlyle which had in other cases led to termination of employment. He confirmed Mr Carlyle in post.

32. In addition, during the time of Mr Carlyle's employment with the respondents, Mr Neil had been supportive. He had arranged for an ergonomically supportive chair which Mr Carlyle had used in the office to be delivered to his home for use there when the pandemic made working from home necessary. He had also offered Mr Carlyle height adjustable workspace, however Mr Carlyle did not wish that.

33. Mr Carlyle and Mr Neil used WhatsApp as a means of communication by text. They had a friendly relationship, as mentioned. That was reflected in the tone and content of WhatsApp messages. A print out of some of those messages appeared at pages 130-133 and 135 of the file. The messages extend over the period from 1 December 2019 until 1 March 2021. They are informal and friendly throughout. Mr Neil regularly expresses concern and support for Mr Carlyle. Mr Carlyle often states his appreciation for that.

34. On 25 February 2020, Mr Carlyle sent a WhatsApp message to Mr Neil saying *"Also I meant to say to you yesterday. I hope you don't mind but I put your details down as a reference for my new house."*

35. On occasion during the WhatsApp exchanges in the period mentioned Mr Carlyle calls Mr Neil "*mate".* Examples of the type of relationship between Mr Carlyle and Mr Neil are shown in the following exchanges:-

10 November 2020 - Mr Carlyle to Mr Neil – "Thank you once again for your understanding Stephen. It really means a lot."

*1 March 2021 – Mr Neil to Mr Carlyle "Good to speak with you earlier John I'm sorry to hear you (*sic*) still battling pain though. The team here are all concerned for you, having been asking after you and wishing you well. Be good to see you back Thursday and hopefully it will give you something else to focus on."*

1 March 2021 – Mr Carlyle to Mr Neil in response to the message that day as above – "That's what I'm hoping, I'm really struggling at the moment but I will give work my all and try not to let it break me. Thanks again for your concern and understanding. See you on Thursday 🙂*"*

Return to Work Interviews

36. The respondents carry out Return to Work ("RTW") interviews with employees who have been absent through ill health. Those interviews are carried out by the line manager of the employee in question. Mr Neil carried out RTW interviews with the claimant.

37. The purpose behind RTW interviews is to gain an understanding of the ill health issue which has resulted in absence, the employee's capability for returning to work and any adjustments which are appropriately discussed and considered from the respondents' perspective. Questions as to how an employee is in general terms, and as to what an employee's GP is saying about the illness would be questions often asked during absence management telephone calls and in RTW interviews. In addition a manager might ask about an employee's understanding of future health and recurrences and whether there is any medical information in that area. This helps planning with work, work distribution and ability to meet target or promised delivery times for elements of work.

38. Absence of an employee within the respondents' organisation requires rearrangement of duties to a degree and impacts both upon workload of those

attending work and ability to ensure all the work is carried out within anticipated time frames.

39. Enquiries of this type and those specific enquiries are reasonable ones for an employer to make in the context of long-term absence.

40. Mr Neil asked Mr Carlyle questions of the type mentioned both during his absence and in RTW interviews.

Mr Carlyle's Return to Work 4 March 2021

41. Mr Carlyle was absent from work from 11 February 2021 until 4 March 2021. His absence was caused by an incident where he had slipped on snow/ice and had tensed his back muscles. This resulted in increased severe and lasting pain for him.

42. During his absence there had been contact between Mr Carlyle and both Mr Neil and Ms Woods. That contact was supportive and the exchanges were civil.

43. When Mr Carlyle returned to work on 4 March he joined the daily team meeting at 9.15. All seemed fine at that point.

44. Mr Carlyle had intimated to Ms Woods that he would be returning to work on 4 March. He did this on 3 March. A copy of the messages exchanged appeared at page 170 of the file. Those messages agreed that a catch up between Ms Woods and Mr Carlyle would take place at 12.30 on 4 March. The catch up call happened and involved discussion of the incident which had led to Mr Carlyle's absence and also of the support he had at home. Ms Woods did not regard there as being issue from Mr Carlyle's perspective with the respondents or circumstances around his returning to work.

45. A RTW meeting was scheduled between Mr Carlyle and Mr Neil for 13.00.. A copy of the exchange arranging that meeting appeared at page 172 of the file. That exchange was also friendly and civil. The RTW meeting took place at 13.00.

46. The RTW meeting between Mr Neil and Mr Carlyle was held by video conference call. A note of the meeting, prepared by Mr Neil, appeared at page 174 of the file. Mr Neil discussed the return to work of Mr Carlyle and any arrangements that could potentially be made by the respondents to assist Mr Carlyle.

47. As would happen in other situations of employees returning to work, Mr Neil asked Mr Carlyle about the issue which had caused absence. He asked Mr Carlyle about the likelihood of that incident having made his back problem worse or more likely to recur. He then went on to ask what Mr Carlyle thought about the likelihood/prospects of recurrence of this type of problem. This was in the context of seeking to support Mr Carlyle and also in relation to work planning, especially when various projects, with deadlines, require to be carried out. Mr Neil did not ask Mr Carlyle when he would next be absent.

48. Mr Neil said to Mr Carlyle that absence had an impact on the team. He said that in relation to absence in general terms. He did not personalise this to Mr Carlyle and his absence. Mr Neil sought to gain information to help understand Mr Carlyle's situation and to assist him to plan the work distribution in the team.

49. The question asked was therefore as to what Mr Carlyle understood to be the likelihood of recurrence. The comment or remark made was that absence had a detrimental impact on the team and its ability to deliver on deadlines/promises made. The question asked was one regularly asked at RTW meetings carried out by the respondents and Mr Neil on their behalf. The remark made was one which had also often been made at such meetings. Both the question and remark were ones which it was reasonable for an employer to ask/make in the context in which they were said.

50. When that question was asked and the remark made, Mr Carlyle became upset and angry. He regarded Mr Neil as having asked him to state when he would next be absent through ill health. Mr Carlyle asked Mr Neil if Mr Neil wished him to resign. Mr Neil said that he did not wish that to happen. Mr Carlyle said that he was disabled, swearing as he did so. Mr Neil confirmed

that he knew Mr Carlyle was disabled. Mr Carlyle terminated the video call, saying he "*had had enough of this shit".*

51. After the video call between Mr Carlyle and Mr Neil, Mr Neil messaged Ms Woods. A copy of that exchange appeared at page 173 of the file. Mr Neil said that Mr Carlyle *"had a massive reaction when asked about the likelihood of future absences."* That message was sent at 13.21.

52. A short time after the call between Mr Neil and Mr Carlyle ending Mr Carlyle contacted Ms Woods. His message to her appeared at page 171 of the file. It was timed at 13.20 and asked if he could phone Ms Woods back. She replied saying she had 5 minutes. Mr Carlyle and Ms Woods then spoke for a short time as Ms Woods was committed to taking part in a meeting at 13.30. She said that to Mr Carlyle, explaining that she could not speak with him for long at that point. She confirmed however that she would speak with him later, saying that a further call an hour and half later (and therefore at 15.00) would be possible.

53. In the call between Mr Carlyle and Ms Woods at 13.20, Mr Carlyle was noticeably upset. He said to Ms Woods that this was due to the way Mr Neil had spoken to him about his disability. Ms Woods was very surprised at how Mr Carlyle presented. This was as his demeanour had altered significantly from that of under an hour prior to this call. Mr Carlyle said to Ms Woods that he was going to resign and make a claim of constructive unfair dismissal because of the way Mr Neil had spoken to him. Ms Woods was also very surprised at this comment as she viewed it as being entirely out of character for Mr Neil to make an upsetting remark. She said to Mr Carlyle that he should not do anything rash but should take a break away from his desk and should reflect on the situation. She confirmed she would call him back when her interview, scheduled for 13.30, had finished. She said she anticipated this as being an hour and half later. Mr Carlyle seemed to Ms Woods to be far calmer when his call with her finished.

54. When Ms Woods was free just prior to 15.00 she spoke with Mr Neil to obtain information from him as to the exchange with Mr Carlyle. She then spoke with Mr Carlyle. That call with Mr Carlyle was at 15.01.

55. Between the call with Ms Woods at 13.30 and that at 15.00, Mr Carlyle conducted some internet research through search engines. He investigated constructive dismissal, including the "last straw" doctrine, and discrimination.

56. Mr Carlyle seemed to Ms Woods to be calmer and less angry at 15.01 than he had been at 13.20. He informed Ms Woods however very early on in the conversation at 15.01 that he had submitted a letter of resignation. A copy of the email containing intimation of resignation appears at page 184 of the file. That email intimating resignation was sent at 15.02. Mr Carlyle said to Ms Woods that he had been considering resignation for a while and that it had been a well thought out process. He said that Mr Neil had made comments in the past asking when his back would get better and had now asked him when the exact date of his next absence would be. Ms Woods regraded it as being far-fetched that Mr Neil would ask those questions. She was aware that no-one would be able to predict absence. She also was of the view that any comments Mr Neil had made to her as to Mr Carlyle had been supportive of Mr Carlyle. Ms Woods said to Mr Carlyle that Mr Carlyle had always said to her in any conversations that Mr Neil had been supportive. Mr Carlyle said to Ms Woods that he had "*kept his mouth shut until now".*

57. Ms Woods asked Mr Carlyle to take time to consider things and to reconsider his resignation. She said that she was hopeful the situation could be resolved. Mr Carlyle said he did not think that was possible.

58. A note of the of the calls between Mr Carlyle and Ms Woods at 12.30, 13.20 and 15.00 appears at pages 175 and 176 of the file.

Resignation and interaction following upon that.

59. The letter of resignation from Mr Carlyle appeared at page 184 of the file. It confirmed that Mr Carlyle would be resigning with immediate effect. It said, in the relevant parts-

" I feel that I am left with no choice but to resign in light of my recent experiences speaking to Stephen Neil regarding my ongoing disability and continual absences.

I was asked by my line manager Stephen Neil a question pertaining to whether I can give a relevant date of when I will be likely to have my "next absence" so this can assist with the scheduling. I was also made aware of the significant hardship that my disability has on the team when I am off with one of my absences.…

*Stephen has often also asked me questions like "when will my back will be better" (*sic*) on our catch up calls, to which I have to constantly remind him that it does not get any better. I am always in pain, however my ability to deal with it changes. I feel I have been discriminated against on the grounds of my disability both with these remarks today and then (*sic*) handling of my absence previously in a reduction of duties. (I have not worked on the service desk for almost a year except cover).*

I consider this to be a fundamental breach of contract on your part due to his discriminatory remarks.

This is also a breach of trust and confidence as I have returned to work today only to experience this situation when I am trying my very hardest to work.

This is also covered in the last straw doctrine where I have not complained about my reduced duties and Stephen Neil's remarks"

60. Mr Carlyle resigned in response to the question asked as to likelihood of recurrence of absence and remark made to him by Mr Neil as to impact of absence upon the team. The question was asked and remark made at the RTW meeting at 13.00 on 4 March. Those were not discriminatory actions in that they did not constitute harassment in terms of Section 26 of the 2010 Act.

Communications Following Resignation

61. Following upon the email from Mr Carlyle intimating his resignation an email exchange occurred between Ms Woods and Mr Carlyle. A copy of that appeared at pages 177-179 of the file.

62. Ms Woods said in her email of 4 March that she respected Mr Carlyle's decision "*especially as it is something you said you had been considering for some time".* She asked Mr Carlyle if he would like to meet and reminded him of Lifeworks, the respondents' confidential support programme which was available to him.

63. The following day, 5 March, Ms Woods tried to contact Mr Carlyle. She expressed concern that no-one had been able to contact Mr Carlyle. She referred to the requirement for a notice period or to a request for that to be foregone as being necessary. Mr Carlyle replied that day. In his email he wrote:-

> *"Stephen's words and actions yesterday from a discriminatory perspective made any contract with Mary's Meals null and void.*
>
> *My position became immediately untenable when I was discriminated against due to my disability. Surely you should know that Stephen has make* (sic) *a case for constructive dismissal.*
>
> *I have already obtained legal representation and have lodged a formal case with the employment tribunal service who you should be hearing from in due course.*
>
> *I request no further telephone or Teams discussion, any further communication should be via email for the record."*

64. In fact Mr Carlyle did not have legal representation at this point and had not obtained legal advice.

65. The following exchanges then resulted, JC being Mr Carlyle and CW being Ms Woods:-

16.13 5 March, CW to JC – "I am sorry to hear that you feel this way. Please can you confirm whether it is your intention to honour your notice period?"

16.38 5 March, JC to CW – "As my employment contract was torn up due to disability discrimination by your employee, I have no right to serve any contractual notice."

17.44 5 March, CW to JC – "I am sorry that you feel this way that you have chosen not to have any further conversations. I had hoped to speak to you today to talk about our internal procedure for resolving such concerns through our grievance process. I have attached the policy for awareness.

I am sorry to hear that it is your decision not to work your contractual notice and we will take your resignation date of yesterday as final and immediate. One point we will have to follow up on is the return of any Mary's Meals IT equipment.

It is unfortunate that things have ended like this and it would have been our preference to try and resolve your concerns through our internal processes before any action was taken. I wish you well for the future."

66. On 11 March Ms Woods sent a letter by email to Mr Carlyle. A copy of that letter appeared at page 186 of the file. It dealt with final salary payment and holiday pay, together with other end of employment matters. It said in the first paragraph:-

"I want to express my regret that you felt the need to resign and that you will not serve your notice. We were very keen to try and resolve the issues you raised through our internal processes. Please be assured that we remain available to provide support should you be open to having any conversations."

67. By reply of the following day in an email which appeared at page 189 of the file, Mr Carlyle responded in the final 2 paragraphs as follows:-

"Lastly, when Stephen said those things to me in my return to work interview he broke the employment contract that I have with MMI. My

position became immediately untenable and any internal grievance procedure would not have resolved the fact that what Stephen did was unlawful. I have already contacted the employment tribunal service and I will proceed with litigation against the company.

This is not what I was wanting. I wanted to successfully return to work after my last absence and continue to the best of my abilities. Stephen's actions have robbed me of my career."

68. Mr Carlyle contacted ACAS on 4 March, notifying them in terms of the Early Conciliation procedure requirements. He presented his claim to the Employment Tribunal later that day, the day of his resignation.

Employment with McDermott Group

69. Mr Carlyle obtained employment with the McDermott Group of companies. His employment with them commenced on 17 May 2021. His remuneration was at a higher level than was the case when he was employed by the respondents. He resigned from employment with them, effective 7 July 2021. Given the outcome of the claim, the circumstances of ending of this employment and any issue as to ability to continue a claim for loss beyond time of his employment with McDermott Group are not matters which require to be determined by the Tribunal.

The Issues

70. The issues for the Tribunal were:-

1 The claimant did not have qualifying service enabling him to bring a claim of constructive unfair dismissal under the ERA. Did he resign in circumstances where he was able to pursue a claim in terms of Section 39 of the 2010 Act?

2 In order to determine that, the Tribunal would require to determine

(a) what the conduct was in response to which the claimant resigned;

(b) was that conduct discriminatory? The allegation was that the actions of Mr Neil at the RTW interview on 4 March 2021 constituted harassment in terms of Section 26 of the 2010 Act. The claimant also referred to questions asked of him at earlier times as to when his back was going to get better and as to what his doctor was saying about his health. He did not however bring a claim on the basis that those questions were acts of discrimination. He also referred to disabling of his email account when he was on long-term sickness absence in February 2020. Again he brought no claim of discrimination in relation to that act. In those circumstances, was he able to seek to reply upon those acts as part of his claim of what might be referred to as discriminatory constructive dismissal?

(c) Did discriminatory conduct upon which the claimant could rely constitute a fundamental breach of contract ?

(d) Had the claimant resigned in response to that?

3. In addition, if there had been harassment in terms of Section 26 of the 2010 Act on 4 March, separate consideration would require to be given to that as a ground of claim, irrespective of any decision in respect of constructive unfair dismissal.

4. If the claimant was successful, consideration would require to be given to the level of compensation to be awarded, taking account of injury to feelings, compensatory awards, employment subsequently obtained, arguments as to mitigation, contribution and failure to follow the ACAS Code of Practice.

Applicable Law

71. The claim under Section 13 of the 2010 Act was no longer proceeding given the position on the facts as to working on the service desk accepted by the claimant and given the refusal by the Tribunal to permit to amend his claim on the morning of the first day of hearing, as detailed above.

72. Section 108 of ERA precludes a claim of unfair dismissal unless an employee has been continuously employed for a period of not less than 2 years.

73. Section 39 of the 2010 Act provides that an employer must not discriminate against an employee by dismissing that employee. Dismissal extends to the situation where an employee resigns in response to discriminatory conduct by the employer which constitutes a fundamental breach of contract.

74. Whilst it might be initially difficult to envisage discriminatory conduct by an employer towards an employee which did not constitute a fundamental breach of contract, if a Tribunal finds there to have been discriminatory conduct, it must then consider if that did constitute a fundamental breach of contract entitling the employee to resign. The discriminatory conduct might well, it would be anticipated, breach the implied term of trust and confidence. A breach of that implied term is regarded as being a fundamental breach of contract.

75. The test in relation to fundamental breach of contract is that set out in *Western Excavating Western Excavating (ECC) Ltd v Sharp ("Western Excavating")* 1978 ICR 221. Other relevant cases helpful in considering constructive dismissal are *Bournemouth University Higher Education Corporation v Buckland ("Buckland")* 2010 ICR 908 and *Malik v Bank of Credit and Commerce International SA (In Liquidation) ("Malik")* 1998 AC 20. Cases which are helpful in relation to discrimination as claimed in this case are *Betsi Cadwaladr University Health Board v Mrs Alison Hughes and Others ("Betsi Cadwaladr")* UKEAT/0179/13 and *Richmond Pharmacology Ltd v Dhaliwal ("Dhaliwal")* 2009 ICR 724

76. The 2010 Act and relevant cases are appropriately considered. The EHRC Code of Practice on Employment of 2011 is also relevant. That Code states that Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.

77. The provisions of the 2010 Act as to burden of proof applied given that this was a claim of discrimination. Section 136 states, insofar as relevant:-

Burden of proof

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

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

78. Section 26 of the 2010 Act states that a person harasses another if they engage in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating the other person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person. It goes on to state that in deciding whether conduct has the effect just mentioned, each of the following must be taken into account –

"(a) the perception of the person involved who has been potentially subjected to harassment

(b) the other circumstances of the case

(c) whether it is reasonable for the conduct to have that effect."

79. In addition therefore to considering evidence from the claimant as to the effect of conduct alleged by him to constitute harassment, the Tribunal also requires to consider whether it was reasonable for the claimant to claim that the conduct had that effect. There is, therefore, a subjective element to the test in terms of Section 26 and also an objective element.

80. In terms of the EHRC Code relevant circumstances are mentioned as including those of a claimant, for example his or her health including mental health. The environment in which the conduct said to have occurred can also be relevant as one of the circumstances of the case.

Submissions

Submissions for the respondents

81. Ms Mackie addressed the Tribunal with lengthy and extensive submissions. The key elements in those submissions are sought to be summarised here.

82. The respondents highlighted the 2 allegations of harassment relied upon. Those were the question said to have been asked to the claimant seeking information as to when his next absence would be and also the comment said to have been made that the claimant's absence had a detrimental impact on the team.

83. Insofar as those elements were concerned there was no *prima facie* case resulting in the transfer of the burden of proof to the respondents. The Tribunal should accept the evidence of Mr Neil as to what was actually said to/asked of the claimant. It should assess Mr Neil's credibility having regard to the absence management policy and the appropriateness/reasonableness of the questions he claimed to have asked and comment he said he had made as to impact of absence on the team.

84. The respondents had acted reasonably in looking to manage the claimant's absence. The claimant said he had the question and comment burned in his mind. Mr Neil's management style as spoken to by colleagues and as shown in his interaction with the claimant did not support the comment or question being as spoken to by the claimant. Mr Neil had been supportive of the claimant and had extended his probationary period despite absences which might have led to dismissal. He had then confirmed the claimant in post. The Tribunal also had the benefit of seeing and hearing Mr Neil give evidence. Again his approach and demeanour did not square with him behaving as the claimant alleged.

85. If the Tribunal accepted that the interaction was as detailed by Mr Neil, then the Tribunal should find that both the question and the comment were not such as to amount to harassment. The matters covered were ones which a reasonable employer could legitimately ask. They had been explored

previously in discussions. They could not reasonably be regarded as having the effect mentioned in Section 26. The words "*harassment", "Violating"* and *"intimidating"* were strong words . *Betsi Cadwaladr* cautioned a Tribunal to keep that in mind. The question and comment made here were not in those categories.

86. In relation to resignation, the claimant had had an issue for some time. He said he had been giving the matter some thought prior to 4 March. On 4 March he had been fine until during the discussion with Mr Neil. He had been looking for an excuse to resign, Ms Mackie said. That was why he had reacted as he did. He had not reflected on the position despite Ms Woods urging him to do that between 13.30 and 15.00. He resigned one minute into the call with Ms Woods at 15.01. He had researched the matter. He went to ACAS and also presented his claim to the Employment Tribunal the same day. He had a well thought out plan, Ms Mackie submitted. There was nothing in the respondents' behaviour which could properly be regarded as constituting a fundamental breach of contract. The respondents had encouraged the claimant to speak with them and to try to resolve the issue. He had refused so to do.

87. The claimant appeared to think that the respondents should have treated the call with Ms Woods at 13.20pm as constituting a grievance being made by him. They should have investigated the matter further before speaking with him further. Someone should have been asked to make contact with him during the 90 minutes when Ms Woods could not speak with him. That was what he had said in evidence. He had not however, at the time, sought that any of those steps were taken. He had, Ms Woods said, calmed down by the time she had to end the call with him at around 13.30pm. His own position had also been that a grievance was not going to lead anywhere, Ms Mackie reminded the Tribunal.

88. There was no fundamental breach involving discriminatory behaviour entitling the claimant to resign and to bring his claim of constructive dismissal. The disabling of his email account was short lived and was normal practice. It was

not discriminatory conduct. It was some time from and had no connection to the events a year later at the RTW interview.

89. In relation to credibility, it should be remembered that the claimant said to the respondents he had taken legal advice when he had not.

90. The cases referred to Ms Mackie included *Kemeh v Ministry of Defence* 2014 ICR 625, *Sithirapathy v PSI CRO UK Limited and Others* ET case 3353038/2017, *GT v RV* ET case 2204567/2018, *Betsi Cadwaladr*, *Komeng v Creative Support* UKEAT/0275/18, *Western Excavating*, *Dhaliwal*, *Buckland*, *Morrow v Safeway Stores plc* 2002 IRLR 9, *Kaur V Leeds Teaching Hospital NHS Trust* 2019 ICR 1 and *Malik*.

91. Ms Mackie also addressed the Tribunal in relation to loss, extending to causation, mitigation and contribution. Given the decision reached by the Tribunal those submissions are not set out here.

Submissions for the claimant

92. Mr Carlyle emphasised that he was unqualified, had no familiarity with Tribunal proceedings or citing of legal authority. He had struggled during the case. The Tribunal sought to reassure him that it would hear what he said by way of submission and he should present his position as he best felt able so to do.

93. During submissions Mr Carlyle strayed into giving evidence, whether repeating points already given in evidence or commenting upon the respondents' evidence and contradicting it. At those points the Tribunal tried to steer him back towards highlighting to the Tribunal why it was, on the evidence it had heard and legal principles applicable, he maintained he should be successful. It underlined that the Tribunal would weigh the evidence before it and apply the law as it regarded it to be. It was explained that submissions in cases vary in length and technical points depending upon the case involved, the familiarity a party/representative might have with the law and process, as well as ability on the day to pull thoughts together. The key

areas, it was emphasised, were the evidence heard, what the Tribunal did or should believe and application of law to facts found.

94. Mr Carlyle said he had brought proceedings as he felt he had suffered an injustice. That was a severe injustice. He had felt compelled to resign.

95. Health was a real issue for Mr Carlyle, he underlined. He was in constant pain. This affected his ability to concentrate. He accepted that he had said in the email that he had legal representation when he did not. He had anticipated being able to obtain representation.

96. Absence management by the respondents had involved a fundamental breach of contract entitling him to resign, Mr Carlyle submitted. The question asked as to when his next absence would be was inappropriate and was a question which haunted him and continued to make him feel worthless and defective. He had always tried to do his best despite his illness or condition. The asking of the question and the manner in which it was asked was derogatory and insulting. He could not do anything about his condition

97. Mr Carlyle said he resigned as he had never felt so worthless. He was aware from research that in this type of situation an employee required to make up their mind quickly and had to react quickly to the actions of an employer.

98. The disabling of his email account was a factor in his decision, Mr Carlyle said. All in all it seemed to him that by their behaviour the respondents wanted him to resign. Whilst absence of an employee can and does have a detrimental effect on the team, it was not appropriate to raise his absence with him in this context. The respondents should have been mindful of his condition, Mr Carlyle said.

99. There were 2 cases referred to by Mr Carlyle. Those were *Chawla v Hewlett Packard Ltd* 2015 IRLR 356 and *Addenbrooke v Princess Alexandra Hospital NHS Trust* UKEAT/0265/14. The first of those, he said, underlined that removing email access could well be an act of discrimination if someone was absent. The second was an instance of the cumulative effect of actions of an employer.

100. What had happened here, Mr Carlyle submitted, was that what Mr Neil had said had been wrong and the way he said it had been wrong. It had completely upset him, it had violated his dignity and had led to loss of confidence such that he could not continue in employment with the respondents. He had expected Ms Woods to do something to assist. She had not.

101. Mr Carlyle addressed his employment with McDermott Group and why it was that he maintained he was entitled to make a claim against the respondents for loss for a period after that employment. The submissions in that area are not set out given the decision of the Tribunal.

Discussion and Decision

General comment

102. The Tribunal appreciated the difficulties Mr Carlyle faced in conduct of his case. It sought at all times to keep in mind the overriding objective in terms of the Tribunal Rules. It sought to deal with the case fairly and justly and to ensure that parties were on an equal footing. It explained that it could not act as Mr Carlyle's representative. It confirmed it would try to assist in clarifying any points or explaining procedure to him. It explained the principle of cross examination and in particular the need to challenge any points within the respondents' witnesses' witness statements with which Mr Carlyle took issue. It was emphasised to him that he should do this even if he expected the witness to "stick to their guns".

103. The Tribunal appreciated the efforts made by Mr Carlyle to detail his case in evidence and to challenge the respondents' witnesses, particularly when this was not a process with which he was familiar. The Tribunal understood that Mr Carlyle found the hearing a difficult experience. Breaks were taken to try to assist Mr Carlyle with issues arising from his disability, the condition affecting his back. At times Mr Carlyle found the proceedings, the cross examination of Mr Neil in particular, an upsetting time. Again breaks were taken, either at the request of Mr Carlyle or at the instigation of the Tribunal.

The Allegations

104. In the circumstances detailed above, the allegation of direct discrimination relating to the service desk duties was no longer part of the case when hearing of the evidence commenced.

105. The allegations therefore were that a remark had been made and a question asked at the RTW interview on 4 March. Both were said constitute harassment in terms of Section 26 of the 2010 Act. In addition Mr Carlyle's resignation was said by him to be constructive unfair dismissal which properly gave rise to a claim by him as the fundamental breach or breaches of contract were acts of discrimination. He relied upon the interaction of 4 March as he spoke to it. In evidence he also pointed to some questions he said had been asked by Mr Neil on earlier occasions as to what his doctor was saying and, he said, questions from Mr Neil as to when his back was going to get better. In addition he referred to the disabling of his email account in February 2020. Those were not allegations of discriminatory conduct made in this claim. The allegation as to change in service desk duties was not a matter before the Tribunal as detailed above.

Basis of Resignation

106. Given the fact that Mr Carlyle did not have sufficient service enabling him to bring a "standard" constructive dismissal claim, the fundamental breach or breaches of contract upon which he relied to support his claim required to be discriminatory in nature.

107. The earlier actions he referred to as detailed in paragraph 105 of this Judgment were not said to be discriminatory. In any event, the Tribunal did not view them as discriminatory. It heard no evidence supporting that view. It was not a proposition advanced by Mr Carlyle. Had it been, on the evidence, the Tribunal would have been satisfied that there were no facts from which it could conclude that the acts were ones of a discriminatory nature.

108. Disabling of the email account was also an act significantly prior to the events of 4 March, such that it was not regarded, had it been discriminatory, as part

of conduct extending over a period. It would not therefore have been possible to rely on it.

109. Further, the Tribunal did not accept on the limited evidence it heard in this area, that Mr Neil had asked Mr Carlyle, in terms, when his back was going to get better. Mr Neil knew that Mr Carlyle had a degenerative back condition which was not going to get better. His whole interaction with Mr Carlyle was also supportive from anything the Tribunal saw and heard on the evidence and documentation before it as spoken to. The Tribunal preferred the evidence of Mr Neil on this matter.

110. Asking Mr Carlyle what his doctor was saying about his health was a perfectly sound and sensible thing for Mr Neil, as his manager, to do in the view of the Tribunal. It was certainly not a discriminatory act. Again no evidence to support that proposition was before the Tribunal. It was appreciated that Mr Carlyle may not have welcomed the enquiry and may have found it likely to unproductive of useful information. There was however no act of discrimination in the asking of the question.

111. As mentioned these acts were not said to have been discriminatory. In the view of the Tribunal they cannot therefore form part of the basis of a claim of "discriminatory constructive unfair dismissal".

112. The potential relevant acts therefore are those said to have occurred on 4 March 2021.

Exchange on 4 March 2021

113. The Tribunal considered the evidence it had. It assessed the witnesses. In the view of the Tribunal, Mr Neil was both credible and reliable. His demeanour and tone in answering questions and speaking about events and documentation were entirely consistent with the way his written communications, including those with Mr Carlyle, appeared. He was regarded by the Tribunal as having acted in a caring and supportive way towards Mr Carlyle from commencement of his employment. Indeed Mr Carlyle's own

interaction with Mr Neil by text in particular, revealed that as being his own view. He was appreciative of Mr Neil's actions and comments.

114. It was regarded by the Tribunal as relevant and of some significance that Mr Neil had been the manager who assisted Mr Carlyle in successfully navigating his probationary period despite absence issues. Mr Neil had also secured adjustments and assistance by way of the ergonomic chair and the offer of the height adjustable desk.

115. That assessment of earlier interactions did not mean of itself that Mr Neil had not made the remark as described by Mr Carlyle and had not asked Mr Carlyle the question as was spoken to by Mr Carlyle. The remark and question would however have been entirely out of keeping with the approach and tone of Mr Neil prior to that point.

116. On the evidence it heard and had before it, the Tribunal therefore found it hard to believe that Mr Neil would have made the remark and asked the question as Mr Carlyle claimed. Mr Neil accepted that he said to Mr Carlyle that absence had a detrimental effect on the team. He did not personalise it to Mr Carlyle. The Tribunal accepted that evidence. Mr Carlyle accepted the proposition within that statement, however said that Mr Neil had specifically referred to absence on **his** part having a detrimental effect on the team.

117. The Tribunal did not accept that the remark was made with specific reference to absence of Mr Carlyle. Applying the balance of probabilities test, namely that of what was more likely to have occurred looking at the evidence and documents, the Tribunal preferred the version detailed by Mr Neil. It came to this view having heard from the witnesses, including but not limited to Mr Neil and Mr Carlyle. Other witnesses spoke to Mr Neil's character and management style as being supportive and considerate. That evidence was entirely consistent with what the Tribunal found in the WhatsApp messages to which it was taken. It seemed distinctly unlikely that Mr Neil would have made the remark in the form Mr Carlyle recalled. Mr Carlyle was also regarded as being less likely to be accurate in his recall in the view of the Tribunal. He was upset. He may even have concluded that the remark was directed at him

rather than being an explanation of why enquiries were being made as to likelihood of recurrence.

118. For the foregoing reasons the Tribunal was satisfied, however, that the comment/remark was a general one rather than one specifically directed at absence on the part of Mr Carlyle.

119. Similarly the Tribunal accepted Mr Neil's evidence that he had not asked when Mr Carlyle would next be absent through ill health. That seemed, as a general observation of the part of the Tribunal, to be a question which it was unlikely any employer would ask on a serious basis. Ill health is not something which can be accurately predicted as arising such that it can be stated that absence will result on a particular date. On the other hand, exploring likelihood of recurrence of the issue, particularly in the context of possible adjustments or assistance from an employer, was something which the Tribunal could see being a reasonable and appropriate enquiry from an employer.

120. Mr Neil confirmed he had not appreciated, until this point, the repercussions which might occur for Mr Carlyle from an otherwise relatively insignificant incident, in this case a potential slip resulting in a tensing of muscles. Asking a question of this type would be part of reasonable information gathering. Asking when the next absence would be did not fit that scenario, however.

121. The question asked being as Mr Neil described it rather than as Mr Carlyle had it was supported by the background approach of Mr Neil and exchanges at earlier times between Mr Carlyle and Mr Neil as mentioned above. It was in line with the management style and personality of Mr Neil as evidenced in documentation and by other witnesses. It fitted with his persona as observed by the Tribunal

122. There was also support for the question being as Mr Neil spoke to in evidence when the contemporaneous exchanges between Mr Neil and Ms Woods as to what had happened at the 13.00 meeting were considered. Mr Neil referred at that point, immediately following the meeting, to having asked Mr Carlyle about the likelihood of recurrence of the issue.

123. It is appreciated that Mr Carlyle reported the exchange in different terms to Ms Woods. He also gave evidence to the Tribunal as to what he says Mr Neil asked him. The Tribunal acknowledges the certainty with which Mr Carlyle states what was asked by Mr Neil. He says it is "*burned in his mind".*

124. Faced with this conflict in evidence that Tribunal weighed both versions. It had regard to the matters referred to earlier. In summary those were the background of the relationship between Mr Carlyle and Mr Neil as spoken to by witnesses and as apparent from documents, Mr Neil's character as spoken to by other witnesses, contemporaneous documents and the evidence from Mr Carlyle and Mr Neil. It regarded the version detailed by Mr Neil as being more credible. It therefore determined that the question asked by Mr Neil was as to likelihood of recurrence of absence and not as to when Mr Carlyle would next be absent.

125. The Tribunal regarded that question as being a legitimate and reasonable one for an employer to ask in the circumstances pertaining at this point.

126. The conduct in question was therefore asking as to likelihood of recurrence and stating that absence has a detrimental effect on the team.

127. The Tribunal then had to consider whether those elements constituted discriminatory actions by the respondents. If they did not then, whatever the Tribunal made of them did not matter. This was as there was no ability on the part of Mr Carlyle to advance a claim of "standard" constructive unfair dismissal. In addition the claim of harassment in terms of Section 26 of the 2010 Act would be unsuccessful.

Was it a discriminatory act to ask the question as to likelihood of recurrence and to make the comment/remark as to adverse impact of absence on the team?

128. In discrimination cases the burden of proof provisions in Section 136 of the 2010 Act require to be kept in mind.

129. However, before the burden might shift to the respondent, a claimant will need to establish on the balance of probabilities that he or she has been subjected

to '*unwanted conduct*' which has the '*purpose or effect of violating his or her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her*".

130. In the view of the Tribunal in this case, there were no facts from which the Tribunal could decide, in the absence of any other explanation, that the respondents had contravened the terms of the 2010 Act. The burden of proof did not therefore shift to the respondents.

131. The actions of Mr Neil in asking the question he did and making the remark he did on 4 March 2021, as found by the Tribunal. did not, in the judgment of the Tribunal, comprise harassment in terms of Section 26 of the 2010 Act. This decision was reached applying the subjective and objective elements of the test.

132. It was recognised by the Tribunal that Mr Carlyle saw the conduct as violating his dignity and meeting the Section 26 test. Looking however to the facts as found and therefore what had been asked or said as found by the Tribunal, the circumstances of the case and to whether it was reasonable for the conduct to have that effect, the Tribunal regarded the test in the Section as not being satisfied. The circumstances of the history of absence and reasons for it, the need to have information to make decisions as to possible adjustments (the respondents being willing from past behaviour to make adjustments) and the fact that the impact of absence on the team had been raised earlier and that it was accepted by Mr Carlyle that absence did indeed have a detrimental impact on the team, were all relevant in that assessment and decision.

Conclusion

133. For the foregoing reasons the Tribunal unanimously concluded that there had not been discriminatory acts of harassment on 4 March 2021 in the RTW interview conducted by Mr Neil. That element of the claim is therefore unsuccessful. In addition and in light of that decision by the Tribunal, given

the absence of discriminatory acts as being the reason for resignation, the case brought by Mr Carlyle of constructive unfair dismissal could not succeed.

134. The claim is therefore unsuccessful.

135. The Tribunal expresses its appreciation to all involved for the manner in which the hearing was conducted which enabled the evidence to be gathered by the Tribunal and the case to be concluded, whilst taking account of, and seeking to assist with, the difficulties Mr Carlyle understandably experienced in being a party to the case and in acting on his own behalf, particularly when coping with a debilitating back condition and associated pain and discomfort..

Employment Judge: Robert Gall
Date of Judgment: 31 January 2022
Entered in register: 08 February 2022
and copied to parties