



EMPLOYMENT TRIBUNALS

Claimant: Ms Saskia Elvin

Respondent: Anglia Crown Limited

Heard at: East London Hearing Centre (by CVP)

On: 2 – 4 March 2022

Before: Employment Judge Fowell

Members: Ms J Houzer
Mr B Wakefield

Representation:

Claimant In Person

Respondent Ms K Annand of counsel

JUDGMENT having been sent to the parties on **8 March 2022** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Introduction

1. These written reasons are provided at the request of the claimant, oral reasons having been given at the end of the hearing. Some pruning has taken place to avoid excessive length and so these now stand as the final version.
2. The case was summarised in helpful detail by Employment Judge Housego at the preliminary hearing on 21 December 2020 as follows:
 48. The Claimant's case in outline is set out here. The Claimant resigned her employment by letter dated 02 July 2020, and left on 31 July 2020. She had been

away from work since becoming very upset on 04 January 2020, when she had gone home and then been signed off sick until she resigned. She says that she is disabled by a variety of different conditions, and that the Respondent knew all about it, as she told them about everything at a meeting in August 2019, that the effect was debilitating upon her, and that the Respondent did little if anything to help her. They said that they would help, and that her manager (Tammie Black) would support her, but she did not. Instead, she was overloaded with work to an impossible degree, and offers to assist were hollow. She says that when she was off sick she was just left well alone, and the Respondent found her too difficult to deal with, and so were content when she was not there, and when she left. All this amounts, she claims, to a course of conduct which was a fundamental breach of contract, and disability discrimination.

49. In a little more detail, the Claimant says that the medical questionnaire she filled in before starting work stated that she had asthma. She had seen occupational health in October 2019, and told the therapist about her Freiberg's disease, and that she had been referred for help with mental health issues including anxiety and OCD, so that the Respondent was aware of these conditions too. Her sleep apnoea made it hard for her to stay awake, at times, and to concentrate. No adjustment (latitude) was made (given) and instead she was unfairly disciplined for absence. It was unfair to penalise her for absence when it was planned surgery, which was of life changing consequence. She should have had a reduced workload, but she had the reverse.
50. There had been 3 disciplinary hearings, and while nothing was done in the 2nd, it was unfair to subject her to the process at all.
51. She had needed multiple surgeries for her Freiberg's disease, and had one such procedure while with the Respondent. They had said that it would not count as sickness absence, but had later called her to an absence meeting partly because of it.
52. After being referred to occupational health in October 2019 she was promised support from her manager (Tammie Black) but it was not forthcoming.
53. In December 2019 she had been involved in a 100 mph car crash and was off for a couple of weeks with shoulder and back injuries. Three others were seriously injured. The Respondent was, she says, unsupportive. She accepts that this was not connected to any disability.
54. The crunch came on 03 January 2020. She was undertaking audit work and the director, Andrew Lone, had told her what was required. It was about adjustments to the stock figures, and it was important. Then Tammie Black told her to do it another way. She had refused, because she knew what she was being asked to do was not as the director had told her. Andrew Lone had heard them arguing about it and said that she was right, but she was so upset about this that she had a breakdown in the kitchen and went home and never returned, signed off with anxiety. The excessive workload had worsened her anxiety.
55. She felt that when she raised disability in August 2019 the Respondent thought that

she was just too hard to handle and were pleased to see her go. She regards her manager Tammie Black as the person largely responsible, and Louise Hunt of human resources.

56. At a meeting in February 2020 with human resources (Louise Hunt) Ms Elvin says that she told the Respondent she wanted to come back to work but could not do so unless her workload was adjusted. She says that she never heard any more about it, and was just left alone and ignored.
 57. The Respondent had asked for a meeting to assess her situation, and that was on 02 July 2020. She had thought that they would probably be unsympathetic, based on experience to date, and so went armed with her resignation letter. She found them just as she had expected, and so had given them the letter. She felt they found her just too much trouble to cope with and were hoping that she would go away.
 58. There was a complete overlap between the facts underlying her disability claims and her unfair dismissal claim.
 59. The Respondent says that it is they are not in any position to accept that Ms Elvin is disabled, as claimed. They will reassess once they have the medical evidence. They do not see how hay fever could be a disability, being seasonal. The anxiety did not seem to be long term (i.e. of 12 months duration, or likely to be so) by the date of resignation.
 60. The Respondent denies Ms Elvin's claims. They say that as she was not at work after 03 January 2020 much of the claim is out of time in any event, and it would not be just and equitable to extend time. They deny that that they failed to make reasonable adjustments, and say that this was no more than a resignation after an extended absence. If it was an unfair constructive dismissal, then with sickness absence of 6 months dismissal for capability reasons was likely in the near future.
 61. It was denied that Ms Elvin had been overworked. Sickness absence has to be managed whether it is caused by a disability or otherwise. They had not breached their obligations in any way. There was no fundamental breach of contract. If there had been, then a delay of 6 months meant resignation was not swift enough to found a claim of constructive unfair dismissal. If they had failed in any way, it was not to the extent of a fundamental breach, which was one which showed that the employer intended not to be bound by, or comply with, a fundamental term of the contract. Here that could be only mutual trust and confidence, and there was no evidence that could lead to such a finding.
3. The company now accepts that Ms Elvin's mental health problems – anxiety and obsessive compulsive disorder (OCD) - amount to a disability and did so at the relevant times, though no admission is made about her physical health problems. They also accept that they knew about it from the time of the disciplinary hearing in August 2019.
 4. Ms Elvin slightly disagrees with this summary in one respect - she maintains that she raised her various health conditions with her manager some time before that

hearing.

5. The complaints presented were also clarified by Judge Housego as follows:
 - a. constructive dismissal;
 - b. discrimination arising from a disability;
 - c. failure to make reasonable adjustments;
 - d. harassment on grounds of disability; and
 - e. victimisation.
6. In addressing these issues we heard evidence from Ms Elvin, and on behalf of the company from her line manager, Ms Black; the HR Manager, Ms Hunt; and Ms Karen Acfield, the company's Head of Compliance, who held a grievance meeting following Ms Elvin's resignation.
7. Ms Elvin also provided a witness statement from a former colleague, Rachel Woodley, who described her own experiences of stress while working at the company, and being signed off sick as a result. Ms Woodley was unable to attend the hearing however. In addition there were statements from her partner and her grandmother (with whom she lives) describing the effect on her of these events. There were no questions for them so they were not required to give evidence.
8. Despite her mental health problems, Ms Elvin managed the hearing process very well. There was a lengthy cross-examination when she showed an impressive grasp of the issues and the evidence. She was able to deal with the many points raised without hesitation and in her closing submissions showed considerable legal research too. We formed the view that she, like the other witnesses, was trying to assist us, and there were limited disputes over what actually happened.
9. There was a bundle of 500 pages plus another 365 pages of medical evidence, although we did not in fact need to refer to that second folder. Having considered that evidence and the submissions on each side, we make the following findings, which are confined to those necessary to reach our decision.

Findings of Fact

Background

10. The company has about 195 staff and makes chilled and frozen meals for use in healthcare and education settings. Ms Elvin was 19 when she joined them and so this was her first significant employment. She already had a long history of quite significant mental health problems. She also had a range of physical problems too, as described in the summary above. However, her mother was friends with

the previous HR Manager at the company, Ms Jackie Bennett. They were looking for someone junior in their finance department; Ms Elvin did not have any finance qualifications but she was good at maths and at using spreadsheets so she joined through an agency in September 2017. Her job title was Finance and Sales Support Administrator. Ms Bennett knew about her history of mental health problems and about her other health conditions.

11. At some stage after she started, Ms Elvin had to have an operation on her foot, to insert a pin into the bone. This is connected with her Freiberg's disease which causes the bone to die away. This is a rare condition and the bones have to be fortified in this way. She then came back to work on 14 March 2018 on a new, fixed-term contract, again as Finance and Sales Administrator. Hence some of her time was spent in Sales, i.e. working on the sales ledger side.
12. Ms Elvin completed a health questionnaire on re-joining and set out some of her problems, mentioning her asthma, allergies, the fact that she was on medication, had a skin condition (psoriasis) and had difficulties walking following the foot operation. She did not mention however any mental health problems.

Absence record

13. Those physical conditions led to a few absences. The first was shortly after arriving again, then one in May, two days in June, one in August taken as holiday, and one more in October 2018 with foot pain, also taken as holiday. She had two days off, essentially on compassionate grounds, in November 2018 because a family member was ill, and took that as unpaid leave.
14. Ms Elvin explained to us that her asthma and sleep apnoea affect her immune system. The sleep apnoea leads to a lack of sleep, causing tiredness, and even to falling asleep at work. That brings with it increased anxiety about it. The sleep apnoea also leads to vomiting. It is not quite clear exactly why that is the case, but she explained in one of the disciplinary hearings that she was prone to this, and might wake up vomiting. She also said it weakens her immune system and she picks up infections more easily. In any event, several of the days off in 2018 were for this reason.
15. Each time she was off she filled in a return to work questionnaire and gave some information about her absence. The form would also be signed by Ms Black. These repeated absences did not seem to raise any particular alarm bells with her. As just noted, sometimes Ms Black told her to take them as holiday or unpaid leave. That was clearly the wrong approach but it also suggests that Ms Black did not want her to get into any trouble over her days off. We are satisfied that these absences were all for the claimed physical reasons and were not stress related or feigned. Ms Elvin enjoyed her job, was a quick learner and was often called on to train the many agency staff that were brought in.

16. The company has a Sickness Absence Procedure which provides that any absence of less than three days is "short-term" and two such absences in a 3-month rolling period leads to an absence review meeting. The Managing Director's PA kept a note of the absences and she would let the HR manager know when the need for an absence review meeting was triggered. The HR Manager would then tell the line manager. While Ms Bennett was the HR Manager there was no disciplinary action and no absence review meetings. When Ms Hunt took over in December 2018 she was unaware of any underlying health problems and did not personally review the health questionnaire.
17. There is a file note dated 23 November 2018 which suggests that Ms Black spoke to Ms Elvin that day about her absence level. It is unsigned and Ms Black could not remember doing so, but if she did, this was the first time her absence was ever raised as an issue. Any conversation would have been brief; there were certainly no formal meetings between them away from their desks.

Helping out in Sales

18. Also at around that time Ms Elvin had to go and help out in the sales ledger team. She says that she was "guilt tripped" into this, on the basis that she would get a permanent role in purchase ledger later on, but this was part of her existing duties and work that needed doing, so we see nothing improper in asking her to cover this desk for a while.
19. However, the manager there, KW, was not easy to work with. Rachel Woodley, who came through an agency, had been working there and could not bear it any longer. She left after a disagreement with KW and was signed off sick with stress before the end. She was then replaced by Ms Elvin.
20. Both Ms Elvin and Ms Woodley in their witness statements give a similar account of what they experienced. KW would put them down, saying things in public like "are you stupid?" or "she's doing my head in." She shouted at them both and they were both in tears at times. Ms Elvin was there for about three months and was quite miserable during that period. Ms Hunt had some awareness of this. Her office was adjacent and she mentioned it during a later disciplinary hearing (p.171). It must also have been obvious to Ms Black that Ms Elvin was unhappy.

Permanent role

21. As promised however, a permanent role was then created for Ms Elvin as Purchase Ledger Assistant. Ms Black arranged this, and it took some time to get approval for it as Ms Elvin did not have any accounting qualifications. It was to start on 1 March 2019 but that was the date of a further hospital admission for Ms Elvin. She was due to have the pin in her foot removed, and so was off work for 11 days. It was agreed that she would start her new role afterwards so that it did not affect her absence record. Once again, this suggests that Ms Black was

supportive and wanted to avoid any repercussions for her absence.

22. Ms Elvin was off again a few days later with more vomiting. This happened again for a day in May too. Each of these absences could have triggered an absence review meeting but no action was taken. All this suggests, and we find, that she was a hard worker and was valued accordingly; she was bright and well-liked.
23. In May 2019 she was roped in again to help with the sales ledger team, who were, once again, short-handed. They were short of a stock controller and a stores manager and Ms Elvin was to be a spare pair of hands while they recruited people. This time it did not involve sitting with KW but she did have to pick up many short-notice tasks and often had to leave her own work to do so; she had no option in this, and Ms Black would simply tell her to go and help or carry out any task that needed doing. It was a very busy period and it lasted until July 2019.
24. The next absence was at the end of July, with two days off for vomiting. As before, no action was taken although the trigger for an absence review meeting was met. Then in August she went on holiday, from 5th to 19th. There was a big backlog of invoices on her desk when she left, which Ms Black cleared for her. Having done so she sent Ms Elvin a long email (p.146) with instructions about how everything should be done. A good deal of red ink and capital letters was involved, although it ended:

“Please don’t take any of the above as a negative against all your hard work over the past few months, I am simply trying to assist you in getting back to an organised state, which can then be maintained.”

25. Ms Elvin says she was never disorganised, she just had too much to do, mainly because she was constantly being told by Ms Black to do other things or help other people. Ms Black agreed that Ms Elvin was not disorganised, so we accept that she was overloaded before she went on leave.
26. The holiday ended on 19 August and was immediately followed by two days off with “strep throat”. This prolonged absence may have caused some annoyance, and Ms Black did then arrange to have an absence review meeting with Ms Elvin on her second day back, Friday 23 August 2019. The meeting invitation had cut and paste into it all of the criticisms and red ink from the earlier email, so it was a meeting to discuss not just her absence but her performance generally.

The first disciplinary hearing

27. It is not clear how that meeting went since there is no record of it, but the next document we have is an invitation to a disciplinary hearing, sent on the following Monday, to take place on the Wednesday (p.154). This was a big change in approach towards Ms Elvin. Until then she had been well regarded and was committed at work; now she was in trouble over her absences.

28. The hearing was attended by both Ms Hunt and Ms Black while Ms Elvin was accompanied by a colleague called Karen Mace. The managers went through with her each of her absences, going back to the start of her employment. This was the first time any real attention had been paid to the pattern of absences or their cause. Ms Elvin described to them the debilitating effects of her foot condition, the vomiting, the sleep apnoea, explained how serious it was, that her tonsils needed to be removed shortly, and that it caused extreme tiredness. She became upset and explained more about her lack of sleep and how she would wake up choking and sometimes threw up in the night. Then she mentioned that she gets stressed a lot at work. The transcript then records her as sobbing.
29. There was a short break. Ms Hunt was particularly concerned about this mention of stress and the questions turned to her workload. Ms Elvin said that she was very pressured at work and felt every morning when she walked into work that she was set up to fail. She went on to disclose the fact that she had a long history of mental health problems. Ms Black asked if there was anything particular about the work that made her anxious and Ms Elvin explained that she felt pulled in too many directions, being told to do this then to do that all the time. This sort of anxiety gave her chest pains, she went on. Ms Hunt was concerned and decided to make a referral to Occupational Health. The nurse would be visiting in September and that was the next opportunity to see her.
30. They adjourned the hearing again for a short break, and when they resumed the two managers announced the outcome of the meeting, which was a verbal warning. Ms Black explained:

“Obviously a disciplinary is not what anyone wants to be in, but it is our policy and we do have to follow it.”
31. Ms Black also promised to tackle her workload and reminded her of the work plan that she had drawn up previously, as she had for all in the team, giving a breakdown of when to do the different tasks required. She also undertook to schedule in time at least twice a week over the next couple of weeks to make sure Ms Elvin was sticking to this plan and that she was managing generally.
32. Ms Elvin was not happy to receive a verbal warning and exercised her right to appeal. That appeal was heard by Ms Acfield on 15 October, and she concluded that the warning was justified on the basis of the absences, regardless of fault.

Occupational Health

33. A few days earlier, on 11 October, Ms Elvin saw the Occupational Health nurse. (Clearly the September date did not prove viable.) The resulting report records four main health conditions: asthma; sleep apnoea; Freiberg’s disease; and anxiety and OCD. Her opinion was that the main issue was her mental health. In describing her OCD she noted that Ms Elvin had told her of a lifelong history of

anxiety, that she had had intensive therapy for this and currently felt that her workload was unachievable. She recommended that the business should engage with Access to Work to provide her with a mentor for six to twelve months to provide support in working smarter and in managing her stress.

Second disciplinary hearing

34. Unfortunately that was never put into effect. Nor was there any meeting with her at the time to discuss this report. The next month passed and then on 30 October she had two days off with sickness, and once again that prompted a disciplinary hearing, which took place on 8 November. As before both Ms Hunt and Ms Black were present but this time Ms Elvin was unaccompanied.
35. They went through the reasons for her absence and Ms Elvin explained that she had been feeling rundown. There had been recent issues with stocktaking and coping with a lot of changing information. Ms Black said that she had picked up on the fact that this could have been potentially stressful for her. Ms Elvin agreed but said it was impossible to say if the stress had made her throw up whether it was down to other causes. If anything she downplayed the impact of her stress.
36. They went through the Occupational Health report, not having done so earlier, and Ms Elvin gave more information about her OCD, and said that she struggled without a routine. Ms Black responded that they did have a routine but Ms Elvin said that a lot of the time it did not happen; there were, she said, a lot of changes; she would have to do this and then do that instead. In explaining this she got upset and said that when these changes happened she was unable to cope and could not concentrate.
37. During this exchange Ms Black mentioned several times that they would talk about the jobs they had on when they met the following Monday, and that Ms Elvin should approach her if she needed more help, but it is not clear what real steps were taken. The only proposal was, as before, that they have a meeting on Monday to sort out her priorities and possibly also that other members of the team might be able to take tasks off her, but no particular tasks were removed. Again these were not intended to be meetings away from their desks. The onus was left on Ms Elvin to ask for help. No particular steps were taken to reduce the number of phone calls or other interactions or distractions. No disciplinary sanction was applied this time however.
38. On 1 December 2019 Ms Elvin was involved in the car accident mentioned in the opening summary and was off until 11th. After her return her employment did not last much longer. It ended on 3 January, a particularly difficult day for her.

3 January 2019

39. That morning Ms Black told her that she needed to help out with a stock taking

exercise. It involved reconciling the figures for stock with those shown on the company's system. Ms Elvin's work was already behind and two colleagues, Charlotte March and Karen Mace, were told to help with her backlog of invoices while she attended to this new task. So again, her normal duties were changed while she carried out this urgent and unfamiliar work to a deadline. It would normally have been done by Ms Black but she had her own deadlines to meet. To make matters worse, Ms Black's mother had had a mild heart attack and was in hospital, and Ms Black had to spend the afternoon there with her.

40. During the morning things got fraught. Ms Elvin was liaising with a colleague called Michaela and there was some confusion over the process. Ms Black asked Charlotte to help Ms Elvin out as it became obvious that there was a problem. Ms Black's evidence was that there is a two-stage process involved, where they compare the results of an initial count with the expected stock figures, and then do a recount in any areas where there is shown to be a big difference. Ms Elvin's understanding was that there should be a thorough stock take first. She thought this had been done, but it had not, and she and Michaela may well have been at cross purposes about this. Things clearly became stressful because one of the directors (Mr Lone) came out of his office to intervene, and said that a recount should be done, just as Ms Elvin said. That requirement meant that the task could not be completed that day. Ms Elvin went into the kitchen and became upset. She had a conversation with Mr Lone, who was concerned about her, and told him that she might leave. She was very stressed and did not come back in to work the next day.

Keeping in touch

41. After that there were various efforts by Ms Hunt to make contact with her and get her to return to work. For the first few weeks Ms Elvin was largely in bed and not in a position to deal with anyone or anything, so she ignored Ms Hunt's initial voicemails on 9 and 10 January, and a letter on 14 January inviting her to a disciplinary hearing for unauthorised absence, although she did provide a medical certificate the next day.
42. On 13 February they had a meeting off site. It was at a local hotel, but the room Ms Hunt booked was not available so they had to talk in the reception area with people coming and going. Ms Hunt made a note of the discussion shortly afterwards, which we accept as reliable. According to this Ms Elvin said that she was fed up being ignored and that nothing had been done to address her workload. She got very upset and was not at all sure that she could return. Ms Hunt said that she would talk to Ms Black to understand the role better and then arrange to meet again. Ms Elvin took from this that there was no expectation for her to return until these concerns had been addressed, and on balance that seems to have been her preference – to return to work once adjustments had been made.

43. A letter followed from Ms Hunt on 24 February suggesting a further meeting but Ms Elvin did not respond. Ms Hunt wrote again on 27 February, again without reply. A sick note was provided by Ms Elvin on 1 March and on 23 March 2020 the first national lockdown began. (By that point, from 14 March, Ms Elvin had two years' service.)
44. The silence persisted and Ms Hunt wrote again on 14 April asking Ms Elvin to get in touch. As before, it was a standard letter, and although it expressed concern and a desire to meet up to discuss things, it ended with the threat of a disciplinary hearing. It might have been better to avoid such a threat in the circumstances,

The final meeting

45. Ms Hunt tried again on 13 May, asking for an update. Then on 30 June, over four months after their meeting at the hotel, they arranged to have a further meeting. This was arranged for 2 July, in the office, and at 7.30 am to avoid Ms Elvin seeing anyone else.
46. Once again, we accept Ms Hunt's account of that meeting. There is some difference of opinion over how it went, but it is clear that she wanted Ms Elvin to return, was sympathetic to her, and approached the meeting as a normal part of her duties. She also made a record of it at the time. Ms Elvin on the other hand was quite emotional and made no such record.
47. Ms Hunt explained to us that it was a long meeting, that she was not able to say very much, and that Ms Elvin did all or most of the talking and was critical of the company and of the way in which things had been handled. Ms Elvin, on the other hand, says that she told Ms Hunt that she just wanted to come back to work (albeit with some changes to allow her to cope) and that Ms Hunt told her no, she could not return. There may have been some miscommunication but we do not accept that that was her position, which is at odds with the efforts made to encourage her back to work.
48. Ms Elvin had come armed with her resignation letter and she handed it over to Ms Hunt. It is not necessary to recite the reasons given in that letter, but she went over the same ground again about being overworked, having work piled on top of her, being forced into the sales team without proper notice, constantly being told to do other jobs to suit the needs of the company, to carry out tasks above her pay grade and generally being pushed from pillar to post.

The grievance

49. That should have ended matters but Ms Hunt, perhaps anxious to resolve matters, decided to treat this resignation letter as a grievance and on 16 July Ms Elvin was invited to a grievance meeting. That meeting took place on 28 July 2020 and was held by Ms Acfield, who had previously dealt with the appeal against the verbal

warning. Ms Elvin chose to attend and engage with that process. It was dealt with conscientiously and Ms Acfield then interviewed both Ms Hunt and Ms Black in turn. Her outcome letter was not sent out until 15 October 2020, by which time the Tribunal claim form had been submitted. The “grievance” was not upheld. The only observation we make about that is that despite the findings covering five pages and going into considerable detail, not much attention was paid to Ms Elvin’s workload or to the events of 3 January.

50. Ms Elvin appealed this conclusion, so the grievance process was not ultimately resolved until 16 November 2020.

Applicable Law

Constructive dismissal

51. Turning to the applicable law, we start with the complaint of constructive dismissal. Constructive dismissal is not a term used in the Act, but section 95(1) gives the legal definition of a dismissal, and it includes where:

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

52. So there have to be circumstances justifying the employee in downing tools and walking out. In legal terms, there has to be a fundamental breach of contract by the employer. In cases of constructive dismissal that usually means a breach of what is known as the implied duty of trust and confidence. According to the House of Lords in the case of **Malik v BCCI** [1997] UKHL 23 that happens where an employer conducts itself

“in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence”.

53. This is not a case where the company has taken a particular step against Ms Elvin. Instead, things came to a head and she went off sick. That is not an uncommon situation and her case, at least up to this hearing, is that the events of 3 January were the final straw. It is important to consider how far the employer was responsible for that state of affairs. Guidance in such cases was given by Lady Justice Hale (as she then was) in **Barber v Somerset CC**, [2002] ICR 613 (2002) which considered the circumstances in which a psychiatric injury for work-related stress was reasonably foreseeable by an employer. Having reviewed recent guidance on stress at work she noted:

10. “... perhaps contrary to popular belief, harmful levels of stress are most likely to occur in situations where people feel powerless or trapped. These are more likely to affect people on the shop floor or at the more junior levels than those who are in a position to shape what they do.

...

28. Harm to health may sometimes be foreseeable without such an express warning. Factors to take into account would be frequent or prolonged absences from work which are uncharacteristic for the person concerned; these could be for physical or psychological complaints; but there must also be good reason to think that the underlying cause is occupational stress rather than other factors; this could arise from the nature of the employee's work or from complaints made about it by the employee or from warnings given by the employee or others around him.
29. But when considering what the reasonable employer should make of the information which is available to him, from whatever source, what assumptions is he entitled to make about his employee and to what extent he is bound to probe further into what he is told? Unless he knows of some particular problem or vulnerability, an employer is usually entitled to assume that his employee is up to the normal pressures of the job. It is only if there is something specific about the job or the employee or the combination of the two that he has to think harder. But thinking harder does not necessarily mean that he has to make searching or intrusive inquiries. Generally he is entitled to take what he is told by or on behalf of the employee at face value. If he is concerned he may suggest that the employee consults his own doctor or an occupational health service. ...
31. These then are the questions and the possible indications that harm was foreseeable in a particular case. But how strong should those indications be before the employer has a duty to act? Mr Hogarth argued that only "clear and unequivocal" signs of an impending breakdown should suffice. That may be putting it too high. But in view of the many difficulties of knowing when and why a particular person will go over the edge from pressure to stress and from stress to injury to health, the indications must be plain enough for any reasonable employer to realise that he should do something about it.
54. This guidance has an obvious application to cases such as this where an employee finally succumbs to stress and goes off sick. Any situation where a psychiatric injury is caused in circumstances where such an injury is reasonably foreseeable and where the employer has taken no steps to prevent it is likely also to be a breach of the implied duty of trust and confidence.
55. It was also established by the Court of Appeal in **Bournemouth University Higher Education Corporation v Buckland** 2010 ICR 908 that once an employer has committed a fundamental breach of contract it cannot be undone. The most conscientious grievance procedure will not undo that breach of contract, or "cure the breach" as it is termed. The only remaining question is whether the employee has decided to overlook it and "affirm the breach."
56. In the well-known words of Lord Denning MR:

"The employee must make up [her] mind soon after the conduct of which she complains: or if [she] continues for any length of time without leaving, [she] will lose

her right to be treat [herself] as discharged.”

57. It is also well established that she may carry on under protest for a while, without necessarily being taken to have affirmed the contract. There comes a point however when delay would indicate affirmation. In **WE Cox Toner (International) Ltd v Ms Crook** 1981 ICR 823, a company director was accused of gross dereliction of duty on insubstantial grounds by his fellow directors and threatened with dismissal. Six months of angry correspondence followed before the employer finally refused to withdraw the accusation and threats, and a month later he tendered his resignation. The Employment Appeal Tribunal held that he had affirmed the contract by this seven-month period, during which he had continued to work and accept payment.
58. For the purposes of comparison, in **Post Office v Roberts** 1980 IRLR 347, an employee continued working while her union representative was attempting to investigate the true position with her employer, and a delay of six weeks was held to be acceptable.

Conclusions

59. Applying that guidance to Ms Elvin’s case, it seems to us that there were ample clues here to reveal to the company that they needed to take action to prevent Ms Elvin going off sick with stress. That meant addressing her workload, and leaving her to get on with it without so many interruptions and changes. It is not necessary to recite all those findings but the first serious indication of mounting stress was her behaviour in the first disciplinary hearing on 28 August when she was so distressed. Both Ms Black and Ms Hunt accepted in those meetings some awareness of her stress and the factors which increased it were discussed.
60. That may have been the first indication that Ms Black and Ms Hunt had about her mental health problems but we are satisfied that Ms Bennett had knowledge of them and so the company had constructive knowledge of her mental health disability throughout – they certainly ought to have known about it. Indeed Ms Bennett’s knowledge has to be ascribed to the company and so amounts to actual knowledge.
61. It is accepted however that they became aware of her anxiety and OCD at that meeting. Hence they commissions an Occupational Health report. So it is not a question, as in the **Barber** case above, of an employee bottling things up and giving no indication of mounting stress levels - she told them that she was suffering from anxiety at work and the Occupational Health nurse told them as well. Clearly that was a serious problem, sufficient to recommend an Access to Work coach for six to twelve months. Not only was that not done but there was no prompt action to address her anxiety such as by reducing her workload at all and she was upset again in the second disciplinary hearing in November, when she explained all about her OCD and the sort of situations which increased her stress.

That was followed on 3 January 2020 by exactly the sort of issue that was likely to cause her problems. It involved leaving her normal duties to do a difficult, unfamiliar task, to a deadline, and where a company process was not, apparently, being followed. She had to stand her ground and insist that the correct process be followed. All of that was bound to raise her stress levels. It was the worst possible combination of circumstances and a situation into which she ought never to have been placed. It is certainly fair to regard it as a final straw, if not itself a fundamental breach of contract. We conclude that the test in section 95(1)(c) Employment Rights Act 1996 was met and these were circumstances in which she was entitled to terminate her contract without notice by reason of the employer's conduct.

62. But she did not do so. The question then is whether she affirmed the contract. An employee may put up with a great deal at work but still say to their employer, "I am prepared to put all that behind me and carry on or to return to work." If that is the case, it is too late afterwards to change their mind.
63. Having looked at the authorities set out above, the first point to note is that we are dealing with a delay of almost exactly six months, from 3 January to 2 July 2020 and that a delay of that order of magnitude is very much the exception. All of the circumstances have to be looked at though. One difference here from the **Cox Toner** case is that for much of this six month period she was off sick. For the first few weeks she was seriously ill and not in a position to make a decision. From the time of the meeting on 12 February 2020 Ms Elvin seems to have been unsure about whether she wanted to return or not. Had she resigned at that point it may well be that no question of affirmation would have arisen.
64. Then of course there was the national lockdown. We have considered the effect of that too. No great play was made of this by Ms Elvin. The company was still functioning. It had to support the care and education sectors and so she had a functioning job to go back to. She has not suggested that her mental health deteriorated during lockdown and that this made it more difficult for her to decide on a course of action. Overall therefore this does not seem to be a particularly significant feature.
65. No real explanation for the delay has in fact been put forward, or why she waited from week to week and month to month without contacting the company. Her rationale did however emerge at this hearing. First of all there is the allegation that she said at the resignation meeting that she just wanted to return to her old job. She made this very clear in her witness statement at para. 23:

"LH asked me what outcome I was looking for and I said that all I wanted was to be able to come back and do my job, the job I was hired to do, not be pulled from pillar to post, being made to do other jobs too. LH told me that the company could not accommodate this, me coming back to do my job."

66. As already noted, we have some concerns about the accuracy of this recollection, or whether there were some wires crossed over a return to work, but that is her case, and it is difficult to avoid the conclusion that her preference on 2 July was to return to her old job. She says in effect that the refusal by Ms Hunt was a final, final straw, and that she resigned in response to that, but that is not the way the case was advanced and recorded at the preliminary hearing, and we have already found that we prefer Ms Hunt's account of that meeting. All that we can take from that passage of evidence is that she wanted to come back to work.
67. That is not an isolated point. She also complained during this hearing about the *lack* of contact during her sickness absence from Ms Hunt, even though Ms Hunt went to some considerable lengths to get her to engage with a discussion about what had happened and what to do to fix it. She also continued to submit sick notes and co-operated with the grievance process, even to the extent of appealing the outcome, when she could simply have refused to have any more to do with the company.
68. So for all those reasons we find that she did affirm the contract by her delay and her evident desire to return to work, and so the complaint of constructive dismissal cannot succeed.

Time limits

69. Where does that leave her complaints of discrimination? Firstly, it is not necessary for us to make factual findings about her *physical* health conditions and whether they amounted to a disability – it is clear that it was her acknowledged mental health conditions that played the main part in her resignation. Secondly, there is the question of time limits. Since Ms Elvin affirmed the contract, and the final straw was on 3 January 2020, the last possible act of discrimination was also on that date. There is nothing, in our view, to criticise in the conduct of the two subsequent meetings and they are not relied on as acts of discrimination. It was the earlier events – the verbal warning and subjecting her to a disciplinary process that were the main focus of her complaints of discrimination arising from disability and of failure to make reasonable adjustments. For the avoidance of doubt we do not accept that any actions by the employer after Ms Elvin went off sick were unfavourable treatment, or less favourable treatment, or otherwise involved a discriminatory act or omission. It would have been better in the letters they sent out to have avoided mention of disciplinary action, but that is a standard provision and no such action was taken.
70. So, the last act of discrimination was on 3 January 2020 and the claim form (ET1) was submitted with the Tribunal on 14 September 2020, over nine months later.
71. By section 123 Equality Act 2010, the claim has to be brought within three months of the last act of discrimination. This period is extended by the time spent in early conciliation, although here that started and finished on 14 September, the same

day that the claim form was lodged, and so no time was added. Consequently any act of discrimination before 15 June 2020 is out of time.

72. Time can be extended where it is just and equitable to do so, but that does not simply mean that it should be extended whenever an employee has a good case. This was considered in **Robertson v Bexley Community Centre** [2003] EWCA Civ 576, where Lord Justice Auld held that:

“25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.”

73. Quite recently the Court of Appeal has revisited the correct approach to this in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** 2021 EWCA Civ 23 and emphasised that the main questions were:

- a. the length of the delay;
- b. the reasons for the lateness; and
- c. the potential prejudice to the other party.

74. Here all we can say is that there was a very considerable delay and we have not had any explanation for the delay in bringing the claim, even though it was begun in time to bring the complaint of constructive dismissal. We did not hear any evidence about prejudice to the respondent beyond the fact of having to meet a discrimination claim, but the first two points are significant. The reality is that the case rested on the finding of constructive dismissal and in particular on the issue of affirmation. Had that succeeded then the last act of discrimination would have been the date of resignation, not 3 January, and so the claim form would have been presented within three months.

75. We will just add in any event that the alleged harassment was long before 3 January. We are also not satisfied that there was a “protected act” for the purposes of a complaint of victimisation. Ms Elvin relies on the meeting on 28 August 2019 when she told her managers about her disability, but she has to go beyond that and make an allegation of a breach of the Equality Act, i.e. an allegation of discrimination, which she did not do. We are also not satisfied that there was a failure to make reasonable adjustments. The adjustments relied on concern the disciplinary process. It is said that a verbal warning should not have been given, and the disciplinary policy should not have been pursued at all. However, plenty of flexibility was shown over her absence, the steps taken did not ultimately prejudice her, and the fact of having a disability does not mean that all

steps to manage absence are precluded. That complaint does not rely on the failure to address workload and the way in which she was tasked with jobs, as it might have done, but even then the same time limit issues would apply.

76. Since we have already found that the events of 3 January involved a fundamental breach of contract, it follows that it also involved unfavourable treatment, and furthermore, treatment which arose in consequence of her disability, namely her OCD and the resulting difficulty in juggling tasks and dealing with the unexpected. No justification defence was put forward by the company, so the complaint of discrimination arising from dismissal would succeed but for the time limit point. As it is, that complaint too must be dismissed.
77. This is clearly a disappointing outcome for Ms Elvin and much more might have been done to address her mental health and manage her workload effectively. It is, we emphasise, only because of the delay in resigning (and other affirmation points) and the subsequent delay in bringing her claim to the Tribunal which have prevented her from succeeding.

Employment Judge Fowell
Date 11 March 2022