EMPLOYMENT TRIBUNALS

Claimant: Mr David Grayson

Respondent: HI Weldrick Ltd

Heard at: Leeds Employment Tribunal (via CVP)

On: 6 and 7 April 2022

Before: Employment Judge K Armstrong
Tribunal Member Mr M Brewer
Tribunal Member Mrs M Cairns

Representation
Claimant: In person
Respondent: Mr D Smith

JUDGMENT having been sent to the parties on 24 May 2022 and a request having been made in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the Tribunal provides the following

REASONS

Claims

1. The claimant brings claims for unfair dismissal, discrimination arising from disability and harassment related to disability.

Conduct of the hearing

2. The hearing took place over two days via video hearing (CVP). The claimant represented himself. The respondent was represented by Mr Smith, solicitor advocate. All witnesses and parties confirmed that they were able to engage fully with the proceedings.

Issues for the tribunal to decide

3. The issues were set out in list of issues determined at a Case Management Hearing (CMH) on 22 September 2021 and subsequently amended to reflect withdrawal by the claimant of a claim for direct discrimination. The

finalised list of issues was as set out at **62-66** of the bundle, including '*Table A'* which sets out the factual allegations relied on by the claimant.

4. In addition, the effective date of termination (EDT) of the claimant's employment was in issue. The parties had previously worked on the basis it was 29 March 2021. It was raised at the CMH by EJ Deeley that this might not be correct, although it was not included on the list of issues. Nothing of particular substance in this claim turns on it, but it is a matter going to the jurisdiction of the Tribunal therefore we have to make a determination. The respondent now says the EDT was 30 March 2021.

5. Therefore, in addition to the EDT, the issues for us to decide were:

Unfair dismissal

1.1 Was the claimant dismissed?
1.1.1 Did the respondent do the things set out at Table A?
1.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:
1.1.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
1.1.2.2 whether it had reasonable and proper cause for doing so.
1.1.3 Did that breach any other term of contract?
1.1.4 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.
1.1.5 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.
1.1.6 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

1.2 If the claimant is found to be dismissed what was the reason or principal reason for dismissal? The respondent says that the reason was capability and that it followed a fair procedure.

1.3 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

2. Remedy for unfair dismissal

2.1 If there is a compensatory award, how much should it be? The Tribunal will decide:
2.1.1 What financial losses has the dismissal caused the claimant?
2.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
2.1.3 If not, for what period of loss should the claimant be compensated?
2.1.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
2.1.5 If so, should the claimant's compensation be reduced? By how much?

2.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
2.1.7 Did the respondent or the claimant unreasonably fail to comply with it?
2.1.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
2.1.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
2.1.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

2.2 What basic award is payable to the claimant, if any?

2.3 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

3. Disability status (Equality Act 2010 section 6)

3.1 Did the claimant's condition of severe tennis elbow and detachment of the ligament and tendon from the bone, leading to arthritis, amount to a disability at the relevant times for the purposes of s6 of the EQA?

4. Discrimination arising from disability (Equality Act 2010 section 15)

4.1 Did the respondent treat the claimant unfavourably by doing the things set out at Table A?

4.2 The respondent accepts that the following things arose in consequence of the claimant's disability:
4.2.1 the claimant's absence from work;
4.2.2 the claimant's inability to perform the duties required by his role, including an inability to drive; and
4.2.3 the claimant's sleep deprivation.
Was the unfavourable treatment because of any of those things?

4.4 Was the treatment a proportionate means of achieving a legitimate aim?
The respondent says that its aims were:
4.4.1 To manage sickness of employees.

4.5 The Tribunal will decide in particular:
4.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;
4.5.2 could something less discriminatory have been done instead;
4.5.3 how should the needs of the claimant and the respondent be balanced?

4.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

5. Harassment related to disability (Equality Act 2010 section 26)

5.1 Did the respondent do the things set out at Table A?

5.2 If so, was that unwanted conduct?

5.3 Did it relate to disability?

5.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

5.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

6. Remedy for discrimination

6.1 What financial losses has the discrimination caused the claimant?

6.2 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

6.3 If not, for what period of loss should the claimant be compensated?

6.4 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

6.5 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

6.6 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

6.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

6.8 Did the respondent or the claimant unreasonably fail to comply with it?

6.9 If so is it just and equitable to increase or decrease any award payable to the claimant?

6.10 By what proportion, up to 25%?

6.11 Should interest be awarded? How much?

6. Table A (**66**) contains the following two factual allegations:

(1) 10 February to 26 March 2021 (inclusive); Cheryl Brown; put pressure on the claimant to return to work in a different role by: (a) 'harassing' the claimant from 10 February onwards into visiting a second occupational health doctor over 40 miles away on 2 March 2021; and (b) at a meeting on 26 March 2021: (i) asking the claimant to look at vacancies in the company's weekly memo and telling him that they were suitable alternatives to his normal role; (ii) stating that the claimant had a limited time in which to return to work; and (iii) discussing the possibility of dismissing the claimant at a meeting on 26 March 2021.

(2) On 29 March 2021; Cheryl Brown; The pressure from the respondent left the claimant with no alternative but to resign from his employment.

7. Both factual allegations are said to be relevant to the claimant's complaints of constructive dismissal and discrimination arising from disability. The first factual allegation is also said to be relevant to his claim for harassment related to disability.

Application to amend claim to include holiday pay

8. At the beginning of the hearing, the claimant applied to amend his claim to include a claim for holiday pay. That application was refused for the following reasons:

9. The Tribunal must carry out a careful balancing exercise of all the factors, having regard to the interests of justice and the relative hardship to the respective parties of allowing or not allowing the amendment.

10. We considered the following relevant factors: (i) the nature of the amendment – this is a significant amendment, bringing the addition of an entirely new claim. (ii) Time limits –the claim is now out of time. Therefore we have to consider whether to extend time, i.e. was it reasonably practicable to bring the claim within 3 months of the claimant's EDT. There is no evidence that it was not – the claimant was aware of the deduction by the time of his pay slip dated 1 May 2021, which was before the claim was brought. There is no reason why it could not have been brought in time. If we are wrong about this, we considered in any event that the claim was not brought within a further reasonable period. This claim has been ongoing for a significant time and there have been two previous case management hearings, when holiday pay was not raised as a claim.

11. We also considered the balance of prejudice. There is prejudice to the claimant in not being able to bring the claim. However this is outweighed by the prejudice to the respondent if we allow the amendment. They have not brought any evidence to the hearing on this point, the situation is not entirely straightforward as the holiday pay appears to have been offset against a previous overpayment and this is not an issue the present witnesses can deal with.

12. In light of all these factors, we decided it was not in the interests of justice or in line with the overriding objective to permit the amendment.

Evidence

13. We considered a bundle of documents comprising 388 pages. Page references in **bold** refer to this bundle.

14. We heard oral evidence via video link from the claimant, and on behalf of the respondent: Miss Cheryl Brown (HR advisor) and Ms Tracy Thornton (Head of HR). We were able to hear all the witnesses clearly and they confirmed they were able to see and hear the proceedings.

Findings of Fact

15. The claimant commenced employment with the respondent on 25 February 2019. He worked as a warehouse operative / delivery driver initially and then as a prescription delivery driver from 28 May 2019.

16. The respondent is a pharmacy company. They employ approximately 700 people in the UK, of which 45 are based at the same site as the Claimant, in Doncaster.

17. The claimant says that on 19 August 2020 he suffered an accident at work which caused an injury to his left arm. This is disputed by the respondent. We make no findings regarding this. It is not necessary in order for us to make our decision as it is conceded by the respondent that at all relevant times the claimant was disabled by reason of damage to the ligaments of his left arm, regardless of the cause.

18. From 20 August 2020 the claimant was absent from work. He did not return. The respondent has no company sick pay policy so after a few days of unpaid absence, the claimant remained on statutory sick pay (SSP) until 8 March 2021.

19. On 24 August 2020 the claimant provided a fit note citing '*multiple joint pains awaiting investigations*' (**205**). This was acknowledged by email by the claimant's line manager, as were all subsequent fit notes.

20. Also on 24 August 2020 the claimant had a meeting with Gill Skill, HR advisor (**202**). They discussed that he had previously suffered with chronic fatigue syndrome (CFS / ME), that this affected his ability to wear a mask, and there was also some discussion about difficulties he was experiencing with his left arm.

21. On 3 September 2020 the claimant provided a further fit note citing the same reason for absence (**208**). He also emailed the respondent to say that he had booked to see a consultant privately (**207**).

22. On 24 September 2020 a further fit note was provided citing the same reason for absence (**211**). The claimant emailed the respondent to say that he had attended a private appointment, was undergoing further investigations and that he had established that one of the issues was tennis elbow and that he was undergoing physiotherapy. He said he would return to work as soon as he was physically able (**210**).

23. On 22 October 2020 the claimant provided a further fit note (**214**). By covering email he said the tennis elbow was now diagnosed as bursitis, that he had been asked if he had received a blow to the arm and mentioned that he remembered the van door slamming on his arm one day. He said his arm was painful and he was unable to drive at present (**213**).

24. A further fit note was provided on 19 November 2020 citing '*CFS with persistent elbow pain'* (**217**) in the covering email the claimant expresses frustration with the situation and tells the respondent that he is attending another physiotherapy appointment the next day (**216**).

25. On 2 December 2020 the respondent requested the claimant to attend an appointment with an occupational health (OH) doctor in order to (**220**):

'determine your fitness to carry out your duties

determine when you might be fit to return to work after your period of sickness absence

determine what reasonable adjustments can be made to the working environment, because of your health condition.'

26. The claimant consented to this (**222**).

27. On 14 December 2020 the claimant attended for a telephone OH consultation with Dr Thomas. The report was produced on 17 December 2020 (**224**). Dr Thomas's view was that the claimant was currently unfit for work due to functional impairment to his arm. The diagnosis and the underlying cause for the arm problems was unclear. He stated:

'I am hopeful that Mr Grayson will improve over time and be able to return effectively to work. When this will be however I do not know
Long-term I would be optimistic that once the arm problem settles there is no other limiting factor that would prevent him from returning to work.

At this point the current symptoms are unlikely to represent a disability as they have not been present for more than 12 months and could reasonably be expected to settle over months with treatment.'

28. On 15 December 2020 the claimant was seen by an NHS orthopaedic consultant and referred for an MRI scan (**84**).

29. On 29 December 2020 the claimant provided a further fit note citing '*persistent elbow pain awaiting investigations'* (**231**). In his covering email he told the respondent he was awaiting an MRI scan (**229**).

30. On 4 January 2021 the respondent contacted the claimant to arrange a meeting to discuss the OH report. On the same date the claimant formally reported the alleged accident on 19 August 2020 (**234**).

31. On 11 January 2021 the claimant underwent a private MRI scan of his elbow.

32. On 14 January 2021 the claimant had a telephone meeting with Cheryl Brown (HR advisor) and his line manager to discuss the OH report. At this stage he had undergone the MRI scan but had not yet received the outcome. The minutes are in the bundle at **236**. The report was discussed and the claimant provided an update as to how he was feeling. He was in significant pain, having difficulty sleeping, and taking painkillers. The claimant also raised that he felt the injury was caused by an accident at work and he should therefore be receiving full pay during his sickness absence (**239**).

33. On 18 January 2021 the claimant attended a GP appointment at which he was informed of the findings of the MRI scan. He emailed the respondent the same day to tell them the outcome (**241**):

'There is no significant degenerative change. There is quite severe lateral epicondylitis. There is gross inflammation in the triceps insertion with what appears to be erosive change and severe adjacent enthesopathy.

The GP is forwarding the results today to the consultant. I have therefore spoken to the consultants secretary and she has booked me an appointment on Tuesday 26 Jan.

I am pleased that things are moving forward relatively quickly now and look forward to the consultants advice/treatment.'

34. On 26 January 2021 the claimant attended an appointment with the consultant. The consultant explained that the MRI results showed a problem with the tendons and ligaments attached to the bone of the claimant's arm. He advised rest, physiotherapy and pain relief. The claimant updated the respondent as to this (**244**).

35. On 28 January 2021 the claimant provided a further fit note citing '*persistent elbow pain on treatment'* (**246**). The claimant disputes that he was '*on treatment'* at this point as he had not yet started attending physiotherapy (the previous course of physiotherapy in November 2020 having been ceased as it was unsuccessful). The claimant states that he commenced physiotherapy some time in March and this seems to be in line with the medical records (**93)**. This is also confirmed by the claimant's email of 17 March 2021 to the respondent in which he states that he had just attended his first physiotherapy appointment (**295**). Therefore we accept that this is accurate.

36. There is no dispute between the parties as to what had happened up to the end of January 2021 and the claimant made it clear throughout the hearing that he makes no complaint about the respondent's conduct up to that point. He did say in oral evidence that they did not show any real care throughout the process, however to the extent that this might form part of his claim or the background to it, we are satisfied there was no inappropriate conduct by the respondent up to that point.

37. On 10 February 2021 the claimant was asked by the respondent to attend a follow up OH appointment (**259**). This is the first act complained of by the claimant. HIs response the same day was (**258**):

'Until I receive a response to my questions a month ago I don't feel agreeing to this is appropriate. My attendance at an appointment would be okay. However, you have every right to contact the professionals I have seen, for their advice from my consultations which were within the last month, unless you don't have confidence in what they have diagnosed/advised.'

38. In oral evidence, the claimant confirmed that he meant that he would not agree to an OH referral until his query regarding full pay raised in the meeting on 14 January 2021 was responded to. He agreed that he was putting pressure on the respondent to provide an answer, before agreeing to a further OH referral, using it as a '*bargaining chip'*.

39. On 11 February 2021, Miss Brown responded to the claimant confirming that he would not be receiving full pay. In the intervening period since 14 January 2021 she had referred the issue to more senior colleagues for a response (**258**).

40. On 15 February 2021 the claimant replied to Miss Brown (**266**). He stated that following on from the MRI scan he felt it was too early to even contemplate a return to work. He stated:

    'I hope to be afforded the time to recover but feel pressure from your request. I am disappointed but not surprised at the lack of care and compassion especially when I am not receiving sick pay from Weldricks when this was a workplace accident.'

41. On 18 February 2021 Miss Brown responded (**263**):

    'To clarify around the Occupational Health (OH) consent request; there is no intention to add any pressure to you. As you now have a diagnosis, this would give the Doctor at OH more information to provide us with detailed information on your occupational needs, if any. We do not have medical knowledge to make an informed decision of what duties you could/could not carry out and what adjustments may help, or even hinder you. Our aim is to support you and seek a way forward; as previously advised your consultants will provide information on your medical diagnosis only, rather than your occupational needs. This is our reason for seeking an occupational health report.

    We would appreciate if you could clarify your position on your consent to refer you to OH, by close of business on Monday 22 February 2021.'

42. On 19 February 2021 the claimant agreed to visit the OH doctor. He said, '*hopefully this can be arranged in Sheffield as [his wife] will be driving me there'* (**264**).

43. There were various emails exchanged around arranging the date and location for the OH visit. Miss Brown asked colleagues for recommendations as the previous OH Dr Thomas was not conducting face to face assessments. Eventually the respondent invited the claimant to an appointment with a Dr Dann in Holmfirth. They confirmed that they would reimburse the claimant for his mileage and it is not disputed that this was done promptly.

44. On 4 March 2021, the claimant visited Dr Dann for an assessment, in Holmfirth.

45. Having considered the evidence of the witnesses and the documentary evidence we are satisfied that the respondent were not acting inappropriately in arranging this assessment, or putting pressure on the claimant. By this point the claimant had been away from work for over six months. There had been a change in circumstances since the first OH report because the MRI scan results had been received. It was reasonable and proper for the respondent to seek to arrange an updated assessment to establish what adjustments could assist the claimant in returning to work and what the likely timescales were in light of that

diagnosis. We have considered whether it was unreasonable to expect the claimant to travel 35 miles to Holmfirth from Sheffield in order to attend the appointment. There is no real dispute that an in-person appointment was necessary and we are satisfied that it was appropriate for the appointment to be in person. In terms of the distance, it is not of itself unreasonable. The respondent attempted to identify an OH doctor who came recommended who was offering in person appointments at the time. We are not satisfied that this was unreasonable.

46. On 9 March 2021, the respondent received Dr Dann's OH report (**279**). The conclusions, in summary, are:

'Mr Grayson is unlikely to be able to return to lifting significant weight for the foreseeable future (for around the next 6 months). He may be able to return to a driving role, but I anticipate the specialist will advise he should minimise any lifting weight or task involving the need to rotate his arm inwards which could involve gripping the steering wheel for prolonged periods. [,,,] for the vast majority of people this condition has resolved by 12 months after onset, with appropriate pain relief and physiotherapy. Mr Grayson's his case the lateral epicondyle was particularly inflamed and he also has inflammation of the tendon insertion, confirmed on MRI. As a result his case may have a more prolonged recovery, particularly if any inflammatory cause is ever identified.

Mr Grayson may be able to return to work sooner if he can be offered a role that doesn't involved regular lifting or weight of over 5-7 kg with his right arm,

Mr Grayson may be permanently unfit, but it is premature to assess this, and recovery is likely in the next 6- 12 months.

Mr Grayson's condition may come under the remit of the Equality Act if it continues to affect him longer term, the severity and impact on activities of daily living would certainly come under the Act's remit.'

47. The respondent concedes that it had knowledge of the claimant's disability at this stage. We return to this later in our judgment.

48. On 11 March 2021 the claimant submitted a further fit note citing '*persistent elbow pain and heel pain awaiting investigations'* (**289**).

49. On 26 March 2021 Miss Brown emailed Dr Dann with some queries about her report. She queried a date, an apparent error where the name of some medication had been omitted, an account of the claimant's earlier sick notes, and in respect of the comment that the claimant might be able to return to work '*sooner*' if he can be offered a role that doesn't involve lifting, she asked Dr Dann to advise an estimated timeframe (**290** and **284**).

50. The claimant sought to criticise the respondent for 'going behind his back' and asking for amendments to the report without his consent. He accepted in oral evidence that Dr Dann telephoned him and asked if he agreed to her answering those questions, which he told her he did. We

are satisfied that they are appropriate questions for clarification and do not amount to any inappropriate attempt to influence Dr Dann.

51. On 24 March 2021 Miss Brown emailed the claimant to say she had received the amended report and could they discuss it on 26 March (**298**).

52. On 26 March 2021 Miss Brown and the claimant had a telephone meeting to discuss Dr Dann's report. The minutes are at **301** onwards in the bundle. There is a dispute as to what was said during that meeting; in particular whether the claimant was put under pressure to return to work by Miss Brown: (i) asking him to look at vacancies in the work memo of the same date, (ii) stating that the claimant had a limited time to return to work, and (iii) discussing the possibility of dismissing him in that meeting.

53. The claimant disputes the minutes that are in the bundle, stating that they are inaccurate because they were not sent to him immediately following the meeting. Miss Brown says that they are not verbatim but they are an accurate reflection of the discussions. She denies amending them before they were sent to the claimant. Where the claimant and Miss Brown's recollection of the meeting differs, we accept Miss Brown's account of the meeting. We do not find that the claimant was deliberately attempting to mislead us, but on balance we are satisfied that the minutes and Miss Brown's witness evidence provide an accurate record of the meeting.

54. This is for the following reasons. Firstly, we find that the notes were taken at the time of the meeting. Secondly, the claimant accepts that he was agitated during the meeting, and we find that he misunderstood or misremembered some of the things that were said. Thirdly, the claimant never put forward any alternative version of the notes. Finally, when certain passages from the notes were put to him in cross-examination he accepted that they reflected the gist of what was said, if they weren't completely verbatim, which suggests that the minutes are broadly accurate.

55. In terms of the specific allegations: firstly, we do not find that the jobs in the memo were said to be suitable alternatives to his normal role. We accept and find that there was some reference to the internal memo as being where roles would be listed, however, the roles in that particular memo (**306**) are clearly not appropriate for the claimant in terms of the hours, location or similarity to his current role. We are not satisfied that Miss Brown said that these were roles that were considered suitable alternatives for the claimant or implied or said explicitly that he should return to one of those roles.

56. Secondly, we are satisfied and find that the claimant asked Miss Brown directly how long his job could be kept open for. We accept her evidence that she replied that the respondent could not keep his job open indefinitely and that the business would have to make a decision, as described by Miss Brown in her witness statement at paragraph 71. We accept as per the minutes that the claimant responded to this with a comment along the lines of:

'Find that disappointing, so telling me I'm getting sacked. Want as much time to get fit and return to work, didn't ask for van door to hit me. Sick of going here there and everywhere, and not getting reimbursed for it.'

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57. The claimant accepted that this particular passage was accurate if not verbatim.

58. We do not find that this was putting the claimant under undue pressure. We find that the issue of dismissal was raised by the claimant not Miss Brown. She was simply making a statement of fact of the reality of the situation that the business would not be able to keep his job open indefinitely. She herself did not have the authority to make a decision about the claimant's dismissal.

59. The claimant concluded the meeting by saying he would like answers to the questions why he had not been paid in full and how long his job would be kept open for. Again, we find that this supports the respondent's evidence that Miss Brown did not tell the claimant that he would be dismissed, but that she said she couldn't give the claimant an answer at that stage how long his job would be kept available for him.

60. In the meeting the claimant and Miss Brown also discussed alternative roles in the warehouse, HR and marketing. We find that the claimant and Miss Brown both agreed that none of these roles at that point in time looked like realistic alternatives. Miss Brown undertook further investigation following the meeting by emailing the claimant's line manager to enquire whether alternative roles in the warehouse might be available or could be adjusted (**310**).

61. The claimant considered his position over the weekend and on Monday 29 March 2021 he sent a resignation letter by post (**308**). He stated:

    'Following our meeting on 26 March 2021 you have caused me great stress and I feel pressure from what you wanted to focus on regarding my return. This is way too premature as I voiced to you on several occasions. it was made clear by you in the meeting that I had very little time left to return to my current role and to this end I asked to be informed exactly how long'

62. He stated that he had no option but to resign with immediate effect.

63. On 31 March 2021 the respondent invited the claimant to attend a medical capability meeting to discuss the OH report – including arrangements for a return to work, and the possibility of dismissal (**318**).

64. By reply the same day at 18.38, the claimant emailed attaching a copy of his resignation letter (**320**).

65. This email was acknowledged by the respondent on 1 April 2021 (**323**).

66. On 6 April 2021 the respondent wrote to the claimant (**327**). The letter states that the resignation hard copy letter was received on 1 April 2021. The letter also states that the respondent has concerns regarding the claimant's welfare, he was invited to discuss the letter and informed that

he could raise a grievance. The letter states should the respondent not hear from him by 15 April 2021 they would process his resignation.

67. By 15 April 2021 the respondent had received no response and they confirmed the claimant's resignation was effective from 29 March 2021. (**331**).

68. Having considered the statute and the relevant case law, we are satisfied that the EDT is 1 April 2021, being the date that the respondent received notice of the claimant's resignation via the email sent after office hours on 31 March 2021, and the hard copy letter.

69. We heard evidence from Ms Tracy Thornton (head of HR) that although the respondent did not have a written capability or long-term sickness absence policy in place at the time, the procedure which was followed by Miss Brown was as she would have expected.

Relevant law

70. Where an employee has resigned, he will be treated as having been dismissed by his employer where there has been a repudiatory breach of contract, i.e. a significant breach going to the root of the contract: *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221.

71. The claimant relies on a breach of the implied term of mutual trust and confidence: the parties to the contract will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to seriously damage the relationship of confidence and trust which should exist between employer and employee: *Malik v BCCI SA (in Liq)* [1998] AC 20.

72. Breaches of this term will usually be fundamental.

73. There is no implied obligation on the employer to act reasonably: *Post Office v Roberts* [1980] IRLR 347, although reasonableness is one of the tools in the Tribunal's factual analysis for deciding whether there has been a fundamental breach: *Buckland v Bournemouth University Higher Education Corporation* [2010] EWCA Civ 121

74. If we find that the claimant is to be treated as having been dismissed, we must then consider the reason for the dismissal (i.e. the reason for the breach of contract). Section 98 Employment Rights Act 1996 (ERA 1996) sets out the statutory potentially fair reasons for dismissal. If a potentially fair reason is provided, the Tribunal must then consider whether the dismissal is fair or unfair depending on whether in the circumstances the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.

75. The Equality Act 2010 (EqA 2010) section 15 contains provisions relating to discrimination arising from disability and section 26 contains provisions relating to harassment. We do not recite these at length within this judgment – the tests are set out in the list of issues as defined by EJ Deeley and set out above at the start of this judgment.

76. *'Disability'* is defined by section 6 EqA 2010 as '*a physical or mental impairment with a substantial and long-term adverse effect on the complainant's ability to carry out normal day to day activities*.' It is accepted that the claimant in fact had a disability. The issue in this case is at what point did the respondent have knowledge of the claimant's disability. It is accepted that the respondent was aware that the claimant's disability had a substantial adverse effect on his ability to carry out normal day to day activities. The issue is whether they knew it had a long-term effect at the time of the alleged discrimination. Long-term is described as lasting or being likely to last more than 12 months.

Conclusions

77. We have set out our conclusions in relation to each of the identified issues.

Unfair dismissal

1.1 Was the claimant dismissed?

1.1.1 Did the respondent do the things set out at Table A?

78. Our finding is that the respondent did not do the things set out in Table A. They did not put pressure on the claimant to return to work or to return in a different role. We make this finding for the following reasons:

79. Firstly, the respondent did not put pressure on the claimant to return by 'harassing' him (in a non-statutory sense, which is how we have taken this to have been used by EJ Deeley in Table A) to attend an OH appointment on 3 March 2021. We have found that there was no inappropriate conduct by the respondent. The respondent acted reasonably in arranging the appointment and asking the claimant to attend. It was not done to put pressure on the claimant to return to work, but to find out more about his prognosis / diagnosis and how this impacted on his ability to work or how his impairment could be managed in the workplace.

80. Secondly, in terms of the meeting on 26 March 2021, as set out above, we find that Miss Brown was acting appropriately in the meeting. She did not put the claimant under pressure to return to work.

81. Therefore, when considering item two on the table, there was no pressure from the respondent which left the claimant with no option but to resign from employment.

1.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:
1.1.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
1.1.2.2 whether it had reasonable and proper cause for doing so.

82. It follows from our conclusions that by inviting the claimant to attend the OH appointment and by conducting the meeting on 26 March 2021, the respondent did not breach the implied term of trust and confidence.

83. There has been no fundamental breach of contract and the claimant resigned by letter dated 29 March 2021, effective 1 April 2021. Therefore there has been no dismissal and the claim for unfair dismissal fails.

3. Disability status (Equality Act 2010 section 6)

3.1 Did the claimant's condition of severe tennis elbow and detachment of the ligament and tendon from the bone, leading to arthritis, amount to a disability at the relevant times for the purposes of s6 of the EQA?

84. The fact of the claimant's disability is now conceded. We make no finding as to the particular label or diagnosis of the claimant's disability. This is not necessary in order to satisfy the statutory definition, which is a functional test. The respondent accepts that the claimant had severe difficulties arising from damage to the ligaments in his elbow.

4. Discrimination arising from disability (s.15 Equality Act 2010)

85. We accept the respondent's account that they were not aware that the claimant was disabled before 9 March 2021. Until that point they placed fair and appropriate reliance on the first OH report which referred to a relatively swift recovery. The MRI scan results in and of themselves without any further OH advice did not change this. There is therefore no possibility of discrimination at the time of the request for a second OH appointment.

86. The respondent accepts that it had knowledge that the claimant's disability was long-term by the date of receipt of the second OH report. The possibility of discrimination could therefore only apply to the meeting of 26 March 2021.

4.1 Did the respondent treat the claimant unfavourably by doing the things set out at Table A?

87. In any event, The actions which the respondent took throughout, in accordance with our findings, did not amount to unfavourable treatment. Their actions were consistent with normal procedure, as outlined to us by Ms Thornton. We are satisfied that it was a normal, reasonable procedure to follow and did not amount to unfavourable treatment.

88. Therefore the claim for discrimination arising from disability fails.

5. Harassment related to disability (Equality Act 2010 section 26)

5.1 Did the respondent do the things set out at Table A?

89. Again, as per our findings in relation to the other points, because the respondent did not put the claimant under pressure to return to work, or 'harass' him in the non-statutory sense, they did not do the things set out at Table A.

5.2 If so, was that unwanted conduct?

90. In so far as the respondent did do the things in Table A i.e. they arranged a second OH assessment in Holmfirth and conducted the meeting on 26 March 2022, this was not unwanted conduct. The claimant agreed to attend the OH meeting in early March. On his own admission, his aim in initially refusing to attend was because he wanted an answer to his question about his pay.

91. The conduct in the meeting on 26 March 2022 cannot have been unwanted conduct – it was a discussion regarding possible adjustments. As we have found, it was the claimant who raised the question of a timescale for his return to work, and it was the claimant who raised the terminology of dismissal.

92. Therefore the harassment claim also fails.

93. All the claims are dismissed.

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Employment Judge **K Armstrong**

Date: 26 May 2022