Case No: 2500730/2022

EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Laverick**

Respondent: **S2S Solutions Ltd**

Heard at: **Newcastle Employment Tribunal via Cloud Video Platform**

On: **3 & 4 November 2022**

Before: **Employment Judge Murphy**
Mr M Moules
Mrs S Don

Representation

Claimant: In person

Respondent: Mr C Gunnell, Director of the Respondent

JUDGMENT having been sent to the parties on 18 November 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

The unanimous judgment of the Tribunal was as follows:

1. The claimant was unfairly dismissed. The respondent is ordered to pay to the claimant compensation in the sum of TWO THOUSAND EIGHT HUNDRED AND NINETY-ONE POUNDS AND SEVENTY TWO PENCE (£2,891.72).

2. The claimant's complaints that the respondent has unlawfully discriminated against her contrary to sections 15 and 39(2) of the Equality Act 2010 ("EA") are well founded and succeed. The respondent is ordered to pay the claimant compensation in the sum of FOUR THOUSAND NINE HUNDRED AND NINETY SEVEN POUNDS AND FIFTY PENCE (£4,997.50).

3. The claimant's claim that the respondent unlawfully discriminated against her contrary to sections 20 and 21 of EA by failing to make a reasonable adjustment does not succeed and is dismissed.

4. The claimant's claim for breach of contract in respect of her notice pay does not succeed and is dismissed.

1. This final hearing took place remotely by video conferencing. The claimant complained of constructive unfair dismissal contrary to section 94 of the Employment Rights Act 1996 ("ERA"), constructive dismissal contrary to section 39 of EA, discrimination contrary to section 15 of EA, a failure to make reasonable adjustments contrary to section 21 of EA and breach of contract pursuant to the Extension of Jurisdiction Order 1994. The respondent denied all claims.

2. The claimant gave evidence on her own behalf. The respondent led evidence from Chris Gunnell, Director. Evidence in chief was taken from written witness statements with some supplementary oral evidence in chief. A joint bundle was lodged running to approximately 110 pages.

3. The issues to be determined in the case were identified by EJ Shore in a Case Management Order ("CMO") sent to parties on 12 August 2022.

4. They were identified in that CMO as follows (the order has been altered):

<u>Reasonable Adjustments (sections 20 & 21, EA)</u>

a. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? Yes, the respondent accepts it did so from 4 August 2021.
b. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:
    i. A requirement to use the stairs and ladders in the shop?
c. Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant would be caused pain, injury and distress?
d. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?
e. What steps could have been taken to avoid the disadvantage? The claimant suggests:
    i. The respondent should have confirmed that the current arrangements should be kept in place.
f. Was it reasonable for the respondent to have to take those steps and when?
g. Did the respondent fail to take those steps?

<u>Discrimination arising from disability (s.15, EA)</u>

h. Did the respondent treat the claimant unfavourably by:

   i. The respondent's alleged intimated wish that the claimant recommence using the stairs and ladders in the shop; and
   ii. The constructive dismissal of the claimant.

i. Did the following things arise in consequence of the claimant's disability:
   i. Pain from using stairs and ladders meaning that the claimant could not use the stairs and ladders in the premises?

j. Was the unfavourable treatment because of that thing? Did the respondent constructively dismiss the claimant because of her inability to use the stairs and ladders?

k. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:
   i. On 16 December, respondent's aim was to talk to the claimant to review measures that had been put in place and how it was looking after the claimant's wellbeing

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

m. The respondent accepts that it knew that the claimant had the disability from 4 August 2021.

Remedy for Discrimination

n. What financial losses has the discrimination caused the claimant?
o. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
p. If not, for what period of loss should the claimant be compensated?
q. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
r. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
s. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
t. Should interest be awarded? How much?

Unfair dismissal

a. Was the claimant dismissed?
b. Did the respondent do the following thing:
   i. Being told at meeting on 31 January 2022 that her reasonable adjustments would be withdrawn and that she had the options of going sick, going sick long term or dismissal for inability to fulfil her contractual agreement?
c. Did that breach the implied term of trust and confidence? The Tribunal will need to decide:
   ii. 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
   iii. whether it had reasonable and proper cause for doing so.

iv. 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.
v. Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of the duty of trust and confidence was a reason for the claimant's resignation.
vi. 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.

d. If the claimant was dismissed, what was the reason or principal reason for dismissal i.e. what was the reason for the breach of contract? The respondent suggests it would be capability.
e. Was it a potentially fair reason?
f. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?
g. If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
    vii. The respondent genuinely believed the claimant was no longer capable of performing their duties;
    viii. The respondent adequately consulted the claimant;
    ix. The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
    x. Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;
    xi. Dismissal was within the range of reasonable responses.
h. If the unfair dismissal claim succeeds, and if there is a compensatory award, how much should it be? The Tribunal will decide:
    xii. What financial losses has the dismissal caused the claimant?
    xiii. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
    xiv. If not, for what period of loss should the claimant be compensated?
    xv. 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?
    xvi. If so, should the claimant's compensation be reduced? By how much?
    xvii. If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?
    xviii. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
    xix. Does the statutory cap of fifty-two weeks' pay apply?
i. If the unfair dismissal claim succeeds, what basic award is payable to the claimant, if any?
j. 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?

<u>Breach of Contract</u>

k. What was the claimant's notice period?
l. Was the claimant paid for that notice period?
m. If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?

Findings of fact

5. The following facts and any referred to in the 'Discussion / Decision' section were found to be proved on the balance of probabilities.

6. The respondent is a company that operates a pet shop in Bedale. The claimant was employed by the respondent as a shop assistant, and was contracted to work 8 hours per week on a Monday. She had worked at the shop since November 2005 and her employment transferred to the respondent under TUPE from a previous owner of the shop on 21 November 2011. The claimant's contract contained a clause as to hours of work which said she may "*from time to time be required to work such additional hours as is reasonable to meet the requirements of the employer's business at their normal hourly rate. This includes alternative day working, e.g. Saturday and holiday cover*".

7. The claimant also had another job working from time to time as an invigilator, invigilating school exams. Generally, her hours doing this work supplemented her hours working for the respondent. Occasionally, in the event of a clash, she sought and took annual leave from the respondent to carry out invigilator work.

8. At the material time, in 2021 / 2022, the respondent had two directors, namely Chris and Lorraine Gunnell. Further to a restructure in 2018, the respondent employed the claimant and one other individual called Lucy who was a student employed to work usually on Saturdays. However, on occasion, Lucy was asked to and did cover additional shifts to suit the business on days which were not Saturdays, including, by way of example, the 15th and 16th October 2021.

9. On 4 August 2021, the claimant had a telephone call with Mr Gunnell. He had asked her to consider some additional shifts in October 2021. During the call, the claimant informed Mr Gunnell that she had arthritis in both knees and for that reason she didn't think she'd be able to work two consecutive days but would work the extra days with a break in between. She said it was a recent diagnosis. It was identified during the conversation that the use of a step ladder to reach the top shelf and the use of the stairs down to the stock room were problematic. The claimant was told by Mr Gunnell that she should not use the ladder or the stairs. The claimant told Mr Gunnell that she would ultimately require surgery but she had been given no indication that any date for a procedure was likely in the near future. She told Mr Gunnell that without the surgery it was very unlikely there would be any improvement in her symptoms.

10. On or about 15 August 2021, Mr Gunnell prepared a document he called a "*Health and Wellbeing Risk Assessment*" which was left at the shop for the claimant's signature when she attended her next shift on Monday 16 August 2022. The document gave instructions, among other matters, not to use the stairs or step ladder, only to top up from items that could be accessed safely and lifted with both feet on the floor. The letter included the sentence "*The situation will be reviewed on a weekly basis in order to identify any issues affecting either you or the business*." There was a request at the bottom for the claimant to sign the document.

11. The claimant did not immediately sign it. She had concerns about what was meant by the reference to reviewing the situation on a weekly basis. She was concerned her employment was vulnerable and might be terminated on a week's notice if Mr Gunnell decided she was unable to fulfil her duties. The claimant told Mr Gunnell she was not keen on signing the risk assessment until she had spoken to him.

12. On 1 September 2021, Mr Gunnell called the claimant. He recorded the call without providing notice to her that he was doing so. During that phone call, the claimant expressed concern about the part in the letter that said the situation would be reviewed on a weekly basis. She said "*..what I don't want is to have a job one week and not the next*." Mr Gunnell responded "*nobody wants that ..but we gotta make sure that we're keeping you safe, but we've also gotta to review it so that by keeping you safe we're not making detrimental decisions in relation to the ongoing recovery of the business. That's what that means …we're also bound by health and safety that once we've put something like this in that it has to be reviewed on a regular basis*."

13. Later in the same call, the claimant and Mr Gunnell discussed the issues with stocking up. The claimant suggested purchasing a grabber so she could reach things from the top shelf. Possibilities about moving specific items of stock were discussed. There was also discussion about the risk of stock running out during the claimant's shift. It was acknowledged that generally, once stocked up before a shift, the items didn't run out from day to day, though this had occurred in relation to one item on one occasion. Mr Gunnell discussed the impact on the business of the adjustments which had been made. One aspect of this to which he referred was "*the impact on the business as in the stuff available to sell*." Another impact to which he referred was "*getting it ready and stocked up prior to you coming in*". He gave the example of the day before the claimant's last shift when he had been busy then had to stay behind and make sure everything was topped up prior to the claimant coming in the next day.

14. Mr Gunnell said "*now, whether that's sustainable in the long term is something we'll need to look at*." The claimant later asked him "*what happens if you think that like you cannot like you just said you can't manage to fill up the shelves and stuff and it's not being able to get done before I come in on a Monday*?" Mr Gunnell replied initially that he did not know although he'd thought about it but nothing could be cast in stone. He went on to say that the options were (1) you assess that you can't do your job and

therefore go on the sick and (2) we assess that you can't do your job and therefore advise you to go on the sick.

15. The parties knew that the claimant's earnings were below the lower limit required to be eligible for Statutory Sick Pay ("SSP). The claimant was not entitled to any company sick pay and, in the event of sickness absence, she would not be paid.

16. Mr Gunnell went on to observe during the call that at some point the claimant would have treatment and would go on the sick. He then identified a third option that the job would be held open for the claimant based on what her doctor said and what the claimant said they would "bring [her] back when she was fit to do so".

17. It was acknowledged during the call that nothing would change without the claimant having surgery. Having acknowledged this, Mr Gunnell continued "*ultimately I suppose … I'm just thinking like if we turn round and deem you couldn't do your job then it would be a case of you have to leave sort of thing which I think is way down the line, that's no one's intention*." He also said words to the effect that if the claimant felt the job was making her worse or couldn't manage the reduced duties or if the respondent was thinking it was getting to the point where there wasn't stock available upstairs on the shop shelves and they couldn't resolve it by rearranging stock storage, then they would say "*get yourself on the sick, let us know when you're sorted out and there's a job there, sort of thing*".

18. Following the call, the claimant signed the Risk Assessment document. In the period that followed, from 1 September to 16 December 2021, the claimant continued to work her Monday shifts with the adjustments in place. She worked alone and did not physically work alongside Mr Gunnell until 16 December 2021. The claimant was able to perform the duties of her role as long as the adjustments remained in place. Her arthritis did not prevent her from carrying out any of the remaining aspects of her job as long as she did not require to climb the ladders or go downstairs to the stock room. The claimant had no date for surgery from her medical professionals and had received no indication of any prospect that one would be forthcoming in the near future.

19. The claimant did not feel able to work two days in a row because of her arthritis on the occasion in October when the respondent required additional cover but she offered to cover shifts that were not consecutive. In the event, Mr Gunnell asked Lucy to cover both shifts.

20. The impact for the respondent in this period was that after close at 4pm on a Saturday, Mr Gunnell would spend time ensuring that the shelves were stocked up to the max in readiness for the claimant's shift on a Monday. (The store was closed on Sundays). This included bringing up a box of biscuits for the claimant to place on shelves when she came in for her shift.

When he came to work on a Tuesday morning, he would also require to replenish any stock to the shelves from the stockroom which had been sold in the course of the claimant's shift, leaving the shelf depleted. This added to Mr Gunnell's duties. At the material time, he was concerned about the business as they tried to bounce back after the Covid restrictions. He removed a biscuit box in November 2021 from the shop floor as he was concerned it could be a trip hazard for the claimant. Sometimes after the claimant's shift, he noted some stock might be running low with, for instance, only two packets left of a particular product on display for sale in the shop.

21. Occasionally, certain displays were empty on his arrival on the Tuesday after the claimant's Monday shift, however, this was very rare. There was no meaningful financial loss to the business which could be attributed to the adjustments over the period they were in place.

22. During their shift together on 16 December 2021, Mr Gunnell said to the claimant "*we need to have a chat about you getting back to normal duties*". We do not accept that during that conversation it was agreed that the adjustments in place were working and that no change or additions were needed at that time. We prefer the claimant's account that the conversation caused her concern as she knew that she was simply unable to resume her normal duties which included using the step ladder to access the top shelves and using the stairs down to the stockroom. We accept that the claimant, after reflecting upon what Mr Gunnell had said that day, requested a so-called 'staff meeting' which, in effect, was simply a meeting with Mr Gunnell and the claimant.

23. The meeting took place on 31 January 2022. The claimant was invited by Mr Gunnell to provide him with any questions she may have in advance. The claimant declined to do so. During the meeting on 31 January 2022, Mr Gunnell once again raised the question of the claimant returning to normal duties. The claimant confirmed she would not be able to do so as nothing to do with her arthritis had improved. She voiced her view that she didn't believe the adjustments in place were having a detrimental effect on the business as she had very rarely been asked to get something from downstairs or from the high shelves. Mr Gunnell agreed with the claimant this was so.

24. During the meeting, there was some discussion regarding the fitting of handrails to the stairs down to the stock room. Mr Gunnell told the claimant that this matter was governed by building regulations and that, under the circumstances, it was not appropriate or practical to fit handrails to the shop stairs. He said it was only right to review the arrangements then in place to accommodate the claimant's arthritis, 6 months having passed. He said words to the effect that the claimant was not able to fulfil her contractual obligation of providing cover for the owner's absence (mainly on annual leave). He was referring here to the issue whereby the claimant had indicated a difficulty with covering two days back-to-back in October 2021 but had offered to cover shifts with a break between them. In the event, Lucy, had covered them both.

25. The claimant suggested the possibility of someone else coming in on the preceding shift to the claimant's or for the last hour of the claimant's shift to assist with the stocking up. The claimant offered to pay for this out of her own wages. She suggested the Saturday girl, Lucy, could do this. Mr Gunnell responded that Lucy was a student. Anyone else, he advised, would not be covered by their insurance as they would not be an employee. His implication was that no one could do this.

26. Me Gunnell also told the claimant that all modifications that were practical and relevant had been carried out, and there were no alternative roles available such as an admin role. Due to this fact, he said the options going forward were that the claimant go on long term sickness absence (for which she would be ineligible for SSP) or the termination of her contract. With regard to termination, it was suggested by Mr Gunnell that an option would be for the claimant to resign. Alternatively, it was suggested notice could be given by the respondent on the grounds of the claimant being unable to fulfil her contractual agreement. The claimant told Mr Gunnell she was not happy to have her employment terminated or to have to resign.

27. Mr Gunnell proceeded to encourage the claimant to consult with her GP at the earliest opportunity to get an up-to-date picture of her health condition and its ongoing impact on her employment. She was told further decisions and actions would be based on this information.

28. On 1 February 2022, the claimant visited her GP. Her GP issued a fit note on that date for two months which recorded the claimant's condition and indicated that she may be fit for work, taking account of the following advice: "*to work within limits of the pain in her knee joint. This may involve brief periods of rest on a chair at work. Stairs and steps may exacerbate the pain and perhaps adaptations here could be considered by occupational health*."

29. The claimant called Mr Gunnell on 2 February 2022 to advise of the contents of the fit note. He considered these and concluded that, as had been discussed on 31 January, there were no adaptations that were suitable and therefore the correct course of action was "removal". He indicated he would not take further action or discussion without having sight of the fit note which he had not yet seen. He saw the fit note on Tuesday 8 February 2022 and telephoned the claimant that same morning. He said that no further practical modifications or alterations could reasonably be carried out to either the workplace or the job description. He identified sickness absence as an option but noted the lack of SSP or benefits available to the claimant in such event. He said that termination of her contract was still an option as this would allow the claimant to apply for Job Seekers Allowance if it was not she who left the employment. He noted it would also allow the claimant to seek an alternative job. He suggested that the contractual notice period was one week. He discussed the possibility of increasing this to assist the claimant financially but said this would be dependent on external factors at the time. He said no immediate action was needed or would be taken but suggested both parties ensure that any changes be identified as soon as practicable.

30. In the following period, the claimant felt upset and depressed. She had worked at the shop for over 16 years but was increasingly unhappy with the circumstances. She worked her shifts on 14 and 21 February 2022. On 27 February, she sent Mr Gunnell two emails with comments and statements regarding the notes of the meeting they had had on 31 January 2022 and the subsequent call on1 February 2022 which he had prepared and sent to her.

31. Only one of her emails was produced to the Tribunal. The claimant took exception in her email dated 27 February 2022 to the record of the discussion on 1 February 2022 when Mr Gunnell had commented (in response to the GP's comments in the Fit Note) that the claimant had enjoyed longer than brief periods on a chair for a very long time. In her correspondence, she observed she had brought the chair in in 2015 with his permission as a result of a sprained ankle. She further pointed out that he was not in the shop on her day of work and queried how he could comment that she enjoyed longer than brief periods on a chair.

32. The claimant worked her shift on Monday 28 February 2022. On Thursday 3 March 2022, she consulted her GP. During the appointment, her GP diagnosed mixed anxiety and depression. Reference was made to the arthritis in her knees and the claimant's concern about how that was impacting her job as well as other personal circumstances relating to the serious illness of the claimant's father. The claimant was struggling to concentrate. She had lost her appetite and had been unable to eat for the last three days. She was feeling nauseas. During the appointment she became tearful at times, particularly when speaking to the doctor about her father. The GP prescribed sertraline but told her it would take 2 weeks before it became helpful. The claimant's father's illness was a significant contributing factor to her poor health at the material time. The claimant's concerns about her treatment at work also contributed.

33. On 6 March 22, the claimant sent an email to the respondent at 17;28. It read as follows:

> *Chris, due to what I feel has been unfair treatment, and the untenable position I have been put in due to the arthritis in my knees, both of which have had an adverse impact on my mental health, I have made the decision to resign from my position of shop assistant with immediate effect. I have posted the shop key and safe key through the door of shop and will not be at work tomorrow.*

34. Mr Gunnell did not read the email until he received a text message from the claimant on 7 March 2022, alerting him to its existence. On that date, he wrote to the claimant offering the opportunity to meet and discuss the issues raised in her resignation email. The same day, the claimant replied that she did not want to meet.

35. As at 7 March 2022, the claimant was 57 years' old and had 16 years recognised continuous service with the respondent and the predecessor employer from which she had transferred.

36. The claimant was upset and disappointed not only at the respondent's treatment of her but the loss of the previous positive relationship they had had at a personal and work level.

37. During the period after the claimant's employment ended, the claimant worked for 4 weeks on invigilating work in the period between March and June 2022. This included sometimes working on four occasions during the hours on Mondays when she would have worked for the respondent had she remained in employment.

38. The claimant did not apply for any new jobs in the 12 weeks following her resignation. She was concerned about whether she would be able to carry out any of the retail roles which she saw advertised because of the arthritis in her knees and the requirement, she anticipated, for long periods of standing.

39. The claimant was paid National Minimum Wage at the time her employment with the respondent ended. At that time, she was paid £8.91 per hour. Her weekly gross wage was £71.28 per week. Her net wage was the same as she did not pay tax or NI on her wages from the respondent owing to her low income. After her employment terminated, from 1 April 2022, the applicable National Minimum Wage rate increased to £9.50. At that rate the claimant's gross (and net) weekly wage with the respondent would have increased to £76 per week based on the claimant's basic 8-hour week, had she remained employed.

40. The claimant has not received any benefits since the termination of her employment. She had not applied for any alternative employment by the date of the hearing (4 November 2022). There was no scope for the claimant to increase her invigilating work. She considered this but, because of its seasonal nature and because all the schools sit their exams at the same time, it was not an option to carry out these duties at other schools or at other times in addition to those already worked.

Relevant Law

Duty to make Reasonable adjustments

89. There is a duty in certain circumstances on an employer to make reasonable adjustments in relation to a disabled employee. The relevant provisions are contained in the EA and are as follows:

> ***'20 Duty to make adjustments***
>
> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and*

the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonably practicable to have to take to avoid the disadvantage.

….

21 Failure to comply with duty

(1) A failure to comply with the first … requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person

90. The claimant need not identify the particular adjustment at the time the adjustment falls to be made (See EHRC Code para 6.24). At that stage the onus to comply with the requirements of the EA is on the employer.

91. However, the EAT has confirmed that, by the time of the Tribunal hearing, there should be some indication of what adjustments the claimant alleges should have been made (**Project Management Institute v Latif** [2007] IRLR 579). What is necessary is that the respondent understands the broad nature of the adjustment proposed and is given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not (para 55).

Discrimination arising from disability

92. The claimant also brings a complaint of discrimination arising from disability under section 15 of EA. The provisions are as follows:

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Remedy (Discrimination under the EA)

93. Where there is a breach of the EA, compensation is considered under s.124 which refers in turn to into section 119. That section includes provision for injury to feelings. The focus is on the actual injury suffered by the claimant and not the gravity of the acts of the respondent (**Komeng v Creative**

Support Ltd UKEAT/0275/18/JOJ).

94. Three bands were set out for injury to feelings in **Vento v Chief Constable of West Yorkshire Police (No 2)** [2003] IRLR 102 in which the Court of Appeal give guidance on the level of award that may be made. The three bands were referred to in that authority as being lower, middle and upper. Sums in the top band range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of race or sex. The middle band, according to the Court of Appeal in **Vento**, should be used for serious cases which do not merit an award in the highest band. Awards in the lowest Vento band were said to be appropriate for less serious such as where the act of discrimination is an isolated or one-off occurrence. Awards below the lower limit of the lowest band are to be avoided altogether as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

95. In **De Souza v Vinci Construction (UK) Ltd** [2017] IRLR 844, the Court of Appeal suggested guidance be provided by the President of Employment Tribunals as to how any inflationary uplift should be calculated in future cases. The Presidents of the Employment Tribunals in England and Wales and in Scotland have issued joint presidential guidance updating the **Vento** bands for awards for injury to feelings. In respect of claims presented on or after 6 April 2022, the Vento bands include a lower band of £990 - £9,900; a middle band of £9,900 - £29,600; and a higher band of £29,600 - £49,300.

96. An award may also be made for financial losses sustained as a result of discrimination. Where loss has occurred as a result of the discrimination, tribunals are expected to award compensation that is both adequate to compensate for the loss and proportionate to it (**Wisbey v Commissioner of the City of London Police** [2021] EWCA Civ 650). The aim is to put the claimant in the position, so far as is reasonable, that he or she would have been had the tort not occurred (**Ministry of Defence v Wheeler** [1998] IRLR 23).

97. The question is “what would have occurred if there had been no discriminatory dismissal… If there were a chance that dismissal would have occurred in any event, even if there had been no discrimination, then in the normal way that must be factored into the calculation of loss“ (**Abbey National plc and anr v Chagger** [2010] ICR 397).

98. There is a duty of mitigation, namely to take reasonable steps to keep losses sustained by a dismissal to a reasonable minimum. That is a question of fact and degree. It is for the respondent to discharge the burden of proof where a failure to mitigate is asserted (**Ministry of Defence v Hunt and ors** [1996] ICR 554). It is insufficient for a respondent merely to show that the claimant failed to take a step that it was reasonable for them to take: rather, the respondent has to prove that the claimant acted unreasonably.

99. In discrimination claim case, where it appears to the Tribunal that an employer has unreasonably failed to comply with the Acas Code of Practice

on Disciplinary and Grievance Procedures, the tribunal may, if it considers it just and equitable in all the circumstances, increase any award to the employee by up to 25%. It may likewise reduce any award where there has been an unreasonable failure to comply on the employee's part (s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA").

100. The Tribunal may include interest on the sums awarded and should consider whether to do so without the need for any application by a party in the proceedings. If it does so, it shall apply a prescribed rate. The rate of interest is prescribed by legislation and is currently 8% (section 17 of the Judgments Act 1838).

Unfair dismissal (constructive)

41. Section 95 of ERA defines a dismissal, including what is commonly referred to constructive dismissal in subsection (1)(c):

> "***95 Circumstances in which an employee is dismissed***
>
> *(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if) -*
>
> *…..*
>
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

101. The onus of proving a constructive unfair dismissal lies with the claimant. The case of **Western Excavating Ltd v Sharp** [1978] IRLR 27 sets out four conditions which must be met to succeed in such a claim:

1) There must be a breach of contract by the employer, actual or anticipatory;

2) That breach must be significant, going to the root of the contract, such that it is repudiatory;

3) The employee must leave in response to the breach and not for some other, unconnected reason; and

4) The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he or she may have acquiesced in the breach.

102. In every contract of employment there is an implied term, articulated in the case of **Malik v BCCI SA (in liquidation)** [1998] AC 20 as follows:

> "*The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.*"

103. In **Baldwin v Brighton and Hove City Council** [2007] IRLR 232, the EAT held that the use of the word "and" following "calculated" in the passage quoted from **Malik** was an erroneous transcription of previous authorities, and the formulation should be "calculated *or* likely" (emphasis added). The EAT reaffirmed this modification in **Leeds Dental Team Ltd v Rose** [2014] IRLR 8:

> "*The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is to be taken to have the objective intention spoken of…*"

104. In **Firth Accountants Ltd v Law** [2014] IRLR 510, the EAT noted that in a case concerning a breach of the implied term of trust and confidence, there must have been no reasonable or proper cause for the employer's conduct for there to be a breach of the implied term. If there was reasonable and proper cause for the conduct, there is no breach of the **Malik** term and no dismissal.

105. In **Omilaju v Waltham Forest London Borough Council** [2005] 1 All ER 75, the Court of Appeal held that a final straw which is not itself a breach of contract could result in a breach of the implied term of trust and confidence. The essential quality of that act was that, when taken in conjunction with the earlier acts on which an employee relied, it amounted to a breach of the implied term of trust and confidence. It had to contribute something to that breach, although what it added might be relatively insignificant.

106. Further guidance in so-called 'last straw' cases where resignation is the culmination of a course of conduct comprising several acts or omissions across a period of time was provided by the Court of Appeal in **Kaur *v* Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978:

> "16. *Although the final straw may be relatively insignificant, it must not be utterly trivial; the principle that the law is not concerned with very small things … is of general application.*
>
> …
>
> *19. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.*

42. Delay will not of itself amount to acquiescence, but it will be an important factor. In **Chindove v William Morrison Supermarkets Ltd** UKEAT/0201/13, a period of six weeks' sickness absence before resigning was held not to amount to affirmation. The EAT said that, as a general principle, a tribunal might be more indulgent towards the period of delay

because the need to make a decision one way or the other was arguably less pressing than if the employee was continuing to actually work for the employer.

Discriminatory Constructive Dismissal contrary to the EA

43. Section 39 of EA provides as follows at sub paragraph (2):

> *An employer (A) must not discriminate against an employee of A's (B)—*
>
> *(a) ….*
>
> *(b);*
>
> *(c)by dismissing B;*
>
> *(d)…*

44. Subsection (7) of Section 39 elaborates

> *In subsections (2)(c) … the reference to dismissing B includes a reference to the termination of B's employment—*
>
> *(a)…*
>
> *(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.*

45. The different ways in which an employer, A, can discriminate against an employee B are set out in Chapter 2 of the Equality Act 2020. These include discrimination arising from disability (section 15) and failing to comply with a duty to make reasonable adjustments (sections 20 *et seq*).

46. Discriminatory conduct will often but not inevitably amount to a breach of the implied term of trust and confidence. In a number of reported cases, for example, a failure to make reasonable adjustments has been held to breach the term (**Meikle v Nottinghamshire County Council** [2004] IRLR 703; **Greenhof v Barnsley MBC** [2006] IRLR 98).

Remedy: unfair dismissal

107. An award of compensation for unfair dismissal consists of a basic award and /or a compensatory award. The formula for calculating the basic award is prescribed by legislation. However, where the Tribunal considers that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award, the Tribunal shall reduce that amount accordingly (s.122(2) of ERA).

108. The compensatory award is such amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the employee as a result of dismissal insofar as attributable to actions of the employer. The compensatory award is to be assessed so as to compensate the employee, not penalise the employer and should not result in a windfall to either party (**Whelan v Richardson** [1998] IRLR 114).

109. An unfairly dismissed employee is subject to a duty to make reasonable efforts to obtain alternative employment to mitigate his losses and sums earned will generally be set off against losses claimed (**Babcock FATA v Addison** [1987] IRLR 173). The duty is to act as a reasonable man would do if he had no hope of receiving compensation from his employer (per **Donaldson J in Archibold Freightage Ltd v Wilson** [1974] IRLR 10).

110. A qualification to the principle of mitigation is that it will not apply fully to payments earned elsewhere during the notice period. In **Norton Tool Co Ltd v Tewson** [1972] IRLR 86, it was held that the employee was entitled to full wages in respect of the notice period without mitigation on the basis that this was good industrial relations practice. (This principle does not apply to claims for wrongful dismissal). There may be exceptions to the **Norton Tool** principle; in **Babcock FATA Ltd v Addison** [1987] IRLR 177, the Court of Appeal accepted the principle is generally applicable but not as a rule of law entitling the employee in every case to full wages in the notice period. The employer should pay such sums as good industrial relations practice requires and sums earned by way of mitigation should not be offset. Where, however, full wages for the notice period would exceed the sum an employer ought to pay on dismissing in good practice, mitigation will apply to that excess.

111. Where a Tribunal concludes a dismissal was unfair, it may find that the employee would have been dismissed fairly in any event, had the employer acted fairly, either at the time of the dismissal or at some later date. The Tribunal must assess the chance that the employee would have been dismissed fairly in any event then the reduce the losses accordingly. Such reduction may range from 0% to 100% (**Polkey v AE Dayton Services Ltd** 1988 ICR 142, HL).

112. In an unfair or wrongful dismissal case, where it appears to the Tribunal that an employer has unreasonably failed to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures, the tribunal may, if it considers it just and equitable in all the circumstances, increase any award to the employee by up to 25%. It may likewise reduce any award where there has been an unreasonable failure to comply on the employee’s part (s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA”).

113. It is customary to include in the compensatory award a sum for loss of statutory rights to reflect the fact it will take the employee some time in the new job to acquire the right not to be unfairly dismissed, the right to a statutory redundancy payment and the right to statutory minimum notice.

114. Section 126 of ERA provides that where compensation falls to be awarded in respect of any act under both the Employment Rights Act 1996 (for unfair dismissal and the Equality Act 2010 (for discrimination), the Tribunal shall not award compensation under either statute in respect of loss which has already been taken into account in awarding compensation in the same or another complaint in respect of that act.

Breach of Contract (Notice)

115. The Employment Tribunal has jurisdiction to consider claims for recovery of damages for breach of contract pursuant to the Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994, SI 1994/1623. There are limits on the Tribunal's jurisdictions and certain types of claim are excluded, including claims for personal injury. The claim must arise or be outstanding on termination of the employment and the damages available are capped at £25,000.

116. In **Johnson v Unisys** [2001] IRLR 279, the House of Lords held that the implied term of mutual trust and confidence is not applicable to the manner of dismissal. The basis for the decision was that to apply the term in those circumstances would trespass on the statutory jurisdiction of unfair dismissal. However, if there have been pre-dismissal breaches that are outstanding on the termination of the employment, these may be actionable in damages (**Eastwood v Magnox Electric Plc, McCabe v Cornwall County Council** [2004] UKHL 35).

117. In an assessment of damages, the contract breaker is to be taken as having performed his obligations in the least onerous way possible. The calculation of damages in a wrongful dismissal is usually limited to the amount of money the employee would have earned during his or her notice period or until the expiry of a fixed term. Section 86 of ERA incorporates into employment contract certain statutory minimum notice periods. Where there is continuous employment of twelve years or more, the minimum is twelve weeks' notice (section 86(1)(c)). An action for wrongful dismissal is an action for damages and, therefore, subject to mitigation. The duty to mitigate is not onerous but the employee must take reasonable steps.

118. A Tribunal may not make awards to an employee in respect of losses for which they have already been or are about to be compensated, known as 'double recovery'. Therefore, where a particular loss is claimed as part of an unfair dismissal claim and a breach of contract claim, it may only be awarded under one claim and not both.

Discussion and decision

Reasonable adjustments

119. It is admitted by the respondent that it knew or reasonably ought to have known from 4 August 2021 that the claimant had the disability (namely arthritis affecting her knees). We accept that before that date, it applied the provision criterion or practice (PCP) of requiring the claimant to use the stairs and ladders in the shop. We further accept that the PCP, had it continued to be applied, would put the claimant at a disadvantage compared to someone who did not have arthritis in her knees. The disadvantage specifically would be that the claimant would be caused pain in her knees with consequent distress and the risk of injury.

120. We further accept that the respondent knew or reasonably ought to have known that the claimant was likely to be placed at the disadvantage. It is clear from the terms of the “Health and Wellbeing Risk Assessment” that the respondent did so.

121. The reasonable adjustment for which the claimant contends is that “the respondent should have confirmed that the current arrangements should be kept in place”. The arrangements to which she refers is the arrangement whereby, the claimant was not required to go downstairs to the stockroom in order to replenish stock and was not required to use step ladders to reach the high shelves on the shop floor.

122. We accept that the arrangements put in place by the respondent in that regard were reasonable steps for the respondent to “have to take” in order to avoid the disadvantage (pain, injury and distress) which would otherwise have been occasioned by the PCP. We further accept that it was also reasonable not to require the claimant to work consecutive days when providing holiday cover because of the disadvantage she would otherwise suffer in terms of the exacerbation of her arthritis symptoms from extended periods of working. We, therefore, find that the respondent was legally obliged to take these steps pursuant to section 20(3) of EA and to have failed or refused to do so would have breached that duty.

123. In deciding that these steps were reasonable for the respondent to have to take, we took into account the impact of these adjustments on the respondent’s business. We acknowledge that the adjustments caused some inconvenience to the respondent, a small business, and that they occasioned some extra work in terms of stock replenishment by Mr Gunnell which would otherwise have been performed by the claimant. We recognise that in order to arrange holiday cover, Mr Gunnell would require to arrange cover elsewhere in circumstances where consecutive days required to be covered. He would require to make such arrangements with the Saturday employee, Lucy, or seek to take on another casual employee for this purpose. Nevertheless, we find that it was objectively reasonable for the respondent to have to take these steps from and after 4 August 2021, in circumstances where the inconvenience to the respondent was relatively low and manageable. The steps could and did avoid disadvantage to the claimant, namely pain, distress and the risk of injury.

124. The respondent did take these steps throughout the period from 4 August 2021 when it became aware of the claimant’s disability until her employment ended. Throughout that period, the respondent did suspend the PCP of requiring employees to use the stairs and ladders in the shop. It also suspended the requirement for the claimant to provide cover for the owners’ annual leave on consecutive days and made alternative arrangements when this arose so that the claimant was not required to work consecutive days, with Lucy providing cover instead.

125. Had the respondent withdrawn these adjustments, then we would have found that it had failed to comply with its duties under section 20(3) of the EA. Such a failure would have amounted to discrimination against the claimant under section 21(2) of EA.

126. The respondent did not, in the event, withdraw these adjustments, as much as it heavily implied to the claimant that it may do so in future.

127. The claimant's case is that the failure to confirm the adjustments would be kept in place breached the duties in sections 20 and 21 of the Equality Act 2010. However, we are not persuaded that this step was one which was reasonable for the respondent to have to take *to avoid the disadvantage* occasioned by the PCP of using the stairs or ladder in the shop or of providing consecutive days of holiday cover. The disadvantage occasioned by the PCP in comparison with persons who did not have arthritis in their knees was the scope of pain with consequent distress and the risk of injury. That disadvantage was avoided by the adjustments which were made (i.e. not using the stairs and ladders and not working consecutive days).

128. We agree that it was reasonable for the respondent to have assured the claimant that the adjustments would be retained in place for as long as needed. However, such reassurance would not be a step which would avoid the identified disadvantage of pain, distress, and a risk of injury which would be experienced by those with arthritis in their knees compared to those without. The claimant's arthritic knees is the disability founded upon. Reassurance that the adjustments would be retained may have restored the claimant's trust and confidence in the respondent. That is not the test for a section 20 claim, though it will be relevant to the claimant's constructive unfair dismissal claim. Reassurance the adjustments would be retained may have alleviated the claimant's symptoms of anxiety. But the section 20 claim which is brought is not concerned with any alleged disability of anxiety or with disadvantage suffered by virtue of that condition. It is concerned with adjustments to alleviate the potential pain and injury which might otherwise be associated with the PCP of using a ladder / stairs. Adjustments to alleviate *that* substantial disadvantage were in place throughout the period complained of.

129. Accordingly, we find that the claim for a failure to make reasonable adjustments does not succeed and is dismissed.

Discrimination arising from disability (section 15, EA)

130. The CMO has characterised the unfavourable treatment of the claimant as:

    a. The respondent's alleged intimated wish that the claimant recommence using the stairs and the ladder in the shop; and

    b. The constructive dismissal of the claimant (which is framed in the CMO as founding upon "being told at the meeting on 31 January 2022 that the claimant's reasonable adjustments would be withdrawn and that she had the options of going sick long term or dismissal for inability to fulfil her contractual entitlement).

131. We have not found that the respondent's Mr Gunnell expressly told the claimant that he wished the claimant to recommence using the ladders and the stairs in the shop. We do find, however, that the respondent persistently declined to give the claimant any assurance that he would retain these adjustments in place. Further, we find Mr Gunnell heavily implied that the claimant could not assume the adjustments would be retained.

132. The claimant had made clear that she was very concerned about the insecurity which was entailed by Mr Gunnell's preference to consider the matter on a week-to-week basis. Mr Gunnell gave the claimant cause for significant concern that the adjustments would not be available in the longer term by telling her on 16 December 21 that "*we need to have a chat with you about getting back to normal duties*". Mr Gunnell thereafter declined to reassure the claimant on the long term retention of the adjustments at the meeting on 31 January 2022. He rejected the claimant's suggestions about how the impact of the adjustment might be alleviated by asking another employee to assist with the stocking up prior to the claimant's shift or during it. He rejected the possibility of handrails. He said all modifications that were practical and relevant had been carried out, and there were no alternative roles available such as an admin role.

133. Mr Gunnell told the claimant on 31 January 2022 that the options going forward were that the claimant go on long term sickness absence (for which she would be ineligible for SSP) or the termination of her contract. With regard to termination, it was suggested by Mr Gunnell that an option would be for the claimant to resign. Alternatively, it was suggested notice could be given by the respondent on the grounds of the claimant being unable to fulfil her contractual obligation of providing cover for the owner's absence (mainly on annual leave). The clear implication of Mr Gunnell's communications was that he did not intend that the respondent sustain the adjustments in place of not requiring the claimant to use the stairs or ladders to work consecutive shifts in the longer term, and possibly in the shorter term.

134. On 2 February 2022, Mr Gunnell said that, as had been discussed on 31 January, there were no adaptations that were suitable and therefore the correct course of action was "removal". On 8 February 2022, Mr Gunnell told the claimant no further practical modifications or alterations could reasonably be carried out to either the workplace or the job description. He identified sickness absence as an option but noted the lack of SSP or benefits. He said that termination of her contract was still an option as this would allow the claimant to apply for JSA. Although he concluded that no immediate action would be taken, he offered no reassurance that these options would not be tabled again in the near future.

135. We have no hesitation in finding that by declining to reassure the claimant that the adjustments would continue and indeed by heavily implying they would not, the respondent treated her unfavourably. Such treatment inevitably caused the claimant concern that her employment was vulnerable. We are also satisfied that by telling the claimant that the options were to go on sick leave or the termination of her contract whether by resignation or termination amounted to unfavourable treatment of the claimant. The claimant had not indicated any wish or need to go on sick leave. Any sick leave would be unpaid. The claimant made clear that she was not happy to resign or have her employment terminated. Objectively, the treatment created a particular difficulty or disadvantage for the claimant.

136. We find that the unfavourable treatment identified above was because of adjustments the respondent had made (namely suspending the requirement to use stairs, ladders and to work consecutive shifts as required to cover

annual leave). Mr Gunnell expressly referred to the claimant's inability to fulfil a contractual obligation to provide annual leave cover when referring to the possibility of terminating her employment.

137. The adjustments in turn arose arose in consequence of the claimant's arthritis affecting her knees. They arose in consequence of her disability. It was because of the arthritis that the claimant could not use stairs or a ladder without experiencing pain, distress and the risk of injury. It was also because of the arthritis that it was not viable for her to work two consecutive days. In the latter case, this was because of (1) of the strain on her knees placed by working 2 days in a row; and (2) the claimant's inability to replenish stock from downstairs making it impractical for her to work multiple consecutive days on her own without the respondent arranging for someone into restock.

138. The unfavourable treatment of heavily implying the reasonable adjustments in place would not be retained and telling the claimant the options were sick leave or termination was because of the adjustments the respondent had made which in turn arose in consequence of the claimant's disability.

139. We went on to consider whether the respondent had shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim for the purposes of section 15(1)(b) of EA. The legitimate aim was characterized at the earlier preliminary hearing as being to talk to the claimant to review measures in place and how it was looking after the claimant's wellbeing.

140. We do not accept this was the true aim of the unfavourable treatment which we found took place. The respondent's purpose in implying the adjustments would not be retained long term and in telling her the options were long term sick or termination was not to promote the claimant's wellbeing. We considered whether the respondent, who was not professionally represented, may have had an alternative legitimate aim such as ensuring the availability of adequate annual leave cover and / or of ensuring adequate stock replenishment to the shop floor as and when required.

141. We accepted in principle that such aims may be legitimate. However, we did not accept that the respondent's treatment of the claimant was a proportionate means of achieving those aims. A less discriminatory approach could have been taken to promote these aims. The adjustments, which we have found to have been reasonable adjustments that the respondent was obliged to make under section 20 of EA could have been retained and that retention could have been confirmed to the claimant. In the meantime, the respondent could have continued to pursue its aim of ensuring holiday cover by covering non-consecutive dates with other existing staff (as it had done successfully in the past) or by recruiting staff. It could have pursued its aim of adequate stock replenishment in the manner it had been doing, namely by topping up stock to the shop floor on a Saturday evening before the claimant's Monday shift and on a Tuesday after her shift.

142. Instead, the respondent declined to reassure the claimant that the adjustments in place would be retained and heavily implied they would not by tabling options of sickness absence or termination. We find that in doing

so the respondent discriminated against the claimant contrary to s.15 EA by subjecting her to unfavourable treatment because of something arising in consequence of her disability. That 'something' was the adjustments made by the respondent to alleviate the pain and risk of injury that would otherwise be occasioned by using stairs and ladders and working consecutive days. The respondent has not shown that the treatment was a proportionate means of achieving a legitimate aim.

Unfair dismissal (constructive)

143. We have found the following facts proved:

a. on 1 September 2021, the respondent told the claimant her adjustments would be reviewed on a weekly basis. She said "..*what I don't want is to have a job one week and not the next*." Mr Gunnell responded "*we've also gotta to review it so that by keeping you safe we're not making detrimental decisions in relation to the ongoing recovery of the business."*

b. On 16 December the respondent told the claimant "*we need to have a chat about you getting back to normal duties*". The context was that there had been no improvement in her arthritis and the adjustments to the use of the stairs and ladder were still very much needed to avoid disadvantage in terms of pain and a risk of injury. The claimant had not been provided with a date for surgery which might have given hope for alleviation in her symptoms.

c. the respondent told the claimant at the meeting on 31 January 2022 that her options were going on the sick or the termination of her contract. The context was that the claimant had not taken any sick days because of her arthritis and was not seeking to do so. She was continuing to work with adjustments in place and there was no discernible financial detriment to the business, albeit the adjustments occasioned some extra duties for Mr Gunnell.

d. the respondent did not provide any assurance that the claimant's adjustments of not having to use the stairs and ladder would remain in place.

e. After the meeting on 31 January 2022, a call took place on 2 February 2022 when Mr Gunnell considered what the claimant told him about the contents of her fit note and said that, as had been discussed on 31 January, there were no adaptations that were suitable and therefore the correct course of action was "removal".

f. A further call took place on 8 February 2022 when Mr Gunnell told the claimant no further practical modifications or alterations could reasonably be carried out to either the workplace or the job description. He identified sickness absence as an option but noted the lack of SSP or benefits. He said that termination of her contract was still an option as this would allow the claimant to apply for JSA. Although he concluded that no immediate action would be taken, he offered no reassurance that these options would not be tabled again in the near future.

g. The claimant sent the respondent an email on 27 February 2022 regarding the note of the discussion on 1 February 2022 Mr Gunnell had prepared. He had commented in response to the GP's comments in the Fit Note that the claimant had enjoyed longer than brief periods on a chair for a very long time. The claimant pointed out that he was not in the shop on her day of work and queried how he could comment that she enjoyed longer than brief periods on a chair. Mr Gunnell's response on 1 March 2022 was to thank her for her emails and to say the contents had been noted and recorded.

144. The claimant was left after the communications on 31 January, 2 and 8 February 2022 with no cause for optimism that Mr Gunnell would not revisit the termination of her employment and / or the withdrawal of adjustments in the near future. He had repeatedly emphasized that he felt all modifications that could be made had been. The spectre of the potentially imminent termination of her employment, therefore, hung over the claimant after the 8 February 2022 until the date she resigned.

145. We find that the respondent's course of acting as set out in paragraphs 143 and 144 above fundamentally undermined the trust and confidence which ought to have existed between the respondent and the claimant. The conduct was, at least latterly, without just or proper cause. In the early stages of the adjustments in September 2021, it may have been understandable that the respondent, a small business, would have concerns about ensuring the viability of the adjustments and that it would wish to undertake a period of review to assess the impacts on the business. By December 2021, however, it had become clear that the adjustments were working effectively. The extra work and inconvenience they occasioned was manageable. It was not having a significant cost impact for the business.

146. The respondent knew that the claimant's condition was not improved in December 2021 and would not do so without surgery. Telling her that "*we need to have a chat about getting you back to normal duties*" in circumstances where the when he knew the consequences of such a change would have rendered her employment untenable was in and of itself a fundamental breach of trust and confidence. It was, in essence, an implied threat to withdraw adjustments which the respondent had a legal duty to make under the Equality Act 2010.

147. We find that the subsequent conduct on 31 January, 2 and 8 February 2022 in each case amounted to further breaches of the trust and confidence term, individually and cumulatively. The objective effect of the communications on those dates was to leave the claimant with legitimate concerns about the precariousness of her continuing employment and to fear she may be forced on to sick leave or have her employment terminated imminently. We readily accept that this significantly damaged the relationship of trust and confidence which ought to have existed between the parties.

148. We considered whether there was reasonable or proper cause for this conduct. We have found that he adjustments in place were reasonable and the inconvenience for the respondent manageable. The claimant was a longstanding employee who was continuing to successfully work for the respondent with the adjustments in place. We do not find there was reasonable or proper cause for the respondent's conduct.

149. In the period after 8 February 2022, the claimant remained in limbo. If the respondent carried out the week-to-week reviews it had said it would undertake in its 'Health & Wellbeing Risk Assessment", it did not communicate any reconsideration of its position to the claimant. Having created uncertainty over her future, the respondent took no action to alleviate this.

150. By so failing, we find that the breach of the trust and confidence term continued through February right up to the date of the claimant's resignation on 6 March 2022.

151. If we are wrong in that, and the continued omission of the respondent to alleviate the uncertainty and insecurity it had created during February and early March 2022, did not in itself form a continuing breach, we find that the last straw of the respondent's reply on 1 March to the claimant's email of 27 February 2022 was sufficient to revive earlier breaches. It is not necessary that a final straw in itself should be a breach; it must contribute to earlier breaches though what it adds may be relatively insignificant. Mr Gunnell's failure to engage with the point made by the claimant by providing any substantive response to her argument that he was poorly placed to comment on how much time she spent seated on her shifts was sufficient to contribute to the respondent's earlier breaches. He did not withdraw his comment that the claimant spent considerable time seated. He did not explain any basis for his belief in this regard.

152. If we are wrong in finding (1) that the breach continued up to 6 March when the claimant sent her resignation and in our alternative finding (2) that previous breaches were revived by Mr Gunnell's email on 1 March 20022, we do not find, in any event, that the claimant affirmed the contract before resigning. If the last breach to occur happened on 8 February 2022 and it was not revived by the respondent's later conduct, we find that the claimant did not by her words and deeds show that she had elected to keep the contract alive in the period from 8 February to 6 March 2022.

153. During that period, the precariousness and uncertainty over her position continued following Mr Gunnell's earlier pronouncements. The claimant did not affirm the position; she protested. She had made it clear in her calls that she was not happy to resign or be terminated. As late as 27 February, she emailed the respondent to protest at his suggestion that she spent longer than brief periods in a chair during her working day. It is also relevant that, during this period, the claimant was unwell. She was upset and depressed. Her concentration was affected. She was a long standing and loyal employee who was reluctant to leave and who required time to consider her response to the breaches.

154. She worked a further 3 Monday shifts only. She consulted her doctor on 3 March 2022 for her symptoms of anxiety and depression when she spoke of her concerns about how the arthritis was impacting her job. Any delay in resigning was relatively short with few working shifts in the period, and none worked alongside Mr Gunnell. Having regard to all the circumstances of the case, including, in particular, the claimant's mental health and her continuing protests about matters, we do not find the claimant showed that she chose to keep the contract alive by any delay or by her actions in working three further shifts after the conversation on 8 February 2022.

155. We considered whether the claimant resigned in response to the breach(es). Her reason for her resignation was not meaningfully challenged. It was clear from her resignation email that her resignation was in response to the respondent's treatment which she called 'unfair' and the untenable position she had been put in due to the arthritis in her knees. We accept the claimant resigned in response to the respondent's breaches of the trust and confidence term.

156. We understand the respondent suggests the potentially fair reason of capability for the claimant's constructive unfair dismissal. We do not accept that the respondent genuinely believed the claimant was no longer capable of performing her duties. With workable adjustments in place, the claimant was able to perform the duties of the role. We do not find, in any event, that the respondent acted reasonably in treating her capability as a sufficient reason for constructively dismissing her. The claimant had many years' service and was a loyal employee. With adjustments which had proved practicable and sustainable, she could continue to perform the vast majority of the essential duties of her job role. She was not off sick or inclined to sickness absence as a result of her disability. She was keen to, and was able to, continue working in the role with the adjustments in place. To (constructively) dismiss the claimant at the time the respondent did for a reason related to her capability was not within the range of reasonable responses in all the circumstances of the case

157. We conclude, therefore, that the claimant was constructively unfairly dismissed. The effective date of termination was 7 March 2022 when the respondent read the claimant's resignation email.

Discriminatory Dismissal (constructive) Section 29, EA

158. We further find that the claimant's constructive dismissal was discriminatory contrary to section 39 of the EA. The conduct in response to which the claimant resigned has been found to have been discriminatory conduct contrary to section 15 of EA, as well as amounting to a fundamental breach or breaches of the trust and confidence term. The claimant was entitled because of the respondent's discriminatory conduct contrary to section 15 of EA to terminate the employment without notice.

Breach of contract

159. We have already found that the respondent fundamentally breached the claimant's contract of employment. That breach was outstanding on the termination of her employment. However, in **Johnson v Unisys**, as noted above, the House of Lords held that the implied term of mutual trust and confidence is not applicable to the manner of dismissal because to apply the term in those circumstances would trespass on the statutory jurisdiction of unfair dismissal. While it is acknowledged that it can be possible that pre-dismissal breaches that are outstanding on termination may fall outside the so-called **Johnson** exclusion zone, in reality it is a moot point. That is because there is no scope for double recovery of the same loss as between a claim for unfair dismissal and a breach of contract claim (s.126, ERA).

160. The claimant seeks 12 weeks' pay by way of damages for breach of contract, equating to her notice period (as incorporated into her contract by section 86 of ERA). That period of loss is compensated by a compensatory

award for the claimant's unfair dismissal without the need for sums earned in mitigation to be offset against the award as would be necessary in a breach of contract award for damages. As such, there are no damages to pursue under the breach of contract jurisdiction. The Tribunal only has jurisdiction to hear proceedings for recovery of damages for breach of contract; it lacks jurisdiction to provide any other remedy such as a declaration. In those circumstances, given there are no damages to recover, the claimant's breach of contract claim is dismissed.

Remedy

Unfair dismissal

47. The claimant is entitled to a basic award for unfair dismissal. The calculation is 20 x £71.28 = **£1,710.72**. We have not found that the claimant engaged in any conduct before the dismissal was such that it would be just and equitable to reduce the amount of the basic award pursuant to s.122(2) of ERA.

48. The claimant sought 12 weeks' loss of earnings. This equates to what would have been her notice period had the respondent dismissed her on providing lawful notice of the termination from 7 March 2022 until 30 May 2022. During this period, the claimant would have earned £893.12 net. The calculation is:

4 x a week's pay @£71.28 (based on hourly rate of £8.91) =	£285.12
ADD	
8 x a week's pay@ £76 (based on hourly rate of £9.50) =	£608.00
Total	**£893.12**

49. During this period, the claimant earned some additional income through her invigilating work including working on 4 Mondays when she would have been contracted to work for the respondent if the employment relationship had continued. However, we find that the **Norton Tool** principle should be followed in this case, namely that the claimant should be entitled to full wages in respect of the notice period without offsetting sums earned in mitigation on the basis that this is good industrial relations practice.

50. We understand that the claimant had a continuing loss after 30 May 2022 when her notice would have expired. We have not found that any continuing loss in the period thereafter is recoverable. The claimant's continuing loss was £76 per week as she has not managed to replace this income. However, the claimant has made no attempt at any stage to find replacement employment of any kind. We understand the claimant's evidence is that she has felt inhibited about doing so by a fear that those vacancies available may entail long periods of standing which may not be viable with her disability. Nevertheless, the claimant presented no evidence that she had searched for jobs and found no sedentary jobs available or that she had enquired in relation to other roles as to whether prospective employers may make adjustments to accommodate the claimant's difficulties with long

periods of standing. In failing to do so, we find the claimant unreasonably failed in her duty to make reasonable efforts to mitigate her losses in the period after 30 May 2022.

51. We award the claimant **£350** for the loss of her statutory rights. The claimant had built up significant service with the associated rights in terms of statutory notice, eligibility for redundancy payments and the right not to be unfairly dismissed. It will take time with any future employer to regain such rights.

52. The total compensatory award for unfair dismissal before any reductions are applied is, therefore, **£1,243.12** (£893.12 ADD £350).

53. We have found no evidence that the claimant by her conduct contributed to her dismissal or that, if the respondent had followed a fair process, a fair dismissal would have ensued in any event within the period of loss awarded. The claimant was successfully working with the adjustments in place before her employment terminated and we find on balance that she would have continued to do so, had her employment continued, in the period to 30 May 2022. We find there is no chance that the respondent would have fairly dismissed the claimant on capability grounds during that period.

54. The ACAS Code of Practice on Disciplinary and Grievance Procedures applied. The claimant failed to follow the Code by failing to raise the matter formally in writing and setting out the nature of her grievance. We find the failure was an unreasonable one; the claimant gave no evidence as to why she did not follow the ACAS Code. We have a discretion as to whether to change the claimant's compensation as a result of the failure. Any such reduction only applies to the compensatory award and does not affect the basic award for unfair dismissal (s.124A, ERA). There is no simple formula for determining what reduction is appropriate to the compensatory award. We have focused first on the gravity of the breach. The claimant failed to formalise her grievance in writing, even when invited to provide written notice of concerns by Mr Gunnell in advance of the meeting on 31 January 2022. Although she did correspond by email with the respondent before the employment ended, she did not take the opportunity to set out her complaints in full. On the other hand, the claimant did not remain completely silent about her concerns. She asked for and fully participated in a meeting with the respondent when she was clear that she was unhappy about her treatment. The claimant also was suffering deteriorating mental health during the material period and was having difficulties with concentration. In all of these circumstances, we consider it is just and equitable to apply a modest discount of 5% to the claimant's compensatory award for unfair dismissal.

55. The claimant's compensatory award for unfair dismissal is therefore reduced to **£1,181** (£1,243.12 LESS 5% reduction of £62.12).

56. The claimant's total award of compensation for unfair dismissal is, therefore, **£2,891.72** (i.e. £1,710.72 (basic award) plus £1,181 (compensatory award)).

Remedy for discrimination

57. The claimant has no financial losses to recover as compensation under the Equality Act section 124 because all recoverable economic losses have been recovered as a compensation for unfair dismissal (section 126, ERA).

58. With respect to injury to feelings, we focused on the injury suffered. We have found the claimant felt upset and depressed as a result of treatment by the respondent which we have found to be discriminatory. That treatment was ongoing in December 2021 and into the early months of 2022. The claimant's feelings of depression and anxiety culminated in a visit to her GP when she discussed these on 3 March 2022 when she was diagnosed with "mixed anxiety and depression, exacerbated by recent stressful circumstances". It was clear both from the claimant's evidence and her GP records that the issues at work was contributing to her feelings but so too was her considerable upset over difficult news regarding her father's illness which had been diagnosed as terminal. While we do not diminish in any way the claimant's symptoms of depression and anxiety during that difficult period, we also note that she was fit enough to undertake some invigilator work after the termination of her employment in March 2022.

59. On taking into consideration the impact upon the claimant of the discriminatory treatment, we decided to make an award for injury to feelings in the middle of the lower **Vento** band. That band (as refreshed by the presidential guidance) is £990 - £9,900. We award the sum of £5,250 for injury to feeling, which lies around the middle of the lower band.

60. We have applied to that award a 5% discount for the claimant's failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures. The total award for injury to feelings is, therefore, reduced to **£4,997.50** (£5,250 LESS 5% deduction of £262.50)

61. Neither party addressed the issue of interest in their submissions. We considered whether we should use our discretion to award interest on the claimant's injury to feelings award. We have discretion as to whether to award interest but if we choose to award it, we are constrained to do so at the prescribed rate of 8%.

62. We determined not to award interest in this case. It is within judicial knowledge that the Bank of England base rate between March 2022 and November 2022 was 0.75% rising to 1% in May, to 1.25% in June, to 1.75% in August, to 2.25% then to 3% the day before the hearing. If the claimant had been in receipt of the compensation at the time she incurred the losses and the injury to feelings, and if she had been able to invest it, it is unlikely she would have achieved a return of 8% on the monies or anything close to that rate during the period to the hearing date.

63. We reminded ourselves that the aim is to put the claimant in the position, so far as is reasonable, that she would have been had the discriminatory act not occurred (**Wheeler**). We considered that to award interest at 8% on the sums would not be proportionate and would place the claimant in a better position financially than she would have been if the discrimination had not occurred. No interest is included.

Employment Judge Murphy (Scotland), acting as an Employment Judge (England and Wales)

Date 23 November 2022

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