



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss J E Yorke

**Respondents:** Samuel Smiths Old Brewery (Tadcaster)

**Heard at:** Leeds      **On:** 20, 21 and 22 July 2022

**Before:** Employment Judge S Shore  
NLM – Ms J Lancaster  
NLM – Mr K Lannaman

## Appearances

For the claimant: Mr J Jenkins, Counsel  
For the respondent: Mr B Hodgson, Solicitor

## WRITTEN REASONS ON LIABILITY

1. The Tribunal delivered an oral judgment and reasons on 22 July 2022. The written judgment was sent to the parties on 28 July 2022. By an email of 2 August 2022, the claimant requested written reasons.
2. These are our unanimous reasons.

## REASONS

### Introduction and History of Proceedings

1. The claimant was employed as a member of Bar Staff at the Lumley Arms, a public house operated by the respondent, from 10 August 2019 to 10 September 2021, which was agreed to be her effective date of termination. The claimant started early conciliation with ACAS on 20 September 2021 and obtained a conciliation certificate on 22 September 2021. The claimant's ET1 was presented on 21 October 2021.

2. The claimant presented claims of:
  - 2.1. Constructive unfair dismissal.
  - 2.2. Direct disability discrimination contrary to section 13 of the Equality Act 2010.
  - 2.3. Failure to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010.
  - 2.4. Harassment related to the protected characteristic of disability contrary to section 26 of the Equality Act 2010.
  - 2.5. Victimisation contrary to section 27 of the Equality Act 2010.
  - 2.6. Failure to provide a written statement of terms and conditions of employment pursuant to sections 1(1) and 1(4) of the Employment Rights Act 1996.
  - 2.7. Breach of contract (failure to pay notice pay) contrary to Article 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.
3. The claims were case managed on 5 April 2022 by Employment Judge Knowles.
4. No list of issues was determined at the preliminary hearing, but Employment Judge Knowles required the parties to produce a list of issues by agreement between themselves.

### **Issues**

5. The list of issues drafted by the parties was not accepted by the Tribunal. We drafted an alternate list that was agreed as follows.

#### **1. *Unfair dismissal***

##### **1.1 *Was the claimant dismissed?***

##### **1.1.1 *Did the respondent do the following things:***

**1.1.1.1 *Handle the meeting on 2 July 2021 inappropriately or in a discriminatory fashion?***

**1.1.1.2 *Fail to investigate, hear and determine the claimant's grievance?***

##### **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 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.*

*1.1.4 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 was dismissed, what was the reason or principal reason for dismissal - i.e. what was the reason for the breach of contract?*

*1.3 Was it a potentially fair reason?*

*1.4 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 Does the claimant wish to be reinstated to their previous employment?*

*2.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?*

*2.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.*

*2.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.*

*2.5 What should the terms of the re-engagement order be?*

*2.6 If there is a compensatory award, how much should it be? The Tribunal will decide:*

*2.6.1 What financial losses has the dismissal caused the claimant?*

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

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

*2.6.4 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?*

- 2.6.5 *If so, should the claimant's compensation be reduced? By how much?*
- 2.6.6 *Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*
- 2.6.7 *Did the respondent or the claimant unreasonably fail to comply with it?*
- 2.6.8 *If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?*
- 2.6.9 *If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?*
- 2.6.10 *If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?*
- 2.6.11 *Does the statutory cap of fifty-two weeks' pay apply?*
- 2.7 *What basic award is payable to the claimant, if any?*
- 2.8 *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. **Wrongful dismissal / Notice pay**

- 3.1 *What was the claimant's notice period?*
- 3.2 *Was the claimant paid for that notice period?*
- 3.3 *If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?*

4. **Direct disability discrimination (Equality Act 2010 section 13)**

- 4.1 *The claimant is acknowledged to meet the definition of 'disabled person' in section 6 of the Equality Act 2010 at all times.*
- 4.2 *Did the respondent do the following things:*
  - 4.2.1 *Fail to investigate the claimant's grievance?*
  - 4.2.2 *Fail to invite the claimant to a meeting to discuss her grievance?*
  - 4.2.3 *Fail to determine the claimant's grievance?*
  - 4.2.4 *Dismiss the claimant?*
- 4.3 *Was that less favourable treatment?*

*The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.*

*The claimant has not named anyone in particular who she says was treated better than she was. She relies on a hypothetical comparator.*

4.4 *If so, was it because of disability?*

4.5 *Did the respondent's treatment amount to a detriment?*

5. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

5.1 *Did the respondent know or could it reasonably have been expected to know that the claimant was a disabled person? From what date?*

5.2 *A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:*

5.2.1 *Holding a disciplinary investigation meeting on 2 July 2021.*

5.3 *Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that;*

5.3.1 *The claimant's disability meant that she had difficulties with concentration and focussing on questions, which gave her difficulties in answering questions?*

5.3.2 *The claimant's disability meant she had an inability to fully understand the questions asked when under pressure?*

5.3.3 *The claimant finds it difficult to keep her emotions under control?*

5.3.4 *The claimant finds it difficult to communicate effectively when in a heightened state of anxiety?*

5.3.5 *The claimant was at increased risk of a panic attack?*

5.4 *Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?*

5.5 *What steps could have been taken to avoid the disadvantage? The claimant suggests:*

5.5.1 *She should have been given reasonable notice of the meeting;*

5.5.2 *She should have been provided with information about the allegations in advance of the meeting;*

5.5.3 *The meeting should have been held in a quiet confidential location;*

5.5.4 *The claimant should have been offered frequent breaks in the meeting; and*

5.5.5 *The claimant should have been offered to opportunity to be accompanied at the meeting.*

5.6 *Was it reasonable for the respondent to have to take those steps?*

5.7 *Did the respondent fail to take those steps?*

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

6.1 *Did the respondent do the following things:*

6.1.1 *Christine Mapley made comments at the meeting on 2 July 2021 that heightened and triggered the claimant's disability; and*

6.1.2 *Christine Mapley made threatening and manipulative comments at the meeting on 2 July 2021.*

6.2 *If so, was that unwanted conduct?*

6.3 *Did it relate to disability?*

6.4 *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?*

6.5 *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.*

7. **Victimisation (Equality Act 2010 section 27)**

7.1 *Did the claimant do a protected act as follows:*

7.1.1 *Submit a grievance on 11 August 2021?*

7.2 *Did the respondent do the following things:*

7.2.1 *Fail to investigate the claimant's grievance?*

7.2.2 *Fail to hold a meeting to hear the claimant's grievance?*

7.2.3 *Fail to make a decision on the claimant's grievance?*

7.3 *By doing so, did it subject the claimant to detriment?*

7.4 *If so, was it because the claimant did a protected act?*

8. **Remedy for discrimination or victimisation**

- 8.1 *Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?*
- 8.2 *What financial losses has the discrimination caused the claimant?*
- 8.3 *Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?*
- 8.4 *If not, for what period of loss should the claimant be compensated?*
- 8.5 *What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?*
- 8.6 *Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?*
- 8.7 *Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?*
- 8.8 *Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*
- 8.9 *Did the respondent or the claimant unreasonably fail to comply with it?*
- 8.10 *If so is it just and equitable to increase or decrease any award payable to the claimant?*
- 8.11 *By what proportion, up to 25%?*
- 8.12 *Should interest be awarded? How much?*

9. **Section 38 Employment Act 2002**

- 9.1 *When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?*
- 9.2 *If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.*
- 9.3 *Would it be just and equitable to award four weeks' pay?*

6. As we did not find in favour of the claimant on any of the discrimination claims, we did not deal with any of the remedy issues relating to discrimination that are set out above.

## **Law**

7. The statutory law relating to the claimant's claims of discrimination is contained in the Equality Act 2010 (EqA). The relevant sections of the EqA were sections 13, 20, 21, 26, 27, 123 and 136.
8. The law relating to unfair dismissal is contained in Part X of the Employment Rights Act 1996.
9. Sections 1(1) and (4) of the Employment Rights Act 1996 requires an employer to provide a written statement of terms and conditions of employment that covers certain prescribed elements and to update that statement when required. Failure to do so means that under section 38 of the Employment Act 2002, a Tribunal can award up to four weeks' pay as compensation.
10. Article 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 authorises a Tribunal to deal with certain breaches of and employee's contract of employment (including the failure to pay notice pay).

## **Housekeeping**

11. The parties produced a joint bundle of 150 pages. If we refer to pages in the bundle, the page number(s) will be in square brackets (e.g. [43]).
12. The claimant gave evidence in person and produced a witness statement. The witness evidence and documents indicated that the claimant may have been a vulnerable witness and we therefore applied the guidance in the Equal Treatment Benchbook and Presidential Guidance: Vulnerable parties and witnesses in Employment Tribunal proceedings dated 22 April 2020. The claimant's father, Mr Michael Yorke, also gave evidence in person.
13. Evidence was given in person on behalf of the respondent by:
  - 14.1. Mrs Christine Mapley, joint manager of the Lumley Arms at the time that the claimant worked there.
  - 14.2. Mrs Linda Stuart, Estate and Property Manager at the respondent.
15. All the witnesses gave evidence on affirmation. The claimant was cross-examined by Hodgson in some detail. All the respondent's witnesses were cross-examined by Mr Jenkins in some detail.
16. At the end of the evidence, Mr Hodgson and Mr Jenkins made closing submissions.
17. We delivered an oral judgment and reasons on the afternoon of 21 July 2022 and adjourned to the morning of 22 July 2022 to deal with remedy. On the morning of 22 July, we were advised by the parties that they had agreed remedy between themselves, so there was no requirement for us to determine that aspect of the case.



18. Neither party asked for written reasons at the hearing. In error, the Tribunal sent a draft judgment and reasons to the parties instead of a judgment only. That document was withdrawn under the slip rule and replaced by a judgment dated 28 July 2022.

## **Findings of Fact**

### **Preliminary Comments**

19. All findings of fact were made on the balance of probabilities. If a matter was in dispute, we will set out the reasons why we decided to prefer one party's case over the other. If there was no dispute over a matter, we will either record that with the finding or make no comment as to the reason that a particular finding was made. We have not dealt with every single matter that was raised in evidence or the documents. We have only dealt with matters that we found relevant to the issues we have had to determine. No application was made by either side to adjourn this hearing in order to complete disclosure or obtain more documents, so we have dealt with the case on the basis of the documents produced to us and the claim as set out in the list of issues.
20. The factual nexus of the individual elements of this case are closely interwoven. That means that in dealing with the claims on an individual basis, we have to determine findings that are also relevant to other claims.

### **Points of Dispute**

#### **Unfair Dismissal**

21. We find that the claimant was constructively dismissed. Our headline findings are that we find that Mrs Mapley handled the meeting with the claimant on 2 July 2021 inappropriately, but not in a discriminatory fashion. We find that the respondent failed to investigate, hear or determine the claimant's grievance at all.
22. We find that Mrs Mapley's handling of the 2 July 2021 meeting was not a breach of the implied duty of trust and confidence of itself.
23. We find that the total failure of the respondent to even acknowledge the claimant's grievance of 11 August 2021 and its subsequent failure to do anything about it, even in the light of a letter from her solicitor dated 26 August 2021 [78], which gave a deadline for a response with the threat of subsequent action for disability discrimination and constructive dismissal, was a breach of the duty of trust and confidence. The respondent's failures go to the heart of the duty. The failure to respond by the deadline was the final straw, as identified in the letter of resignation dated 10 September 2021 [79-80].
24. We find that the respondent's behaviour was likely, rather than calculated, to destroy or seriously damage the trust and confidence between the claimant and the respondent and that the respondent had no reasonable or proper cause to do so.
25. We find that the resignation letter is clear that the claimant resigned in response to the breach. The respondent did not seek to persuade us otherwise.

26. The claimant did not delay in resigning from the expiry of the imposed deadline on 9 September, which was the effective date of the final straw.
27. The respondent did not seek to persuade us that it had a fair reason for dismissal if we found that the claimant had been constructively dismissed. We find the reason for dismissal to be conduct, as the dismissal arose from circumstances arising from the claimant's alleged failure to properly account for £12.00 that had gone missing from the till. That is a potentially fair reason.
28. We find that the respondent did not act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant. Mr Hodgson did not seek to persuade us otherwise. We find that no deduction for contributory conduct or the Polkey Principle would be fair or reasonable.

### **Notice Pay**

29. It was agreed that the issue of notice pay would follow the unfair dismissal claim, so we find the claimant was entitled to notice on the termination of her contract of employment. The claimant did not do something so serious that the respondent was entitled to dismiss without notice.

### **Direct Disability Discrimination**

30. The claimant was acknowledged by the respondent to meet the definition of "disabled person" in section 6 of the Equality Act 2010 at all times.
31. We have found that the respondent did the following things:
  - 31.1. Failed to investigate the claimant's grievance;
  - 31.2. Failed to invite the claimant to a meeting to discuss her grievance;
  - 31.3. Failed to determine the claimant's grievance; and
  - 31.4. Dismissed the claimant.
32. We do not find the respondent's acts and omissions to be less favourable treatment, because we heard no evidence that would lead us to a conclusion that a hypothetical comparator who was identical to the claimant, save for the claimant's disabilities, would have been treated any differently. Mrs Stuart gave unchallenged evidence that there were a number of grievances sat on her desk that she did nothing about, including grievances from employees who were not disabled. The constructive dismissal of the claimant was an outcome of the other omissions (i.e. acts or omissions that were not acts of discrimination), as she chose to accept the breach of the duty of trust and confidence to terminate her employment.
33. For the avoidance of doubt, we do not find that the four acts identified in paragraph 31 above were in any way caused by or motivated by discrimination because of

disability. We therefore do not have to address the issue of whether the treatment alleged was a detriment.

### **Reasonable Adjustments**

34. We find that the respondent did not know and could not reasonably have been expected to know that the claimant was a disabled person during her period of employment. We make that finding because:
  - 34.1. It may not need saying, but, the fact that someone has a physical or mental impairment does not automatically mean that they meet the legal definition of “disabled person”. The test in section 6 of the Equality Act 2010 is a mixed medical and legal test. The legal test is whether the impairment has a substantial long-term adverse effect on the person’s ability to carry out normal day to day activities.
  - 34.2. In making our findings, we are in no way seeking to trivialise or refute the unchallenged evidence in the claimant’s impact statement dated 23 February 2022 [81-94]. The issue is what the respondent knew, or ought to have known.
  - 34.3. The claimant says that the respondent knew, or ought to have known that she met the definition of disabled person because of her diagnoses of autism, anxiety and panic attack disorders.
  - 34.4. The respondent accepts that it had knowledge that the claimant is autistic.
  - 34.5. The most compelling evidence we found on the question of knowledge was Mrs Mapley’s evidence that the claimant’s impact statement did not reflect the Jess that she knew. The claimant did not seek to persuade us that she had disclosed the details of her disabilities that are set out in her impact statement. There is no reason why she should have had to. However, we find that the Mrs Mapley’s knowledge was limited to being aware of the autism diagnosis. No Tribunal can draw the automatic conclusion that a person who is autistic meets the definition in section 6 of the Equality Act 2010.
  - 34.6. No reasonable adjustments were ever requested by the claimant in respect of any of her disabilities during her employment and she was described as a very good employee by Mrs Mapley, which we are sure she was. This supports the respondent’s case that it lacked constructive knowledge.
  - 34.7. Mrs Mapley had a discussion with Mr Yorke about the claimant’s disability in late 2019 and on two other occasions. We accept Mr Yorke’s evidence on that point. However, we find that the evidence at its highest does not say that he gave Mrs Mapley information from which she should have concluded that the claimant met the definition of disability.

34.8. The claimant's evidence, at its height, about her panic attack disorder was that she had two panic attacks whilst working at the Lumley Arms which Mrs Mapley knew about. One was when she was informed that her boyfriend had ended their relationship and the other was a reaction to a nightmare. We find that these incidents, at their highest, do not constitute constructive knowledge of disability because of panic attack disorder.

34.9. We find that the claimant's evidence did not meet the standard of proof required to show that the respondent knew, or ought to have known of her disability related to anxiety disorder.

35. The claimant's claim of failure to make reasonable adjustments fails at that point.

### **Harassment**

36. We had reservations about the wording of this claim. We find that Christine Mapley did not make comments at the meeting on 2 July 2021 that heightened and triggered the claimant's disability or made threatening and manipulative comments at the meeting on 2 July 2021. The claimant's evidence on the two points, at its highest, did not meet the required standard of proof (the balance of probabilities).

37. The claim falls at that point

### **Victimisation**

38. We find that the claimant's grievance of 11 August 2021 was a protected act. It is self-evidently a complaint about a breach of the Equality Act 2010.

39. We have already found that the respondent did the following things:

39.1. Failed to investigate the claimant's grievance;

39.2. Failed to invite the claimant to a meeting to discuss her grievance; and

39.3. Failed to determine the claimant's grievance.

40. By doing so, the respondent subjected the claimant to a detriment, but we found no evidence that suggested that the reason for the detriments was that the claimant had submitted the grievance. Despite Mr Jenkins' strong arguments, we do not agree that Mrs Stuart's failures were down to anything but pressure of work (if we are being generous) or incompetence (if we quote the witness herself). On the question of the amount of work that Mrs Stuart undertook, we entirely agree with Mr Jenkins that her witness statement and lack of corroborative documents was unacceptable. However, the witness was cross-examined at some length and in much detail about every aspect of her work and the finding that we make is that Mrs Stuart's oral evidence backfilled the void in her written evidence. We find that she showed on the balance of probabilities that in August and September 2021, she was totally overwhelmed by the volume of work she had to deal with and ignored the correspondence from the claimant's solicitor as a result.

41. In making that finding, we are mindful of the fact that it would have taken Mrs Stuart moments to acknowledge the correspondence, but find that, as an industrial jury, we find that her explanation, whilst providing no excuse, was credible to the required standard.

***Section 38 Employment Act 2002***

42. We find that when the claimant began these proceedings, the respondent was in breach of its duty to give the claimant a written statement of employment particulars or of any change to those particulars. We find that there are no exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002. We make that finding on the evidence of Mrs Mapley that she could not recall giving the claimant a contract and could not find a copy of one. We find that it would not be just and equitable to award four weeks' pay.

Employment Judge Shore

Date: 3 January 2023