



EMPLOYMENT TRIBUNALS

Claimant: Miss B Jacks

Respondent: The Vital Element (UK) Limited

Heard at: Leeds

On: 11-13 January 2022

Before: Employment Judge Maidment

Members: Ms N Arshad-Mather

Mr G Harker

Representation

Claimant: Miss S Regan, lay representative

Respondent: Mr S Roberts, Counsel

JUDGMENT having been sent to the parties on 16 January 2023 and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. The claimant complains of discrimination arising from disability in respect of her being placed at risk of redundancy on either 18 or 19 May 2021. She says that she was treated unfavourably in this regard because of her absence from work, which she says arose in consequence of her disability. The claimant, it is accepted by the respondent, was at all material times a disabled person by reason of her mental health impairment of PTSD, depression and/or anxiety.
2. The claimant then maintains that she was constructively dismissed and this amounted also to discrimination arising from disability - due to lack of qualifying service, an unfair dismissal claim could not be pursued. The claimant resigned from her employment on 21 October 2021. In terms of

the acts of the respondent which she says singularly and/or cumulatively, amounted to a breach of trust and confidence, the claimant relies on her being placed at risk of redundancy, the respondent acting so as to deprive her of the ability to be represented at meetings to address her grievance and her wages deliberately not being paid on time and/or in the correct amount. It has been articulated, on behalf of the claimant, that the amount of work she had been given triggered her mental health impairment, but it was clarified by Miss Regan that the claimant was not suggesting that she had been given excessive duties because of or arising from her disability. Given that this is an alleged constructive dismissal, the tribunal's focus will be on determining the reason for the respondent's acts, said to amount to a fundamental breach of contract, in response to which the claimant resigned.

3. Whilst the acts relied upon in the constructive dismissal claim (other than the redundancy warning) had not been specifically identified during the case management process, they were of no surprise to Mr Roberts acting on behalf of the respondent and he had come prepared to deal with such matters, including through witness evidence.

Evidence

4. Having identified the issues, the tribunal took some time to read into the witness statements exchanged between the parties and relevant documents contained within an agreed bundle. Each witness was able to confirm their written statement and then, subject to brief supplementary questions, be open to be cross-examined.
5. The tribunal heard firstly from the claimant. Before her cross-examination was completed, a number of witnesses called on her behalf were interposed, namely Mrs Kimberly Orwin, the claimant's mother, Kristian Tankard, a former team leader with the respondent and David Swindon, who had been employed as operations administrator from June – October 2020. The tribunal also accepted in evidence a statement of a former employee, Liam Powell, albeit on the basis that little weight could be given to his evidence in circumstances where he was not present to be cross-examined. The tribunal then heard, on behalf of the respondent, from its managing director, Nicholas Calcutt.
6. Having considered all relevant evidence, the tribunal made the findings of fact set out below.

Facts

7. The respondent is in business providing grounds maintenance, landscaping, cleaning and caretaking services to predominantly schools and housing associations. It is a small business managed by Mr Nick Calcutt. The claimant first worked briefly for the respondent part-time as its operations administrator between 3 June and 8 July 2019. The operations

administrator was responsible for scheduling staff working on contracts and liaising with customers.

8. The claimant suffers from PTSD, anxiety and depression stemming from events in her childhood. On joining the respondent, she completed a health questionnaire in which she did not disclose such conditions. She believed that she did not have to and was concerned that she would have to disclose the reasons for her fragile mental health. The respondent accepts now that at all material times the claimant was a disabled person by reason of her mental health impairment. It maintains, however, a lack of knowledge of her impairments until a date in the first half of 2021.
9. The claimant maintains that she had conversations which involved Mr Calcutt in this first period of employment with the respondent during which she disclosed her conditions. She was clearly, however, uncertain in giving evidence as to the exact date such conversations occurred. She referred to only being willing to have such conversations once she had developed trust in Mr Calcutt. In this first period employment, she obviously had a very short time in which to do so.
10. The claimant left the respondent to take up an offer of alternative employment with slightly more hours, at a greater wage and with more benefits. Furthermore, it was a role she could undertake flexibly around her requirements to care for her young son. The claimant is a single mother.
11. That new employment did not, however, ultimately work out due to the demanding nature of the role, which required the claimant to be available suddenly and out of normal working hours to deal with customers. On 5 May 2020 the claimant messaged Mr Calcutt asking if he had any vacancies. He agreed to meet with her to discuss a possible business development administration role to assist him generating more business. The respondent had previously had an employee in such a position (targeting estate agents in particular), but at this time Mr Calcutt was undertaking those responsibilities within the rest of his management role.
12. The claimant was offered and accepted this part-time position working 16 hours each week (8am-4:30pm on Tuesday and Thursday) from 28 July 2020. The claimant completed a further medical questionnaire on that date in which she again did not declare any mental health impairment. On balance, if the claimant had confided in Mr Calcutt during her first period of employment, there was, on her own evidence, no reason why she would not make the declaration now.
13. Nevertheless, the claimant has given evidence that, after she had been with the respondent for a while, she built up trust with Mr Calcutt. She also confided in a team leader Chris Tankard that she suffered from PTSD. The

claimant's evidence was that she heard Mr Calcutt talk about his own struggles with mental health and felt she could confide in him. She said that there had been multiple conversations involving her, Mr Tankard and Mr Calcutt about their respective mental health.

14. Mr Calcutt denies that such conversations took place. Mr Tankard, however, told the tribunal that he had suffered a breakdown whilst in the respondent's employment, during which the claimant messaged him asking how he was. He explained his situation and she said that she was in the same boat. He then sung Mr Calcutt's praises, saying that he was all for mental health and that she should be able to talk to him as Mr Tankard had been able to do. He said that thereafter, a number of times over a coffee, all 3 together had discussed their respective mental health.

15. Mr Tankard's evidence, together with that of the claimant, was detailed and convincing and is preferred to that of Mr Calcutt. It is noteworthy that both the claimant and Mr Tankard, without hesitation, praised how Mr Calcutt had at various times reacted to their own mental health issues. Mr Tankard told the tribunal that he had discussed his PTSD in his interview with Mr Calcutt before he started employment in 2017/2018. Mr Tankard described Mr Calcutt as sympathetic in the beginning. The tribunal notes that Mr Tankard was absent without leave on several occasions early in his employment, yet was not disciplined. On another occasion, he had absented himself from the workplace with one of the respondent's vans and a trailer. Again, no disciplinary action was taken in circumstances where Mr Tankard accepted that it could have been. On another occasion, he had been absent without leave, had not answered telephone calls and had taken out money using the respondent's bankcard (which he quickly reimbursed). Again, Mr Calcutt took no action, albeit in circumstances where Mr Tankard suggested that the business might have struggled at that time without him, given his ability to drive the respondent's vans and trailers.

16. Mr Calcutt's credibility is also significantly damaged by his denial of knowledge in the respondent's tribunal response of the claimant's mental health issues prior to the date where he issued her with a warning of redundancy. This was after, as will be described, she had messaged him with information about her mental health impairment. Mr Calcutt's assertion that he forgot about those messages when he prepared the response is not credible. The tribunal notes that he did not correct the statement in the respondent's response and, whilst he says he did not realise he could do so, he allowed the respondent's position to be reaffirmed at the subsequent case management discussion. His acceptance in his witness evidence now that he has greater knowledge was inevitable, given the documents in the tribunal bundle.

17. The claimant's own mental ill-health appeared not to impact on her work or attendance. She presented herself as a very willing and enthusiastic employee.
18. The claimant did devote her time in the early days of her employment to business development, with particular reference to putting together a proposal for a school academy regarding hiring out its facilities. The respondent envisaged that this model could be rolled out and promoted to other schools. However, particularly due to the coronavirus, it was difficult to get any school to commit at this stage. Partly as a result of that, the claimant did start to undertake other administrative work including accounting and bookkeeping functions, which she received some training on. She processed receipts for expenditure incurred by maintenance staff on contracts, invoiced customers and started to complete the respondent's VAT returns. Effectively, this finance and administration work became her core role for the respondent, certainly from January 2021.
19. The claimant painted a picture of her willingness to take on work being abused by Mr Calcutt in circumstances where she was, over time, asked to take on more and more responsibilities within her existing working hours and without any increase in remuneration. Certainly, there was a brief period where there was no operations administrator in place and where the claimant had to take on those duties. Even when a replacement employee, Heather, commenced, the claimant continued to have responsibility for other work which took her away from her core business development activities. In the period leading up to the claimant's absence due to sickness in March 2021, the claimant had been involved in frequent and lengthy video calls with Mr Calcutt and Heather regarding the future of the business, which again had taken up time which she felt she could not then properly devote to her core duties.
20. It is not the claimant's case (as Ms Regan confirmed at the commencement of the hearing) that the claimant had been given additional duties and a heavy workload for reasons relating to her disability. Indeed, it is clear from the evidence that Mr Calcutt treated other employees in the same way. Mr Tankard told the tribunal of the pressure he felt he was under to get all the work done. Mr Swindon, who had held the operations administrator role from June to October 2020, told the tribunal that he felt bullied, with pressure to perform and again a heavy workload. Mr Swindon was not a disabled employee.
21. Right up until the claimant's sickness absence, she attended the aforementioned video meetings with Mr Calcutt and Heather which she described as restructuring meetings, but he said were more focused on a long-term vision for growing and changing the business. In particular, there was a consideration of developing a franchise model and how each of them

might sit within a franchisor operation. Whilst no appointments were made, there was discussion that Mr Calcutt would take the role of head of sales and marketing, the claimant responsibility for finance and administration and Heather for operations.

22. Mr Calcutt made the claimant aware in late February that a number of contracts with an annual revenue of £9000 (against annual total turnover of around £250,000) would be lost from Accent on a transfer of 14 properties to another housing association. He had been informed by letter of 26 February 2021. The claimant was not concerned by this in terms of her own role. She said, and the tribunal accepts, that Mr Calcutt remained positive and spent more time talking up the respondent's recent achievement of winning a contract with responsibility for another 20 sites which came online in November 2020. Mr Calcutt confirmed to the tribunal that he wanted to stay optimistic and did not want to worry people. This remained his position when the Accent sites were lost on 10 March 2021.
23. The tribunal notes Mr Calcutt's evidence that on 8 March 2021 schools reopened. He said, however, that the previous business development plans for using school facilities still could not be advanced due to the continuing need to maintain social distancing.
24. Mr Calcutt was neglectful in ensuring that employees were paid on time and in the correct amounts. The claimant in her tribunal complaint said that, since the start of her employment with the respondent, her wages had been wrong almost every single month and always lower than they should have been. This had put her in serious financial hardship. Mr Tankard described this as a problem for everyone, describing a failure to pay wages as adding to his own stress.
25. The claimant's mental health did suffer a deterioration. The evidence (as given by her to her GP) is that she was suffering from financial problems, problems at home, difficulties arising out of living during periods of the coronavirus lockdown and having to school her young son at home. She said, however, that a significant cause of her illness was stress at work, describing herself as being made to feel that she had to do extra work. She was effectively caught in a trap, not being able to say no to work demands which built up her feelings of stress. She said to the tribunal, however, that she was not saying that Mr Calcutt picked on her or manipulated her because of her disability.
26. The claimant saw her GP on 19 March 2021. She described the problems impacting upon her health which included stress from not being able to fully do all her work. She described now dreading going into work and that she was looking at alternative work. She made reference to her having to undertake accounts management. On a further visit to her doctor on 8 April

she described herself as feeling a little better save that Mr Calcutt had been ringing her to ask how she was, but then starting to put pressure on her to come back to work, which made her anxiety worse.

27. Indeed, the claimant had messaged Mr Calcutt at 3:53pm on 19 March with a photograph of a fit note and saying that she had been signed off for 4 weeks due to stress, that she was back on her antidepressants and going back to see her counsellor. The wording of that message is not suggestive of her informing Mr Calcutt of her anti-depressant medication for the first time. Mr Calcutt's responses do not expressly disclose an awareness of her mental health issues. He maintained that, when he responded that he didn't expect that and referred to the claimant "putting a brave face on as always", such words were indicative of him having no knowledge at all of her mental health impairments. The messages, however, were just as likely to have been sent in circumstances where, he knew about her mental ill health, but he was simply not aware that the claimant was struggling at that time and on the point of having a breakdown in her health.

28. It is accepted by the tribunal that Mr Calcutt showed sympathy and compassion during the claimant's absence. On hearing the news, he asked if she was okay and if she wanted a chat. The claimant responded: "... It's been building up for a while, money worries, my PTSD and I just broke down on my mum yesterday...". He replied making the comment about her putting a brave face on but saying: "okay no problem... Hope you're okay. Call me whenever you're ready!". The claimant responded saying that she burrying everything "until it blows" was what she did best. Mr Calcutt responded that he had just been thinking that she was looking a lot better in herself, repeating that he was there for her if she needed anything. Having resolved an issue with the claimant's wages on 31 March 2021, when raised by her and after her response, he replied that he was glad she had had a better week. On 12 April he messaged saying that he was checking to see if she was okay. The claimant replied on 13 April saying that she had had a bad few days, had had a first counselling session, which had helped a bit, but her head was just all over the place at the minute. He responded saying he was getting a bit worried and was glad she was holding in there. He said that they were all okay at the respondent company and asked her to keep in touch and get well soon. In another message he described himself as missing "our 3rd musketeer". He asked her to keep him posted and to "take care".

29. In Mr Calcutt's witness evidence he described having received the claimant's medical certificate and then, on the same day, holding a discussion with Heather regarding business continuity where he decided to absorb back the business development function and that the claimant's bookkeeping role would be outsourced as had been the original plan. Heather agreed to work additional hours in the meantime. The claimant's sickness certificate was received, however, very shortly before 4pm when

Heather's working day finished. The tribunal cannot accept that there was such a detailed discussion on that day. Mr Calcutt sought to assert that the claimant had also earlier telephoned him regarding her sickness, but again there is no evidence whatsoever of such communication. The tribunal notes that the claimant's sick note was sent on Friday 19 March which was not a working day for the claimant.

30. When asked why he had not informed the claimant of his plans or sought to commence a redundancy process earlier, he said that he was biding his time and hoping that the situation would improve, having tried to telephone customers to generate additional business. When asked in cross-examination to clarify the reason for redundancy, he said that there were a number of factors. The claimant's business development role was not working, partly due to Covid and partly due to her home circumstances. He said that it was difficult for her to work in her normal hours. Redundancy was also partly due to the aforementioned loss of work. He stated that the bookkeeping element of her work was not being done, so he had to outsource it "fairly quick".

31. On 19 April the claimant messaged saying she had been signed off for another 4 weeks. On 22 April Mr Calcutt messaged saying that they hadn't received her sicknote and asked if she could let him know when they could expect it, saying that they needed the original copy either dropping off or posting. He repeated that he hoped she was keeping well. The claimant responded apologising and saying that she would send it over and the doctors only sent it to her online. She described herself as "not doing too good this week" having had to go through things in her past with her counsellor. Mr Calcutt responded that he was sorry to hear that and hoped that she would start feeling the benefit of the counselling soon. He asked if she could also send over the original fit note. Later that day, Mr Calcutt said to let him know if there was anything he could do to help and the claimant responded saying that she couldn't tell him how much she appreciated him.

32. On 28 April the claimant messaged Mr Calcutt saying that her earnings from March had been reported to HMRC as £745.71, but she had only been paid £464.11. She said that was affecting her universal credit. She messaged further the following day saying she hadn't received a reply from Mr Calcutt, but it needed it sorting by tomorrow otherwise she was going to have £800 to pay £1700 worth of bills. Mr Calcutt responded explaining the payments made to her and the claimant reverted regarding problems caused by a higher amount having been submitted to HMRC. Later that day Mr Calcutt said he had adjusted the payroll which has brought her gross pay down and it had been resubmitted to HMRC. The claimant responded thanking him and describing him as "a gem".

33. Mr Calcutt messaged the claimant on 5 May 2021. He said he was hoping she was well and had expected her in work the previous day as her sicknote had run out. He asked for an update. The claimant responded that she had been given another sicknote for 3 weeks and her antidepressants been increased. She said that once she had her sicknote through she would send it to him. She accepted in cross-examination that she had not realised that it had run out earlier than previous certificates. On 6 May, she messaged to say that she had emailed the sicknote over. Mr Calcutt replied saying he had received it and asking how she was.
34. The claimant told the tribunal (and it accepts) that she informed Mr Calcutt that she was hundreds of pounds short for her bills for the 4th month in a row due to her wages being incorrect and that this was more stress and worry that she didn't need. She said that she received no response until 18 May.
35. On 18 May 2021, Mr Calcutt wrote to the claimant advising that the respondent might need to make redundancies and was considering making 1 employee within the office team redundant because of a team restructure. He said that the restructure of duties had been necessary to ensure business continuity and unfortunately the claimant's post was one of those at risk of redundancy. The respondent was now to start a process of consultation.
36. Mr Calcutt told the tribunal that he had taken advice from HR consultants, but he had misunderstood this advice. They had said he should create a pool for redundancy but in fact his letter, he accepted, should have said that it was simply the claimant's role that was at risk. When asked why he had suddenly dropped the respondent's vision for the long-term future, he said that the vision was still there. When asked why the claimant had been singled out when the vision had been that she would be head of finance and administration, he said that the discussion had only been what roles might be taken on at a future date.
37. When asked by the tribunal what had changed, he said that the respondent had lost some contracts and the business development role had not worked as the work from the schools was simply not there. He also had been informed on 10 May 2021 that an Academy Trust was going to re-tender a number of contracts in July with a value of £30,000. Mr Calcutt confirmed that the respondent in fact managed to retain those contracts. Again, he said that he had tried to remain optimistic. He had not announced a redundancy in February although it was in the back of his mind, hoping that work would come in. He tried to generate more landscape work. He did not take any steps in the earlier part of March when the Accent properties were transferred as revenue was still coming in during April for that work.

38. The claimant said that on receipt of the redundancy warning she felt really upset and was worried as to how she would be able to provide for her son and pay her bills while she was struggling so badly with her mental health. She was concerned that with her self-esteem being so low, she would not find another job easily. She said that she contacted Heather and asked her about the redundancy letter. Heather said that she had not been served with any at risk letter which made the claimant feel that she had been singled out and caused her to believe that she had only been sent the letter due to her being off work sick.
39. It is noted that the claimant had a telephone appointment with her GP as a follow-up. The claimant said she was feeling better, since starting citalopram and was able to think straighter now. She had been feeling worried though again as her boss had sent her a letter threatening redundancy and restructuring. The doctor advised the claimant to get an opinion from the CAB. The claimant was recorded as saying that she did not want to go back to this place of work as it was making her mentally unwell.
40. The claimant then took advice from ACAS and submitted a written grievance to Mr Calcutt dated 24 May. In this, she described herself as being off work due to stress, anxiety and depression which stemmed from her PTSD triggers of stress at work and home. She described her workload causing her stress as well as having to work from home and conduct home schooling during the lockdown. She referred to her wages having been processed wrongly a number of times during her period of sickness putting her in serious financial hardship. She said that after receiving the “at risk” letter she had been “plummeted even further into the stress and depression where I have had to have my antidepressants upped again as I have gone straight back to where I was 2 months ago.” She said that she could not comprehend how Mr Calcutt needed to make redundancies for a restructure that she had been part of for the last 6 months. She said that she had been advised that the treatment of her was discrimination, as she was only at risk of redundancy due to being off work because of her mental health disability. She asked for a consultation meeting which had been arranged for 25 May to be delayed because of her ill-health.
41. Mr Calcutt wrote to the claimant on 4 June inviting her to a grievance meeting on 7 June. She was told that she was entitled to be accompanied by a colleague or union representative. She was told then that she had to make the necessary arrangements and had to give him at least 24 hours prior notice of who would be accompanying her.
42. The claimant responded to the grievance invitation on 4 June saying that she did not have time to prepare and arrange for a colleague to be available. She was also currently in hospital. Mr Calcutt responded saying that he had

rearranged the meeting for Friday 11 June. The claimant contacted him again on 8 June saying that she had been discharged from hospital, but was on bed rest and asked if the meeting could be arranged for Monday 13 June. She emailed again on 10 June saying that she had not had confirmation from him yet about her not attending a meeting the following day. Mr Calcutt replied saying he had rearranged the hearing to 2pm on Tuesday. The claimant responded saying that she could not do Tuesdays or Fridays as she had counselling sessions and weekly appointments with her doctor on those days. Mr Calcutt then suggested Thursday 17 June at 2pm.

43. Mr Calcutt then became aware on 15 June from Mr Tankard that Mr Tankard had been asked by the claimant to accompany her at the grievance meeting. Mr Calcutt messaged the claimant saying unfortunately that caused operational issues asking if there was anyone else who could accompany her. She responded that he was the only colleague she felt comfortable with. Mr Calcutt reverted saying that unfortunately operational obligations were a priority and Mr Tankard had already been booked out on a job - if he had been made aware the previous week, then arrangements could have been made. He therefore needed to rearrange the Thursday meeting, so with that in mind asked the claimant to let him know convenient days and times over the weekend, next week or alternatively to allow Mr Tankard to attend the meeting remotely. The claimant responded that she could only do Wednesday the following week and needed Mr Tankard to be with her to provide the necessary support.
44. The claimant chased Mr Calcutt on 18 June to see if the following Wednesday was possible. Mr Calcutt responded on 21 June saying that they were unable to release Mr Tankard on the Wednesday due to being short staffed. He referred to the claimant previously mentioning that Saturday might be a possibility. The tribunal notes that this was not, however, convenient to Mr Tankard. The claimant told Mr Calcutt and that there were difficulties with Mr Tankard the following week, but that she could do the Monday after. Mr Calcutt then suggested a time from 4:30pm on Monday 5 July. The claimant responded on 25 June saying to leave it with her and that she would get a babysitter.
45. Mr Calcutt, on 1 July, asked if she had had a chance to think about a time for a hearing. The claimant responded that she had thought that the meeting had been booked for 5 July. Mr Calcutt replied that she was going to get back to him with a date. He was unable now to make that day, but any other day that week would work. He chased the claimant further for some dates on 12 July. The claimant emailed him on 4 August saying that ACAS were now involved and would be in contact. The claimant's position was that she had determined to go through an early conciliation process.

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46. The claimant raised the issue of a shortfall in the payments due to her, in particular during her period of sickness. The tribunal has already commented on Mr Calcutt's failings generally in administering the respondent's payroll. It is of the view that this continued during the claimant's sickness. In particular, the system resulted in HMRC being informed of the claimant's notional rate of pay rather than only her SSP. Mr Calcutt did not appreciate this. He corrected the amounts through an adjustment submitted to HMRC, but only when brought to his attention by the claimant. The same thing then happened subsequently.
47. The claimant submitted various sicknotes referring to stress and then stress and low mood. One dated 5 May covered her up until 23 May. A further one dated 25 May covered the period from 24 May until 13 June. A fit note was submitted by the claimant to the respondent covering the period thereafter until a fit note was produced dated 2 August backdated to cover the period from 13 June to 10 August. The claimant maintains that she had previously sent an electronic link for Mr Calcutt to access this fit note, which was how fit notes were supplied by her doctors during the period of Covid. However, she had then gone back to her doctors to get a further fit note because the link had expired. The tribunal has seen no evidence of any earlier submission of this fit note and accepts the respondent's case that it was not provided in a timely manner. The claimant had previously, as referred to, been late with the submission of a fit note. The respondent paid SSP entitlement for the whole month of June despite this, but did not pay her for the month of July. The claimant accepted that she had been paid all that was due to her "eventually".
48. The claimant resigned from her employment by letter of 23 September 2021 giving 4 weeks' notice so that her last day of employment would be 21 October. She said that she was resigning in response to her grievance and early conciliation with ACAS not being resolved. She said that her grievance (as recounted above) set out the basis on which she was resigning.
49. The claimant told the tribunal that she resigned because she felt she had no option. She could never go back when Mr Calcutt had singled her out as the only person to be sent a redundancy letter. Whilst he said no decision would be made, only she had been put at risk. Because of that, she went to ACAS and lodged her grievance. Had he not behaved in such a manner, she had intended to return to work once her mental health had improved and to then look for another job.

Applicable law

50. In the Equality Act 2010 discrimination arising from disability is defined in Section 15 which provides:-

"(1) A person (A) discriminates against a disabled person (B) if –

*A treats B unfavourably because of something arising in consequence of B's disability, and
A cannot show that treatment is a proportionate means of achieving a legitimate aim.*

51. The tribunal must determine whether the reason for any unfavourable treatment was something arising in consequence of the claimant's disability – this involves an objective question in respect of whether “the something” arises from the disability which is not dependent on the thought processes of the alleged discriminator. Lack of knowledge that a known disability caused the “something” in response to which the employer subjected the employee to unfavourable treatment provides the employer with no defence – see **City of York Council v Grosset 2018 ICR 1492 CA**.
52. Any unfavourable treatment must be shown by the claimant to be as a result of something arising in consequence of the claimant's disability, not the claimant's disability itself. The EHRC Code at paragraph 5.9 states that the consequences of a disability “include anything which is the result, effect or outcome of a disabled person's disability”. It has been held that tribunals might enquire as to causation as a two-stage process, albeit in either order. The first is that the disability had the consequence of “something”. The second is that the claimant was treated unfavourably because of that “something”. In **Pnaiser v NHS England 2016 IRLR 170 EAT** it was said that the tribunal should focus on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious for process of that person, but keep in mind that the actual motive in acting as the discriminator did is irrelevant.
53. Disability needs only be an effective cause of unfavourable treatment - see **Hall v Chief Constable of West Yorkshire Police 2015 IRLR 893**. The claimant need only establish some kind of connection between his or her disability and the unfavourable treatment. On the other hand, any connection that is not an operative causal influence on the mind of the discriminator will not be sufficient to satisfy the test of causation. If an employee's disability-related absence, for instance, merely provided the circumstances in which the employer identified a genuine non-discriminatory reason for dismissal, then the requisite causative link between the unfavourable treatment and the disability would be lacking. The authorities are clear that a claimant can succeed even where there is more than one reason for the unfavourable treatment. As per Simler J in the Pnaiser case: “The “something” that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (more than trivial) influence on the unfavourable treatment, and so amount to an effective reason or cause for it”. Further, there may be more than one link in a chain of consequences.

54. The classic test for a constructive dismissal is that proposed in **Western Excavating (ECC) Ltd v Sharp 1978 IRLR 27CA** where it was stated:

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed. The employer is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract”.

55. Here no breach of an express term is relied upon. The claimant asserts there to have been a breach of the implied duty of trust and confidence.

56. In terms of the duty of implied trust and confidence the case of **Mahmud v Bank of Credit and Commerce International 1997 IRLR 462** provides guidance clarifying that there is imposed on an employer a duty that he “will not without reasonable and proper cause conduct himself in a manner calculated [or] likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee”. The effect of the employer’s conduct must be looked at objectively. The conduct complained of must have played a part in the decision to resign – it may, however, be one of a number of causes of the resignation – see **Meikle v Nottinghamshire County Council 2005 ICR 1**.

57. On the question of affirmation, the tribunal has also derived assistance from the Court of Appeal decision in the case of **Buckland v Bournemouth University [2010] EWCA Civ 121**. There Jacobs LJ said:

“When an employer commits a repudiatory breach there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation.”

58. In **Cantor Fitzgerald International v Bird and ors [2002] IRLR 867 QBD, Mr Justice McCombe** described affirmation as “essentially the legal embodiment of the everyday concept of ‘letting bygones be bygones”.

59. Applying these principles to its factual findings, the tribunal reaches the following conclusions.

Conclusions

60. The claimant complains that her being sent a letter warning her of her potential redundancy amounted to unfavourable treatment arising from her disability.
61. Certainly, the receipt of such letter amounts to unfavourable treatment. The claimant could and did reasonably consider that she was being treated to her detriment in being told that her employment was at risk and that a period of consultation would commence which might lead to the termination of her employment.
62. The tribunal also concludes, as already referred to, that Mr Calcutt was aware and certainly, in any event, on notice prior to the issue of the redundancy letter that the claimant was a disabled person. On the respondent's behalf, it is accepted by Mr Roberts that he had constructive knowledge from the beginning of her absence on 19 March 2021.
63. The claimant maintains that the respondent issued that letter because of her being absent due to sickness.
64. The tribunal concludes that her absence, from 19 March up to the point the warning of redundancy letter was issued dated 18 May, arose from her disability of PTSD, depression and/or anxiety. Mr Roberts rightly reminds the tribunal that it should not simply make such an assumption and that the initial sicknotes simply referred to the absence being by reason of the claimant suffering from stress.
65. This is a matter for the tribunal's determination on the facts and it is entirely satisfied that the claimant, whilst suffering from stress, had suffered a relapse in her mental health and there had been a triggering of her PTSD symptoms. She was clearly, on her accepted evidence, in a state of significant anxiety and was suffering from depression. The claimant was placed on antidepressant medication from the outset of her absence and the dosage was subsequently increased. She referred at the time to having broken down and to her PTSD. Again, the claimant's evidence as to how she felt is indicative of a reaction of some distress to the situation she found herself in. She was quickly referred to counselling and indeed suffered a relapse in her condition by 22 April due to having to relive past events which had caused her condition of PTSD in the first place. The tribunal cannot accept that she was simply suffering from stress and that was the sole reason for her absence.

66. The key question is then whether Mr Calcutt issued the redundancy letter because of her absence - whether her absence was a material influence on him at the time he issued the letter. It does not have to be the sole or even the predominant reason. That involves an examination of Mr Calcutt's conscious and unconscious thought processes and the operation of the burden of proof provisions in the Equality Act.
67. Certainly, the claimant has shown facts from which the tribunal could reasonably conclude that her absence was a material factor in the issuing of the redundancy letter. There had been no prior indication given to the claimant of a potential redundancy, the redundancy coincided with a period of sickness which was clearly going to be of a protracted nature and Mr Calcutt, on his own admission, issued a letter which was inaccurate in terms of both any reason for potential redundancy and in suggesting that he was considering more than one employee as part of a potential pool of selection.
68. Turning to Mr Calcutt's explanation for his issuing of the letter, the tribunal cannot regard him as a reliable witness, not least given its conclusions regarding his evidence of a lack of earlier discussions with the claimant about her mental health and him providing, without adequate explanation, a misleading response to the tribunal claim asserting a lack of knowledge before he issued the redundancy letter. He now recognises that that was inaccurate. Again, it is hard to accept that he had simply forgotten the claimant referring explicitly to her mental health impairments when she first notified him of her sickness absence.
69. This redundancy situation seems to have come quite out of the blue. Up until the claimant's absence from work she had been involved in meetings to discuss a vision for the respondent's future which involved a changing business model and an expansion in its activities which might result in the claimant becoming a head of finance and administration.
70. Those meetings indeed pre-and post-dated the notification sent to Mr Calcutt dated 26 February 2021 that there was to be a loss of 14 sites serviced by the respondent. There is no indication of any reaction by Mr Calcutt to that loss of business, a loss of business which he now maintains, at least in part, was the reason for the claimant being at risk of redundancy. That lack of reaction is perhaps unsurprising in the context of a loss of contracts worth only £9000 per annum out of an annual turnover of around £250,000 per annum and where the respondent had, as recently as November 2020, added an additional 20 properties to its portfolio of a similar value in revenue terms. Indeed, when Mr Calcutt told the claimant about the loss of the Accent work, he was optimistic and certainly did not suggest that this should cause the claimant personally any concerns. Again, when those contracts ended on 10 March, there was no action taken by the respondent.

71. Mr Calcutt maintains that the claimant's business development role for which she was initially employed had not worked out. This role had been primarily to explore the possibility of generating additional work from schools hiring out their facilities. That had been difficult to progress given the coronavirus pandemic. However, if anything, with the reopening of schools from 8 March noted by Mr Calcutt, there was cause for more cautious optimism, albeit it is accepted in circumstances where that pipeline of work was still some way off given continued social distancing.
72. Mr Calcutt maintains that having received the claimant's sick note he held a meeting with Heather where there were some detailed purported discussions of contingency plans given the claimant's absence. The tribunal does not accept that such discussion took place at the time or in the manner described by Mr Calcutt. However, even on his own case, there is a suggestion that a decision had been taken to outsource the bookkeeping and accounts work carried out by the claimant and for Mr Calcutt himself to take back business development responsibilities. There is no suggestion, in the way he presented such discussions, that this was simply for a temporary period. If those discussions had occurred in the way he described, there appears to have been a swift reaction to the claimant's sickness absence which put her employment instantly in some jeopardy.
73. In any event, Mr Calcutt did still not contact the claimant to tell her that her role might be at risk.
74. The context here is of an employee, who may have been initially employed to do business development work, but who had turned her hand to whatever the business required in terms of administrative work including accounts and bookkeeping and who was very much part of an administration/management team consulted on the future direction of the business. The claimant had previously worked as an operations administrator and was clearly very flexible in terms of the duties she could undertake. She was also an employee working at a level of wages not far off national minimum wage and for only 16 hours over 2 days each week – an overhead of limited cost.
75. Whilst Mr Calcutt points to a schools Academy re-tendering a more valuable contract, of which he became aware on 10 May, again, no steps were taken by him to inform the claimant or to further consider business structures.
76. Mr Calcutt then produced the redundancy letter dated 18 May stating, on his own evidence, inaccurately that the respondent needed to make redundancies (in the plural) with one employee within the office team redundant because of the team restructure - the restructure of duties being necessary to ensure business continuity. The reality was that the claimant's singular position, regarded simplistically as one to assist in business

development, was to be removed. No one else was at risk of redundancy, indeed again in circumstances where the claimant, out of the 2 administrative assistants, was the longest serving employee who had shown considerable flexibility in her duties over the period of her employment.

77. The aforementioned factors cause the tribunal to reject Mr Calcutt's explanation that this was a straightforward and genuine redundancy situation.

78. The tribunal takes careful note of Mr Calcutt having been in the past sympathetic to both the claimant and Mr Tankard on matters of mental health. He did not rush to dismiss the claimant on her notification of initial sickness. However, by 22 April, he was having to chase a fit note and it was becoming clearer that the claimant's absence was likely to be longer than a few weeks. The claimant raised issues regarding her universal credit due to inaccurate declarations of wages on 28 April. On 5 May Mr Calcutt emailed the claimant saying that he had expected her at work the previous day, because her fit note had run out. The claimant subsequently referred to her being hundreds of pounds short in terms of wages.

79. That was the background to the issuing of the redundancy notice. In circumstances where the burden of proof has shifted the tribunal is not satisfied that it has been provided with an explanation from Mr Calcutt that his decision to issue the redundancy notice was in no sense whatsoever influenced by the claimant's sickness absence. Indeed, the tribunal positively concludes that the claimant's sickness absence was a material influence on his decision making.

80. It is still then open to the respondent to defend this type of discrimination complaint on the basis that it acted proportionately in pursuit of a legitimate aim.

81. Mr Roberts, in his submissions, somewhat conflated the earlier issue of unfavourable treatment and the reason for it with the potential defence available to the respondent. His argument is that the redundancy notice was a genuine redundancy notice untainted by discrimination which was aimed at achieving a legitimate aim in terms of a reduction in the workforce. That is essentially an argument that the unfavourable treatment did not arise from disability, but rather from a genuine business decision that the claimant's role was surplus to requirements untainted by considerations of her absence. The tribunal has rejected that proposition.

82. It is then very difficult to see what legitimate aim the respondent is relying upon. It is not, for instance, maintaining that it was seeking to have a

workforce fit and able to provide satisfactory attendance at work such that the claimant's dismissal for ill-health absence was then proportionate.

83. In circumstances where the tribunal does not consider that there was a legitimate aim of redundancy and where this was effectively used as a pretext to dismiss an employee because of her ill-health and disability related absence, with no evidence or regard for how long the claimant might for instance be absent, the future prognosis of her condition, whether she might be given alternative duties or whether the respondent's administration function might be restructured in some other way which might preserve her employment, the respondent cannot have acted proportionately.
84. The claimant's complaint of discrimination arising from disability in respect of the issuing of the redundancy warning letter therefore succeeds.
85. The claimant also maintains that she was constructively dismissed and that such constructive dismissal amounts to a further act of discrimination.
86. Consideration of such claim may make little difference in circumstances where the tribunal considers that, but for the issuing of the (discriminatory) redundancy note, the claimant would have remained in the respondent's employment. She would probably have left the respondent's employment relatively quickly, but she would have done so at a point where she had secured alternative employment elsewhere.
87. The tribunal records, at this point, its conclusion that the issues regarding the claimant's wages and the conduct of the grievance procedure in no way related to the claimant absence arising out of her disability. The respondent's treatment of all employees regardless of disability issues was similarly erratic in terms of the payment of wages. The claimant had suffered from this throughout her employment. The lack of payment for the claimant for the month of July was because of a lack of provision of a sick certificate. Mr Calcutt was not preventing a grievance hearing from proceeding. Both parties had issues which hampered an arrangement of a meeting. Whilst Mr Calcutt's belief that Mr Tankard could not be released from work on particular occasions might have been inflexible, he genuinely considered that the timings suggested by the claimant were not convenient.
88. The issuing of the warning of redundancy notice, as an act of unlawful discrimination, must, however, in the circumstances be regarded as a breach of the mutual obligation of trust and confidence which entitled the claimant to resign with immediate effect. She was being told of a decision not genuinely on the grounds of redundancy and fundamentally inaccurate/misleading as to the nature of a proposed restructure. She was being told this for a reason arising out of her disability. The redundancy notice then simply needs to be an operative cause of the claimant's

resignation, certainly not the predominant cause, if there was more than one reason. It was an operative cause.

89. The key issue the tribunal has to decide is whether by remaining in the respondent's employment the claimant affirmed the contract of employment losing her right to rely on the respondent's conduct as bringing her contract of employment to an end. Authority suggests that the tribunal should not be too ready to regard an employee's conduct as affirming a breach of contract, recognising that resigning from any employment is a significant decision for an employee to take. Here there was a period of delay before the resignation after the redundancy notice was received and in circumstances where the claimant had continued to receive and accept sick pay. The continuing acceptance of such payments is not, however, determinative. On balance, the tribunal does not consider that the claimant affirmed the contract of employment in circumstances where certainly her conduct was not such as to indicate a willingness to let bygones be bygones. She was clearly affected by the receipt of the redundancy notice which she believed to be a reaction to her ill-health absence. She raised a grievance about this, a grievance which was never, as a matter of unarguable fact resolved. She further then effectively sought to pursue her complaints through ACAS early conciliation. The claimant, of course, during this period, was in a very poor state of mental health.

90. The claimant was constructively dismissed by the issuing of the redundancy notice and such dismissal was discriminatory.

Remedy

91. Awards of compensation in claims of discrimination are governed by Section 124 of the Equality Act 2010 which gives to the tribunal the same power to grant any remedy which could be granted in proceedings in tort before the civil courts. Compensation based on tortious principles aims to put the claimant, so far as possible, into the position that she would have been in had the discrimination not occurred - see **Ministry of Defence v Cannock [1994] ICR 918** – essentially a “but for” test in causation when assessing damages flowing from discriminatory acts.

92. As regards injury to feelings arising out of the detriment as found to be proven, according to **Prison Service and others v Johnson [1997] ICR 275** the purpose of an award for injury to feelings is to compensate the claimant for injuries suffered as a result of the discriminatory treatment, not to punish the wrongdoer. In accordance with **Ministry of Defence v Cannock** the aim is to award a sum that, in so far as money can do so, puts the claimant in the position she would have been had the discrimination not taken place. Pursuant to **Corus Hotels Plc v Woodward [2006] UK EAT/0536/05**, an Employment Tribunal should not allow its feelings of indignation at the employer's conduct to inflate the award made in favour of a claimant.

93. The tribunal was referred to the Vento guidelines (derived from **Vento v Chief Constable of West Yorkshire 2003 ICR 318**) and to the guidance given in that case where reference was made to three bands of awards. Sums within the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory treatment. The middle band was to be used for serious cases which did not merit an award in the highest band. Awards in the lower band were appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. Nevertheless, the Tribunal considers that the decisive factor is the effect of the unlawful discrimination on the claimant.
94. The bands originally set out in **Vento** have increased and have given rise to Presidential Guidance which has re-drawn the low band for claims brought on or after April 2021 as ranging from £900 - £9,100 and the mid band from £9,100 at the lower end to £27,400 at the top end.
95. The claimant's schedule of loss refers to an appropriate sum for injury to feelings as being £27,000. The claimant elected to give no further evidence at the remedy stage, after the tribunal had given its Judgment. Mr Roberts invited the tribunal to assess injury to feelings somewhere from the middle to the upper level of the lower Vento band and giving a figure therefore of £6000 or £7000.
96. Following the claimant's resignation, she was unable to obtain alternative employment for a period of 6 weeks. Based on her earnings declared in her tribunal application, which were not contested by the respondent, the claimant had been paid the net sum of £140.77 per week giving a figure for loss of earnings in the sum of £844.62. The respondent did not seek to argue any failure to mitigate.
97. The tribunal considered that an award of compensation for injury to feelings should fall at the bottom of the middle Vento band. Whilst the claimant's successful complaint of unlawful discrimination was in respect of one incident, that did lead to the termination of her employment. Clearly the receipt of the letter putting the claimant at risk of redundancy caused significant upset to her. However, the claimant had already before that point suffered a deterioration of her mental health for some time and for reasons unrelated to any disability discrimination. The claimant was clearly then also affected by the respondent's failure to pay her the correct level of wages and in a timely matter. She was further affected by the lack of progress in finding a resolution to her grievance. From the claimant's medical records, it is clear that her doctor recognised that the claimant was feeling worried again as a result of receipt of the redundancy letter. However, by then the claimant was already receiving counselling and antidepressant medication, the dosage of which had already increased in April before receipt of the letter warning her of redundancy. The claimant was then after receipt of that

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letter able to look for and obtain alternative employment commencing from 1 December 2021.

98. In all of the circumstances, the tribunal considers that an award of £10,000 is an appropriate expression in money terms of the injury to feelings suffered by the claimant. To this should be added interest at the rate of 8% over a period of 87 weeks from the receipt of the warning of redundancy letter. That amounts to a further sum payable by the respondent to the claimant of £1338.46.

Employment Judge Maidment

Date 3 February 2023

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