EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P Withers	**v**	Halfords Autocentres Ltd

Heard at: Bury St Edmunds **On**: 2/3/4/5 May 2023

Before: Employment Judge Conley
Ms S Blunden
Mr G Page

Appearances
For the Claimant: Ms J May, solicitor
For the Respondent: Ms A Akers, counsel

JUDGMENT

1. The claims of harassment, victimisation and discriminatory dismissal are dismissed.

2. The claims of discrimination arising from a disability is well-founded and succeeds in relation to the following acts of unfavourable treatment:

A. Issuing the Claimant with a Record of Improvement pursuant to the respondent's absence process;

B. Delaying compliance with and/or failing to follow risk assessments undertaken on 12 November 2020, 27 May 2021 and 4 August 2021

3. The claim that the respondent failed to make reasonable adjustments is well-founded and succeeds.

REASONS

BACKGROUND

1. By a claim form presented to the Employment Tribunals on 24 January 2022, following a period of ACAS early conciliation between 30 November 2021 and 10 January 2022, the Claimant pursues a complaint against the Respondent that they discriminated against him in a number of ways by reason of his disability.

2. The claim was resisted by the Respondent and they presented a Response on 29 March 2022 which included comprehensive Grounds of Resistance to the Claim. They thereafter made a request for further and better particulars on 23 May 2022.

3. Following a Case Management Hearing on the 14 October 2022 before Employment Judge Bloom at which a comprehensive List of Issues was prepared. Thereafter, the Respondent served Amended Grounds of Resistance on 10 November 2022.

CASE SUMMARY

4. In outline, the circumstances which give rise to this claim are as follows.

5. The Claimant, Mr Paul Withers, is (now) a 37-year-old man with cerebral palsy. His condition, which affects his left side, causes weakness in his leg and arm, which in turn affects to a degree his mobility and ability to lift heavy objects.

6. He worked for the respondent for a little more than 2 years. Initially all was well but after around 4 months in his job his condition deteriorated, and he took a number of periods of sick leave.

7. The change in his condition prompted the respondent to initiate a series of risk assessments with a view to setting in place some reasonable adjustments to assist the claimant in his work and to mitigate the effects of his condition.

8. The claimant's case is that the way in which the respondent dealt with his sickness absence, and in particular his perception that it was being treated as a disciplinary matter, coupled with their repeated failures to implement the reasonable adjustments that they had identified in the course of the risk assessments, was the beginning of a course of discriminatory conduct towards him by the Respondent which culminated in his constructive dismissal on disability grounds on 25 November 2021.

9. The respondent's case is that they did not discriminate against the claimant on the grounds of his disability; on the contrary, they were a supportive and considerate employer that correctly followed its own procedures in relation to absence and disciplinary matters; identified reasonable adjustments to support the claimant of its own volition, and applied them as far as was practicable; and that any perception of discrimination on the part of the claimant was founded on misconceptions held by him.

10. In addition to the respondent's substantive grounds of resistance, they also submit that the majority of the claimant's complaints are time barred in that they occurred outside the statutory 3-month time limit.

THE EVIDENCE

11. We have considered evidence from the following sources in reaching our findings of fact in this case:
    i. The statement and oral evidence of the Claimant;
    ii. The statements and oral evidence of Paul Senior, Stuart Benton, Gary Hall and Steve Warburton (the latter appearing via CVP)
    iii. An agreed Bundle of Documents consisting of 243 pages, together with some supplementary documents provided (by agreement) during the course of the hearing.

THE ISSUES

12. The List of Issues set out by Employment Judge Bloom identifies five separate heads of claim, although factually there is a considerable overlap in relation to all five.

13. The heads of claim are as follows:
    i. Discrimination arising from a disability;
    ii. Failure to make reasonable adjustments
    iii. Harassment
    iv. Victimisation
    v. Discriminatory constructive dismissal

14. It is not necessary for the List of Issues to be rehearsed here. The questions will be addressed when the Tribunal's conclusions are provided below.

FINDINGS OF FACT

15. The Claimant was interviewed for his position with the respondent as an MOT tester (grade 3) on 14 October 2019 by Roger Thorn. During the course of the interview, he disclosed that he had cerebral palsy and that as a result he struggled with some duties such as changing tyres.

16. This condition amounted to a 'disability' for the purposes of the Equality Act. This was not disputed by the respondent.

17. The claimant's duties were to carry out MOT tests on vehicles, in addition to carrying out the work of a service technician if there were no tests to complete.

18. He commenced his employment on the 17 October 2019. He was based at the respondent's large Milton Keynes branch.

19. The first four months of his employment with the respondent went well. However, in February 2020, as a direct consequence of his condition, the claimant's hip became inflamed, and his ankle bones rubbed which made it painful for him to weight-bear. At some unspecified point he started to use a crutch in order to ease the pain. This was not until some time later, shortly

before the decision to conduct a risk assessment due to the potential hazards at the respondent's site for someone using a crutch.

20. As a result of the pain, the claimant took a number of days off sick; and he then took further time off in order to attend medical appointments. On 20 August 2020 the claimant had to attend hospital due to increased pain and bruising on his thigh. He was advised that he would be referred for an MRI and for physiotherapy. He informed Stuart George (who was at that time the manager of the Milton Keynes branch) by text message (which was reproduced at page 104 of the bundle).

21. The claimant's specific days of absence during 2020 were as set out in an email dated 4 November 2020 from Stuart George to Gary Hall, the Regional General Manager; and were as follows:

March 4 - 1 day

March 20 - 1 day

July 14

Aug 7

Aug 20

Oct 5

Nov 3

22. The claimant then took two further periods of absence. On the 22 and 23 December 2020, he was suffering from acid reflux because of the medication that he was taking to control his pain; and then subsequently he took a period of seven days sickness from the 29 December 2020 as a result of an admission to hospital due to a muscle spasm in his back, possibly caused as a result of the use of his crutch. Whilst in hospital he was prescribed morphine in order to control the pain.

23. These were all genuine sickness absences and were all directly connected with the claimant's disability. Again this is not in dispute.

24. The respondent's absence policy at page 89 sets out the procedure to be adopted in relation to "absence triggers". This states that: *'trigger points inform managers when they need to work with colleagues on finding ways to improve absence levels. Our stage one trigger points are: -three or more separate occasions of absence in a rolling 12-month period; Or -an unacceptable pattern of absence.'*

25. It goes on: *'colleagues who hit one or both of the stage one trigger points will be issued with a letter of concern which will highlight that their absence levels are in excess of company requirements.'*

26. The guidance on the company absence policy document at page 243 says this about absence triggers in relation to disability related absence and triggers: *'discretion must be utilized where a colleague hits an absence trigger due to disability related absence. The manager must consider all the circumstances and decide if further action is something they wish to consider; It may be the case that a longer-term reasonable adjustment may be more appropriate, however this could change over time. There is no obligation to disregard disability related absence when monitoring and reviewing absence. If line managers are unsure, then advice should be sought from the people advice team.*

27. Clearly in relation to the claimant's absences during 2020, despite the fact that absence Trigger Stage 1 point was reached and indeed exceeded, the claimant was not issued with a letter of concern at any stage during 2020. This could have been for a number of reasons; for instance the fact that 2020 was a year in which working patterns were substantially disrupted due to the COVID outbreak. We are prepared to accept that they respondent exercised its discretion in the case of the claimant not to initiate any form of disciplinary procedure. However, it is difficult to make any definitive finding of fact in relation to this in the absence of any evidence from who were the centre managers at the material times.

28. The respondent's absence policy P87 requires that 'Return to Work' interviews should take place *'immediately following every period of sickness absence*', or if it is not feasible to do so, then it should be conducted as soon as is reasonably possible.

29. No Return to Work interviews were conducted in respect of any of the absences set out in para 21 above. The first and only 'Return to Work' interview took place on 24 December (the form at p122) following the two-day absence due to acid reflux. This was plainly in breach of the respondent's own policy.

30. In evidence Gary Hall, when asked about the e-mail sent by Stuart George setting out the number of days of absence of the claimant, said this:

> *"He was a new manager at this point, I guess he inherited a situation and was unclear on how to proceed. It would be standard practice for me to speak to most of the centre managers on a daily basis, so I would have had to speak to him and tell him to sit down with PW and make him aware of the situation. We would have expected a manager to have done a 'Return to Work', but it was important for him to be aware of the situation."*

FIRST RISK ASSESSMENT

31. On the 12th November 2020 Stuart Benton conducted the first risk assessment having become aware of the fact that the claimant was using a

crutch. At this point the only adjustments that had been implemented in order to mitigate the claimant's disability were improvised and at best sporadically employed. In order to limit the time that the claimant spent standing still, which caused him pain, the claimant had taken it upon himself to take a stool from the tea-room which he used at his MOT desk.

32. Other measures, such as blocking out slots in the diary for lunch breaks and blocking the last slot of the day to ensure that the claimant had sufficient time to take breaks and to complete his workload for the day may have been stated aims, but we find that they were rarely if ever happening and certainly not with any degree of consistency at this point.

33. in relation to blocking the last slot of the day the risk assessment form under the heading Existing control measures taken to avoid risk says the following:

"Blocked slots are in the pace diary for lunch breaks and the CM has been instructed to block the last slot of the day also. When Paul is the solitary tester, this must happen and is being monitored. Leanne CSA brings the car keys for booked MOTs to Paul to save him coming to reception and limit his walking."

34. As previously stated, we find that these measures were aspirational but not in fact actually taking place. So far as Leanne bringing the keys to the claimant was concerned, frequently if not invariably she was too busy on the phone dealing with customers or managing her own workload to be able to assist the claimant in this way.

35. Under the heading 'Further action to be taken to reduce risks', the document records that the decision was made at this point for the RGM (Gary Hall) or SM (Stuart George) to source and provide for the claimant a more suitable chair for his use rather than the improvised (and uncomfortable) stool that he was using at the time.

36. Further, it also records that the respondent was to ensure that MOT customers are directed to park in the MOT dedicated car park at the rear of the building *'this will reduce the amount of walking Paul has to do'*. The evidence from Mr Hall and Mr Benton was that in practice this was difficult to achieve due to the use of a shared car parking facility and the fact that many of these sites' customers booked their MOTs online at short notice and could not be advised of the parking facility. We find this to be a poor and unsatisfactory explanation and that in our view greater effort could have been made to put in place this modest and yet potentially extremely helpful adjustment. Once again when it came to taking steps to alleviate his own pain and suffering, the claimant had to improvise a solution by using customer's cars to drive to and from the car park in order to collect cars for testing, rather than being provided with support from the respondent.

37. There is a significant dispute between the parties in relation to what the adopted practice was in relation to the blocking of the last slot of the day. Clearly the claimant's interpretation and understanding was that the last slot was to be blocked on every day to enable him to catch up if he had fallen behind with his workload, whereas the respondent's view was that this was only ever agreed where the claimant was the only MOT tester on site, and that in due course there were several other testers available which negated the need to block out the final slot of the day. We find the claimant to be credible in relation to this insofar as his understanding was that these slots were to be blocked on every occasion. We find that the sentence *"when Paul is the solitary test of this must happen and is being monitored"* does not imply that it should only happen when he is the only solitary tester but merely emphasises the importance that it is done on those occasions and that in fact the aim was that the slots should have been blocked if not on every single occasion then certainly the majority of the time.

38. Support for this can be found on the Record of Improvement form at p123 in which it specifically states *"lunch slot and last slot of the day have been adjusted to allow Paul time to catch up"*.

39. Whilst we accept that the risk assessment document was prepared in consultation with the claimant, we do not accept the assertion made by Mr Benton that this and its future iterations were fully collaborative documents and ones that the claimant was able to contribute to and amend freely. We note that none of them are signed by Mr Withers and nowhere in the document is it apparent that he was given the opportunity to express any of his own views or comments. Had it been the case then we find that the ambiguity in relation to the last slot of the day would have been clarified and the claimant would not have continued to labour under the misunderstanding which he plainly did.

RECORD OF IMPROVEMENT

40. On 14 January 2021 the claimant was issued with a record of improvement by the then site manager Stuart George (Page 123). This document begins by giving details of the claimant's most recent sickness absences and then poses the question "what needs to happen in the future?" after which the following passage is written presumably by Mr. George. *'A concerted effort to ensure your attendance is 100% going forward. Doing this will lessen the impact on colleagues having to cover your absence meaning extra workload and stress.'*

41. Under the heading next steps if no improvements are made the following is written: *"if there is a fourth incident an absence meeting will be held to discuss further action."*

42. The respondent through all four of their witnesses has sought to explain the status of a Record of Improvement document and each of them has emphatically stated that the Record of Improvement is not part of a disciplinary process, and needs to be distinguished from a Letter of Concern which does represent the first step towards disciplinary process. However, we have not been directed to any form of policy document in which the precise function of a Record of Improvement is contained, nor any explanation as to the circumstances in which it is issued to an employee. We also cannot help but notice the degree of confusion that exists between the two documents and the fact that their names appear to be used almost interchangeably.

43. We have however been provided with two separate records of improvement issued to 2 other employees. One by the name of KG issued by Gary Mantle on the 26 April 2021 and another issued to VT on the 16 June 2020 by Stuart George. Both of these documents under the final heading of next steps if no improvements are made both make clear indications that disciplinary proceedings may follow in the event of further similar issues arising in the future. KG was told failure to comply can result in a disciplinary hearing which could lead to dismissal. VT was told failure to improve workmanship and reporting could result in further action being taken in line with the Respondent's disciplinary procedures.

44. Whilst the record of improvement issued to the claimant does not explicitly refer to the possibility of disciplinary proceedings, the fact that there is a reference to "further action" in the event of a further incident of absence, we have no doubt that the claimant would have interpreted this as raising the prospect of disciplinary sanction in the event of further absence.

45. The claimant had this to say about this document:

> *"When Stuart George gave me the letter of improvement, he made it sound like if I had one more time off they would look at getting rid of me. The way I was spoken to about it made me think that it was part of a disciplinary."*

46. Paul Senior gave evidence to the effect that the purpose of a Record of Improvement is not necessarily to identify issues that may require disciplinary action, but could equally be a device for an employee to explain any difficulties that they may have been having at work and for the employer to make suggestions as to how the employee could be better supported or assisted in their role. This may well be the correct purpose of this document, but there is absolutely nothing in the Record of Improvement issued to the claimant that suggests that this was what was envisaged by the respondent, or perceived by the claimant. Mr Senior accepted when questioned by the Tribunal that the wording of the document appeared to place all the

obligation for the claimant's future attendance on him and nothing on the respondent.

47. We are therefore left with the view that as far as the claimant was concerned the Record of Improvement represented a *de facto* first step towards disciplinary proceedings and left him with the impression that any future absence would be sanctioned.

48. The claimant's evidence was that from this point onward there were no further absences, and we accept his evidence. The respondent through their Counsel Ms Akers indicated that this was not accepted but no evidence was adduced to indicate that there had been any further absences which suggests to us that the Record of Improvement weighed heavily on the claimant's mind from that date forward.

CHAIR

49. As previously stated, following the first risk assessment the decision had been made for a more suitable chair to be sourced and ordered on behalf of the claimant. However, despite that indication on the 14 November 2020, by 12 March 2021 the claimant had not received the chair and texted Gary Hall to inquire as to its whereabouts, to which he received the reply "*just chased*".

50. However, once again there was a further delay resulting in the claimant sending Mr Hall a further chaser text message on the 9 April 2021 to which he replied *"Hi Paul they've come back to me saying there aren't many proper chair options that are suitable height, mainly bar stool types, i've asked for a few examples which I'll send to you to have a look at."* The claimant never received such examples, but nevertheless received his chair on 7 May 2021, approximately six months after the initial risk assessment first identified the need.

51. The Tribunal struggles to reconcile the evidence of Mr Hall in relation to the circumstances in which the ordering of the chair was delayed, with the Sales Order confirmation that is produced in the bundle (at page 67) which appears to indicate that a chair was ordered on 17 March 2021. We note that this was five days after the initial chaser text message, but three weeks prior to the text message in which Mr Hall indicated the difficulties that he was having in procuring a suitable chair for the claimant. We cannot even be entirely satisfied that this Sales Order confirmation relates to the chair that was ultimately provided to the claimant on the 7 May 2021; but we do however note that the chair referred to in the Sales Order is not a specialist or bespoke piece of equipment, but an off the shelf (or more accurately, out of the catalogue) standard task chair that presumably could have been ordered almost immediately after the risk assessment took place in November. We do not accept the evidence that either the specifications

required or logistic problems caused by the COVID pandemic played any part in the delay in obtaining chair for the claimant. We find that it is far more likely that Mr Hall simply forgot to order the chair in a more timely fashion and was prompted into action four months later as a result of the claimant sending a text reminder.

SECOND RISK ASSESSMENT

52. A second risk assessment was conducted by Stuart Benton on 27 May 2021, described by Mr Benton as a '*review'*. This records the fact that the claimant now had a new chair that was better. The claimant reported the fact that he was having great difficulty in carrying out MOTs on low slung sports cars and Class 7 commercial vehicles (because of the need to climb up into the cab using a step).

53. In relation to these vehicles, it was made clear that the claimant would be happy to carry out technician work whilst those particular vehicles will be tested by other testers on site. This measure was approved by Mr. Benton.

54. The matter of the blocking of the last slot of the day was revisited and is recorded in the document at page 127 in this way *"last slot still an issue. CM to action"*.

55. This clearly demonstrates to us that not only did the claimant believed that this routine blocking of the final slot of the day was what had been previously agreed but also that it was not happening with any degree of consistency and this was causing him a problem in managing his workload.

56. In the final section of the form, under the heading 'Other relevant information' the following is recorded: *"We spoke about the inability of Paul carrying out MOT tests on certain vehicles and how this could become detrimental to the business, we talked about his job role and the implications of not being able to carry it out fully Paul was open and honest throughout and agreed that if he worsened we would need to maybe look at other options for him moving forward.*"

57. In his evidence, the claimant said that he was concerned that Stuart Benton saying that his inability to carry out MOT tests on certain categories of vehicle could become detrimental to the business. He said that he found this statement threatening. We can understand why he would feel this way. The comment appears to contradict what is said earlier on in the risk assessment, which implies that the claimant could be able to carry out other duties whilst his colleagues carried out tests on those vehicles which he found difficult.

58. At the time the claimant was carrying out an average of nine MOTs per day, whereas the numbers of Class 7 and sports vehicles was

approximately 5 to 8 per week, and so between 10 and 20% of his overall workload.

DISCIPLINARY

59. On 23 June 2021 the claimant was interviewed by Stuart Benton in the presence of Gary Mantle (by now the new site manager for the respondent at Milton Keynes) in relation to his alleged failure to identify a missing wheel bolt during an MOT test As a result of this error, the claimant passed a vehicle that ought to have failed its test. During the course of the interview, he disclosed that he had made two recent mistakes in relation to tyres in that he misread the size of one tyre, and missed damaged cords in another. He had been issued with a Record of Improvement in relation to the latter (although this was not adduced as part of the bundle).

60. He was invited to a disciplinary hearing into alleged gross misconduct with Gary Hall on the 14 July 2021. We also note that he was suspended from work pending the disciplinary, which seems to us to be a wholly unnecessary and heavy-handed approach given that there was no suggestion that the claimant represented a danger either to the integrity of the investigation, or to colleagues or customers of the respondent during the course of the investigation process. Mr Hall accepted that this practice is no longer adopted by the respondent but was customary at the time.

61. When asked to explain how he made the error in relation to the wheel bolt he said *"I'm not sure, it might be that I took a phone call from my doctor about tests for cancer and it might have thrown me off a bit".*

62. He was asked about his ongoing health issues and whether there were any mitigating circumstances in relation to them. He replied *'other than pain from risk assessments not being followed no'*, and then went on to explain that the risk assessment which recommended that another tester deal with Class 7 vehicles, and the blocking of the last slot of the day, was still not being implemented.

63. We accept from this evidence, that as before, by the 14 July 2021 these adjustments were still not being put in place.

64. The decision in relation to this disciplinary procedure was that the respondent would issue the claimant with a final written warning rather than impose the ultimate sanction of summary dismissal. We accept that this decision may have been in part due to the exercise of discretion by the respondent based upon the claimant's disability.

65. The claimant did not exercise his right to appeal against the sanction.

66. Nevertheless, the claimant gave evidence as to his belief that his mistake at work had been treated with disproportionate severity when compared to other colleagues and that this gave him the impression of being targeted. He made reference to three colleagues in particular. In relation to KG and VT we have seen the record of improvement documents issued to them and we do not find that their errors are in the same category of seriousness as that committed by the claimant and so do not offer any meaningful comparison that would allow us to make a finding that he had been targeted. There is insufficient evidence available in relation to another alleged mistake by a colleague called Steve Rabone for us to make any finding in relation to that matter.

67. In relation to the disciplinary procedure, the Tribunal recognises that the pressures being exerted upon the claimant as a result of the failure to implement the risk assessment, combined with his perception that he might be subjected to disciplinary procedures may well have made it more likely that he would have made mistakes; however, we did not find his evidence sufficiently persuasive on the issue of there being some causal connection between his condition and the error.

68. Even if we were to conclude that the disciplinary procedure was discriminatory, we nevertheless would also conclude that the imposition of a sanction of a Final Written Warning would have been proportionate to the commission of an error, in which a potentially dangerous vehicular defect was overlooked resulting in a vehicle that should have failed an MOT being deemed roadworthy. We would therefore accept the disciplinary procedure and the sanction imposed were proportionate means of achieving a legitimate aim.

THIRD RISK ASSESSMENT

69. Either on or very shortly before 3 August 2021 the claimant spoke to Sarah Hards, the Employee Relations Officer for the respondent, and informed her that he had contacted ACAS due to the feeling that he had been discriminated against because the risk assessments had not been followed, and that every time he tried to raise it with Gary Hall he did not feel that Mr Hall had taken his concerns seriously.

70. This conversation with Ms Hards clearly resulted in a meeting taking place between her and Mr Hall on the 3 August 2021 which is evidenced by an e-mail at page 147. Notably, in this e-mail Mr Hall said the following:

"I've apologised that some last slots of the day haven't been booked but we have had a change in management in the centre and they may have been unaware. As such I've asked Stuart to go through the diary this afternoon and block out any last slots which aren't already booked. Stuart will also visit the centre tomorrow and brief the covering CM of this requirement going forward.

71. The e-mail goes on to say:

    'The last slot is only blocked so we can accommodate any retests and also allow for the odd occasion where Paul may be running behind. It wasn't an expectation that this would always be the case. We have multiple MOT testers in that centre and therefore they can support if available where a car has been booked in for the last slot. If Paul is available and has the allocated time remaining in the day then the expectation is that he conducts a test should it be required.'

72. We find these two passages contradictory. On the one hand, Mr Hall took steps to ensure that last slots in the near future would be blocked; but at the same time he also reaffirms his view that this should be the exception rather than the rule.

73. We do not find it to be a coincidence that the following day a further risk assessment took place, and moreover we do not accept the explanation that this further assessment only took place because of a recent change of management. We find that both the meeting between Gary Hall and Sarah Hards and the subsequent further risk assessment were precipitated by the claimant's frustration at the respondent's failure to implement its previous risk assessments and that he had taken advice from ACAS in respect of a potential complaint of discrimination.

74. Rather tellingly, we note that at page 151 the e-mail from Mr Hall to Ms Hards has been cut and pasted verbatim into the risk assessment document. We find that this meeting was an attempt by the respondent to address the concern that the claimant was contemplating making a complaint.

GRIEVANCE

75. On 5 August 2021 the claimant submitted a formal grievance based on 3 grounds common namely:
    1. The fact that he was given a letter of concern about his attendance;
    2. The fact that the risk assessments had not been implemented; and
    3. The fact that he was subjected to a formal disciplinary in relation to the missing wheel bolts.

76. The claimant was invited to a grievance meeting on 11 August 2021 conducted by Paul Senior, divisional director. The meeting took place between 2:30 PM and 3:55 PM.

77. During the course of this meeting when discussing the question of the risk assessment and in particular the process for conducting tests on class seven vehicles, Mr Senior asked of the claimant *"So can you do the role Paul?*" to which he replied *'Yes I can't get my legs under the car but once*

the vehicle is on the ramp then yes I can do it.' He went on to say that he wanted to get back to doing MOTs on the Class 7 vehicles.

78. We find that the question asked of the claimant in this way and in these circumstances was crass and insensitive and we entirely understand why the claimant took offence at it.

79. We recognise that the question is not in and of itself inappropriate in the context of a meeting between a manager and an employee, but the context of this meeting and the background to it made it an inappropriate thing to ask of the clamaint.

80. On 6 September 2021, as part of his investigation into the grievance, Mr Senior had a meeting with Gary Hall. We have seen record of the conversation. During the course of this meeting Mr Hall made a number of unguarded remarks which the tribunal found significantly undermined the reliability of his evidence.

81. Firstly he said this:

"*To be honest over the last six months I've not had a lot to do with [the claimant].*"

This conflicted with his account that he was a manager who displayed a high level of engagement with his staff and had had many tens of conversations with the claimant about his health, and had shown great concern in his welfare, in stark contrast with the perception of the claimant that Mr Hall seemed uninterested in his situation. We prefer the evidence of the claimant in this regard.

82. Secondly, He stated the following:

"he [the claimant] *always wants others to do his work"* and *"I think some of the pushback is from the centre because they believe he is lazy his condition seems to have got worse he doesn't want to do Class 7 which is really annoying for the other colleagues".*

83. We do not accept Mr Senior's categorisation of these comments as merely being an attempt by Mr Hall to articulate the feelings of other members of staff. We find them to be quite revealing in relation to Mr Hall's attitude generally towards the claimant. Even if we were to adopt Mr Senior's more generous interpretation, we could not ignore the fact that management should have been taking steps to educate other staff in how they should interact with colleagues with disabilities and not, as occurred here, seek to justify the grumblings of discontented colleagues.

84. We find that the grievance procedure was inadequate in investigating the complaints raised by the claimant. It was clear that Mr Senior had not fully

familiarised himself with the background to the claimant's grievance, and, significantly, he had not even seen the Record of Improvement document and was therefore reliant upon information provided to him by Mr Hall who was of course the subject of many of the claimant's complaints.

85. The investigation into the grievance was perfunctory at best and in the light of the circumstances which led to the issuing of the Record of Improvement and the subsequent failure to implement the risk assessments adequately, we find it difficult to understand how the grievance could have been so roundly dismissed.

86. On 9 September 2021, Mr Senior issued the outcome of his grievance investigation in which he dismissed all three points.

GRIEVANCE APPEAL

87. On 9 September 2021 the claimant lodged an appeal against the findings in relation to his grievance, and he was thereafter invited to a grievance appeal meeting on 28 September 2021 conducted by Steve Warburton via a conference call.

88. The meeting took place on 5 October 2021 in the presence of Diane Bolton, who was an HR professional. Notes of the meeting were taken but they run to merely 3 pages. Although the precise length of the meeting is not indicated, we take the view that it was not given sufficient time or dealt with sufficiently thoroughly.

89. We note that the claimant at this point accepted the explanation which had now been given to him on numerous occasions that the Record of Improvement was not part of the disciplinary process and therefore that aspect of his grievance was withdrawn. However, for the reasons we have already set out in detail above, we do not agree with that assessment. Even if the Record of Improvement is not intended to be a precursor to disciplinary action, in reality that is exactly what we took it to be.

90. The appeal was upheld in part, only in respect of point 2, which related to the failure to implement the risk assessments. It was decided, at this very late stage, that the risk assessment would be completely followed and that the new centre manager, Adrian Friend, would ensure that it would be implemented in full. This finding underlines in our view the fact that previous risk assessments had clearly not been implemented in a satisfactory way.

RESIGNATION

91. On 4 November 2021 the claimant resigned his position in a very brief letter of resignation simply indicated that he would be ending his contract as of the 30 November 2021. His resignation was accepted on the 4 November 2021 in writing by Mr Hall, although Mr Hall's evidence which we do not

dispute was that this was a standard response and not one that he had direct input into.

92. The claimant's last day of work was the 25 November 2021. We note that the claimant had managed to find alternative employment which he commenced on 1 December 2021.

93. We fully accept that the claimant had been for some time justifiably unhappy with the way in which he had been treated by the respondent during the course of 2021 in particular.

94. We nevertheless find that his decision to resign was in consequence of him having found better and more suitable employment locally rather than being as a direct consequence of discrimination to which he had been subject previously in his employment.

LAW AND CONCLUSIONS

Time Limits

95. The legislation on time limits in discrimination cases is set out in s123 Equality Act as follows:

> 123 Time limits (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable
>
> ...
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is taken to decide on a failure to do something -
>
> a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period within which P might reasonably be expected to do it.

96. The Respondent submits that any allegation that occurred before 1 September 2021 would be out of time pursuant to section 123(1)(a) Equality Act 2010, having occurred outside of three months before presentation of the claim. They say this renders the majority of the Claimant's claim as being

out of time, save for the allegations in relation to the refusal to uphold the claimant's grievance, the grievance appeal, and the alleged discriminatory dismissal.

97. However, where, as here, the principle complaint from which all the others descend is that of the failure on the part of the respondent to make reasonable adjustments under Equality Act section 20, and the start of the limitation period falls to be determined in accordance with EqA 2010 s 123(4)(b), above, the calculation of this date involves carrying out an investigation into the period during which the respondent might reasonably have been expected to make the adjustments in question and deciding on the date when that period ended, as that will be the date which will be treated as the beginning of the limitation period.

98. This, is not a precise science and may well result in an artificial date, which is not readily apparent to either claimant or respondent (see *Matuszowicz v Kingston upon Hull City Council [2009] ICR 45*, at para 21, per Lloyd LJ).

99. This is exactly the case here. During the course of submissions on behalf of the respondent, the Tribunal specifically asked Counsel for the respondent, Ms Akers, what the respondent submits to be the date on which the time limit expired so far as the 'reasonable adjustments' claim is concerned. No discourtesy or criticism is intended in saying that she was unable to offer a definitive answer to the question. We therefore are bound to make the observation that if the respondent is unable to pinpoint when the time limit expired in relation to that aspect of the case, then how could the claimant possibly be expected to have known the date by which he ought to have submitted his claim to the Tribunal.

100. What is important to note is that the expiry date is is not to be equated with the date when the respondent's breach of duty began, for not only is that not the date to which s123(4)(b) refers but it could well be unfairly prejudicial to the claimant (see *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, [2018] IRLR 1050, [2018] ICR 1194).

101. In *Morgan* Leggatt LJ pointed out that under s20(3) the duty to comply with the relevant requirement begins as soon as the employer is able to take the requisite steps to avoid the relevant disadvantage to the claimant, and if time ran from that date a claimant who reasonably believed that his employer was taking steps to redress the disadvantage might find that the time limit had passed before he discovered that the employer was in fact doing nothing at all.

102. In our judgment this is precisely the situation in this case. Over the course of the last 12 months of the claimant's employment, he was

continuously in the invidious position of being offered 'jam tomorrow' in that he was repeatedly assured that the reasonable adjustments would be put into place but repeatedly left disappointed.

103. We therefore find that the so far as the s20 claim is concerned the claim did not fall outside of the time limit, but in any event, even if it were found to have fallen outside of any notional time limit, the particular circumstances of this case would lead us to conclude that it would be just and equitable to extend time.

104. In relation to the other heads of claim, whilst we may have accepted Ms Akers submissions in relation to them if taken in isolation, we nevertheless observe that they are all inextricably connected to the reasonable adjustments that the respondent failed to make, in that, were it not for the failure on the part of the respondent to make the adjustments, the other discriminatory acts would not (or at least might not) have occurred in the first place. Therefore although we accept the submission that those earlier incidents are outside the time limit, once again we find that it is just and equitable to extend the time to enable us to consider them.

REASONABLE ADJUSTMENTS

105. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the Equality Act 2010.

106. Section 20 of the Equality Act 2010 provides in respect of the duty to make reasonable adjustments as follows:

> (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 reasonable to have to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature 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 reasonable to have to take to avoid the disadvantage.
>
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 reasonable to have to take to provide the auxiliary aid.

107. The claimant puts his case on the basis of a number of separate provisions, criteria or practices (PCPs) adopted by the respondent. We make the observation that, in relation to the chair, the claim might have been more appropriately categorised as relating to an 'auxillary aid' pursuant to s20(5) but we do not find that this fatally undermines the claim.

108. The PCPs relied upon were identified in the list of issues as follows:

(1) The requirement to attend work and to undertake work to a certain level in order to avoid being placed on the Respondent's absence process and if absences reached a certain period, formal warnings would be recorded

(2) The policy that Vehicle Technicians were required to undertake MOT tests and perform all duties pursuant to that role; and

(3) The practice that Vehicle Technicians were required to perform their roles without making mistakes.

109. We are satisfied that numbers (1) and (2) above were PCPs adopted by the respondent. The first is enshrined in the respondent's policy documents on absence and discipline; the second is set out in the job description of the claimant. We are not, however, of the view that the respondent expected perfection of its Vehicle Technicians, and mistakes could and would inevitably be made without necessarily incurring sanction.

110. The next matter that we must consider is whether these PCPs placed the claimant at a substantial disadvantage in comparison to persons who are not disabled. A substantial disadvantage is one which is more than minor or trivial: see s212(1). The substantial disadvantages relied on by the Claimant are threefold, namely:

(1) He would be absent from work due to pain or fatigue;

(2) He was unable to undertake all of the duties of a Vehicle Technician/MOT tester due to his lack of mobility, pain and fatigue; and

(3) He made a mistake due to the pain and fatigue he was suffering from as a result of the allegation that the risk assessments were not fully implemented by the respondent or were not implemented in a timely manner

111. We are satisfied that the disadvantages referred to in (1) and (2) above were suffered by the claimant, and that they were both more than minor or trivial. However in relation to (3), we cannot be satisfied on the evidence that the mistake that he made in relation to the wheel bolt when conducting the MOT (which resulted in disciplinary action) was necessarily attributable to the pain and fatigue that he was suffering.

112. The adjustments that the Claimant contends should have been made are as follows:

(1) Disregarding disability related absence when considering the Claimant's sickness absence record;

(2) Adjusting the Claimant's duties and removing those he was unable to undertake due to his lack of mobility and pain. Providing him with more time to undertake other duties and providing him with assistance; and

(3) Adjusting the Disciplinary Procedure and not undertaking disciplinary action with respect to matters that impacted on the Claimant's disability.

113. Has the respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage?

114. As stated in our findings of fact, there was at best partial compliance, and such compliance as there was took far too long to be put in place - the chair being a prime example – by which time the claimant had endured considerable pain, and very likely had exacerbated his condition unnecessarily. In addition he had undergone the stress and anxiety of worrying about the adequacy of his work and the security of his job.

115. There is evidence from a number of sources that where there was a tension between the requirement to make reasonable adjustments and the desire to placate disgruntled staff who perhaps felt that they were having to pick up the claimant's slack, Priority appears to have been given to the interests of other colleagues, presumably as a result of the 'pushback' that they were giving, rather than to support a disabled employee who was plainly in need of support.

116. The aims of management at first appeared to have been supportive but unfortunately this has given way to a concern about the perception of junior colleagues at the centre and to placing an emphasis on matters of performance that could have been managed more effectively

117. For all these reasons, the claim under s20 of the Equality Act 2010 is well founded and succeeds.

DISCRIMINATION ARISING FROM DISABILITY

118. Section 15 Equality Act 2010 states:

(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.

119. Under S118(1)(a) there is no need for any comparison with another person – it is simply a question of whether the claimant was treated unfavourably. Unfavourable treatment is anything which the disabled person could reasonably consider to be disadvantageous.

120. The EHRC Code of Practice on Employment says that unfavourable treatment "means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment

has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably".

121. The unfavourable treatment must be because of something arising in consequence of the claimant's disability. This part comprises of two elements – there must be 'something arising', and that something must be 'in consequence of' the claimant's disability. The test in *York City Council v Grossett [2018]* IRLR 746 is to the effect that the approach to be taken is that the tribunal must ask 2 questions:

a. Did the respondent treat the claimant because of an identified "something"?

b. Did that something arise in consequence of the claimant's disability?

122. The second question is an objective one – did the something actually arise in consequence of the claimant's disability. In this case there is plainly 'something arising' from the disability – the fact that the claimant's condition deteriorated, that he had to use a crutch and that he had to take a number of days off sick and for medical appointments in order to alleviate his pain.

123. There must actually be an objective link, even if not a direct link (*York City Council v Grossett)* between the disability and the something arising. Again, in this case the answer is obvious from the facts.

124. Even if all these elements are present, the actions of the respondent will not amount to discrimination under this section if they can show that the treatment of the claimant was for a legitimate aim and that treatment was a proportionate means of achieving that aim.

125. The only 'legitimate aim' defence in this case relates to the disciplinary procedure that was implemented in relation to the claimant's failure to identify faults in a vehicle that he was testing, resulting in the vehicle passing its MOT when it ought to have failed. The Tribunal acknowledges that the consequences in terms of driver safety, and in relation to the business as a result of regulatory sanctions by the DVSA, were serious and the respondent was entitled to take the action that it did. For the reasons given above we find that it was both proportionate and legitimate and therefore on that point we do find in favour of the respondent.

126. The Claimant alleges four specific acts of unfavourable treatment which are:

i. Issuing him with a Record of Improvement pursuant to the Respondent's absence process;

ii. Taking disciplinary action against and him and issuing him with a final written warning on 20th July 2021

iii. Delaying compliance with and/or failing to follow risk assessments undertaken on 12th November 2020, 27th May 2021 and 4th August

iv. Causing the claimant to resign his employment in circumstances where there was a repudiatory breach by the respondent it a constructive dismissal.

127. For the reasons set out in our findings of fact, we find that the respondent did discriminate against the claimant in respect of item numbers i. and iii. above.

128. We accept that the disciplinary action was legitimate, proportionate and non-discriminatory; and for reasons which are set out below in relation specifically to the claim of constructive dismissal, we reject item iv.

129. To this extent, the claim is well founded and succeeds.

HARASSMENT RELATED TO DISABILITY (S 26 EQUALITY ACT 2010)

130. S26 Equality Act 2010 states, as far as is relevant

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection

(1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

131. S26(5) lists the relevant protected characteristics, which include disability.

132. In *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336*,* the EAT analysed this provision. There are a number of elements.

133. Firstly, the unwanted conduct. Did the respondent engage in unwanted conduct? This is a subjective test. The test is whether the action or inaction of the employer contributed to the proscribed circumstances. It is not necessary under the Equality Act to consider the extent to which the action or inaction is attributable to the characteristic; the

provision refers only to conduct 'related to' rather than 'on the grounds of' the characteristic (in contrast with the earlier legislation).

134. Secondly, the purpose or effect of that conduct. Did the conduct in question either:

(a) have the purpose *or*

(b) have the effect

of either

(i) violating the claimant's dignity or

(ii) creating an adverse environment for the claimant?

135. Thirdly, the grounds for the conduct. Was that conduct on the grounds of the claimant's disability?

136. If the conduct had the effect of violating the claimant's dignity or creating an adverse environment, was it reasonable for the claimant to have felt that way. All the circumstances must be considered. In *Richmond Pharmacology*, it was said that

> *"…if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if [she] did genuinely feel [her] dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt [her] dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt".*

137. The EAT cautioned against encouraging a culture of hypersensitivity. It will also be necessary to consider the purpose of the comments or actions to determine the context. In *Thomas Sanderson Blinds Ltd v English* UKEAT/0316/10/JOJ, UKEAT/0317/10/JOJ it was held that

> *[40] There is, in our judgment, no general rule applicable to answer the question whether, when fellow workers use homophobic or sexist language to each other (or language relating to any other protected characteristic), both commit unlawful harassment; one commits unlawful harassment; or neither does. The answer lies in an application of the statutory test now contained in s 26 of the Equality Act 2010. We think in many cases both employees will have committed unlawful harassment; each will commit conduct having the effect of violating the dignity, or creating an adverse environment, for the other. Also in many cases the conduct will have had this purpose, and the other form of harassment ("purpose harassment") will be in play.*

> *[41] In [that] case, where the fellow workers engaged in similar conduct toward each other while remaining genuinely good friends, the tribunal was entitled to reach the conclusion it did, so long as it applied the correct statutory test. We think that in substance it did".*

138. Clearly, this requires the tribunal to consider the surrounding circumstances and take a view on the nature of the relationship between the alleged perpetrator of the harassment and their alleged victim.

139. In respect of whether the conduct was related to a protected characteristic, where overtly derogatory terms are used, little, if any, further enquiry is required. However, in less clear cut cases, whether conduct is related to the relevant protected characteristic is a matter for the Tribunal to decide on the facts, having regard to the surrounding context. In our judgment, related to is a broad test and does not require a *causal* link between the acts complained of and the relevant protected characteristic.

140. The two acts of unwanted conduct complained of by the claimant are firstly that Paul senior during the grievance investigation meeting on 11th August 2021 asked him if he could do his job and secondly steve Warburton at the grievance appeal hearing on the 5th October 2021 proposed that the claimant should undergo an occupational health assessment.

141. The second of these complaints can be dealt with very shortly indeed . We do not consider that making a referral to occupational health could in these circumstances possibly amount to unwanted conduct that had the purpose or effect of either violating the claimant's dignity or creating an adverse environment for him . Country, it seems to us that if anything the respondent was remiss in not involving occupational health at an earlier stage in order to address some of the issues faced by the claimant whilst at work . That they may have been rather late in making the referral does not mean that they were wrong to do so and certainly does not amount to harassment.

142. As we have already stated in our findings of fact, the comment made by Paul Senior to the effect that the claimant was being asked if he was capable of doing his job was without doubt a crass and insensitive comment, given the circumstances of the situation in which it was asked . We fully understand why the claimant took offence at the comment and we do not consider that he was being over-sensitive in doing so. However, having heard from Mr Senior in evidence we are satisfied that causing offence was not an intended purpose.

143. Notwithstanding the fact that Mr Senior did not set out to cause offence we do of course have to consider the effect of his words and we acknowledge that the effect was to cause a fence and leave the claimant feeling uneasy and insecure in his job. But we must also consider carefully the words of the statute and the phrases 'violating his dignity' and 'creating an adverse environment' for the claimant. We have considered a number of authorities in order to try to gauge whether this incident meets what is

obviously a high threshold. We have been unable to find any comfortable situation that would lead us to conclude that this incident satisfies the test.

144. Accordingly, and without wishing to minimise the claimant's understandable feelings about this incident, we dismiss this part of the claim.

VICTIMISATION (S 27 EQUALITY ACT 2010)

145. Section 27 Equality Act says, as far as relevant,

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

146. It is not entirely clear to us what the claimant's case is in relation to this head of claim, and when Ms May was asked by the Tribunal for some further assistance she seemed unable to provide it, either in relation to the question of what constituted the protected act, or what, specifically, was the evidence of a link between any protected act and the alleged act of victimisation.

147. The 'protected acts' that are set out in the List of Issues are the risk assessments, and the raising of the grievance. The suggestion that the risk assessments themselves were protected acts is puzzling. They were not acts carried out by the claimant and so it is hard to see how they meet the definition set out in s142(2). We accept that the grievance is at least capable of amounting to a protected act.

148. The other 'protected act' that we were able to identify was the claimant's reference to having consulted ACAS. This could potentially fall within section 27(2)(c) or (d) – namely making an allegation that a person has breached the act or doing any other thing for the purposes of, or in connection with, the Equality Act. It is not necessary to refer explicitly to the Equality Act in making the allegation under subsection (d), but the asserted facts must be capable of amounting to a breach of the Equality Act if found

to be true. The test under subsection (c) is much broader and any act done in connection with the Equality Act in a broad sense will be covered.

149. In respect of detriments, in *MOD v Jeremiah* [1979] IRLR 436 the Court of Appeal held that a detriment exists if a reasonable worker would take the view that the treatment was to his detriment. In many cases it is obvious. In *Shamoon v Chief Constable of the RUC* [2003] IRLR 285, Lord Nicholls said : *"while an unjustified sense of grievance about an allegedly discriminatory decision cannot constitute 'detriment', a justified and reasonable sense of grievance about the decision may well do so".*

150. The detriments alleged in this case are said to be the disciplinary action taken against him in July 2021 culminating in the final written warning, and the failures to uphold the grievance and grievance appeal.

151. The question of identifying the reasons for any detriments is summarised by the Court of Appeal in *Chief Constable of Greater Manchester Police v Paul Bailey* [2017] EWCA Civ 425. In summary, it is necessary to find that the reason for the detriment, if any, must be the reason why the decision to subject the claimant to any detriments was made. If the claimant can show facts from which we could conclude that the protected act was the reason for the detriment, it will be for the respondent to show that in fact the detriment was in no way because of the protected act. It is not enough to show a detriment and a protected act, there must be at least something which connects the two. However, if the claimant shows that something from which we could conclude that the protected act was the reason for the detriment, the burden of proof will be reversed.

152. The Tribunal cannot accept that there is any connection between the protected acts as identified and the alleged detriments suffered. We have already confirmed that we found the disciplinary action to have been legitimate and non-discriminatory; and it seems to us illogical to conclude the a refusal to uphold a grievance is an act of victimisation arising from the grievance itself.

153. This part of the claim is dismissed.

DISCRIMINATORY CONSTRUCTIVE DISMISSAL

154. An employee has the right not to be unfairly dismissed by her employer. This includes circumstances in which the employee terminates the contract themselves because of a repudiatory breach of contract on the part of the employer.

155. The relevant law is contained within Section 95 of the Employment Rights Act 1996, which reads as follows:

(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.

156. An employer may not discriminate against an employee on the grounds of a protected characteristic by dismissing them; this includes constructive dismissal - Equality Act s39, the relevant passages of which read as follows:

> 39 Employees and applicants
>
> (2) An employer (A) must not discriminate against an employee of A's (B)—
>
> …
>
> (c) by dismissing B;
>
> …
>
> (7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—
>
> …
>
> (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.

157. An employee will be considered to have been constructively dismissed where the employee shows that:

a. The employer has committed a repudiatory breach of contract;
b. The employee resigned in response to such a breach;
c. The employee did not affirm or waive the breach prior to resigning.

158. Not every breach of contract - even if there has been discrimination at some stage prior to termination - will be repudiatory ie of a nature that entitles the wronged party to treat the contract as being at an end. Even if a tribunal finds that an employee who resigns in response to an incident of discrimination has suffered discrimination, it is not inevitable that the tribunal will find that a constructive dismissal has occurred. *Amnesty International v Ahmed* 2009 ICR 1450, EAT.

159. Even where the employer's actions do amount to a repudiatory breach of contract, the employee can only claim constructive dismissal if his or her resignation was caused by the breach. Thus an employee who waits too long before resigning, or otherwise acts in such a way as to indicate that he or she would wish the contract to continue, will be taken to have waived the breach and affirmed the contract.

160. In *Bunning v GT Bunning and Sons Ltd* 2005 EWCA Civ 104, CA An employment tribunal was satisfied that the employer had failed to carry out

adequate risk assessments in respect of the jobs in the workshop and in the stores. Accordingly, it upheld the claim that B had been subjected to a detriment because of her pregnancy. However, it rejected the claim that B had been constructively dismissed. The Court of Appeal upheld the tribunal's finding that B had not been constructively dismissed. Had B resigned in response to the first inadequate risk assessment, a finding of unfair constructive dismissal would have been probable. Her acceptance of the stores job, however, waived the employer's breaches or affirmed the contract.

161. The Tribunal found that, despite its findings regarding the earlier acts of discrimination against the claimant, there was no evidence that it was any act of discrimination, rather than the fact that the claimant had found better and more suitable employment, that led to his resignation on 4 November 2021.

162. The resignation came shortly after the grievance appeal, which was not upheld in its entirety; however, we found that that grievance appeal itself was not a discriminatory act. It was upheld in its most important aspect, namely the failure to implement previous risk assessments; and we did not find that the proposal that the claimant undergo an OH assessment was unreasonable, let alone discriminatory.

163. The List of Issues clearly sets out the requirement that, in relation to this head of claim, the Tribunal must be satisfied that the reason for the claimant's resignation was an act of discrimination rather than the respondent's failure to uphold the grievances.

164. In fact, we find that neither was the case - it was in our judgment a decision that was made on the basis of having found a better job. Accordingly this part of the claim is dismissed.

_____
Employment Judge Conley
Date: 23 June 2023

Sent to the parties on: 23 June 2023

GDJ
For the Tribunal Office