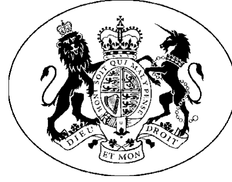

EMPLOYMENT TRIBUNALS

Claimant: Miss T Allen

Respondents: (1) AV Accessories Limited;
(2) Sunjiv Pabial

Heard at: **Sheffield** **On:** **6, 7 and 8 June 2023**

Before: **Employment Judge Ayre**
Ms R Hodgkinson
Mr A Senior

Representation

Claimant: Mr P Sangha, counsel

Respondents: Ms S Kamal, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim for disability related harassment fails and is dismissed.

2. The claim for victimisation fails and is dismissed.

3. The claimant was unfairly dismissed by the First Respondent.

4. The claim for breach of contract fails and is dismissed.

5. The Tribunal does not have jurisdiction to hear the claim for unlawful deduction from wages as it was presented out of time.

6. The First Respondent failed to provide the claimant with a statement of terms and conditions of employment contrary to section 1 of the Employment Rights Act 1996.

7. The First Respondent is, by agreement, ordered to pay the sum of £4,993.29 to the claimant.

REASONS

The Background

1. On 15 March 2022, following a period of early conciliation that started on 14 March 2022 and ended on 15 March 2022 the claimant issued proceedings in the Employment Tribunal. Both respondents defend the claim.

2. A Preliminary Hearing took place before Employment Judge Shepherd on 21 July 2022. At that hearing:

    1. The claimant clarified that the disabilities relied upon for the purposes of her disability discrimination claim are obsessive compulsive disorder ("**OCD**") and stress / anxiety;

    2. There was a discussion of the claims that the claimant is bringing and the issues in the case were identified; and

    3. Case Management Orders were made to prepare the case for final hearing.

3. The claimant is bringing the following claims:

    1. Unfair constructive dismissal;
    2. Harassment related to disability;
    3. Victimisation;
    4. Failure to provide a written statement of terms and conditions;
    5. Unauthorised deduction from wages; and
    6. Breach of contract / failure to pay the National Minimum Wage.

4. On 18 October 2022 the respondents wrote to the Tribunal confirming that they did not concede that the claimant is disabled either by reason of OCD or by reason of anxiety.

The Issues

5. The issues that fell to be determined at the hearing were identified at the Preliminary Hearing on 21 July 2022, and confirmed at the start of this hearing as being the following:

Unfair dismissal

6. Did the First Respondent breach the implied term of trust and confidence in the claimant's contract? The claimant relies upon the following alleged breaches:

    1. Sending a text message stating that she was not working;
    2. Making a false allegation that she was not working when she was;
    3. Shouting at her;
    4. Falsely accusing her of making a postal mistake;
    5. Discriminating against her;
    6. Harassment;
    7. Breaching her contract by making an unlawful deduction from her wages;
    8. Failing to deal properly with her grievance and the grievance outcome;
    9. Failing to deal with her grievance about pay; and/or
    10. Failing to provide a section 1 statement?

7. Did the claimant resign in response to the breaches of contract?

8. Did the claimant waive any breaches of contract through her actions including (but not limited to) raising the grievance appeal?

9. Did the claimant delay too long before resigning, thus affirming the contract?

Disability

10. Is the claimant disabled within the meaning of section 6 of the Equality Act 2010 by reason of anxiety and OCD?

Harassment

11. Did the respondents subject the claimant to the following unwanted conduct:

    1. In July 2021, did the Second Respondent send a text to the claimant falsely accusing her of not working?
    2. On 13 August 2021 did the Second Respondent falsely accuse the claimant of making a postal mistake, shout at the claimant and threaten to deduct money from her wages?
    3. On 16 August 2021 did the Second Respondent tell the claimant that she may have to stay away from work indefinitely as she had refused to take the

vaccine due to her health issues?

4. On 16 August 2021 did the Second Respondent remark that he may look for another apprentice and/or intimate that he would dismiss / replace the claimant?

5. On 20 August 2021, did the Second Respondent write ‘let me know if you intend to return or move on? I can get your P45 ready if required’?

6. On 20 August 2021 did the Second Respondent not allow the claimant wo work from home, despite allowing Leah to work from home?

7. In October 2021 did the Second Respondent write that the claimant should be better now as she had had two months off work, and her mental illness should have subsided?

8. Between 19 January 2022 and 9 February 2022 did the Second Respondent insist on dealing with the claimant’s grievances personally, despite being the subject of the grievances?

9. Did the respondents fail to investigate the claimant’s grievances properly, and fail to speak to other employees?

10. By the conclusions reached in the first grievance outcome?

11. By failing to deal with the second grievance relating to wages?

12. Did the above conduct relate to disability?

13. Did the conduct have the purpose or effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

14. Taking into account the perception of the claimant and the other circumstances of the case, was it reasonable for the conduct to have that effect?

<u>Victimisation</u>

15. Did the claimant do a protected act? The claimant claims the grievance that she raised on 19 January 2022 amounts to a protected act.

16. Did the respondent subject the claimant to the following detriments:

    1. Failing to deal properly with her grievance about discrimination;

    2. Failing to deal with her second grievance about pay; and

    3. Dismissing her.

17. If so, was it because she did a protected act?

18. Was the grievance raised by the claimant false and made in bad faith?

Failure to provide a section 1 statement

19. The respondent accepts that it failed to provide the claimant with a statement of employment particulars, contrary to section 1 of the Employment Rights Act 1996.

Breach of contract

20. Was the claimant an apprentice? If so, what type?

21. What was the correct hourly rate(s) of pay she was entitled to between 24 March 2016 and April 2017?

22. Was the claimant paid in accordance with the National Minimum Wage

Remedy

23. If the claimant succeeds what sums should the respondents be ordered to pay to her by way of compensation?

Time limits

24. The claim in relation to payments made between March 2016 and April 2017 was originally pleaded as both a complaint of unlawful deduction from wages and a complaint of breach of contract.

25. Mr Sangha submitted that the Tribunal has jurisdiction to hear the complaint as one of breach of contract, as it was outstanding on the termination of the claimant's employment. Very sensibly he did not seek to argue that the Tribunal had jurisdiction to hear it as a complaint of unlawful deduction from wages as the last in the series of alleged deductions was made almost five years after the last of the alleged deduction.

The Proceedings

26. There was an agreed bundle of documents running to 143 pages.

27. We heard evidence from the claimant, the Second Respondent and his wife.

28. At the start of the hearing we considered how to deal with the question of disability. The discrimination claims brought by the claimant are of victimisation and harassment. The claimant does not have to prove disability to pursue a complaint of victimisation or of harassment. Harassment claims can be brought on the basis of perceived disability.

29. In light of this, and of the fact that many of the allegations of harassment are also

relied upon in the constructive dismissal claim, so evidence would have to be heard on them in any event, we decided to deal with the question of disability together with the other issues in the claim, rather than as a separate issue at the start of the hearing.

30. On the third day of the hearing we delivered our judgment on liability to the parties. We then gave the parties time to discuss the question of remedy. The parties then indicated that they had been able to agree compensation for unfair dismissal and failure to provide the claimant with a section 1 statement. The sum agreed comes to £4,993.29 and, by consent therefore, we order the First Respondent to pay the above sum to the claimant.

Findings of fact

31. The following findings of fact are made on a unanimous basis.

32. The First Respondent is a small, family run business that sells remote controls for TVs and set top boxes. The Second Respondent is the sole director of the First Respondent. The First Respondent sometimes uses the trading name Remotes4u.

33. At the time of the claimant's employment the First Respondent had six employees. Those employees were the Second Respondent and his wife, Kanwal Pabial, who worked full time in the business, and their son and daughter who worked at weekends. There were two employees who were not family members: the claimant and another employee called Leah.

34. The claimant was initially employed as an apprentice under the terms of an Apprenticeship Learning Agreement between the First Respondent, the claimant and Doncaster College. We were provided with a copy of that agreement which was signed by the claimant and by Kanwal Pabial on the 7 July 2016.

35. The Apprenticeship Learning Agreement stated that it "*outlines a programme of learning agreed between the company / organisation, Doncaster College and the learner. The plan is to be carried out under Skills Funding Agency Apprenticeship Provision and is underwritten by an Apprenticeship Agreement.*" It set out the Learning Objectives, described the framework as Level 2 Business Administration.

36. The training provider was Doncaster College, and the employer was the First Respondent. The agreement contained a health checklist which the claimant completed to say that she did not have any health issues or disabilities. The agreement records that an apprenticeship induction was carried out on 28 April 2016.

37. The agreement was initially signed by the Second Respondent and the claimant on 28 April 2016. It was signed again on 7 July 2016 by the claimant and Mrs Pabial. The claimant signed to confirm certain matters including that she had received a copy of her contract of employment from her employer and had received from her employer an Apprenticeship Agreement.

38. The claimant worked for the respondent as an apprentice until April or May 2017. In June 2017 she obtained her Apprenticeship Completion Certificate. She signed the Certificate on 22 June 2017 to confirm that she had met of the requirements of her apprenticeship framework. The Certificate also stated that: "*The signing of this consent form by an Apprentice provides the required evidence of their acknowledgement and declaration that they have undertaken and completed an Apprenticeship…*"

39. Doncaster College provided the First Respondent with the paperwork that they said was necessary for the apprenticeship. The First Respondent did not provide the claimant with a contract of employment and the respondents' evidence, which we accept, is that they were not made aware that they needed to provide a written contract of employment in addition to the Apprenticeship Learning Agreement.

40. It is clear however that all of the parties considered the claimant to be an apprentice from March 2016 until April or May 2017 when she became an employee. All of the contemporaneous evidence was consistent with her being an apprentice and she was treated as such. She worked for the First Respondent whilst also receiving training from Doncaster College and received regular visits from Doncaster College. The conduct of the parties was consistent with the claimant being an apprentice.

41. Between March 2016 and August 2016 the claimant was paid £3.30 an hour. From September 2016 to December 2016 the claimant was paid £4 an hour. Between January 2017 and April 2017 the claimant was paid £5 an hour. From May 2017 she was paid £7.05 an hour.

42. The claimant became a permanent employee of the First Respondent at the end of her apprenticeship and remained working as a Business Administrator and Customer Service Assistant until she resigned on 14 March 2022, giving two weeks' notice.

<u>Disability</u>

43. The claimant has experienced symptoms of OCD since childhood. In March 2020 she saught medical advice about the symptoms for the first time. On 3 March 2020 she saw her GP and described having poor sleep, panic feelings at work about getting work finished, and some checking behaviours. The GP diagnosed her with potential OCD, prescribed sertraline to help her with the condition and referred her for therapy.

44. The claimant described her OCD as restricting her from being able to do day to day tasks as easily as someone who doesn't have OCD because she is constantly overthinking and checking. She also has a number of rituals that she has to carry out. At the same time the claimant also suffered from anxiety which she lays is linked to her OCD. She has never however had any time off work due to either anxiety or OCD.

45. The anxiety does however affect the claimant's day to day activities as it makes her scared to speak to people she doesn't know, including difficult customers at work,

and she avoids going to crowded places. At time she finds it difficult to concentrate and also to leave the house. Some days she does not get dressed or leave the house at all. Preparing food is time consuming as she has to constantly clean up any mess she creates.

46. The claimant continues to take sertraline. She has suffered from OCD symptoms since childhood and from anxiety since 2018.

Knowledge / perception of disability

47. In her claim form the claimant said that she had informed the respondents about her OCD at the start of her employment. In her witness statement she said that she informed them as soon as she was diagnosed. In cross examination however she accepted that she had never told the respondent directly about her OCD.

48. Rather, she said that she had discussed it with Leah in the workplace and thought that they would have overheard. Both Mr and Mrs Pabial were clear and consistent in their evidence that they did not know about the claimant's OCD or, until she went off sick in August 2021, that she experienced anxiety.

49. There was one occasion when the claimant texted Mr Pabial to ask him to check that she had turned the kitchen water heater off, following which they had a conversation about her need to check things. At this stage the claimant had not been diagnosed with OCD, and Mr Pabial thought that she was just being on the safe side by wanting to double check that the water heater was off. This conversation did not put him on notice of a potential underlying medical condition.

50. The claimant had no time off work due to either anxiety or OCD, and we accept the respondents' evidence that they did not know that the claimant had either OCD or anxiety before she went off sick in August 2021. We also find that they did not know about her OCD at any time prior to the termination of her employment. On 20 August 2021 however the claimant informed the respondents that she was suffering from anxiety.

51. Between the start of her employment and 2020 there did not appear to be any issues with the claimant's work or her performance, and the claimant's relationship with the Pabials was a good one.

52. In March 2020, when the country went into lockdown, the claimant began working from home. Mr Pabial perceived her to be answering fewer telephone calls than Leah was, although the telephony system that the First Respondent used sent calls to Leah initially, and only if she did not answer would they then pass to the claimant.

53. Mr Pabial also became concerned, when the claimant returned to work in the office, that on occasion she did not appear to be working, although the claimant continued to receive bonuses including a £500 bonus in July 2021.

54. On or around 1 June 2021 Mr Pabial became concerned that the claimant was not

working. He saw her scrolling up and down her screen and switching between browsers when there were items on the desk that needed to be processed. Mrs Pabial's desk was adjacent to the claimant's. Mr Pabial sent a text in which he wrote: "*when you get back keep an eye on Tian she is sat doing nothing when she has a pile of remotes to pack*". Mr Pabial intended to send the text to his wife but sent it to the claimant by mistake.

55. Mr Pabial realised his mistake, but neither he nor his wife apologised to the claimant or said anything about it. The claimant did not say anything to them either. In her witness statement the claimant said the message made her feel uneasy and created a hostile and intimidating environment. In cross examination however she said that the text did not make the environment hostile, but more awkward, and that it was 'like a kick'.

56. On 19 July 2021 the claimant was told that she would be receiving a bonus of £500.

57. On 13 August 2021 there was an incident in the office during which Mr Pabial became aware that a surcharge of £10 had been applied to the company because an item had the incorrect postage applied to it when it was dispatched. Mr Pabial became angry and went to the stockroom shouting. Mrs Pabial was not present at the time, but both the claimant and Leah were in the office.

58. Mr Pabial shouted words to the effect that 'mistakes like these shouldn't be made and if you don't know how to do your job you shouldn't be here…anything that gets charged will be taken from wages'. Mr Pabial did not use the claimant's name and the shouting was directed at both the claimant and Leah.

59. The following week however Mr Pabial, having found out that the mistake was made by the claimant, sent her an email in which he wrote:

    "*…any errors caused by you that incur any additional costs or losses will be deducted from your monthly pay...*"

60. The claimant replied "*That's fine by me, I never realised it happened until afterwards as it was a mistake…If there's anything you want to speak about personally regarding me making mistakes then I have no problem having a conversation with you about it alone…*"

61. The First Respondent did not make any deduction from the claimant's wages either on that or any other occasion, and there was no evidence before us to suggest that the Second Respondent took the claimant up on her offer of a conversation.

62. In May 2021 the claimant contacted the respondents to let them know that her partner, Zack, was awaiting the result of a Covid test. Mr Pabial sent an email to the claimant on 19 May in which he wrote that if the test result came back positive, the claimant would be sent home and would have to get a test. He also said that "*if your test comes back positive in this instance, I will allow you to work from home but in the future, you may be sent home and have to go onto sick pay."*

63. The First Respondent initially adopted a policy of allowing the claimant and Leah to work from home. Over time however their approach changed, and they wanted them back in the office.

64. In August 2021 the claimant's partner came into contact with someone who had Covid. As a result he took a Covid test, and the claimant contacted the respondents to let them know. On 16 August she sent a text message to Mr and Mrs Pabial saying that her partner had woken up feeling unwell and was waiting for the results of a Covid test. In her text she asked what the respondents wanted her to do and wrote that "*I can use tomorrow as a holiday and wait for the results.*"

65. Mr Pabial replied saying that he had booked the day off as a holiday. The next day he sent a text message to the claimant saying:

    "*Also as Kay and I are going away I can't risk you working in the office as you refuse to have the vaccine. I'm going to get legal advise as your employer as you are putting us all at risk. So you may have to stay away from the office indefinitely and go on sick pay. We can manage just fine. I'd rather have a safe working environment. You need to think carefully about your future. If not 100% happy at Remotes4u let me know why. I'm reassessing everything and I've seen you work well. But Tian you seem to lack any motivation to do well in your job role…We're a small family business and each employee plays a vital role in helping the business grow. I'm now contemplating taking on a new apprentice. You should think carefully what you want from working…*"

66. The claimant replied that she had not refused the vaccine but rather had been advised not to have it by her doctor as she had allergies to medication, and that her grandmother had died from an allergic reaction. She also explained that as well as not refusing to get the vaccine, she did not lack motivation in her job. She wrote that "*I do sometimes feel like you don't think I am good at my job like for example the text you sent that was meant for Kay saying to keep an eye on me…that made me feel a bit shitty…*"

67. The following day the claimant sent a message saying "*I think we need to discuss what's happening because from the text I got last night I'm under the impression you don't want me back. I feel like what you said about me lacking motivation is not true as I always get my work done and you have never pulled me up on anything until last night…*

    This has massively messed with my emotions and I already have a lot going on already so this needs sorting but also I do not want to be in a work place where I don't feel valued or like my work ethic is being questioned..."

68. Mr Pabial did not respond substantively to that message or take any steps to try and resolve matters, nor did he speak to the claimant as she had suggested.

69. On 20 August 2021 the claimant sent an email to the First Respondent in which she wrote:

"*Just to let you know I have been to my Doctor who says I am in not fit state to be at work right now,*

I have been given a signed sick note which I will forward to you once I have received this.

I have suffered with anxiety for a long time now & I have been on medication and unfortunately this last week it has took a massive hit,

I am sorry that it has come to this but the way I feel right now is terrible and I feel like I really can't deal with any of it. I have been made to feel worthless and very stressed right now.

I do appreciate Kay's phone call and how she tried to help me, I feel like I had a good working relationship up until now…"

70. The respondents were therefore aware from 20 August 2021 that the claimant was suffering from anxiety and had been for some time, and that she was taking medication for the anxiety.

71. The Second Respondent replied to the claimant's email: "*Thanks for letting me know*". Later that day he sent her an email in which he wrote:

    "*I've instructed payroll you are on sick from today.*

    Let me know if you intend to return or move on?

    I can get your p45 ready if required…"

72. Mr Pabial accepted in evidence that he knew a reference to P45 was a reference to the end of employment. He also accepted that the claimant had never suggested that she wanted to leave. He said the reason he asked what her intentions were was because they are a small business.

73. This was however the very first day of sickness absence, and Mr Pabial agreed in cross examination that there was no reason for him to refer to the P45 and that with hindsight he should not have done so.

<u>Seventh allegation</u>

74. The claimant was signed off with work related stress and never returned to work.

75. On 29 October 2021 Mr Pabial sent an email to the claimant in which he wrote:

    "*I…will need to meet you and have a face to face meeting. You have stated this work related stress and you have been off work for almost two months so the work related stress should have sub-sided. I am now seeking legal advice from both Doncaster Chamber and ACAS…*"

76. The claimant replied on 1 November and commented in her email that: "*you told me to go off on the sick, to which I did and then when I emailed my sick note across you said shall I get your P45 ready? Its comments like these you make towards me that makes me feel intimidated and undervalued and with all due respect my mental health doesn't have a timescale on when I'll be feeling myself and back to work.*

    The stress caused by yourself towards me has had a massive detriment on my mental health."

77. The claimant also asked how she could put a grievance in. On 2 November Mr Pabial replied to the claimant. In that email, amongst other things, he asked her to confirm if she would still like to log a grievance and said he would be happy to assist her in any way he could.

78. The claimant replied the same day indicating that she did not feel able to meet face to face at this time due to her health, and she referred again to feeling very anxious and pressured by the emails that he sent to her. She also said that she felt that she was being pressured to return or her job would be on the line and that she did want to raise a grievance.

79. The claimant was invited to a grievance meeting to take place on 13 January 2022. The claimant was told that the grievance meeting would be chaired by Mrs Pabial, and that Mr Pabial would also be present to take notes.

80. Mrs Pabial was the second most senior employee in the business. There was no one more senior than Mr Pabial, and he is the sole director and office holder of the First Respondent.

81. The claimant indicated that she was unable to attend a meeting in person because her mental health was at an all-time low and she sent in a detailed written grievance to be considered. In the grievance she raised a number of issues, including:

    1. The text message sent to her rather than Mrs Pabial in error;

    2. The incident with the postal surcharge in August 2021;

    3. The text messages sent when her partner had suspected Covid, including the reference to recruiting an apprentice;

    4. The reference to her P45 in the email of 20 August 2021; and

    5. The email of 29 October 2021.

82. The claimant referred repeatedly to feeling anxious and upset by Mr Pabial's behaviour and described it as having a massive impact on her mental health. She also wrote:

    "*I also felt like I was being told I wasn't good at my job and that he was thinking of replacing me with an apprentice, and I also feel like Sunjiv was looking for any excuse*

to end my employment, I feel bullied, victimised, and discriminated. Again Sunjiv's approach to discuss these issues with me via a text message late at night out of working hours is unacceptable and unprofessional. This took a massive toll on my mental health, it completely broke me down, I felt trapped and scared, I didn't sleep that night…"

83. The grievance was dealt with by Mrs Pabial who discussed the claimant's complaints with her husband. In evidence to the tribunal Mrs Pabial said that she had spoken to Leah about the postal surcharge incident, but she could not remember whether this was before or after the grievance. Her evidence on this issue was not persuasive.

84. Mrs Pabial then wrote a grievance outcome letter, which she shared with her husband before it was sent to the claimant. Mr Pabial commented on and suggested changes to the letter.

85. In the grievance outcome letter Mrs Pabial upheld the grievance about the text message but did not uphold any of the other complaints made by the claimant. She wrote that:

"*The work environment was not hostile after you received the text message and he does not agree with this point at all. The rudeness and abruptness you speak of when he communicated with you is incorrect too as he continued to communicate in the usual polite and professional manner that he has done in the past and he does not agree with that point either…*

The description of Sunjiv's actions you have provided are inaccurate…he does not recollect the exact words of the quotes you provide so he is unable to agree with what you have stated…"

86. It was clear from the contents of the letter that Mrs Pabial accepted her husband's version of events on all issues and also accepted all of his explanations for his behaviour.

87. Mrs Pabial concluded the letter by commenting that the issues could be resolved through a face-to-face meeting when the claimant felt better and wished the claimant well in her recovery. She told the claimant that she had the right to appeal against the grievance outcome.

88. The grievance outcome was sent to the claimant on 10 February 2022. On the same day the claimant sent in a second grievance by email. The email was drafted after she had taken legal advice and was headed "*Formal grievance*". In the email the claimant stated clearly that she wanted to raise a formal grievance about an unlawful deduction from wages, breach of contract and failure to pay the National Minimum Wage.

89. Her grievance related to the time that she was an apprentice when she was not issued with a contract of employment. She claimed she was entitled to be paid at

the National Minimum Wage for that period and sought compensation of £8,425.10 less tax and national insurance.

90. Mr Pabial replied to her email on the same day in an email in which he wrote "*I have located your 'Individual Learning Plan Apprenticeship Learning Agreement' fully signed by you and me and this invalidates any claim for unlawful deductions.*"

91. The claimant was not invited to a meeting to discuss her second grievance.

92. The claimant appealed against the outcome to her first grievance and was invited to a grievance appeal hearing to take place on 10 March 2022. The claimant did not wish to attend a meeting in person, and on 8 March sent in a detailed letter of appeal. One of the points raised in that letter was the 'pay grievance' and the delay in dealing with what she saw as the incorrect level of pay she had received whilst an apprentice.

93. On 14 March 2022 the claimant resigned. She sent an email to the Second Respondent in which she wrote:

   "*During my time in your employment…I was made to feel uncomfortable and anxious within my position with the company. I have been shouted at, discriminated against and have had threats to have my P45 sent to me – (employment terminated).*

   Given the unfair treatment I have received, the manner in which my subsequent grievance was dealt with and your failure to deal with my other grievance regarding the shortfall in my wages, I have made the decision to terminate my employment.

   The treatment has left me feeling unappreciated…"

94. The grievance appeal was dealt with by Mrs Pabial, with the input of a solicitor. The outcome was sent to the claimant on 16 March 2022. Although Mrs Pabial wrote at the start of the outcome letter "*I HAVE decided to partially uphold your grievance appeal.*" It is not clear however from the subsequent content of the letter what part of the grievance appeal was upheld.

95. The claimant's employment ended on 28 March 2022.

96. The claimant began a new job on 26 March 2022. At the time the claimant resigned she was looking for other work but had not yet found another job. We accept her evidence that she had not received a job offer at the date of her resignation.

The law

Constructive unfair dismissal

97. Section 95 of the Employment Rights Act 1996 ("**the ERA**") sets out the circumstances in which an employee is dismissed for the purposes of an unfair dismissal claim. It includes, at section 95(1)(c), the situation in which:

"*the employee terminates the contract under which he is employed (with or without notice) by reason of the employer's conduct.*"

98. Where the claimant relies upon section 95(1)(c), the Tribunal must consider:

    1. Did the respondent breach the claimant's contract of employment?
    2. Was the breach of a fundamental term of that contract?
    3. Did the employee resign in response to the breach, and not for some other reason?
    4. Did the employee delay before resigning, such that she can be said to have waived the breach?

<u>Time limits – discrimination claims</u>

99. Section 123(1) of the Equality Act 2010 provides that complaints of discrimination 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…*
> *(a) Such other period as the employment tribunal thinks just and equitable.*

100. Section 123 (3) states that:

> "*(a) conduct extending over a period is to be treated as done at the end of the period;*
> *(a) Failure to do something is to be treated as occurring when the person in question decided on it.*"

101. In discrimination cases therefore, the Tribunal has to consider whether the respondent did unlawfully discriminate against the claimant and, if so, the dates of the unlawful acts of discrimination. If some of those acts occurred more than three months before the claimant started early conciliation the Tribunal must consider whether there was discriminatory conduct extending over a period of time (i.e., an ongoing act of discrimination) and / or whether it is just and equitable to extend time. Tribunals have a discretion as to whether to extend time but exercising that discretion should still not be the general rule. There is no presumption that the Tribunal should exercise its discretion to extend time: ***Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434***.

102. Factors that are relevant when considering whether to extend time include:

    1. The length of and reasons for the delay in presenting the claim;
    2. The extent to which the cogency of the evidence is likely to be affected by the delay;
    3. The extent to which the respondent cooperated with any requests for information;

4. How quickly the claimant acted when she knew of the facts giving rise to the claim; and
5. The steps taken by the claimant to obtain professional advice once she knew of the possibility of taking action.

103. In ***Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686*** the court held that in order to prove that there was a continuing act of discrimination which extended over a period of time, the claimant has to prove firstly that the acts of discrimination are linked to each other and secondly that they are evidence of a continuing discriminatory state of affairs.

Disability

104. The relevant statutory provisions are contained in Section 6 of the Equality Act 2010 which provides that;

"(1) A person (P) has a disability if -

a) they have a physical or mental impairment, and

b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to- day activities".

105. Paragraph 5 of Schedule 1 to the Equality Act obliges Tribunals to ignore the effect of medication when deciding when someone is disabled (the so called "deduced effect" and provides that;

"an impairment is to be treated as having a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities if measures are being taken to correct it and but for that it would be likely to have that effect".

106. Paragraph 12 of Schedule 1 of the Equality Act provides that:

"When determining whether a person is disabled the Tribunal must take account of such guidance as it thinks is relevant".

107. The Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability ("the Guidance") was issued by the Secretary of State pursuant to section 65 of the Equality Act in May 2011 and we have taken this into account.

108. In ***Goodwin v Patent Office [1999] ICR 302*** the then President of the Employment Appeal Tribunal gave guidance on the approach for Tribunals Tribunal to adopt when deciding whether a claimant is disabled. He suggested that the following 4 questions should be answered in order-

1. Did the Claimant have a mental or physical impairment?

2. Did the impairment affect the Claimant's ability to carry out normal day-to-day activities?
3. Was the adverse condition substantial?
4. Was the adverse condition long-term?

109. When deciding whether the adverse impact is substantial or not the Tribunal must take account of the cumulative effects of the impairment. The Guidance provides examples of factors which it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities. Paragraph B2 states that "*The time taken by a person with an impairment to carry out a normal day-to-day activity should be considered when assessing whether the effect of that impairment is substantial".* Paragraph B7 provides that: "*Account should be taken of how far a person can* ***reasonably*** *be expected to modify his or her behaviour. For example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities".* Account should also be taken of where a person avoids doing things for example because they cause pain, fatigue or social embarrassment or because of the loss of energy or motivation.

110. It is for a Tribunal to decide whether an impairment has a substantial effect and when making that decision the Tribunal must take account of the impact on day-to-day activities were the individual not receiving the medical and other treatment to support their condition.

111. Day-to-day activities are given a wide interpretation and in general will be things that people do on a regular or daily basis. They can include general work-related activities but will not include activities which are only normal for a small group of people.

112. Schedule 1 Part 1 Para 2 of the Equality Act defines long-term as;

"an impairment which has lasted for a least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person effected".

Harassment related to disability

113. Harassment is defined in section 26 of the Equality Act as follows:

"*(1) A person (A) harasses another (B) if –*
(b) A engages in unwanted conduct related to a relevant protected characteristic, and
(c) 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…"

114. In deciding whether the claimant has been harassed contrary to section 26 of the Equality Act, the Tribunal must consider three questions:

b. Was the conduct complained of unwanted?
c. Was it related to nationality; and
d. Did it have the purpose or effect set out in section 26(1)(b).

Richmond Pharmacology v Dhaliwal [2009] ICR 724*.*

115. The two stage burden of proof set out in section 136 Equality Act (see below) applies equally to claims of harassment. It is for the claimant to establish facts from which the Tribunal could conclude that harassment had taken place.

116. In ***Hartley v Foreign and Commonwealth Office Services [2016] ICR D17*** the EAT held that the words 'related to' have a wide meaning, and that conduct which cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it. The Tribunal should evaluate the evidence in the round, recognising that witnesses will not readily accept that behaviour was related to a protected characteristic. The context in which unwanted conduct takes place is an important factor in deciding whether it is related to a protected characteristic (***Warby v Wunda Group plc EAT 0434/11***).

117. In order to constitute disability related harassment, the unwanted conduct just needs to be related to disability, not to the claimant's disability. The claimant does not have to prove that she meets the legal test of the disability and can pursue a complaint of disability related harassment even if she is not disabled.

118. In ***Chief Constable of Norfolk Constabulary v Coffey [2020] ICR 145***, the question arose as to whether it was necessary for the employer to perceive the claimant as having all of the characteristics that make up the definition of disability. The EAT held that in cases involving a perceived disability it was not necessary for the discriminator to know disability law and perceive the claimant as falling within the legal definition of disability. The question is whether the discriminator perceived that the claimant had an impairment with the features set out in the legislation. When the case went to the Court of Appeal, both parties agreed that in a claim of perceived disability discrimination, it is necessary for the discriminator to believe that all of the parts of the legal definition of disability are met.

Victimisation

119. Section 27 of the Equality Act states as follows:

"*(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*

(b) B does a protected act, or
(c) 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.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith…"

120. Although Tribunals must not make too much of the burden of proof provisions (***Martin v Devonshires Solicitors [2011] ICR 352***), in a victimisation claim it is for the claimant to establish that she has done a protected act and has suffered a detriment. There needs to be some evidence from which the Tribunal could infer a causal link between the protected act and the detriment, for example, the detriment occurs soon after the protected act, or others were not treated in the same way.

121. It has been suggested by commentators that the three stage test for establishing victimisation under the pre-Equality Act legislation, endorsed by Baroness Hale in ***Derbyshire and ors v St Helens Metropolitan Borough Council and ors [2007] ICR 841*** can be adapted for the Equality Act so that it involves the following questions:

e. Did the alleged victimisation arise in any of the prohibited circumstances set out in section 27?
f. If so, did the respondent subject the claimant to the alleged detriment(s)?
g. If so, was the reason the claimant was subjected to the detriments that the claimant had done, or might do, a protected act?

122. Following the decision of the House of Lords in **Nagarajan v London Regional Transport [1999] ICR 877** it is not necessary in a victimisation case for

the Tribunal to find that the employer's actions were consciously motivated by the claimant's protected act. Victimisation may occur if the discriminator was subconsciously affected by the protected act, and it had a 'significant influence' on his or her treatment of the claimant. An employer can be liable for an act of victimisation even where the motives for the treatment of the claimant are benign.

Failure to provide a section 1 statement of employment particulars

123. Section 1 of the ERA provides that:

"*(1) Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment.*

124. It goes on to set out the particulars that must be included in the written statement and the timescale within which the statement must be provided. Section 11 of the ERA gives workers the right to make a complaint to the Employment Tribunal where there has been a failure to comply with section 1.

Breach of contract

125. The jurisdiction of the Employment Tribunal to hear claims for breach of contract is conferred by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("**the Order**"). Article 3 of the Order gives the Tribunal the power to hear certain claims for breach of contract which arise or is outstanding on the termination of the employee's employment. The claim must be one which a civil court in England or Wales would have jurisdiction to hear.

126. The time limit for presenting claims for breach of contract in the Employment Tribunal is contained within Article 7 of the Order which states that:

"Subject to article 8B, a*n employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented –*
(a) Within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

(b) Where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or

(c) Where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable."

127. In ***Sarker v South Tees Acute Hospitals NHS Trust [1997] ICR 673***, a case involving a breach of contract claim involving a contract that was terminated before the employee started work, and which the EAT said the Tribunal had

jurisdiction to hear, the EAT noted that the purpose of extending contractual jurisdiction to Tribunals was to avoid the situation in which employees have to bring claims in both the Tribunal and the civil courts.

128. In ***Hendricks v Lewden Metal Products ltd EAT 1181/95*** the EAT upheld the decision of a Tribunal that it did not have jurisdiction to hear a complaint of breach of contract relating to unpaid sick pay in 1991 and 1992 when the employee was dismissed in 1994. A claim could not, it found, be outstanding on the termination of employment when it had not been raised during the course of employment. No complaint had been made at the time of the deductions and the claimant was out of time to pursue a claim under the predecessor legislation to the unlawful deduction from wages provisions.

129. Volume 6 of the IDS Handbook – Employment Tribunal Practice and Procedure comments, in paragraph 2.10, that:

"*However, despite the EAT's decision in the Hendricks case, there is nothing in either the ETA or the Order which states that an employee has to have raised a matter with his or her employer during the currency of the employment in order for it to be classed as 'outstanding' when the employment ends. Furthermore, the right to claim breach of contract is independent of other statutory employment rights, so why should H have lost her right to claim breach of contract in the tribunal simply because she did not take action at the relevant time under the Wages Act? It is clear that, after H's dismissal, the breach of contract in question was 'live' in that H could still have brought a claim in the county court where the limitation period is six years from the date of the breach. Accordingly, there would appear to be no sound reason why H should have been prevented from bringing her claim in the tribunal…*"

130. In ***Mitie Lindsay Ltd v Lynch [2003] 8 WLUK*** a tribunal found that it had jurisdiction to hear a claim for breach of contract presented within three months of the date of termination of an employee's contract in 2002, despite the fact that the breaches relied upon had occurred in 1998 and 1999. This decision was upheld on appeal by the EAT which held that claims for unlawful deduction from wages and claims for breach of contract are 'entirely separate' although they may cover the same ground. The EAT declined to follow ***Hendricks*** and found that the claim for breach of contract was outstanding at the termination of the claimant's employment. The EAT also commented that "*as a matter of practical reality, if this claim was stopped on limitation grounds, the Applicant would still have a right for six years following 1999 to make a claim in similar terms to a County Court, although we express that view tentatively, since we have not heard full argument about it.*"

Unlawful deduction from wages

131. Section 13 of the ERA gives workers the right not to suffer unauthorised deductions from their wages. Section 23 gives them the right to make complaints

of unauthorised deductions to the Employment Tribunal and contains the time limits within which such complaints must be made:

"*(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with –*

(a) In the case of a complaint relating to a deduction by the employer, the date when the deduction was made, or
(b) In the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of –

(a) a series of deductions or payments…

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received…

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."

National Minimum Wage

132. Regulation 5 of the National Minimum Wage Regulations 2015 ("**the NMW Regulations**) provides that:

"(1) *The apprenticeship rate applies to a worker –*

(a) who is employed under a contract of apprenticeship, apprenticeship agreement (within the meaning of section 32 of the Apprenticeships, Skills, Children and Learning Act 2009 or approved English apprenticeship agreement (within the meaning of section AI(3) of the Apprenticeships, Skills, Children and Learning Act 2009, or is treated as employed under a contract of apprenticeship, and

(b) who is within the first 12 months after the commencement of that employment or under 19 years of age.

(2) A worker is treated as employed under a contract of apprenticeship if the worker is engaged –

(a) in England, under Government arrangements known as Apprenticeships, Advanced Apprenticeships, Intermediate Level Apprenticeships, Advanced Level Apprenticeships or under a Trailblazer Apprenticeship;

….

(4) In this regulation –

(a) "Government arrangements" means –

(i) in England, arrangements made by the Secretary of State under section 2 of the Employment and Training Act 1973, or section 17B of the Jobseekers Act 1995…

(b) "Trailblazer Apprenticeship" means an agreement between an employer and a worker which provides for the worker to perform work for that employer and for the employer, or another person, to provide training in order to assist the worker to achieve the apprenticeship standard in the work done under the agreement;

(c) "apprenticeship standard" means the standard published by the Secretary of State in connection with the Government arrangements known as Trailblazer Apprenticeships, which applies as respect the work done under the agreement.

133. Section 32 of the Apprenticeships, Skills, Children and Learning Act 2009 ("**the ASCLA**") defines an apprenticeship agreement as follows:

"*(1) in this Chapter, "apprenticeship agreement" means an agreement in relation to which each of the conditions in subsection (2) is satisfied.*

(2) The conditions are –
(a) that a person ("the apprentice") undertakes to work for another (the "employer") under the agreement;
(b) that the agreement is in the prescribed form;
(c) that the agreement states that it is governed by the law of England and Wales;
(d) that the agreement states that it is entered into in connection with a qualifying apprenticeship framework…"

134. The Explanatory Notes to section 32 state that: "*This clause applies to both England and Wales. The apprenticeship agreement will be a contract entered into between the employer and the apprentice. The Government expects that it should set out both the on-the-job training and the learning away from the workstation that will be delivered; make clear what job role an apprentice will be qualified to hold upon completion; and stipulate the supervision that an apprentice will receive throughout the period of the apprenticeship."*

Submissions

135. We summarise briefly below the submissions of the parties. The fact that a point raised in submissions is not mentioned in the summaries below does not mean that it has not been considered.

Claimant

136. Mr Sangha submitted that the claimant did not have to have a formal medical diagnosis in order to meet the legal test for disability. The focus should be on what the claimant cannot, or can no longer, do at a practical level. He also submitted that both Mr and Mrs Pabial had knowledge of the claimant's disability. She did not hide it and referred to it openly. In the grievance outcome Mrs Pabial referred to the claimant having suffered from anxiety prior to the current situation.

137. In relation to the 11 allegations of harassment, Mr Sangha invited the Tribunal to draw an inference that the conduct in question was related to disability. The claimant does not have to prove that she was disabled, but merely that the respondents perceived her to be disabled.

138. On the constructive dismissal claim, Mr Sangha submitted that failure to engage with an employee's grievance in a full and fair way may lead to a finding that the employer has breached trust and confidence. Where there are mixed motives for an employee resigning, the Tribunal should decide whether the employer's breach of contract was an effective cause of the resignation, it does not need to be the only cause. The resignation email sent by the claimant shows what was in her mind at the time.

139. In relation to the claim for breach of contract / failure to pay the National Minimum Wage, Mr Sangha submitted that the claimant accepted that she was an apprentice and fulfilled the role of an apprentice in that she learned a skill, was involved in being trained, was assessed and was doing on the job learning. He argued however that the claimant's apprenticeship was not covered by the new statutory apprenticeship regime introduced by the ASCLA and was therefore governed by the old statutory regime.

140. Under the old regime, Mr Sangha argued, certain requirements must be met under the Apprenticeships (form of Apprenticeship Agreement) Regulations 2012, including an apprenticeship agreement which met the employer's duty under section 1 of the ERA. The respondent had failed to provide the necessary documentation, including a section 1 statement, and was therefore not entitled to pay the claimant at the apprenticeship rate of the National Minimum Wage.

141. The apprenticeship was not a common law apprenticeship in Mr Sangha's submission because the respondent sought to rely on a statutory apprenticeship and that precluded the possibility of a common law apprenticeship.

142. On the question of time limits, Mr Sangha referred the Tribunal to the case of

Mitie Lindsay Ltd v Lynch EAT/0034/03/MAA & EAT/0224/03/MAA as authority for the proposition that unlawful deduction from wages claims are a separate regime from breach of contract claims, with their own provisions on time limits, and that provided the claim is outstanding on termination of employment, the relevant time limit for presenting a claim for breach of contract is three months from the date of termination of employment.

143. Mr Sangha submitted that, as the time limit for bringing a breach of contract claim only started to run on the termination of the claimant's employment, it cannot be said that the claimant waived any breaches of her contract by continuing to work for the respondent after the end of her apprenticeship.

Respondent

144. Ms Kamal submitted that there had been no breach of contract by the respondents. Failing to provide a section 1 statement and sending a text message erroneously to the claimant were not fundamental breaches of contract. The respondent had reasonable and proper cause for its conduct and there was no calculated damage to the implied term of trust and confidence. Moreover, the evidence suggested that the claimant resigned because she had another job lined up. The claimant had also, in Ms Kamal's submission, waived any breaches of contract through her conduct, including by raising a grievance.

145. In relation to the disability claim, Ms Kamal did not accept that the claimant was disabled, or that the respondents knew or perceived that she was. The claimant had, she suggested, accepted in her evidence that some of the things she struggles with because of OCD are things that many people struggle with.

146. Many of the harassment allegations are, Ms Kamal argues, out of time. There was no continuing act of discrimination and no grounds for extending time on a just and equitable basis. Even if the Tribunal were to find that they were in time, the acts complained of do not meet the test for harassment. She referred the Tribunal to ***Grant v HM Land Registry [2011] IRLR 748*** as authority for the proposition that violating dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment are significant words and that trivial acts causing minor upset are not covered by the legal concept of harassment.

147. Ms Kamal also submitted that it is not sufficient for the claimant to claim that the respondents' conduct had the proscribed effect set out in section 26 of the EQA, the Tribunal must find that it was reasonable for it to have that effect.

148. On the question of victimisation, Ms Kamal submitted that the claimant had not been subjected to the alleged detriments, and that in any event her treatment was not linked to the protected act.

149. In relation to the claim for wages whilst the claimant was an apprentice, Ms Kamal submitted that any claim for unlawful deduction from wages was out of time, but she accepted that case law suggested the claim for breach of contract was in time. She

says that there was no breach of contract, because even if the statutory test for an apprenticeship was not met, the claimant was still a common law apprentice and was paid appropriately. In the alternative, Ms Kamal argues that the claimant has waived any breaches of contract whilst she was an apprentice by continuing to work for the respondent.

Conclusions

150. The following conclusions are reached on a unanimous basis.

Disability

151. We are satisfied on the evidence before us that the claimant did have a mental impairment, namely anxiety and OCD. We accept the claimant's evidence on this issue, which is consistent and reflected also in the medical evidence.

152. We find that the impairment had an adverse impact on the claimant's ability to carry out normal day to day activities, including:

1. Washing and dressing;
2. Food preparation;
3. Social interaction;
4. Leaving the house and leaving work; and
5. Concentration.

153. The repeated checking also means that it takes her longer to do certain activities, and it is harder for her to do them.

154. The claimant takes medication to manage her conditions, and without this medication the impact on day-to-day activities would be worse. We have reminded ourselves that we have to consider the impact on day-to-day activities without medication.

155. We have then gone on to consider whether the impact on the claimant's ability to carry out normal day to day activities at the time of the alleged acts of discrimination was substantial. Substantial is not a high threshold and means more than minor or trivial. We find on balance that, given the number of activities that are affected and the nature of the impact, the claimant's mental health impairments did have a more than minor or trivial impact upon her ability to carry out normal day to day activities.

156. We are also satisfied that the impairment is long term. The claimant has had OCD symptoms since childhood, although she was not formally diagnosed until 2019 or 2020. A formal medical diagnosis is not a prerequisite of a disability falling within section 6 of the EQA. The claimant has suffered from anxiety since 2018. The impact on her ability to carry out normal day to day activities, as set out above had,

at the time of the alleged acts of discrimination, lasted for more than 12 months.

157. For the above reasons we find that the claimant was, at the time of the alleged acts of discrimination, disabled by reason of OCD and anxiety

Knowledge / perception of disability

158. We find that the respondents did not have actual or constructive knowledge that the claimant had OCD at any time during the course of her employment. We accept the respondents' evidence that the claimant did not tell them that she had OCD, that they did not overhear her discussing OCD in the workplace, and that her behaviour did not alert them to the possibility that she may have it.

159. From the 20 August 2021 however the respondents were put on notice that the claimant was suffering from anxiety and had been for some time, and that she was on medication as a result. She sent an email to Second Respondent that day in which she explicitly stated that she had suffered with anxiety for a long time and had been on medication. At the same time she submitted a sick note signing her off with work related stress.

160. We therefore find that the respondents had actual knowledge, from 20 August 2021, that the claimant suffered from anxiety.

161. We also find that the respondents did not perceive the claimant to be disabled prior to the 20 August 2021, as they had no knowledge of her anxiety prior to that date.

Harassment

First Allegation (a)

162. We find that it was inappropriate of the Second Respondent to send the text message and then not to apologise for it when he realised the claimant had received it instead of his wife. If he had concerns about the claimant's productivity, he could and should have spoken directly to the claimant rather than sending a text message. When he realised his mistake, he should have apologised to the claimant.

163. We find however that this conduct arose out of a belief that the claimant was not working and was not related to disability. At the time the text message was sent the Second Respondent did not know that the claimant had either OCD or anxiety and did not perceive her to be disabled.

164. There was no evidence before us to support the claimant's contention that the respondents' attitude towards her changed once she was diagnosed with OCD. To the contrary, the respondents did now know about her diagnosis, and Mr Pabial believed that the claimant's attitude to work had changed during and since lockdown.

165. This allegation therefore fails and is dismissed.

Second Allegation (b)

166. This is a further example of poor management practice, but we accept that the behaviour of the Second Respondent on this occasion was born out of anger and frustration and was not related to disability. At the time of the incident the Second Respondent did not know and did not perceive that the claimant was disabled.

Third and Fourth Allegations (c) and (d)

167. We find that the Second Respondent did, on 16 August 2021, send a text message to the claimant which was threatening. The Second Respondent said the claimant was refusing to take the vaccine, when in fact she wasn't refusing, she had been advised by her doctor not to take it. The Second Respondent was also questioning the claimant's motivation and her future with the company, which understandably felt threatening to the claimant.

168. This text message was inappropriate and unjustified. There was no need to talk about taking on an apprentice in this message, and it was understandable that the claimant felt this was a threat to her position. In contrast, the claimant's response was polite and reasonable.

169. We find that this behaviour was a breach of the implied term of trust and confidence but that it was not related to actual or perceived disability. These allegations of disability related harassment therefore fail and are dismissed.

Fifth allegation (e)

170. The email that the Second Respondent sent to the claimant on 20 August was also entirely inappropriate and poor management practice. It was intimidating and threatening to refer to the issuing of a P45 on the very first day of sickness absence. This behaviour amounted to a breach of the implied term of trust and confidence. On balance however we find that it was not related to disability but was instead born out of the Second Respondent's poor approach to managing staff and his perception that the claimant was not committed to her employment.

171. This allegation therefore fails and is dismissed.

Sixth allegation (f)

172. The claimant has not discharged the burden of proof in relation to this allegation. She accepted in evidence that Leah had been allowed to work from home earlier in the year, as had she. We accept the respondent's evidence that by August their position had changed, and they were no longer allowing either the claimant or Leah to work from home. There was no evidence before us linking the respondent's refusal to allow the claimant to work from home on this occasion to either actual or perceived disability.

173. This allegation therefore fails and is dismissed.

Seventh allegation (g)

174. The email sent by the Second Respondent on 29 October was another example of poor management practice. Referring to taking legal advice in an email to an employee was threatening, and it is clear from her reply that the claimant felt both intimidated, threatened and pressurised.

175. By now the respondents were on notice that the claimant was suffering from anxiety and had been for some time. The comments made in the email of 29 October relate to the claimant's mental health and had the effect of creating an environment in which the claimant felt intimidated and humiliated.

176. We would therefore have found that the Second Respondent did subject the claimant to disability related harassment on this occasion.

177. However, the harassment occurred on 29 October 2021 and the claimant did not start early conciliation until 14 March 2021. The complaint about this allegation is therefore approximately six weeks out of time. It cannot be said that it was part of a continuing act of discrimination, as this is the only allegation of discrimination that is upheld.

178. We have considered whether it would be just and equitable to extend time in relation to this complaint. The claimant did not give any evidence as to why she did not put her claim in earlier. She was off sick, but she was also looking for other jobs and was able to take legal advice. It is clear from the content of the email that she sent on 10 February 2022 that she had received legal advice by then. She waited however until 14 March before contacting ACAS.

179. It is for the claimant to persuade the Tribunal that it would be just and equitable to extend time. She has failed to do so.

180. This complaint of harassment is therefore out of time and the Tribunal does not have jurisdiction to hear it. We would however have upheld it but for the time limit point.

Eighth allegation (h)

181. We accept that the grievance was on the face of it allocated to Mrs Pabial to carry out, although Mr Pabial did have some involvement in the drafting of the letter. On balance however it cannot be said, as the claimant alleges, that he insisted on dealing with the grievance personally.

182. This was a very small employer, and the grievance was about the most senior individual within the business. There was therefore a very limited choice as to who could deal with the grievance unless an external grievance hearer were to be appointed.

183. In addition, we find that the involvement of Mr Pabial in the grievance did not

relate to disability. Rather it was a reflection of the fact that the grievance hearer was married to Mr Pabial and therefore took his views into account when reaching her decision.

Ninth allegation (i)

184. We do not accept that Mrs Pabial did interview Leah as part of the grievance process. There was no independent investigation carried out into the grievance, and Mrs Pabial merely spoke to her husband and accepted what he said to her.

185. There was therefore a failure to properly investigate the claimant's grievance. This was due to the fact that the First Respondent is a very small business, and that Mrs Pabial had no experience in dealing with grievances. It was therefore due to inexperience and poor management rather than disability.

186. This allegation of disability related harassment therefore fails and is dismissed.

Tenth allegation (j)

187. We find that the conclusions reached in the grievance outcome were not robust, because Mrs Pabial merely repeated what her husband had said to her. There was no critical evaluation of the evidence before her and no independent investigation.

188. The conclusions reached by Mrs Pabial cannot however be said to relate to disability but are rather another example of inexperience and poor management. This allegation of harassment therefore fails and is dismissed.

Eleventh allegation (k)

189. The failure to deal with the second grievance relating to wages was yet another example of poor management by the Second Respondent. We accept however that the reason the grievance was not dealt with was poor management and inexperience rather than disability. This allegation therefore also fails and is dismissed.

Victimisation

190. We find that the claimant did a protected act on 19 January 2022 when she referred in her grievance to being discriminated against. This was in our view an allegation that the respondent had contravened the Equality Act. It did not refer to the Equality Act, but section 27 of that Act does not require it to do so.

191. We find that the First Respondent did fail to deal properly with the claimant's grievance about discrimination and also that it failed to deal properly with her second grievance about pay. However this was due to incompetence and inexperience rather than because the claimant did a protected act. There was no evidence to suggest that had the claimant raised a grievance which did not refer to discrimination that it would have been dealt with any better.

192. We have reminded ourselves that the burden of proving that the reason for the

detrimental treatment was the protected act lies with the claimant, subject to section 106 of the Equality Act. The claimant has not discharged the burden of proof in relation to the victimisation complaint.

193. The victimisation claim therefore fails and is dismissed.

Constructive dismissal

194. We find that the following conduct of the respondents did amount to a breach of the implied duty of trust and confidence:

1. Sending a text message that suggested the claimant was not working, and then not apologising for it or even mentioning it when Mr Pabial realised that it had been sent. Whilst Mr Pabial may have had grounds to speak to the claimant if he was concerned that she may not be working, sending her a text message in the manner that he did, and then not apologising for it amounted to conduct likely to undermine trust and confidence;

2. Making an allegation by text that the claimant was not working without checking first with her and giving her the opportunity to comment on it. Mr Pabial made an assumption without speaking to the claimant;

3. Shouting at the claimant and a colleague in the workplace. The fact that the behaviour was directed at two employees does not justify it or mean that it does not amount to a breach of the implied duty;

4. Although the Second Respondent did not falsely accuse the claimant of making a postal mistake, the manner in which he dealt with the issue, by shouting in the stockroom and then threatening to make deduction from her wages did amount to a breach of the implied duty of trust and confidence. The comment he made to the effect of ‘If you don’t know how to do your job you shouldn’t be here’ was a clear breach of trust and confidence.

5. Whilst the allegations of harassment have not been upheld because they are not related to disability and/or are out of time, we find that the following behaviour complained of as part of the harassment claim did amount to a breach of the implied duty of trust and confidence:

    i. Telling the claimant she may have to stay away from work indefinitely because the Second Respondent wrongly believed she was refusing to take the vaccine when she wasn’t;

    ii. The comments on the 16 August 2021 about looking for another apprentice;

    iii. The email of 20 August 2021 offering to get the claimant her P45 and asking what her intentions were on the very first day of sickness absence;

iv. The email sent to the claimant on 29 October 2021 saying she should be better now and that he was taking legal advice;

v. Failing to deal properly with the claimant's first grievance; and

vi. Failing to deal with the grievance about the pay.

195. We find however that the failure to provide the section 1 statement was not a breach of trust and confidence. It occurred years ago, and although the First Respondent did not take steps to remedy the situation, the claimant made no complaint about the issue and did not appear concerned about it.

196. We accept that the final straw leading to the claimant's resignation was the way in which the respondent dealt wtith the claimant's grievances and that the claimant resigned in response to those breaches and not for some other reason. We accept that she had not received another job offer job by that stage although she was understandably looking for one.

197. We also find that the claimant did not waive the breaches of contract or delay too long in resigning. She was unwell and it was only a matter of a few weeks between the last straw and her resignation. It cannot be said that raising a grievance appeal in which she continues to complain about the respondent's behaviour amounts to an affirmation of the contract.

<u>Apprenticeship pay</u>

198. This claim relates to pay prior to May 2017. It is therefore approximately five years out of time as a complaint of unlawful deduction from wages. No attempt has been made to argue that it was not reasonably practicable to submit that claim on time or that the claimant submitted it as soon as reasonably possible after the end of the three-month time limit.

199. The Tribunal therefore does not have jurisdiction to hear the claim as one of unlawful deduction from wages.

200. We do however find that the claim for breach of contract is in time and that the Tribunal has jurisdiction to hear it. The claim was outstanding on the termination of employment and was presented within three months of the date of termination. In addition, the claim was made within six years of the alleged breach, so would have been in time in the civil courts. We accept Mr Sangha's submissions on this issue.

201. The contract that was in place during the relevant period was in our view a contract of apprenticeship. In ***Dunk v George Waller and Son Ltd [1970] 2 QB 163***, Lord Justice Widgery summarised a contract of apprenticeship as securing three things for an apprentice: pay during the apprenticeship, training and instruction, and status. The contract between the claimant and the First Respondent did all of those things. The claimant was paid during the course of her apprenticeship, she received training and at the end of the apprenticeship she obtained a certificate which gave

her the status of having completed an apprenticeship.

202. In ***Commissioners for HM Revenue and Customs v Jones and ors (trading as Holmescales Riding Centre) [2014] ICR D43***, the EAT held that it is legitimate for a tribunal to have regard to the way in which the parties categorise their relationship when deciding whether a contract is one of apprenticeship, although that factor is not in itself determinative. It was clearly the intention of all parties involved in the Apprenticeship Learning Agreement that the claimant would be an apprentice. The agreement stated as such. In addition, the parties conducted themselves in a manner that was consistent with the claimant being an apprentice. The claimant received training and regular visits from Doncaster College.

203. The contract was in writing, was signed and did not contain any provisions which were inconsistent with it being a contract of apprenticeship. The primary objective of the contract was the training of the claimant.

204. The IDS Handbook Volume 1 suggests, in paragraph 6.41, that it is possible that a contract or agreement that purports to be an apprenticeship agreement but does not comply with the formalities required of a statutory apprenticeship may nonetheless by treated as a common law contract of apprenticeship. It also notes that in several cases (including ***Flett v Matheson [2006] ICR 673***) courts have heled that modern apprenticeship arrangements gave rise to traditional contracts of apprenticeship.

205. In ***Beddoes v Woodward Electrical Ltd Et Case No. 2600221/2017*** an Employment Tribunal found that a contract which purported to be an apprenticeship agreement under the ASCLA but which did not meet the statutory conditions for such an agreement, was nonetheless a common law contract of apprenticeship. Whilst this decision is a first instance one which is not binding on this Tribunal, it is an indication that the fact that the fact that a contract purports to be one of statutory apprenticeship is not a bar to it in fact being a common law contract of apprenticeship. That is a reasoning that we have also adopted.

206. We find that the claimant was employed on a common law contract of apprenticeship. Under regulation 5 of the NMW Regulations the apprenticeship rate applies to those employed under ‘a contract of apprenticeship’ which includes a common law contract of apprenticeship.

207. The claimant was paid in line with the agreed rate set out in the contract between the parties, and which was in line with the NMW for apprentices at the time. There was no breach of the Apprenticeship Learning Agreement in relation to pay.l

208. We therefore find that the claimant has failed to discharge the burden of proving that the First Respondent breached the claimant’s contract by paying the apprentice rate of NMW. The claim for breach of contract fails and is dismissed.

<u>Failure to provide a section 1 statement</u>

209. In light of the respondents' admission, we have no hesitation in finding that the First Respondent failed to provide the claimant with a statement of employment particulars, contrary to section 1 of the ERA.

Remedy

210. The question of remedy having been agreed between the parties, we make an order that the First Respondent pay the agreed sum of £4,993.29 to the claimant.

Employment Judge Ayre

Date: 20 June 2023

JUDGMENT SENT TO THE PARTIES ON

......28 June 2023...

....

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