



EMPLOYMENT TRIBUNALS

Claimant: Miss S.A. Parminter

Respondent Evolve Child Care Ltd

Heard at: Exeter (by CVP)

On: 24th, 25th & 26th April 2023

Before: Employment Judge David Hughes
Ms Y Ramsaran
Ms L Fellows

Representation

Claimant: In person

Respondent: Mr Singha, counsel

RESERVED JUDGMENT

1. The Claimant's claim for unfair constructive dismissal is not well-founded, and is dismissed;
2. The Claimant's claim for harassment related to age is not well-founded, and is dismissed.

REASONS

The Parties

1. The Respondent in this case provides residential care settings for children. The Claimant is a woman who, at the time that concerns the Tribunal, was aged 56.

The Claim

2. The Claimant claims in respect of unfair constructive dismissal, and discrimination on the grounds of age.

3. On 05.04.2023, a Case Management Hearing was held before Employment Judge King. At that hearing, the following issues (going to liability) were identified:

1. Constructive unfair dismissal

1.1 The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the express / implied term of the contract relating to mutual trust and confidence. The breaches were as follows;

1.1.1 On 5 April 2022, the Claimant's line manager, Dan Walker, unreasonably refused the Claimant's request not to be on the rota to work alongside Amy Morton;

1.1.2 Between 5 and 29 April 2022, the Claimant's line manager, Dan Walker, said he would organise a mediation meeting between the Claimant and Amy Morton, and then failed to do so;

1.1.3 The Claimant's line manager, Dan Walker, conducted an internal investigation into the incident of 29 March 2022 (which the Claimant had reported to him) without informing the Claimant. The Claimant says this made her feel betrayed by him.

(The last of those breaches was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law).

1.2 The Tribunal will need to decide:

1.2.1 Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

1.2.2 Whether it had reasonable and proper cause for doing so.

1.3 Did the Claimant resign because of the breach? The Tribunal will need to

decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end. The Respondent...¹.

1.4 Did the Claimant tarry before resigning and affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

1.5 In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?

2. Harassment related to age (Equality Act 2010 s. 26)

¹ This reflects the list of issues included in the Case Management Order of Employment Judge King.

2.1 Did the Respondent do the following things:

2.1.1 On 29 March 2022, Amy Morton, a co-worker of the Claimant, said to the Claimant "you have Alzheimers" when suggesting that the Claimant could not recall that there had been an additional £50 in the cash tin.

2.2 If so, was that unwanted conduct?

2.3 Did it relate to the Claimant's protected characteristic, namely age?

The Claimant's case is that Amy Morton would not have said this to a younger member of staff.

2.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

2.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

4. The Tribunal canvassed with the parties whether they were content with the issues as set out in the Case Management Order. The Claimant told us that she had sent in a proposed amendment to the list of issues. In fact, what she had sent to Tribunal was a suggested tweak to the case summary recorded in the Case Management Order.
5. We have not set out the case summary, because to do so would unnecessarily extend these reasons. However, it is appropriate to record the change that the Claimant wished made.
6. Central to this case was a shift handover that took place on the morning of 29.03.2022. Paragraph 66 of the Case Management Order dealt with that handover, and originally read, in part:

... The claimant says that Amy Morton, a co-worker of the claimant, asked the claimant how much money was in the tin. The claimant replied that it was 13p. Amy said words to the effect of it should be £50.13. "The claimant denied that there was additional £50...
7. The Claimant requested that this be changed to:

The claimant read out from handover that there was 13p in the cash tin, as this is what was written on the handover.

Amy Morton, a co-worker of the claimant, said £50.13. The claimant said 'oh, how come?'

Amy Morton replied, "well you should know you picked it up". The claimant said no she hadn't".

8. The Claimant's reasons for requesting this change were that she wanted to clarify that Ms Morton didn't ask her how much was in the tin, as the Claimant had read that figure out. And the Claimant had not denied that there was an additional £50, she merely denied seeing it or handling it.
9. Employment Judge King did not rule on whether this proposed change to the case summary should be made. At the hearing, the Respondent made no objection, and we were content that the case summary should be read subject to the Claimant's proposed change.
10. Save for this change, the parties confirmed that they were happy that the list of issues in the Case Management Order reflected what the Tribunal would need to decide.

What happened

11. The claimant was employed by the respondent from 03.06.2017 to 29.04.2022 as a residential support worker.
12. In setting out what happened, the Tribunal reaches its decisions on a balance of probabilities. This means that, if we decide that something is more likely than not to have happened, it is treated as a fact. At times, the Claimant voiced strong opinions as to things that she "knew". It is, of course, important to listen and consider what she said in her evidence, and what the other witnesses said. But it is for the Tribunal to decide what, in fact, happened.
13. The claimant worked with a number of other individuals, one of whom was Amy Morton. Although the matters that the Tribunal has to decide took place on and after 29.03.2022, those events took place against the

background of what the Claimant said was a tense relationship with Ms Morton. 3 particular instances were referred to as having been mentioned in a meeting with Daniel Walker, the Respondent's Operations Manager, in April 2023. Those instances were:

- (a) In December 2021, the Claimant said that she had asked Ms Morton to send a text message that needed to be sent to the parents of one child. Ms Morton, on the Claimant's version of events, said that she would do so. The text was not sent, and Ms Morton is said to have denied having this conversation with the Claimant. For her part, Ms Morton told us that she had no recollection of this incident ("the Text Incident");
- (b) At some unidentified point, Ms Morton had asked the Claimant what the initials "CSE" meant. The answer, we were told, was "Child Sexual Exploitation". The Claimant felt that Ms Morton ought to have known this ("the CSE Incident");
- (c) Before working for the Respondent, Ms Morton had asked to do a karate demonstration and/or training with the young people in residence. Another employee had complained that this was a bad idea, and the idea was not pursued. The Claimant reported that Ms Morton had accused her of being the person who had stopped this idea from progressing ("the Karate Incident").

14. These prior incidents were not explored before us, and it is not for us to determine whether they happened, or the rights and wrongs of them if they did. We note them simply because they indicate that, in the Claimant's mind at least, there was some friction between her and Ms Morton.

15. Ms Morton herself denied friction between herself and the Claimant. She describes the Claimant as being "*kind and funny*" when she – Ms Morton – first started working for the Claimant, but says that the Claimant became less interactive, less willing to chat with colleagues, in the months leading up to 29.03.2022.

16. We also heard evidence from another support worker at the Respondent, Sarah Schock. She described a friendly relationship with both the Claimant and Ms Morton, but said that the Claimant "*didn't seem to like Ms Morton*".

17. We think it likely that there was some friction between the Claimant and Ms Morton. The Claimant's reservations about Ms Morton are likely to have increased over time. We note that she did not escalate the Text Incident in December 2021 at that time. We note that the CSE Incident was likewise not escalated, that it was in the Claimant's mind in April 2023 but had not been mentioned earlier and would not seem to be something over which people might be expected to fall out. As for the Karate Incident, that was not explored before us at all.

18. The Claimant would work about 10 shifts per month, but not on a regular pattern. Ms Morton would work about 6 shifts per month. Ms Morton told us that she worked every Tuesday and every other Saturday.

29.03.2023

19. On 29.03.2022, the Claimant was involved in a shift handover process. At the end of one shift, a handover would take place to the staff working on the following shift. This took place in a room. Also in the room was Ms Schock, Megan Gorrett (a team leader), Carly Norris and Gary Bridgeman.

20. The documents before us included a manuscript plan of the room, prepared by the Claimant. It indicated that Ms Gorrett, Ms Morton and Ms Norris were sat on a bed next to a wall. The Claimant was sat with her back towards them, facing a computer. To her left was sat Ms Schock, side-on to the Claimant and looking in her direction. Mr Bridgeman was shown standing to Ms Schock's left.

21. Although Ms Schock and Ms Morton were reluctant to agree the plan, neither of them said that they specifically remembered anything different from it, nor that anything on it was obviously wrong, and we accept it as showing the individuals present in the room and their approximate positions in the room.

22. The Claimant was going through the handover process, which involved passing on certain information from a computer. What happened at the handover is the subject of differing accounts.

The Claimant's accounts

23. The Claimant initially said that she read out how much cash was in the cash tin. She read out the sum "13p". Ms Morton said, "no, £50.13p". The Claimant turned and asked "oh, how come?" Ms Morton replied, "you should know, you picked it up". The Claimant said that she hadn't, Ms Morton insisted that she had. Ms Morton then said, in a mocking tone, "you handed it to Sharon", meaning Sharon Sowden, an employee who had left the room by this time, and made a hand gesture imitating the passing of money.
24. The Claimant continued to insist that she had not touched the money, and turned around to face Ms Morton, and saw her huffing in a facial gesture she interpreted to convey contempt, and heard her make a joke about Alzheimer's disease, saying "haha, you've got Alzheimer's".
25. The Claimant said that she was feeling humiliated, and concerned about what had happened.
26. Everyone save for Mr Bridgeman left the room. The Claimant protested to Mr Bridgeman that she hadn't touched the money. Mr Bridgeman pointed to the edge of the desk and said that the money had been "right there", and told the Claimant not to worry about it. She then has Ms Morton returning to the room and speaking to Mr Bridgeman, but ignoring her.
27. Subsequently, the Claimant modified her account. An investigation was held by Mr Walker, with which we deal below. In the course of that investigation, the Ms Schock told Mr Walker that she had made a joke about Alzheimer's disease. This was passed on to the Claimant. She says that she subsequently reflected on this, and said that, on the night of 09.04.2023, she recalled events more fully. In this recollection, the Claimant has Ms Schock making a joke about Alzheimer's disease, saying that she (Ms Schock) sometimes forgot the way she was driving on her way to work.
28. Ms Morton, who was working the subsequent shift, asked the Claimant how much money was in the cash tin. The Claimant respondent replied

that 13p was in the tin. Ms Morton. Thereafter, however, events progressed as per her earlier recollection.

Ms Schock's account

29. Ms Schock first gave an account to Mr Walker on 04.04.2023. The bundle for the hearing included a typed-up note of this meeting. It emerged during the hearing that Mr Walker made his notes of this and other meetings in manuscript, in a book which was kept. That book should, as counsel for the Respondent frankly acknowledged, have been disclosed. It was possible to arrange disclosure of the relevant pages of the book during the hearing.

30. The typed-up note of the meeting with Ms Schock, in which she gave her account, is much fuller than the handwritten note. However, it is not inconsistent with the handwritten note, and Ms Schock did not say that the account recorded in the typed note was wrong.

31. Ms Schock has some money being brought over to where the handover was taking place, and needing to be put away. The handover was chaotic, as handovers sometimes were, and the atmosphere somewhat tense. Ms Morton said that the Claimant had handed the money to another member of staff, to be put away. The Claimant denied this, and seemed offended. In an attempt to lighten the mood, Ms Schock said her own Alzheimer's was playing up and she couldn't remember how to get to work sometimes. This comment was made as a joke. She confirmed that Ms Morton had not said anything about Alzheimer's disease.

Ms Gorrett

32. Although Ms Gorrett had been in the room during handover, she was noted as not having witnessed the incident. She did not give evidence before us, did not prepare a statement for this hearing, and no manuscript note of her meeting with Mr Walker was available.

Ms Morton's account

33. Ms Morton gave her account to Mr Walker on 05.04.2023. The typed account is very brief, and has her confirming that she did not make the

comment, but feeling that the handover became unnecessarily difficult. She is recorded as describing the Claimant as “*a lovely lady*” – a comment which is also in the manuscript note on which the typed note is based.

34. In her statement, and her live evidence before us, Ms Morton expanded on this account. She said that £50 had been brought into the office to be put into the cash tin. She was in the office when this happened. When the Claimant read out the figure of 13p, she asked the Claimant about the £50, thinking that the Claimant had brought the £50. She says that the Claimant became very defensive and repeating that she hadn't touched the £50. Ms Morton then remembered that it was Ms Sowden who knew where the £50 was. Ms Morton says that she apologised to the Claimant and acknowledged her mistake in thinking that the Claimant had brought the £50. She was able to find out where the £50 was from Ms Sowden.
35. Ms Morton then has Ms Schock attempting to defuse matters with a light-hearted comment about Alzheimer's.

Factual findings about the handover

36. The Tribunal finds that the only comment made about Alzheimer's disease during the handover came from Ms Schock. We find that the Claimant was asked by Ms Morton about the £50. We find that the Claimant's reaction to this question was one of surprise, and that she became defensive. In an attempt to defuse matters, Ms Schock said something about Alzheimer's disease and sometimes forgetting her own way to work.
37. We find that the Claimant heard the word “Alzheimer's”, and was genuinely hurt by it. She told us towards the end of the hearing that she had, in fact, been concerned at some point that she might have Alzheimer's disease, and her reaction to the word may have been influenced by a genuine concern. But we find that, when she heard that word, she concluded that it came from Ms Morton because of what the Claimant perceived to be past friction between them. Put simply, she heard a term used that she considered hurtful, and attributed it to the person whom she considered likely to have behaved hurtfully towards her.

38. We wish to emphasise that this finding is not a finding that the Claimant has been dishonest. We do not believe that she has. We accept that she genuinely believed, and continues to believe, that Ms Morton behaved as the Claimant describes.

39. But honesty is not the same thing as reliability. We are not persuaded that the Claimant is always a reliable historian. Reasons for this are:

- (a) Although Ms Morton's account is self-absolving, it is supported by Ms Schock's account. The Claimant did not describe Ms Schock as having any hostility towards her;
- (b) Ms Schock's own account took all blame for any behaviour that might attract criticism onto herself. It is not for this Tribunal to attempt to lay down rules about fit subjects for humour, but it seems to us to be obvious that attempts at humour about Alzheimer's disease risk being both unfunny and poorly received. Ms Schock's attempt at humour was well-intentioned, but by admitting to it she was owning up to something that a manager might criticise, and by saying that only she had made such a comment, she was declining the chance to spread any blame;
- (c) The Claimant professed a great confidence in her own memory of events, at the same time as showing understandable hesitation at times. But when confronted with evidence that, we consider, pointed to a meeting she said had taken place on 19.04.2022 having, in fact, taken place on 05.04.2022, she obstinately insisted that her recollection was correct. We deal with this further below. For present purposes, we considered this incident to show that the Claimant's memory of events was not only unreliable, but that she had excessive confidence in its reliability.

Investigation

40. On 04.04.2022, the Claimant spoke to Mr Walker. She said that her interactions with Ms Morton were causing her concern, and was stressed enough about them for her not to want to come in to work, as she did not feel she could trust Ms Morton.

41. She mentioned the 3 previous incidents referred to in paragraph 13 above, and also the handover incident. She described Ms Morton insisting that the Claimant had handed money to Ms Sowden to put in the tin, then saying that the Claimant had Alzheimer's. The Claimant said that Ms Morton had humiliated her, and that she did not want to work with Ms Morton as the latter kept accusing her of things she hadn't done. She was worried that Ms Morton might make something up and get her into trouble.
42. The Claimant and Mr Walker discussed what might be done. Mr Walker thought there should be an investigation, that he should speak to the others present, and then possibly arrange for a meeting between the Claimant and Ms Morton, to discuss a way forward.
43. The typed note of the discussion identifies the following actions to be taken:
- (a) The Claimant was to email a written record of her words for the complaint;
 - (b) Mr Walker would meet with Ms Morton and discuss what was said, and why;
 - (c) Mr Walker would meet with the other staff present at the handover, and;
 - (d) Mr Walker would then meet with the Claimant, to discuss his findings and how matters might be resolved.
44. The typed-up note is consistent with the manuscript note of the meeting, although more complete.
45. Mr Walker and the Claimant agreed that the Claimant did not want the meeting to be dealt with as a formal grievance, and in her evidence before us told us that she did not want the matter dealt with as a grievance, be it "*official or unofficial*".
46. The Claimant did not email a written record of her complaint to Mr Walker. However, he had the substance of her complaint, and he was able to investigate it.

47. Although we were told that the note of this meeting was emailed to the Claimant, we find that this was not done. There is no record of it having been done. Although Mr Walker's explanation – that he deletes his sent emails after one year – is plausible in itself, it is surprising that, if records of the meeting (including the manuscript notes) are kept, that no record of the notes having been sent to the Claimant was kept. And, in her resignation email, the Claimant refers to not having had an email of a “*conversation*”, which we think probably refers to the meeting on 04.04.2022.
48. The Claimant told us that, at the meeting, she asked Mr Walker not to speak to the others present in the room at the handover. She wanted there to be a mediation meeting.
49. Although we accept that there was discussion of a mediation meeting between Ms Morton and the Claimant, we do not accept that the Claimant was given any assurance or understanding that Mr Walker would not speak to others present at the handover. We find that Mr Walker told the Claimant that he would speak to others present at the handover, and that she did not disagree with this. It is not surprising to us that Mr Walker wanted to speak to people present as soon as possible, so that their recollections were as fresh as possible when he spoke to them.
50. In the same meeting, we find that the Claimant did ask that she not work alongside Ms Morton. We do not accept Mr Walker's evidence to the contrary. It is clear from Mr Walker's own note that the Claimant had a deep distrust of Ms Morton. Whether or not that was well-founded is beside the point. She told Mr Walker that she had not wanted to work her previous shift (referred to as “*Saturday*” in the note of the meeting, and we take this to be 02.04.2022, when the Claimant is shown on the rota as having been off sick) to avoid working alongside Ms Morton. It defies credulity to suggest that she was happy to work alongside her.
51. The rota included in the bundle shows the Claimant to have been off sick on 02.04.2023, 08.04.2023, 10.04.2023, and 14.04.2023. On all of these dates save the last, Ms Morton is shown to have been working. We infer

from this that the Claimant was calling in sick at least in part to avoid Ms Morton.

52. Mr Walker's response to this request was that employees were not permitted to say with whom they would or would not work. It is understandable that the Respondent would not want employees to be able to veto with whom they worked, and to avoid any understanding of a right to such a veto. But we find that Mr Walker was obstinate in sticking to this approach. Although organising the rota no doubt presented complications, there would have been obvious merit in at least attempting to keep Ms Morton and the Claimant apart, if only until matters were resolved. And, given that they did not work alongside one another often, that Ms Morton undertook only limited shifts and the Claimant did not work to a fixed shift pattern, the complications of the rota may not have been great.

53. We find that the Claimant's request not to work alongside Ms Morton was dismissed. There was no recognition that there may be merit in trying to keep them apart until matters were resolved. There was no exploration of whether doing so would be possible.

54. We were told of another house that the Respondent opened, Oak House, the following month. We find that the Claimant probably did ask about working there. We accept what Mr Walker told us, that it was not known at the time when it would open, and Oak House was not subject to a necessary inspection until 19.04.2022. However, it would have been possible to say to the Claimant that working there could be explored. This was not said.

55. Although the Respondent's steps in speaking to those present quickly are not reasonably to be criticised, we think the Respondent can be criticised for its inflexible approach to the rota issue.

56. Mr Walker spoke to Ms Schock, Ms Gorrett and Ms Morton on 04.04.2022 and 05.04.2022. They gave the accounts referred to above.

Meeting on 19th or 5th April

57. There was another meeting between the Claimant and Mr Walker. The Claimant insisted that this took place on 19th April 2022.
58. The Claimant said that she drove to the Respondent's premises after doing a school run on the morning of this meeting, specifically to see Mr Walker. Counsel for the Respondent pointed out that 19th April 2022 was the Tuesday after Easter, and contended that it was unlikely that any child would be in school that week.
59. Over the evening at the end of the first day of the hearing, daily logs for the relevant child were obtained for 19.04.2022, and 05.04.2022. It became common ground that the logs indicated that the child was indeed not in school on 19.04.2022, but was in school on 05.04.2022, on which day the Claimant woke the child and did the school run.
60. Notwithstanding her agreement that these documents indicated that the meeting she described could not have taken place on 19.04.2022, the Claimant insisted that it had. We do not doubt that she was honest in her insistence. But what she agreed to be the effect of the documents points to her being wrong. It was not to the Claimant's credit that she insisted that her recollection was correct in the face of documents.
61. We find that this meeting – when the Claimant returned from a school run to see Mr Walker – happened on 05.04.2022. She has Mr Walker agreeing not to mention the earlier matters she had referred to – those mentioned in paragraph 13 above – and has Mr Walker leading her to believe that he had not yet spoken to Ms Morton. The Claimant believes that Mr Walker misled her as to the latter.
62. We accept that the Claimant saw Mr Walker briefly, and asked him not to refer to the earlier matters. However, Mr Walker had not, at that time, yet spoken to Ms Morton. The Claimant had driven back from a school run, and would have spoken to him early that morning. The typed note of the meeting with Ms Morton has its time as 11:30hrs. The Claimant's belief that Mr Walker misled her is based on an incorrect recollection as to the date of the conversation, we find.

63. Also on 05.04.2022, the Claimant came across Ms Morton as the former was coming off shift, and the latter coming on shift. The Claimant was making tea, and prepared a cup for both Ms Morton and Ms Schock. As the Claimant picked up her coat, Ms Morton said, "*are you sure you've got the right coat this time?*" This was because they had similar coats, and on an earlier occasion the Claimant had mistaken Ms Morton's coat for her own. The Claimant said this was another attempt by Ms Morton to humiliate her. She did not cross-examine Ms Morton about this, and in her own evidence said that she did not think this incident "*poignant*" at the time. We think this incident was probably a light-hearted comment about an admitted previous confusion.

64. The manuscript note of the meeting with Ms Schock on 04.04.2023 has a note at the bottom, reading "*possible meeting 08/08, (AP + AM on shift?)*" Mr Walker told us that the second "08" was an error, and that he had meant to write "04". He told us that this was identified as a possible date for a mediation meeting. How far it progressed in planning is not clear, and in any event it could not have happened on that date because the Claimant was off sick. But we accept that this date was identified as a possible date for the meeting. We also accept that a later date was identified, but the Claimant reigned before that could be progressed.

Meeting on 22.04.2022

65. The Claimant attended a meeting with Mr Walker on 22.04.2022.

66. In that meeting, Mr Walker explained that both Ms Schock and Ms Morton had said that the Alzheimer's comment was made by the former, not the latter. The typed note records that the Claimant accepted this, and was happy that the comment was not personal. Given the Claimant's obvious unhappiness about matters, we are doubtful that the Claimant expressed happiness. We think this part of the note may reflect the Claimant being nonplussed at the outcome of the investigation, and an element of wishful thinking on Mr Walker's part, that he wanted matters to come to a happy end. That said, we accept that the Claimant said that she did want to carry on working.

67. The note records that the Claimant was happy at work, had no other issues and wanted to carry on doing to job. The note acknowledged that the Claimant had earlier wished not to work alongside Ms Morton, but that she was now happy to work alongside her.
68. In her evidence before us, the Claimant said that her happiness or otherwise to work alongside Ms Morton would depend on the outcome of the mediation meeting. On this, we prefer the Claimant's evidence. Mr Walker's account is at odds with the Claimant's position both before and afterwards.
69. One action identified, according to the note of the meeting, is that Mr Walker was to attempt to arrange a mediation meeting. In his evidence, Mr Walker told us that he wanted to arrange such a meeting at a time when both Ms Morton and the Claimant were on shift. This is understandable, to avoid either of them having to come in to work when not on shift.

Resignation

70. The Claimant had called in sick to avoid a previous shift alongside Ms Morton. On 29.04.2022, the Claimant emailed the Respondent, resigning with immediate effect. Her email read as follows:

Dear Dan

I came to see you on Friday 8th April 2022 following an incident that happened during handover on the 5th April whereby a colleague Amy had made a false accusation that i had passed some cash to Sharon and she became animated about it when i knew i hadn't. even when i stated i had not, Amy insisted in front of everyone that i had.

i explained to you that i phoned Sharon, as Sharon had by this time left the building and was the only person who could verify i did not pass her any cash, which she did confirm. There was a comment made in the room about having Alzheimer's which you later said that was not Amy, although i do believe she said it too but was not aimed directly at me but said it in response to Sarah. WHICH OBVIOUSLY CAME TO LIGHT LATER The original concern, a false accusation, remains.

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I explained how this made me feel vulnerable to work with her and I requested a meeting to resolve this. You had spoken with Amy yourself after our meeting and she said I was 'off with her'. I can definitely say this was not the case as I am aware, although there is an unresolved issue I would not be off with her at all as this would not be professional. I explained to you that when I did briefly see her in handover, I made her a cup of tea and chatted normally. This really does contribute to my decision not to come back to work as explained to you that I feel open to any accusations, this being said confirms that I was correct.

I did mention some previous incidents which I said I did not feel necessary to be addressed with her however I did state that I wanted this particular incident to be addressed.

As no meeting that I requested has taken place with Amy I feel I have no choice now in my decision, you even asked me if I was happy to be here, which I replied 'yes'. This did not make me feel supported to be honest as it made me feel like my employment was in question when I was simply raising an issue to be resolved. You also discussed my sickness (return to work) at this time in the conversation and you said I needed to speak with HR about this.

I did want the meeting with Amy to try and resolve this before being on shift with her, however I am not prepared to put myself in the vulnerable position, now it is imminent I have had to make this decision. I know she is best friends with Lauren our manager and I know a discussion has already taken place between them as Sharon had tried to clarify that I hadn't passed the cash, to which Lauren dismissed discussing any further when Amy was present.

Dan, you did say on the 8th? you would email me our conversation, as far as I can see I do not have the email but I could be mistaken, apologies if so.

I am sad it has come to this situation today, I am seeking legal advice and will be in touch

Law

Unfair constructive dismissal

71. S95 of the Employment Rights Act 1996 provides as follows:

95.— Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or

(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.

(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—

(a) the employer gives notice to the employee to terminate his contract of employment, and

(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

72. In this case, it is for the Claimant to show that she was constructively dismissed, in which case her situation would fall within s95(1)(c).

73. The Claimant relies on alleged breaches of the implied term of trust and confidence. This was described in Malik & Mahmud -v- BCCI [1998] AC 20 as an obligation that the employer shall not:

“Without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”

74. The test is an objective one, and all the circumstances must be considered: see Malik.

Harassment related to age

75. The Equality Act 2010, s26, provides as follows:

26 Harassment

(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.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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.

(5) The relevant protected characteristics are—

- age;
- disability;
- gender reassignment;
- race;
- religion or belief;
- sex;
- sexual orientation.

76. Counsel for the Respondent referred us to the cases of Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR, Unite the Union v Nailard [2019] ICR 28, Betsi Cadwaladr University v Hughes UKEAT/0179/13 and Grant v HM Land Registry [2011] EWCA Civ 769.

Conclusions on the issues

77. We turn now to the issues identified at the Case Management Hearing.

78. The first identified issue asks whether Mr Walker unreasonably refused to the Claimant's request not to be on the rota alongside Ms Morton. We think that Mr Walker can be criticised for not exploring whether it would be possible to keep them apart, until matters could be resolved.

79. However, we do not think that this amounted to a fundamental breach of contract. It was not calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Mr Walker was attempting to arrange a mediation meeting. Although it would have been preferable to investigate whether they could be kept apart pending a meeting, the Claimant had been happy to make Ms Morton a cup of tea on 05.04.2022, and they were not going to work alongside one another frequently.

80. The fact that an alternative course of action would have been preferable, does not mean that the course, in fact, adopted was a fundamental breach of contract.

81. We have found that Mr Walker did attempt to arrange a mediation meeting. He did not fail to do so. That no mediation took place was because the Claimant was off sick on one postulated date, and resigned before another could be arranged.

82. We have found that Mr Walker did investigate the incident of 29.03.2022, but did not do so without telling the Claimant.

83. We therefore do not accept the Claimant's argument identified in the list of issues, that there was any repudiatory breach of contract.

84. The question of whether the Claimant resigned because of any breach, does not therefore arise. We find that the Claimant resigned because she did not want to work alongside Ms Morton.
85. The question of whether the Claimant affirmed the contract does not arise.
86. It follows that we do not accept that the Claimant was constructively dismissed. There being no constructive dismissal, it follows that the question of whether or not any constructive dismissal was fair, does not arise.
87. The Claimant's case on harassment is dependent on her allegation that Ms Morton said, "*you have Alzheimer's*". We do not give any importance to the exact words, but we have found that the only person who made any comment about Alzheimer's was Ms Schock. The Claimant makes no complaint about Ms Schock.
88. The factual allegation on which the Claimant's harassment claim is based not having been accepted by the Tribunal, the remainder of the questions under the harassment heading in the list of issues do not arise.
89. Questions as to remedy equally do not arise.

Employment Judge David Hughes
Date 27 July 2023

Reserved judgment & reasons sent to the parties on 14 August 2023

For Employment Tribunals