EMPLOYMENT TRIBUNALS

Claimant: Mr C Wooton

Respondent: Specialist Building Products Limited part of Epwin Group Plc

Heard at: West Midlands (Birmingham) Employment Tribunal **On: 4 – 8 December 2023**

Before: Employment Judge Childe

Mrs Chavda

Mr Woodall

REPRESENTATION:

Claimant: **Mr E Beever (Counsel)**

Respondent: **Mr Huddleson (Consultant)**

JUDGMENT

The judgment of the Tribunal is as follows:

1. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.

2. The claimant did not cause or contribute to the dismissal by blameworthy conduct, and it is not just and equitable to reduce the compensatory award payable to the claimant.

3. The complaint of being subjected to detriment and/or dismissal for making protected disclosures is dismissed on withdrawal.

4. The complaint of being subjected to detriment and/or dismissal for asserting a statutory right is dismissed on withdrawal.

5. The complaint of indirect disability discrimination is dismissed on withdrawal.

6. The complaint of unfavourable treatment because of something arising in consequence of disability is well-founded and succeeds.

7. The following complaints of failure to make reasonable adjustments for disability are well-founded and succeed:

    a. The respondent requiring the claimant to return to work with contact with his line manager, Jason Swinney, who was causing the claimant stress.
    b. Not allowing the claimant's companion to attend the 4 July 2022 meeting.

8. The complaint of victimisation is well-founded and succeeds.

9. The complaint that the claimant was subjected to a discriminatory dismissal is well-founded and succeeds.

Summary of the case and Issues to be determined

Introduction

1. I had access to an agreed tribunal bundle which ran to 428 pages.
2. Witness evidence was provided by the claimant himself. We also heard evidence from Matt Cox, Group HR Project Manager, but whose role had evolved to what is normally described as “Head of HR”, Tammy Hancox, HR Manager, James Burn Head of Warehousing and Distribution who heard the claimant’s grievance and Ryan Owens, Head of Manufacturing and appeal officer.
3. On the first day of the employment tribunal hearing, we heard the claimant’s application to amend his claim. For the reasons we gave orally at the time, the claimant’s application to amend his claim succeeded.
4. The parties then agreed the list of issues for the tribunal to determine, based on a draft list of issues Mr Beever had prepared. During the hearing some of the claimant’s claims were withdrawn and therefore not all the original agreed issues needed to be dealt with.
5. We refer to the relevant issue and its corresponding issue number, in the analysis and conclusion section the judgement below, for those issues that remain to be determined.
6. Due to the train strikes scheduled to take place on the week of the hearing, it took place in a hybrid format. The parties attended the tribunal in person. The tribunal panel sat remotely and appeared via CVP.
7. The tribunal agreed a timetable with the parties to enable the case to be heard and disposed of within the agreed listing. This involved limiting the amount of

time each party spent on cross examination and in delivering submissions. Both parties were able to complete their respective cross examination and submissions within the agreed timetable.

8. This case is about the way the claimant's absence due to sickness; grievance and grievance appeal; and his return to work was dealt with by the respondent. The claimant alleged the respondent conducted itself in a manner which led to a breakdown in mutual trust and confidence between them, which was a fundamental breach of contract and entitled him to resign and claim constructive dismissal. The claimant says he was also subjected to unlawful disability discrimination in the way these matters were handled. The respondent's case was that it had always treated the claimant reasonably and had not subjected him to disability discrimination, primarily based on an assertion that the claimant was not disabled and that the respondent did not know the claimant had a disability at the relevant time.

Findings of fact

10. We make the following findings of the relevant facts in this case. Where we have had to resolve a fact due to conflicting evidence, we indicate how we have done so in this judgment.
11. The respondent is a business which supplies double glazing.
12. The claimant was an operator setter, who later moved to a toolroom technician role.
13. The claimant began employment on 2 January 1992 and was employed until 7 July 2022, when he resigned.

14. At the point of the claimant's dismissal, he had 30 years' service with the respondent and was 59 years old.
15. Other than a period of sickness absence in connection with an injury relating to his finger, the claimant had not had any lengthy periods of absence due to sickness during his employment with the respondent.
16. In mid-2020 Jason Swinney became the claimant's line manager. His job title was service coordinator.
17. The claimant felt bullied, harassed and intimidated by Jason Swinney.
18. The claimant was issued with a final written warning on 18 February 2021 which was live for a period of 12 months. This was in connection with an incident involving a forklift truck which the claimant declared fit for use, despite the claimant identifying a fault during the vehicle check. It also related to inappropriate language that the claimant had used on a health and safety document.
19. On 13 November 2021 the claimant received a letter from Matthew Cox. In this letter he was invited to attend an investigation meeting to understand the claimant's view on allegations which have been made against him regarding his attitude at work and behaviour towards management.
20. On that same day the claimant was signed off work for four weeks with stress at work. The claimant remained absent from work due to sickness until 11 June 2022, for a period of seven months.
21. The claimant reported his absence to the respondent's outsourced employee sickness and absence monitoring and advisory service, throughout his sickness absence.

22. On 18 February 2022 the claimant raised a grievance about Jason Swinney. The main thrust of this grievance was that the Jason Swinney had subjected the claimant to bullying and intimidation.
23. On 3 March 2022 the claimant sent an email to Ms Hancox. In this email the claimant:
    a. stated he had been diagnosed with stress and depression;
    b. requested that he be accompanied by a companion, Gary Seale, at a grievance meeting to support him because he had been diagnosed with stress and depression; and
    c. requested the document, which he later found out to be the Jason Swinney grievance against him, be provided and made it clear that the Jason Swinney grievance letter was part of the claimant's grievance.
24. The claimant attended a grievance hearing on 10 March 2022. James Burns was the grievance officer. The respondent allowed the claimant to be accompanied by Gary Seale at this meeting. Gary Seale was the claimant's friend and was not a work colleague or trade union representative.
25. The claimant was provided with the grievance appeal outcome on 30 March 2022. The claimant's grievance was not upheld.
26. The claimant submitted a data subject access request (**"DSAR"**) on 8 April 2022. The respondent had until 12 May 2022 to respond to that DSAR.
27. The claimant submitted his grievance appeal on 8 April 2022.
28. The respondent scheduled the grievance appeal hearing to take place on 29 April 2022.
29. The grievance appeal hearing was subsequently postponed until 11 May 2022.

30. On 8 May 2022 the claimant wrote to Ms Hancox to say that Gary Seale could not attend the grievance appeal meeting on the morning of 11 May 2022. A request was made that it be postponed to the afternoon or another day by the claimant.
31. On 10 May 2022 the claimant wrote to Ms Hancox to say he couldn't attend the appeal meeting until the additional documentation he had requested, including the Jason Swinney grievance and the DSAR, were provided.
32. The claimant did not attend the grievance appeal hearing. Ryan Owens was the grievance appeal officer. Mr Owens met with Ms Hancox on the afternoon of 11 May 2022. A decision was taken to deal with the grievance appeal as a paper exercise only. Mr Owens did not complete his conclusions on the claimant's grievance appeal until sometime after 16 May 2022.
33. On 15 May 2022 the claimant wrote to Ms Hancox by email and again referred to the failure on the respondent's part to provide the Jason Swinney grievance and the DSAR. A further request for this documentation was made. The claimant said '*If you will not provide the documentation, then I will need to take account of this at the appeal and draw this to the attention of any subsequent decision maker as appropriate. This continues to cause me additional stress which I could well do without.*' The claimant went on to provide specific dates in May and June 2022 that he and Gary Seale could attend the appeal meeting. The claimant finished this email by saying "*I look forward to hearing from you with the documentation or your clear statement that it will not be provided together with confirmation of the date and time for the appeal.*"
34. On 26 May 2022 the claimant received a letter which resolved a previous query he had raised about his sickness entitlement.

35. On 31 May 2022 the claimant received the appeal outcome letter from Mr Owens. The claimant's appeal was not upheld.
36. On 8 June 2022 the claimant wrote a letter to Mr Owens. In this letter the claimant said he intended to return to work on 16 June 2022, but to then take a period of annual leave which meant his first day back at work would be 2 July 2022. In this letter the claimant said that he wanted to understand how the company would make sure he felt safe when he returned to work and he also requested that his friend, Gary Seale, attend any work meetings with him as his companion.
37. On 24 June 2022 Ms Hancox wrote to the claimant to say that the respondent did not deem it appropriate for Gary Seale to attend any work meetings with him as his companion.
38. The return-to-work meeting took place on 4 July 2022. Mr Cox led the meeting and Ms Hancox was in attendance. The claimant arrived for the meeting with Gary Seale in attendance. Mr Cox refused to allow Gary Seale to attend the meeting as the claimant's companion. Mr Cox made it clear in the meeting that the respondent would not consider moving Jason Swinney from his position as tool service coordinator, working on the same shift as the claimant.
39. On 6 July 2022 the claimant sent his letter of resignation to the respondent. In this letter the claimant resigned with immediate effect. In his letter of resignation, the claimant identified the following reasons for his resignation:
    a. The company had refused to engage in his request for documentation.
    b. The company had not provided his DSAR to him prior to the grievance appeal.
    c. The company heard his grievance appeal in his absence.

d. The company refused to allow his companion, Gary Seale, to attend at the return-to-work meeting on 4 July 2022.

e. The claimant had not been offered what he considered to be a safe working environment for his return to work. The company had not considered the options that he had put forward regarding his return to work.

Relevant Law, Finding of Fact, Analysis and conclusion

2.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about?

The Law

40. The definition of disability is found in section 6 of the Equality Act 2010 (**"EqA"**), which states:

6 Disability

(1)A person (P) has a disability if—

(a)P has 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.

(2)A reference to a disabled person is a reference to a person who has a disability.

(3)In relation to the protected characteristic of disability—

(a)a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b)a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4)This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a)a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b)a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

(5)A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6)Schedule 1 (disability: supplementary provision) has effect."

9. Following the case of *Goodwin v Patent Office* [1999] ICR 302 the EAT laid down detailed guidance on how this Tribunal should evaluate and decide the issue of disability. The following key points of guidance are given:

a. Specific reference should be made to the pleadings and the issues clarified before the issue of disability is decided;

b. When taking into account any part of statutory guidance or statutory code, the Tribunal should expressly refer to each section relevant to making its decision;

c. If an activity can still be performed with difficulty and great effort, that does not mean the ability to do the activity is not impaired;

d. Account must be taken of the fact that many people play down the effects their impairments have on them;

e. The Tribunal should take into account how a person manages their condition;

f. There should be no single focus on a narrow set of activities such as for example housework. How the impairment affects someone in all aspects of their normal lives should be looked at both at home, outside of home and in the workplace;

g. If medication or other treatment is helping to treat the impairment, the Tribunal should take into account both the situation whilst medication for example is being taken and what the effects would be if the medication or other treatment was not being taken or taking place;

h. The Tribunal should never lose sight of the overall picture when coming to its decision about the specific parts of the disability statutory test.

The relevant date

41. The Tribunal must apply the statutory test for disability at the date the alleged discrimination took place and not at the date of the hearing determining the issues after **Cruikshank v VAW Motorcast limited** [2002] IRLR 24.

42. It has also been clarified that when looking at the relevant date, the only evidence that is admissible is evidence and circumstances that date from the date of the alleged discrimination backwards. Looking at evidence from after the relevant date, to determine the test as at the relevant date, is impermissible hindsight following **All Answers Limited v W and R** [2021] EWCA Civ 606.

Impairments

43. Whether an impairment has an adverse effect alleged, is a causation question to be determined objectively by the Tribunal **Dias Da Silva Primas v Carl Room Restaurants Limited t/a McDonalds restaurants Ltd and others** [2022] IRLR 94.
44. The *Disability: Equality Act 2010 - Guidance on matters to be taken into account in determining questions relating to the definition of disability* (**"Guidance"**) states:
    a. A4: Whether a person is disabled for the purposes of the Act is generally determined by reference to the effect that an impairment has on that person's ability to carry out normal day-to-day activities.

Substantial adverse impact

45. To determine this point, the correct approach is to ask the question of what the claimant's ability to undertake the day-to-day activity would be, if they did not have the impairment **Elliott v Dorset County Council** [2021] IRLR 880.
46. If the impact is more than minor or trivial, then it must be deemed to be substantial **Aderemi v London and South Eastern Railway Limited** [2013] ICR 591.
47. The Guidance at B7 states: *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.

48. The Guidance at B12 states: *The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, 'likely' should be interpreted as meaning 'could well happen'. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question (Sch1, Para 5(1)). The Act states that the treatment or correction measures which are to be disregarded for these purposes include, in particular, medical treatment and the use of a prosthesis or other aid (Sch1, Para 5(2)). In this context, medical treatments would include treatments such as counselling, the need to follow a particular diet, and therapies, in addition to treatments with drugs.*

Long term

49. The relevant part of Schedule 1 EqA states:

"Long-term effects

2 (1) The effect of an impairment is long-term if—

(a)…

(b)it is likely to last for at least 12 months, or

(c)….

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term."

50. When considering this issue and an impairment has not lasted for 12 months, the Tribunal is usually required to take a broad rather than narrow view of the evidence and must consider the reality of risk of whether the effects of the impairment "could well happen" rather than focussing on the diagnosis itself from medical evidence. Consequently, if there is a diagnosed or present impairment that has not yet lasted 12 months, then it will be a long-term condition if the proven effects complained about could well happen **Nissa v Waverly Education Foundation Limited and another** UKEAT/0135/18/DA.

Relevant findings of Fact, Analysis and conclusion

Relevant date

51. We accept the respondent's submission that we must apply the statutory test for disability at the date the alleged discrimination took place. In this case the

material time is between 11 May 2022, which is the appeal hearing and 6 July 2022, which is the date of the claimant's resignation ("the **Material Time**")**.**

Impairment

52. Turning to consider whether the claimant had a mental impairment at the Material Time. We find that the claimant did have a clinically recognised impairment. The details of this are set out in Dr Khan's (consultant psychiatrist) medical report, dated 20 June 2023. This is said to be: Adjustment Disorder, ICD-11 coding 6B43. This is described by Dr Khan as an adjustment disorder which is a maladaptive reaction to an identifiable psychosocial stressor or multiple stressors. We will describe this as the Mental Impairment in our judgment.

Substantial adverse effect

53. Turning next to whether the Mental Impairment had a substantial adverse impact on the claimant.
54. At the Material Time the claimant was taking Setraline medication in connection with his Mental Impairment.
55. We accept the claimant's evidence that without Setraline medication, the claimant would not be able to function in any every day or social or public settings.
56. We accept the claimant's evidence that the claimant did limit his activities outside of work at the Material time and that the claimant could not cope with anything unexpected and so planned his day and organised his time so that he did not have anything unexpected or any stressful surprises. We accept the

claimant's evidence that he had to plan and prepare everyday journeys such as going on a shopping trip.

57. We find these coping strategies did not alter the effects of the Mental Impairment to the extent that they were no longer substantial. This is because we accept that at Material Time the claimant had poor sleep patterns, got headaches and social anxiety, and was anxious meeting new people and being in new situations. We find that the claimant's condition had an adverse impact on his social functioning at the Material Time, i.e. socialising with friends or for that matter even doing trivial tasks such as shopping.

58. In reaching this conclusion, we have accepted the claimant's own evidence on this point which was straightforward and honest. This is consistent with what is set out in Dr Khan's report about the Mental Impairment. We appreciate that the claimant was self-reporting this information to Dr Khan, but we have no reason to doubt that this was anything other than an honest account of the impact of the claimant's condition on his day-to-day activities.

Long Term

59. We turn finally to consider whether the claimant's mental impairment was long term at the Material Time.

60. We find that the claimant's Mental Impairment first manifested itself on 13 December 2021. There is insufficient evidence available to us to conclude that the claimant's condition began any earlier than this date.

61. Having reached this finding, the only way the claimant can establish his condition was long term under schedule 1 EqA, is to demonstrate that it was

likely to last for at least 12 months as at the date of the discriminatory treatment. This is because it had not lasted for at least 12 months as of 6 July 2022.

62. We accept the respondent's submission that by July 2022 there was an escalation of the Mental Impairment. The claimant's GP notes record that the claimant was prescribed Sertraline in connection with his Mental Impairment. On 1 July 2022 the notes record that the claimant's prescription of Setraline doubled, which is consistent with an escalation in the claimant's condition.
63. This view is consistent with the evidence of Dr Khan where he says *"due to the long delay between the start of symptoms and the present, I believe the response to cognitive behavioural therapy and increased medication could be anywhere between 12 to 24 months. However, this would need to be reviewed during treatment."* This was a view expressed on 20 June 2023, but we consider it would equally apply to 6 July 2022 as the claimant had at that point been off work for a period of seven months.
64. We therefore conclude that by 6 July 2022 the effects of the Mental Impairment could well have extended to last 12 months.
65. We therefore conclude that the claimant was disabled at the relevant time.

Knowledge of disability

The Law

66. Paragraph 20 (1) of Schedule 8 EqA states:

> *A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—*
>
> *(a) …;*

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

67. The Equality Act 2010 Code of Practice ("**the Code**") at paragraph 5.15 states that employers must '*do all they can reasonably be expected to do' disability. What is reasonable will depend on the circumstances. This is an objective assessment*."
68. We take this to mean that reasonable enquiries should be made.

Relevant findings of Fact, Analysis and conclusion

69. The respondent's case is that they didn't know that the claimant was disabled at the Material Time.
70. We accept the claimant's submission that the words 'could not reasonably be expected to know' in Paragraph 20 (1) of Schedule 8 EqA, leaves scope for us to find the respondent had constructive knowledge of the claimant's disability at the Material Time.
71. The respondent used a company called Medigold, which was in effect an outsourced employee sickness and absence monitoring and advisory service to the respondent.
72. We find that Mr Cox and Ms Hancox had access to the claimant's notes stored on the Medigold system and they did review the notes. That was part of their role.
73. The notes recorded on the Medigold system were made following contact between the claimant and Medigold staff.

74. A key entry in the claimant's Medigold records is 14 December 2021, which stated the following:

    i. Illness/Sickness

    j. Absence Category: Psychological

    k. Absence Sub Category: Stress and anxiety

    l. Recuring Illness?: Yes

    m. Pre Existing Conditions Details: On and off for years, headaches and chest pains

75. Then on 15 December 2021 Lucia Carabine, a nurse acting on behalf of Medigold, provided the following advice to the respondent: *I have also provided additional advice for management of symptoms. With work related stress symptoms and absence often persist until a resolution which is satisfactory to all parties is reached. I would therefore advise a management meeting and stress risk assessment to identify the work stressors and comprise a plan of supportive interventions to reduce stress at work.*

76. Mr Cox said in evidence that he reviewed these notes in December 2021 and intended to arrange a management meeting with the claimant and conduct a stress risk assessment in January 2022, following the factory shut down for the Christmas period.

77. This was consistent with the approach set out in the respondent's absence management policy which said:

    a. ***Long Term Sickness Absence*** *If you are unable to work due to illness or injury for more than 2 weeks the absence is viewed as long term. In this case contact will be made with you to determine the nature of the illness or injury and to gather information about an appropriate return to*

work date. This may involve referring you to ***occupational health for an independent medical opinion*** *over and above what has been provided via the Doctors Medical Certificate* (our emphasis).

78. By early January 2022, following the respondent's annual shutdown due to the Christmas period, the claimant would have been absent from work due to illness for a period of more than two weeks.

79. However, in the intervening period, on 12 January 2022, the claimant's solicitor sent a without prejudice email in which it was proposed that the parties reach an agreement through which the claimant leave his employment with the respondent in return for financial compensation.

80. Mr Cox accepted in evidence that once he received the claimant's solicitor's email, he decided not to investigate the claimant's mental health condition further because he thought the claimant wanted money to leave the organisation and did not wish to remain employed by the respondent.

81. In his witness statement Mr Cox says *"I felt Chris just wanted to extract money from the company with no real desire or intention to return."*

82. We have decided that Mr Cox formed the view at this early stage, without the benefit of any medical evidence or further enquiry of any kind, that the claimant's mental health condition was not genuine. This is why no further investigation of inquiry was undertaken at the time into the claimant's mental health condition.

83. We find that in forming the view that the claimant's mental health condition was not genuine, Mr Cox set the tone of how the claimant was treated by the respondent throughout the remainder of his employment. In other words, Mr

Cox and the respondent did not take the claimant's mental health condition seriously.

84. This was an incorrect view in our judgment. Had the respondent carried out further inquiries and investigations, including instructing occupational health as envisaged in the respondent's own absence management policy, the respondent would have realised in January 2022 that the claimant had a mental health condition which amounted to a disability.

85. If we are wrong on that point, on both 18 February 2022 in the claimant's grievance and 3 March 2022 in the claimant's email to the respondent, he made it clear that he had a mental health condition. On 3 March 2022 the claimant talked about his condition amounting to a disability under EqA.

86. We therefore conclude that the respondent ought to have known from January 2022 that the claimant was disabled because they ought to have made reasonable enquiries, as directed by their own nurse from Medigold. The respondent had constructive knowledge of the claimant's disability from January 2022.

87. In addition, we find that the claimant was trying to find a solution to leave the company in 2022. However, once he realised that there would be no settlement and exit from the company, and his job was not redundant, he came to terms with the fact that he could return to work if the issue that he saw as a barrier to returning to work was removed, which was working with Jason Swinney. We find that the claimant was honestly and genuine trying to return to work in July 2022.

1 Constructive Unfair Dismissal (s94 and s95(1) ERA 1996)

The Law

Constructive Dismissal

88. The Employment Rights Act 1996 (ERA 1996) provides the following:

> 1. *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) F1. . . , only if)—*
>
> (c)the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

89. In **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221, CA**, the common law concept of a repudiatory breach of contract was imported into what is now section 95(1)(c). Lord Denning MR in that case made it clear that the matter has to be looked at from traditional contract principles, not whether the employer has been unreasonable.

90. The component parts of a constructive dismissal which need to be considered are as follows:

    a. A repudiatory or fundamental breach of the contract of employment by the employer, i.e. a breach which is sufficiently serious to entitle the employee to leave at once;

    b. A termination of the contract by the employee because of that breach.

c. The employee must not have lost the right to resign by affirming the contract after the breach, typically by delay.

91. The claimant relies on the implied contractual term of trust and confidence. in **Malik and Mahmud v BCCI** [1997] ICR 606 the House of Lords described this as being an obligation that the employer shall not:

    a. "*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.*"

92. The **Malik** case makes clear that the test is an objective one. All the circumstances must be considered. An employer with good intentions can still commit a repudiatory breach of this implied contractual term.

93. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or *seriously* damage the relationship of confidence and trust.

94. A breach of trust and confidence might arise not because of any single event but because of a series of events. This is commonly known as the last straw. A claimant can rely on a "last straw" which does not itself have to be a repudiation of the contract **London Borough of Waltham Forest v Omilaju** [2005] IRLR 35, reaffirmed in **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978.

Reason for resignation

95. The fundamental breach of contract by the employer need only be a reason for the resignation of the claimant. It does not matter if there are other reasons: **Wright v North Ayrshire Council** [2014] IRLR 4.

Affirming the Contract

96. The contract is affirmed if after the breach the claimant behaves in a way which shows that he or she intends the contract to continue.

Once dismissal is established

97. If it is admitted or established that there has been a dismissal, the next stage is for the Tribunal to consider the reason for the dismissal and if appropriate the question of fairness.

Relevant findings of Fact, Analysis and conclusion

1.2.1 The Respondent's … final decision to hold the appeal in his absence and to thwart attempts to review documentation to support his case

98. We deal first with the respondent's failure to provide documentation to the claimant and then with the decision to hold the appeal in the claimant's absence. This is a logical approach to take because of the claimant's case that the failure on the respondent's part to provide documentation is interrelated with the decision to hold the appeal claimant's absence.
99. In connection with each of the separate allegations we will consider whether either in isolation or taken together any of the respondent's actions:
    a. damaged the relationship of trust and confidence between the Respondent and Claimant (issue 1.3); and
    b. whether those actions, if they did damage the relationship of trust and confidence, were carried out without reasonable and proper cause (issue 1.4).

Jason Swinney grievance

100. The claimant could be criticised for not attending the initial grievance meeting to discuss the grievance against the claimant on 14 December 2021.

101. However, we accept that the invitation to this meeting was the trigger for the claimant's mental health breakdown and we find his absence due to sickness was genuine at this time. We have accepted the claimant's evidence on this point which we found to be clear, genuine and honest.

102. Subsequent events then took over. On 18 February 2022 the claimant raised his grievance. The respondent's witnesses accepted that the main thrust of this grievance was that the Jason Swinney had subjected the claimant to bullying and intimidation and this was the matter investigated by the respondent through its grievance process.

103. The claimant, as it turned out rightly, suspected that the person behind the grievance on 14 December 2021 was Jason Swinney. The claimant consistently said he wanted to see this grievance to fully present his grievance that he was subjected to bullying and harassment by Jason Swinney.

104. The respondent kept the two issues, Jason Swinney's original grievance and the claimant subsequent grievance, separate, for reasons that are not clear to us.

105. It seems to us that in doing so the respondent denied the claimant the opportunity to fully present his grievance or understand his grievance. The respondent could have provided the claimant with this information and could have considered the issues together to understand whether Jason Swinney was bullying the claimant or alternatively whether the claimant was behaving inappropriately. The obvious suggestion from the claimant was that Jason

Swinney was motivated to raise a false grievance about the claimant as part of his ongoing campaign to bully and intimidate the claimant. This could have been considered by the respondent as part of the claimant's grievance against Jason Swinney.

106. We conclude that in failing to consider these matters together, there was objectively no real desire on the respondent's part to understand whether there was line management bullying of the claimant.

107. This damaged the relationship of trust and confidence between the respondent and the claimant, and we find the respondent failed to conduct themselves with proper cause in this regard.

DSAR

108. We accept the claimant's submission that as this is a grievance the respondent should be more open minded and supportive in their approach to dealing with this matter. We accept that as the context is not a disciplinary, there was less of a priority on the part of the respondent to deal with the grievance quickly at the cost of not having all relevant documentation available at the appeal hearing.

109. It is accepted that the respondent failed to provide the DSAR documentation prior to the claimant's appeal.

110. We accept that the claimant genuinely wanted to have the documentation to present his case. It was also his legal right to have this documentation.

111. It is accepted that the original date that the DSAR had to be complied with was 12 May 2022.

112. The respondent provided no clear reason why the first grievance appeal was scheduled on 29 April 2022, before this deadline. There was no reasonable reason, in our view, not to delay the grievance appeal until shortly after 12 May 2022 when the DSAR was due to be provided.

113. There was also no objective reasonable reason why Ms Hancox decided to treat the two matters (i.e. a grievance appeal and DSAR) as entirely separate. The suggestion by Ms Hancox that the claimant didn't need his DSAR prior to his grievance appeal because he could request specific documents from his DSAR rather missed the point. The claimant wanted to see all documentation relating to him as requested in his DSAR. There was at least the likelihood that he would be unaware of the existence of some of this documentation as he may not have been party to it.

114. Indeed, on 12 May 2022 the respondent then said that the DSAR would take a further two months to be produced. If that was right, we consider the respondent could and should have waited for the DSAR, before scheduling the appeal meeting.

115. The upshot of the respondent's conduct was the claimant didn't have the DSAR documentation prior to his grievance appeal. This was documentation that the claimant considered was important to enable him to present his case effectively.

116. We conclude that by deciding not to provide the DSAR documentation prior to the appeal and in the timeline followed by the respondent, the respondent was objectively showing to the claimant it wasn't interested in dealing with the claimant's grievance in a way that the claimant objectively and reasonably considered to be fair.

117. This damaged the relationship of trust and confidence between the respondent and the claimant, and we find the respondent failed to conduct themselves with proper cause in this regard.

Sick Pay documentation

118. We accept that the respondent resolved the claimant's complaints regarding sick pay in May 2022, prior to the claimant's resignation.

119. Whilst it could have been done quicker, we find this was due to a genuine misunderstanding of the claimant's contractual position by Ms Hancox, which was resolved prior to the resignation.

120. We find that the respondent did conduct themselves with proper cause in this regard.

Going ahead with appeal in Claimant's absence

121. We accept that by the time the claimant reached the grievance appeal hearing, he was not provided with documentation that he reasonably wanted and which we found that in the main the respondent failed, without reasonable cause, to provide.

122. Whilst there had been some initial confusion about whether the claimant would attend the appeal meeting, as he had said he would on 9 May 2022, by 10 May 2022 he had made it clear he would not attend because the documentation had not been provided.

123. In those circumstances, and given the documentation should have been provided, there was no objective reasonable basis on the respondent's part to go ahead with the appeal in the claimant's absence.

124. We accept the claimant's submission that the respondent was objectively showing they were not going to take the claimant's grievance seriously by proceeding with the appeal in his absence. This was a breach of mutual trust and confidence and the respondent acting without due cause.

125. We would add that we find as a fact that Mr Owens did not consider the claimant's appeal until after 16 May 2022. This is because he told us in evidence that he had three sites to look after, his diary was busy, and he did not make a decision about the claimant's grievance appeal there and then on 11 May 2022. He said he reviewed the grievance appeal decision later, which he thought could be later in that week or the following week. We observe that there were only two further working days after 11 May 2022 as this was a Wednesday. We find on the balance of probabilities the Mr Owens looked at the grievance appeal after 16 May 2022.

126. By this point, on 15 May 2022, the claimant had written to explain he wished to attend the appeal meeting and put forward several dates on which the claimant and his companion could attend. He also asked for clarification about whether he would be provided with the documents he had requested.

127. We therefore find that the claimant was intending to pursue his grievance appeal, as evidenced in his email of 15 May 2022. We also find it would have been very easy to reschedule the grievance appeal and invite the claimant to attend, given that at this point where he had given a clear indication that he wanted to continue with his grievance appeal, no decision about the grievance appeal outcome had been made.

1.2.2 The Respondent's conduct at the return to work meeting on 4 July 2022:

128. This is characterised by the claimant as a decision to go ahead with the return-to-work meeting on 4 July 2022 without the claimant's companion, Gary Seale.

129. We accept that claimant expected and needed to have his companion with him as a supportive measure due to his Mental Impairment. There was no evidence to suggest otherwise.

130. Gary Seale had been allowed to attend the previous grievance meeting. We reject the respondent's claim that Gary Seale had been disruptive in this meeting. Mr Burns accepted that he had been able to deal with both the claimant and Gary Seale calmly and effectively during the grievance meeting. There was no evidence of Gary Seale inappropriately interjecting during the grievance. In fact, we find he was raising relevant points on behalf of the claimant during this meeting.

131. We find the respondent did behave without due cause in not allowing Gary Seale to attend the meeting and that this did undermine mutual trust and confidence between claimant and the respondent. The explanation from the respondent was lacking and seemed to be simply, "no, this is a return-to-work meeting". That was objectively unreasonable in our view.

1.2.2.1 failing to offer the Claimant a safe working environment regarding his contact with his line manager, JS, who was causing the Claimant stress

1.2.2.2 failing to look at options put forward by the Claimant

132. This is characterised by the claimant as a failure on the respondent's part to consider a solution, at the return-to-work meeting on 4 July 2022, which would not involve him working alongside Jason Swinney.

133. Mr Cox said in evidence that the company would not consider moving Jason Swinney from his position because it was not fair on him or the company.

134. We find that the Mr Cox had closed his mind to this option when he conducted the return to work meeting on 4 July 2022.

135. This was objectively unfair because we find the respondent had not adequately investigated whether Jason Swinney had in fact bullied and intimidated the claimant as the claimant had alleged. Mr Burn's investigation and grievance outcome was lacking in this regard as follows.

a. The witnesses interviewed by Mr Burns into the claimant's allegation that Jason Swinney had used stories of his violent behaviour as a police officer to intimidate the claimant and others, were never even asked about this allegation.

b. In addition, Mr Burns had recommended disciplinary action against Jason Swinney for disclosing sensitive and confidential information about the claimant's mental health condition to his team. Despite making this finding, Mr Burns had failed to ask those witnesses whether he had done so in way designed to humiliate and belittle the claimant, which was the claimant's allegation.

136. We find that, objectively, there was a failure on the respondent's part to establish fairly whether Jason Swinney had subjected the claimant to harassment and intimidation.

137. We therefore find Mr Cox acted without proper cause in deciding on 4 July 2022, without further consideration, that Jason Swinney would not be moved because it was not fair on him. We find the respondent in fact treated Jason Swinney more favourably than the claimant here, by disbelieving the claimant without having carried out a proper investigation and by not at least considering moving Jason Swinney, given that at the very least disciplinary action have been recommended for him due to the way he disclosed the claimant's medical condition to his team.

138. We reject the respondent's submission that the matter of whether Jason Swinney would be moved as left open, as Mr Cox had clearly said to the tribunal in evidence that this was not an option he would consider and we find this is the approach he took at return to work meeting.

139. Given there was no consideration of moving Jason Swinney, the claimant was reasonably left with sense that there was no option of him returning to work on his regular shift pattern without Jason Swinney as his line manager.

140. We also accept that the claimant was genuinely asserting that he could not work with Jason Swinney.

141. In fact, in contrast to Mr Cox, Mr Burns fairly acknowledged that there was potential for either Jason Swinney or the Claimant to be moved. However, this was never put to the claimant by Mr Cox at the return-to-work meeting. The claimant was left thinking that this wasn't an option for him.

142. The respondent acted objectively without due course in taking this approach and undermined mutual trust and confidence.

Conclusion

143. In conclusion, we find objectively that the claimant was entitled to form the view that his grievance not treated seriously by the respondent. The attempts to return the claimant to work on 4 July 2022 were lacking and left him with a reasonable view that he would have to continue to work with Jason Swinney, someone who as we have said genuinely caused the claimant additional stress and anxiety. We find the claimant was not supported by the respondent at the return-to-work meeting.

144. We have already found that specific matters relied on by the claimant individually fundamentally breached the implied contractual term of mutual trust and confidence.

145. We also find that when taken together, these specific matters fundamentally undermined mutual trust and confidence between the claimant and the respondent and were examples of the respondent acting without due cause. The respondent's conduct and return to work meeting on 4 July 2022 was the last straw in a series of fundamental breaches of the claimant's contract of employment.

1.6 Did the Claimant resign in response to the breach?

146. We find the claimant did. We accept that the reason for the claimant's resignation is set out in his letter of resignation dated 6 July 2022. In this letter the claimant explains that he had resigned due to the:

a. Obstructive approach the respondent took to his DSAR request.
b. The respondent's decision to hold the appeal in his absence.
c. The inadequacy of the grievance investigation
d. The lack of companion at the return-to-work meeting on 4 July 2022.

147. We find that the claimant did resign in response to the respondent's fundamental breach of his contract of employment.

1.7 Did the Claimant affirm his contract or waive any such breach before resigning on 6 July 2022?

148. We find that the claimant did not affirm his contract or waive the fundamental breach of his contract of employment before resigning. The claimant made his mind up to resign within two days of the return-to-work meeting.

1.8. If there was a constructive dismissal, was it fair within the meaning of s.98(4) of the

149. The respondent has advanced no fair reason for the claimant's dismissal. We therefore find the dismissal was unfair.

Contributory fault

150. The claimant cannot be criticised or said to have conducted himself unreasonably in connection with his constructive dismissal.

2 Reasonable Adjustments

The Law

151. The duty to make reasonable adjustments is found in sections 20 and 21 Equality Act 2010.

152. It is unique as it requires *positive action* by employers to avoid substantial disadvantage caused to disabled people by aspects of the workplace. To that extent it can require an employer to treat a disabled person more favourably than others are treated.

153. We take a methodical approach to this task.

Relevant findings of Fact, Analysis and conclusion

2.10 At the time in question, did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

154. We have already found at paragraphs 69 to 87 that the respondent had constructive knowledge of the claimant's disability from January 2022.

2.11 Did the Respondent do any of the following things:

2.11.1 fail to adjust its investigation and grievance process in refusing to provide documentation relating to the bullying and harassment element of the grievance and sick pay? If so, when did this occur?

2.11.2 Proceed to hold the appeal in the Claimant's absence without provision of documentation to allow him to further his grievance? If so, when did this occur?

155. Whilst we accept that these matters did occur, we do not find these examples can properly be characterised as a provision criterion or practice. They are better characterised as adjustments sought by the claimant.

2.11.3 Require the Claimant to return to work with contact with his line manager, JS, who was causing the Claimant stress

156. We have found, at paragraphs 137 and 139, that the respondent's conclusion from the return-to-work meeting on 4 July 2022 was that Jason Swinney would not be moved from his shift pattern. It followed therefore that if the claimant returned to work on his existing shift pattern, he would be required to working alongside Jason Swinney as his line manager. This was a provision criterion or practice operated by the respondent.

2.11.4 Not allow the Claimant's companion to attend the 4 July meeting

157. We have found that the respondent had decided Gary Searle would not be allowed to attend the return-to-work meeting as the claimant's companion at the 4 July 2022 meeting. We heard evidence from Ms Hancox that the respondent's policy was only to allow a colleague or trade union representative

to attend a return-to-work meeting. This was a provision criterion or practice applied to the claimant.

2.13 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

158. We accept the claimant's submission that the respondent had an individual who was off work through stress, saying repeatedly that he needed documentation and a companion to provide support, to enable him to navigate his grievance and return to work. For example, the claimant specifically said this in his email of 3 March 2022. This was enough to put the respondent on notice that the claimant was placed at the disadvantage he alleges due to his disability.

2.14 What steps could have been taken to avoid the disadvantage?

159. The respondent could have:

a. changed the claimant's line management so that he didn't have to work alongside Jason Swinney.

b. allowed Gary Searle to attend the return-to-work meeting on 4 July 2022.

2.15 Was it reasonable for the Respondent to have to take those steps and when?

160. It was reasonable for the respondent to have to take those steps.

161. Mr Owens fairly acknowledged in evidence that it was quite possible for either Jason Swinney or the claimant to have swapped shifts so that the claimant was not required to work alongside Jason Swinney. This would have been a simple reasonable adjustment to make.

162. It was plainly an easy and straightforward option to allow Gary Searle to attend the return-to-work meeting as the claimant's companion at the meeting on 4 July 2022. He was in the building. He could have been asked to attend as the claimant wished.

2.16 Did the Respondent fail to take those steps, and when?

163. We find that the steps should have taken place on 4 July 2022 at the return-to-work meeting.

2.2 Discrimination arising from disability (section 15 Equality Act 2010)

The Law

164. In order for the claimant to succeed in his claims under section 15 EqA, the following must be made out:

a. there must be unfavourable treatment;

b. there must be something that arises in consequence of the claimant's disability;

c. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability;

d. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

165. Paragraph 5.20 of the Code says that employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments.

166. Paragraph 5.2.1 of the Code says that if a respondent has failed to make a reasonable adjustment it will be very difficult for it to show that its unfavourable treatment of the claimant is justified.

167. As to justification, in paragraph 4.27 the Code considers the phrase "a proportionate means of achieving a legitimate aim" (albeit it in the context of justification of indirect discrimination) and suggested that the question should be approached in two stages:-

a. is the aim legal and non-discriminatory, and one that represents a real, objective consideration?

b. if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

168. As to that second question, the Code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts.

Relevant findings of Fact, Analysis and conclusion

2.2Did the Respondent treat the Claimant unfavourably by:

2.2.1The decision to hold the appeal in the Claimant's absence

2.2.2 Not allowing the Claimant's companion to attend the return-to-work meeting on 4 July

169. The decision to hold the claimant's grievance appeal in his absence and not allowing the claimant's companion to attend a return to work meeting on 4 July 2022 was unfavourable treatment. We have already found this at paragraphs 123, 129 and 131 above.

2.3 Did the following things arise in consequence of the Claimant's disability?

A need to obtain documentation in order to support his grievance

170. We accept that due to the claimant's Mental Impairment, the claimant needed to see documentation that he believed was important to support his grievance appeal. We have accepted the evidence of the claimant on this point. We therefore find that the need to see documentation to support his grievance appeal arose from the claimant's disability.

A requirement to attend at a return-to-work meeting

171. We find the reason the claimant was absent from work and therefore needed to attend a return-to-work meeting was because of his Mental Impairment. We therefore find that the requirement to attend the return to work meeting arose from the claimant's disability.

Was the unfavourable treatment because of any of those things?

172. We find the unfavourable treatment was connected to the failure to provide documentation and the requirement to attend the return-to-work meeting.

173. We accept that the claimant's anxiety led him to consider documentation was vital to claim. We have already found that failure of the respondent to provide the claimant with relevant documentation was the reason he didn't attend the grievance appeal meeting.

174. We accept and have found at paragraph 129 that the claimant needed a companion at the return to work meeting on 4 July 2022 due to his Mental

Impairment and the reason the claimant was required to attend that return-to-work meeting was because he had been absent from work due to his Mental Impairment.

2.3 Was the treatment a proportionate means of achieving a legitimate aim?

175. We accept the respondent's aim: to get the claimant back to work, was of itself legitimate.

176. However, the means to achieving that aim were not proportionate.

177. We have already found at paragraph 123 the respondent could and should have postponed the grievance appeal meeting until after the documents under the DSAR and Jason Swinney's witness statement had been provided. This would have been a couple of months delay at most, and probably less. In failing to postpone the appeal hearing, the respondent acted disproportionately.

178. We have also found at paragraphs 160, 162 and 163 that the respondent failed to make a reasonable adjustment by not allowing Gary Searle to attend the return-to-work meeting on 4 July 2022. We do not except that this failure facilitated the claimant's return to work, and we reject this as a proportionate means of achieving the respondent's aim.

Victimisation: (Section 27 Equality Act 2010)

The Law

179. By EqA s.27:-

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

(a) B does a protected act, or

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

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

(a) bringing proceedings under this Act;

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

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

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

180. The issue here is one of causation which involves looking at the mental processes of the alleged discriminator.

181. The reversal of burden of proof applies under EqA s136 'to any proceedings relating to a contravention of this Act'.

182. The EqA provides for a shifting burden of proof. Section 136 so far as material provides as follows:

"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

183. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the EqA. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention.

184. If and when the claimant establishes a prima face case of discrimination, then the second stage of the burden of proof test is reached, with the

consequence that the burden of proof shifts onto the respondent. According to the Court of Appeal in **Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong** and other cases 2005 ICR 931, CA, the respondent must at this stage prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever based on the protected ground.

Relevant findings of Fact, Analysis and conclusion

2.17 Did the bringing of a grievance on 18 February 2022, raising discrimination due to a mental health condition, amount to a protected act?

185. The respondent has accepted it was and we agree that it was a protected act.

2.18 Did the Respondent

2.18.1 Deny the Claimant documentation in order to support his grievance

Determine the appeal in the Claimant's absence

186. We have found at paragraphs 121 and 123 above that the respondent did do this.

Did this amount to a detriment?

187. Yes this did amount to a detriment for the reasons we have already given.

Was this because of the Claimant's protected act?

188. The claimant has established facts which without further information could amount to discriminatory treatment. We have already found that Mr Cox took the view, incorrectly, that the claimant was not being genuine about his mental health condition but instead he thought that the claimant was trying to extract a payoff from the respondent. The claimant worked for the respondent for 31 years without a lengthy period of absence, other than in relation to an injury to his finger. The respondent took no active steps whatsoever to enquire into the claimant's mental health condition, despite the respondent's own nurse suggesting this. The respondent chose to interpret the claimant's mental health condition, somewhat dismissively, as stress at work.

189. We conclude that it does for fall to the respondent to provide an innocent explanation for why they chose to act as they did and they have failed to do so. We have found at paragraphs 121 and 123 above that no satisfactory explanation has been provided to explain why the claimant was denied documentation he required to advance his grievance and why the grievance appeal meeting was held his absence.

190. We therefore uphold the victimisation claim.

Discriminatory Constructive Dismissal (section 39(7) Equality Act 2010)

2.21 The Claimant asserts his resignation was a constructive dismissal. The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term relating to mutual trust and confidence. The breaches relied on are the acts of discrimination in 2.2 (section 15), 2.7 (section 19); 2.11 (section 20); 2.18 (section 27).

Relevant findings of Fact, Analysis and conclusion

191. We have found that the following fundamental breaches of the implied contractual term of mutual trust and confidence were discriminatory:

a. the decision to hold the appeal in the claimant's absence and not to allow the claimant's companion to attend the return-to-work meeting on 4 July 2022, were acts of discrimination arising from disability;

b. the requirement of the claimant to return to work with Jason Swinney and not to allow the claimant's companion to attend the return-to-work meeting on 4 July 2022, was a failure to make a reasonable adjustment to accommodate the claimant's disability; and

c. denying the claimant documentation in order to support his grievance and determining the appeal in the claimant's absence were unlawful acts of victimisation.

Did the Claimant resign because of the breach?

192. Yes, we have found the claimant did so at paragraphs 146 and 0.

2.23 Did the Claimant delay or otherwise affirm the contract?

193. No, we have found at paragraph 148 the claimant did not delay or otherwise affirm the contract.

194. We therefore find that the acts the claimant relies on as fundamental breaches of the claimant's contract of employment were acts of discrimination and we find they sufficiently influenced the constructive dismissal to mean that the constructive dismissal itself amounted to discrimination.

Are any of the claimant's claims time-barred?

The Law

195. In **De Lacy v Weichsein Ltd t/a Andrew Hill Salon** UKEAT/0038/20 the employment appeal tribunal set out guidance that a tribunal should follow when determining time limits in a discriminatory constructive dismissal case.

196. The tribunal should first identify whether the alleged acts complained of amounted to discriminatory acts.

197. The tribunal should secondly decide whether those discriminatory acts sufficiently influenced the constructive dismissal to mean that it amounted to discrimination.

198. The employment appeal tribunal said in De Lacy *"The fact that the last straw was not itself discriminatory did not automatically mean that the constructive dismissal was not discriminatory. If the constructive dismissal was discriminatory, then the claim for discrimination would be in time, even though the events that rendered the constructive dismissal discriminatory were themselves outside the primary limitation period."*

Relevant findings of Fact, Analysis and conclusion

199. We have found the acts complained of by the claimant in his constructive dismissal claim did amount to discriminatory acts. This includes the allegations in connection with the return-to-work meeting on 4 July 2022, which was in time.

200. We find that those discriminatory acts were sufficient to influence the constructive dismissal to mean that it amounted to unlawful discrimination. There is a clear causal connection between them and the constructive dismissal. They are the same acts relied on in support of the fundamental breach of contract in the claimant's constructive dismissal claim.

201. We therefore find that time runs from the date of the acceptance of the repudiatory breach, which in this case 6 July 2022, not from the date or dates of the discriminatory events, which were earlier.

202. We conclude that the entirety of the claimant's discrimination claim is in time even though some of the events that make the constructive dismissal discriminatory were themselves outside the primary limitation period.

Employment Judge Childe

13th December 2023

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