EMPLOYMENT TRIBUNALS

Claimant
Mr D Stubbs

Respondents
(1)Electronic Wholesale Suppliers (Guildford) Limited
(2) Mrs C Noon

v

Heard at: Reading Employment Tribunal **On**: 16, 17 and 18 October 2023

Before: Employment Judge Anderson
B Osborne
C Juden

Appearances

For the Claimant: J Strong (lay representative)
For the Respondent: C Noon (second respondent and director of first respondent)

JUDGMENT

1. The claimant's claim of harassment related to disability is upheld.
2. The claimant's claim that the respondent failed to make reasonable adjustments is dismissed.
3. The claimant's claim of constructive automatically unfair dismissal for a health and safety reason is dismissed.
4. The claimant's claim to have suffered detriment for having raised a health and safety matter is dismissed.
5. Remedy will be decided at a separate hearing.

REASONS

Background

1. The claimant was employed by the first respondent, an electrical supplies wholesaler, from 24 February 2020 until 14 September 2020. He brings a claim against the employer and against Cate Noon, a director of the first respondent, of disability discrimination, detriment due to raising a health and safety matter, and constructive automatic unfair dismissal. The respondents deny that they

discriminated against the respondent. The claim was filed on 27 November 2022 and a response was filed on 22 December 2022.

The hearing

2. Neither party had complied with the case management orders fully. There was no joint bundle. Mr Strong filed a bundle on behalf of the claimant and the claimant filed a witness statement. The respondents filed a witness statement from Andy Porter, an employee of the first respondent, but he did not attend the hearing to give evidence on oath. Mr and Mrs Noon, directors of the first respondent attended and gave evidence on oath. They did not file witness statements but relied on a document dated 11 May 2022 entitled 'Defense' as their evidence in chief. This had some documents appended to it, as did the witness statement of Andy Porter.

3. Ms Noon confirmed that the respondents conceded that the claimant had the disability of mixed anxiety and depressive disorder. She said that the respondents accepted that it had knowledge of the disability from 16 August 2020. Mr Strong confirmed that the claimant agreed that the respondents would not have had knowledge before that date though later said that they knew from the interview stage in February 2020.

4. Oral judgment was given at the end of the hearing and the parties did not request written reasons. Written reasons were requested by the respondent's representative on 7 November 2023.

List of Issues

5. A list of issues was determined at the hearing with EJ Hawksworth on 7 April 2022. That list is set out below:

1. Time limits

1.1 Given the date the claim form was presented (27 November 2020) and the dates of early conciliation (12 days in September 2020), any complaint about something that happened before 16 August 2020 may not have been brought in time.

1.2 Were the detriment complaints made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

- 1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?
- 1.2.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
- 1.2.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
- 1.2.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

1.3 Were the harassment/reasonable adjustments complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

- 1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
- 1.3.2 If not, was there conduct extending over a period?
- 1.3.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
- 1.3.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
  - 1.3.4.1 Why were the complaints not made to the Tribunal in time?
  - 1.3.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Health and safety concerns

2.1 Was the claimant:

2.1.1 an employee at a place where there was no health and safety representative or safety committee; or

2.1.2 an employee at a place with a health and safety representative or a safety committee but it was not reasonably practicable for the employee to raise the matter by those means.

2.2 If so, did the claimant bring to his employer's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety ('raising health and safety concerns')? The claimant says he did:

2.2.1 in a letter left on John Noon's desk on 7 July 2020; and

2.2.2 in an email sent on 8 July 2020 to John Noon with letters and about shielding

3. Health and safety detriment (Employment Rights Act 1996 section 48)

3.1 Did the respondent do the following things:

3.1.1. In an email sent on 21 July 2020 Cate Noon requested the claimant return to work on 27 July 2020 (page 62);

3.1.2 In emails sent on 22 July 2020 and 24 July 2020 Cate Noon told the claimant that if he did not return to work on 27 July 2020 his employment would be terminated

3.1.3 On 14 August 2020 Andy Porter refused the claimant's application for two days paid leave or unpaid leave to care for dependents;

3.1.4 In SMS messages on 16 August 2020 John Noon requested a copy of the claimant's fit note, a signed copy of the fit note, asked whether the claimant had seen the doctor and asked for a copy of the email thread, and said the fit note was invalid;

3.1.5 In an email sent on 17 August 2020 Cate Noon told the claimant his sickness absence was unauthorised, that he was refusing to return to work and that she did not think he had any holiday left and she told the claimant that his contract was terminated with immediate effect (page 72);

3.1.6 In emails sent on 18 August 2020 at 13.41 and 15.32 Cate Noon said there were discrepancies with the claimant's fit note (pages 75 and 78);

3.1.7 The respondent contacted the claimant's GP to check the validity of his fit note;

3.1.8 In emails sent on 21 and 27 August 2020 Cate Noon withdrew the dismissal of the claimant, extended the claimant's probation and said the claimant would have a meeting to highlight the importance of allowing a month's notice when booking holiday and to discuss his future employment with the respondent (page 81 and 83);

3.1.9 In an SMS sent on 31 August 2020 John Noon told the claimant not to contact the respondent out of office hours and said the claimant was harassing the respondent

3.1.10 In an email sent on 1 September 2020 Cate Noon said the fit note was very vague (page 88);

3.1.11 In an email sent on 1 September 2020 at 15.53 Cate Noon asked the claimant for more information about his sickness absence (page 92);

3.1.12 In an email sent on 2 September 2020 Cate Noon asked the claimant to respond by the end of the day

3.1.13 In an email sent on 3 September 2020 Cate Noon said the claimant's absence had made the respondent question whether the position was right for him long term

3.2 By doing so, did it subject the claimant to detriment?

3.3 If so, was it done on the ground that he raised health and safety concerns?

4. Automatic unfair dismissal (Employment Rights Act 1996 section 100)

4.1 Was the claimant dismissed?

4.1.1 Did the respondent do the things set out at paragraph 3.1 above?

4.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

4.1.2.1 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

4.1.2.2 whether it had reasonable and proper cause for doing so.

4.1.3 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

4.1.4 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

4.2 If the claimant was dismissed, was the reason or principal reason for dismissal (that is, the reason for the breach of contract) that the claimant raised health and safety concerns?
If so, the claimant will be regarded as unfairly dismissed.

5. Disability

5.1 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 Tribunal will decide:

5.1.1 Did he have a physical or mental impairment: anxiety?

5.1.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

5.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

5.1.4 Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

5.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

5.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

5.1.5.2 if not, were they likely to recur?

6. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

6.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

6.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

6.2.1 Failing to put protective measures against covid-19 in place during the period 1 June 2020 to 7 July 2020;

6.2.2 Requiring employees to give one months' notice of leave requests.

6.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

6.3.1 His son was shielding and it caused the claimant anxiety to be at work without protection against covid-19;

6.3.2 His family circumstances made it impossible to give 30 days notice of the need to take leave and he would have anxiety if he was unable to care for his son.

6.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

6.5 What steps could have been taken to avoid the disadvantage? The
claimant suggests:

6.5.1 Putting in place protective measures against covid-19, namely social distancing, PPE and a separate workstation; and

6.5.2 Granting him leave even though he had not given 30 days' notice.

6.6 Was it reasonable for the respondent to have to take those steps and when?

6.7 Did the respondent fail to take those steps?

7. Harassment related to disability (Equality Act 2010 section 26)

7.1 Did the respondent do the things set out at paragraph 3.1 above?

7.2 If so, was that unwanted conduct?

7.3 Did it relate to disability?

7.4 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?

7.5 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.

8. Remedy for health and safety detriment

8.1 What financial losses has the detrimental treatment caused the claimant?

8.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job? If not, for what period of loss should the claimant be compensated?

8.3 What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

8.4 Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

8.5 Is it just and equitable to award the claimant other compensation?
8.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the respondent or the claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
8.7 Did the claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?

9. Remedy for unfair dismissal
9.1 Does the claimant wish to be reinstated to their previous employment?
9.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
9.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
9.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
9.5 What should the terms of the re-engagement order be?
9.6 If there is a compensatory award, how much should it be? The Tribunal will decide:
9.6.1 What financial losses has the dismissal caused the claimant?
9.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job? If not, for what period of loss should the claimant be compensated?
9.6.3 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the claimant's compensation be reduced? By how much?
9.6.4 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the respondent or the claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
9.6.5 If the claimant was unfairly dismissed, did s/he cause or
contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
9.6.6 Does the statutory cap apply?
9.7 What basic award is payable to the claimant, if any?
9.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

10. Remedy for discrimination
10.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
10.2 What financial losses has the discrimination caused the claimant?
10.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job? If not, for what period of loss should the claimant be compensated?
10.4 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
10.5 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
10.6 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
10.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the respondent or the claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
10.8 Should interest be awarded?

Findings of Fact

6. On 24 February 2020 the claimant commenced employment with the respondent as a sales assistant. His hours of work were 6.30am until 3.00pm. The claimant's employment contract (emailed to him on 23 July 2020) set out that he would have a probation period, which could be extended by the respondent. The probation period set out in the contract is 62 months. Mrs Noon

said in oral evidence that this was a typographical error, and the probation period was three months. The tribunal accepts this evidence. It is set out in the contract that:
You should give at least four weeks' notice of your intention to take holidays of a week or more and two weeks' notice is required for odd single days.

7. During the claimant's employment, on his second return from furlough, he was notified that henceforth all requests for holiday must be made four weeks in advance.

8. The respondent has a health and safety policy in which John Noon is designated as having overall responsibility for health and safety.

9. At the interview for the job the claimant told John Noon, the managing director of the first respondent that his son was disabled, used a wheel chair and that he needed to finish at 3.00 pm in order to provide care for his son. The claimant said variously in cross examination that *'I told John he was in a wheelchair and had special needs which is why I had to leave at 3.00 pm'* and later *'I told him exactly what my son had, that he had a low immunity, and this was before Covid'*. It was not put to Mr Noon in cross examination that he had full knowledge of the seriousness of the claimant's son's illness at that interview. It is the respondents' position that they were unaware of the nature of the illness before the claimant left a letter from the Ataxia-Telangiectasia (AT) Society on John Noon's desk on 7 July 2020. Taking into account the reaction of the respondents on receiving that information (i.e. them immediately insisting that the claimant cease coming to work and John Noon stating in a text that he was unaware of the severity of the situation until then), the tribunal finds that the claimant gave no more detail than that his son used a wheelchair and the claimant had caring responsibilities for him, at the interview.

10. On 24 March 2020 the first respondent closed its business due to the pandemic and its employees were furloughed.

11. On 11 May 2020 Mr Noon sent a letter to all employees notifying them that it was possible that redundancies would take place due to the downturn in business.

12. On 12 May 2020 the claimant sent a WhatsApp message to John Noon, asking Mr Noon to call him. In cross examination Mrs Noon put it to the claimant that Mr Noon called the claimant and the claimant had asked to return to work. The claimant said that Mr Noon had not called him, he (the claimant) did not follow up on this and he cannot recall what happened next. It was not put to Mr Noon in cross examination that he had failed to call the claimant in response to the message. On the matter of a number of WhatsApp messages sent to Mr Noon by the claimant in May 2020 asking for an update on when the business would be re-opening, the claimant said that he was just concerned that he may lose his job. The tribunal finds, from the evidence of the messages, and from the fact that the claimant was invited back to work earlier than other employees, that he did make it clear to Mr Noon during May 2020 that he wanted to return to work.

13. On 29 May 2020 Mr Noon sent a WhatsApp message to the claimant saying that he could return to work, and he would be based in the warehouse using the PC situated there so that the first respondent could provide social distancing. Mrs Noon said in oral evidence that at the time the claimant returned to work (1 June 2020) there were only three people working at the premises and it was arranged so that they could socially distance. It would have been too crowded to comply with guidelines if a fourth person was added and for that reason the claimant was provided with a workstation in the warehouse. The tribunal accepts that this was the reason why the claimant was provided with a workstation in the warehouse.

14. The claimant returned to work on 1 June 2020. His oral evidence was that he was not based in the warehouse but on the counter, where customers were served. The claimant said in oral evidence that he complained to Mr Noon about this. He said he had told Mr Noon he was not happy and asked why he was not in the warehouse as agreed, and Mr Noon said, 'You're working here, that's it.' This was not a matter set out in pleadings or one that was raised at the preliminary hearing. The claimant refers to the loosening of social distancing measures in his resignation/grievance letter on 7 September 2020 but does not say that he had raised it with Mr Noon. The respondents filed two witness statements from staff stating that the claimant had a workstation in the warehouse but did not stay at his workstation and chose to enter other parts of the building. Mr Noon was not cross examined on this point. The tribunal finds that the claimant returned to work on 1 June 2020, was provided with an area to work, in the warehouse, which would allow for social distancing, and raised no concerns with the respondents that he considered the measures taken in respect of social distancing to be inadequate.

15. The claimant took annual leave from 2 July 2020, returning to work on 7 July 2020. At the end of the working day on 7 July 2020 he left a letter on Mr Noon's desk as he was leaving. The letter was from the AT Society, explaining the heightened dangers of Covid-19 to sufferers of that condition and noting that the claimant's son had the condition. Mr Strong said, for the claimant, that this letter was enough to put the respondents on notice that the claimant suffered from a disability. He relied on the following paragraph:

    These are extraordinarily stressful times for all of us, but for Ben and other families like his, the anxiety and fear of exposing his son to C-19 continues to be a valid worry. The stress caused by the pandemic has potential to have a negative impact on Ben's overall health and wellbeing, therefore the family need to be effectively supported so they can maintain good physical and mental health.

16. Mr Noon responded by WhatsApp as follows: *Hi Ben, I have read your letter and didn't fully appreciate the issues relating to your family. I was unaware of how severe your situation was. With this in mind and the information you have given me I have no alternative but to ask you to call me tomorrow and NOT to return to work.'* The claimant's reply was: *'Sorry John I know that you want me to call you tomorrow but I really cannot afford to not work, why can't I return tomorrow please'.*

17. Mr Noon agreed to look at the measures that would need to be put in place and the claimant was put back on furlough from 8 July 2020. The furlough agreement was sent by Mrs Noon, the first respondent's finance officer and director, and the second respondent, on 9 July 2020 with a cover email stating '*We hope you will be happy to return to work from the 1 August with the government guidelines measures being carried out to the best of our ability…'* and asking the claimant to suggest relevant measures.

18. The claimant set out the measures required to ensure his safety and these were implemented by the respondent to the claimant's satisfaction. He emailed the respondents on 20 July 2020 stating that he would return to work on Monday 3 August 2020. Mrs Noon, wrote to the claimant on 24 July 2020 setting out the steps put in place and stating as follows: *I have been advised that it is in fact your son that is shielding and not you, or the family, and that the government guideline advice regarding shielding applies only to your son, and not you personally. Therefore, taking this into consideration we will require you back in the workplace Monday the 27th of July.*

19. The claimant referred the respondent to a youtube video from the AT Society in which, he said, parents of children with AT were advised to shield and asked when he should return. The tribunal accepts that there was government advice that vulnerable people should shield until 31 July 2020 and it specifically referred to sufferers of conditions rather than their families. It also accepts that the AT Society was advising that carers of those with AT should shield with them.

20. Mrs Noon responded that he should return on 27 July 2020 as the respondents had taken advice on the government guidelines on shielding but if the claimant was *'feeling that this jobs not right for you at this current moment in time, we would understand fully and accept your resignation.'*

21. The claimant said that he would return 'all being well' and the second respondent sent a further email on 24 July 2020 in which she said that *'Your absence on Monday morning will be seen as unauthorised leave and gross misconduct, and your contract will be immediately terminated.'*

22. The claimant returned to work on 27 July 2020. He said in oral evidence that all relevant safety precautions had been put in place for his return. Both Mr and Mrs Noon said in oral evidence that there had been no issues with the claimant on his return and he had appeared happy to be back at work.

23. Mr and Mrs Noon were away on annual leave from 9 to 16 August 2020. Andy Porter was managing the business while the directors were on leave. Mr and Mrs Noon's evidence was that Mr Porter did not have authority to authorise leave in their absence. It is the claimant's case that on 11 August 2020 he submitted two holiday request forms to Mr Porter. The forms are dated 11 August 2020. There is a witness statement in the bundle before the tribunal from Mr Porter in which he states that the forms were given to him on 13 August 2020 and he advised the claimant that he would need to wait for Mr Noon's return for an answer. Mr Porter did not attend the hearing. It does not matter for the purposes of this case whether the forms were submitted to Mr Porter on the

11 or 13 August. The requests were for a one-day absence on 21 August 2020 and 24 August 2020, both for the purposes of caring for the claimant's sons. The second request referred to the claimant's oldest son being in a wheelchair. Both requests said 'will take as unpaid leave if not holiday'. It is agreed that Mr Porter said that he could not authorise the absences and the claimant would need to wait until the directors returned from leave. Mrs Noon referred in subsequent correspondence on an unrelated matter to 'Andy refused the following day (Friday 14 August) after considering it overnight'. She said in oral evidence that this was incorrect. The tribunal noted that the claimant agreed in oral evidence that he would have to wait until the Noons' return and finds that this is what happened.

24. On 16 August 2022, a Sunday, the claimant sent a WhatsApp message to Mr Noon, at 22:10, stating that he had sent an email to Mr Noon to explain why he would not be back at work until 1 September 2020. He emailed a fit note stating that he was signed off work from 14 to 31 August 2020 for the reason of 'mixed anxiety and depressive disorder'. At the outset of the hearing the parties agreed that this was the first time that the claimant had told the respondents that he suffered from this disability. Mr Strong later sought to rely on the letter from the AT society, given to Mr Noon on 7 July 2020 as the first notification. The tribunal finds that the respondents had knowledge of the claimant's disability from 16 August 2020 and the letter delivered to Mr Noon on 7 July 2020 does not refer to the claimant having a disability or imply that he has one.

25. A WhatsApp conversation ensued between the claimant and Mr Noon after the fit note was emailed, about the fact that the fit note was unsigned. Mr Noon said the fit note was invalid. The claimant said he would contact his doctor the next day to ask why it was unsigned.

26. On 17 August 2020 at 11:15 the second respondent wrote to the claimant noting that the claimant had asked for leave at short notice, which was not in accordance with his contract terms, had emailed Mr Noon on a Sunday night to say he would not be in the next day without forwarding a valid fit note, noted the claimant's reluctance to return on 27 July 2020, and finished as follows: *'Your absence today is being treated as unauthorised leave (gross misconduct) your contract has been terminated with immediate effect, we will pay you till the end of the week.'*

27. At 20:00 on 17 August 2020 the claimant forwarded a signed fit note and a letter appealing the termination. In the letter he noted that he felt that he was being discriminated against on the grounds of his own mental health and his child's disabilities and said *'I will seek legal advice, if necessary.'*

28. The second respondent replied on 18 August 2020 as follows:

In response to your email sent at 8.00pm Monday the 17th of August.
"Please find letter and fit note duly signed as requested"

We requested this Sunday the 16th ?? Doctor's email received Friday the 14th ? (to which we still haven't received email trail from doctor)! As also requested. There seems to be a delay in providing the signed

fit note, in relation to the initial unsigned fit note received Sunday evening, and no official Doctors stamp, or Dr's name on either document? To which we have been led to believe is necessary , and always present. There are discrepancies that require authentication in order for us to review our decision, and also allow us to pay SSP for the 14 days that the fit note advises.

Once this information has been provided I will notify you of our decision.

I must request that you refrain from contacting either myself or John outside working hours, but we are available between the hours of 6.30 a.m and 6.00 p.m, which should be ample time to discuss any concerns you may have.

Regards

29. The claimant requested confirmation of what was required re the sick note and Mrs Noon answered as follows:

You sent an image of the fit note Sunday evening with no signature to John attached to a text, you told him this was emailed to you ? so john asked for the email trail? You have failed to produce this?

You told him originally it was an email? We have the text!

As said, lots of discrepancies?

Thank you for the offer of permission to contact your Dr, however this is not necessary as legally we are able to contact them for clarification of sick notes as long as no other information is disclosed.

This we have already done.

Regards

30. On 21 August 2020 the second respondent advised the claimant that his dismissal had been rescinded and instead his probation would be extended for a further two months (having previously been extended on his return to work in July 2020). The email noted also that on his return there would be a meeting to highlight the need to give notice when booking holiday and *'to discuss your future employment with us'.* Mrs Noon said in oral evidence that the dismissal was rescinded when she received more information about self-certification and the format of fit notes during the pandemic, as well as confirmation from the claimant's doctor that the fit note was valid.

31. The claimant queried claims from Mrs Noon that he had taken all of his holiday and said that he would like any meeting minuted. Mrs Noon responded that she felt the tone of his email was curt and unnecessary and sadly not a basis for a good working relationship going forward.

32. On 29 August 2020 the claimant emailed Mrs Noon with a new fit note expiring on 28 August 2020.

33. On 1 September 2020 the second respondent emailed the claimant as follows:

Good Morning,

Once again you felt the need to contact John by text at approximately 8.00 pm on bank holiday Monday this is after already emailing on Friday, and again Saturday with a further fit note notifying us of your absence. Once again I am requesting that please do not contact us evenings, weekends, bank holidays, or outside working hours. This is not acceptable or necessary, and this is now the second or maybe third time I have requested this, please stop. There is every opportunity to contact us either by phone or email during working hours 6.00 a.m to 7.00 p.m . as you had already done, (Twice)!

With regards to the second fit note from your Dr , I am confused by the continuation of absence. The last email received from you was requesting confirmation of your continued employment with EWS, giving the impression that you were intending to return to work on the 1st , as specified? You mentioned nothing about still feeling unwell? Also the fit note is very vague as to why you are unfit for work, and would ask that you request from your Dr the following information:-

Is this an ongoing condition, something you have been suffering with for some time? And if so when did it actually commence.
How long does he feel you will need to be absent from work ? and what are the indications that render
you unfit .
Has he prescribed you any medication? Or advised counseling.

Obviously we want to support you where possible, but this is all very sudden and unexpected, especially as you have been with the company such a short time.

We will need again to extend your probationary period, and have decided we will leave it open indefinitely until your return to work.

Regards

34. The claimant responded the same day, apologising for having contacted the respondents out of hours and giving permission for them to contact his GP for any further information they required. Ms Noon responded as follows at 15:53 on 1 September.:

Hi,

You emailed John Friday within working hours, there was no requirement for a further three notifications over that same weekend? Alerting us in good time would have been to advise or hint that you're intentions were to not return back to work when you emailed on the Thursday , I'm puzzled you

left it another day before notifying us if you wanted to let us know in good time?

Because of confidentiality your Dr is not at liberty to divulge that information to us, but we have every right to ask you to discuss your treatment and condition with him, this would assist us greatly in ascertaining your condition, and or perhaps assist in someway to maintain a swift recovery and return back to the work place.

The questions were :-

Is this an ongoing condition, something you have been suffering with for some time? And if so when did it actually commence.
How long does he feel you will need to be absent from work ? and what are the indications that render you unfit .
Has he prescribed you any medication? Or advised counseling.

I trust you are happy to speak to your Dr on our behalf? And await your response.

35. On 2 September 09:31 she chased for an answer as follows:

I note there is still no response to our questions below? We would appreciate answers to the best of your ability by close of today.

Thank you.

36. In his response on 2 September the claimant said

‘ Anxiety and depression in the workplace is what has caused this trigger on this occasion.

37. Mrs Noon wrote to the claimant on 3 September 2020 requesting details of how the workplace had triggered such a response in order that the respondents could address it.

38. On 7 September 2020 the claimant submitted a formal grievance, which included his resignation. He refers to feeling disbelieved in the way the unsigned fit note was dealt with, being threatened with dismissal, questions being fired at him whenever he gave an answer and no thought being given to how such an approach would affect someone with his disability. The claimant said that he resigned and considered himself to have been constructively dismissed. Mrs Noon asked the claimant in cross examination why, if he was happy with his job, he had left. He said that it was *‘because you made my life a misery’*. When asked to elaborate he said that was by the respondents not believing anything he said to them, he was ill due to the stress of not being able to have time off to look after his children, and that the bombardment of emails from when he commenced sick leave was putting more stress on him. The tribunal notes that it has found that leave was not refused but that a decision

on leave was deferred until 17 August 2020, however it accepts that this is a true statement by the claimant of his reasons for resigning.

39. Mrs Noon sent a rebuttal of all the claimant's points on 8 September. She said that the respondents would accept the claimant's resignation but if he wished to continue to work his job remained open.

40. The claimant responded at length on 9 September 2020, maintaining his resignation. Mrs Noon wrote to him on 10 September 2022 accepting his resignation and treating it as taking effect on 14 September which would include a contractual one week notice period.

Submissions

41. The tribunal has set out below a synopsis of the parties' submissions. Where this was simply a restating of the witness evidence in detail it is not included in the synopsis but the submissions were considered in full by the tribunal.

42. Mr Strong, for the claimant said that, in relation to health and safety detriment the claimant had provided evidence of harassment and disability harassment. He has shown the refusal of dependency leave. Mr Strong said that he presented 22 docs as evidence to the tribunal on which it could make its judgment. The respondent said that the claimant's son's illness was only mentioned on 7 July. If this is so why did John Noon say he could have adapted hours to care for his son's needs. 24 February 2020 is when the conversation took place about the claimant's son's needs. The claimant still worked a full time 42 hour week. Cate Noon stated in an email that leave was not refused but when we reviewed the email it clearly was refused. On the contract, Cate Noon made a statement that probation would be indefinite. Why would that be a mistake? The respondents dismissed the claimant twice and constantly questioned his mental health claims, asking whether doctors notes were valid, whether he could have care leave – and that is what made it possible for him to leave and put in a claim for constructive dismissal. There was never a fight or warning, if anything the claimant was eager to please. He sent texts asking to come back as he was frightened that he would be made redundant. He was the only breadwinner and depended on that job. That does not make someone bad.

43. For the respondents, Ms Noon said the first respondent was a small family business that had never had a situation like this before and had a number of long standing members of staff. The problem has always been that the claimant was reluctant to share information and they had to prize it out of him. Once they knew about his son's illness they asked him not to come in until they could review the situation,. They acted immediately. They were completely unaware of his mental health problems. Amended hours were offered at the outset as they thought the claimant needed to take and collect a disabled child from school. The claimant would not stay in the area assigned to him to protect him on his return to work in June. The respondents were unaware of the claimant's son's health issues until he left the letter on John Noon's desk. In relation to the leave request made while the Noons were on holiday, they were unaware at the time that it was a parental leave request. Other staff were already on leave

and that is why the request was refused. Once the respondents had validation of the claimant's illness they accepted it. They were within their rights to query the vague evidence first submitted. It was not bullying, the respondents were simply trying to establish when the claimant could return to work. The claimant did not give the respondents the opportunity to put things right or address his concerns.

Law, Decision and Reasons

44. Both parties made submissions on matters that were not in evidence and the tribunal has not considered those matters in reaching its judgment.

Detriment due to raising Health and Safety concerns:

45. Employment Rights Act 1996 (ERA 96)

S 44 Health and safety cases.

(1)An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

…

(c)being an employee at a place where—

(i)there was no such representative or safety committee, or

(ii)there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,…

46. The tribunal finds that in leaving the AT letter with Mr Noon on 7 July 2020 he raised circumstances connected with his work which he reasonably believed were potentially harmful to health and safety and so is covered by s44 ERA 96.

47. The claimant relies on 13 alleged detriments which are set out at paragraph 3.1 of the case management order dated 7 April 2022 in his case that the first respondent breached s48 ERA 96. The tribunal adopts that numbering throughout the remainder of this decision. The tribunal accepts that the alleged detriments at 4 (messages of 16 August), 5 (email of 17 August 2020 terminating the claimant's contract) and 8 (emails of 21 and 27 August stating the claimant's probation was extended) were detriments. It does not accept that detriment 3 took place. It has found that Andy Porter did not refuse the leave but told the claimant he would need to wait until the following Monday for an answer. It does not find that the remaining alleged detriments were detriments. The actions taken or put forward by the first respondent in those communications were in connection with its role as employer.

48. The tribunal then went on to consider whether the actions carried out in relation to detriments 4, 5 and 8 were done so because the claimant had raised a health

and safety issue. The tribunal's conclusion is that there is no evidence that those actions were related in any way to the action taken by the first respondent on 7 July 2020. The evidence is that the first respondent was at pains to address the health and safety issues and that it did so to the claimant's satisfaction. Detriments 4, 5 and 8 arose because of the claimant's sick leave and not because he had raised health and safety matters on 7 July 2020.

49. For these reasons the claimant's claim of health and safety detriment under s44 ERA 96 is not upheld.

Constructive Automatic Unfair dismissal for a health and safety reason.

50. The claimant was employed for a period less than two years and the tribunal does not therefore have jurisdiction to consider a claim of constructive unfair dismissal unless the claim is that the dismissal is for one of the automatically unfair reasons, for which no qualifying period is required. The claimant relies on the reason that he was dismissed for a health and safety reason. This is potentially an automatically unfair dismissal reason and is one for which there is no qualifying period.

51. **Employment Rights Act 1996 s100 Health and safety cases**.

(1)An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

…

(c)being an employee at a place where—

(i)there was no such representative or safety committee, or

(ii)there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

52. The claimant relies on 13 alleged acts which are set out at paragraph 3.1 of the case management order dated 7 April 2022 as breaches of contract that led to his resignation.

53. Employment Rights Act 1996 s*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 …

(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 his employer's conduct.

54. This is what has become known as “constructive dismissal”. The leading case of Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 makes it clear that the employer’s conduct has to amount to a repudiatory breach. The employee must show a fundamental breach of contract that caused them to resign and that they did so without delay.

55. The claimant relies on the detriments set out at paragraph 3.1 of the list of issues as breaches of contract. The tribunal finds that, except for allegation 3, all of those acts did take place. It finds that cumulatively, the acts 4 to 13, except for allegation 7, were likely to damage the trust and confidence between the claimant and the first respondent and the first respondent did not have proper cause for doing so. The reasons for the tribunals conclusions on why the acts amounted to a breach is set out in detail below under the heading of harassment.

56. The tribunal finds that the claimant did resign in response to that breach and that he was therefore potentially constructively dismissed.

57. The tribunal does not find that the reason or principal reason for this dismissal was that he raised health and safety concerns. The tribunal relies on the conclusion set out above at paragraph 47 and it finds that acts 4 to 13 were in response to the claimant’s sickness absence. Acts 1 and 2 concerned the claimant’s return to work date after health and safety measures were put in place and were not because the claimant had raised health and safety concerns.

58. As the dismissal was not because the claimant raised health and safety concerns his claim for automatically unfair dismissal is dismissed.

Reasonable Adjustments

59. S20 and 21 Equality Act 2010

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

…

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

60. The tribunal has found that the date from which the respondents had knowledge of the claimant's disability was 16 August 2020.

61. Reasonable Adjustments Claim One

62. This is that the respondents had a policy of failing to put protective measures against Covid-19 in place during the period 1 June to 7 July 2020 and that this caused anxiety to the claimant because of his son's vulnerability.

63. As the respondents were unaware of the client's disability at this time they could not have known or be reasonably expected to know that the claimant was likely to be placed at this disadvantage and therefore this claim is not upheld.

64. Reasonable Adjustments Claim Two

65. This is that the respondents' required one month's notice of leave requests, that this was impossible for the claimant due to his family circumstances, and he would have anxiety if he was unable to care for his son.

66. Although the respondents did have such a PCP, the request for leave at short notice that was actually made was done so before the respondents had knowledge of the claimant's disability (11 or 13 August 2020) and because the claimant did not return to work after 14 August 2020 there is no evidence that it refused to or would not have made an adjustment.

67. For these reasons this claim is not upheld.

Harassment

68. **21 Equality Act 2010 s**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.For a claim under s26 (1) of the EA10 the tribunal needs to decide if the conduct alleged took place and if it was related to a protected characteristic, in this case the claimant's disability. If it decides that it did take place and it was related to disability it needs to decide whether it was unwanted and if so, whether it had the purpose of violating the claimant's dignity, or

creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

69. Under S26 (1)(a) conduct will be covered by this section regardless of the reason for it, provided it has some connection with a protected characteristic.

70. In his claim of harassment, the claimant relies on the 13 alleged acts set out at paragraph 3.1 of the case management order of 7 April 2020. The first three of those alleged acts took place before 16 August 2020. As the respondents had no knowledge of the claimant's disability before that date, their actions cannot have been related to the claimant's disability and therefore the tribunal has not considered these acts when deciding the harassment claim.

71. The remaining acts (4-13) concern various communications between the claimant, and with one exception, Cate Noon. The tribunal finds that each of these acts took place. It finds that except for act 9 (the text from John Noon telling the claimant not to contact him out of office hours) the acts, or conduct, were all related to the claimant's disability in that they arose because the respondents had received a fit note on 16 August 2023 setting out that he suffered from Mixed Anxiety and Depressive Disorder.

72. The tribunal then went on to consider whether the conduct was unwanted and what effect it had on the claimant. In accordance with s26 of the EA10, when considering that it kept in mind that in accordance with s26(4) any such consideration should take into account the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

73. The tribunal does not find that the messages sent by John Noon to the claimant on 16 August 2020 about the validity of the fit note (act 4) were messages that could be construed as harassment. An unsigned fit note was received late at night and the respondent was short staffed.

74. The remaining acts are communications between the claimant and Mrs Noon. The tribunal finds that the tone, the threats and the words used in the emails on 17 August 2020 (act 5), 18 August (act 6), 21 and 27 August (act 8), 2 September 2020 (act 12) and 3 September (act 13) were both intimidating and hostile in nature. While it does not find that the two emails of 1 September 2020 (acts 10 and 11) were intimidating and hostile in themselves, when placed in the context of the communications before and after that, they formed part of a stream of communications, the nature of which were clearly unwanted by the claimant, and which did constitute harassment.

75. The questions about the fit note clearly imply a lack of belief in the claimant's ill health on the part of the respondents and the first respondent then terminated the claimant's contract on the grounds of an invalid fit note. Although this was later rescinded, when the second respondent obtained further information, no apology was made and the tribunal accepts that taking such precipitous action did create a hostile environment. Comments about having to hold a meeting to discuss the claimant's future employment with the respondents on his return

are intimidating particularly where the claimant has been told that his probation has been extended. The tribunal noted particularly the conversation about obtaining further information about the claimant's illness. Mrs Noon asked for information. The claimant replied and gave her permission to contact his doctor in a timely manner. Mrs. Noon said she could not do so and he must do it at 15:53 on Tuesday 1 September 2020. At 09:31 on 2 September she chased information asking for it by the close of business. The claimant had a valid fit note until 14 September 2020 and there is no reason for the urgency. The respondents will have been aware by this time, in September 2020, of the problems of contacting GP surgeries and pressure on the NHS in general during the height of the pandemic.

76. The claimant has Mixed Anxiety and Depressive Disorder. No medical evidence has been presented but on an everyday understanding of the terms of anxiety and depression the tribunal finds that the respondents gave no thought to the impact of their actions on the claimant. The tribunal accepts that the respondents were within their rights and carrying out their roles in seeking to obtain information from the claimant about his illness and his prognosis, but it finds that the manner in which this information was sought by Mrs Noon was such that it created an intimidating and hostile environment.

77. The claimant's claim of harassment related to disability is upheld.

Time

78. Given the date the claim form was presented, 27 November 2020, and the dates of early conciliation any complaint about something that happened before 16 August 2020 may not have been brought in time.

Disability

79. As the date on which the claimant had knowledge of the claimant's disability was 16 August 2020, the tribunal has not upheld any allegations relating to actions before 16 August 2020 in relation to reasonable adjustments or harassment. Both of these claims require knowledge of disability. There was therefore no requirement for the tribunal to consider whether the allegations prior to 16 August 2020 were brought in time.

Health and safety

80. Thet tribunal has not upheld the health and safety claim but in reaching that decision it did consider the first three allegations and whether those were in time.

81. Those claims are out of time unless they were part of a series of similar acts or failures, or it was not reasonably practicable for the claim to be made to the tribunal within the time limit.

82. The three acts are the respondents asking the claimant to return to work on 27 July 2020, the respondents telling the claimant he must return on 27 July or his contract would be terminated and Andy Porter refusing the claimant leave. The claimant then returned to work, with health and safety precautions implemented to his satisfaction, and the next alleged detriment concerns the validity of the

sick note he sent to the respondent on 16 August 2020. The tribunal finds that the three acts that took place before 16 August 2020 were not part of a series of similar acts in that they concerned separate matters to the allegations made from 16 August onwards. The tribunal was not addressed on whether it was not reasonably practicable for the claim relating to these allegations to be filed in time despite specifically raising this with the parties. It finds that it was reasonably practicable for the claim to have been filed in time and therefore allegations 1 to 3 of the health and safety claim are out of time.

_____
Employment Judge Anderson

Date: 19 December 2023

Sent to the parties on:
22 December 2023

For the Tribunal Office