

Case No: 2415092/2019
2414182/2019
2400906/2020
2401559/2021



EMPLOYMENT TRIBUNALS

Claimant: Miss A Morley

Respondent: 1. KDPG Limited
2. Mr King
3. Miss Tullett

Heard at: Manchester Employment Tribunal

On: 13, 14, 15, 16 and 17 November 2023

Before: Employment Judge M Butler
Mr J Flynn
Ms P Owen

Representation

Claimant: Ms A Goulden (claimant's mother)
Respondent: Mr S Anderson (of Counsel)

JUDGMENT

It is the unanimous decision of this tribunal that:

1. The claimant is found not have satisfied the tribunal that she had a disability by reason of a mental impairment of anxiety between June 2019 and March 2020.
2. The claims of direct disability discrimination do not succeed and are dismissed.
3. The claims of harassment related to disability do not succeed and are dismissed.
4. The claims that the respondent failed in its duty to make reasonable adjustments do not succeed and are dismissed.

5. The claims of victimisation do not succeed and are dismissed.
6. The claimant is found not to have been constructively dismissed, and her claims insofar as they relate to dismissal do not succeed and are dismissed.
7. The respondent did not subject the claimant to unlawful deductions from her wages. This claim does not succeed and is dismissed.
8. For the avoidance of any doubt, no claims in this case succeed and they are all dismissed.

REASONS

INTRODUCTION

9. The claimant presented a total of four claim forms in her claims against the respondents. The first was presented on 29 October 2019, and brought claims against the second and third respondent. The second claim was presented on 04 December 2019, and brought claims against the second respondent. The third claim was presented on 05 February 2020, and brought claims against the first respondent. The fourth claim, presented on 04 February 2020, brought claims against all three respondents.
10. The case was case managed across 6 separate preliminary hearings between 17 July 2020 (the first preliminary hearing) and 27 October 2023 (the final preliminary hearing).
11. The tribunal was assisted in this case by two files of evidence. The respondent produced a file of evidence that ran to 901 pages in total. Whilst the claimant produced an additional file of evidence that ran to 217 pages. Although it would have been preferable to have had a single agreed file of evidence in this case, this did not cause the tribunal any difficulties during the hearing. During the hearing, there was additional disclosure of relevant materials that had only been discovered late in the process. Particularly, there was a newspaper article that mentioned the claimant having taken up employment elsewhere and which contradicted some of the evidence the claimant gave under cross-examination. Following hearing from both sides, the late disclosure was admitted as evidence.
12. The claimant gave evidence, and her mother had also prepared a witness statement and was in attendance to give evidence. Although Mr Anderson informed the tribunal on completing cross-examination of the claimant that he was not intending to cross-examine Ms Goulden.
13. There were two other statements within the evidence file, from Ms Osbourne and Ms Smith. Neither of which were called to give evidence. It was explained to the parties that the tribunal would give such statements such

weight that it considered appropriate to these statements, given that they were not being subject to cross-examination.

14. The respondent had exchanged witness statements for the second and third respondent, and statements for Ms Gibson, Ms Brown, Ms Scanlon, Ms Whelan and Ms Campbell. However, on completing cross examination of the claimant, the respondent decided that it was no longer calling any witnesses to give evidence. Like that above, as the witnesses were not being called to give evidence, the tribunal only attached the weight it considered appropriate to such evidence.

CAPACITY CONCERN

15. The claimant started her evidence on the second day of the proceedings, with the first day having been used to read into the case.
16. At around 12.30pm, the tribunal became concerned with the way that the claimant was presenting herself whilst giving her evidence. The tribunal paused the hearing and explained its concerns to the parties. In short, it explained that the claimant was appearing confused with what could only be described as basic questions and was struggling to recall any information. There was also concern over the claimant's ability to retain information presented to her in cross-examination for long enough to enable her to answer the question posed. There was some concern over whether the claimant was understanding the process and was able to effectively participate. Particularly as she became teary, was seen rubbing her forehead and looked visibly distressed when being asked questions. The tribunal was also aware of medication that the claimant was taking and the effect that this may have been having on her.
17. The tribunal, having raised those concerns, broke early for lunch. This was to enable the claimant and her lay representative to digest what the tribunal had explained, with a view to discussing it following the lunch adjournment.
18. On return, it was explained to the tribunal that due to the claimant having a physical impairment to her eye she struggled with reading, and this was made even more difficult when she needed to consider more than one document at a time. The claimant explained to the tribunal that she would be able to engage better if the following adjustments were made: that she be allowed a pen and paper so that she could jot down the question being asked and any of her thoughts, that Mr Anderson read out the specific parts of the document that he was referring to, and that Mr Anderson only referred to one document at a time, and a question was asked about that document before moving on to the next one.
19. The tribunal proceeded with these adjustments in place. The tribunal was satisfied, on monitoring the claimant following the introduction of these adjustments, that she was able to engage appropriately with the tribunal process.

RELIABILITY AND CREDIBILITY OF CLAIMANT

20. The tribunal concluded that the claimant was not a reliable witness of fact. Whether because of passage of time or whether for matters relating to medication, her ability to recall matters and events was poor. This manifested itself particularly in the answers that the claimant gave under cross-examination, with several occasions when the claimant could not recall information being sought. This led the tribunal to conclude that she was an unreliable witness of fact.
21. However, the tribunal considered that the claimant's vague and unclear evidence went beyond being simply unreliable. The tribunal also concluded that the claimant was not a credible witness. Reaching this conclusion primarily centred around a role that the claimant commenced with Peaks Dental Practice and her attempts to secure other employment, which was highly relevant to these proceedings. Not only does the claimant fail to introduce any of that evidence in her witness statement, she also did not disclose any of the relevant documents around such attempts (save for a conditional job offer for a practice in Thameside) and this was despite being requested to do so by the tribunal on day 2 of this hearing. Given the relevance of this matter, and that the tribunal was left with the impression that the claimant was seeking to conceal such information, it concluded that the claimant was not a credible witness.
22. Further supporting the tribunal's conclusion on this matter, the claimant gave evidence that she only commenced other work at Peaks Dental Practice after she had resigned from her employment with the first respondent, and that that was in December 2020. And she gave this evidence in the full knowledge that she had started working at Peaks Dental Practice much earlier, and whilst still employed by the first respondent. The tribunal could have accepted that the claimant was not able to recall specific dates and that this could be related to the claimant's mental health. However, this would not explain the claimant's evidence that she had stopped left the employ of the first respondent before starting work for another, which was simply untrue.
23. Given the tribunal's finding that the claimant was not a reliable or credible witness, this was considered when making findings of fact in this case. And in particular, where there was a conflict between the claimant's evidence and that contained within a written document, the tribunal preferred that written document.

LIST OF ISSUES

24. The parties agreed that the list of issues contained at pages 115-129 of the bundle remained the issues to be determined in this case. For ease, these have been attached to the back of this judgment.
25. Ms Goulden did submit that the issue of disability throughout the material period had already been conceded by Mr King on behalf of all three

respondents. And in doing so she relied on p.737.

26. Having considered this document carefully, and having heard from Mr Anderson, the tribunal was not convinced that that was what that document had done. Rather, the document at p.737 is too ambiguous to concede disability for the entire material period. At its height Mr King accepts that the claimant reported that she was disabled. This does not concede disability in the legal sense.
27. What the tribunal had to decide in respect of disability and knowledge of disability was set out on day 2 of the hearing. Ms Goulden, nor the claimant, disputed that the tribunal was tasked with deciding whether the claimant had a disability and the respondent's knowledge of that disability for the period before March 2020, as per the letter at p.738, where this is clear.

TAMPERING OF EVIDENCE ALLEGATIONS

28. At the Preliminary Hearing before Employment Judge Allen on 27 October 2023, Ms Goulden had raised that she had concerns that a number of documents had been tampered with by the respondents. At paragraph 15 of that record, EJ Allen recorded that he explained to Ms Goulden that if there were concerns about tampering then the onus was on Ms Goulden to refer to the alleged discrepancies during evidence, to tell the tribunal what the documents show and to refer to it in submissions. None of this was done.
29. The tribunal during this hearing was not taken to any document by Ms Goulden that she alleges was tampered with. However, after judgment had been handed down, Ms Goulden raised the tampering issue. After some time, she identified a letter from July 2018 (at pages 701 and 702) and some observations she had in respect of a witness statement of Ms Karen Brown (see p.730).
30. The tribunal was satisfied that its decision had been reached without consideration of these documents and therefore did not need to resolve this matter. But further, concluded that the decision had been determined, with findings of fact, primarily made with reference to the claimant's evidence only.
31. Although there was no formal application for reconsideration made on this basis that the tribunal had not given thought to the tampering issue, the tribunal did consider, and concluded, that even had these matters been raised during the hearing (rather than after judgment was handed down), the same decision would have been reached.
32. The judgment was confirmed as that handed down orally to the parties.

LAW

Disability

33. Section 6 of the Equality Act (2010) (“EqA (2010)”) states:

- (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.

...

34. Schedule 1 of the EqA contains supplementary provisions in relation to the determination of disability. Paragraph 2 states:

- ‘2(1) The effect of an impairment is long-term if-
- (a) it has lasted at least 12 months,
 - (b) it is likely to last for at least 12 months, or
 - (c) it is likely to last for the rest of life of the person affected.’

35. When considering the term ‘likely’, this means something that ‘could well happen’ (this was decided by the House of Lords (now called the Supreme Court) in a case called **SCA Packaging Ltd v Boyle [2009] ICR 1056**).

36. Paragraph 5 states:

- ‘5(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if –
- (a) measures are being taken to treat or correct it; and
 - (b) but for that, it would be likely to have that effect.’

37. The ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’ (the Guidance) does not itself impose legal obligations, but the Tribunal must take it into account where relevant (Schedule one, Part two, paragraph 12 EqA).

38. The Guidance at paragraph B1 deals with the meaning of ‘substantial adverse effect’ and provides:

‘The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect.’

39. Paragraph B1 should be read in conjunction with Section D of the Guidance which considers what is meant by 'normal day-to-day activities'.

40. Paragraph D2 states that it is not possible to provide an exhaustive list of day-to-day activities.

41. Paragraph D3 Provides that:

'In general, day-to-day activities are things that people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities.'

42. D16 provides that normal day-to-day activities include activities that are required to maintain personal well-being. It provides that account should be taken of whether the effects of an impairment have an impact on whether the person is inclined to carry out or neglect basic functions such as eating, drinking, sleeping, or personal hygiene.

43. The Equality and Human Rights Commission: Code of Practice on Employment (2011) at Appendix 1, sets out further guidance on the meaning of disability. It states at paragraph 7 that

'There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause.'

44. At paragraph 16 it states:

'Someone with impairment may be receiving medical or other treatment which alleviates or removes the effects (although not the impairment). In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if the substantial adverse effects are not likely to occur even if the treatment stops (that is, the impairment has been cured).'

45. In **Goodwin v Patent Office [1999] IRLR 4**, the EAT held that in cases where disability status is disputed, there are four essential questions which a Tribunal should consider separately and, where appropriate, sequentially. These are:

- a. Does the person have a physical or mental impairment?
- b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?

- c. Is that effect substantial?
- d. Is that effect long-term?

46. The burden of proof is on a claimant to show that he or she satisfies the statutory definition of disability.

Direct disability discrimination

47. Protection against direct discrimination is provided for at s.13 of the Equality Act 2010:

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

48. Lord Nicholls in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** gave guidance as to the approach an employment tribunal should consider when determining a direct discrimination complaint:

“7. ...In deciding a discrimination claim one of the matters employment tribunals have to consider is whether the statutory definition of discrimination has been satisfied. When the claim is based on direct discrimination or victimisation, in practice tribunals in their decisions normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator (the 'less favourable treatment' issue) and then, secondly, whether the less favourable treatment was on the relevant proscribed ground (the 'reason why' issue). Tribunals proceed to consider the reason why issue only if the less favourable treatment issue is resolved in favour of the claimant. Thus the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining.

8. No doubt there are cases where it is convenient and helpful to adopt this two-step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined.

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11. ...employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others."

49. This is further explained by Mr Justice Underhill P (as he then was), in **Amnesty International v Ahmed [2009] IRLR 884:**

"32. The basic question in a direct discrimination case is what is or are the "ground" or "grounds" for the treatment complained of.^[3] That is the language of the definitions of direct discrimination in the main discrimination statutes and the various more recent employment equality regulations. It is also the terminology used in the underlying Directives: see, e.g., art. 2.2 (a) of Directive EU/2000/43 ("the Race Directive"). There is however no difference between that formulation and asking what was the "reason" that the act complained of was done, which is the language used in the victimisation provisions (e.g. s. 2 (1) of the 1976 Act): see *per* Lord Nicholls in **Nagarajan** at p. 512 D-E (also, to the same effect, Lord Steyn at p. 521 C-D).^[4]

33. In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself. If an owner of premises puts up a sign saying "no blacks admitted", race is, necessarily, the ground on which (or the reason why) a black person is excluded. **James v Eastleigh** is a case of this kind. There is a superficial complication, in that the rule which was claimed to be unlawful – namely that pensioners were entitled to free entry to the Council's swimming-pools – was not explicitly discriminatory. But it nevertheless necessarily discriminated against men because men and women had different pensionable ages: the rule could entirely accurately have been stated as "free entry for women at 60 and men at 65". The Council was therefore applying a criterion which was of its nature discriminatory: it was, as Lord Goff put it (at p. 772 C-D), "gender based".^[5] In cases of this kind what was going on inside the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose – will be irrelevant. The "ground" of his action being inherent in the act itself, no further inquiry is needed. It follows that, as the majority in **James v Eastleigh** decided, a respondent who has treated a claimant less

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favourably on the grounds of his or her sex or race cannot escape liability because he had a benign motive.

34. But that is not the only kind of case. In other cases – of which Nagarajan is an example - the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, i.e. by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in James v Eastleigh, a benign motive is irrelevant. This is the point being made in the second paragraph of the passage which we have quoted from the speech of Lord Nicholls in Nagarajan (see para. 29 above). The distinctions involved may seem subtle, but they are real, as the example given by Lord Nicholls at the end of that paragraph makes clear.

...

37. ...although (as Lord Goff points out) the test may be applied equally to both the "criterion" and the "mental processes" type of case, its real value is in the latter: if the discriminator would not have done the act complained of but for the claimant's sex (or race), it does not matter whether you describe the mental process involved as his intention, his motive, his reason, his purpose or anything else – all that matter is that the proscribed factor operated on his mind. This is therefore a useful gloss on the statutory test; but it was propounded in order to make a particular point, and we do not believe that Lord Goff intended for a moment that it should be used as an all-purpose substitute for the statutory language. Indeed if it were, there would plainly be cases in which it was misleading. The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment.

Harassment related to disability

50. Protection against harassment is provided for at s.26 of the Equality Act 2010:

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

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

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

- (i) violating B's dignity, or
- (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

- (a) the perception of B;
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.

A failure in the duty to make reasonable adjustments

51. The relevant statutory provisions, in respect of a failure to make reasonable adjustments complaint are as follows:

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.

Victimisation

52. Section 27 EqA states that:

(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—

...

- (c) Doing any ... thing for the purposes of or in connection with the EqA 2010.
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

Burden of proof under the Equality Act 2010

53. We reminded ourselves of the burden of proof in discrimination cases, with reference to section 136 of the Equality Act 2010:

(1) This section applies to any proceedings relating to a contravention of this Act.

(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.

54. Lord Justice Mummery (with which Laws and Maurice Kay LJJs agreed) in **Madarassy v Nomura International plc [2007] ICR 867**, at paragraphs 56-58, provided a summary of the principles that apply when considering the burden of proof in Equality Act Claims:

"56. The court in *Igen v Wong*... expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. **The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.**

57. "Could... conclude" in section 63A (2) must mean that **"a reasonable tribunal could properly conclude" from all the evidence before it.** This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; **for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.**

58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim." (emphasis added)

55. Mummery LJ also explained further how evidence adduced by the employer might be relevant, noting that it could even relate to the reason for any less favourable treatment (paras. 71-72):

"71. Section 63A (2) does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. **The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant; or that, even if there has been less favourable treatment of the complainant, it was not on the ground of her sex or pregnancy.**

72. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the complainant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination on the proscribed ground...."

56. Lord Justice Mummery also pointed out that it will often be appropriate for the tribunal to go straight to the second stage. An example is where the employer is asserting that whether the burden at the first stage has been discharged or not, he has a non-discriminatory explanation for the alleged discrimination. A claimant is not prejudiced by that approach since it is effectively assumed in his favour that the burden at the first stage has been discharged.

57. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant succeeds in doing this, then the onus will be on the respondent to prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations.

Constructive Dismissal

58. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed where they terminate their contract of employment "...with or without notice in circumstances in which he is entitled to terminate the contract without notice by reason of the employee's conduct". In short this is the legal principle of constructive dismissal.

59. What this is referring to is the entitlement to bring a contract of employment to an end without notice by an employee where the employer is in fundamental breach of that contract. The leading case in relation to this is **Western Excavating v Sharp [1978] 1 All ER 713.**

60. In **Western Excavating v Sharp** it is explained that a fundamental breach of contract occurs where the claimant commits a significant breach, which goes to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the central terms of that contract. In such a case the employee is entitled to treat himself as discharged from any further performance and resign.

61. This test is an objective test, and it is not sufficient that the employee subjectively perceives that there is a fundamental breach.

62. It is further clear from this case, that an employee relying on a breach of contract in this way must make up their mind and resign soon after the

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breach, or otherwise it may be held at the contract has been affirmed. The burden is on the employee to show that a dismissal has occurred.

63. A constructive dismissal may result from a breach of an express term or from a breach of an implied term in the contract of employment.

64. Lord Steyn in **Malik v Bank of Credit; Mahmud v Bank of Credit [1998] AC 20** gave guidance for determining if there has been a breach of trust and confidence, when he said that an employer shall not:

‘...without reasonable and proper cause, conduct itself in a matter calculated (or) likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.’

65. Whilst conduct of the employer must be more than unreasonable, breach of trust and confidence will invariably be a fundamental breach.

66. A constructive dismissal may result from either a single act, or from the cumulative effect of a series of acts. Where it is brought on cumulative effect of a series of acts, the last act, often referred to as the last straw, need not be a breach of contract in itself but it must be capable of contributing something to the cumulative breach of contract. And this is a principle that is well developed in case law. For example, Dyson LJ in **London Borough of Waltham Forest v Omilaju [2005] All ER 75** described the last straw in the following terms:

“I see no need to characterise the final straw as unreasonable or blameworthy conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and perhaps even blameworthy. But, viewed in isolation the final straw may not always be unreasonable, still less blameworthy. Nor do I see why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however, slightly to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.”

Unlawful Deduction from wages

67. Section 13(1) ERA provides that a worker has the right not to suffer unauthorised deductions from wages. A deduction is defined a s.13.(3) ERA as being ‘[w]here the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion...’

68. Section 13(1) ERA also provides for deductions from wages that are authorised, namely where the deduction is required or authorised by a statutory provision or a relevant provision of the worker's contract (s.13(1)(a) ERA), or the worker has previously signified in writing his or her agreement to the deduction (s.13(1)(b) ERA).

CLOSING SUBMISSIONS

69. The tribunal heard closing oral submissions made on behalf of the respondent and the claimant. Although these are not repeated here, those were considered and taken into account in reaching this decision.

FINDINGS OF FACT

We make the following findings of fact based on the balance of probability from the evidence we have read, seen, and heard. Where there is reference to certain aspects of the evidence that have assisted us in making our findings of fact this is not indicative that no other evidence has been considered. Our findings were based on all of the evidence, and these are merely indicators of some of the evidence considered in order to try to assist the parties understand why we made the findings that we did.

We do not make findings in relation to all matters in dispute but only on matters that we consider relevant to deciding on the issues currently before us.

Findings of fact: Did the claimant have a disability before March 2020? And did the respondent have knowledge of any such disability before March 2020?

70. The claimant attended her GP on several occasions presenting herself with low mood, and other matters before September 2019.

71. On 09 September 2019, the claimant attended an appointment at her doctors (p.815). There is no reference to anxiety at this appointment, as this was not affecting the claimant at this time. The focus at this appointment was on the claimant's low mood, and this is being linked to occupational stressors.

72. On 09 Sept 2019, the claimant is provided with a fitness to work note (see p.789). It is recorded that the claimant is unfit to work, and that she would benefit from amended duties at work to reduce occupational stress and time pressures to alleviate her anxiety symptoms. This note is for a period of 14 days.

73. On 10 Sept 2019 (p.814) the claimant again attended an appointment with her GP (see p.814). It is recorded that breaks will not help, and the claimant explained to her GP that she would like to explore options of working elsewhere, including in decontamination. It is recorded that such a change

would see the claimant not having to work with Ms Tullett, which triggered her symptoms. The claimant was due to see GP again in two weeks.

74. The claimant was provided with an amended fit note following her attendance at her GP surgery on 10 September 2019 (p.791). The fit note was amended to refer to the claimant suffering from anxiety. But again, this references occupational stressors. Some adjustments are recommended. However, this does not give an indication of effects on normal day to day activities. Again, this fir note covers a 2-week period.
75. On 16 Sept 2019, the claimant attended a meeting with Mr King and Ms Roberts, and the claimant's mother was in attendance. The notes of this meeting are at pp356-358 of the bundle. Although the claimant disputes the accuracy of document, the tribunal accepted this to be an accurate record of what was discussed. In oral evidence the claimant said she disputed the accuracy of the entire document, and yet was unable to explain what she says was discussed. Not only did the claimant not keep any note herself, she was not able to explain to the tribunal what she recollected being discussed in that meeting. And further, Ms Goulden's witness statement at paragraphs 3 and 4, and paragraph 31 of the claimant's witness statement, seems to support that health matters were discussed, a written questionnaire was used, a script was in effect followed and contemporaneous notes were taken. All of that appears to fit with this being a document recording that discussion, and therefore the tribunal makes this finding.
76. The document at pages pp.356-358 is taken as an accurate document in respect of what questions were asked in respect the claimant's health, and in respect of the answers that were given by the claimant in response. The tribunal finds that the following was said at that meeting:
- a. Aside from the sick note from 09 and 10 September 2019, there were no other absences relating to anxiety
 - b. The claimant describes herself as having had episodes of anxiety outside of work
 - c. The claimant explains that it was a work relationship with Debbie Tullett that was causing her to be anxious and that time away from work would not help
 - d. That the claimant is not taking any medication or treatment at this moment in time or previously, but is taking Kalms
 - e. That there have been occupational stressors for the previous 3 months.
 - f. The claimant explained that the only thing that would help would be to be kept separate from Ms Tullett.
77. The next relevant GP attendance by the claimant is on 23 September 2019 (p.813). At this attendance, the claimant explained to her GP that she had ongoing low mood and had ongoing difficulties with manager. That she is managing to get out the house and do usual activities. That she is now back at work. The doctor records that he considers the primary driver to be stress.

78. The claimant presents her first claim form in these proceedings on 29 October 2019. She does not bring a disability discrimination claim. The box at part 12 of the ET1 is ticked to inform the tribunal that the claimant does not have a disability.
79. The claimant attends a GP appointment on 02 December 2019 (see p.811) In this record it is highlighted that the claimant was feeling stress at work. Low mood is recorded, and the claimant declines medication.
80. The claimant presents her second claim form in these proceedings on 04 December 2019. She does not bring a disability discrimination claim. The box at part 12 of the ET1 is ticked to inform the tribunal that the claimant does not have a disability.
81. The claimant attended a GP appointment on 22 January 2020 (see p.811). It is recorded that the claimant is feeling stressed. That the stress at work was due to bullying. That there was a downhill relationship with her manager. And it is recorded that the claimant has recently suffered a bereavement. There is no mention of anxiety in this record.
82. The claimant is provided with a fit note, that records stress related illness (p.793). The fit note covers the period 22 to 23 Jan 2020.
83. On 23 January 2020, the claimant attended a GP appointment requesting an amended fit note (see p.810) Issues at work are again referenced.
84. The claimant presents her third claim form in these proceedings on 05 February 2020. She does not bring a disability discrimination claim. The box at part 12 of the ET1 is ticked to inform the tribunal that the claimant does not have a disability.
85. The claimant did not attend a GP's appointment again between 23 January 2020 and March 2020.
86. On 09 December 2020, the claimant resigned by letter from her position with the first respondent (see pp.p.87- 103) resignation letter. This resignation letter concludes with: *'The relief of not attending work and having to cope with the discrimination which impacted my health was significant.'* The claimant's own evidence was that she accepted that her resignation was a weight off her shoulders, and it relieved her symptoms.
87. When the claimant commenced work at Peaks Dental Practice the claimant did not ask or require any adjustments to be made for her. This is the evidence she gave to the tribunal. The claimant explained that she did not need any adjustments from her new employer as they were not bullying her.

Conclusions: Did the claimant have a disability before March 2020?

88. All the evidence considered above points towards the claimant being anxious about attending work, and that this was a result of her actual or her

perceived treatment of her by Ms Tullett. The claimant herself explained this in her oral evidence, and this is a clear theme in the claimant's witness statement. Rather than the claimant having a mental impairment of anxiety in the disability sense, the claimant gave evidence that it was the work environment that was causing her to be anxious.

89. None of the evidence supports that during this time, up until March 2020, the claimant was suffering with a mental impairment of anxiety that was having a substantial long term and adverse effect on her normal day to day activities. There is no contemporaneous evidence that supports that the claimant's normal day to day activities were being affected because of anxiety. And this is particularly evident in the doctor's note of 23 September 2019 where he records that the claimant was able to get out and continue with normal day to day activities. Also notable is that he records that workplace stress was the primary driver, which is a common theme throughout the claimant's medical records.
90. Furthermore, the evidence at the time supports that any impairment (had it been found to exist) was not considered to be long term nor likely to be long term. The fit notes that were provided, especially where anxiety is mentioned, were for relatively short periods of time. And from this, the tribunal concludes that the evidence supports that any such reference to anxiety, had it effected the claimant's ability to undertake normal day to day activities at the time, was a short-term issue. With the evidence at the time not supporting that it was long term or that it was likely to be long term
91. Considering our findings and analysis above, the tribunal concludes that the claimant did not have a disability by reason of anxiety, pursuant to s.6 of the Equality Act 2010, for the material period up until March 2020.
92. The tribunal makes no comment in respect of the period from March 2020, as the respondents have conceded that during this period the claimant did have a disability.
93. All complaints of disability discrimination that pre-date March 2020 are therefore dismissed.

Conclusions: Did the respondent have knowledge of the claimant's disability before March 2020?

94. The tribunal turns to the issue of knowledge of disability before March 2020, in considering what the position would have been had it determined that the claimant satisfied the definition of disability in respect of anxiety for that period. And the claims insofar as they relate to disability discrimination before March 2020 would have still failed and have been dismissed.
95. The claimant's case is that the respondents knew of the claimant's disability since around September 2019. And this was primary through the fit note on 09 September 2019, and the meeting that took place on 16 September 2019.

96. However, given our findings above, and given the findings the tribunal has made in respect of the meeting record, we conclude that the respondents did not have actual or constructive knowledge that the claimant was disabled by reason of anxiety. The tribunal accepts that the fit note of 09 September 2019 refers to the claimant having anxiety symptoms but goes not further (that is it does not provide any information on the affects it was having on the claimant). This could put an employer on notice that something may need investigated. And in this case, the employer does investigate this matter, that being through the meeting of 16 September 2019. The claimant does not give any indication that she has a mental impairment of anxiety reaching the level of disability in that meeting. In that meeting, the claimant placed her troubles in the workplace as being due to a fractious working relationship with Ms Tullett, that made the claimant anxious about being at work. In those circumstances and given that there has been nothing else to suggest that the respondents had actual or constructive knowledge, this tribunal concludes that the employer would not have had actual or constructive knowledge of the claimant's anxiety as a disability before March 2020, had it found that that impairment was a disability during that period.

97. So even had the tribunal concluded that the claimant was disabled by reason of anxiety during the material period up until March 2020, those disability discrimination claims concerning pre-March 2020 would have still failed as the tribunal would have concluded that the respondents did not have knowledge of that disability at the time.

98. In summary, all claims brought as disability related harassment are dismissed by reason of the conclusions reached above. And all allegations of direct disability discrimination, save for allegations 31, 32 and 33 are dismissed, again by reason of the conclusions reached above.

Findings of fact: Direct disability discrimination

99. On 08 April 2020, the claimant's mother, Ms Goulden, phoned the Greater Manchester Dental Emergency Line. This was not in relation to a dental emergency, but rather to raise concerns that she had around the first respondent and how she perceived them to be treating the claimant. Ms Goulden used a false name.

100. The matter was passed to Ms Tullett, who called the caller back. Ms Tullett recognized that the person she had called was Ms Goulden, the claimant's mother.

101. The phone call by the claimant's mother was raised by Ms Tullett with the claimant. The claimant alleges that Ms Tullett prevented the claimant from leaving the work place, shouted at her, called her a liar and implied that she was within 1% of the staff that she did not consider to be friends.

102. There was no contact between the first respondent and the claimant

following her going off sick on 08 April 2020 resigning. Nobody at the respondent tried to contact the claimant. And the claimant did not attempt to contact the respondents.

Conclusions: Direct disability discrimination

103. In respect of allegation 31 and 32 of the list of direct disability discriminations, even if they were found to happen and were detrimental treatment, there is no evidence adduced by the claimant from which the tribunal could conclude that they were because of the claimant's anxiety.
104. The meeting between Ms Tullett and the claimant on 08 April 2020, and whatever happened during it, was as a direct consequence of the claimant's mother's phone call to the Greater Manchester Dental Emergency Line and her use of a false name, that was discovered by Ms Tullett. That was the reason behind such events. It was not because of the claimant's anxiety that she was subjected to any of the alleged treatment.
105. There is simply no evidence brought to support that the reason why the respondents did not make contact with the claimant during the period in question could have been for reasons connected to her disability.
106. The issue of dismissal is considered below.
107. In these circumstances, the complaints of direct disability discrimination are dismissed in their entirety.

Findings of fact: Reasonable adjustment complaint

108. The claimant was moved from what she describes as her usual role in orthodontics, to work in decontamination, before being transferred to work in general nursing. During this time, she was moved from working alongside Mr King, to work alongside a dentist named Viv. This is addressed in the claimant's evidence at paragraphs 32 and 33.
109. The claimant was not seeking to move to alternative roles to avoid having to work with her usual colleagues. The claimant was reluctant to do so due to the risk of deskilling.
110. The claimant raised a grievance, and this was investigated, the outcome of which was sent to the claimant on 19 November 2019 (see p.359).
111. The claimant did not raise concerns with the respondent that she was particularly anxious about working in an environment where there was a risk of contracting COVID 19.
112. The claimant's concerns about being in the workplace after April 2020 were due to other medical problems and the concerns about walking long distances and/or using public transport (see para 49-57 of Claimant's

witness statement). The claimant does not give evidence as to how such a requirement to attend work, put her at a substantial disadvantage when compared to somebody without her disability. She gives evidence of general anxiety that would affect everybody, and identifies disadvantages she was at due to medical reasons outside of her anxiety.

Conclusions: Reasonable adjustment complaint

113. Given the findings above, the tribunal concludes that the claimant has not satisfied the tribunal that the respondents operated any of the first three PCP's.
114. In respect of the PCP that the respondents had a requirement for staff to work with their usual colleagues, and the PCP that the respondents had a requirement for staff to work their normal duties, then the claimant's own evidence suggests otherwise. The claimant was moved into different roles and to work with different people and therefore this tribunal concludes that no such PCPs are applied in this case.
115. In respect of the third PCP, that the respondents had a practice of not investigating grievances. The claimant's own evidence centres on her disagreeing with the outcome. The tribunal was satisfied that the grievance was investigated, albeit reaching a conclusion that the claimant disagreed with. This tribunal concluded that no such PCP existed.
116. Turning to the fourth PCP, that the respondents had a requirement for staff to work in an environment that could expose them to coronavirus, during the pandemic The claimant has not produced any evidence to support that such a PCP existed. Her own evidence was that others, such as Lauren Whelan (see para 58) could work from home. The claimant has not produced evidence of such a requirement.
117. Further, the claimant has not adduced evidence that supports that she was subject to the substantial disadvantages as alleged. Particularly in respect of the fourth PCP, the claimant's evidence supports that her concerns about being in the workplace were for reasons connected to other medical issues. She has not satisfied the tribunal that she was put at a substantial disadvantage of increased anxiety when compared to somebody without her disability.

Findings of fact: Victimisation complaint

118. The claimant did not on 25 June 2019 raise any matter that implied that that Ms Tullett was discriminating against her because of her age, and particularly did not express that the claimant would not be able to take on a trainee as she was too old. The reason why the tribunal reaches this conclusion is that the claimant deals with matters of 25 June 2019 at paragraphs 8-10 of her witness statement. The claimant's own evidence does not support that this took place.

119. The claimant did not accuse Ms Tullett of bullying and harassing her on 06 September 2019. The claimant addresses 06 September 2019 in her witness statement at paragraphs 22 and 23. At its height, the claimant says to Ms Tullett that she is 'sick of being harassed and singled out'. The claimant's own evidence does not support that she had made a protected act on this date.
120. The claimant's mother, in the meeting on 16 September 2019, did not allege that Ms Tullett was bullying and harassing the claimant. Again, the tribunal does not accept that this happened. The claimant gave her evidence in paragraph 31 of her witness statement and does not give any evidence that this happened. At its height, in the meeting note (see p.358), it is recorded that the claimant's mother had said that 'Debbie was unprofessional, discriminatory against Amber and manipulative of Amber, which she could evidence'. However, no context or explanation was provided. This was, at most, an unsubstantiated allegation made by the claimant's mother, for which no detail was provided.
121. The claims presented by the claimant under claim numbers 2414182/2019 and 2415092/2019 do raise discrimination matters. These did bring proceedings under the Equality Act 2010.
122. Save for the cancellation of the Christmas Party in 2019, there is no evidence brought by the claimant that the detriments complained of were caused by her having presented claims with the Employment Tribunal. The allegations of victimisation, save for the allegation concerning the cancellation of the 2019 Christmas Party (dealt with below), fail for want of evidence.
123. On balance, the tribunal concluded that the December 2019 Christmas party was cancelled as a result of incidents that had taken place between staff members at the previous two Christmas parties, which had caused issues between the staff members involved. The tribunal reached this conclusion based on the claimant's own evidence under cross examination, where she explained that at the 2018 party she had fallen out with Fran, after which the claimant was found by Ms Tullett sometime after crying in the stockroom. Further, the claimant described a punching incident involving a colleague called Lisa at a previous party.

Conclusions: Victimisation complaint

124. Following the findings above, the tribunal is not satisfied that there was a protected act on 25 June 2019, 06 September or 16 September 2019. The claimant's evidence, nor the documents before the tribunal, support that a protected act was made on any of those three dates.
125. The tribunal does find that the bringing of the claims under claim numbers 2414182/2019 and 2415092/2019 were protected acts.
126. However, there is no evidence adduced by the claimant that supports

that any of the alleged protected acts (either those found to be protected acts or those found not to be) caused the detriments relied upon in the victimisation complaint. The claimant does not satisfy the initial burden of proof that rests on her in respect of the causal connection between the detrimental treatment and an alleged protected act.

127. The claim of victimisation fails in its entirety.

Findings of fact: Constructive dismissal

128. By 20 March 2020 at the latest, the claimant had signed up to the website Indeed. This was with a view to finding work away from the first respondent. By this time, the claimant was actively looking for a new job.

129. On 21 March 2020, the claimant started a trial shift with Peakes Dental Practice.

130. The 08 April 2020 was the claimant's last day at work before going on long term sick.

131. On 09 April 2020, the claimant was offered a job role with Thameside and Glossop Integrated Care (see p.379).

132. On 01 July 2020, the claimant explained to her GP that she was actively trying to get another job (p.807), and repeated this on 27 July 2020 (p.806) and 10 August 2020 (p.806).

133. By mid-August 2020, the claimant had started regular work for Peakes Dental Practice, a matter accepted by the claimant under cross-examination. This was at least 17 hours per week. The tribunal rejected the claimant's submission that she started working only on Saturdays, building up to 17 hours per week and that the reason behind taking on this role was for her mental health. This was rejected on the basis that the claimant opted to not disclose any relevant documents around this, despite it being relevant and despite being required to do so by the tribunal. The tribunal thus concluded that this was deliberate and for the purpose of hiding that she was working 17 hours per week whilst still under the employment of the first respondent. This was also supported by the newspaper report that had been disclosed during these proceedings, which was dated 16 August 2020, and identified the claimant expressly as a dental nurse that formed part of the clinical team at Peakes Dental Practice.

134. The claimant exhausted her statutory sick pay with the first respondent around 30 November 2020 (see p.474).

135. The claimant resigned on 09 December 2020.

Conclusions: Constructive dismissal

136. With respect the constructive dismissal complaint, the tribunal has

taken a proportionate approach to its findings and limited its findings and conclusions to the reasons behind why the claimant resigned.

137. To establish that the claimant has been constructively dismissed, the burden of proof rests on the claimant to establish that she resigned in response to a repudiatory breach of her contract by her employer.
138. Given our findings above, the tribunal was satisfied that the claimant resigned from her post with the first respondent because she had secured alternative work, which she had already started some months previous, and had exhausted her Statutory Sick Pay entitlement. It was these two combined that was the reason behind the claimant's resignation. That is not a resignation because of a repudiatory breach, and therefore the claimant has not been constructively dismissed.
139. The tribunal also concludes, given the above, that the claimant's allegations that she was dismissed either because of her disability or for having done a protected act must also fail.
140. The claimant was not dismissed in this case. Her claim for unfair dismissal therefore fails.

Unauthorised deduction from wages

141. The claimant's contract contains a clause that allows for deduction from wages to recover costs of training (the contract starts at p.341, with clause 27 addressing deductions from wages found at p.346).
142. The claimant received a copy of her contract and was aware of this clause. The claimant submitted that she had no received a copy of her contract. However, the tribunal rejects this submission. The claimant's own evidence, in her witness statement at para 20, is that she disputed specific parts of her contract. In order to be able to raise issues with it , she must have had a copy of it.
143. Further, the claimant explained under cross-examination that she had had 3 pay rises, but only received 2 contracts during her time with the respondent. The claimant must therefore have had a copy of her initial contract. This finding is consistent with the claimant's own evidence.
144. The contracts that the claimant had received both contained clause 27. On balance we make this finding given that there is no suggestion otherwise.
145. In these circumstances, the claimant has not satisfied the tribunal that she has been subjected to any unauthorised deductions from her wages for deductions to repay training costs. This was provided for in her contract, a copy of which the claimant had received. The deductions for training costs were therefore lawful deductions.

OVERALL CONCLUSIONS

146. Given the above, the tribunal has concluded that the claims brought by the claimant are dismissed in their entirety.
147. The tribunal does not consider it necessary to consider the out of time point that was a live issue in this case.
148. Following an indication by the tribunal that the claimant's conduct had not extended the length of hearing, the respondent did not pursue an application for costs.

Employment Judge M Butler

Date_18 January 2024_____

JUDGMENT SENT TO THE PARTIES ON

22 January 2024

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

1. Time limits

1.1 Given the date the claim forms were presented and the effect of early conciliation, any complaint about something that happened three months before the claim may not have been brought in time.

1.2 Were the discrimination and victimisation complaints made within the time limit in[section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal (Please note dismissal is also brought as an act of discrimination/victimisation)

Dismissal

2.1 Can the claimant prove that there was a dismissal?

2.1.1 Did the respondent do the following things:

1. 25/6/19 R3 singling out the claimant in front of colleagues and pressurising her to discuss the pay of a trainee.

2. 25/6/19 In the same discussion, R3 calling the claimant a “shit stirrer”, “immature” and a “bully”.

2A. 25/6/19 In the same discussion, R3 telling the claimant to leave if she did not agree with the pay system and telling her not to approach Ms Roberts, because it was stressing her out.

3. 27/8/19 R3 subjecting the claimant to a tirade of abuse over the telephone, saying that Mr King would not be happy if she did not do X-rays and that she should do the job “or else...”

4. 28/8/19 R3 sharing the claimant's confidential contract with Lisa Roberts
5. Failed to provide the claimant with a written contract of employment for four years
6. About 28/8/19 R1 Gave the claimant a smaller pay rise than colleagues who had less skills, qualifications or experience
- 7 R1 unlawfully deducted sums from the claimant's wages in respect of training fees without her knowledge or consent
8. 3/9/19 R3 Approached the claimant during her lunch break, to discuss matters relating to the dispute between them relating to pay and her contract of employment
9. 4/19/19 R3 snapping at the claimant when she asked for further information. Telling the Claimant that
 - If she did not sign her contract she would not have a job
 - She did not thin that the claimant should have been nominated for the orthodontics course
 - If she did not like it she could leave and
 - Her supervisor would be "anyone you fucking want it to be"
- 10 6/9/19 On the claimant's return from lunch Ms Tullet encouraged Ms Roberts to join in what should have been a private discussion about pay/contract and whether she should have been on the training course
- 11 6/9/19 In the same conversation, Ms Tullet accusing the Claimant of rudeness when she went to put something in the bin, shouting at the claimant and not letting her get a word in.
- 12 Unclear Ms Tullet copied Ms Roberts into emails concerning the Claimant
- 13 Unclear Ms Roberts emailed the claimant directly on behalf of the practice in relation to her dispute with Ms Tullet when Ms Roberts was not a manager
- 14 9/9/19 When the Claimant produced a fit note recommending lighter duties, Ms Roberts repeatedly questioned the Claimant about what she wanted to do. Mr King refused to pass comment on the fit note.
- 15 9/9/19 Ms Roberts expected the claimant to work in Rochdale, knowing Ms Tullet would be there

16 9/9/19 and 10/9/19 The Respondent failed to accommodate the claimant's request for light duties in accordance with the recommendation with the claimant's first fit not and subsequently withdrew the offer of duties previously made

17 16/9/19 Me King refused to discuss the claimant's allegations of bullying and harassment during a wellbeing meeting

18 16/9/19 Mr King invited Lisa Roberts to participate in the meeting- it is the claimant's case that Ms Roberts had no need to be in attendance

19 November 2019 Failing to give the claimant a pay rise when she completed her orthodontics course

20 Sep to Dec 2019 Failing to stay in touch with the claimant

21 February 2020 Criticising the claimant for having done an x-ray with Adele Scanlon

22 Unclear Ms Tullett telling the claimant that she would have to repay her course fees back if she left KDPG Ltd

23 17/9/19 Mr King demoted the Claimant and required her to work in the decontamination room. It is the Claimant's case that placing her in this role meant she was unable to qualify for an increase in pay and exercise the skills for which she had been trained

24 After 16/9/19 Mr King approached staff members who would "back up" Ms Tullett's version of events, but did not interview the claimant.

25 Unclear On "a few occasions" when Ms Tullett needed something that could have been provided by the claimant, she would bypass the claimant and ask someone else.

26 Daily Mr King greeted colleagues every morning but would not greet the claimant.

27 Unclear Ms Tullett removed the claimant from acting as the nurse when Ms Tullett's daughter came in for an appointment.

28 Christmas Mr King cancelled the annual Christmas party so that colleagues would feel resentful and take it out on the claimant.

29 Unclear Mr King started going into the staff room during breaks. She believes that he did this in order to make her feel uncomfortable.

30 January 2020 Ms Tullett instructed Ms Roberts to ask the claimant questions about her mental health and her medication.

31 9 April 2020 Following the Claimant's mother's complaint to the GDC around covid health and safety the Respondent discovered this. The Respondent blocked the claimant from leaving work and said she needed to attend a meeting in front of other members of staff Ms Tullett shouted at the claimant, called her a liar, implied that the claimant was one of the 1% of people who were not her friends, and raised the subject of the claimant's claim to the tribunal saying to the Claimant 'bring it on'. Ms Tullett and Ms Roberts were standing over the claimant at a time of COVID risk.

32 April 2020 onwards The respondents failed to contact the claimant whilst on sick leave for 28 weeks.

2.1.2 Did that breach the implied term of trust and confidence? Taking account of the actions or omissions alleged in the previous paragraph, individually and cumulatively, the Tribunal will need to decide:

2.1.2.1 whether the respondent had reasonable and proper cause for those actions or omissions, and if not

2.1.2.2 whether the respondent behaved in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.

2.1.3 Did that breach an express term of the contract?

2.1.4 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

2.1.5 Was the fundamental breach of contract a reason for the claimant's resignation?

2.1.6 Did the claimant affirm the contract before resigning, by delay or otherwise? 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.

Reason

2.2 Has the respondent shown the reason or principal reason for the fundamental breach of contract?

2.3 Was it a potentially fair reason under section 98 Employment Rights Act 1996?

2.4 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

The Tribunal will usually decide, in particular, whether:

2.4.1 The respondent genuinely believed the claimant had committed misconduct;

2.4.2 there were reasonable grounds for that belief;

2.4.3 at the time the belief was formed the respondent had carried out a reasonable investigation;

2.4.4 the respondent followed a reasonably fair procedure;

2.4.5 dismissal was within the band of reasonable responses.

2.5 What was the reason or principal reason for dismissal? The respondent says the reason was a substantial reason capable of justifying dismissal, namely [].

2.6 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

4. Disability

4.1 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, namely June 2019 to December 2020. The Tribunal will decide:

4.1.1 Did s/he have a physical or mental impairment?

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

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

4.1.4 If so, would the impairment have had a substantial adverse effect on his/her ability to carry out day-to-day activities without the treatment or other measures?

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

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

4.1.5.2 if not, were they likely to recur?

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

5.1 Did the respondent do the following alleged things:

1. 9/9/19 When the claimant produced a fit note recommending lighter duties, Ms Roberts repeatedly questioned the claimant about what she wanted
2. Unclear Mr King started going into the staff room during breaks. She believes that he did this in order to make her feel uncomfortable.
3. January 2020 Ms Tullett instructed Ms Roberts to ask the claimant questions about her mental health and her medication.

5.2 If so, was that unwanted conduct?

5.3 Was it related to disability ?

5.4 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?

5.5 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.

6. Direct disability discrimination (Equality Act 2010 section 13)

6.1 What are the facts in relation to the following allegations:

1. 25/6/19 R3 Singling out the claimant in front of colleagues and pressurising her to discuss the pay of a trainee.

Comparator:
Maisie Holland or
hypothetical

2. 25/6/19 In the same discussion, R3 calling the claimant a "shit stirrer", "immature" and a "bully".

Comparator:
Maisie Holland or

hypothetical

2A. 25/6/19 In the same discussion, R3 telling the claimant to leave if she did not agree with the pay system and telling her not to approach Ms Roberts, because it was stressing her out.

Comparator:
Maisie Holland or
hypothetical

3. 27/8/19 R3 subjecting the claimant to a tirade of abuse over the telephone, saying that Mr King would not be happy if she did not do X-rays and that she should do the job "or else..."

Comparator:
Maisie Holland or
hypothetical

6 and 7 About 28/8/19 R1 Gave the claimant a smaller pay rise than colleagues who had less skills, qualifications or experience R1 unlawfully deducted sums from the claimant's wages in respect of training fees without her knowledge or consent

Comparator Lauren Osborne/hypothetical

8. 3/9/19 R3 Approached the claimant during her lunch break, to discuss matters relating to the dispute between them relating to pay and her contract of employment

Comparator: hypothetical

9. 4/19/19 R3 snapping at the claimant when she asked for further information. Telling the Claimant that

- If she did not sign her contract she would not have a job
- She did not thin that the claimant should have been nominated for the orthodontics course
- If she did not like it she could leave and
- Her supervisor would be "anyone you fucking want it to be"

Comparator Lauren Osborne who also did not want to sign the contract and/hypothetical

10 6/9/19 On the claimant's return from lunch Ms Tullet encouraged Ms Roberts to join in what should have been a private discussion about pay/contract and whether she should have been on the training course

Comparator hypothetical

11 6/9/19 In the same conversation, Ms Tullett accusing the claimant of rudeness when she went to put something in the bin, shouting at the claimant and not letting her get a word in

Comparator : hypothetical

19 November 2019 Failing to give the claimant a pay rise when she completed her orthodontics course

Comparator: hypothetical

20 Sep to Dec 2019 Failing to stay in touch with the claimant

Comparator: Hypothetical

21 February 2020 Criticising the claimant for having done an x-ray with Adele Scanlon

Comparator: hypothetical

22 Unclear Ms Tullett telling the claimant that she would have to repay her course fees back if she left KDPG Ltd

Comparator hypothetical

23 17/9/19 Mr King demoted the Claimant and required her to work in the decontamination room. It is the Claimant's case that placing her in this role meant she was unable to qualify for an increase in pay and exercise the skills for which she had been trained

Comparator: hypothetical

24 After 16/9/19 Mr King approached staff members who would "back up" Ms Tullett's version of events, but did not interview the claimant.

Comparator: hypothetical

25 Unclear On "a few occasions" when Ms Tullett needed something that could have been provided by the claimant, she would bypass the claimant and ask someone else.

Comparator: hypothetical

26 Daily Mr King greeted colleagues every morning but would not greet the claimant.

Comparator: hypothetical

27 Unclear Ms Tullett removed the claimant from acting as the nurse when Ms Tullett's daughter came in for an appointment.

Comparator: hypothetical

28 Christmas Mr King cancelled the annual Christmas party so that colleagues would feel resentful and take it out on the claimant.

Comparator: hypothetical

29 Unclear Mr King started going into the staff room during breaks. She believes that he did this in order to make her feel uncomfortable.

Comparator: hypothetical

30 January 2020 Ms Tullett instructed Ms Roberts to ask the claimant questions about her mental health and her medication.

Comparator: hypothetical

31 9 April 2020 Following the Claimant's mother's complaint to the GDC around covid health and safety the Respondent discovered this. The Respondent blocked the claimant from leaving work and said she needed to attend a meeting in front of other members of staff Ms Tullett shouted at the claimant, called her a liar, implied that the claimant was one of the 1% of people who were not her friends, and raised the subject of the claimant's claim to the tribunal saying to the Claimant 'bring it on'. Ms Tullett and Ms Roberts were standing over the claimant at a time of COVID risk.

32 April 2020 onwards The respondents failed to contact the claimant whilst on sick leave for 28 weeks.

Comparator: Hypothetical

33 09/12/2020 Dismiss the claimant

6.2 Did the claimant reasonably see the treatment as a detriment?

6.3 If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances without a disability? [The claimant says s/he was treated worse than the names of the comparators set out in the table aboveor The claimant relies on a hypothetical comparison.

6.4 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of disability?

6.5 If so, has the respondent shown that there was no less favourable treatment because of disability?

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

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

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

7.2.1 The requirement for staff to work with their usual colleagues (as per employment judge Sharkett table)

7.2.2 The requirement for staff to work their normal duties (as per employment judge Sharkett table)

7.2.3 The practice of not investigating grievances

7.2.3 The requirement for staff to work in an environment that could expose them to coronavirus, during the pandemic

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

7.3.1 The Claimant was less able to work with a colleague with whom she was having a dispute because of her anxiety

7.3.2 By reason of her anxiety the claimant could not carry out her full duties

7.3.3 Because of her anxiety, leaving grievances unresolved in the workplace caused her greater disadvantages than someone without anxiety

7.3.4 Because of the claimant's anxiety she was particularly anxious about working in an environment with risks of contracting Covid 19

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

7.5 Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

7.7.1 Allowing the Claimant to work away from Ms Tullet

7.7.2 Allowing the Claimant light duties as recommended by her Dr

7.7.3 Investigating the Claimant's grievances including holding an investigation meeting

7.7.4 Offering to put the Claimant on furlough leave

7.8 By what date should the respondent reasonably have taken those steps?

8. Victimisation (Equality Act 2010 section 27)

8.1 Did the claimant do a protected act as follows:

8.1.1 On 25 June 2019, the claimant made an implied allegation of age discrimination, in that she accused Ms Tullett of having said that she would not be able to take on a trainee, Maisie Holland, because she was too old.

8.1.2 On 6 September 2019 (during the conversation referred to in the discrimination and harassment complaints), the claimant accused Ms Tullett of bullying and harassing her.

8.1.3 During a meeting on 16 September 2019, the claimant's mother alleged on the Claimant's behalf that Ms Tullett was bullying and harassing the Claimant
(It is the Claimant's case that these two allegations carried with them the implication that the harassment was in relation to the claimant's age and/or disability. She was therefore impliedly alleging the EqA had been contravened

8.1.4 The claimant presented claims 2414182/2019 and 2415092/2019 to the tribunal.

8.3 Did the respondent do the following things:

Date Brief description

1. 25/6/19 Singling out the claimant in front of colleagues and pressurising her to discuss the pay of a trainee.
2. 25/6/19 In the same discussion, calling the claimant a "shit stirrer", "immature" and a "bully".
3. 25/6/19 In the same discussion, telling the claimant to leave if she did not agree with the pay system and telling her not to approach Ms Roberts, because it was stressing her out.
4. 3/9/19 Approaching the claimant during her lunch break, ignoring the claimant's wishes not to discuss matters informally.
5. 6/9/19 In the conversation that occurred on the claimant's return from her lunch break (see the allegations of discrimination and harassment above), when the claimant expressed her concerns about feeling harassed, Ms Tullett continued.
6. 17/9/19 The claimant was "demoted".
7. After 16/9/19 Mr King approached staff members who would "back up" Ms Tullett's version of events, but did not interview the claimant.
8. Unclear On "a few occasions" when Ms Tullett needed something that could have been provided by the claimant, she would bypass the claimant and ask someone else.

9. Daily Mr King greeted colleagues every morning but would not greet the claimant.

10. Unclear Ms Tullett removed the claimant from acting as the nurse when Ms Tullett's daughter came in for an appointment.

11. Christmas 2019 Mr King cancelled the annual Christmas party so that colleagues would feel resentful and take it out on the claimant.

12. Unclear Mr King started going into the staff room during breaks. She believes that he did this in order to make her feel uncomfortable.

13. January 2020 Ms Tullett instructed Ms Roberts to ask the claimant questions about her mental health and her medication.

14. 9 April 2020 Ms Tullett shouted at the claimant, called her a liar, implied that the claimant was one of the 1% of people who were not her friends, and raised the subject of the claimant's claim to the tribunal. Ms Tullett and Ms Roberts were standing over the claimant at a time of COVID risk.

15. April 2020 onwards The respondents failed to contact the claimant whilst on sick leave for 28 weeks.

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

8.5 If so, has the claimant proven facts from which the Tribunal could conclude that it was because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act?

8.6 If so, has the respondent shown that there was no contravention of section 27?

10. Unauthorised deductions

10.1 Were the wages paid to the claimant less than the wages s/he should have been paid in money was deducted from her wages to pay for a training course, without her knowing?

10.2 Was any deduction required or authorised by statute?

10.3 Was any deduction required or authorised by a written term of the contract?

10.4 Did the claimant have a copy of the contract or written notice of the contract term

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before the deduction was made?

10.5 Did the claimant agree in writing to the deduction before it was made?

10.6 How much is the claimant owed?