Case No: 2405590/2023

EMPLOYMENT TRIBUNALS

Claimant: Mrs C Mattis

Respondent: Mr D Parish

Heard at: Manchester Employment Tribunal

On: 31 January, 01 and 02 February 2024, and 06 March 2024 (in chambers, with no parties)

Before: Employment Judge M Butler
Mr I Frame
Ms V Worthington

Representation
Claimant: In person
Respondent: Mr R Powell (of Counsel)

JUDGMENT

1. The allegation of indirect disability discrimination is dismissed on withdrawal.

2. The complaint of harassment related to disability is not well founded and is dismissed.

3. The complaint of discrimination arising from disability is not well founded and is dismissed.

4. The complaint that the respondent had failed in his duty to make reasonable adjustments is not well founded and is dismissed.

5. The claim for unfair (constructive) dismissal is not well founded and is dismissed.

6. For the avoidance of doubt, no claims in this case succeed. And all claims have been dismissed.

REASONS

INTRODUCTION

7. The decision in this case was reserved at the end of the liability hearing on 02 February 2024. The tribunal commenced its deliberations on 02 February 2024, but met again in chambers on 06 March 2024 to conclude this process. A decision was reached on 06 March 2024. However, some time was needed to complete the reserved decision. This is that reserved decision.

8. The claim was presented by the claimant on 28 April 2023. The claimant brought claims for unfair dismissal, disability discrimination and for other payments.

9. The claim was considered at a Case Management Preliminary Hearing by Employment Judge Buchanan on 09 August 2023. As part of the record of that hearing, EJ Buchanan appended a list of issues, which was based on those case management discussions.

10. Following that hearing, and as explained to the tribunal at this hearing, there is a second list of issues that has been produced to be used at this hearing. This is the version at pages 71-78. Most notably, this did not include a complaint of indirect disability discrimination (which was contained in EJ Buchanan's annex). The claimant confirmed that she was not pursuing a complaint of indirect disability discrimination on the morning of day 2. The claimant withdrew her indirect disability discrimination complaint. Any reference to indirect disability discrimination is therefore dismissed on withdrawal. The parties confirmed that the List of Issues at pages 71 to 78 remained the issues to be determined in this case. The tribunal proceeded on this basis.

11. The tribunal was assisted with an evidence file that ran to 427 electronic pages.

12. The claimant gave evidence on her behalf and called no additional witnesses.

13. The respondent called the following witnesses to give evidence:

    a. Mr Parish, who is the respondent in this case and the owner and senior partner of the business that employed the claimant.
    b. Ms Jenny Lui, who worked alongside the claimant and was employed as Personal Assistant to Mr Parish.
    c. Ms Tina Clegg, who was appointed by Mr Parish as maternity cover for Ms Lui.

LIST OF ISSUES

14. For ease, the list of issues has been attached to the back of this document. However, this is subject to the following clarifications that the claimant

explained to the tribunal during the progress of this case:

a. Reference to requiring the claimant to work in breach of health and safety regulations was explained by the claimant as the respondent not having undertaken a Display Screen Assessment ('DSE') assessment.

b. The complaint of indirect disability discrimination was withdrawn by the claimant on the morning of day 2 of the hearing.

c. Allegation 2.1.1.3 covers the matters referred to in allegation 2.1.1.6.

d. Allegation 2.1.1.5 is referring to failing to investigate a suitable chair.

e. Allegation 2.1.1.7 is referring to in-work support, rather than workplace adjustments.

f. Allegation 2.1.1.11 is referring to the claimant bringing in her own cushion and hot water bottle.

15. The claim was initially pursued on both a physical and mental impairment. The physical impairment concerned the effects on the claimant following a road traffic accident. This included nerve pain in the lower back, legs, arms, hands and fingers, pain in the neck, shoulders and upper and lower back and weakness in the right arm and hand. The mental impairment concerned adjustment disorder with anxiety and depressed mood of moderate severity. The respondent had, in advance of this hearing, conceded that the claimant's physical impairment amounted to a disability pursuant to s.6 of the Equality Act 2010, but not in respect of the mental impairment.

16. At this hearing on the second day, the claimant, having considered her disability discrimination complaints carefully, explained that none of the claims she brought was being brought in relation to her mental impairment. The claimant's claim was thus amended to a disability discrimination complaint that was brought on a physical impairment only.

17. In respect of the allegation that the respondent had failed in its duty to make reasonable adjustments, the claimant explained to the tribunal that this complaint related to 10 January 2023 onwards only. And that she was not bringing any complaint about matters before that date. The decision of the tribunal in respect of reasonable adjustments is therefore limited to events starting from 10 January 2023.

LAW

Constructive dismissal

18. 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.

19. 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**.

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

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

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

23. 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.

24. 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.'

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

26. 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."

Harassment related to disability

27. Protection against harassment related to disability 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

28. 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.

29. The tribunal reminded itself that when considering a claim for a failure in the duty to make reasonable adjustments, that there is need to establish knowledge (actual or constructive) of the substantial disadvantage alleged on the part of the respondent.

30. In **Tarbuck v Sainsbury's Supermarkets Ltd 2006 IRLR 664**, and followed in **Salford NHS Primary Care Trust v Smith EAT 0507/10**, the EAT held that carrying out an assessment as to what adjustments may be made was not, of itself, capable of amounting to a reasonable adjustment. In short, the assessment itself is not capable of removing or reducing the substantial disadvantage, rather it merely identifies means of doing so.

Discrimination arising from disability

31. Protection against discrimination arising from disability is contained at section 15 of the Equality Act 2010.

15.Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a)A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

Burden of Proof under the Equality Act 2010

32. 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.

33. Lord Justice Mummery (with which Laws and Maurice Kay LJJ 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)

34. 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…."

35. 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.

36. 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. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment.

Variation of contract

37. According to the EAT in **Jones v Associated Tunnelling Co Ltd 1981 IRLR 477, EAT**, implying an agreement to vary a contract '…should be adopted with great caution'. Further, 'if the variation relates to a matter which has immediate practical application (e.g. the rate of pay) and the employee continues to work without objection after effect has been given to the variation (e.g. his pay packet has been reduced) then obviously he may well be taken to have impliedly agreed. But where… the variation has no immediate practical effect the position is not the same.'

38. Similarly in **Solectron Scotland Ltd v Roper and ors 2004 IRLR 4** *the EAT* stated:

> 'The fundamental question is this: is the employee's conduct, by continuing to work, *only referable* to his having accepted the new terms imposed by the employer? That may sometimes be the case. For example, if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change, they must either refuse to implement it or make it plain that by acceding to it, they are doing so without prejudice to their contractual rights. But sometimes the alleged variation does not require any response from the employee at all. In such a case if the employee does nothing, his conduct is entirely consistent with the original contract containing; it is not only referable to his having accepted the new terms. Accordingly, he cannot be taken to have accepted the variation by conduct.'

39. Although the tribunal reminded itself that although such an inference may be taken, it is not an inference that will be drawn easily. And that the question of what inferences can be drawn will depend on the circumstances in the case.

Unlawful deduction from wages

40. 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…'

41. It was accepted by the EAT in ***Cleeve Link Ltd v Bryla*** **[2014] IRLR 86**, that ordinary contract principles apply to employment contracts.

CLOSING SUBMISSIONS

42. The tribunal benefitted from oral closing submissions from both parties. These are not repeated here but have been taken into account when 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.

43. The claimant started her employment with the respondent on 04 June 2018. She was employed as a Paraplanner/New Business Administrator.

44. As part of the claimant's contract (see pp.89-96), the claimant was entitled to sick pay at the statutory level only. Any payments over and above statutory sick pay rates was at the discretion of the employer (see clause 7.4 of the claimant's contract on p.91).

45. The claimant worked 9 days in every two week and worked 9am to 5pm on her working days. Her contractual working day was for 8 hours. The claimant would work 5 days one week, and 4 weeks the subsequent week. And this cycle would then repeat.

46. The claimant had support from Ms Lui during her employment. She accepted under cross examination that when she requested supported, Ms Lui would provide it.

47. The claimant was involved in a Road Traffic Accident on 31 May 2021.

48. In June 2021, the respondent bought the claimant a laptop (see p.99). This was to facilitate the claimant working form home during her recovery.

49. The claimant was signed off as unfit to work from the date of her accident until the end of August 2021. During this period, the respondent used his discretion to continue to pay the claimant at her full rate of pay.

50. On 16 July 2021, there was a routine compliance meeting, which saw a review of the respondent's business. This was undertaken by Vicky Ashton of St James Place. As part of this review, it was identified that the claimant had made errors in respect of dating of letters. In essence, the claimant was dating suitability letters that made them appear to have been sent within the prescribed days when they had not been (this is the unchallenged evidence of Mr Parish, see para 23 of his witness statement, and accepted by the claimant under cross examination, and p.310).

51. On 02 November 2021, Ms Ashton met with Mr Parish in a formal compliance interview to discuss the outcome of the compliance review. The claimant was due to attend but overslept so did not. There were no consequences applied to the claimant.

52. On 04 November 2021, the claimant had a formal compliance interview with Ms Ashton (notes of which are at p.117). It was explained to the claimant that there were several anomalies in the creation and dating of Suitability Letters. The claimant accepted under cross examination that she understood that her mistakes in this regard would have a negative impact on the business.

53. On 18 January 2022, the respondent received a Verbal Warning from Dave Wheelton, Deputy Head of Business for Manchester, due to non-compliance with SJP Business protocols. This resulted in the respondent's Business Allowance being reduced, with the consequence of the amount the practice was remunerated also being reduced. This was a financial consequence applied to the respondent's business due to the claimant's

actions.

54. From around 01 September 2021, the claimant commenced a phased return to work, starting at 2.5 hours a day.

55. The claimant continued to receive full pay when the claimant returned to work on a phased return.

56. Between 31 May 2021 and December 2022, the respondent only understood the claimant's health position through the claimant communicating it to him directly, without requiring any supporting documents. The respondent trusted the claimant and simply accepted what the claimant was informing him without requiring any documentary evidence.

57. From around March 2022, because of the claimant's physical impairments (that were a result of the accident), the claimant was referred through the Physical Activity Referral Scheme ('PARS') for adapted exercise and rehabilitation classes. The claimant was to attend various classes, from March 2022. This involved classes on Mondays and Thursdays, and an adapted Pilates on Tuesdays. This is the evidence in the claimant's witness statement at paragraph 18, which is not in dispute.

58. The Monday lesson that the claimant attended started at 11.30am. The Tuesday lesson started at 2pm. Whilst the Thursday lesson started at 10am. The respondent was flexible in enabling the claimant to attend these classes as and when required.

59. On occasion, the claimant had a need for pain relief after a class. However, this was not necessary after every class. When the claimant did take pain relief she would not drive in the afternoon. The only occasion that the claimant gives evidence on where the claimant was caused pain that impacted on her driving following a PARS class was Monday 16 January 2023.

60. On 18 March 2022, the claimant emailed Mr Parish (see p.118a). This email was to update Mr Parish on her health situation. Within this email, the claimant provides the following information:

    a. An explanation of the classes she will be attending to help her recovery, as referenced above
    b. The claimant had attended a GP consultation who suggested that she try a sit to stand desk to assist her with increasing working hours.
    c. A hyperlink to a standing desk convertor.
    d. That her GP is going to provide a further fit note to increase her hours per day to 4.5 hours.

61. In response to the claimant's email of 18 March 2022, Mr Parish purchased a suitable sit to stand desk. This was delivered to the claimant's home on 21 March 2022 (see p.119).

62. On 26 September 2022, the claimant emailed the respondent. In this email the claimant provided an update on her recovery progress. The claimant informed the respondent that she could increase to 5.5 hours per day. There

is also reference to being referred to a podiatrist, to consider whether her pelvis/hips have been misaligned following the accident (see p.133).

63. On 12 December 2022, Ms Clegg was appointed for maternity cover, whilst Ms Liu started maternity leave. Ms Clegg was to cover the majority of Ms Liu's role, and that anything not covered by Ms Clegg would be covered by the respondent himself.

64. On 15 December 2022, the claimant sent to the respondent an email (see p.188) explaining that St James Place did not cover assessments for employees, and that Partners would be responsible for assessments of their own employees. The claimant explained that an assessment would ensure that she had the correct aids in place and a correct desk set up to ensure no further injury was sustained and to not affect her recovery. The claimant also forwarded an email from Peninsula's business team along with their health and safety pamphlet (see pages 190-193).

65. On 20 December 2022, the claimant had a meeting with Mr Parish.

66. Mr Parish sent the claimant a summary of the 20 December 2022 meeting on 04 January 2023. These were his notes of what were discussed (a copy of the email is at p.214).

67. Between January and March 2023, Mr Parish took control of all new business. This was work that would ordinarily have been done by the claimant. However, to try to relieve the claimant of some workload and to support the claimant. Mr Parish transferred this responsibility from the claimant to himself.

68. In reply to Mr Parish's summary, on 05 January 2023 the claimant sent Mr Parish her note of the meeting (pp.201-203). Mr Parish accepted under cross-examination that the claimant had made him aware that she had experienced pain whilst working. We therefore make the finding that in the meeting of 20 December 2022, the claimant explained to the respondent that she experienced pain as a result of using the telephone and that a headset may help, that she found the chair to be uncomfortable on her lower back, that a footrest and wrist rest would help with her posture and that the laptop height was causing her pain in her neck and lower back.

69. In the meeting on 20 December 2022, the claimant's pay was also discussed. It was explained to the claimant that the claimant's pay would be reducing to 75% of her current salary, to reflect her current working hours. The claimant at that point was only working 6 hours per working day, as opposed to her contractual working day of 8 hours (see p.202, for the claimant's calculation of this, which is further supported by the time sheets that the claimant completed for the week commencing 06 February 2023). This is equivalent to 75% of her contracted working time.

70. The claimant worked to this new arrangement. The claimant did not raise any concerns about this. However, she did query whether she would be entitled to sick pay for the hours she could not work in addition to the pay for work actually done and did query what her pay position would be should her hours increase in the future.

71. Around Mid/Late December 2022, the claimant handed to Mr Parish copies of her fit note(s) provided to her by her GP.

72. On 05 January 2023, in addition to her notes of the 20 December 2022 meeting, the claimant also attached a copy of her most recent fit note (this is at p.204). This followed an assessment on 28 December 2022. This did not identify a need for continued reduced hours. The focus of the fit note was on enabling the claimant to attend PARS classes and to consider workplace adaptations. The claimant from this point was fit to return to work on full hours.

73. On 06 January 2023 at 13.33, Mr Parish emailed the claimant in response to her note from the meeting of 20 December 2022 (see pp.212-213). In that email, the respondent explained the following:

    a. That a telephone headset would be available to the claimant from 09 January 2023.
    b. An adjustable workstation that would allow the claimant to work standing or sitting had already been purchased and in the office ready for use.
    c. That the chair was ergonomically designed and very adjustable, so an ideal seating position should be achievable.
    d. That any other changes to the claimant's workstation should wait until the new equipment needed to access the new SJP system was in place.
    e. That there were empty offices available for the claimant to use should the claimant need to take a break and stretch.
    f. That as the claimant's GP was no longer recommending 'phased return to work' then it was suggested that the claimant's working hours increased to 6 hours per day, with two days in the office. To be reviewed monthly, with the intention of moving back up to 8 hours per working day.
    g. That the respondent worked in the office on Mondays, and a Practice Admin meeting takes place on that say. As such one of the days the claimant attends the office should be Monday, with the claimant free to choose the other day.
    h. That Tina had been appointed to cover Jenny's maternity leave and may need a little time to 'find her feet'.
    i. The claimant would no longer be eligible to pay Statutory Sick Pay as that had been exhausted.

74. On 06 January 2023 at 14.54 (see p.210), the respondent emailed the claimant in respect some performance concerns, which resulted in a high number of cases where the Field Risk Officer sent the respondent notices of outstanding documents. There were at least 11 in the previous six months. The respondent concluded that working from the office would assist in more efficient hand over meetings, which should improve this process. The respondent queried the completion dates recorded on a specific client file with the claimant.

75. On 07 January 2023, the claimant emailed Mr Parish (see p.212), in response to his email referred to in paragraph 73, above. In this email, the claimant states:

a. She thanks the respondent for arranging the headset and adjustable work station.
b. She asks the respondent to arrange a footrest and a wrist rest to be provided. As this would allow her to work effectively for the full six hours.
c. She explains that she understands that the chair is ergonomic and is happy to see whether the footrest and wrist rest reduces the pain. The claimant also asks whether the respondent could show her how to adjust her chair.
d. The claimant explains that if the adjustments referred to in this email were in place, then she would be able to return to the office on Tuesday 10 January.

76. Mr Parish ordered a phone headset on 06 January 2023 to be delivered to the claimant on 09 January 2023 (see p.211). No other items were ordered at this time.

77. From 09 January 2023, inclusive, until the claimant's resignation, the Monday morning admin meeting never took place.

78. On Monday 09 January 2023, at 17.56 (p.216b), the claimant emailed the respondent in response to his email referred to at paragraph 74 above, in respect of performance concerns. The claimant raises concerns about her workload with the respondent in this email.

79. 09 January 2023 at 18.06, the claimant emailed the respondent (p.216). In this email the claimant explained that she would be attending the office at 10am the following day (which was a Tuesday). That she had a class at 2pm, and would have her Pilate's mat, hot water bottle and a cushion with her. The claimant also explained that the cushion she is bringing is one that she uses at home 'which could help with the chair'.

80. The claimant attended the office on Tuesday 10 January 2023. However, she left at 2pm to attend a Pilates class (see p.216). The claimant never returned to work that day but worked from home.

81. A brochure for Ellie Physio and Wellness was available at the premises of the respondent (see pp.349-351). This explains the services that Ellie provides and includes ergonomic assessments of the workstation and work area, HSE approved workstation assessments, posture and advice on the safe use of computers.

82. Whilst in work, on 10 January 2023, the claimant bumped into Ellie on the stairs and discussed whether she could provide an assessment. Ellie advised the claimant that she could carry out an ergonomic assessment and would do so free of charge. Following on from this, the claimant informed the respondent that she was going to ask Ellie to come in and undertake an assessment.

83. The claimant emailed the respondent on 12 January 2023 (see p.219) to further explain that she would arrange a time for Ellie (whose name is Elana) to come and do an ergonomic assessment (as it was better than nothing). The claimant did not tell the respondent that she would only arrange the assessment once the adjustments were in place. We reject this evidence

from the claimant, which was given under cross-examination. This was something not included in the claimant's witness statement. And is not plausible given the email of 12 January 2023, which would have made this clear if that was the case.

84. It would form part of the claimant's role to organise workplace assessments for employees of the respondent. The claimant accepted this under cross-examination.

85. The claimant at no point invited Ellie in to do any form of ergonomic assessment.

86. A meeting on 16 January 2023 was arranged by email between the claimant and the respondent (see pp.219- 218). The claimant raised difficulty with attending an afternoon meeting as she could not guarantee she would be fit to drive after her rehabilitation class.

87. The claimant had arranged to be given a lift to work following her rehabilitation class on 16 January 2023 to enable her to attend the formal meeting. However, this lift became unavailable at the time, with her being informed around 12.30pm, which was 90 minutes before the meeting was due to start. The claimant delayed taking pain relief and drove to work after her class had finished. This was the claimant's evidence under cross-examination.

88. On 16 January 2023, the claimant attended a meeting with the respondent. In that meeting, the claimant's performance issues that had been raised on 06 January 2023 were discussed. And the claimant agreed to speak to Ms Aston correct the procedure, having admitted to having made the mistakes identified (see p.230). The respondent expresses that this is causing extreme concern.

89. The claimant took a period of annual leave between 17 January and 30 January 2023. During this time, she spent one week in Cape Verde. And then on a period of annual leave from 03 to 06 February 2023.

90. The claimant returned to work from her annual leave on 07 February 2023.

91. On 02 February 2023, a letter was sent by the respondent to the claimant., requiring her to attend an investigatory meeting. This was arranged to take place on 09 February 2023.

92. The claimant is signed off as being unfit for work for the period 04 February to 26 March 2023. This was due to chronic low back pain and shoulder pain. This was an amended fit note to include a reference to allow the claimant to work from home (p.325).

93. On 06 February 2023, the claimant emails the respondent a letter entitled 'Request to Make Reasonable Adjustments' (see pp.221-222c). The claimant identifies 4 suggested aids for her:

    a. A foot rest.
    b. A wrist rest.
    c. A suitable chair.

d. A suitable screen height for her laptop.

94. Within her email of 06 February 2023, the claimant also raised the following:
    1. She raises some physical impacts she says she is enduring due to her physical impairments.
    2. That she had some other coping mechanisms that she uses when working form home.
    3. Details the issues she had driving to the meeting on 16 January 2023, having had to withhold taking pain killers.

95. The respondent, on 06 February 2023, ordered the following items: a wrist rest (see p.223), a footrest (see p227) and a laptop riser (p.228), all with a delivery date of 07 February 2023.

96. On 09 February 2023, there was a formal investigation meeting between the claimant and the respondent (see respondent's email to claimant at p.235 and the claimant's notes of that meeting at pp.232-233). In this meeting the compliance issue was discussed, the claimant's workload was discussed, the claimant's reduced salary was discussed, and the position of reasonable adjustments was discussed. There was specific discussion about the suitability of the chair (noted below).

97. During this meeting, there was discussion around the suitability of the chair. The respondent during which sat on the chair with the purpose of trying to demonstrate how it worked and how it can be adjusted. Words to the effect that the chair was not touching his lower back were said. And there was likely to have been a discussion about the claimant wanting to lean back and have support for her shoulders and back. This discussion was about trying to demonstrate the usability of the chair. This discussion was in circumstances where neither of them were experts in the mechanics of the chair.

98. Around this same time, there was a second occasion where the respondent demonstrated the use of the ergonomic chair, with Ms Clegg in attendance. The tribunal considered Ms Clegg to be an honest witness and accepted that she had been present on one such occasion.

99. As part of the claimant's response on 13 February 2023 to the respondent's email of 09 February 2023, the claimant requested a copy of the company grievance procedure (see p.234). the respondent provides this to the claimant on that same day.

100. On 15 February 2023, the claimant made a phone call to Mr David Harris. Mr Harris is the Executive Manager of SJP and named specifically in the respondent's grievance procedure (see p.372) as the person to approach if a grievance was against a complainant's manager.

101. Mr Harris wrongfully informed the claimant that her grievance against the respondent was not something that was for him to address (p.368, Ms Williams confirms that Mr Harris was an appropriate contact for the grievance).

102. The claimant did not raise this grievance with the respondent direct, or with anybody else. The respondent was not aware of the details of the

grievance. Nor was it invited to undertake any investigation into it by the claimant.

103. The claimant emailed the respondent her resignation letter on 16 February 2023 (see pp.237-239). In her resignation letter, the claimant explains that she was resigning because of a range of matters, including being forced to work in breach of health and safety laws, failing to investigate grievances and her formal request for reasonable adjustments, and unlawful discrimination.

104. On 16 Feb 2023, the claimant went to her GP and got an updated fit note (see p.240). The fit note was to cover the period 04 February 2023 to 26 March 2023, and records certain adaptations that would assist the claimant. These being a larger seating area, a folding table, a laptop tray to allow working during leg elevation, and to allow working from home where such adjustments were not in place. These were adjustments that had not been raised with the respondent before.

CONCLUSIONS

Harassment related to disability

105. The tribunal is not satisfied that the conduct alleged had the purpose or effect of creating a harassing act as defined by s.26 of the Equality Act 2010. The tribunal does not accept that the claimant perceived it to be that way. Nor that it would be reasonable to do so in circumstances where the respondent was trying to demonstrate the use of the ergonomic chair to the claimant. Comments concerning the claimant wanting to lean back and where on the body the chair was pressing (or not pressing) into would appear to be natural parts of a conversation when demonstrating the various functions of an ergonomic chair.

106. Furthermore, the tribunal concluded that it was unlikely that the respondent made such statements in such a derogatory way to amount to harassment related to disability given the efforts he made to support and make adjustments for the claimant following her road traffic accident. This is part of the circumstances against which any such demonstration must be considered. The claimant asked for assistance in understanding how to use the chair, the respondent, who had been making adjustments where requested, sought to provide that assistance and guidance on 09 February 2023.

107. The claim for harassment related to disability is dismissed.

Failure by the respondent in its duty to make reasonable adjustments

108. It is well established that investigating what can be done to assist an employee cannot be reasonable adjustments. They may be a means of identifying adjustments that may be made and that may help, but nonetheless not reasonable adjustments in themselves (see **Tarbuck** and **Smith**). That means that the first two claims in this category (allegations 7.2.1 and 7.2.2) must fail and are dismissed.

109. The third claim in this category is brought on a requirement that employees were physically present in the office during working hours (allegation 7.2.3). The claimant's own evidence defeats this as a requirement imposed on the claimant and/or other members of the workforce. The claimant herself worked from home. And even when required to attend in the office on Monday, did so scarcely without any consequence or without any suggestion of consequence by the respondent. Indeed, the claimant only attended the office on 3 occasions in 2023, namely 10 January, 16 January, and 09 February 2023. Ms Lui also gave evidence, which the claimant accepted as accurate, that she had not been required to attend the office between September 2022 and the claimant's dismissal. The tribunal concludes that there was no such requirement, and this part of the claim must also fail.

110. Similar to that above, the fourth type of this claim must also fail. This is brought on a requirement for employees to be physically present in the office on Mondays each week (allegation 7.2.4). Ms Lui's evidence remains relevant to this, in that she was not required to be physically present in the office on a Monday and there is no evidence to support that anybody else, aside from the claimant, was required to be physically present in the office on a Monday. Further, the only Monday the claimant attended work in the office during 2023 was 16 January 2023. And the claimant under cross-examination accepted that she was allowed to leave the workplace on a Monday to attend a PARS class, thus not having to remain physically present, and would not be required to return to work after her PARS class on a Monday, given the effect that painkillers had on her ability to drive. The only occasion where she was required to attend was on 16 January 2023 and that was to attend a specific meeting that the claimant had to be present at.

111. Although the tribunal accepts that there was an expectation on the claimant to physically attend on a Monday morning (for the respondent's convenience as this was his admin day) there was no such provision, criterion or practice applied to the workforce by the respondent. The tribunal finds that there is no such requirement, and this part of the claim is dismissed.

112. Even if we are wrong on this. At its height, the evidence before this tribunal only supports an expectation that the claimant would be in attendance at the office on Monday morning, to attend an admin meeting where there would be handover of work. The claimant's own evidence was that it was following her PARS class at 11.30am on a Monday that she would struggle to drive and attendance at the office would cause her difficulty. The claimant accepted under cross-examination that she did not have difficulty on attending the office on Monday morning. As such, had the PCP been framed as a requirement to attend the office physically on Monday morning, and the tribunal had found that this was a PCP applied broadly (rather than just applied to the claimant), then the tribunal would have concluded that this did not put the claimant at a substantial disadvantage for reasons connected to her disability. As the claimant's own evidence was that it was only following her PARS class that she had difficulty attending the office. And therefore, this part of the claim would have failed on these grounds.

113. Turning to the issue of auxiliary aids. The claimant alleges that the lack of a suitable chair, a docking station for her laptop computer, a footrest, a wrist rest, and a headset put her at a substantial disadvantage in that she could not carry out her duties without those aids.

114. The claimant has adduced no evidence as to why the lack of a docking station put her at a substantial disadvantage compared to those without a disability. The claimant's evidence on this is contained at paragraph 44. And this merely refers to a potential tripping hazard when the laptop was plugged into the wall. This part of the claim fails and is dismissed.

115. The claimant limits her complaint of a failure to make reasonable adjustments to the period of 10 January 2023 onwards. On 07 January 2023 (see p.212), the claimant emailed the respondent to thank him for having organised the headset and adjustable workstation. These had been arranged by this date, and therefore the complaint insofar as it relates to the headset fails on that basis.

116. In that same email the claimant identifies that she would benefit from being shown how to adjust the chair (rather than identifying that it is unsuitable and needs replaced) and that the footrest and wrist rest may improve her posture, so she is happy to test these to see whether they would help in the first instance.

117. The claimant attended the office on 10 January 2023. However, left to attend a Pilates class for 2pm. The claimant did not complain about the chair or her workstation on this day. On this day the claimant did talk to Ellie about a possible workstation assessment. And followed this up with an email to the respondent on 12 January 2023, where the claimant identified that she would arrange a time for Ellie to do an ergonomic assessment.

118. The claimant attended in the office again on 16 January 2023 for a meeting only, in the afternoon.

119. The claimant did not attend at the office again until 09 February 2023. By which time, the respondent had purchased both a wrist rest, a footrest and a laptop riser, these being available for the claimant by 07 February 2023.

120. Not having a footrest and wrist rest could only have put the claimant at any sort of disadvantage as alleged when she attended the office and is therefore limited to her attendance on 10 January and 16 January 2023.

121. On 16 January 2023, the claimant only attended during the afternoon, and this was to attend a meeting only, rather than to work at her desk. The claimant did not work at her desk on that day. And therefore, not having a footrest and/or wrist rest in place on this date did not impact upon the claimant's ability to complete her work duties. In other words, not having these in place on 16 January 2023 did not put the claimant at the disadvantage alleged.

122. The tribunal does not accept that not having these aids in place for 10 January 2023 is a failure by the respondent in its duty to make reasonable adjustments. The claimant had only emailed the respondent to indicate a desire to have a footrest and wrist rest on 07 January 2023. The respondent is a micro-business. Mr Parish was implementing adjustments for the claimant himself. It is not unreasonable that it took longer than 3 days to have these aids in place. By the time the claimant was next present in the office (09 February 2023), the footrest and wrist rest were in place. The tribunal does not accept that in these circumstances there has been a failure by the respondent to make reasonable adjustments in respect of the footrest and wrist rest.

123. Turning to the provision of a suitable chair. The claimant identified in her own email of 07 January 2023 that she knew the chair to be ergonomic and would benefit from a demonstration as to how to adjust the chair. And that she was willing to first test whether the footrest and wrist rest altered her posture such as to remove pressure on her lower back.

124. The first opportunity to test the claimant's posture with the footrest and wrist rest in place was on 09 February 2023, which is the same date on which the respondent tried to demonstrate how to use the chair (and this one of two occasions a demonstration is accepted to have taken place). In the meantime, the respondent was waiting for the claimant to organise an ergonomic assessment of the claimant's workstation with Ellie. Given the views of the claimant, the new aids in place, that the claimant had informed the respondent that she was organising an assessment of the workstation, then it was not a failing by the respondent in its duty to not have a new chair in place on 09 February 2023.

125. Given that an ergonomic chair can be expensive, that the claimant was complaining about a chair purchased for her not being fit for purpose (at this stage), it appears only sensible that the respondent was wanting to address the matter of the chair properly. This was through discussion with the claimant (as had happened with previous adjustments) and through awaiting a professional assessment with Ellie which would inform the respondent of the claimant's needs. Rather than simply purchasing another chair that may equally not resolve the alleged issues the claimant was having with her current chair.

126. Taking a holistic approach to adjustments, the respondent has not failed in its duty to make reasonable adjustments in circumstances where through consulting with the claimant, the respondent tried to help the claimant to understand how to use the current ergonomic chair, was waiting to see whether other adjustments had resolved the claimant's difficulties and was waiting for the claimant to arrange an ergonomic assessment that she had informed him she would do. This final part of the reasonable adjustment claim therefore fails.

127. The allegation that the respondent failed in its duty to make reasonable adjustments fails in its entirety.

Discrimination arising from disability

128. An Occupational Health report, or advice, in part, is simply a means of identifying potential impacts of impairments on a person in the workplace and a means of addressing those concerns. The discussions are led by the person being assessed. The claimant on her own evidence was capable of identifying her needs and what adjustments she would benefit from and was capable of communicating these to the respondent. As this is what she did on numerous occasions (see email on 18 March 2023, 07 January 2023 and 06 February 2023). The claimant has not established that a necessity for Occupation Health advice arose as a consequence of her disability (allegation 6.3.1). And in these circumstances, where the claimant was capable of communicating her needs, not carrying out an Occupational Health referral is not a detriment (allegation 6.2.1).

129. In respect of the difficulty attending the office in person on Mondays. The tribunal is not satisfied that this arose in consequence of the claimant's disability. First, as already concluded above, the claimant's own evidence was that she could attend Monday morning without difficulty. Secondly, the claimant only had difficulty in attending in the afternoon of a Monday after a PARS class, if she needed to take painkillers as they could impede her driving. Working in the office was not the difficulty. The claimant's evidence was that her difficulty on Mondays was about how she travelled to the office. The claimant's own evidence was that she did not aways need to take painkillers after her PARS class. And therefore, this did not affect every Monday. And that in practice, this only affected her attendance on 16 January 2023. And this difficulty attending only arose from her arranged lift falling through at the last moment. The claimant has not satisfied the tribunal that a difficulty attending the office on Monday arose in consequence of her disability (allegation 6.3.2). The claimant could attend on Monday morning. And the claimant has not adduced any evidence that working in the office on any other Monday, aside from 16 January 2023, caused her any difficulty (allegation 6.2.3).

130. Given our findings above, the claimant was not excluded from weekly administration meetings from January 2023 onwards (allegation 6.2.2).

131. In respect of allegations 6.3.3 to 6.3.6, the claimant appears to have misunderstood what is required for a discrimination arising from disability complaint. These appear to focus on adjustments the claimant was seeking and placing these as the 'something arising'. However, we consider each in turn.

132. There is no evidence to support that a need for a specially adapted office chair arose in consequence of the claimant's disability (allegation 6.3.3). And further, even if we are wrong on that, given our findings above, the tribunal concludes that the claimant was not subject to a detriment of being spoken to by the respondent in a mocking manner about the claimant's chair on 09 February 2023, which is the only detriment this can link to (6.2.4).

133. The claimant has not adduced any evidence that supports that a need to work form home arose in consequence of the claimant's disability (allegation 6.3.5). The claimant may have preferred this, however, that is not enough. The claimant adduced no evidence on this matter.

134. The claimant has adduced no evidence to support that an extended phased return to work, beyond that already afforded, arose in consequence of her disability (allegation 6.3.6). Where there was support by a medical practitioner for a phased return to work, the respondent put this in place. Even after the medical documents stopped supporting a continued need for a phased return to work, the respondent did not require a full return to work by the claimant.

135. In the above circumstances, the claim of discrimination arising form disability is dismissed in its entirety.

Claimant's contractual position

136. The tribunal finds that there was an implied agreement to reduce the claimant's wage to reflect the hours that she was working, which took effect from the beginning of January 2023.

137. The issue of reducing the claimant's pay was raised with the claimant in the meeting on 20 December 2022. The claimant at this point was no longer on a phased return to work. It was identified, and the tribunal has accepted, that at this point the claimant was working 6-hours per day on the days that she worked. This was 75% of the 8-hours she was contracted to work on any given working day. And she continued to work at this 75% level until her resignation.

138. The claimant did not challenge the reduction to her pay, save for raising that she should receive any statutory sick pay entitlement for the hours that she could not work in addition to the 75% pay. However, the claimant as from 28 December 2022, was fit to return for full hours, with the proviso that she could attend PARS classes and (unspecified) workplace adaptations were considered. In other words, there were no hours that she could not work due to her injury that could attract statutory sick pay (if she had not already exhausted that, which she had).

139. The claimant worked 6 hours per week from the agreement on 20 December 2022 without raising any concerns. The claimant further confirms her acceptance of pay related to hours worked in the investigation meeting on 09 February 2023. In notes made by the claimant she records a conversation which shows that the claimant was accepting of the pay based on hours approach (see p.233). And this is further supported by the way the claim is brought. In the claimant's schedule of loss, the claimant limits her unlawful deduction from wages claim based on hours worked. The tribunal is in no doubt that the claimant was accepting of the new pay arrangement: that the claimant was to be paid based on the hours that she worked.

140. In these circumstances, although there was no express agreement to reduce salary to reflect hours worked, there was an implied agreement.

141. During January and February 2023, the claimant worked 75% of her hours. She was paid for 75% of her hours. There is no unlawful deduction from wages. This claim must be dismissed. And this does not form part of a breach of the claimant's contract for the purposes of constructive dismissal.

Constructive dismissal

142. The issue of the claimant's salary is already addressed above. There has been no breach of contract in this respect, nor does this contribute to a breach of the implied term of trust and confidence.

143. The tribunal accepts that there was no DSE assessment that had taken place for the claimant. However, at least in respect of the ergonomic/workstation assessment, the claimant had informed the respondent that she would be arranging for such an assessment to take place. Although not having a DSE assessment for the claimant may be a failing by the respondent, this must be considered in context. The claimant would be responsible for arranging workplace assessments. That would fall within her remit. The claimant informed the respondent that she was organising an ergonomic/workstation assessment. The claimant did not arrange this, despite her saying she would. Failing to undertake a DSE assessment in these circumstances is not conduct by the respondent that contributes to a repudiatory breach of the claimant's employment contract.

144. As already concluded above, the respondent had expected the claimant to work in the office 2 days per week, with one of those days being a Monday. However, there were no consequences for not doing so, and the claimant very rarely did work in the office since January 2023 (only attending on a total of 3 days). The respondent had good reason for the claimant attending at the office on a Monday. This was his admin day, and this was the beginning of the week so best suited him for any handover of work. It is managerial prerogative as to how the respondent organises his working week. Expecting the claimant to work in the office on a Monday and one other day, is simply a lawful instruction by the respondent. Introducing this expectation is not conduct that would justify the claimant resigning, and it is not conduct that when looked at objectively reaches the level of being a repudiatory breach of the claimant's contract.

145. The claimant appears to be relying on her GP evidence that she should be allowed to attend her PARS rehabilitation classes. The respondent at no point prevented this, and indeed was flexible in respect of all of the classes that the claimant was attending.

146. The failing in respect of the grievance did not rest with the respondent. The claimant accepted that she at no point raised her grievance with the respondent. There was no action for the respondent to take in respect of the claimant's grievance given it was unaware of it. The failure rests with a third party, namely Mr Harris. This in no way contributes to a repudiatory breach of the claimant's employment contract.

147. Given our conclusions above, the tribunal was satisfied that the respondent made adjustments that were reasonable and following discussion with the claimant. Given we have not found a breach of this duty, the tribunal does not conclude that the respondent failed to thoroughly investigate the claimant's requests for reasonable adjustments. To the contrary, we conclude that it did. The respondent consulted with the claimant, it put in place adjustments that were required, it gave permission for the claimant to invite Ellie to do an ergonomic/workplace assessment

which would have provided further information, and it responded relatively swiftly throughout.

148. As concluded above, the claimant was not excluded from weekly meetings from January 2023 onwards.

149. The tribunal concludes that the claimant was provided support in her work. Ms Liu provided support and was available to assist the claimant, up until her maternity leave. Ms Clegg was then appointed to provide maternity cover and provided assistance. And the respondent took over new work from January to March 2023, with a view to supporting the claimant.

150. The tribunal has concluded that there have been no acts of disability discrimination. And specifically, that the comments concerning the chair was not an act of harassment related to disability.

151. The claimant attended the office on 09 January 2023 with a hot water bottle and a cushion that she used at home. The claimant had never raised these as something to be supplied by the respondent. The claimant attending the office with these is not the respondent requiring the claimant to arrange her own return to work and provide her own auxiliary aids. In fact, it was the respondent who organised the claimant's return to work. And the respondent provided auxiliary aids to assist the claimant when they were raised.

152. Taking a step back, and looking at the relationship as a whole, the respondent has taken extraordinary steps to try to preserve the working relationship, rather than conducting itself in a manner that showed that it no longer intended to be bound by the employment contract:

a. The respondent paid the claimant full pay during her time off following her road traffic accident, although she had a contractual entitlement to statutory sick pay only.
b. The respondent accepted the claimant's word at face value, with respect her medical position and adjustments (see messages pp.260-270) without requiring documentary evidence
c. The respondent was flexible in allowing the claimant to attend various rehabilitation classes during the working day.
d. The respondent covered work that would have been done by the claimant during January to March 2023.
e. The respondent was supportive of the claimant when there were errors in the claimant's work that effected the respondent's business.

153. We have considered the claimant's case very carefully. For the most, the tribunal has not accepted the conduct as alleged took place. However, even those matters accepted by the tribunal as having taken place, either individually or cumulatively, when viewed objectively, is not conduct by the employer that causes a significant breach to Ms Mattis's contract. There is therefore no constructive dismissal in this case, and the claim for unfair dismissal fails.

154. Even if the tribunal is wrong on that, and there was conduct by the respondent that could be categorised as a repudiatory breach of contract, the tribunal was not satisfied that that was the reason (or part of the reason)

as to why the claimant resigned. The tribunal concludes that the claimant resigned due to the disciplinary investigation that the respondent had commenced in respect of the claimant. The reason why the tribunal concluded this is that:

a. the claimant's own evidence was that her relationship with the respondent was good until the issue of backdating of documents was raised in November 2022.

b. On 06 February 2023, it appears that the claimant was still intending on continuing her working relationship with the respondent.

c. The only thing that changed from this date was that the claimant had attended a disciplinary investigation meeting on 09 February 2023. This appeared to spark the claimant seeking to raise a grievance. Attending her GP for an amended fit note and ultimately her resignation.

155. The tribunal having considered all the evidence concluded that the claimant resigned from her post because of the investigation into her conduct (which was the second occasion) rather than for the matters that she lists in her allegations pertaining to constructive dismissal.

156. The claimant has not been found to have been constructively dismissed.

_____

Employment Judge Mark Butler

Date: 13 March 2024

JUDGMENT SENT TO THE PARTIES ON

25 March 2024

FOR THE TRIBUNAL OFFICE

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

List of Issues

1.1 Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 18 November 2022 may not have been brought in time.

1.2 Were the discrimination 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?

1.3 Was the unauthorised deduction complaint made within the time limit in section 23 of the Employment Rights Act 1996? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the date of payment of the wages from which the deduction was made?

1.3.2 If not, was there a series of deductions and was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the last one?

1.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within such further period as the Tribunal considers reasonable?

1.4 There do not appear to be time issues in respect of the complaint of unfair constructive dismissal.

2. Unfair constructive dismissal: sections 94/98 Employment Rights Act 1996

Dismissal

2.1 Can the claimant prove that there was a dismissal?

2.1.1 Did the respondent do the following things:

2.1.1.1 Decrease the claimant's salary with effect from January 2023 not taking into account the hours worked by the claimant? Make unauthorised deductions from the salary of the claimant in January and February 2023?

2.1.1.2 Require the claimant to work in breach of health and safety regulations?

2.1.1.3 Require the claimant to accept unreasonable changes to her place of work and working patterns? Requiring the claimant to work from the office on two days per week, including Mondays, from January 2023 onwards contrary to the advice of the claimant's GP?

2.1.1.4 Fail to thoroughly investigate the claimant's grievance and fail to offer a proper grievance procedure? Fail to deal with the claimant's grievance in a timely manner?

2.1.1.5 Fail to thoroughly investigate the claimant's request for reasonable adjustments?

2.1.1.6 Exclude the claimant from weekly meetings which she would normally be expected to attend from January 2023 onwards?

2.1.1.7 Fail to offer reasonable and proper support to the claimant to enable her to carry out her contractual duties?

2.1.1.8 Commit acts of disability discrimination against the claimant?

2.1.1.9 Make a harassing remark towards the claimant related to her disability on 9th February 2023?

2.1.1.10 Cause the claimant to suffer from stress at work?

2.1.1.11 Require the claimant to arrange her own return to work and her own provision of auxiliary aids to enable her to return to work safely?

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 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.

2.1.4 Was the fundamental breach of contract a reason for the claimant's resignation.

2.1.5 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?

Fairness

2.4 If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?

3. Remedy for unfair dismissal

3.1 Does the claimant wish to be reinstated to their previous employment?

3.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

3.3 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.

3.4 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.

3.5 What should the terms of the re-engagement order be?

3.6 What basic award is payable to the claimant, if any?

3.7 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?

3.8 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.8.1 What financial losses has the dismissal caused the claimant?

3.8.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

3.8.3 If not, for what period of loss should the claimant be compensated?

3.8.4 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?

3.8.5 If so, should the claimant's compensation be reduced? By how much?

3.8.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.8.7 Did the respondent or the claimant unreasonably fail to comply with it?

3.8.8 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

3.8.9 If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

3.8.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

3.8.11 Does the statutory cap of fifty-two weeks' pay or £93878 apply?

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 from May 2021 until March 2023? The Tribunal will decide:

4.1.1 Did she have a physical or mental impairment: upper and lower back pain: nerve pains in legs: nerve pains in arms, hands and fingers: pain in neck, shoulders and upper back: back pain: nerve pain in lower back: weakness of right arm and hand:

adjustment disorder with anxiety and depressed mood of moderate severity?

4.1.2 Did it have a substantial adverse effect on 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 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:

5.1.1 On 9 February 2023 when in a conversation about the chair provided to the claimant during which the claimant explained the chair hurt her back if she leant backwards, the respondent said “oh, you want to lean back?” and “this isn’t pressing into my back”.

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

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 If so, did the respondent treat the claimant unfavourably in any of the following alleged respects:

6.2.1 Failing to carry out a referral to occupational health at any time from May 2021 until March 2023.

6.2.2 Excluding the claimant from weekly administration meetings from January 2023 onwards.

6.2.3 Being required to attend meetings in person from January 2023 onwards.

6.2.4 Being spoken to by the respondent in a mocking manner when discussing the claimant’s office chair in a meeting on 9 February 2023.

6.2.5 By being constructively dismissed by the respondent on 16 February 2023 effective from 16 March 2023.

6.3 Did the following things arise in consequence of the claimant’s disability:

6.3.1 The necessity for OH advice about her complex medical conditions?

6.3.2 The difficulty in attending the office in person on Mondays?

6.3.3 The need for a specially adapted office chair?

6.3.4 The need to have special equipment provided to enable the claimant to carry out her contractual duties?

6.3.5 The need to work from home?

6.3.6 The need to have an extended phased return to work?

6.4 Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things?

6.5 If so, can the respondent show that there was no unfavourable treatment because of something arising in consequence of disability?

6.6 If not, was the treatment a proportionate means of achieving a legitimate aim?

6.7 The Tribunal will decide in particular:

6.7.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

6.7.2 could something less discriminatory have been done instead;

6.7.3 how should the needs of the claimant and the respondent be balanced?

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 A policy not to carry out risk assessments for employees returning to the workplace.

7.2.2 A policy of not seeking advice from an occupational health resource for employees returning to work after illness/injury?

7.2.3 Requiring employees to be physically present in the office during working hours?

7.2.4 Requiring employees to be physically present in the office on Mondays of each week?

7.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant’s disability, in that the claimant needed the benefit of a risk assessment, occupational health advice and could not easily be physically present in the office particularly on Mondays?

7.4 Did the lack of an auxiliary aid, namely a suitable chair, a docking station for the laptop computer used by the claimant, a footrest, a wrist rest and a headset put the claimant at a substantial disadvantage compared to someone without the claimant’s disability, in that the claimant could not carry out her duties without those aids in the same manner as those who were not disabled?

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

7.6 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:

7.6.1 To have carried out a risk assessment on the claimant's return to the office.

7.6.2 To have obtained advice from an occupational health expert.

7.6.3 Not to have required the claimant to have to work in the office but to have continued the practice of working remotely while attending PARS classes.

7.6.4 Not to have required the claimant to be physically present in the office on Mondays from January 2023 onwards whilst attending PARS classes.

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

8. Remedy for discrimination

8.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

8.2 What financial losses has the discrimination caused the claimant?

8.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

8.4 If not, for what period of loss should the claimant be compensated?

8.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

8.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

8.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

8.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

8.9 Did the respondent or the claimant unreasonably fail to comply with it?

8.10 If so, is it just and equitable to increase or decrease any award payable to the claimant?

8.11 By what proportion, up to 25%?

8.12 Should interest be awarded? How much?

9. Unauthorised deductions: Part II Employment Rights Act 1996

9.1 Were the wages paid to the claimant in respect of January 2023 and February 2023 less than the wages she should have been paid?

9.2 Was any deduction required or authorised by statute?

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

9.4 Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?

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

9.6 How much is the claimant owed?