EMPLOYMENT TRIBUNALS

Claimant: Mr O Balogun
Respondent: Ronnies Limited T/A McDonalds

Heard: in Leeds

On: 24, 25 and 26 April 2024

Before: Employment Judge Ayre
Mr T Downes
Ms K Harr

Representation

Claimant: Dr O Taiwo, lay representative
Respondent: Mr C McDevitt, counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claim for unfair dismissal is not well founded. It fails and is dismissed.

2. The claim for discrimination arising from disability is not well founded. It fails and is dismissed.

3. The claim for harassment related to disability is not well founded. It fails and is dismissed.

REASONS

Background

1. The claimant was employed by the respondent as a crew member from 20 November 2019 until April 2023. Early conciliation started on 25 April 2023 and ended on 6 June 2023. The claimant presented his claim to the Tribunal on 5 July 2023.

2. A Preliminary Hearing took place on 16 October 2023 before Employment Judge Brain. At that hearing:

    1. There was a discussion about the claims that the claimant is bringing (constructive unfair dismissal and disability discrimination) and a list of the issues that fall to be decided at this hearing was identified;

    2. The claims of direct discrimination were withdrawn;

    3. The case was listed for final hearing; and

    4. Case Management Orders were made to prepare the case for final hearing

3. The disability relied upon by the claimant for the purposes of this claim is arthritis. Following the provision by the claimant of medical evidence and a disability impact statement, the respondent admitted on 12 January 2024 that the claimant was disabled within the meaning of the Equality Act 2010, between October 2022 and April 2023.

The hearing

4. There was a bundle of documents running to 235 pages. An additional document was added by consent, at the request of the claimant, at the start of the second day of the hearing. The parties had prepared an agreed chronology, for which we are grateful.

5. At the start of the hearing the claimant was asked if any adjustments were required to take account of his disability. He said that no adjustments were necessary.

6. We heard evidence from the claimant and, on behalf of the respondent, from:

    1. Bridgette Woods, Human Resources and Training Consultant;

    2. Jake Paterson, Maintenance Man and formerly Business Manager;

    3. Rhiannan Haigh, Assistant Manager; and

    4. Emma Bushby, Business Manager.

7. Judgment and reasons were delivered orally at the end of the hearing. The claimant requested written reasons and these reasons are being provided as part of this judgment.

The issues

8. The issues that fell to be determined at the hearing were the following:

<u>Unfair dismissal</u>

9. Was the claimant dismissed?

10. Did the respondent do the following things:

    1. Write a letter to the claimant on 21 February 2023 contending that his absence from work after 25 October 2022 was unauthorised, in circumstances where the respondent knew of the reasons for the claimant's absence and had authorised it?

    2. In the letter of 21 February 2023, intimate that the respondent was contemplating dismissing the claimant?

    3. Write to the claimant on 4 April 2023 in similar terms to the letter of 21 February 2023?

    4. Fail to deal with the claimant's grievance sent after the letter of 21 February 2023 was received by him?:

    5. Fail to forward to the claimant, at his request, copies of the policies upon which they wrote to him about his absence on 21 February and 4 April 2023?

11. Did those things breach the implied term of trust and confidence? In particular:

    1. Did the respondent behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

    2. Did the respondent have reasonable and proper cause for doing so?

12. Did the claimant resign in response to the breach? Was the breach of contract a reason or a material reason for the claimant's resignation?

13. Did the claimant affirm the contract before resigning?

14. If the claimant was constructively dismissed, what was the reason for the breach of contract?

15. Was it a potentially fair reason? The respondent says it was because of conduct.

16. Did the respondent act reasonably in all the circumstances, including its size and administrative resources, in treating that reason as sufficient reason to dismiss the claimant?

17. Was the dismissal fair or unfair in accordance with equity and the substantial merits of the case?

<u>Discrimination arising from disability</u>

18. Did the respondent treat the claimant unfavourably by:

1. Writing a letter to the claimant on 21 February 2023 contending that his absence from work after 25 October 2022 was unauthorised, in circumstances where the respondent knew of the reasons for the claimant's absence and had authorised it?

2. In the letter of 21 February 2023, intimating that the respondent was contemplating dismissing the claimant?

3. Writing to the claimant on 4 April 2023 in similar terms to the letter of 21 February 2023?

4. Failing to deal with the claimant's grievance sent after the letter of 21 February 2023 was received by him?:

5. Failing to forward to the claimant, at his request, copies of the policies upon which they wrote to him about his absence on 21 February and 4 April 2023?

19. Did the claimant's absence from work after 17 October 2022 arise in consequence of his disability? The claimant acknowledges that his absence was not solely because of his disability, as he had personal and family matters to deal with, but he says his disability was a material reason for his absence.

20. Was the unfavourable treatment because of the claimant's absence from work?

21. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were to ensure that staffing was at a level to provide good and adequate services for the respondent's customers.

22. Was the treatment an appropriate and reasonably necessary way to achieve those aims? The respondent says that its legitimate aims were:

    1. The economic and operational requirements of the business, including ensuring that any absences are author5ised and/or that the business is kept up to date regarding any absences in order that it can identify where action needs to be taken;

    2. Ensuring the health, safety and welfare of its employees; and

    3. Ensuring that staffing was at a level to provide good and adequate services of the respondent's customers.

23. Could something less discriminatory have been done instead?

24. How should the needs of the claimant and the respondent be balanced?

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

<u>Harassment related to disability</u>

26. Did the respondent do the following things:

    1. Write a letter to the claimant on 21 February 2023 contending that his absence from work after 25 October 2022 was unauthorised, in circumstances where the respondent knew of the reasons for the claimant's absence and had authorised it?

    2. In the letter of 21 February 2023, intimate that the respondent was contemplating dismissing the claimant?

    3. Write to the claimant on 4 April 2023 in similar terms to the letter of 21 February 2023?

    4. Fail to deal with the claimant's grievance sent after the letter of 21 February 2023 was received by him?:

    5. Fail to forward to the claimant, at his request, copies of the policies upon which they wrote to him about his absence on 21 February and 4 April 2023?

27. If so, was that unwanted conduct?

28. Did it relate to disability?

29. Did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? The claimant does not say that the respondent's conduct was done for that purpose.

Remedy

30. In light of our findings on the issues above, it was not necessary for us to consider issues of remedy.

Findings of fact

31. The claimant was employed by the respondent, which is a franchise that runs McDonald's restaurants, at its Oakwood restaurant on Easterly Road in Leeds. He was employed as a 'crew member' under the terms of a contract of employment (headed 'Particulars of Employment) that he signed in November 2019.

32. The Particulars of Employment contained the following relevant provisions:

    "*Your hours of work cannot be permanently guaranteed because of the number of staff we need on each shift depends on how busy the Restaurant is. However you have indicated that your availability for work is as follows:*

    MONDAY Any

    TUESDAY Any

WEDNESDAY Any

THURSDAY Any

FRIDAY Any

SATURDAY Any

SUNDAY Any

Sometimes it is necessary to increase or reduce the number of hours you work to take business fluctuations into account. If changes need to be made to your work schedule, your Manager will inform you of the changes as far in advance as possible…."

33. The claimant was not guaranteed any minimum number of hours of work under the contract. In the six months between March 2022 and September 2022 he worked on average between 28 and 40 hours a week.

34. The claimant worked in the dining area of the restaurant, and his duties involved cleaning tables, sweeping, cleaning toilets and emptying bins in customer areas. His role was a manual one. The claimant was a well like and valued member of staff who received recognition for good performance.

35. The claimant has suffered from chronic arthritis since 1991. His arthritis has caused him, amongst other things, to have severely deformed hands and his deformities are visible. To his credit, whilst employed by the respondent the claimant tried not to let his arthritis affect his work and his evidence was that, certainly prior to September 2022, it had not stopped him from working.

36. The respondent's witnesses all gave evidence that they were not aware that the claimant suffered from arthritis. The claimant's evidence was that he told the respondent when he was recruited that he had arthritis, but that his arthritis did not affect his work. There was no evidence before us of the claimant having taken time off work due to arthritis, but there was evidence of him taking time off due to migraine.

37. We found the evidence of Jake Paterson that he had never noticed the claimant's hands not to be persuasive, given that he had worked with the claimant for two years and had regular contact with him during that period. The deformities to the claimant's hands are obvious and were also visible in at least one photograph that Mr Paterson had posted with commentary on a private Facebook page used by employees at the Oakwood restaurant. We therefore find that Mr Paterson was aware that the claimant had deformed hands but did not know that the deformity was caused by arthritis and took no steps to find out.

38. We accept the evidence of the other witnesses for the respondent that they did not know either about the claimant's hands or his arthritis. Only Ms Haigh had actually worked with the claimant directly, and that was only for a short period of time. We accept her evidence that on the few occasions she met the claimant in person she had not noticed his hands. Ms Bushby did not meet the claimant until the

Tribunal proceedings, and there was no evidence that Ms Woods had met him either.

39. The claimant had a difficult home life and was forced to leave the matrimonial home by his wife. He was also separated from his children who were living in Nigeria, and who he hoped to bring to the UK. On one occasion in December 2021 the claimant discussed being forced out of the matrimonial home with Jake Paterson who was sympathetic and tried to help him. Jake Paterson and the claimant had a good working relationship. In his witness statement the claimant expressed his appreciation to a number of people, including Jake Paterson.

40. In September 2022 the claimant took a period of holiday from 28 September to 21 October. He was expected back at work on 25 October 2022. By September 2022 the claimant's mental health had deteriorated because of his difficult family circumstances. He was living alone in a room provided by a charity and was spending a lot of his time alone in the room upset. His family were concerned about him and suggested that he move to live with an aunt in Milton Keynes. In October 2022 therefore the claimant moved temporarily to Milton Keynes to live with an aunt. He remained living in Milton Keynes for about 10 months until August 2023, but during that period he would come back to Leeds for treatment for his arthritis and to collect medication.

41. The claimant was not able to work from October onwards due to a combination of poor mental health, a wish to focus on his difficult family situation, and his decision to move temporarily to Milton Keynes. The claimant's poor mental health during this period also had an impact on his arthritis, which deteriorated during this time.

42. On 17 October 2022 the claimant sent an email to an email address used by managers at the Oakwood restaurant. The email was addressed to Jake Paterson, and in it the claimant wrote:

"*Temporary Unavailability for Work.*

Please note that I would be unavailable for work temporarily starting from the end of my current Annual Leave.

This has become necessary in order for me to actively focus on my health conditions, as well as the need to attend to certain family and personal matters.

I will let management know when it is convenient to return to work please, while thanking you for your consideration of my request. "

43. The claimant did not receive any response to that email. Mr Paterson's evidence, which we accept, was that he did not see the email. We find that the email was received by the respondent but was not actioned. At the time fifteen or sixteen different employees had access to this inbox, and there did not appear to be a system in place for ensuring that all emails were picked up. The email appears to have been missed. It was not seen by any of the respondent's witnesses prior to the Tribunal proceedings.

44. Although part of the reason for the claimant's absence was his poor mental and

physical health, he did not submit any fit notes during his absence. This is because he genuinely and understandably given his email of 17 October, believed that he had notified his employer of his absence.

45. After the claimant did not turn up for work on 25 October Jake Paterson telephoned the claimant but the claimant did not answer.

46. On 16 November Jake Paterson sent a WhatsApp message to the claimant asking, "*How are you doing?*". The claimant did not reply to this message, and on 6 December Mr Paterson sent a further WhatsApp message asking: "*How you doing? I need some sort of contact with me so I understand what's going on*". The claimant replied the same day in a WhatsApp message in which he wrote: "*Good morning Jake, I'm just still hanging in there. Trying to sort out my family, especially my children. As soon as I'm able to work I will let you know please, thank you for checking on me.*" As a result of this WhatsApp message from the claimant, and the fact that Mr Paterson had not seen the email of 17 October, Mr Paterson formed the view that the reason for the claimant's absence was his family situation.

47. In January 2023 a new Business Manager Emma Bushby took over responsibility for the Oakwood restaurant from Jake Paterson. She had a handover meeting with Mr Paterson in which they discussed a number of issues. Mr Paterson told her in the briefest of terms that the claimant was absent due to family issues. He did not give any indication as to whether the absence was authorised, how long it had lasted or how long it was expected to last.

48. At the time Emma Bushby took over the Oakwood restaurant there were a number of issues with staffing. There were approximately 175 employees based at the restaurant, but a number were not actually working, and there was an issue with employees not turning up for shifts when they were scheduled to work.

49. The respondent uses a weekly People Tracker to track employees who are not in work. The claimant appeared on this tracker as 'sick' which is a generic categorisation used by the respondent when it is unclear why somebody is absent from work.

50. In January 2023 Emma Bushby and Rhiannan Haigh reviewed the People Tracker and began to telephone people who were recorded as absent from work to try and find out why they were off and when they envisaged returning. There were a lot of staffing issues in the Oakwood restaurant at the time which needed addressing. Ms Bushby and Ms Haigh wanted to understand how many staff they actually had available to work and whether there were any recruitment requirements, so that they could help the restaurant to run more smoothly.

51. From January 2023 therefore Rhiannon Haigh and Emma Bushby began calling the claimant every week. He did not answer any of their calls and they were not able to speak to him

52. Having not been able to contact the claimant by telephone, on 7 February 2023 Rhiannon Haigh sent an email to the claimant. In the email she explained that she

had tried to contact the claimant to see how he was and if he planned on returning to work and asked the claimant to get in touch to give them an update. She also wrote that if the claimant did want to return to work he should just let the respondent know so that they could plan a phased return or make a plan to make his return easier. The tone of this email was supportive towards the claimant and it was clear that the purpose of the email was to find out how the claimant was and to encourage a return to work.

53. The claimant replied to the email the same day, thanking Ms Haigh for checking on him. He said that he was not in a position to give a return date but would let the respondent know as soon as he was able to.

54. Ms Haigh was not sure what to do next and contacted Bridgette Woods in the respondent's HR team for advice. By that time the claimant had been off work for five months and was not able to give an indication as to when he may be able to return to work. Ms Haigh told Ms Woods that the claimant had not worked since September and had never provided a sick note. She said that she was not sure where to go next as the claimant didn't know when he would return to work and asked Ms Woods for advice.

55. Ms Woods replied advising Ms Haigh to write to the claimant and attaching a template letter. The template letter that was provided was one often used by McDonalds and that Ms Haigh and Ms Bushby used with other staff at the time.

56. Ms Haigh adapted the letter by adding personal details relevant to the claimant. In the letter she referred to the fact that the claimant had been absent from work since 26 September 2022 and wrote that:

"*As we do not have a current sick note to cover your absence, or have not been able to contact you to discuss your return to work this absence is deemed to be unauthorized.*

Due to your length of time off, we would now like to meet with you to discuss your current state of health and your employment….

I must advise you that should you fail to attend this meeting without advising me of your non-attendance, the meeting will be held in your absence. Furthermore, failure to attend this meeting may lead to disciplinary action, of which one of the outcomes could be dismissal….

If it is that you do not wish to return to your position at the restaurant and you deem yourself to have resigned from your employment with Ronnies Ltd please confirm that to me in writing…."

57. At the time Rhiannon Haigh sent the letter to the claimant on 21 February 2023 she was not aware that he had arthritis or that one of the reasons for his absence was an exacerbation of his arthritis. She did not know why the claimant was absent from work and wanted to find out.

58. Her aim in sending the letter was to prompt a conversation with the claimant about

why he was off work and a potential return to work. The letter is a standard template, and similar letters are sent regularly to employees who are off work when the respondent does not know why they are off. At the time similar letters were sent to approximately 10 other employees of the Oakwood restaurant who were also absent from work.

59. The intention of the letter was not to threaten or scare the claimant. The mention of dismissal was only in the context of what could potentially happen if the claimant did not attend the meeting. It was not followed through on. The claimant did not attend the meeting, and no disciplinary action was taken.

60. The claimant was distressed to receive the letter and sent an email on 22 February to Emma Bushby. In the email he raised a number of questions, including why he was "*being accused of "…absence from work*", why he was being threatened with dismissal and what his rights were. He commented that "*Even if this invitation had been appropriate, I would not have been able to attend due to the short notice and the threat of dismissal, all of which have caused me distress and anxiety."*

61. The claimant asked to be sent "*the policy or procedure under which Rhiannan's letter was written to me*" and wrote that "*this email should be regarded as a grievance over what I reasonably believe to be acts of bullying, harassment and breaches of trust and confidence, as well as less favourable treatment.*" He also asked what the nature of his employment contract was, what his rights were as a worker and whether he would find 'such information' in the documents he had requested.

62. After receiving this email Emma Bushby replied asking the claimant if she could contact him over the phone for a quick catch up, stating that they had tried calling him a few times. The claimant replied that "*I have been in a very terrible state since receiving the letter from Rhiannan and therefore not in a position to speak on phone please"*. He asked for a response to be provided to his earlier email. The claimant told us in evidence that, by the time he wrote this email, he had taken legal advice, although not from a solicitor.

63. Ms Bushby did not want to make things worse and thought that the best way to resolve what she perceived to be a genuine misinterpretation of the letter of 21 February by the claimant was for her to speak to the claimant. She wanted to reassure the claimant that he had nothing to worry about, and replied to his email saying that:

"*I apologise if you have been upset by the letter. There is nothing to worry about. I am a new Business Manager in the restaurant and have invited you to a meeting so I can meet you and understand your situation so I know how we can support you going forward. Appreciated that 48 hours' notice was not a sufficient amount of time for you to attend a meeting so I can meet you. When would you be free to come up and have a catch up with me?....*"

64. The tone of Ms Bushby's email to the claimant was conciliatory and reassuring. It was sent with the best of intent.

65. Ms Bushby also forwarded the claimant's email to Bridgette Woods in HR with the comment "*He isn't answering the phone and his email does sound like he's spoken to a solicitor….bit reluctant to start answering his pile of questions*". Ms Bushby did not send answers to the claimant's questions but did send him a copy of the Employee Handbook by email on 2 March 2023. In that email she suggested that the claimant contacted her if he needed further assistance or had any additional questions.

66. The claimant did not reply to Ms Bushby's email. Ms Bushby sent a further email to the claimant asking him to provide a sick note. He did not do so. On 4 April 2023 Ms Bushby sent a further letter to him, by email. In her letter Ms Bushby wrote:

"*I write with reference to your current unexplained absence from work….We have contacted you requesting a sick note to cover the absence period. Due to you not being in contact with us I would like you to attend an investigation meeting to discuss your current absence from work….*

If you are unable to attend this meeting or have any questions regarding this letter, please do not hesitate to contact me directly….Should you fail to attend we will conduct the investigation meeting in your absence, which may later be considered as an incident of misconduct and could lead to your employment being terminated without notice….

If it is that you do not wish to return to your position at the restaurant and you deem yourself to have resigned from your position with Ronnies Ltd please confirm to me in writing…."

67. At the time she wrote this email Ms Bushby did not know that the claimant had arthritis. She had never met or worked with the claimant. It was not her intention when she wrote the letter to threaten or intimidate the claimant – but merely to encourage him to meet with her. There was no evidence before us to suggest that Ms Bushby, Ms Haigh or indeed anyone else within the respondent wanted to dismiss the claimant. On the contrary, the evidence before us suggested that the claimant was a well-regarded and valued employee who the respondent wanted to support to return to work.

68. On 14 April 2023, 10 days after receiving Ms Bushby's letter of 4 April, the claimant resigned from his role with the respondent. He resigned in a lengthy email in which he referred to what he perceived to be "*very unfriendly and intimidating contents*" in Ms Bushby's email, and to "*management's pre-determined plan to terminate my employment*" of Ms Bushby's email. He also wrote that:

"*I have therefore considered the reality of my employment…as that of one with no present or future, as I was threatened that disciplinary hearing would take place in my absence should I not attend the said hearing. I hereby resign my appointment with immediate effect, as I cannot accept these treatments, which I believe to be less favourable in nature.*"

69. Ms Bushby forwarded the claimant's resignation to HR, as is normal practice. She also wrote to the claimant on 24 April acknowledging his resignation and asking

him if he would like his email to become a grievance. She said that if she did not hear from him within the next 7 days, she would go ahead and process his resignation.

70. The claimant did not reply to Ms Bushby, so his resignation email was not treated as a grievance. Unbeknownst to Ms Bushby, payroll sent the claimant a P45 on 24 April 2023.

71. In August 2023 the claimant's health improved and he got a new job working for Amazon.

The Law

Constructive unfair dismissal

72. Where an employee resigns, as the claimant in this case did, he can claim unfair dismissal if he can establish that his resignation falls within section 95(1)(c) of the Employment Rights Act 1996, which provides that:

> "*(1) For the purposes of this Part an employee is dismissed by his employer if….*
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*"

73. The employee must establish that:

1. There was a fundamental breach of contract by the employer (***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221***);
2. The employee resigned in response to that breach and not for some other reason; and
3. The employee did not wait too long before resigning, such that it could be said that he affirmed the contract.

74. The questions that the Tribunal needs to consider in a constructive dismissal claim in which, as in this case, the claimant alleges that the respondent breached the implied term of trust and confidence, are:

1. Did the respondent behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent;
2. Did the respondent have reasonable and proper cause for doing so;
3. Did the claimant resign in response to the breach of contract by the respondent; and
4. Did the claimant affirm the contract before resigning?

Discrimination arising from disability.

75. Section 15 of the Equality Act 2010 states that:

> "*(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.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

76. In a claim under section 15, no comparator is required, and the claimant is merely required to show that he has suffered unfavourable treatment and that the reason for that treatment was something arising because of his disability.

77. In ***Secretary of State for Justice and another v Dunn EAT 0234/16*** the then president of the EAT, Mrs Justice Simler, identified four elements that must be made out for a claimant to succeed in a complaint under section 15:

1. There must be unfavourable treatment;
2. There must be something that arises in consequence of the claimant's disability;
3. The unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability; and
4. The respondent must be unable to show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

78. Under section 15(2) of the Equality Act 2010 if the employer shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability, then a claim for discrimination arising from disability will fail.

79. An employer can not however 'turn a blind eye' to evidence of disability and the EHRC Employment Code provides that employers must do all they can reasonably be expected to do to find out whether an employee is disabled. Paragraph 5.15 of the Code states that:

> "*An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy…*"

80. The Code also states that employers should consider whether an employee is disabled even where the employee does not declare the disability. That said, failure to enquire about a possible disability is not, in itself, sufficient to give a respondent constructive knowledge of the claimant's disability.

81. In ***A Ltd v Z [2020] ICR 199 EAT*** the claimant was dismissed for repeated sickness absences and poor timekeeping. She had put her absences down to physical impairments, rather than the true cause which was depression, schizophrenia, stress and low mood which amounted to a disability. The respondent had some knowledge that the claimant may have mental health issues but did not make any enquires about them. The EAT held that the Tribunal was wrong to find that the employer had constructive knowledge of the claimant's disability because it failed to take account of what the employer might reasonably have been expected to find out if it had made enquiries. In the tribunal's view, the claimant would have continued to hide information about her mental health difficulties and insisted that she could work normally.

82. It is not necessary in a claim under section 15 for the employer to be aware that the "something" arises in consequence of the disability. In ***City of York Council v Grosset [2018] EWCA Civ 1105***, an employer was found to have discriminated against an employee contrary to section 15 even though it was not aware that the 'something arising' (in that case, the employee's actions which lead to a misconduct dismissal) was due to the employee's disability. The test of whether the 'something' arises from the disability is an objective one.

Harassment

83. Under section 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."*

84. In deciding whether the claimant has been harassed contrary to section 26 of the Equality Act, the Tribunal must consider three questions:

a. Was the conduct complained of unwanted:
b. Was it related to disability; and
c. Did it have the purpose or effect set out in section 26(1)(b).

Richmond Pharmacology v Dhaliwal [2009] ICR 724.

85. The two stage burden of proof set out in section 136 Equality Act applies equally to claims of harassment. It is for the claimant to establish facts from which the Tribunal could conclude that harassment had taken place.

86. In ***Hartley v Foreign and Commonwealth Office Services [2016] ICR D17*** the EAT held that the words 'related to' have a wide meaning, and that conduct which cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it. The Tribunal should evaluate the evidence in the round, recognising that witnesses will not readily accept that behaviour was related to a protected characteristic. The context in which unwanted conduct takes place is an important factor in deciding whether it is related to a protected characteristic (***Warby v Wunda Group plc EAT 0434/11***).

Conclusions

87. The following conclusions are reached on a unanimous basis having considered the evidence before us, the submissions of both parties and the legal principles summarised above.

Unfair dismissal

88. There are five alleged breaches of trust and confidence relied upon by the claimant in support of his claim that he was constructively unfairly dismissed, and we set out first our findings in relation to each of those alleged breaches.

89. The first alleged breach of contract relates to the letter sent to the claimant on 21 February 2023 by Rhiannan Haigh. The claimant complains that this letter referred to his absence being unauthorised in circumstances where the respondent knew of the reasons for his absence and had authorised it. We find that the respondent did write a letter to the claimant on 21 February 2023 contending that his absence from work was unauthorised. At the time the letter was written however, neither Rhiannan Haigh nor Emma Bushby had seen the claimant's email of 17 October. Neither of them had any knowledge of the claimant's medical conditions and they genuinely believed that his absence was not authorised.

90. In February 2023 Emma Bushy believed, on the basis of the handover that she had from Jake Paterson, that the claimant was off for family reasons. Rhiannon Haigh, who wrote the letter, thought the absence was unauthorised.

91. It is unfortunate that the claimant's email of 17 October was not picked up by Mr Paterson, and that no response was sent to the email. It is understandable that, given the lack of response to that email, the claimant concluded that his absence was authorised. In fact no one at the respondent had authorised his absence.

92. The second alleged breach of contract is the reference in the letter of 21 February 2023 to dismissing the claimant. We find that the respondent did refer to potential dismissal in the letter, but that was not because of the claimant's absence, but rather as a potential consequence of not attending the meeting that they were trying to arrange. There was no direct threat of dismissal, and dismissal was contingent on

not attending the meeting. Whilst the wording of the letter is unfortunate, and caused the claimant distress, it was standard wording which the respondent has used on many occasions. Its purpose was to encourage the claimant to attend a meeting, not to threaten him.

93. The third breach of contract alleged by the claimant is that the respondent wrote to him on 4 April 2023 in similar terms to the letter of 21 February. We accept, on the evidence before us, that the respondent did write to the claimant on 4 April 2023 in similar terms to the letter of 21 February 2023. The purpose of that letter was to encourage the claimant to meet with the respondent to discuss his absence. It was not to threaten him.

94. The fourth alleged breach of contract is that the respondent did not deal with the claimant's grievance. We do not uphold this allegation and find that the respondent did attempt to deal with the claimant's grievance, albeit informally. It cannot in our view be said that the respondent ignored the claimant's grievance or took no action in response to it. Ms Bushby responded to the claimant's email raising the grievance by offering to meet with him. We accept that in doing so she genuinely wanted to try and resolve the situation. It is common when grievances are raised for attempts to be made to resolve matters informally. Moreover, the first stage in most grievance procedures is for a meeting to be held with the employee raising the grievance to discuss the grievance.

95. We accept that Ms Bushby genuinely believed that the claimant had misinterpreted the letter of 21 February and wanted to reassure him. She thought at the time that the best way of doing this was by speaking directly with the claimant, rather than launching straight away into the formal grievance procedure. She wanted to try and resolve matters; she was not trying to sweep them under the carpet or ignore them. The claimant was not willing to meet with or speak to Ms Bushby and did not take her up on her offer.

96. The final breach of contract alleged by the claimant in his constructive dismissal claim is that the respondent did not forward copies of policies to him in response to his request. In his email of 22 February 2023 the claimant asked for "the policy or procedure under which Rhiannan's letter was written to me". He also asked about his rights as a worker and whether he would find information in the requested documents when received, and what was the nature of his employment contract. The response to this email by Ms Bushby was to suggest a meeting or discussion, and to send him a copy of the entire Employee Handbook but without identifying what policies were being relied upon. We find that, whilst the respondent did send the Employee Handbook to the claimant, it did not answer the questions he had raised or tell him which policies within the handbook it was relying upon.

97. We have then gone on to consider whether any of the above conduct of the respondent breached the implied duty of trust and confidence. We have asked ourselves whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the parties, and whether the respondent had reasonable and proper cause for doing so.

98. We find that the respondent did not act in a way that was calculated to destroy or seriously damage trust and confidence. Rather it acted in the way that it did because there was a general staffing issue in the Oakwood restaurant that Ms Bushby, as the new Business Manager, was seeking to address with the help of Ms Haigh and HR. The respondent genuinely wanted to know why the claimant was off work and when he would be able to return to work, so that it could plan its staffing levels appropriately. The claimant was well regarded by the respondent and considered to be a good worker. There was no evidence before us that anyone at the respondent wanted him to leave.

99. Whilst we accept that the claimant was genuinely upset by the letters, and with hindsight the letters could have been better worded, looking at the wording objectively, it was not threatening or inappropriate. The letters were worded as they were because that was the standard approach taken by the respondent and which was used at the time with a number of other employees in Oakwood as well. It cannot be said that the claimant was targeted in any way.

100. In terms of the response to the grievance, we accept that Ms Bushby wanted to try and resolve the issues raised by the claimant, and that she genuinely believed that the best way to try and do that was informally, by speaking to the claimant, rather than through a formal grievance procedure. There was, in our view, nothing untoward in the email that she sent to the claimant in response to the grievance.

101. The respondent had repeatedly attempted to speak to the claimant but without success and, as a result, they resorted to written communications, which at the time were also the claimant's preferred method of communication.

102. Given the situation that the respondent was in, we accept that the steps it took were objectively reasonable and do not amount to a breach of trust and confidence. The respondent wanted to speak to the claimant about a return to work, so that it could assess and plan staffing levels at the Oakwood restaurant. The action that the respondent took was not calculated to destroy trust and confidence, but rather to find out whether the claimant was able to return to work and when.

103. We also find that the actions of the respondent, when considered in the round, were not likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. We do not doubt that the claimant was genuinely upset by receiving the letters, but that alone is not sufficient to make the conduct a breach of trust and confidence. We note that the letters were standard letters that were used regularly within the business and there was no evidence before us to suggest that other employees had a similar reaction to the claimant. The focus of the letters is on arranging a meeting to discuss absence, and not on dismissal.

104. In any event, we also find that the respondent had reasonable and proper cause for acting as it did. Emma Bushby had come into a store which had significant staffing issues and was seeking to resolve those issues. The claimant had, at the time Rhiannon Haigh sent the first letter in February 2023, been absent from work for 5 months. By the time of the second letter in April 2023 he had been absent for more than 6 months. In the circumstances and given that attempts to contact the claimant

by telephone had not been successful, it was not unreasonable for the respondent to act as it did. Similarly, the actions of Ms Bushby in responding to the claimant's grievance and request for documents were taken with a view to trying to resolve matters.

105. There was in our view no breach of the implied term of trust and confidence by the respondent. The claim for constructive dismissal therefore fails and is dismissed.

Discrimination arising from disability

106. The claimant alleges that the alleged breaches of contract referred to in the constructive unfair dismissal claim also amount to unfavourable treatment for the purposes of the complaint of discrimination arising from disability. In reaching our decision on whether the conduct did amount to unfavourable treatment, we have reminded ourselves that 'unfavourable treatment' must be widely construed and can arise when a disabled employee is put at a disadvantage.

107. We accept that the treatment was unwanted by the claimant, but that alone does not, in a complaint under section 15 of the Equality Act 2010, make the treatment 'unfavourable'. We find on balance that the treatment of the claimant was not unfavourable. It did not put him at a disadvantage. Writing to an employee to encourage that employee to meet with the employer where there is an ongoing employment relationship, the employee has been off for months, and the employer wants to understand when the employee may be back at work is not putting the employee at a disadvantage. Rather, in relation to the letters it was the application of the respondent's standard approach, which was adopted with other employees also and which was applied for good business reasons.

108. There was no evidence before us to suggest that the respondent's response to the claimant's grievance and request for information was unfavourable treatment. It is of note that a few weeks after the claimant raised his grievance, when he was asked if he wanted his resignation email to be treated as a grievance, he did not even reply. Even before his resignation he did not take Emma Bushby up on her offer to meet with him, and he would not speak with any of the managers who tried to contact him.

109. We have also considered whether the claimant's absence from work after 17 October 2022 arose in consequence of the claimant's disability of arthritis. In reaching our decision on this issue we have taken account of the claimant's evidence that until September / October 2022 his arthritis had not prevented him from working. During the summer and autumn of 2022 there was a deterioration in the claimant's mental health as a result of the very difficult family circumstances he found himself in. He was no longer able to live in the matrimonial home, his marriage had broken down and he was separated from his children. This understandably caused him to suffer from depression and anxiety. With a view to improving his mental health he temporarily relocated to Milton Keynes where he was able to live for approximately ten months with an aunt. In light of the distance between Milton Keynes and Leeds it would not have been possible for him to work in the Oakwood restaurant whilst living in Milton Keynes.

110. We find that the claimant's absence was due to a combination of the deterioration in his mental health, his difficult family situation, and his decision to move to Milton Keynes on a temporary basis. Whilst we accept his evidence that at the same time there was an exacerbation in his arthritis, we find that not to be a material reason for his absence. The material reasons for his absence from work were his poor mental health, his family situation and moving to Milton Keynes.

111. We also conclude, on the evidence before us, that the respondent did not have actual or constructive knowledge of the claimant's disability of arthritis. Whilst we find that Jake Paterson would have seen the claimant's hands, we accept Rhiannan Haigh's evidence that she did not notice them on the few occasions she worked with the claimant, and Emma Busby's evidence that she had never met the claimant.

112. The claimant's arthritis did not affect his ability to do his job until the autumn of 2022 when his personal situation led to a deterioration in his mental health and an exacerbation of the arthritis. Until then the claimant was performing his duties well and getting recognition for his performance. His evidence to the Tribunal was that his arthritis did not prevent him from carrying out his duties and there was no evidence of arthritis related absence before us. There was nothing in his performance or absence record to put the respondent on notice that there may be an underlying health condition.

113. We find on balance that the visible deformities to the claimant's hands were not sufficient to put the respondent on notice that the claimant may have had a disability. Whilst there was no evidence of any enquiries being made of the claimant about his hands and whether any adjustments were needed, given the claimant's good performance and the lack of arthritis related absence, that was understandable.

114. The claimant is a stoic who, to his credit was able and is now able in his new role, to carry out a physical role notwithstanding his arthritis. It is in our view likely that, had the claimant been asked about his hands, he would have downplayed the effect of his arthritis upon him.

115. On balance we find that the respondent did not have actual or constructive knowledge of the claimant's disability.

116. We also find, in the alternative, that the steps taken by the respondent were a proportionate means of achieving a legitimate aim. The respondent relied upon three aims, although did not introduce any evidence in relation to the second of those aims, namely ensuring the health, safety and welfare of its employees. We accept however that the economic and operational requirements of the business and ensuring that staffing was at a level to provide good and adequate service for customers were legitimate aims. The claimant did not suggest otherwise.

117. In terms of assessing the proportionality of the action taken, we have asked ourselves whether the respondent could have done something 'less discriminatory' to achieve those aims. We find on balance that it could not have done. It had tried repeatedly contacting the claimant by telephone and email but did not get the information it needed. It therefore resorted to writing formal letters to the claimant to

encourage him to meet with Emma Busby, and explain the potential consequence of not doing so. Given the claimant's lack of response to telephone calls, it was understandable that the respondent took the steps that it did.

118. For these reasons the claim of discrimination arising from disability fails.

Harassment

119. The first question in the harassment claim is whether the conduct that we have found occurred was unwanted by the claimant. We have no hesitation in finding that it was. We accept that the claimant was genuinely distressed by what happened in February and April, to the point that he resigned from his employment. It was clear from the evidence before us that the conduct was not welcomed by the claimant.

120. We have then considered whether it can be said that the conduct related to disability, taking account of the fact that 'related to' is a much wider concept than 'on 'because of'. We have asked ourselves whether it can be said that there is any link between the claimant's arthritis and the conduct complained of. We find on the evidence before us that neither Emma Bushby nor Rhiannan Haigh, who are the alleged discriminators in this case, knew that the claimant had arthritis. Emma Bushby had never met the claimant prior to this Employment Tribunal and had been told by Jake Paterson that he was off work due to family reasons. Rhiannon Haigh had met him but did not know he had arthritis. The reason that Emma Bushby and Rhiannon Haigh acted as they did was because they wanted to resolve staffing issues in the Oakwood restaurant and understand more about why the claimant was absent and when / if he would be able to return to work.

121. Their conduct did not therefore relate to disability.

122. The claimant did not argue that the respondent's conduct was done with the purpose of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, but he says it did have that effect.

123. We find that the conduct complained of was offensive and upsetting to the claimant, that he perceived it to be bullying and harassment, and that he resigned in response. Looking at the conduct objectively however, it cannot in our view be said that it was reasonable for the conduct to have that effect on the claimant. In the circumstances where the claimant had been off work for 5 months, without any indication as to when he may be fit to return, and where it had not been possible to contact the claimant by telephone, it was reasonable for the respondent to write to the claimant as it did, and for Ms Bushby to respond to the claimant's grievance as she did.

124. The claim for harassment therefore fails and is dismissed.

Employment Judge Ayre

Date: 30 April 2024

JUDGMENT SENT TO THE PARTIES ON

Date: 9th May 2024

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FOR THE TRIBUNAL OFFICE

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