Case No: 3310774/2023

EMPLOYMENT TRIBUNALS

Claimant: **Anna Szymanek**

Respondent: **Kolak Snack Foods Limited**

Heard at: **Cambridge Employment Tribunal**

On: 16, 17, 18 , 19 and 20 September 2024, 4 November 2024 (in chambers) and 22 January 2025 (in chambers).

Before: **Employment Judge Freshwater**
Tribunal Member Ms K Omer
Tribunal Members Ms D Clarke

Representation
Claimant: Mr M Curtis (counsel)
Respondent: Mr M Greaves (counsel)

RESERVED JUDGMENT

1. **The claimant's complaint of disability discrimination contrary to section 13 of the Equality Act 2010 is dismissed.**

2. **The claimant's complaint of failure to make reasonable adjustments contrary to section 20 of the Equality Act 2010 is dismissed.**

3. **The claimant's complaint of harassment contrary to section 26 of the Equality Act 2010 is dismissed.**

4. **The claimant's complaint of constructive unfair dismissal contrary to section 94 of the Employment Rights Act 1996 is dismissed.**

REASONS

Introduction

1. The claimant is Ms Anna Szymanek. The respondent is Kolak Snack Foods Limited. For clarity, in this judgment the parties will be referred to

as the claimant and the respondent. Witnesses will be referred to by their names.

2. The claimant was employed by the respondent as an administrator from 17 August 2020 until 21 June 2023. Her employment ended by way of resignation on one week's notice which she gave on 14 June 2023.

3. This claim is about direct disability discrimination; failure to make reasonable adjustments, harassment and unfair (constructive) dismissal.

Procedure and hearing

4. The case was heard in person and in chambers at Cambridge Employment Tribunal.

5. The tribunal was referred to a bundle of documents, and a list of issues that was agreed by the parties.

6. The tribunal read witness statements from the following people: Mrs Szymanek, Miss Anne Marie Jones, Ms Rose Lewis, Mrs Michelle Zamiteas, Mr David Blagg, Mrs Mantha Subramaniam, and Ms Cheryl Sharp.

7. Oral evidence was heard from all of the witnesses, with the exception of Ms Rose Lewis. As her evidence was unchallenged under cross-examination, the tribunal attached less weight to it than to that of other witnesses.

8. Submissions were heard on behalf of both parties. The tribunal allowed a considerable period of adjournment on the afternoon of the 16 September in order for the claimant and her representative to speak in private. The claimant did not return to hear the submissions made by her representative. The tribunal proceeded in her absence, which made no difference to the findings and conclusions reached.

9. The panel met in chambers on two occasions to conclude deliberations, giving sufficient time to work through the (lengthy) list of issues and reach a decision.

Issues

10. The respondent accepted that the claimant was disabled by reason of depression and anxiety. The claimant contended that the respondent knew or ought to have known of her disability from 21 November 2022. The respondent's case was that it did not have actual or constructive knowledge of the claimant's disability until 24 November 2022.

11. The claimant alleged that she had been discriminated against directly by the respondent due to her disability. She relied upon a hypothetical comparator. This was not accepted by the respondent.

12. The claimant alleged that the respondent had a number of "PCPs" (Provision, Criterion or Practices) that it had applied to her which placed

her a substantial disadvantage as compared with others who are not disabled. This was not accepted by the respondent.

13. The claimant alleged that the respondent had engaged in unwanted conducted related to her disability, which amounted to harassment. This was not accepted by the respondent.

14. The claimant's case is that she was constructively dismissed when she resigned from her employment. This is disputed by the respondent.

15. The law as applied by the tribunal is set out in more detail below. The above issues are in summary form.

The Law

Direct disability discrimination

16. Section 13 of the Equality Act 2010 (in so far as is relevant) states:

> "(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others...
>
> (3)If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B."

Reasonable adjustments

17. Section 20 of the Equality Act 2010 states:

> "(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..."

Harassment

18. Section 26 of the Equality Act 2010 states:

> "(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.

(5)The relevant protected characteristics are...disability...."

Unfair (constructive) dismissal

19. Section 94 of the Employment Rights Act 1996 states:

"(1)An employee has the right not to be unfairly dismissed by his employer.

(2)Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239)."

20. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) says that "an employee is dismissed by his employer if…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." This is commonly known as constructive dismissal.

21. In the case of *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA,* the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed".

22. In the case of *Malik v BCCI; Mahmud v BCCI 1997 1 IRLR 462*, guidance is provided for deciding if there has been a breach of the implied term of trust and confidence. Lord Steyn said that an employer shall not: "…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

23. In assessing whether there has been a breach of the implied term of trust and confidence, the test is not whether an employee has subjectively lost confidence in the employer, but whether, objectively, the employer's conduct was calculated or likely to destroy or seriously damage trust and

confidence without reasonable and proper cause: *Leeds Dental Team Ltd v Rose [2014] ICR 94, EAT [20-21, 23-26].*

Findings of fact

What happened?

24. On 21st November 2022, we prefer the evidence of Mrs Zamiteas. She was consistent in her account orally and in writing. We do not find that Mrs Zamiteas shouted at the claimant or spoke to her in an inappropriate tone or manner. None of the employees in the area reported hearing any shouting or screaming (see pages 184 and 185 in the bundle).

25. We do not find that Mrs Zamiteas refused to allow the claimant to take a break. The claimant chose to leave the room. The claimant did not tell Mrs Zamiteas that she was having a panic attack – as she conceded her own evidence orally, she did not know at that point what a panic attack was. She was told later on by her GP that this is what had happened.

26. Indeed, the claimant reported to her doctor on 22 November 2022 that she had issues at work with HR, but that HR was not at fault. The claimant said that she was embarrassed to go back to work. She said that she liked her job and had good colleagues (page 257 in the bundle).

27. On 24 November 2022 there was a meeting between Ms Sharp and the claimant. We do not find that the claimant informed Ms Sharp that she had been suffering from severe depression since October 2021, or that the depression had increased as a result of Mrs Zamiteas' treatment of the claimant. This is inconsistent with what the claimant told her doctor at the time. The evidence before us is that the meeting was to discuss the email that the claimant had sent regarding her job title and the claimant's reaction during the meeting with Mrs Zamiteas on 21 November.

28. During the meeting on 24 November 2022, the claimant first raised allegations against Mrs Zamiteas. Ms Sharp informed the claimant that she should put her concerns in writing.

29. We do not find that the claimant was told Mrs Zamiteas had been appointed as her new line manager on 24 November 2022. It was not an issue that was pursued during the evidence. It was clear that there had been a plan for the line management of the claimant to change, and we find that it had been discussed, but was not implemented by 24 November.

30. On 24 November, the claimant submitted a grievance against Mrs Zamiteas by email to Ms Sharp (see page 152 in the bundle). In that grievance, the claimant said that she wished to inform Ms Sharp confidentially that she was suffering from anxiety and depression (See page 150 in the bundle). This was the first time that the claimant informed Ms Sharp, or indeed anybody at work, that she had anxiety and depression.

31. On 1 December 2022, the claimant attended a meeting to discuss her formal grievance. It is accepted that Ms Sharp said there was no evidence

to suggest the allegations against Mrs Zamiteas were founded. We do not find that Ms Sharp specifically told the claimant that she had a "poor attitude". However, it is clear that she did tell the claimant that she felt the claimant had been disrespectful to her during the meeting on 24 November. Ms Sharp also told the claimant that "during her investigations it came to light that [the claimant] had been spoken to by a senior member of the team about the way in which [she spoke] to people in meetings." [see page 164]. It was also accepted that Ms Sharp did not disclose who had made statements. This was in accordance with the grievance policy in place at the time.

32. Ms Sharp provided the claimant with minutes of the meeting on 1 December 2022. The claimant was able to set out her views on the minutes. There was clearly a dispute as to what was said, but the minutes were generally accurate. They were certainly not misleading.

33. Following the meeting with the Occupational Health adviser, Miss Jones, we do not find that Miss Jones made a recommendation that the claimant's line should manager should not be changed. It was not in her written report of 5 December 2022 (see page 186). We did not find her oral evidence to be credible because she appeared confused when answering straight forward questions. We do not find that there was a recommendation that changes to the claimant's work environment may had a significant impact on her mental health. The only recommendations were around a stress assessment, which was not completed, and to be accompanied at future meetings if feasible.

34. We do not find that HR pressured the claimant to agree to any developments or changes to the company's structure, including line manager.

35. We are satisfied that, overall, a fair and reasonable investigation into the claimant's grievance was carried out. Ms Sharp interviewed the potentially relevant witnesses. It would have been better if she had conducted a more detailed interview with Mrs Zamiteas, and kept notes of that meeting rather than relying on a brief email from Mrs Zamiteas. In our view, a better investigation would have included some questions about the claimants' anxiety and depression and dealt with more of the points raised in the written grievance (as opposed to orally). As we have stated, notwithstanding these issues, we find that Ms Sharp did enough to reach a reasonable conclusion.

36. We do not find that the claimant was told that if she dropped her complaint against Mrs Zamiteas and agreed to participate in mediation that she could have a former line manager back. The complaint was made and dealt with. It was not dropped. The respondent agreed to allow Mrs Subramaniam to continue to be the claimant's line manager, at least temporarily. We found the evidence of Ms Sharp to be credible on this point. The evidence of Ms Lewis states that she does not recall any conditions to the agreement that the claimant would remain reporting to Mrs Subramaniam.

37. We find that during the mediation meeting on 22 December that Mrs Zamiteas did say that she felt the claimant was overreacting. This is supported by the witness statement of Rose Lewis. In her oral evidence to us, Mrs Zamiteas said that she felt claimant's reaction was out of proportion when leaving the room during the meeting of 21 November 2022. This is indicative of the essence of Mrs Zamiteas' evidence to us, which gave the impression she felt the issues had been blown out of proportion. However, we do not find that Mrs Zamiteas said she was shocked by the claimant's attitude. We accept that she said she was shocked they had got into this position. This is consistent with Mrs Zamiteas' view that she felt it had been blown out of proportion.

38. We do not find that Mrs Zamiteas was told that the claimant had depression during the mediation meeting. Both Ms Sharp and Mrs Zamiteas agreed she had not been told before the claimant commenced these proceedings. In any event, we do not find that Mrs Zamiteas overloaded the claimant with tasks beyond her expertise or assigned her tasks with short deadlines. There was evidence beyond what was said in paragraph 19 of the claimant's witness statement which is a generic allegation. No further detail was provided during oral evidence. The allegation is therefore unfounded.

39. The claimant was informed that Mrs Zamiteas would be assigned as her line manager from 1 April. This was not a reassignment as her line manager had always been Mantha until that point (although many different people gave the claimant instructions about her work).

40. The claimant had a return to work meeting with Mrs Zamiteas on 27 March 2023. We find that the claimant did attempt to explain the difficulties she was facing at work. We also think it is more likely than not that Mrs Zamiteas stated that maybe the claimant should not have returned to work too soon. This would be a normal response to an employee who said they were still struggling. We accept that Mrs Zamiteas may not have recalled what was said and that the meeting was very short. She was confused as to whether it was her or Mrs Subramaniam that had conducted the meeting, and this is supports the fact that her recollection was poor. On that basis we prefer the evidence of the claimant.

41. Between 1 April 2023 and 6 June 2023, Mrs Zamiteas made no effort to establish contact or arrange a meeting with the claimant. Mrs Zamiteas accepted this in her evidence, as felt that early June was the right time to start one-to-one meetings. She was careful to carry out a light touch approach.

42. On 19 May 2023, the claimant was not asked to prepare a presentation. She was asked to set up the meeting space (which included laying some snacks out) and arrange the PPE needed for the guests. It was accepted that Mrs Zamiteas told her two hours before the meeting. However, this was adequate time to prepare and included tasks that were reasonably

within the claimant's role. It was thought that 15 guests were coming, but 22 attended. This meant the claimant had to arrange for extra PPE. However, this was not untoward, and it is a fact of life that sometimes things happen at short notice and diaries need to be rescheduled.

43. The claimant and another colleague took the lead for organizing a well-being week from 15 to 19 May. However, the claimant did not report feeling overwhelmed at the time. Mrs Zamiteas did not assist, but she was not asked to do so and it was not part of her role.

44. We do not find that the claimant was asked to deal with an alleged burglary on behalf of Mrs Zamiteas. During evidence, it became clear that the incident was in fact an attempted theft. This is not important. In any event, it was not within Mrs Zamiteas' role to deal with attempted thefts. Mr Blagg was responsible for the factory and had no knowledge of what had happened. There is no record of the incident occurring and we do not find it credible that Mrs Zamiteas or the claimant would have been expected to deal with it. If the incident did occur, we think it is more likely that the claimant thought she should deal with rather than being directed to deal with it.

45. There was only one example in respect of induction meetings in the evidence before us. On 12 June 2023, the claimant was given one hour's notice to set up a remote induction meeting. She was not responsible for delivering the induction. On 2 June 2023, there appears to have been one occasion where a new starter was unable to obtain a share code. It was not an expectation of the claimant to check and verify an employee's right to work status. The situation was resolved by Mrs Subramaniam, and Mrs Zamiteas was unaware of what had happened. We do not find that the claimant was never given notice about inductions or training, nor was she frequently expected to complete application forms for prospective employees, nor was she expected to check all documents including right to work status.

46. The claimant accepted in her oral evidence that she was not given extra tasks by Mrs Zamiteas on 5 June 2023. At most it seems to us that she was asked to post a letter, but this was the evidence of Mrs Zamiteas not the claimant. The claimant therefore changed her evidence in this regard. She may have worked a 12 hour shift helping to arrange the health and safety day, but this was not under the direction of Mrs Zamiteas who was not aware of the claimant's working hours that day.

47. On 7 June 2023 the claimant had her first meeting with Mrs Zamiteas since the change in line management. It was agreed that there would be another meeting on 12 June. We do not find that the claimant was told to improve her communication and always pick up her phone. We found the evidence of Mrs Zamiteas to be credible when she said that she apologies for sending an early morning text message to the claimant when she realised this had upset the claimant. We are satisfied that this was the

only occasion Mrs Zamiteas had attempted to contact the claimant out of hours. She was remorseful and there was no evidence it happened again. Mrs Zamiteas did explain to the claimant that she could not change the decision about line management. It was not Mrs Zamiteas' decision to take.

48. We do not find that Mrs Zamiteas told the claimant that only new employees and managers had access to Occupational Health services. We think on balance that there was confusion between the claimant and Mrs Zamiteas. The claimant thought she had asked for a referral, but Mrs Zamiteas seems not to have understood there was a request. This is because Mrs Zamiteas said in her oral evidence that she explained referrals would be made through a line manager/HR manager (including Mrs Zamiteas). There was clearly a conversation about occupational health referrals. This does not mean that the claimant had a request that was refused.

49. On 12 June 2023, the claimant was called into a meeting without notice and we find it credible that she was on her lunch break at the time. Nobody else could provide detail about the timing of the meeting. There was no suggestion that that the claimant had been sent a meeting invite. The meeting took place between Mr Blagg, Ms Sharp and Katie Bailey. We accept that this made the claimant feel vulnerable and uneasy. It would have been more appropriate for the claimant to have had notice of the meeting even if Ms Sharp intended the discussion to be informal and supportive.

50. During this meeting, the claimant asked to speak to Mr Blagg alone. Ms Sharp left. The claimant expressed her concerns to Mr Blagg. She said that she did not wish to be line managed by Mrs Zamiteas. Mr Blagg was firm that decision had already been made and would not be changed.

51. On 14 June 2023, the claimant resigned from her employment. There was a dispute as to whether she asked Mrs Zamiteas to keep her resignation confidential. We think that on balance, she did. This is because it is accepted that the claimant was very upset with Mrs Zamiteas when she found out that Katie Bailey and Martha Hearn had been told by Mrs Zamiteas. We accept Mrs Zamiteas' evidence that it was appropriate to inform Katie and Mrs Subramaniam due to operational reasons. This does not negate the impact on the claimant of realising that people knew she would be leaving. We think it was naive of Mrs Zamiteas to try and organise a cake and leaving collection for the claimant in the circumstances. By extension, organising a leaving collection would have meant that wider coworkers knew. There was no operational reason for more people to know. However, there is now evidence that at that point, all her coworkers knew.

52. However, we do not find that Mrs Zamiteas told the claimant she should go home if she was unable to handle the situation. The claimant's

evidence was that she had a panic attack and left crying uncontrollably. There was a quick handover with Jenny Inman. This was not because it was directed by Mrs Zamiteas, but it was the best handover that could be completed in the circumstances. Martha Hearn set out her record of what happened on 14 June (See page 198). This reports that Mrs Zamiteas told the claimant that she could leave once she had finished typing up her handover. The claimant told Mrs Zamiteas that she would be finsihed by 1 pm. We think that the claimant perceived Mrs Zamiteas to be telling her to go home but that actually Mrs Zamiteas was trying to resolve the situation in the heat of the moment.

53. The evidence was that all employees were expected to manage a busy workload, and juggle various tasks. This meant there were competing priorities that had to be managed.

54. We do not find that administrators were expected to manage a substantial workload without support. The claimant was the only administrator employed by the respondent. She was given instructions from various people at the Stevenage site.

Reasonable adjustments

55. There was no evidence before us about the workload of employees generally, or how it might be found to be substantial. We do not find that the respondent had this PCP.

56. There is no evidence that administrators were expected to manage a substantial workload without support. The claimant was the only administrator but she did not adduce any evidence that she was required to manage a substantial workload. Her complaint was about being given short notice and being expected to perform tasks which she considered to be outside her level of expertise. We therefore do not find the respondent had this PCP.

57. There was no evidence that the respondent required employees to carry out tasks above their expertise and competence. The only evidence was that the claimant believed she had been asked to do such tasks, not that employees generally were so expected. In any event, we do not find that the claimant was asked to carry out tasks above her expertise and competence. We do not find that this PCP is made out.

58. The respondent did have a PCP of choosing the line manager for employees. This was accepted by the respondent. This PCP was applied to the claimant. This did cause her additional stress and anxiety. It did not mean that the claimant was unable to gain medical advice and support she needed. There was no suggestion that the claimant did not complete her work and her workload to a good standard. To the contrary, the claimant was helping various parts of the respondent's business. The claimant was not, therefore, at a substantial disadvantage as compared to others without a disability because of this PCP.

59. There was no evidence to suggest the respondent had a PCP of not carrying out risk assessments upon having knowledge of an employee's disability.

60. There was no evidence that the respondent had a PCP of restricting referral access to Occupational Health.

Conclusions

61. It is just and equitable to extend the time to bring a complaint under the Equality Act 2010 in respect of the complaints relating to failures to make reasonable adjustments. There is minimal prejudice caused to the respondent because it was able to call the relevant witnesses and test the claimant's evidence. If time was not extended, the prejudice to the claimant would be far greater as she would not be able to proceed with those complaints. The claims involved a number of incidents taking place over time, rather than a single incident. There is a common thread throughout the evidence (discontent around who was her line manager) leading to the day that the claimant's employment ended which, although insufficient to amount to continuous conduct, is a link between the complaints. The delay is, at most, 5 months which in all the circumstances did not impact on the respondent's ability to deal with the claim and collect the evidence necessary to defend it.

62. The respondent had knowledge of the claimant's disability on 24 November 2022 when she informed Ms Sharp in her written grievance.

63. Ms Sharp could have undertaken a better investigation after she was told about the claimant's grievance against Michelle. It would also have been advisable for her to ensure that the recommended stress risk assessment was carried out before the outcome of the grievance procedure and to provide notice to the claimant of the meeting that took place on 12 June 2023.

64. However, we do not find there is any evidence that any of this occurred because of the claimant's disability. In particular, it was not less favourable treatment than a hypothetical comparator would have received. The reason that the stress risk assessment was not carried out was because it was decided that the grievance ought to be dealt with first. The meeting on 12 June was supposed to be an informal chat, but it would have been better practice to provide notice. We are satisfied that it was not the intention of Ms Sharp to cause distress to the claimant or to make her feel uneasy. We accept that Miss Sharp intended to be supportive, even if this was not the result.

65. In the view of the tribunal, it is a general feature of this case that there was a misunderstanding in the communication between the claimant and Ms Sharp and Mrs Zamiteas. The claimant was clearly a hardworking and diligent person, who had a tendency to internalise what was upsetting her. She did not always articulate to Ms Sharp and Mrs Zamiteas what she

needed. This is entirely understandable, given she was going through tremendous difficulties in her personal life. The claimant told her doctor that she had good colleagues and, generally, we find that this was the case. The respondent could have handled the situation more sensitively, particularly when the claimant resigned.

66. The claimant did not engage in any unwanted conduct in relation to the claimant's disability. Instead, the actions of the respondent were intended to deal with issues raised by the claimant.

67. None of the facts that we have found amount to a breach of the implied term of mutual trust and confidence. Objectively the respondent's conduct was not calculated or likely to destroy or seriously damage trust and confidence. As we have said, it was at times insensitive and misguided but not to a such an extent as to show an intention to refuse to perform the contract. There was no repudiatory breach of the contract by the respondent.

68. The complaints are therefore dismissed in their entirety.

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Approved by:

Employment Judge Freshwater

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Date 22 January 2025

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

30 January 2025 .....

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FOR EMPLOYMENT TRIBUNALS

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