



# EMPLOYMENT TRIBUNALS

## Claimant

Mrs L Elmes

## Respondent

Gigaclear Limited

v

## Heard at:

Reading

## On:

25, 26, 27 and 28 March 2025

## Before:

Employment Judge Gumbiti-Zimuto

## Members:

Mrs A Brown and Mrs F Tankard

## Appearances:

### For the Claimant:

Mr W Lewis, Consultant

### For the Respondent:

Ms G Holden, Counsel

**JUDGMENT** having been sent to the parties on 13 May 2025 and written reasons having been requested in accordance with Rule 60(4) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Introduction

1. The Claimant submitted a Claim Form on 5 January 2023. She originally brought claims for constructive dismissal, whistle blowing detriments, disability discrimination, victimisation based on whistle blowing detriments and wrongful dismissal.
2. She abandoned most of those complaints and the claims before use are limited to just two, namely: constructive unfair dismissal and direct disability discrimination.

### Evidence

3. The Tribunal heard evidence from the Claimant and from the Respondent's side we heard evidence from Rebecca Hands, Laura Jones and Laura Richards.
4. We were provided with a Bundle containing 591 pages of documents and some additional disclosure, although we were never actually taken to that

by the parties. We were also provided with a useful chronology and cast list, a Bundle containing inter-parties correspondence which we have not considered and Supplementary Witness Statements from Laura Jones and Laura Richards.

5. At the end of the evidence both sides provided the Tribunal with useful submissions setting out their closing arguments in the case. We do not repeat the matters set out in the closing arguments because those were set out in writing and there were some additional submissions made by the parties which supported the written submissions which had been given.

### **Background and the Facts**

6. The Claimant was employed by the Respondent as a Contract Performance Manager between 1 March 2020 and 14 October 2022.
7. The Claimant, whilst on holiday, was invited to a catch up meeting on 12 September 2022. When she attended that meeting she discovered that it was in fact part of the Respondent's disciplinary process in that it was an Investigation Meeting. This was relating to an issue that had been discovered during the time that the Claimant had been away on leave.
8. On 13 September 2022, the day after the Claimant returned to work from leave, she signed off sick and was given a Fit Note for a period of two weeks.
9. The Claimant was sent an email by the Respondent on 14 September 2022; in that email they asked her for some additional information. She says they also set out some further allegations.
10. The Claimant was invited to attend a Disciplinary Hearing which was to take place on 16 September 2022. That invitation was sent to her on 15 September 2022. On receiving it the Claimant decided to resign her employment.
11. On 27 September 2022, the Claimant sent an email seeking to retract her resignation. In her retraction she explained that her judgement had been clouded by her mental health. The Claimant was informed on 14 October 2022 that she was not going to be permitted to rescind her resignation.
12. The Respondent had become aware that the Claimant had exchanged WhatsApp messages with a member of her team. The Respondent considered those WhatsApp messages showed that the Claimant had been disparaging towards the Respondent and also identified a number of other members of the Claimant's team who she is stated to have helped to arrange to have interviews with another company N Limited, a direct competitor of the Respondent. In the WhatsApp messages with her colleague, Max, she offered to arrange an interview for him with N Limited on more favourable terms.
13. The Respondent's position was that N Limited was a company founded by former employees of the Respondent and the Claimant's conduct was seeking to arrange for their employees, at a difficult time for the Respondent business, to go into the employment of N Limited. The

Claimant had indicated in the WhatsApp exchange that having done this she herself would resign her employment with the Respondent and join N Limited.

14. That series of WhatsApp messages is what was spoken about with the Claimant on 12 September 2022 when the Claimant fully admitted that she had been a party to that WhatsApp exchange.
15. Those basic facts give rise to the issues that we have to decide in this case.

### **The Law**

16. The Claimant had claimed unfair dismissal relying on constructive dismissal.
17. Section 95(1) of the Employment Rights Act 1996 provides,
  95. Circumstances in which an employee is dismissed
    - (1) For the purposes of this Part an employee is dismissed by her employer if-
      - (a) ...
      - (b) ...
      - (c) the employee terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct.
18. The case of Western Excavating (ECC) Limited v Sharp set out how that operates in context of common Law. That case and a number of other cases are distilled into a number of propositions which are set out in the case of Waltham Forest v Omilaju.
19. Both parties made reference to those principles in their submissions and I do not consider it necessary for the purposes of these Reasons to set those out but we have considered those principles and we have had those in mind in arriving at our conclusions.
20. The question of unfair dismissal arises from consideration of s.94 and s.98 of the Employment Rights Act 1996.
21. The Claimant also makes a complaint of a wrongful dismissal. The claim for wrongful dismissal is one where an employee claims that they have been dismissed in a manner which is in breach of their contract of employment, usually related to the provision of notice but not exclusively.
22. The other legal claim that we have considered is the complaint of direct discrimination. In relation to that we have considered the provisions that are contained in the Equality Act 2010, s.13.
23. We have also had regard to the provisions contained in s.6 of the Equality

Act 2010 which set out the definition of disability where the Act defines a disabled person as a person who has a physical or mental impairment and that impairment has a substantial and long term adverse effect on their ability to carry out normal day to day activities.

### **Conclusions**

24. With those matters in mind, we have considered the issues as they are set out in the Case Management Summary which was prepared by Employment Judge Hawksworth. This was a repetition of the List of Issues which had been originally prepared by Employment Judge Annand who set these matters out and made a number of directions which had played themselves out by the time Employment Judge Hawksworth made her Orders.

### **Constructive Dismissal**

25. Dealing first of all with the question of constructive dismissal.
26. The Claimant shared WhatsApp exchanges with a colleague, Max. The messages suggested that the Claimant had contacts with another company, N Limited. She said that they were a good company and that a number of other colleagues had had interviews with N Limited.
27. Looking at the WhatsApp exchange, it includes a passage which reads,
- “I am very good friends with a couple of directors, that’s how they all got interviews. My plan is to get them sorted then I’ll be off as they want me too.”
28. These WhatsApp messages were brought to the attention of the Respondent’s HR Business Partner and the decision was made after consultation with others, including that HR Director, that the Claimant who at the time was on holiday, would be called into a meeting on her return from holiday to discuss the WhatsApp messages.
29. The decision was made that the Claimant would not be informed of the purpose of the meeting beforehand. The reason for not informing the Claimant of the purpose of the meeting was because they wanted to ensure the Claimant’s attendance. There was reference to there being a concern that the Claimant might go off sick if she was notified of the purpose of the meeting and also to avoid the possibility of the Claimant tampering with evidence.
30. The meeting took place as arranged on 12 September 2022. The Claimant accepts that she was invited to attend this meeting whilst on holiday. She says it was originally stated to be a catch up meeting and that she was taken by surprise at that. The Respondent suggests that that is not the case and the Claimant would not have been taken by surprise because she would have been aware that the Respondent was looking into those matters.
31. We are satisfied that the Claimant was taken by surprise, based on the evidence we have heard, there is no direct evidence which supports the

proposition that the Claimant was in fact aware that the Respondent was looking into these matters. Though there was some suggestion of hearsay evidence to that effect.

32. The important significant feature is that the notes of that meeting provided to the Tribunal, and contained in the Bundle at pages 204 – 206, were not disputed by the claimant. The Claimant accepts that what she told the Respondent in the course of that meeting was not true.
33. The first issue that they are asked to determine, paragraph 28.1.b is the contention that the Claimant was lured into an Investigation Meeting on 12 September 2022 without warning, causing shock and disappointment.
34. We do not accept that the Claimant was lured into any Investigation Meeting. She was invited to the Investigation Meeting and there was nothing underhand about the Respondent's actions in inviting her without notifying her; there are sensible reasons why the Respondent felt it appropriate not to inform her about that beforehand. It may well be that she was shocked and disappointed about the content of the meeting, bearing in mind that she accepted the base allegations which the meeting was concerned with and then proceeded to not tell the truth to the Respondents in that meeting, we do not find that the Respondent did anything to cause shock or disappointment to the Claimant.
35. On the following day, the Claimant submitted a sick note and she complains that she received no response. It is accepted by the Respondent that there was no direct response to the sick note which was submitted. The sick note stated that the Claimant was unfit to work due to anxiety status. The comments about the functional effects of the Claimant's condition described her as having low mood, panic attacks and feeling very anxious. The Claimant was signed off until 27 September 2022.
36. Although the Respondent concedes that there was not any response to the fit note on the day that it was sent, the Respondent contends and it is established in documents that have been produced to the Tribunal, that the Claimant's sickness absence was acknowledged in an email from Adam Frith.
37. The next issue which the Claimant seeks to rely upon in support of the suggestion that there was a breach amounting to a fundamental breach of contract, is that despite being on sick leave the Claimant received further allegations on 14 September 2022 and had short notice to respond which added to her mental distress.
38. The text of the email from Adam Frith should be considered in its entirety. The text reads as follows,

“We would like to have a further investigation meeting with you. However, we understand that you're currently off sick at the moment and a meeting might be a step too far.”
39. I stop there to mention that that is the acknowledgment of the Claimant's sickness which was referred to by the Respondent. The email continues,

“With this in mind we will accept written answers to our questions that I have included below.

1. You have sent an email on 7<sup>th</sup> September 2022 from your personal email address to Jack Eatwell, Laura Jones and Rob Elmes on copy. In that email you pay information regarding a number of other engineers was disclosed which was a breach of confidentiality. Please can we have your comment on the sharing of such information and why you disclosed that in email with an engineer on copy, who would not otherwise have access to such information.
2. There was a phone conversation between yourself and Craig Ellis on Friday 9<sup>th</sup> of September. In that conversation Craig disclosed he was working with Max and the phone was then passed to Max. What was the situation in which by you needed to talk with Max and please can you give us an account of that conversation.

Please can I ask you to respond to these questions by 11am tomorrow (Thursday 15 September). If you have any questions please feel free to ask.”

40. We have seen there that the Claimant was being given less than a day in order to respond to that information. The Claimant’s complaint is that she was on sick leave at the time and that the email contained further allegations against her alleging a breach of confidentiality and she had a short period of time in which to respond.
41. An Investigation Report was completed by Laura Jones in the intervening period. This followed Laura Jones having spoken to a number of the Claimant’s colleagues who had been referred to in the WhatsApp message exchange between the Claimant and Max. The Respondent had concluded that the matter should proceed to a Disciplinary Hearing under the Respondent’s Disciplinary Procedure.
42. The Claimant was invited to a Disciplinary Hearing which was to take place on 16 September 2022. The Claimant had not responded to the email of 14 September 2022 seeking further information. She then received the email on 15 September 2022 inviting her to a Disciplinary Hearing taking place on 16 September 2022. Her response to that was to submit her resignation.
43. The invitation to the Disciplinary Hearing on 16 September 2022 included the following passages,  
  
“Further to your meeting with Adam Firth and Laura Jones on Monday 12<sup>th</sup> September 2022, you are now invited to attend a disciplinary hearing on Friday 16<sup>th</sup> September... I understand that you are signed off at present with anxiety and getting through this process may be a precipitating factor. Please can I ask you to let me know whether you want to have a meeting or would prefer for us to submit our questions

in writing.”

44. That email attached a letter which set out the allegations which are said to be allegations of gross misconduct and the accompanying evidence. The Claimant was told that she could be accompanied at the meeting. The letter dealt with the fact that the Claimant was off sick by saying,

“I understand that you are signed off at present with anxiety and getting through this process may be a precipitating factor. Please can I ask you to let me know whether you want to have a meeting or would prefer for us to submit our questions in writing.”

45. The Claimant’s response to the invitation to the Disciplinary Hearing was to send an email resigning her employment. The Claimant’s response to the invitation for a Disciplinary Hearing did not include any request for more time or for an abeyance during the period of her sickness absence. What the Claimant wrote was this,

“Hi Rebecca. Unfortunately, due to my mental health currently I am unable to even function with normal day to day duties let alone a face to face meeting or providing answers in writing. My doctor signed me off after assessing me Tuesday. I can’t eat or sleep and I have lost 7lbs in weight since Monday due to severe anxiety and panic attacks from this whole situation. I feel that the best option is for me to hand my notice in as my mental state is completely at its worst. I feel out of control. I am struggling to breathe. I have chest pains from the panic and feel extremely overwhelmed. I understand my contractual notice period is five weeks which I am giving now. Going forward I regret that my communication is with yourself as the thought of anyone else contacting me increases my anxiety levels even more. Please can you confirm what the next steps are.”

46. The Claimant was wrong in identifying five weeks as her notice period; the correct figure was in fact four weeks.

47. The Claimant was subsequently to make a request to retract the resignation. However, the Respondent refused to allow the Claimant to retract the resignation. The Respondent offered the Claimant the opportunity of explaining the circumstances in which she had made the resignation so that it could better understand how her mental health had affected the decision to make the resignation. Having considered the material that was provided by the Claimant, the Respondent made the decision not to accept the Claimant’s retraction.

48. This is a case where there is a gap of a number of days over a week between the resignation and the retraction. The Claimant was then given an opportunity to explain why the retraction should be permitted by the Respondent. The Tribunal is of the view that this was a matter that the Respondent properly took time to consider. There was a significant gap between the resignation and the retraction and the Tribunal was unable to criticise the way that the Respondent dealt with the request by the Claimant for a retraction. In any event, we have regard to the way that the case was presented in the Case Summary and the List of Issues and we

note that the question in this case is not whether there was an express dismissal as a result of a refusal to accept the retraction but the question was, whether or not there was a constructive unfair dismissal arising from the resignation of 15 September 2022.

49. The final point which the Claimant asked the Tribunal to make findings of a serious breach of contract, is that she says the company was aware of her documented mental health issues but still took the actions set out through (a) to (d) in the List of Issues which negatively affected her mental health.
50. The Respondent was aware that the Claimant had a history of anxiety but the Respondent did not know that this amounted to a disability until the Occupational Health Report, which post-dates these events, identified the Claimant as disabled. The Respondent's actions in inviting the Claimant to an Investigation Meeting without notifying her of the purpose of the meeting beforehand and then subsequently taking steps to continue the disciplinary process were reasonable actions in the light of what the Respondent knew of the Claimant's condition and the seriousness of the matters under consideration.
51. The view of the Tribunal is that the matters set out at 1a, b, c, d and e, insofar as they occurred do not amount to a breach of the implied term of trust and confidence. The Claimant resigned her employment because she said she wanted to "make it all go away" and the make it all go away related to the Respondent's investigation into conduct which, although she did not ever in the context of our case suggest that she had done anything wrong, was however conduct about which she was willing to lie to the Respondent's about, or, as she put it herself in her resignation letter,

"...due to my mental health currently, I am unable to even function with normal day to day duties let alone a face to face meeting or providing answers in writing."

52. It is clear to us that the Claimant did not want to go through a disciplinary process and so she resigned her employment. That resignation may have been informed by how she felt in terms of her overall wellbeing and her mental health but what it was not, was as a result of a breach of contract by the Respondent at the time of the Claimant's resignation. There was no fundamental breach of contract that cause the Claimant to resign.
53. The Claimant's claims of unfair dismissal therefore fails and is dismissed.

#### Wrongful Dismissal

54. The Claimant claims wrongful dismissal.
55. The evidence that we heard, however, does not support a claim for wrongful dismissal as the Claimant gave notice, worked out her notice and the question of dismissal does not arise.

#### Direct Discrimination

56. The Claimant also makes a complaint of direct discrimination.



57. Direct discrimination arises where a person is treated less favourably than others would be treated by their employer in circumstances where the reason for the less favourable treatment is a protected characteristic; in this case, disability.
58. The matters relied upon by the Claimant are those set out at paragraphs 12 a – e of the list of issues.
59. The Tribunal first of all is satisfied that the Claimant was a disabled person. The evidence shows that. The Tribunal, however, is also satisfied that the Respondent did not know that the Claimant was a disabled person and could not reasonably have known about the Claimant's disability until after these events occurred. The Claimant had the opportunity of informing the Respondent of the full extent of her incapacity as a result of her condition of anxiety but she did not do so. That is not to criticise the Claimant, it is in our view merely a fact.
60. The fact that the Claimant has an occasion when she is off sick with anxiety does not mean that her employer should therefore conclude that she is a disabled person. The fact that the Respondent some years back had provided the Claimant with Counselling support or assistance, which appeared to be successful and resolved issues that she had been facing, in our view does not lead to the necessary conclusion that the Respondent ought to have known sometime later that the Claimant was a disabled person.
61. The claim under s.13 does not, in the way that s.15 and §.20 and 21 do, require a knowledge of the particular protected characteristic or the disability in this case. However, lack of knowledge on the part of the supposed perpetrator of the discriminatory act may present complications when looking at whether the said disability was the reason for the alleged less favourable treatment.
62. What the Claimant relies on is being lured into an Investigation Meeting on 12 September 2022 without warning, causing shock and disappointment.
63. The Claimant was asked to attend the Investigation Meeting on 12 September 2022 because she was suspected of being guilty of gross misconduct. It had nothing whatsoever to do with her disability.
64. On 13 September 2022, the Claimant submitted a sick note and received no response.
65. The Claimant did not get a response to her Fit Note because the Respondent did not reply specifically to Fit Notes. They acknowledged the sickness absence soon afterwards but did not respond directly to the Fit Note.
66. At this point the Respondent was unaware of the Claimant being a disabled person. The failure to respond was not because of the Claimant's disability. In any event, the Tribunal are not satisfied that if there was any less favourable treatment of the Claimant in this respect that it amounted to a detriment, taking all the circumstances of this case, we are not satisfied that the Claimant could be said to have been

subjected to a detriment when the Respondent sent an email to the Claimant on 14 September 2022 which acknowledged her sickness absence. The fact that there had not been any express acknowledgement of the Fit Note, in our view, in those circumstances cannot amount to a detriment.

67. The Claimant goes on to say that despite sick leave she received further allegations on 14 September 2022 and had short notice to respond, which added to her mental distress.
68. The Claimant was informed of further questions by the Respondent arising from the investigations carried out and as part of the disciplinary process that was in hand. This was because the Respondent suspected the Claimant of serious misconduct. It was not because of the Claimant's disability.
69. On 15 September 2022, the Claimant was invited to a Disciplinary Hearing on 16 September 2022 with insufficient time and information to prepare her defence.
70. The Claimant was invited to a Disciplinary Hearing because the Respondent believed the Claimant was guilty of serious misconduct.
71. Finally, the claimant complains that the Respondent was aware of the Claimant's documented mental health issues but still took the actions in (a) to (e) which negatively affected her mental health.
72. The Respondent was aware that the Claimant had a history of anxiety. The Respondent did not know that this amounted to a disability until the Occupational Health Report, which post dates these events, identified the Claimant as a disabled person.
73. There was not a link between the Claimant's disability and the reasons for the Respondent to act as they did in the matters which we have addressed at points 12a, b, c and d.
74. For those reasons, the conclusion of the Tribunal is that the Claimant's complaints of direct discrimination are also not well founded and should be dismissed.

**Approved by:**

Employment Judge Gumbiti-Zimuto

Date: 19 June 2025

Judgment sent to the parties on

23/06/2025

For the Tribunal office

**Public access to Employment Tribunal decisions**

Judgments and reasons for the Judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.

**Recording and Transcription**

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

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