



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000051/2023

Hearing held at Aberdeen on 13 and 14 March 2024

**Employment Judge I McFatridge
Tribunal Member J Copland
Tribunal Member R Dearle**

Ms M Pirie

**Claimant
In person**

Orka Artisan Cafe Limited

**Respondent
Represented by
Mr McFarlane,
Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claim having been withdrawn by the claimant should be dismissed in terms of Rule 51 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1.

REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed that she had been automatically unfairly dismissed and suffered discrimination at the hands of the respondent. The claim was originally made against the respondent and a further respondent, HR Services Scotland. Both parties denied the claims. The claim against HR Services Scotland was struck out by EJ Hendry on 21 July 2023 as having no reasonable E.T. Z4 (WR)

prospect of success. A further hearing took place in January 2024 in order to clarify the identity of the respondent in this case and in a judgment issued following that hearing I confirmed that the correct respondent was Orka Artisan Cafe Limited. A particular feature of the way that the claimant has chosen to conduct this claim is that she has bombarded the Tribunal with a vast number of emails almost all of which have been completely irrelevant to the claims before the Tribunal and a substantial number of which have been vituperative making spurious and irrelevant accusations of corruption levelled at the Tribunal and other parties. This tendency was evident as far back as the hearing in July 2023 and Employment Judge Hendry noted in paragraph 25 of his judgment that this behaviour was extremely challenging and inappropriate.

2. The case proceeded to a final hearing which was set down to take place on 13, 14, 15 March 2024.
3. The claimant attended the hearing representing herself. Mr McFarlane attended the hearing representing the respondent along with Louise Smart who was a director of the respondent and had managed the cafe where the claimant worked. The claimant gave her evidence during the first day of the hearing. Although the panel indicated that they would be prepared to allow Ms Smart to be present during the claimant's evidence Ms Smart declined and remained in the waiting room for most of that day only coming out to view a video along with the claimant. During the course of the claimant's cross examination she was aggressive and unresponsive, refusing to answer a number of questions. She would answer questions with a question. She became emotional on a number of occasions. She behaved aggressively towards the respondent's representative. The Employment Judge attempted to gently persuade her that the hearing would go more smoothly if she refrained from these behaviours. This appeared to have little success.
4. On the second day Ms Smart gave evidence. From the outset of cross examination the claimant behaved aggressively towards Ms Smart. It was clear that her behaviour was having an adverse effect on Ms Smart. During her cross examination the claimant mainly asked questions which were entirely irrelevant to the matter before the Tribunal. She spent some

time trying to establish that the claimant was trading from her cafe in Ballater without a licence. She was not prepared to accept Ms Smart's perfectly logical and reasonable explanation as to who the holder of the licence was. She was critical of the fact that the claimant was now trading in her Ballater cafe as a sole trader following the liquidation of the company which had previously run that business. It appeared to be the claimant's view that there was something underhand or nefarious about this when in fact Ms Smart's explanation was perfectly reasonable. The claimant asked about other members of staff who had left. Generally speaking the employment judge attempted to gently remind her that she should only ask questions which were relevant to her case but allowed the questions to be answered on the basis that he did not wish to put the claimant off. The claimant then asked some potentially relevant questions in relation to whether or not Ms Smart would have known she was going to visit the cafe after hours on 4 September. She then asked Ms Smart if Environmental Health had been back to the cafe since the visits in September where they had first suggested that Ms Smart voluntarily closed the cafe for 24 hours and then returned to confirm that all works had been completed satisfactorily. Ms Smart said she could not recall this. She then put it to Ms Smart that there had been another visit in October 2022 and that at this visit Environmental Health had given another warning because everything in the cafe failed apart from two items. Ms Smart confirmed that she knew nothing of this. The claimant then moved on and asked Ms Smart if she had been concerned that Kathryn Wylie the journalist the claimant was speaking to might put something in the paper about it. Ms Smart confirmed that this was correct. The claimant then stated that there were various messages sent around this time where the claimant had confirmed that Kathryn Wylie would not be putting anything in the paper. The claimant said this was "not me trying to throw the cafe under a bus". Ms Smart confirmed to say that she couldn't see why the claimant had sent the information about Orka to Ms Wright in the first place. The claimant said that this was untrue. The claimant then stated that she had lodged various texts with the Tribunal which had not made their way into the final bundle. She essentially accused the respondent's representative of manipulating the bundle so as to exclude texts which did not suit the respondent's case. Given that this was a serious allegation

the Employment Judge asked the claimant to confirm what text messages she was talking about and where they were. He explained that the bundle had been sent to her and that it was her responsibility to ensure that all relevant documents were before the Tribunal. The Employment Judge did however offer her the opportunity to show if these texts had been sent to the respondent's representative and if so, when. The claimant indicated that there were things which had been in the bundle for the previous hearing which had now been dropped.

5. The claimant then went through one of the bundles. By this time she had changed her tack and instead of talking about text messages which had been omitted she then said that a response to a Freedom of Information request from Aberdeen City Council relating to the alleged Environmental Health visit in October 2022 had been deliberately omitted. The Employment Judge asked the respondent's representative to advise on his position in relation to this. He stated that when he had taken over the file he had essentially taken the bundle for the November hearing (which had been postponed) and added to it further documents in relation to the hearing which had taken place in January and he said nothing had been taken away from it. He said that an additional bundle had been put together for the hearing in January 2024 which only dealt with the issue of identity of employer. The November bundle had been sent to the claimant on 19 November 2023.

6. The claimant then said that in relation to one of the bundles she considered pages 69-79 were different and had been altered. The claimant's demeanour throughout was extremely unpleasant and she was aggressive to the Tribunal and to the respondent's representatives. By this time it was 1.00 pm and I indicated that the Tribunal would adjourn for a one hour lunch break. During the lunch break I attempted to obtain copies of the previous bundles in order to compare these. Unfortunately the Tribunal only had electronic copies of the bundle for the hearing in July 2023, they did not have copies of the original bundles. After the break, the respondent's representative stated that he had been able to identify the original bundles from the respondent's system. He indicated that there were no more text messages. It appeared that the claimant was referring

to pages 69-79 of the bundle prepared for the January hearing was different. He said that the January hearing was for a different purpose. He stated that the claimant had lodged a copy of a request for information from Aberdeen City Council with this bundle however there was nothing in the bundle relating to their response.

5

7. The Employment Judge suggested that matters move on. The claimant then put it to Ms Smart once again that Environmental Health has visited in October 2022. Ms Smart repeated that she had no knowledge of this. The claimant at this point became extremely upset and accused Ms Smart of lying. She accused the Tribunal of abetting her. The Employment Judge attempted to defuse matters by asking Ms Smart to set out her position, in particular about the timeline after the claimant was dismissed. Ms Smart set out the timeline. She confirmed that she had no knowledge of any subsequent visit by the Environmental Health Department. She indicated that she had dealt with the issue of the cupboard by ordering that no foodstuffs be stored in there. She confirmed that the lease on the cafe had expired in November and she had planned to give it up then. The landlord had persuaded her to continue leasing the property on a month to month basis which she had done until the following May. The cafe had operated until then. At around this point the claimant said that she wanted a new Tribunal starting again with a fresh Employment Judge. The Employment Judge refused this application.

10

15

20

8. The claimant accused the Employment Judge of being biased. She stated that the fact that I considered her questions to be irrelevant showed her bias. This was in relation to an earlier ruling I had made which was that whilst I accepted the respondent's position that whatever Environmental Health had said in October 2022 did not appear to be relevant I would allow it principally on the basis that it might relate to credibility if indeed the claimant had a Freedom of Information request from Aberdeen City Council giving a report on an inspection at that date. The Employment Judge also had in mind, although it was not part of the claimant's pleaded case, that it may be circumstantial evidence in relation to Ms Smart's motive if indeed there had been a further Environmental Health visit shortly before the decision to dismiss the claimant was made.

25

30

9. The claimant's response to this ruling which I leant very much in her favour given the circumstances and the complete lack of clarity in her questioning resulted in the claimant stating that if the Employment Judge considered matters irrelevant then this was clearly showing bias. During this
5 exchange the claimant referred back to an answer previously given by the Ms Smart as to whether it was right to withhold wages from employees. Ms Smart's response had been that if there was no money there then there was nothing that could be done. The Employment Judge checked his notes and advised the claimant that Ms Smart had not said that this was
10 all right but simply pointed out the factual position which was that if the company had no money then they could not pay their staff. The claimant then accused the Employment Judge on several occasions of saying that it was all right for employers to fail to pay their staff. She stated that it was very strange that he, as an Employment Judge, was saying that. The
15 Employment Judge pointed out to her on several occasions that he had not said anything like that. She was not prepared to accept this. The claimant then got up and said she was leaving.
10. Given that the claimant was clearly upset the Employment Judge said that he would be happy to adjourn for ten minutes and then allow her to
20 recommence her cross examination after that. The claimant said that she was going. The Employment Judge then said that he would be prepared to allow an adjournment to the following day. He had in mind that he would not have been prepared to allow a further adjournment given the fact that the tribunal had already heard evidence of the toll that this case was taking
25 on Ms Smart's health not to mention that the case had dragged on for some considerable time and that hearings had had to be postponed on various previous occasions.
11. The claimant then said that she was going and was not coming back. She said that she was not wanting to proceed with the case. The Employment
30 Judge said that this was a matter entirely for her but that if she did withdraw then it was likely that the respondent would apply for the case to be dismissed. She said she was not prepared to proceed. She said that she was in contact with GB News and that she would be reporting the matter to them. The claimant then left.

12. Following the claimant's withdrawal the respondent's representative then made a submission. With regard to the incident which had taken place he said that it was quite clear that the claimant was withdrawing her claim and in terms of Rule 51 then the claim fell to be dismissed. He stated that if the Tribunal were not with him on that then it would be appropriate for the Tribunal to go on to consider the matter in terms of Rule 47 and in his view the Tribunal should issue a judgment giving their view as to the merits of the case on an alternate basis.

Discussion and decision

- 10 13. Rule 51 states:

“Where a claimant informs the Tribunal, either in writing or in the course of the hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.”

14. We were referred by the respondent to the case of ***Drysdale v Department of Transport 2014 EWCA civ 083***. The respondent's representative helpfully forwarded a copy of this case so that it would be available to us during the course of our deliberations. In the present case, all three members of the Tribunal were of the view that the claimant had very clearly and unambiguously indicated that she was withdrawing her claim. She had been offered the possibility of an adjournment but had refused this in peremptory terms. The Employment Judge specifically asked the members whether they considered there was anything more he could have done to assist the claimant given that she was unrepresented and had clearly been having difficulties. They were clear in their view that there was nothing more he could have done and that he had been as patient as one could be in the circumstances. All three were also minded of the need to be fair to the respondent as well as the claimant. The claimant's behaviour throughout the case had arguably been scandalous and vexatious. The respondent's representative and Ms Smart had been required to continue to act professionally in the face of considerable provocations from her. The claimant was clearly not minded to take any

advice from the Tribunal as to how to present her claim in an appropriate way. Given the history of the matter this was very unlikely to change. Whilst the claimant had stated on a very large number of occasions during the hearing that she was mentally unwell there was a dearth of any medical evidence confirming this and the only real evidence was the vindictive and vitriolic way the claimant behaved, bombarding individuals and organisations with unpleasant accusatory emails. In all the circumstances there appeared to be absolutely no reason why the claimant's words should not be taken at their face value. It was her position that she had clearly lost all confidence in the Tribunal and did not want to proceed with her claim. In those circumstances it would be artificial and frankly prolonging of the injustice to the respondent if we did not accept her at face value. Accordingly, the unanimous decision of the Tribunal is that the claim is dismissed.

15. On the basis that the respondent specifically asked us to complete an alternate judgment based on Rule 47 and in the event that we are found to be incorrect in our decision under Rule 51 or indeed if subsequent evidence emerges in relation to the claimant's mental state which suggests that her decision to withdraw her claim cannot be relied upon then the Tribunal sets out its view on the evidence below. This is set out as an alternate judgment on the basis that if we had not dismissed the claim under Rule 51 then we would have been entitled to go on to consider the claim under Rule 47. In this connection it should be recorded that after the claimant left the Tribunal itself asked questions of Ms Smart and recorded her answers. These questions were essentially putting points to her which arose from the claimant's pleadings and which we considered that if the claimant had remained (and confined her questions to those relevant to the claim), then these were the obvious questions which would have been asked. It should be noted however that this judgment is purely obiter given our primary position which is that the claimant withdrew her claim and that we have correctly dismissed it under rule 52.

16. Had we gone on to consider the claim under Rule 47 we would have found the following relevant facts to be established on the basis of the evidence and the productions.

17. The respondent took over the running of the Orka cafe in or about October 2019. The directors of the company were Ms Smart, her partner and one of her sons. The premises at Aberdeen had been run as a cafe prior to the respondent taking over. It is a small cafe with seven tables. The maximum number of covers is 22 but generally speaking it will only seat 16. There is a small serving counter. As is well known the Covid pandemic broke out in March 2020 and the cafe had to close. After a short time takeaway meals were permitted and the respondent reverted their business to dealing solely with takeaways. At this point it was run and operated by Ms Smart and members of her family. Gradually as restrictions eased Ms Smart hired employees. These were generally casual employees who were students or had other jobs.
18. In or about November 2021 the respondent advertised on Gumtree for staff. The claimant responded to this advert and met with Ms Smart for an informal interview. The claimant discussed her needs for child friendly working hours. She did not raise any health or mental health issues with Ms Smart. Contrary to what the claimant states Ms Smart did not mention any matters relating to her own private life to the claimant.
19. The claimant previously worked in a cafe known as the Sand Dollar at Aberdeen beach for around seven years. The claimant was also a bit older than the other members of staff. Although some of the other staff had catering experience Ms Smart felt that the claimant would be a good fit since she would be able to mentor some of the younger staff who had less experience. The claimant's hours were 10 until 3 Monday to Friday to fit in with school hours. The cafe would usually open around 8.30 in the morning and finish at 5. The staff on opening would usually attend half an hour before hand and staff on closing half an hour after that. The claimant was never responsible for opening or closing. There would usually be two other staff on during the day as well as the claimant on weekdays.
20. After the claimant had been with the respondent for approximately two weeks the claimant telephoned Ms Smart to advise that she was concerned about some of the practices in the kitchen. She said that food was not being labelled clearly and that foodstuffs were being mixed together on the refrigerator shelves which was contrary to good food

hygiene practice. Ms Smart told the claimant that this showed that the claimant was exactly the kind of person that she needed. She explained once again that a lot of the other staff were young and inexperienced. She asked if the claimant would be prepared to work as Supervisor and amongst other things make sure that appropriate food hygiene protocols were followed. The claimant agreed to this and her pay was increased by £1 per hour.

21. The claimant worked until around May/June 2023. During this period she had a couple of altercations with other members of staff which led to these members of staff stating that they were not prepared to work the same shifts as the claimant. During this time the claimant also introduced one of her daughter's friends to the business (Erin). Although Erin did not have a great deal of experience she impressed Ms Smart as being a hard and conscientious worker and Ms Smart made her weekend Supervisor so that she would supervise the cafe at weekends when the claimant was unavailable. In or about May 2023 the claimant suffered the breakdown of her marriage. She alleges that she was the subject of domestic violence. She advised the respondent of her position and that she would try to carry on but after a few weeks went off sick.

22. Ms Smart felt sorry for the claimant and for the first few weeks of this continued to pay her the full rate of pay. She then reduced her rate of pay to £100. This was considerably in excess of the SSP which the claimant would have been entitled to. When the claimant was recruited the respondent took no steps to register to pay PAYE income tax or National Insurance for her. The claimant's total earnings during the course of her employment with the respondent (over two tax years) amounted to £12,200 and it is therefore highly likely that the claimant was below the threshold for making National Insurance contributions in any event. That having been said there is no doubt that the respondent was in the wrong for failing to register her with HMRC and make the appropriate deductions.

23. In addition it is likely, given the level of the claimant's pay, that the respondent would have been under an obligation to register the claimant for a NEST pension and pay employer's pension contributions and deduct employee contributions. She did not do so.

24. During the period the claimant was off sick and after Ms Smart had started paying her £100 per week the claimant attempted to claim a contributions related benefit. During this time she discovered that the respondent had not registered her for HMRC payments. She blamed the respondent for her failure to obtain the contributions related benefit. Given the dates it is however highly likely that the refusal of benefit was related to the claimant's contribution record in previous tax years and had absolutely nothing to do with the period of her employment with the respondent.
25. The claimant maintained contact with Ms Smart and indeed other members of staff during her sickness absence. During the early part of her period off sick the claimant became concerned about the running of the cafe. She was still in the group WhatsApp chat. Erin was supervising the cafe in her absence and the claimant contacted Ms Smart about a number of issues. Ms Smart decided that it would be best if the claimant removed herself from the cafe WhatsApp group so that she didn't stress herself over matters while she was off sick.
26. A copy of one of the claimant's sick notes is lodged (page 63). It shows that she was signed off with domestic stress. Ms Smart's texts to the claimant over this time were extremely supportive. Her understanding was that the claimant was suffering from situational stress as a result of the breakdown of her marriage and incidents taking place around this. The claimant at no time suggested that she had previously suffered from depression or any other mental illness.
27. In or about early September the claimant indicated to Ms Smart that she was fit to return. She had told Ms Smart she had a support worker and she had previously indicated to Ms Smart that she and her support worker had concerns over security. The Tribunal understood this to mean she was frightened of being attacked by her husband whilst working in the cafe. She said that she and her support worker should have a meeting with Ms Smart. Various texts were lodged. At page 64 Ms Smart is quoted as saying:

"Mags I'm not pushing you back into work at all I want you to be safe when you do so. Why don't the both of you come up with some

5 suggestions then we can meet next week and take it from there then we can launch it as a general safety for all staff no focus on you what do you think? Ask your support worker for a 5.30 meeting next week then we can have a chat with no-one else around and she can have a look and we can take it from there."

10 28. The claimant agreed a phased return to work with Ms Smart. The claimant was due to go back to work on Wednesday 7 September and Thursday 8 September. The claimant then told Ms Smart that she wanted to call in to the cafe to check that everything was okay before she did her first shift. Ms Smart expected that she would be coming in during working hours and indicated she had no problem with this. The claimant's position was that she said that she would be coming in "off the clock". Ms Smart understood this to mean that the claimant would not expect to be paid for coming in to the cafe and would be doing it in her own time. The claimant's position at 15 the hearing was that this clearly meant that she would be coming in after hours.

20 29. On the evening of 4 September the claimant went in to the cafe. She probably went in in the early evening. The claimant looked in the fridges and considered that the cafe had clearly not been following the instructions she had previously given about labelling items and ensuring that foodstuffs were on the appropriate shelves. The fridges also appeared to need cleaned with stagnant water in them. At approximately 9.00 pm that evening the claimant messaged Ms Smart advising her that she had been at the cafe and sending her various photographs which in her view tended 25 to show that there were food hygiene problems at the cafe.

30 30. There had been a previous Environmental Health inspection of the cafe in January 2022. At that time the Environmental Health Department had made two recommendations going forward. The first was that the seals on one of the fridges should be replaced. The second was that a store cupboard required to have a hole in the ceiling fixed and to be thereafter lined with a wipe down surface before the cupboard could be used for storing food. Ms Smart had ordered a new seal from her suppliers however due to supply chain issues this was still on back order from China. With regard to the cupboard Ms Smart had made the decision that

the cafe could not afford to spend the several thousand pounds it would require to line the cupboard and that the appropriate course of action was to ensure that this cupboard was not used for storing food. She had instructed staff that this store cupboard should not be used but, unknown to her this instruction had not been followed and the staff were using the cupboard to store traybakes.

5
31. Following receipt of the message from the claimant Ms Smart checked her telephone which allowed her to access the CCTV in the cafe. She noted that the claimant had gone into the cafe when it was dark. She had
10 remained there for a time and then came out for a cigarette. She had then gone back in and left again. She had gone in with one bag and left with three. The claimant had been in the cafe for a total of around two hours.

32. At this time Ms Smart was under considerable business pressure. In or about March 2021 she had taken over a cafe in Ballater. She had not
15 anticipated how difficult it would be to obtain hospitality staff in the period immediately after the Covid pandemic. As a result she had found herself in the position of having to personally work in the Ballater cafe seven days per week. She also had to ask other people to work there as a favour. The claimant had in fact done one shift at the Ballater cafe. Ms Smart
20 lives in Aberdeen and the cafe in Ballater is around 45 miles away. It is a journey of at least an hour each way. She was well aware that in those circumstances she had relied on the supervisor in the Aberdeen cafe to make sure everything was okay.

33. Ms Smart also had a further difficulty on the Sunday evening the claimant
25 sent her the message about her hygiene concerns (4 September) in that the engine of her car had overheated and then ceased to function. She therefore found herself on the Sunday evening without a car. She was therefore not in a position to deal with the claimant's message personally by going through to Aberdeen on the Monday. What she did was instruct
30 the three staff who were working in the Aberdeen cafe on the Monday the 5th to give the place a good clean and address the issues the claimant highlighted. In the meantime however the claimant decided that she would advise the Environmental Health Department of the issue. She wrote to them by email at 8.51 am on 5 September 2022 stating:

“Hi I am hoping that someone from EHO will be able to visit Orka Cafe in Aberdeen. One of your employees Courtney attended either last year or the start of this one and gave a pass. Since then there has been issues with the owner not coming in to the cafe to work/train staff and the place had become a complete shambles. I am an employee who would like to remain anonymous but cannot in good faith allow food to be served to the public from here.

There is no cleaning been done in the kitchen no stock rotation no food labelling/dates being adhered to and severe cross contamination.

I have attached a couple of photos I took yesterday.

Please can someone go asap and again keep the tip anonymous.”

34. At this point the claimant was not due to be working in the cafe until Wednesday and Thursday since she and Ms Smart had agreed a phased return to work.

35. Whilst the claimant was travelling in to work on the Wednesday an environmental health officer called at the cafe. He found a number of matters of concern. Erin who was in the cafe at the time contacted the claimant who then contacted Ms Smart. Ms. Smart was at the café in Ballater and, because her car was not working she was unable to travel through to Aberdeen immediately. Ms Smart and the environmental health officer then had a telephone conversation during which the environmental health officer suggested that given the nature and number of the issues he had identified it might be better for Ms Smart to voluntarily close the restaurant until these issues had been addressed. Ms Smart agreed over the telephone that this is what she would do. During the course of various messages which appear to have passed between the claimant and Ms Smart that day, Ms Smart stated to the claimant that it was not her fault. By this she meant that it was not the claimant’s fault that the premises were non-compliant because she accepted the claimant had been off work since June. Ms Smart’s position was that she had been working in Ballater and simply unable to give the business the attention it needed. She had made an arrangement for her son (who also has other employment) to call into the cafe once a day on his way to and from work

but she accepted with hindsight this had clearly been insufficient. Given that she did not have her car Ms Smart was unable to drive to Aberdeen to deal with the situation herself at the café and therefore got on the bus. When she got off the bus she then got a taxi to the cafe.

- 5 36. One of the issues highlighted by the environmental health officer was that the staff in attendance did not appear to know what they were doing and there were no records that they had received appropriate training. Ms Smart's position was that certain of the staff had received training but not all of them and that where a member of staff said they had previous
10 catering experience she had taken this on face value. She decided that the appropriate thing to do was to immediately purchase an online training module and that the staff would require to complete this training module before the café re-opened.
- 15 37. By the time Ms Smart arrived at the cafe the environmental health officer had gone. All of the food in the fridges had been thrown in the bin and bleach poured over it so that it could not be retracted from the bin and re-used. It was between 2.00 and 3.00 pm. On arrival Ms Smart was extremely surprised to be verbally attacked by the claimant. The claimant behaved extremely aggressively towards her. She raised the issue of staff
20 not being paid in time. The position was that the claimant had been paid on time ever since she had raised the matter with the respondent soon after she started employment. The claimant was however aware that other members of staff were being paid erratically and although they had not raised the issue with Ms Smart the claimant decided it was appropriate
25 for her to raise it with her. During the course of this altercation the claimant called Ms Smart a liar. Ms Smart noted that by this time it was nearly three o'clock when the claimant was due to leave and reminded the claimant that she should leave to be in time to collect her children from school. The Tribunal was in no doubt that this verbal attack had come as an unpleasant
30 surprise to Ms Smart. It was the claimant's position that during this altercation the claimant had advised Ms Smart that she i.e. the claimant was the one who had informed Environmental Health. The Tribunal did not accept this evidence which was contradicted by Ms Smart, the reasons for this are given below.

38. Ms Smart then arranged for the staff to complete the appropriate training module that day.

39. That evening Ms Smart and her mother spent several hours cleaning the cafe. She arranged for the environmental health officer to call round the following day to confirm he was happy with the steps which had been taken. The environmental health officer duly called round. He confirmed that he was happy with the steps taken and was happy for the cafe to re-open. With regard to the fridge seal he accepted Ms Smart's explanation that she had ordered the seal and was awaiting its arrival. With regard to the cupboard he accepted the position which was that the cupboard could not be used for storing food. As noted above, unknown to Ms Smart, a practice had arisen whereby traybakes were being stored in the cupboard.

40. There was a brief discussion over text between the claimant and Ms Smart about whether the claimant should come in the following Wednesday/Thursday. By this time the claimant was referring to a court case she was involved in. She led Ms Smart to believe that this was a court case in connection with her husband having assaulted her. Ms Smart responded stating that given the court case was going to be stressful it was perhaps better for the claimant to stay off until the court case is over. She asked what the claimant's doctor and support worker thought. The claimant never in fact returned to work. During this time Ms Smart continued to pay the claimant £100 per week sick pay.

41. On or about 20 October the claimant wrote to Ms Smart stating:

"Hiya sorry I haven't sent my latest sick line I need to pick it up from the surgery I'm signed off until January and have weekly court appointed sessions for 12 months with the Women's Department of Social Work. They said that its court ordered so I have to go, you can have my wages for that day reimbursed. Did you get the other one ok." (p88)

This was at 22:48. At 22:49 the claimant sent a message to Ms Smart stating:

“I have an interview with the reporter tomorrow from the Press & Journal she wants to do a story.” (p88)

The claimant then sent a photograph showing the journalist’s card and a note from the journalist referring to her court appearance.

5 42. At some point subsequent to this the claimant sent Ms Smart a message
indicating that she had sent the journalist copies of the photographs and
documentation in relation to the environmental health inspection of the
cafe. The next day Ms Smart was taking a day off to take her mother on
a short break. This involved leaving early and she appears to have
10 received the claimant’s emails and responded to them at around 5.00 am
in the morning. Ms Smart was extremely concerned that the claimant was
speaking to a journalist about the cafe. She was concerned that if an
article appeared in the paper saying that the cafe was unsanitary then the
cafe would have to close and everyone would be out of work. She asked
15 the claimant to contact the journalist and ask that things not be used.
There then appears to have been a number of other messages between
Ms Smart and the claimant which were not lodged. During the course of
these it would appear that the claimant stated that she would be taking the
respondent to a Tribunal. A screenshot of the claimant’s phone was
20 lodged (page 89) which shows that by this stage the claimant was
threatening to take the respondent to a Tribunal for “not acting
appropriately when I brought health and safety issues to you, bullying her,
pay coming late, no pay slips no communication.” Ms Smart wrote to the
claiming saying that if she wished to make a formal complaint she should
25 do so by emailing the respondent.

43. Ms Smart contacted her family solicitor. She could not really understand
what was going on. Her family solicitor said it was very odd that Kathryn
Wylie would be interested in the cafe being inspected by Environmental
Health since she was the Press & Journal’s criminal court reporter.
30 Ms Smart felt that she was out of her depth and required to obtain legal
advice. She contacted a couple of employment law advisers
recommended to her by the family solicitor before being put in touch with
HR Services Scotland. In the meantime, Ms Smart had spoken to the
journalist involved. She had left a message for the journalist on or about

21 September but it was a few days later before the journalist returned her call. The journalist told her that the claimant had been in court on a shoplifting charge and had been convicted of shoplifting. The journalist said that she was interested in the story because the claimant had said that she had been forced to do shoplift as a result of the cost of living crisis and the domestic abuse she had suffered. The journalist confirmed that she had been sent documents in relation to the cafe and a visit by Environmental Health but that it was not her intention to use these. She advised that she understood the claimant had been the person who wrote to Environmental health alerting them to the food hygiene problems in the café.

44. During this period Ms Smart was bombarded by the claimant with emails and messages. She felt extremely pressurised. No sooner would she have read one message and be in the course of replying to it when another would arrive. The messages were aggressive. Ms Smart felt extremely upset by what was going on. She contacted HR Services Scotland and advised them of the situation. She said that she had now discovered that the claimant had a conviction for shoplifting. In the circumstances, given that the claimant had unrestricted access to the till she was not keen for the claimant's employment to continue. She also felt she could not continue when the claimant had clearly decided that Ms Smart was her enemy. HR Services Scotland advised her that given the claimant had less than two years' service and there appeared to have been a complete breach of trust and confidence there was no impediment to simply dismissing her. Ms Smart told them that she wished to terminate the claimant's employment. The reason for this was the fact that she had now discovered the claimant had been convicted of shoplifting and, in addition, the claimant was behaving aggressively towards her.

45. HR Services Scotland contacted the claimant by telephone to advise her of her dismissal and followed this up with a letter confirming that her employment would end on 26 October 2022. They stated within this that the claimant would receive her pay and other benefits that she was due including holiday pay. These sums were paid to the claimant on 31 October. There was a minor issue regarding holiday pay which was

corrected a few days later. In the meantime, the claimant bombarded HR Services Scotland with a vast number of emails. On one day she sent 32 emails. The claimant lodged a transcript of a telephone conversation she had with HR Services Scotland which clearly shows that she accepted she had been asked by them not to contact them further but was doing so in any event. She made it clear during the transcript that she was not prepared to listen to a word that was said to her. The Tribunal found the transcript to be an accurate record of what was said. The claimant did initially seek to lodge a video which the Tribunal had understood to be a video of this conversation however in the event the video only showed various 10 second excerpts of the conversations.

46. The claimant sent her initial application to the Tribunal on 4 November. This application was not accepted due to the claimant's failure to provide an early conciliation number. At around this time the claimant claimed that she had made an application for interim relief. She refers to this on numerous occasions during the telephone call with the former second respondent. She is critical of them for stating that this was somewhat unusual. In any event, no application for interim relief was made during the appropriate statutory period.

47. As noted above, the claimant initially raised proceedings against HR Services Scotland as second respondent. Their response was lodged. Their position regarding the factual background is:

"The second respondent was engaged as an external consultant to the first respondent. During a phone call on 24 October 2022 the first respondent instructed the second respondent to carry out termination of the claimant's employment. It is not known and not admitted that the claimant made a qualifying protected disclosure prior to that time. The reasons given by the first respondent for the claimant's dismissal were ostensibly related to her conduct. In light of the claimant's length of service at the time of her dismissal she was not afforded protection from unfair dismissal under sections 94 and 98 ERA. The claimant's dismissal by the first respondent was communicated by the second respondent verbally and in writing on 26 October 2022.

5 Following termination of her employment the claimant contacted the second respondent repeatedly with questions which they were unable to answer. The claimant was redirected to her former employer the first respondent but continued to contact the second respondent. It is understood that the claimant recorded a call to the second respondent's HR director Kerry Hyslop without her consent. The claimant continued to contact the second respondent as did a personal friend of the claimant who was posing as a journalist. The claimant raised a formal complaint against the second respondent which was duly investigated but not upheld. The second respondent found no wrongdoing in their communication with the first respondent's decision to terminate the claimant's employment."

15 48. On or about 14 October 2022 the claimant was interviewed over the telephone in connection with her application for Employment Support Allowance. A copy of the note taken of this call by Ms Esther Mortley, the member of staff she spoke to was lodged (pages 98-99). She was assessed as not being fit for work or any work related activity. It was noted that she was being treated for anxiety and depression and was on medication. It noted that she was smoking cannabis on a daily basis. The claimant also lodged a photograph of various medication which she advised she is currently taking. One of these is Mirtazapine which is an antidepressant and the box shows it was picked up on 20 April 2023. One of these is Propranolol which is a betablocker which the box shows was issued in August 2022. She is also taking Amitriptyline and Co-codamol, Zeroderm and there is another box where the name of the drug is impossible to make out. The claimant's position is that the effect on her ability to carry out day-to-day activities as a result of her anxiety and depression is as she stated in to the representative of DWP. She is noted as saying:

"She stays in her night clothes during the day will put joggers over her clothes if she needs to go out she will shower without prompting she is making meals without prompting she tidies up around the home does the washing she does struggle with leaving the home

to appoint the children attendance at school has been poor and truancy officer has become involved. It is lack of motivation and anxiety that restricts her on days the kids do not go to school she says in bed and does not get up until later in the afternoon.

5 Realistically she is not leaving the home by herself she has her children with her and the only time she is alone is when she is driving back from the school after dropping them off this is not reliable she has no routine to her day but if there were changes relating to her children she will cope. She takes her children to the

10 supermarket but she stays in the car while they go in with a list this is due to her anxiety and fear of being around people she has friends that message her but she does not meet them she parks and stand away from the school to avoid other parents she will not answer the door but she does not have any problems with her

15 behaviour towards anyone. She was highly emotional throughout the interview she needed prompting and a gentle approach so she did have difficulty coping with the interview. Based on the evidence significant functional restrictions are likely in areas of going out and social interaction but unlikely in other areas of mental

20 health.”

49. The claimant has remained on benefits since her dismissal. Her position is that she remains unfit to take part in any work related activity and so has not been looking for other work.

Observations on the evidence

- 25 50. As noted above we have made these findings in fact on an alternate basis given that if we are incorrect in stating that the claimant withdrew her claim under Rule 51 then we would be required to proceed under Rule 47 which provides that if a party fails to attend or to be represented at the hearing the Tribunal may dismiss the claim or proceed with the hearing in the
- 30 absence of that party. Accordingly, our findings in fact are based on the evidence which we heard to the point where the claimant walked out. There was actually a substantial amount of agreement between the evidence of the claimant and the respondent. During her evidence the claimant accepted that she is in the habit of bombarding people with

messages. She said that “sometimes I can be a bit manic over the messages”. She did not offer any apology for this.

51. Both parties were in agreement that the claimant had sent a vast number of messages to Ms Smart in October. Given the terms of the messages we saw we have little doubt that Ms Smart found this very difficult to deal with. Somewhat surprisingly, there was a difference in evidence between the two witnesses as to the point at which Ms Smart became aware that the claimant was the person who had contacted Environmental Health. Both witnesses essentially gave evidence which was against their own interests. The claimant’s position was that she had told Ms Smart on 5 September just after Ms Smart had arrived at the cafe. Ms Smart’s position was that she had not discovered this until around 22 October when she had spoken to the journalist albeit in the day or so prior to this she had begun to wonder how the claimant had access to the various photographs sent to Environmental Health.

52. Most of the other factual disputes were about matters which were not particularly relevant to the case. As noted above, the claimant’s attitude to cross examination was extremely confrontational and unhelpful. She appeared to be much more interested in making points than answering questions which were put to her. She accepted in evidence that she had been convicted of shoplifting. This was a matter which at the previous hearing in January she had stated was an untrue allegation. The claimant tended to answer questions with another question. When it was clear that the answer to the question was probably not going to suit her case she would become aggressive and make allegations against the respondent and Ms Smart personally. It was clear that the claimant’s view is that if her position on matters is challenged in any way then this is evidence of corruption and “lying”. She accused Ms Smart of lying about saying she had travelled to the cafe on 5 September by both bus and taxi. Quite frankly this was something where the claimant could not possibly have any information to counter what Ms Smart said. She accused Ms Smart of being corrupt in that she continued to operate the cafe in Ballater as a sole trader following the liquidation of the company. She accused her of trading without a licence. She also made other allegations. It was clear to us from

Ms Smart's demeanour and her evidence that Ms Smart has found the whole experience devastating. The claimant appears to have absolutely no understanding of the effect of her behaviour on others. Ms Smart gave several instances where the claimant has tried to damage Ms Smart's interests by taking scurrilous allegations against her. During a period when Ms Smart was trying to sell the business in 2023 the claimant wrote to the surveyors alleging that the building was suffering from subsidence and was unsafe. She has also contacted members of Ms Smart's family. Ms Smart's position was that her husband died many years ago in tragic circumstances. She was able to get through this without the use of antidepressants. The claimant's campaign against her however has caused her to have to consult her doctor and be prescribed antidepressants. At the end of the day we preferred the evidence of Ms Smart over that of the claimant where there were clear differences. Ms Smart said that she had not discussed her own personal issues with the claimant at the interview. We rejected the claimant's contrary assertion since we thought it highly unlikely that Ms Smart would have discussed highly personal issues with someone she had just met. We preferred Ms Smart's version of events in relation to when she found out that it was the claimant who had advised Environmental Health. It seemed something which it was unlikely that Ms Smart would lie about if the claimant had indeed told her on 5 September as the claimant said. It should be noted that the claimant had initially offered to bring a witness to this conversation (Erin). Prior to the hearing she indicated that Erin would be giving evidence in person. Immediately prior to the hearing she said that she would be asking for Erin to give her evidence by CVP. At the outset of the hearing the Employment Judge confirmed that the respondent had no objection to this and asked the claimant to contact the clerk with a view to getting the appropriate log-on details. The claimant said that Erin was on a course and would not be able to give evidence that day but would be able to give evidence the following day. The Employment Judge secured the agreement of the respondent's representative that he would have no objection to Erin's evidence being taken out of turn after the start of Ms Smart's evidence if this proved necessary. Subsequently the claimant indicated that in fact Erin had not anticipated giving evidence in the normal way but thought she could simply call in on her telephone

during her lunch hour. The employment judge indicated that she would require to give her evidence over CVP but again having secured the agreement of the respondent's representative to this he said he would be happy to arrange matters so that she was called to give evidence over her lunch break. Subsequent to this the claimant advised that despite what she had been told to do she had not in fact got the log-in details from the clerk and passed this on to Erin. She said she would not be calling Erin as a witness.

53. During the course of the claimant's cross examination on the Wednesday afternoon the claimant had stated that she considered Ms Smart to be lying when Ms Smart said she had contacted the journalist Kathryn Wylie. The claimant repeated her allegation that this was a lie on several occasions. She indicated that she would be calling Ms Wylie to give evidence to refute this. The employment judge stated that this was up to her but that she should arrange to contact Ms Wylie as soon as possible in order to organise this. The claimant advised on the Thursday morning that she would not in fact be calling Ms Wylie.

54. With regard to the issue of whether or not Environmental Health had reinspected the property in October 2022 the claimant did not give any specific evidence herself about this but in cross examination she put it to Ms Smart in some detail that this had happened. Ms Smart's evidence was quite clear that she had no knowledge of it. If it had happened then she was unaware of it. The claimant initially suggested that Environmental Health had closed the business down and that was why it had shut but she then withdrew from this position in cross examination and said that Environmental Health had failed everything apart from two specific items. Given that this was a very specific allegation and the claimant claimed to have this information from a Freedom of Information request the employment judge spent some time as indicated above trying to get to the bottom of why the response to the claimant's Freedom of Information request was not lodged. Apart from making generalised accusations of corruption against the respondent, the Tribunal and everyone else the tribunal is still no further forward in establishing how it came to be that if such a document exists it was not lodged. As noted above, the only

document lodged in relation to this was contained in pages 69-70 of the bundle for the 25 January 2024 preliminary hearing on identity of respondent. It contains a copy of the claimant's application which states:

5 "Please provide me with any documentation held by ACC
Environmental Health in relation to their inspection of Orka Cafe
Aberdeen from September 22 to date."

10 It also contains a copy of the response which states that the requested
documentation is attached. It states that some documentation in the
photographs would be emailed separately. It notes that various things had
been redacted. None of the documentation was attached. In general
terms it has to be recorded that whilst both parties referred to a number of
15 messages as noted above only a fraction of these were lodged. They
were also lodged in no particular order that could be discerned and in
many cases the date and in some cases the identity of the party is
impossible to make out. At the end of the day the Tribunal felt that in order
to comply with our duties under Rule 47 we require to make whatever
findings we could and our findings in fact are based on this.

Issues

20 55. The claimant's principal claim was that she had been automatically unfairly
dismissed for making a protected disclosure. She relied on the protected
disclosure made to the environmental health officer on 5 September 2022.
She had also ticked the box on her ET1 to indicate that she was making
claims of sex discrimination and disability discrimination. Despite it being
noted in the initial preliminary hearing which took place in May 2023 that
25 she should provide further details of these claims she never in fact did so.
At the outset of the hearing the employment judge tried to establish what
the claims were. With regard to sex discrimination it was her position that
her dismissal was an act of direct sex discrimination in that if she had not
been a woman then she would have been treated differently. During the
30 course of the remainder of the hearing she neither asked any questions of
Ms Smart in relation to this nor did she put forward any evidence on which
to support this contention. The respondent's representative had
suggested that she may wish to make a claim of indirect sex discrimination

if it was her position, as it sometimes appeared to be, that she had been dismissed because the respondent's manager was unhappy that she was going to be off work until January at least. It could be argued that this placed her as a woman who suffered from domestic violence at a disadvantage as opposed to others. Despite being invited to do so by the Tribunal the claimant did not take up the respondent's suggestion and indeed, once again, there was absolutely no evidence to support this contention either given or referred to during the course of the hearing.

56. With regard to the claim of disability discrimination it was the claimant's position that she was disabled as a result of suffering from anxiety and depression. She confirmed that she was making a claim of discrimination arising from disability which appeared to be on the basis that the reason for her dismissal was connected to the fact that she had been signed off until January. There also appeared to be at least a suggestion from her that if she had been dismissed because she was sending too many emails and messages to the respondent and that these were inappropriate then this was something arising from her disability.

Discussion and decision

57. The respondent's representative had submitted written representations in relation to the issues in the hearing which he had written in advance.
58. We do not propose to deal with these reasons in detail however they are referred to for their terms. In general terms we accepted the respondent's representative's analysis of the relevant law.

25

Automatic unfair dismissal

59. Our position was that it had been established that the claimant did make a protected disclosure. She disclosed information to the environmental health officer in her email of 5 September. It was information in relation to health and safety and also that the respondent were in breach of a legal obligation. Our view was clearly in the public interest that this should be

30

disclosed. We should say that had the old law been in force and we required to make a finding that the disclosure was made in good faith then we would have struggled to do so however there was no doubt in our mind that the claimant's email did qualify as a protected disclosure. The timing of the disclosure coming early on the Monday morning after she raised the issue with Ms Smart late on the Sunday night left us in little doubt the claimant's motive was to cause as much difficulty to Ms Smart as she could that is not a relevant consideration and the claimant is entitled to the full protection the law offers to those who make protected disclosures.

60. The key question then is whether in terms of section 103A of the Employment Rights Act 1996 the sole or principal reason for the claimant's dismissal was that she had made that protected disclosure. We were referred by the respondent's representative to the case of **Kong v Gulf International Bank (UK) Limited [2022] EWCA civ 941** which is a recent case where the Court of Appeal examined the authorities on the subject and confirmed the approach which tribunals should take. As noted above the claimant's case was that she had told Ms Smart on 5 September that she the one who had made the report. Ms Smart's case was that she had only found out that the claimant was responsible on or about 22 October when she had spoken to the journalist. We preferred Ms Smart's version of events. Ms Smart's position was that the reason that the claimant was dismissed was a breach of trust and confidence. There were two aspects to this. The first was that she had discovered that the claimant had a conviction for shoplifting and indeed had been disingenuously told her that the reason for having to attend court was due to her husband's assault case. The other reason was that Ms Smart simply could not cope with the claimant bombarding her with aggressive, threatening, vitriolic messages and emails. Ms Smart had found these extremely upsetting and indeed one of the reasons she gave for the fact that these emails had not been properly stored by her and lodged with the Tribunal was that she found the existence of them on her phone to be too upsetting. She had been advised to arrange a separate file for them to go in, she didn't have to read them.

61. At the end of the day we felt that this was a matter which the Tribunal required to judge based on our assessment of Ms Smart's evidence and her honesty. It appeared to us to be quite clear that she regarded the visit of the environmental health officer as something which was unfortunate but also a wake-up call which she did not resent in any way. Her position was that she had not realised that standards in the cafe had deteriorated to the extent they had. She had made an arrangement for a replacement supervisor to be appointed while the claimant was off. She had also arranged for her son to go in on his way to and from work. She had had no reason to believe that these steps had not been successful in ensuring that the standards were kept up. She accepted that she had not been in the cafe herself due to the pressure of having to work in Ballater seven days a week.
62. When the claimant reported her concerns to her on the Sunday night she was somewhat concerned that the claimant had gone in after hours but did not dwell on the issue. Her evidence, which we accepted, was that she had told the three staff who were in the cafe on the Monday to clean the place properly. When the environmental health officer came on Wednesday she did not seek to argue with him or minimise the position. Indeed, her position was that she and her mother personally cleaned the property in order to make sure that everything was being done correctly. She also made arrangements for the staff to complete the training modules. It appeared to the Tribunal that in her view that was really the end of the matter. It is part of the warp and weft of running a catering business. The environmental health officer had reinspected the property and was satisfied. The matter was effectively closed.
63. We have no doubt that what did concern Ms Smart was the fact it became evident to her that for some reason the claimant had decided shortly after this to go on a mission to attack her in every way. We have no doubt that Ms Smart was extremely alarmed and concerned that the claimant contacted a journalist. By the time she dismissed the claimant however she was well aware that the journalist was not going to put anything in the papers since the journalist had personally told her this. We note that the response put in by the second respondent clearly states that the reason

for dismissal was a loss of trust and confidence. Whilst they could not be cross examined on this this no doubt reflects their understanding at the time of what Ms Smart told them.

5 64. Given that on the claimant's own evidence there were very few controls on the cash proceeds at the cafe. (Her evidence in January was that no X or Z readings were taken) and that Ms Smart would simply call in from time to time to remove excess cash, it appears to us that it must have been quite devastating for Ms Smart to discover that the claimant had a conviction for dishonesty. It is also clear that by this time the claimant had 10 for some reason taken into her head that she would treat Ms Smart as an enemy. As against that we have the claimant's assertion that Ms Smart must have been motivated by the protected disclosure. Given that the claimant's position is that from the outset everyone has been corrupt and lying we felt that her evidence on this matter lacked any kind of credible 15 basis. Having considered Ms Smart's evidence most carefully we felt that this was one of these situations where although protected disclosures had been made the protected disclosure was neither the sole nor the principal reason for the dismissal. The claimant's claim of automatic unfair dismissal therefore fails.

20 65. With regard to the claim of disability discrimination the Tribunal noted that the burden of proof was on the claimant to prove that she was disabled. The claimant lodged no medical evidence. It is noteworthy that in May 2023 EJ Hendry went into considerable detail with the claimant as to the definition of disability and the steps she should take in order to prove this 25 aspect of her case at the preliminary hearing. The tribunal also specifically advised the claimant of the steps she should take in order to obtain and lodge her GP medical records with the tribunal in an email sent to the claimant on 19 May 2023. Given this clear guidance it is disappointing that the only evidence the claimant did lodge was a copy of the report from 30 DWP which was based entirely on information which the claimant provided to the DWP officer in a telephone call and the evidence of the photo of the pillboxes. The claimant's position in evidence was that she had previously suffered from anxiety around 20 years ago but that at the time she applied for the job she was not suffering from it and was not receiving any

medication. She did not give any direct evidence of the effect of her anxiety on her ability to carry out day to day activities. When asked by the Employment Judge she confirmed that what she had told the DWP manager was correct. She then went on to say that when she has things to do she does not spend all day in her pyjama attire as suggested. In all the circumstances we agreed with the respondent that the claimant had not fulfilled the burden of proof which lay on her to show that she was disabled at the relevant time. Her evidence was essentially that she had become unwell around May/June which coincided with her marital breakdown. Any anxiety and depression was situational. At the time when the claimant was dismissed in an allegedly discriminatory way in October she had suffered from this for less than 12 months. There was no corroboration of the claimant's suggestion that she had previously received treatment or indeed that the condition which she had previously had was the same as she suffered from in 2022.

66. As we appreciate this is a somewhat narrow decision at the end of the day it was for the claimant to prove that she had disabled status. The claimant had had the requirement spelled out to her on a number of occasions but as she has done throughout these proceedings has totally ignored any suggestions made by the Tribunal and indeed treated them as hostile.

67. The Tribunal did consider whether off our own volition we could make a finding that the claimant's self-admitted tendency to bombard people with hostile and critical emails could be regarded as a disability. It was our view that it would be inappropriate for us to do so. There was absolutely no evidence that this tendency of the claimant (well-established in the evidence) is in any way linked to an impairment.

68. If the Tribunal was wrong in this we were in no doubt that the respondent did not have either actual or constructive knowledge of her disability at the time of the claimant's dismissal. The claimant was not entirely clear as to what she considered the link between her dismissal and her disability was however if the claimant's allegation was that she had been dismissed because she had told the respondent that she would be off work for a further three months then there was absolutely nothing in the evidence to suggest that this was in the mind of Ms Smart at the time of dismissal. In

evidence, she quite clearly stated that she had no difficulty with the claimant being off. The business had been able to cope with the claimant's absence between June and September and there was no reason this would change. Various contemporary messages also show that far from seeking to chase the claimant back to work Ms Smart was very solicitous of her welfare and wanted to ensure that she was fit before she returned.

69. The claim of disability discrimination is therefore dismissed.

70. With regard to the claim of sex discrimination there was really no evidence on which to base the claimant's assertion that her dismissal had been in any way linked to her sex. It was established that 90 per cent of the employees of the business are female. The respondent had given the claimant child friendly hours when she asked for them. There was absolutely nothing to suggest that if the claimant had been a man who had similarly sent abusive emails to Ms Smart and who Ms Smart had similarly discovered to have a shoplifting conviction would have been treated any differently. For this reason the claim of sex discrimination also fails.

71. At the end of the day the Tribunal found this to be a very difficult case. The claimant does not assist herself by sending voluminous emails and messages to all and sundry particularly when these contain serious allegations which are made without any evidence or indeed thought. If the claimant's difficult tendencies are due to an underlying mental health condition we have to record that we have seen absolutely no evidence to support this. The tribunal deal with many claimants who suffer from anxiety and depression which are the impairments claimed by the claimant who do not exhibit this tendency. Despite being told on various occasions what she has to do in order to promote her claim to be disabled the claimant has not provided any evidence.

72. The claimant's position throughout has appeared to be that on the one hand she bemoans the fact that she is not an employment law specialist and does not have access to assistance whilst on the other hand she refuses point blank to take on board any advice from the Tribunal or anyone else as to what the correct law on the subject is. The claimant

appears to find a sinister explanation for straightforward everyday business matters. All members of the Tribunal consider that the Tribunal tried our very best to cope with the claimant's unreasonable behaviour. This process has no doubt had a deleterious effect on the respondent who also it has to be recorded have tried their best to ignore the intemperate behaviour of the claimant at all times and seek to have the case determined fairly. At the end of the day the Tribunal members do not consider there is anything more that we or the respondent could have done by way of a reasonable adjustment. We are satisfied that if we were incorrect in our finding that the claimant had withdrawn her claim then if we had approached the matter in terms of rule 47 we would have dismissed all the claims based on the evidence before us.

Employment Judge: I McFatridge

Date of Judgment: 2 April 2024

Date Sent to Parties: 3 April 2024