Case No: 2301119/2020

EMPLOYMENT TRIBUNALS

Claimant:	Ms Y Jones
Respondent:	ABM Facility Services UK Limited
Heard at:	Croydon by Cloud Video Platform
On:	31 August – 2 September 2021 and 22 October 2021 (In Chambers)
Before:	Employment Judge Nash Ms A Rodney Mr G Mann

JUDGMENT

1. The claimant was unfairly dismissed contrary to section 98 Employment Rights Act 1996.

2. The respondent did not directly discriminate against the claimant because of her age contrary to section 13 Equality Act 2010.

3. The respondent did not directly discriminate against the claimant because of her disability contrary to section 13 Equality Act 2010.

4. The respondent harassed the claimant related to her disability contrary to Section 26 of the Equality Act 2010.

5. The respondent did not harass the claimant related to her age contrary to Section 26 of the Equality Act 2010.

6. The respondent victimised the claimant contrary to section 27 Equality Act 2010.

7. It is agreed that the respondent made an unauthorised deduction from the claimant's wages in that it paid her one week less than her accrued holiday pay.

8. It is agreed that the respondent will pay the claimant five days pay.

REASONS

The Proceedings

1. Following ACAS Early Conciliation from 29 January 2020 to 12 February 2020, the claimant presented her claim on 21 February 2020.

2. At this hearing, the Tribunal heard from the claimant and from Ms M Dean, a former respondent employee. For the respondent it heard from:-

   Mr G Ford, Security and Soft Services Manager;
   Mr I Dema, Security Officer;
   Mr T Norris, Security Officer and
   Ms S Buckingham, HR Advisor.

3. The Tribunal had sight of a bundle to 541 pages. Two documents were added by consent on the second day. These were a sign said to be put on the claimant's office door and a document ('ICD10') in respect of adjustment of disorder.

The Claims

4. The claims before the Tribunal were for:-

   i. Unfair dismissal under Section 94 of the Employment Rights Act 1996;

   ii. Disability discrimination under the Equality Act 2010;

   iii. Age discrimination under the Equality Act 2010 and

   iv. Section 13 of the Employment Rights Act 1996, unauthorised deduction from wages/breach of contract.

The Issues

5. The Tribunal had sight of an agreed list of issues in the bundle as follows (original numbering reproduced)

   AGREED LIST OF ISSUES

   Unfair Dismissal

   1. Was the Claimant dismissed as per section 95(1)(c) Employment Rights Act 1996 ("ERA");
   a. Did the Respondent breach the implied term of trust and confidence in the Claimant's employment contract? The Claimant relies on the following allegations cumulatively and/or separately – have the same been proved?
   i) Mr Ford's conduct as set out in paragraphs 6, 8, 9, 12-16 of the Particulars of Claim("the Ford Allegations");
   • Behaving towards the Claimant in an aggressive and intimidating way: aggressively calling the Claimant back to the reception desk on a daily basis whilst she was on her lunch break.

• On 14 June 2019, telling the Claimant, under his breath but nevertheless aggressively, "Can you take you lunch break, now".
• On 15 June 2019, storming through the management suite door and aggressively asking where the Claimant was.
• On 21 June 2019 holding a meeting with the Claimant described by Mr Ford at the outset as "a little chat about commitment" at which unjustified and unfair issues were raised and it was suggested that the Clamant struggled with computer skills and "had been here for a year and still can't work a computer". The Claimant felt that the meeting had been set up a as means for Mr Ford to threaten her continued employment.
• On 22 August 2019 Mr Ford initiating a meeting with the Claimant by appearing with a notice in his hand which read "Guest Services Closed Today", pointing and stating to the Claimant "conference room".
• During the discussion on 22 August 2019, when the Claimant became visibly upset and hyperventilated upon responding to why she had not gone for lunch, placing his hands on the desk and continuing to talk aggressively to the Claimant saying "who is the Centre Manager today, I am – I take full responsibility for managing the centre". When asked by the Claimant why he was bullying her, Mr Ford responded "wrong word".
ii) The Respondent's failure to contact the Claimant during her period of absence from 22 August 2019, other than the letter dated 23 August 2019, which was unfair, unsympathetic and unsupportive and one dated 17 September 2019;
iii) The Respondent's advertising of the Claimant's position; and
iv) The Respondent's failure to address her grievance dated 1 October 2019.

b. If so, did the Claimant resign on 11 November 2019 in response to this fundamental breach?
c. If so, was the dismissal for a potentially fair reason, namely capability and/or SOSR relating to the Claimant's alleged inability to carry out her duties and/or her alleged inability to work with reasonable management supervision and feedback.

2. Where the unfair dismissal claim succeeds, what is the appropriate basic award and compensatory award (taking into account any overlap with the claim presented pursuant to EqA)?

Equality Act 2010 ("EqA")

Jurisdiction

1. What are the dates on which the alleged acts of discrimination occurred?

2. Has any claim been brought out of time? Acas Early Conciliation process was commenced on 29 January 2020 and the claim was submitted on 21 February 2020. Alleged acts before 29 October 2019 are therefore out of time.

3. If yes, do any of the alleged acts qualify as conduct extending over a period for the purposes of section 123 (3)(a) Equality Act 2010? The Claimant avers that conduct contrary to EqA was conduct extending over a period, the end of which was 10 December 2019.

4. If the complaints do not constitute a single continuing act of discrimination, which of the claims advanced by the Claimant are out of time?

5. For those complaints that are out of time, is it just and equitable in all the circumstances for the Tribunal to extend time to admit these complaints?

Disability

3. The Claimant avers that she suffered with a vulnerable mental condition as a result of anxiety and confidence issues, and a diagnosed adjustment disorder, which amounted to a disability as defined in the EqA. The Respondent accepts that the Claimant was disabled during the relevant time.
4. Did the Respondent have knowledge of the Claimant's disability? The Claimant alleges that Mr Ford, as an agent of the Respondent, knew about the Claimant's disability. The Respondent does not admit knowledge of the Claimant's disability.

Harassment

Disability

5. The Claimant presents a claim pursuant to section 26(1) of the Equality Act 2020 ("EqA").
The Claimant relies on the Ford Allegations:
a. Has the Claimant proved that the alleged conduct took place?
b. Was this unwanted conduct?
c. If so, was the conduct related to the Claimant's disability? The Claimant alleges that Mr Ford acted as specified in the Ford Allegations because he had knowledge of the Claimant's disability and how the unwanted conduct would impact her (paragraph 22 of the Particulars of Claim).
d. If so, did the conduct have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, subject to the considerations of section 26(4) EqA.

Age

6. The Claimant presents a claim of harassment, on the grounds of age, relating to an allegation that Mr Ford made a comment about the Claimant not being able to operate a computer on 21st June 2019. As to this:
a. Has the Claimant proved that the alleged comment was made?
b. Was this unwanted conduct?
c. If so, was it related to the Claimant's age?
d. If so, did the conduct have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, subject to the considerations of section 26(4) EqA.

Direct Discrimination

7. The Claimant avers that her dismissal amounted to direct discrimination on the grounds of disability and age on the basis that breach of trust and confidence stemmed from harassment related to disability and age. As to this:
a. Was the Claimant unfairly, constructively dismissed [see above]?
b. Has the Claimant proved a prima facie case that the dismissal, amounted to less favourable treatment when compared to treatment that would have been afforded to a non-disabled person who was in a different age range to her?

c. If so, has the Respondent proved that the dismissal was not an act of unlawful discrimination by providing a non-discriminatory explanation for the differential treatment?

Victimisation

8. The Claimant presents a claim pursuant to section 27 EqA, as to this:
a. Was the grievance dated 1 October 2019 a protected act within the meaning of section 27(2)(d) EqA?
b. Did the Claimant subject the Claimant to a detriment by discounting a weeks' holiday from the Claimant's accrued and untaken holiday, in non-adherence to previous agreement to gift her an additional weeks' holiday on top of her ordinary entitlement (such agreement being accepted by the Respondent) (paragraph 21 of the Particulars of Claim);
d. Was that detriment because she had done the protected act? The Respondent avers that this was not because of a protected act but as a result of an administrative error.

Remedy

9. Where any of the Claimant's complaints made pursuant to the EqA are successful:
a. What compensation is appropriate, including consideration of injury to feelings and pain, suffering and loss of amenity.
b. Did the ACAS Grievance Procedures apply?
c. If so, did the Respondent unreasonably fail to follow the same?
d. If so, should the compensatory award be uplifted by 10 to 25%?

Unlawful deduction from Wages/Breach of Contract

10. The Respondent accepts that the Claimant was paid one week less than she was contractually entitled for her accrued holiday. The Respondent will make a payment to the Claimant equivalent to five days' pay.

6. The following amendments and clarification were agreed at the hearing:-

i. In respect of the victimisation claim, the respondent accepted that the grievance, if received, would amount to a protected act. It denied that it received the grievance.

ii. In respect of unfair dismissal, the respondent relied on Polkey and a contribution in the event that the dismissal was found to be unfair. If the Tribunal found that there was a dismissal for a potentially fair reason, the claimant relied on the issue of sanction.

iii. In the direct discrimination claim, the claimant relied only on dismissal as an act of discrimination.

The Facts

Background

7. The claimant was diagnosed with depression in December 1989 following a bereavement. She received a diagnosis of anxiety and depression in 1990. The claimant had a history of depressive episodes which involved self-harming. She was also a victim of domestic violence which was one of the causes of her mental health conditions.

8. The claimant started work in August 2012 as a Security Officer at the Westwood Cross Shopping Centre in Broadstairs, Kent. In December 2014 she moved to the Customer Services Team in recognition of her excellent customer and people skills. The claimant was personally mentioned in online reviews and received a national award for her customer services.

9. In January 2016 the claimant was diagnosed with an adjustment disorder. The claimant's evidence was that she handed a letter from her General Practitioner dated 19 January 2016 stating that she had been diagnosed with adjustment disorder to her previous employer. This was photocopied and put on file. Following this, the claimant's employment was transferred under TUPE to the respondent. The respondent denied that it had sight of the letter from the GP.

10. The Tribunal accepted the claimant's evidence that she had handed the letter to her employer because the diagnosis was important to her. The purpose of the letter was to inform her employer and any other interested parties about the diagnosis.

11. In April 2017 the claimant's employment was transferred under TUPE to the respondent, which provided management services including reception, security and cleaning to the owners of Westwood Cross Shopping Centre, Savilles.

12. In June 2018 the claimant was moved from a portacabin outside the centre to the main front desk within the shopping centre. As a result, her role changed to include more IT work. Mr Ford who managed the respondent's contract at Westwood Cross became the claimant's manager. It was a matter of common knowledge that the claimant struggled with computers. For instance, Mr Norris said that he had sat with her when she was working alongside him as a security guard before 2014 and he helped her with police reports.

13. On a daily basis, the claimant received her instructions from Savilles. However, Mr Ford dealt with a number of issues and interacted with her frequently. The Tribunal accepted the respondent's evidence that the claimant and all respondent staff, were on occasion caught between the needs of Savilles and the needs of the respondent.

14. From 17-20 October 2018 the claimant took sick leave due to panic attacks, high blood pressure and anxiety. According to the return to work form, these conditions recurred periodically and she was taking Sertraline (an SSRI anti-depressant), and Propranolol (a beta-blocker for anxiety). She continued to

take these medications throughout her employment. The incident was brought on when the claimant discovered her son's cancer diagnosis.

15. In April 2019 the claimant reported an extremely serious sexual assault (a historical allegation) to the police. She took three weeks leave. Mr Ford and an HR Manager attended the claimant at home. They agreed that she would receive two week's paid leave which would not count towards her annual leave entitlement.

16. The claimant, it was agreed, was in the habit of sharing her personal difficulties with colleagues at work and this included the very serious sexual assault.

Issues between the Claimant and Mr Ford

17. On 10 June 2019 Mr Ford sent an email to both reception staff, including the claimant, saying that they must not leave the desk unstaffed. The claimant said that sometimes in an emergency, she might leave the desk and forget to take her radio.

18. The claimant's evidence was that, particularly from about June 2018, Mr Ford became more aggressive and unreasonable in the way that he managed her. A particular bone of contention was her being interrupted when taking her break. The claimant preferred to take her break in the early afternoon when the centre was quiet. However, Mr Ford, wanted her to take her break at lunchtime when the centre was busier. This was because it was more convenient at lunchtime for security to provide cover. The Tribunal accepted the claimant's evidence that when providing cover, the security team were not able to deal with all enquiries. Accordingly, her breaks were regularly and frequently interrupted, for instance when she was eating or queueing to buy lunch, and she had to go back to deal with the enquiries. The respondent said that this only happened occasionally.

19. The Tribunal preferred the claimant's evidence because she gave a detailed explanation as to why she was interrupted. Further, the respondent's attitude was that because her break was paid, she could not expect to take it uninterrupted. This fitted with the respondent being willing to interrupt the claimant regularly.

20. The Tribunal accordingly accepted the claimant's evidence that she felt that she had to spend her break in the canteen rather than anywhere else because that made it easy for her to come back to the desk to deal with enquiries. Therefore, the claimant did not receive a twenty-minute uninterrupted break every day and where she could move about as she pleased.

Meeting of 21 June 2019

21. In June 2019 the claimant discovered that her son's cancer had returned, and she went sick from work with a migraine. In an exchange of voicemail and texts with Mr Ford, the claimant said variously, that she had "done so much crying" and "I need to be working" and "I think I'm gonna hand [in] my notice."

22. On her first day back, on 21 June, Mr Ford called her into a meeting. The claimant's evidence was that Mr Ford said, *"We need a little chat about commitment."* Mr Ford denied that he had used those words. The Tribunal preferred the claimant's evidence because it was consistent with the exchange of texts.

23. In his witness statement Mr Ford said that he called the meeting on 21 June to deal with this situation and a number of other issues - the claimant leaving the desk unstaffed, the timing of her breaks, Savilles' concern that the claimant could not use the computer, and two recent discrete issues raised by Savilles. Savilles had complained about the claimant once having failed to hand out water bottles as instructed and about her once leaving early. Mr Ford stated that he was concerned that the claimant was not happy in her role, and her personal life was affecting her performance; he had received reports that she was breaking down in front of Savilles' staff and customers, and disclosing personal details inappropriately.

24. In the witness statement he stated, *"I anticipated that this might lead to a further formal process."* He told the Tribunal that this would be a capability process.

25. The Tribunal found that this witness statement did not fit well with the evidence or the respondent's case in submissions. Firstly, Mr Ford prepared a meeting agenda. The agenda listed the incident with the bottles, the claimant leaving work early, her accepting instructions from Savilles, and whether there was a problem with her being able to work her hours.

26. Further, in cross-examination, Mr Ford resiled from some of his witness statement in respect of the meeting. He accepted that the claimant's leaving the desk was resolved prior to the meeting, and the timing of breaks was no longer a concern. Mr Ford said that the meeting was not called because of computer issues. The claimant could work on a computer pretty well because Savilles had trained her. It was the claimant who brought up the computer in the meeting.

27. Mr Ford's evidence was that he had discovered in the meeting that the claimant was unhappy. The respondent's case in submissions was that prior to the meeting, the claimant appeared to be managing well and performing well.

28. Accordingly, the only consistent reasons for calling the meeting were the claimant's recent sickness absence and the two discrete Savilles complaints.

29. The claimant attended the meeting with Mr Ford and Mr Dema, a security guard, as a witness. The Tribunal accepted the claimant reasonably viewed this as a formal meeting. There was a witness, notes were taken, it took place in the conference room and there was a reference to commitment.

30. The Tribunal had sight of hand-written minutes by Mr Ford. Some of these minutes were agreed between the parties and other parts were disputed. It was agreed that the minutes accurately showed the meeting began with discussing the two Savilles' issues. The claimant provided an explanation and there was no suggestion in the minutes that this explanation was not

accepted or that anything further came of these two issues. The references in the minutes to the two issues were brief.

31. Early in the meeting, the claimant said that she was not happy in the job and she was unhappy that she could not leave her desk. Mr Ford told her because the break was paid, she could be called upon occasionally during the break. The claimant said that she was not good with computers, that she did not 'have a clue' how to work them. The claimant denied making this statement about computers, but the Tribunal accepted that she had said this. It was a common idiomatic statement and consistent with the claimant's other evidence. The claimant said that she was not an IT person but was a practical and people person.

32. The claimant complained about the changes to her job and having to deal with emails. She said that she was frightened about raising issues due to her anxiety. She was pretty emotional.

33. Mr Ford replied that the claimant had been in the job for a year and but was not confident. The claimant then mentioned various historic issues about the previous workplace. The claimant said that it had been difficult working in security as a woman in a man's world. She did not make any mention of sexism.

34. The parties disputed what was said about providing the claimant with computer training. According to the claimant, Mr Dema said that if she wanted to keep her job, she should go to night school and learn how to use a computer. Mr Ford did not disagree or do anything to make the claimant think that this was not also his view. Mr Ford and Mr Dema denied that Mr Dema had said this.

35. According to the minutes, "GF/ID" asked if the claimant would consider an outside computer course. The claimant replied that she had no time after long hours at work. The Tribunal accepted that both parties meant a course outside of the work hours by an outside course.

36. The tribunal preferred the evidence of the claimant for the following reasons. Mr Ford wrote the notes of the minutes of the meeting. All respondent statements were attributed to GF. However, the computer training comment was attributed to GF/ID, which indicated that Mr Dema said something at this point. Mr Ford, when questioned, said that he could not explain why he had written in the notes that Mr Dema had said something when, on his case, Mr Dema had said nothing.

37. Further, the Tribunal did not find Mr Dema an independent witness. He reported to Mr Ford. When the allegation about computer training was put to Mr Dema, he was defensive. Further, the Tribunal did not accept that Mr Dema's witness statement was independent. It stated, "you just could not have a manageable conversation with her without her getting upset". Mr Dema emphasised before the Tribunal that he was not management. In the view of the Tribunal, Mr Dema was simply adopting Mr Ford's experiences and opinions.

38. Accordingly, on the balance of probabilities, the Tribunal preferred the claimant's evidence that she was told that if she wanted to continue in employment, she needed to take a course outside of working hours. Thus, the only reference to training was, in effect, a threat to her job.

39. The parties agreed that the claimant told Mr Ford that she was a supervisor. He disagreed. The minutes showed that the claimant provided a document which referred to her as a supervisor.

40. Mr Ford finished the meeting by telling the claimant not to discuss her personal issues with customers. The Tribunal accepted that the claimant then hyper-ventilated as this was confirmed by Mr Dema.

41. The claimant said that she signed the minutes at the end of the meeting with little or no time to review. She never received a copy. Accordingly, the Tribunal drew no adverse inference from the claimant's failure to challenge the minutes at the time.

42. Later that day, Mr Ford emailed the head of HR about the claimant, "now she thinks she is not confident on a computer". He said that she had, despite this, received training from Savilles. He said that the claimant was blaming others for her failure to be able to carry out her tasks effectively.

43. Mr Ford criticised the claimant for making a "sexist" comment about being a woman in a man's world. In the view of the tribunal, this was a significant allegation to make to management. However, Mr Ford was not able to explain what he meant by this or its relevance. There was no suggestion that the claimant had referred to or made any allegations of sexism. In the view of the Tribunal, if the Mr Ford thought that the claimant was making a complaint about previous sex discrimination, then he had told his superiors that a sex discrimination complaint amounted to blaming other people. The other interpretation was that Mr Ford accused the claimant of being sexist because she pointed out that she was a member of a minority, women, at work.

44. The Tribunal found that this was evidence of an animus against the claimant, which Mr Ford was unable to explain.

45. In his email Mr Ford stated that he was extremely concerned that the claimant was frightened of Savilles, was not strong enough to follow Savilles' instructions and whether she was able to do her role. He asked, taking into account the claimant's state of mind, her anxiety problems and inability to carry out her job effectively, was a capability hearing an option?

46. Mr Ford resiled from this email in cross-examination, stating that his only concern was computer training and that that the claimant thought she was a supervisor. He said he went to HR to show empathy and sympathy to the claimant. The tribunal found this inconsistent with his evidence that a capability hearing was the next step.

47. The Tribunal found it hard to understand what justification there was for Mr Ford wanting to progress to capability at this point. Mr Ford said that the customer was happy with the claimant's explanation over its two discrete complaints. He said that she was able to work on the computer. The

remaining issue was the claimant's anxiety and state of mind. There was no explanation why a capability process would be the appropriate next step.

48. In the event, no capability process was started and there was no explanation as to why not, when Mr Ford had stated that the claimant was unable to do her job effectively.

49. The Tribunal, based on this evidence, came to the view that Mr Ford was at this point looking to see if the claimant could be exited from the business. In the view of the Tribunal, the email shed valuable light on Mr Ford's motivation in the meeting on 21 June 2019.

Meeting of 17 August 2019

50. The claimant's evidence was that she was very worried about her position and Mr Ford's attitude after the 21 June meeting.

51. The next material incident occurred on 14 August 2019. The claimant alleged that Mr Ford had said aggressively under his breath, "why can't you take your break now?" (The claimant originally said that this event and the next day occurred in June but corrected this to August shortly before the hearing). Mr Ford denied this had occurred. The Tribunal accepted the claimant's evidence that this had occurred for the following reasons.

52. It had found that there was a long-standing tension between Mr Ford and the claimant about break times. Further, the 21 June meeting and email indicated Mr Ford's frustration with the claimant. According to the 21 June email, Mr Ford believed that the claimant was not capable of doing her job. In effect he had lost faith in her.

53. On 15 August 2019 the claimant alleged that Mr Ford had – before her start time - aggressively demanded where she was. This was despite her having arrived on site and there being no reason to suppose that she would not be ready in time. Mr Ford denied this.

54. The Tribunal accepted the claimant's evidence for the following reasons. Mr Ford believed that the claimant was no longer capable of doing her job and had lost faith in her. This was consistent with an assumption that she was late, or unreliable, even when there was no indication of this.

55. The next incident occurred on 17 August at lunchtime on a Saturday. The claimant and Mr Dema's account was that Mr Ford sent Mr Dema to tell the claimant that, when she went to lunch, she should close the desk and put up the sign to this effect. The claimant told Mr Dema that she could not put up a sign because Savilles disapproved. Mr Ford sent Mr Dema back to tell the claimant that she had to put a sign on the door. The claimant continued to refuse.

56. Mr Ford's account was somewhat different. He said that he sent a message via Mr Dema that the claimant must go to lunch at 1.30pm and the claimant refused to go. The tribunal did not accept this account because Mr Dema, who spoke to the claimant, did not agree. Therefore, the dispute was not

about the timing of the claimant's break but about whether a sign should be put on the door during the break.

57. It was agreed that about five minutes later Mr Ford approached the claimant, put a "closed" sign on the door and told her to go into the conference room with Mr Norris - a security guard and friend of her son - as a witness.

58. The Tribunal found that Mr Ford was waiting for an opportunity to take further action against the claimant who he had a stated intention of progressing to a capability. This was shown by him having prepared a witness, Mr Norris, and his being very quick to act on 17 August. However, the Tribunal did not accept that the incident was pre-planned as the claimant alleged.

59. Mr Ford said that he was firm in the meeting with the claimant. Mr Norris agreed with this. The minutes of the meeting were evidently not verbatim, and the pronouns and speakers were confused making it somewhat difficult for the Tribunal to understand. Mr Ford's notes start with, *"*C – why did you not comply to my request. We are not allowed to do this. Who is the duty manager?" In the view of the Tribunal, it made sense that it was Mr Ford who said this rather than the claimant. Mr Ford went on "who is your duty manager today?"

60. The minutes record the claimant saying that she was having a panic attack and Mr Ford says, "please calm down". Mr Ford said several times that the meeting was simply about her getting breaks. Mr Ford agreed that he raised his voice, but he said, because the claimant raised hers. The claimant told Mr Ford that he was bullying and intimidating her. Mr Norris got the claimant a glass of water. The claimant essentially broke down and left the meeting and left the workplace.

61. Later that day, (page 72) Mr Ford sent an email to the respondent stating, 'another day on which (the claimant) is not behaving correctly'. The tone of this email was manifestly angry with many exclamation marks. Mr Ford stated that he told the claimant to take a break and she ignored his request. (This was untrue). He stated that the claimant had, "went on with a volley comments". He said that the claimant alleged that, he was a bully, intimidating and aggressive. He referred to "outrageous comments about myself".

62. The Tribunal found that Mr Ford's comments about the claimant's sexual assault allegation were somewhat dismissive. He went on to say that she often broke down in front of customers, "about splitting up from her most recent partner".

63. The Tribunal saw this email as evidence of further animus by Mr Ford towards the claimant. The relationship had broken down in effect. He had concluded that she was a needy, time consuming, and a burdensome employee, who the respondent would be better off without.

Claimant's Sickness Absence

64. The claimant did not return to work after this meeting.

65. The claimant then started to send very disturbing emails to her colleagues, including two employees of Savilles, including the centre manager. These included graphic images of the claimant self-harming. The Tribunal accepted that this was extremely upsetting to the recipients. The claimant also sent text messages and telephone calls including in the early hours of the morning.

66. The respondent alleged in its grounds of resistance that the claimant then came to the shopping centre half-dressed and drunk. It did not formally resile from this allegation, or admit it was untrue, until Mr Ford was directly questioned by the Tribunal.

67. Mr Ford, on 20 August 2019, emailed the respondent management alleging that the claimant had been sectioned (which was not true) and that she had been found in her neighbourhood partly dressed telling people she worked the shopping centre. The claimant admitted that she had been outside of her house in night attire in the daytime and a neighbour had called an ambulance for her.

68. The Tribunal found that the claimant made harassing telephone calls to her colleagues and Savilles' employees which caused them genuine and considerable distress and caused the respondent embarrassment in its client relationship.

69. Mr Ford emailed management to say that staff were very upset and distressed by the claimant's behaviour. He was told that HR were dealing with the claimant.

70. On 23 August 2019 the respondent sent a letter to the claimant telling her to stop contacting its employees. This was an appropriately phrased letter stating that she must stop contacting her colleagues and Savilles' staff.

71. The claimant provided, on 28 August, a sick note from 21-30 August. She was signed off with stress in the workplace.

72. The respondent did not contact the claimant about her health or situation until a letter on 17 September 2019 inviting her to a welfare meeting at her home on 24 September. The letter stated that it would discuss her ill-health absence, the reasons for the absence, whether medical advice was needed and the likelihood of return. It asked for the claimant's permission to contact her GP. It was stated that she might bring a companion.

73. The respondent wrote to the claimant saying that a General Manager (Mr Mann) and a woman would come to the claimant's home for a welfare meeting. The claimant did not reply. Her explanation was that she believed that Mr Ford was coming to her house. In cross-examination, she said that she thought that it was two men that would come to visit her. She said that she was not able to suggest any alternative because she was ill. The tribunal found that the claimant was not capable of effectively engaging with the respondent.

74. The claimant was signed off sick on 30 September for six weeks due to stress at work, anxiety and depression.

75. The respondent again invited the claimant to a welfare meeting by way of a letter of 17 October. On 28 October 2019 the claimant sent the respondent an email refusing the meeting.

76. The claimant sent a message to the respondent on 1 November saying "please don't contact me anymore. A solicitor will speak on my behalf".

The Claimant's Grievance and Resignation

77. The claimant's case was that on 1 October 2019 her solicitor sent a grievance on her behalf to the respondent at its Borough High Street address, its headquarters and the correct address for such correspondence. No reply was received. The claimant was not able to give any evidence about the sending of the reference. There was no evidence that the solicitor or the claimant chased the grievance.

78. The claimant's solicitor sent a letter dated 7 October 2019 to the respondent's same Borough High Street address. The letter stated that they had received no response to the grievance (a copy was enclosed). The fact that the grievance was ignored had forced the claimant to resign and claim constructive dismissal.

79. The respondent's case was that it did not receive the 1 October grievance but it did receive the resignation letter on 11 November. The Tribunal heard from Ms Buckingham from the respondent's HR who worked at its Ruislip address. Her evidence was that she had received an envelope sent to her from Borough High Street. This envelope contained the 7 November resignation letter with the grievance and also contained other letters from different solicitors (in Sheffield) about different respondent employees. The letters from the Sheffield solicitors stated that they had not received any reply to previous correspondence. Ms Buckingham's evidence was that this envelope was sent to her directly by Borough High Street and accordingly the claimant's solicitors had mistakenly put the wrong documents in the envelope, being the letter from the Sheffield solicitors.

80. Upon receipt on 11 November, Ms Buckingham emailed the claimant's solicitors asking why they had put the wrong letters in the envelope. She chased them and the solicitors apologised for enclosing the wrong letter. The solicitor confirmed that the claimant had resigned as of 11 November 2019.

81. Ms Buckingham said that she believed that the grievance was not received before 11 November 2019. She said that she was the only person who opened post in the Ruislip address, but she had no personal knowledge of what had occurred at the Borough High Street office.

82. The tribunal understood the respondent's case to be that the claimant's solicitors' carelessness in putting the wrong letters in with the 7 November letter made it more likely that they had not posted the 1 October letter.

83. The Tribunal considered whether, on the balance of probabilities, the respondent had received the 1 October grievance. The Tribunal could not accept Ms Buckingham's explanation. It found it unlikely that the claimant's solicitors (in Margate) had somehow got hold of letters from a Sheffield

solicitor representing other respondent employees. There was no suggestion that these other employees had any links with the claimant or worked at the same site. The most likely explanation was that the various letters were received from their respective senders at the Borough High Street address. All the letters were opened and the contents put into a single envelope and forwarded to Ms Buckingham.

84. Accordingly, there was no reason to disapply the usual postal rule, particularly with solicitor correspondence. Therefore, the tribunal found on the balance of probabilities that the respondent received the grievance within two days of 1 October 2019. The Sheffield solicitors' complaint about the respondent failing to reply to correspondence was consistent with this finding, in that it indicated some shortcomings in the respondent's management of incoming post. Further, Ms Buckingham could give no first hand evidence about what had happened at the Borough High Street office.

85. On 13 November 2019 the respondent's solicitors wrote to the claimant's solicitors (page 186-9). As there was no response, the respondent's solicitors again emailed the claimant's solicitors asking if she wished to pursue the grievance and there was no reply. The claimant said that she was too ill at this stage. The respondent concluded that the claimant did not wish to pursue the grievance and took no further action.

86. The claimant was unable to give evidence as to what date she instructed solicitors. She must have instructed solicitors after 30 August 2019, when according to her GP records, she had not yet taken legal advice. At the latest she must have instructed solicitors a few days before 1 October 2019.

87. The claimant's evidence was that she had not attended ACAS earlier because it was only when her elderly father advised her to go to ACAS over Christmas that she acted. She was then further delayed by health problems.

The Law

88. The law on unauthorised deductions from wages is found in the Employment Rights Act 1996 as follows

> **13 Right not to suffer unauthorised deductions**
> (1) An employer shall not make a deduction from wages of a worker employed by him unless—
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction…
>
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.
>
> (4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

89. The law on unfair dismissal is found in the Employment Rights Act 1996 as follows

95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if …

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,…

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held…

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

90. The law on discrimination time limits is found in the Equality Act 2010 as follows

123 Time limits

(1) [Subject to [[section] 140B],] proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

91. The law on harassment is found in the Equality Act 2010 as follows

26 Harassment

(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

92. The law on direct discrimination is found in the Equality Act 2010 as follows

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

93. The law on victimisation is found in the Equality Act 2010 as follows

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

94. The law on the burden of proof is found in the Equality Act 2010 as follows

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Submissions

95. Both parties made oral submissions and extensive written submissions. The Tribunal will refer to the relevant parts of the submissions below.

Applying the Law to the Facts

Unfair Dismissal

96. The claimant claimed constructive dismissal.

97. The Tribunal firstly considered whether the allegations relied upon as breaches of the implied term of trust and confidence occurred. The claimant relied on Mr Ford's conduct as set out at paragraph 6, 8, 9, 12-16 in the particulars of claim ("the Ford allegations").

98. The first allegation was Mr Ford, 'behaving towards the claimant in an aggressive and intimidating way; aggressively calling the claimant back to the reception desk on a daily basis whilst she was on her lunchbreak'.

99. The Claimant did not give evidence that she was called back from her break every day. The Tribunal had found that the claimant was called back frequently and regularly by the respondent, and she did not receive a twenty-minute uninterrupted break. The Tribunal had accepted that the security guards who covered her could not carry out a number of tasks. Accordingly, there was a reason for the claimant to be called back from her break regularly and quickly. The Tribunal found that this was so frequent that the claimant had to stay in the canteen during her break.

100. The Tribunal found that this prevented the claimant from taking her statutory breaks and caused her considerable stress. In light of Mr Ford's attitude to the claimant – that he had lost faith in her and viewed her as incapable of carrying out her role - the tribunal found on the balance of probabilities that at times he appeared aggressive and intimidating when calling the claimant back. This was particularly likely when a customer was waiting and there was some urgency to the situation. The fact that Mr Ford inaccurately alleged that the claimant had refused to take her break when instructed on 22 August indicated that his default attitude was that the claimant was being difficult about breaks. This made it more likely that he would appear aggressive.

101. The next allegations were that 'on 14 August 2019 Mr Ford said under his breath but nevertheless, aggressively, "can you take your lunchbreak, now?" and on 15 August 2019 Mr Ford 'storming through the management suite door and aggressively asking where the claimant was'.

102. The Tribunal found that the first allegations was made out. The Tribunal found that Mr Ford was frustrated on a long term basis with the claimant's breaks. An aggressive, if muttered, comment about the claimant's break was consistent with this attitude. This was also consistent with his inaccurate allegation that she refused to take a break on 22 August. It was also consistent with the overall tone and content of Mr Ford's emails to management following the June and August meetings.

103. The Tribunal had found that Mr Ford unreasonably asked where the claimant was on 15 August. The Tribunal was not convinced that Mr Ford "stormed" but found that he was frustrated on this occasion, as shown by the ease with which he wrongly assumed the claimant was at fault. He assumed that she was not where she should be and was not reliable. The Tribunal therefore accepted that his question was aggressive.

104. The next allegation was 'On 21 June 2019 holding a meeting with the claimant described by Mr Ford at the outset as 'a little chat about commitment' at which unjustified and unfair issues were raised and it was suggested the claimant struggled with computer skills and 'had been here for a year and still cannot work a computer'. The claimant felt that the meeting had been set up as a means for Mr Ford to threaten her continued employment.'

105. The Tribunal had found that Mr Ford did say "a little chat about commitment". Some issues raised at the meeting were justified, for instance, Savilles' two discrete issues - these were customer complaints or enquiries. It was the claimant who raised her problems with computer skills and not Mr Ford. The Tribunal found that it was unfair and unjustified for the respondent to in effect tell the claimant that she needed to take an IT course in her own time if she wanted to save her job. This was unjustified when Mr Ford's evidence was that the claimant was coping on the computer.

106. Mr Ford emailed the respondent management to say that the claimant had been in her role for about a year, "and now she thinks she is not confident on a computer". This was true to some extent but it was not the whole picture. The claimant had been in effect threatened that her job was at risk if she did not obtain computer training. Mr Ford said that he believed she was good enough on the computer, and this comment would make the claimant less, not more, confident. Mr Ford did not reassure the claimant that her computer skills were adequate or take positive steps such as offering training. Even if the meeting was not set up in order to threaten the claimant's future employment, her future employment was threatened in the meeting.

107. The tribunal found Mr Ford's email of the same day a good guide to Mr Ford's attitude to the claimant and how he acted in the meeting. Mr Ford believed, as he said in the email, that the claimant was unable to carry out her job effectively. He tried to progress the claimant to a capability procedure. In the view of the Tribunal, Mr Ford was exasperated with the claimant and did not want her to continue in the business. His animus against the claimant was illustrated by his attitude to the claimant saying she was a supervisor. He was concerned that she thought she was a supervisor. Mr Ford might well have been correct that the claimant was not in fact a supervisor. However, the claimant had written evidence that she had been told she was a supervisor, so her belief was not in itself unreasonable.

108. The Tribunal next considered the two allegations relating to 22 August. 'On 22 August 2019 Mr Ford initiated a meeting with the claimant by appearing with a notice in his hand which read 'Guest Services Closed Today' and pointedly stated to the claimant, "conference room". "During the discussion on 22 August 2019 when the claimant became visibly upset and hyperventilated on responding to why she had not gone for lunch, placed his

hands on the desk and continued to talk aggressively to the claimant saying, "who is the centre manager today? I am – I take full responsibility for managing the centre". When asked by the claimant why he was bullying her, Mr Ford responded, "wrong word".

109. The Tribunal found that Mr Ford had, by this stage, an animus against the claimant. He was exasperated with her and willing to believe the worst. He assumed she was late or unreliable when she was not. The Tribunal found that he was the source of the allegation in the grounds of resistance that the claimant came to the Centre drunk and not fully dressed, as this was consistent with his claim that she had been sectioned. In the view of the tribunal, Mr Ford was finding it difficult to manage the claimant. The relationship between them had broken down by this meeting as illustrated by Mr Ford's email that day to respondent management. He wrongly accused the claimant of refusing to take her break when ordered.

110. The email showed Mr Ford to be angry with the claimant. The claimant had made significant allegations against Mr Ford in the meeting – stating that he was bullying and intimidating her. These are not pleasant things for any manager to hear and a manager would want to defend himself. However, Mr Ford's tone went beyond that of a manager unjustly accused of bullying when he was simply trying to manage a challenging member of staff. He referred to her making "outrageous comments against me" and that "she just went on with issues with her job". He referred to her being given additional time off with pay for "taking her ex-husband to court for an allegation of rape for an offence over ten years ago", and she broke down in front of customers about "splitting up from her most recent partner." Neither matter was necessarily irrelevant but, in the view of the tribunal, the tone indicated that Mr Ford was dismissive of and hostile to the claimant.

111. In light of Mr Ford's attitude to the claimant, the tribunal accepted that he placed his hands on the desk and that his manner of talking to the claimant was, to a degree, aggressive and that he said, "who is the centre manager today? I am – I take full responsibility for managing the centre".

112. The Tribunal also accepted that when the claimant complained of bullying, Mr Ford said, "wrong word" because this was consistent with his views of the claimant. He viewed the claimant as being no good at her job and making outrageous allegations against him.

113. Mr Ford behaved, the Tribunal found, in an overbearing manner.

114. The next allegation was 'the respondent's failure to contact the claimant during her period of absence on 22 August 2019 other than the letter dated 23 August 2019 which was unfair, unsympathetic, unsupportive and one dated 17 September 2019'.

115. The Tribunal found that the letter of 23 August 2019 was reasonable and not unfair. It may have seemed unsympathetic and unsupportive to the claimant. However, its purpose was to support its and its client's employees who urgently needed protection from the claimant. The respondent contacted the claimant again when she was on leave on 17 September and again 24 October to try to obtain her medical records. This was reasonable in the

circumstances of the claimant's sickness absence. The tribunal had found that the claimant was not able to engage with the respondent. The Tribunal did not find that the respondent's correspondence after the claimant went off sick amounted to a fundamental breach.

116. The next allegation was that the respondent advertised the claimant's position. There was no evidence before the Tribunal that the position had been advertised and the Tribunal did not find that this allegation was made out.

117. The final allegation was that the respondent failed to address the claimant's grievance. The Tribunal had found this allegation to be made out.

118. The Tribunal then considered whether the facts found amounted to a fundamental breach of the claimant's contract of employment. The Tribunal directed itself in line with the Court of Appeal's ruling in *Western Excavating (ECC) Limited v Sharp 1978 CA*

> 'If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.'

The breach may be the last of a series of breaches, which taken together form sufficiently serious conduct by the employer (known as the "last straw" concept — see *Lewis v Motorworld Garages Ltd* [1985] IRLR 465, CA).

119. The Tribunal reminded itself that conduct that is unreasonable is not in itself sufficient to amount to a fundamental breach. See *Western Excavating (ECC) Ltd v Sharp* [1978] I.R.L.R. 27 and *Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA*.

120. The claimant relied on the implied term of mutual trust and confidence, that, without reasonable and proper cause, a party will not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties, see *Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL*. According to *Morrow v Safeway Stores plc 2002* [IRLR 9 EAT], any breach of this term is a fundamental breach.

121. It is not necessary for an employer to intend to breach the fundamental term. If the effect is a breach of a fundamental term, this is sufficient to found a

constructive dismissal. See *Leeds Dental Team Ltd v Rose 2014 ICR 94,*

EAT.

122. The Tribunal found that the Ford allegations together with the failure to reply to the grievance (which was mainly concerned with those allegations) amounted to a breach of the implied term of trust and confidence. The tribunal had found that Mr Ford had lost faith in the claimant as an employee. He wanted to exit her from the business. He was present when she was told that she needed to get computer training if she wanted to save her job and therefore impliedly authorised this comment. He saw her as not capable of carrying out her duties, as needy and exasperating to manage. Mr Ford told the respondent management that the claimant had difficulties in withstanding pressure. She had mentioned resignation. In the view of the tribunal, he believed that she would resign if pushed. However, the result of this pressure was not a resignation but the claimant sending very distressing self-harming images to her colleagues and Savilles' employees.

123. The respondent then failed to take any action on her grievance. The Tribunal heard no evidence as to why, when the grievance was received, the respondent failed to do anything, for instance sending it to Ms Buckingham. It may have been a simple oversight, or evidence of a more systemic failure to deal with grievances, or it may have been targeted at the claimant personally. Nevertheless, even if was only an oversight, the effect was that the respondent did not engage with the claimant's concerns even when she instructed solicitors.

124. The tribunal found that the cumulative effect of its findings of fact amounted to a fundamental breach of the claimant's contract of employment by breaching the term of mutual trust and confidence. The respondent put pressure on the claimant in the hope that she would leave because Mr Ford has lost trust in her ability to do her job and because he believed she was a burdensome employee.

125. The Tribunal went on to consider causation. It accepted that the claimant resigned in response to the breach. The respondent contended that the claimant had earlier suggested that she might resign when she said, "I feel like handing in notice". The Tribunal found that the claimant was, in effect, 'venting'. This was not evidence of a fixed intention to resign as she at the same time told the respondent that she needed to work. The Tribunal accepted the claimant's evidence that she was deeply concerned about her financial situation and was therefore unlikely to resign for any other reason than a fundamental breach of contract.

126. The Tribunal went on to consider whether the claimant had affirmed the contract and waived the fundamental breach. Following the Ford allegations, the claimant went off sick. She then submitted a grievance and waited several weeks for the respondent to deal with her the grievance. She resigned once she believed that the respondent was not going to reply to the grievance.

127. In the view of the Tribunal, a claimant who did not resign until she tried to resolve the workplace issues by way of a grievance, and then gave the employer time to investigate and reply, had not affirmed the contract.

128. Accordingly, the Tribunal found that the claimant was constructively unfairly

dismissed and went on to consider fairness under section 98 ERA 1996.

129. The respondent relied upon capability and/or some other substantial reason as potentially fair reasons for dismissal. The substantial reason was the claimant's inability to carry out her duties and an inability to work with reasonable management supervision and feedback. The Tribunal accordingly decided if either was the reason for the breach of contract.

130. The Tribunal had found that Mr Ford believed the claimant was not capable of carrying out her duties and accordingly the reason for the constructive dismissal was capability. However, there was no evidence that this was in the respondent's mind when it failed to deal with the grievance. Accordingly, if there was a potentially fair reason of capability, it can only have applied to the Ford allegations. The Tribunal accordingly went on to consider reasonableness.

131. There was no dispute that there was no procedure for the dismissal, fair or otherwise. Accordingly, the procedure, or lack of one, adopted by the respondent fell outside a range of responses available to a reasonable employer in the circumstances. The dismissal was procedurally unfair.

132. The Tribunal accordingly went on to consider the question of a Polkey deduction. That is, had the respondent followed fair procedure, would it and could it have dismissed the claimant fairly? The Tribunal directed itself in line with the *Software 2000* Limited *v Andrews* and others (EAT/0533/06). In a fair procedure, the respondent would have investigated its concerns about the claimant's performance and, if appropriate, proceeded to a disciplinary. Based on the evidence before it, the tribunal sought to construe what might have happened.

133. At the June meeting the claimant answered, apparently to the respondent's satisfaction, its concerns about the bottles and the attendance incident. The claimant raised concerns about computers, but this was a matter that the respondent had known about for some time, and, on Mr Ford's case, was not a significant problem at the time the June meeting. Mr Ford was concerned that the claimant lacked confidence and was over-sharing at work.

134. The Tribunal found that, had the respondent followed a fair procedure concerning the claimant's capability, it would have discussed providing the claimant with support with IT, or simply reassured her that she was performing acceptably. The Tribunal accepted that it might be somewhat tiresome for the respondent to have to reassure the claimant that her IT performance was acceptable, especially if her concerns were linked to her age. However, this was a far from insurmountable problem if, as Mr Ford stated, the claimant was performing her IT duties acceptably.

135. As to the claimant's over-sharing at work, this could have been dealt with by a straight-forward instruction to desist. There was no evidence that the claimant would have continued to over-share if she realised that her job was potentially on the line if she continued. Mr Ford's evidence was that he was broadly content with her performance apart from the two Savilles' issues which had been resolved.

136. Accordingly, the Tribunal found that, had the respondent dismissed the claimant following a fair procedure, this would have fallen outside of a range of responses available to a reasonable employer in the circumstances. The Tribunal reminded itself that it should not substitute its view of what amounts to a reasonable response for that of the employer.

137. The Tribunal went on to consider whether the claimant had contributed to her dismissal.

138. The Tribunal firstly considered, in respect of the basic award, whether there was any conduct by the claimant before the dismissal, such that it would be just and equitable to reduce the amount of the basic award.

139. The Tribunal directed itself in line with *Steen v AS Packaging Limited 2014 [ICR 56 EAT]* where the EAT set out the correct approach under Section 122(2) Employment Rights Act stating that the Tribunal must:-

    (1) identify the conduct which is said to give rise to possible contributory fault;

    (2) decide whether that conduct is culpable or blameworthy and

    (3) decide if it is just and equitable to reduce the amount of the basic award to any extent.

140. The Tribunal had found that the claimant had sent vivid, distressing and potentially dangerous self-harming images. This could have been triggering if it had been received by a person with a risk of self-harming. In the view of the Tribunal, this was culpable and arguably blameworthy conduct. Nevertheless, the Tribunal did not find it just and equitable to reduce the basic award because the claimant was ill at this time, as referenced in the GP notes. Further, when instructed by the respondent, she desisted.

141. The Tribunal went on to consider contribution to the compensatory award. According to Section 123(6) in the Employment Rights Act, 'where the Tribunal finds that dismissal was to any extent caused or contributed to any actions by the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable, having regard to that finding.'

142. The Ford allegations pre-dated the claimant sending the self-harm messages. The question for the Tribunal was whether the self-harm messages caused or contributed to the respondent's failure to do anything about the grievance. The respondent's failure, as far as the Tribunal could judge, as there was no direct evidence, appeared to have occurred at the headquarters in Borough. There was no suggestion, let alone evidence, from the respondent that those who were responsible for this omission or action were aware that the claimant had sent self-harming images. Further, the respondent did not run a case that the constructive dismissal was to any extent caused or contributed to by the self-harming images.

143. Accordingly, the Tribunal made no deduction from either award in respect of

contributory fault.

Harassment - Disability

144. The Tribunal considered the harassment claim related to disability.

145. The respondent argued that the harassment claim could not succeed if the respondent did not have actual or constructive knowledge of the claimant's disability. The difficulty for the respondent was that there is nothing express in Section 26 which requires a respondent to know that a claimant has a disability. Where knowledge is required to establish liability elsewhere in the Equality Act, for instance in Section 15(2), this is expressly stated.

146. In the view of the Tribunal, this point was best considered as an aspect of whether the harassment was related to the protected characteristic of disability. The Tribunal took into account the Equality and Human Rights Commission's Employment Statutory Code of Practice:-

> 1.12 The Commission has prepared and issued this Code on the basis of its powers under the Equality Act 2006. It is a statutory Code…
>
> 1.13 The Code does not impose legal obligations. Nor is it an authoritative statement of the law; only the tribunals and the courts can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings. (Emphasis added).

147. At paragraph 7.9 it is stated that unwanted conduct related to a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic. The code at 7.9(b) provides that a worker would be protected 'where there is any connection with the protected characteristic' (emphasis added).

> "Protection is provided because the conduct is dictated by a relevant protected characteristic whether or not the worker has that characteristic themselves. This means the protection against unwanted conduct is provided where the worker does not have the relevant protected characteristic including where the employer knows that the worker does not have the relevant characteristic."

148. This is expressly stated to include where, 'the worker is known not to have the protected characteristic but is nevertheless subjected to harassment relating to that characteristic'. There is no reference in the Code to protection not being provided if the harasser does not know if the victim is disabled.

149. The Tribunal accordingly applied a broad meaning to whether conduct is related to disability. If conduct directed at a victim can relate to disability when the harasser and the victim both actually know that the victim is not disabled, the Tribunal was of the view that conduct could relate to disability if the harasser does not know if the victim is disabled. Accordingly, even if Mr Ford

did not know (or could not be reasonably expected to know) that the claimant

was disabled, this would be no defence to a claim under s27.

150. The respondent in its submission relied on *Gallop v Newport City Council (2014) [IRLR 211] Court of Appeal and A Limited v Z (2020) [ICR 199 EAT]*. However, these cases related to Section 15 of the Equality Act, discrimination arising from disability. Liability under Section 15(2) expressly requires knowledge. This is reflected in the Code which deals with the question of knowledge in respect of s15 at paragraphs 5.13 to 5.19 including examples. In contrast, there is no reference to knowledge in the harassment section of the Code.

151. However, for the avoidance of doubt, the tribunal considered if the respondent knew or could reasonable have been expected to know that the claimant was a disabled person under section 6. The tribunal concluded that, even on the respondent's case - that caselaw on s15 was relevant to s26 - the respondent would still be fixed with knowledge of the claimant's disability.

152. According to *Gallop v Newport City Council* [2014] IRLR 211, CA paragraph 36:

> "(i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and (ii) that for that purpose the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in s.1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties;"

153. According to HHJ Eady QC in *A Ltd v Z [*2020] ICR 199:

> 23. In determining whether the employer had requisite knowledge for section 15(2) purposes…
>
> > (2) The respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect: see *Donelien v Liberata UK Ltd* (unreported) 16 December 2014, para 5, per Langstaff J (President), and also see *Pnaiser v NHS England* [2016] IRLR 170, para 69, per Simler J.
> >
> > (3) The question of reasonableness is one of fact and evaluation: see *Donelien v Liberata UK Ltd* [2018] IRLR 535, para 27; none the less, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.
> >
> > (4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability-related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for Equality Act purposes (see *Herry v Dudley Metropolitan Borough Council* [2017] ICR 610, per Judge David Richardson, citing *J v DLA*

Piper UK LLP [2010] ICR 1052), and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it has not [already] done so", per Langstaff J in *Donelien* 16 December 2014, para 31.

(5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the code, which (relevantly) provides as follows:

"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.

"5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making inquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

(6) It is not incumbent upon an employer to make every inquiry where there is little or no basis for doing so: *Ridout v TC Group* [1998] IRLR 628 ; *Secretary of State for Work and Pensions v Alam* [2010] ICR 665.

(7) Reasonableness, for the purposes of section 15(2), must entail a balance between the strictures of making inquiries, the likelihood of such inquiries yielding results and the dignity and privacy of the employee, as recognised by the code.

154. The Tribunal had accepted that the claimant gave her employer the notification of her mental condition 2016. The respondent simply denied that the document was on file. No evidence was brought by the respondent of this. It was a bare denial, although the tribunal accepted the difficulties in trying to prove a negative. However, there was no evidence or suggestion that it had experienced shortcomings in the documents received from the transferee, for instance a lack of employee files. Further, there was no evidence that the respondent showed surprise later when the claimant disclosed her mental health condition and this was consistent with the respondent having the 2016 letter.

155. Further, the tribunal had concerns with the respondent's credibility on this point because Mr Ford told the tribunal that he did not know there was a mental health problem which contradicted paragraph 8 of his witness statement where he said that he knew the claimant had problems with her mental health.

156. He with another respondent employee visited the clamant at home following a breakdown when she had made a historic sexual assault allegation in April 2019. Mr Ford agreed that she would have unpaid leave due to her mental condition. The claimant sent a text in 2018 where she told Mr Ford that went to her doctor with anxiety and a panic attack. She was prescribed sertraline and propranolol. Mr Ford agreed that he knew the medications assisted with

anxiety.

157. Mr Ford and the respondent had sight of the 25.10.18 claimant return to work form. This referred to panic attacks, anxiety, and high blood pressure. The symptoms were described as “comes back periodically”. The form records her medications - Sertraline (SSRI antidepressant) propranolol a beta blocker used for anxiety.

158. Accordingly, the respondent knew that the claimant had a mental health condition. It knew that she had suffered with this since 2016 and was reminded of this in 2018 and in 2019. It knew that this had a substantial (that is, more than minor or trivial) effect on her ability to carry out daily activities because the claimant suffered panic attacks and needed to take time off work. This was in the context of the claimant being entirely open about her mental health condition. In fact, the respondent’s complaint was not that she failed to inform it of her mental health issues, or misrepresented. The respondent’s concern was that she over-shared her mental health issues.

159. Knowledge, notwithstanding, there are three essential elements of a harassment claim. Under Section 26(1) there must be unwanted conduct, which has the prescribed purpose or effect, and which relates to the protected characteristic of either age or disability.

160. In *Richard Pharmacology v Dhaliwal 2009* [ICR 2009 EAT], (a case relating to race brought under legacy legislation), the EAT recommended a Tribunal address all three elements. Nevertheless, the EAT acknowledged that in some cases there is a considerable overlap between the components of the definition.

161. The Tribunal firstly considered whether the facts found had the prescribed purpose or effect.

162. The Tribunal reminded itself that conduct amounting to harassment must be of significant consequence. It directed itself in line with *Richmond Pharmacology v Dhaliwal* as follows:-

> *“*We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”

163. Further, another President of the Employment Appeal Tribunals stated in *Betsi Cadwaladr University Health Board v Hughes & Others [EAT0179/13]* that

> ‘…the word “violating” is a strong word. Offending against dignity, hurting

it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence'.

164. When determining whether an adverse environment has been created, the Tribunal directed itself in line with *Weeks v Newham College of Further Education [EAT 0630/11].* The EAT under its President, stated that environment means a state of affairs. Such an environment may be created by a one-off incident, but its effects must be of longer duration.

165. Further, according to the Employment Appeal Tribunal in *Insitu Cleaning Company Limited v Heads 1995 [IRLR 4],* the question of whether an act is sufficiently serious is essentially a question of fact and degree for the Tribunal.

166. When it comes to the question of perception, the Tribunal reminded itself of *Pemberton v Inwood 2018 [ICR1291*] where the Court of Appeal instructed Tribunals to consider both whether the putative victim perceives themselves to have suffered the effect in question and whether it was reasonable for the conduct to be regarded as having that effect.

167. According to the EHRC Code, relevant circumstances can include the claimant's circumstances such as their health, including mental health and capacity, cultural norms, previous experiences of harassment and can also include the environment where the conduct takes place.

168. Finally, the Tribunal reminded itself of the guidance of the Employment Appeal Tribunal in *Reed & Another v Stedman 1999 [IRLR 299 EAT],* where Tribunals were reminded to take a cumulative approach to whether harassment has been established. It quoted with approval a USA Federal Appeal Court decision:-

> "The trier of fact must keep in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment might exceed the sum of the individual episodes".

169. The Tribunal accepted that subjectively the claimant perceived the conduct to which she was submitted as violating her dignity and creating a proscribed environment. She said that she broke down in the meeting in August. Mr Norris said that the claimant was extremely upset. As a result of this, she never returned to work and instructed solicitors to raise a grievance and when this grievance was not responded to, she later resigned.

170. The Tribunal found that under Section 26(4) it was objectively reasonable for the conduct to be regarded as having the proscribed effect. The Tribunal found the relevant circumstances to be the claimant's mental health vulnerability and the fact that she was Mr Ford's direct subordinate.

171. The Tribunal concluded that it was a culminative effect of the conduct which was crucial in this case. The claimant was not permitted to take a twenty-minute break and forced, in effect, to eat her lunch in the canteen. In effect,

her concerns were dismissed. Mr Ford spoke to her aggressively about her breaks. Further, in the meeting on 21 June 2019, the claimant said that she was struggling with computers and appeared somewhat defeatist. She tried to blame her age which must have been provoking for Mr Ford who was of a similar age. Nevertheless, the claimant did say that she was having difficulties with IT and the only help that was available was to be told that if she did not get training in her own time, she could lose her job.

172. It was objectively reasonable for the claimant to come out of that meeting thinking her job was in jeopardy. This was magnified by the meeting in August. Mr Ford put his hands on the desk and said to her, "Who is the manager here, who is the manager?"

173. The question of whether the conduct was unwanted was, in effect, answered by the finding that the conduct amounted to proscribed conduct.

174. The Tribunal went on to consider whether the conduct was related to the claimant's disability. The claimant's case on this was set out in her submissions as follows. The issue for the Tribunal was whether Mr Ford was seeking deliberately to provoke a deterioration in the claimant's mental health. It was said that this was 'because he had knowledge of (the disability) and how the unwanted conduct would impact her'. Accordingly, the claimant's case was narrowly based. Was the reason for Mr Ford's behaviour, consciously or sub-consciously, her disability? (There was no suggestion that the failure to act on the grievance was related to the claimant's disability).

175. The Tribunal considered that on the balance of probabilities, Mr Ford was seeking to provoke a reaction in the claimant because he was frustrated and exasperated by the claimant, including but not limited to her emotional difficulties. The claimant's mental health vulnerabilities were well-known and they constituted an obvious weakness. In fact, it was this weakness that Mr Ford complained about. He was concerned she was not strong enough to do her job.

176. Based on the Tribunal's findings on the fundamental breach of contract, the Tribunal found that the respondent did pressure the claimant in this way partly because of her mental weakness. Mr Ford was seeking to push the claimant to her limits. He wanted the claimant to leave. He believed that the claimant was more likely to succumb to this behaviour because of her mental health difficulties. There is evidence that Mr Ford's attitude to the claimant's mental health issues was, to some extent, dismissive. This is illustrated by comments in his emails to management and the fact that he was quick to see her as unable to do her job although on his evidence prior to the June meeting, he thought that she was performing well. He was quick to suggest a move to a capability procedure, even if this came to nothing.

177. Accordingly, the Tribunal found that the Ford allegations amounted to harassment related to disability. The Tribunal paused consideration of the time point until the victimisation claim had been determined, as this went to whether there was a continuing act.

<u>Harassment - Age</u>

178. The age harassment claim was based on a single incident - Mr Ford making a comment about the claimant not being able to operate a computer on 21 June. Although the minutes of the meeting did not contain this comment, the Tribunal accepted that the comment had been made as it was referred to in Mr Ford's email that day. Further, the claimant gave evidence that the comment had been made in the meeting.

179. The Tribunal did not accept that this comment related to the claimant's age. The Tribunal accepted that there is a stereotype that people who are older are less computer literate. However, the Tribunal did not find that Mr Ford shared this stereotype. Mr Ford was (a little) older than the claimant and there was nothing in the documents or his evidence to indicate that he linked shortcomings with IT to age. In fact, the person who linked shortcomings with age was the claimant. The claimant in her witness statement said she referred to herself as "old" and not being good with computers. She said, in terms, that she felt that people in her generation, that is people in their fifties, were at a disadvantage with computers.

180. On the claimant's case, Mr Ford made no express reference to age. The link was based on the bare assumption that a comment about not being good with computers would be linked to age. The Tribunal did not accept that this comment had anything to do with age. It was the claimant who raised her difficulties with IT at the meeting. The claimant said that computers were the hardest part of her job. The Tribunal found that it was the claimant, not Mr Ford, who related computer illiteracy with age. Therefore, she interpreted a comment about computers, as being because of age. There was no evidence of any such link. In fact, the evidence pointed the other way. Mr Ford was concentrating on the claimant's shortcomings, as he saw it. This was nothing to do with age and, indeed, age from his point of view was no excuse. The link existed solely in the claimant's mind.

Direct Discrimination - Age

181. The Tribunal considered whether the constructive dismissal amounted to direct discrimination under section 13 Equality Act 2010 because the fundamental breaches stemmed from harassment related to age.

182. The Tribunal had not found any harassment related to age so this claim could not succeed.

Direct Discrimination - Disability

183. The Tribunal considered whether the constructive dismissal amounted to direct discrimination under section 13 because the fundamental breaches stemmed from harassment related to disability.

184. The Tribunal found that, based on its findings of harassment, there could be no successful claim under direct discrimination because Section 212 Equality Act provides that detriment under the Act does not include conduct that amounts to harassment.

Victimisation

185. The Tribunal had found that the respondent received the grievance dated 1 October 2019. It was not disputed that the grievance amounted to a protected act within the meaning of Section 27(2)(d) Equality Act. The detriment relied upon was that the respondent discounted 'a weeks' holiday from the claimant's accrued and untaken holiday in non-adherence to previous agreement to gift her an additional weeks' holiday on top of her ordinary entitlement' (sic). It was not in dispute that the respondent had not paid the week's holiday. Accordingly, the victimisation case turned on causation.

186. The Tribunal directed itself in line with *Igen Limited and Others v Wong and Others 2005 [ICR931]* where the Court of Appeal clarified that for an influence to be significant, it does not have to be of great importance. It is 'an influence which is more than trivial. We find it hard to believe that the principle of equal treatment will be breached by the merely trivial'.

187. Further, the Tribunal bore in mind the comments of the Employment Appeal Tribunal in *Villalba v Merrill Lynch & Co Inc and Others 2007 [ICR469]:-*

> 'We recognise that the concept of 'significant' can have different shades of meaning but we do not think it could be said here that the Tribunal thought that any relevant influence had to be important … if in relation to any particular decision a discriminatory influence is not a material influence or fact, then in our view it is trivial'.

188. There was no real dispute that the claimant's being given an extra week's unpaid leave was a personal arrangement made when Mr Ford and another came to her house.

189. Mr Ford did not deny knowing about the grievance at the material time, including in his witness statement. This, the Tribunal found, was a notable omission as this would have likely constituted a complete defence. The Tribunal heard no evidence as to how much, if any, input Mr Ford had into the weekly wages. Again, this was a notable omission as it might be a defence to the claim.

190. The relevant payment was made in December 2019 at a time when it was agreed that the respondent was in receipt of the constructive dismissal letter enclosing the grievance. Accordingly, the respondent was aware of the grievance and knew there was a real possibility of an Employment Tribunal claim.

191. The Tribunal found that as far as the respondent and Mr Ford were concerned, although the claimant had left, they now had reason to believe that she was not going quietly. The claimant had, from Mr Ford's point of view, been a significant problem whilst she was employed and there was now every chance that this would continue. In Mr Ford's mind, there was a real possibility that this could end in the Employment Tribunal. If Mr Ford had thought that the problems with the claimant were over, he now had to think again.

192. These matters constituted evidence from which, applying *Madarassy v*

Nomura International plc 2007 [ICR867] Court of Appeal, the tribunal could infer a link between the grievance and the failure to pay. Thus, the burden shifted to the respondent. As the respondent led no evidence on this point, it did not discharge the burden. Accordingly, the Tribunal found that the victimisation claim was made out.

Time Point on the Harassment Claim

193. The Tribunal considered whether the harassment complaints which had been made out (see *South Western Ambulance Service NHS Foundation Trust v King EAT 0056/19*) formed part of a continuing act with the act of victimisation. As the victimisation detriment occurred after 29 October 2019, this would mean that the harassment complaint was made within time.

194. The Court of Appeal in *Aziz v FDA 2010 EWCA Civ 304, CA* (in which the Court cited with approval *Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA*), stated that whether separate incidents form part of an act extending over a period, 'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents'.

195. The Tribunal found that the harassment and the victimisation constituted a continuing act. Mr Ford was involved in the harassment. He was involved in the detriment. The harassment led to the grievance and the grievance led to the detriment. These various elements formed part of the same story. The grievance and the detriment were not new events unlinked to the previous events.

196. Accordingly, the harassment claim was brought within time and the tribunal had jurisdiction to consider it.

Employment Judge Nash
Date: 9 December 2021

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