



EMPLOYMENT TRIBUNALS

Claimant: Mrs Sarah Brooks

Respondent: TUI UK and Ireland limited

Heard at: North Shields

On: 8th,12th,13th,14th,15th,16th
November 2018

Deliberations: 25th January 2019

Before: Employment Judge AE Pitt

Members: Mr M Ratcliffe
MRS L Georgeson

Representation

Claimant: Mr J Barker, Solicitor

Respondent: Mr B Frew, Counsel

RESERVED JUDGMENT

1. The claimant was not a disabled person for the purpose of Equality Act 2010.
2. The claimants claims for disability discrimination are dismissed.
3. The claimant did not make a public interest disclosure for the purposes of section 43A Employments rights Act 1986.
4. The claimants claim for detriments as a result of a public interest disclosure are dismissed.
5. The claimant was unfairly dismissed.

REASONS

1. The claimant, Sarah Brooks, date of birth 28th September 1972, was employed by the respondent from 1st November 1999 until 23rd February 2018, latterly as the Manager of the respondent's store in Newcastle upon Tyne. The claimant brings claims for Unfair Dismissal, namely constructive dismissal, Disability Discrimination, namely section 15 Equality Act 2010, Discrimination arising, section 20 Equality Act 2010, Failure to make reasonable adjustments; section

26 Harassment; section 47B Employment Rights Act 1996 detriments for making a Public interest Disclosure.

2. The Tribunal read witness statements including a supplemental statement and an impact statement and heard evidence from the claimant; Kay Dixon, General Manager at the respondent; Gail Smithson, Regional Manager for the respondent; Kelly Reading, Regional Sales Manager for the respondent; Katrina Barry, Head of Ancillaries and Commercial Department; Emma Jayne Thompson, contact Centre Manager for the respondent; Stephen Bracegirdle, Divisional Sales Manager for the respondent; Tierney Stephenson, an HR representative.
3. The Tribunal also had before it a bundle of documents which included various emails, notes from grievance and disciplinary hearings, medical evidence including a partial extract from the claimant's GP records, copies of counselling notes.
4. The respondent is a well-known, high profile travel company, it has a presence on the High Street as well as call centres. The claimant was employed, initially, at its Sunderland store commencing work there as a travel adviser rising to the level of sales manager. Her line manager at Sunderland and Newcastle branches was a lady by the name of Sandra Morgan.

The Claimant's health between 2002- 2018

- 5.1 Dealing with the evidence in relation to the disability, the claimant complains of anxiety and has prepared a full written statement as to the impact the anxiety has upon her; she told the Tribunal that it started following the breakup of an abusive relationship in 2002 when she was treated for anxiety and depression; the Tribunal's understanding is that during that period the claimant continued working. Ms Morgan, the claimant tells us, was aware of this relationship and the impact it had upon her, the claimant, and specifically it was included in her full year review.
- 5.2 The Tribunal was referred to medical records from 2000 which show that in October 2002 the claimant complained of 'anxiety state' and was prescribed medication. From the medical notes it is impossible to know how long the medication was required for. In addition, the notes show the claimant was signed off on 23rd October but not for how long. The next entry on 29th November refers to insomnia but there is no reference to a further sick note.
- 5.3 In 2010 during a review with her manager, the claimant discussed with Ms Morgan how she had been abused by some customers whilst she was on holiday in Egypt. She tells the Tribunal that the response from Ms Morgan was to the effect 'if they write to complain then an investigation will have to follow' which claimant alleges made her anxiety worse. The GP medical notes show on 11th January 2010 she attended presenting as weepy and anxious as a result of a client. The Tribunal understand this is the event referred to above. She is prescribed an antidepressant. Upon review on 8th February 2010 the claimant indicated she wanted to stop medication and see a CPN. She was referred but she failed to follow up on this referral. Her next visits that year are for physical complaints. There is no further reference to medication for this incident.

- 5.4 The claimant in her main statement alleges that she was bullied by Ms Morgan for a period of 18 months ending in May 2017. On 16th May the claimant's evidence was that she had a complete breakdown at work she describes as a mental breakdown. The GP notes record that the claimant presented with low mood and weepy, issues at work being bullied by district manager...fainted at work, feels shaky can't go to work. The examination describes the claimant as 'well dressed, weepy, occ eye to eye contact, speech normal. The comments are she should take time off with a diagnosis of stress, anxiety and low mood, work related. The claimant continued to visit her GP periodically until 4th October when she was given a final sick note. During this time the diagnosis was stress, anxiety, low mood work related. She was referred to outside agency and prescribed medication.
- 5.5 As a result of this breakdown the claimant was placed on sick leave for a period of some five months she says that during this time she struggled to get out of bed; she couldn't do day-to-day tasks such as house work or shopping and washing; relationships broke down with the family because of a lack of communication; she felt very low and her anxiety was out of control. On 19th February she was referred to the Sunderland psychological well-being services and thereafter for cognitive behavioral therapy with Miss Rasouli; thereafter she also received an employment support referral in September 2017. She tells us that she to this day is receiving psychological therapy.
- 5.6 Within the medical evidence the Tribunal also considered a letter from Ms Rasouli who is a CPN, dated 20th August 2017, this sets out a Therapy Assessment Care Plan. In particular, it makes reference to bullying at work. It also states that this affects her sleep, appetite, ability to focus and to do daily tasks.
- 5.7 The Tribunal was also referred to the claimant's counselling notes (pg. 680ff and pg. 743). Again, there is reference on 26th May to the claimant being bullied, plus other stressors such as financial matters. There is a record on 22nd September that the claimant loves her job and her SSP/wages will end on 3rd October. Further sickness is discussed but the claimant states she is well enough to go back; on 28th September the notes show that the claimant felt at her grievance she felt listened to. It is noted on 30th November that the claimant has received her grievance outcome which was partly upheld. There is a specific comment 'yippee'. In November it is also noted that the claimant is applying for other jobs. In February there is a note that the claimant has been offered another job and 'she is going to have resign from her job'
- 5.8 To conclude the medical history there is a letter from her consultant Psychiatrist dated 2nd August 2018 Dr Nair who states; "Sarah feels her current prescribed medication regime is managing her anxiety and her low mood is reactive to awaiting her husband appeal decision and the outcome of grievance at work
- 6.1 To continue with the chronology, the claimant was transferred to the Newcastle upon Tyne branch 28 December 2015 it is clear that at that time the branch was performing poorly. There was a lack of motivation and

financially it was struggling. from the evidence we have heard the reason why the claimant was sent there was in order to try and turn the store around.

- 6.2 The claimant asserts that her line manager Ms Morgan's behavior changed towards her whereas previously they had had a good working relationship that she alleges that Ms Morgan treated in such a way that it amounted to bullying. These are set out in grievance letter no.1 pg.97 the letter runs to 8 pages so it is not rehearsed here in full, However the claimant describes Ms Morgan as hostile and dismissive, calling into the store most days, criticising and questioning everything the claimant did 'Nothing we did as a management team was correct or good enough for her' There were times when the behaviour improved. In November 2016 the bullying recommenced. In particular, the claimant points to a date in November when she was injured at work prior to delivering some training. As a result of the attitude of Ms Morgan she felt she no alternative but to stay at work rather than receive hospital treatment. Ms Morgan's scrutiny of the claimant continued until May 2017 when the claimant describes having a breakdown at work. As is noted above she sought medical advice and was absence through ill health from this time until October
- 6.3 As a result of this behaviour she lodged a grievance with the respondents; the letter above refers to this, on 8th September 2017. This is the public interest disclosure.
- 6.4 A grievance meeting was held on 28 September, the grievance was investigated by Ms Kay Dixon; there are notes of that meeting to which the Tribunal has been referred in addition Miss Dixon also emailed the claimant regarding sick pay and a phased return to work. Further Miss Dixon spoke to Ms Morgan again; there are notes within the bundle to which the Tribunal has been referred; Ms Dixon concluded that Ms Morgan did seem to be visiting the claimant's store often because it was an underperforming store and it needed to improve, despite that Ms Dixon concluded that Ms Morgan was putting undue pressure on the claimant.
- 6.5 The outcome letter was issued on 27 October in which Miss Kay partially upheld the grievance she concluded that there was no justification for the number of visits and the behaviour of Miss Morgan during those visits especially as there was no evidence the claimant underperforming. However, she concluded that the behaviour of Miss Morgan fell within bullying rather than harassment she also felt that it had nothing to do with the claimant's ill health; she told the Tribunal that although she was aware there was a mental health issue, she wasn't aware of the details save the fact that the claimant was receiving counselling forward. In her witness statement she says, "this complaint wasn't as far as I understood it about any ongoing mental illnesses as I believe this was not diagnosed until sometime later when she visited her GP."
- 6.6 The outcome letter committed the respondent to the following actions: mediation between the claimant and Ms Morgan; set clearly defined and documented objectives for the claimant for this performance year; ensure regular 1-2-1 take place and are documented; notes of these to be signed to confirm accuracy and that action points are agreed; ensure clearly

defined processes and applied consistently across all locations; the company will follow internal company processes in relation to Ms Morgan.

- 6.7 The claimant returned to work, although as part of a phased return she did not return to the Newcastle office rather she moved to a call centre at Stockton-on-Tees, the Tribunal's understanding that this was with her agreement. The claimant says to us that she felt out on a limb and isolated by this move in particular as she was only that meant to be there two weeks but then this was extended for seven weeks. None of the other proposed actions were put into place.
- 6.8 The claimant was invited to a meeting on 29 November 2017 with Gail Smithson, in her witness statement Ms Smithson says this was as a result of concerns which had been raised by the Newcastle team as part of another investigation. The claimant was unaware of the nature or reason for the meeting. the Tribunal concluded that this meeting was fractious the claimant becoming aggressive towards Ms Smithson. In particular the claimant alleges that Ms Smithson should not have been dealing with the investigation she was a friend of Miss Morgan. The Tribunal heard evidence from Ms Smithson as to the nature of the relationship with Ms Morgan and is satisfied that although they knew each other, and they travelled together to meetings and conferences the two ladies only ever had a working relationship which did not extend beyond the respondent's offices. It satisfied that it was appropriate for her to continue to investigate.
- 6.9 There were a number of allegations put specifically she would turn away price match sales in order to protect her bonus, using her working hours in order to deal with personal matters relation to her husband, a travel adviser who alleged she had been under pressure to accept the role of third in charge.
- 6.10 The meeting was adjourned for investigations and it was agreed that the claimant would remain at Stockton whilst those investigations were ongoing. Ms Smithson took witness statements from 12 people who had been members of Miss Brooks team in Newcastle. Having obtained the witness statements she held a further meeting with the claimant on 7 December; the allegations put to the claimant were of unprofessional behaviour, for example she would dance around the store, she would not wear shoes, she would pull her dress up, she had used the lavatory and left the door open so she was exposed to the shop floor, but staff were sent out for beverages and food and over the drug over-the-counter drugs on her behalf. In addition, there was an issue as to the rates used in the bureau de change and the sufficiency of training. Having listened to explanations from the claimant which were in the general denials as to the allegations, Ms Smithson concluded there was sufficient for the matter to go towards a disciplinary hearing. She also decided at this time it was appropriate to suspend the claimant until a disciplinary was dealt with. Although Ms Smithson arranged for the disciplinary hearing the Tribunal accepted that she was not involved save administratively. One specific issue raised by the claimant was that she wanted to have six members of the team present at the disciplinary hearing, Ms Smithson refused that she felt it was the claimant attempting to intimidate the witnesses. During the period prior to the disciplinary hearing the claimant made a request for 42 documents,

there is a full list of this at page 451 which we I do not intend to rehearse. Much of the information was provided however some of it was not available according to Miss Smithson.

- 6.11 The claimant tells a she was so concerned about the disciplinary and how it has been dealt with that she submitted a second grievance, the second grievance, in which she complained that the respondent had not undertaken the steps it had suggested on 27 October 2017 and the level of investigation which undertaken. She explained about the impact all of this was having upon her mental health.
- 6.12 On 19th December of the claimant received a letter saying that she was not going to receive a pay rise, this surprised her because she had had a pay rise every year and in particular that her performance at her appraisal her marking was "delivery to expectations". She concluded that this failure was because of the grievance she had submitted.
- 6.13 Some of the information requested was received by the claimant around New Year 2017, however she felt that there was information missing which she required. She requested access to the Newcastle store in order to obtain materials held on her computer there was partial agreement by the respondent in that it was agreed the claimant could attend the Washington store. She alleges that the information she required was not available there and was only available in Newcastle. It is important to note here that the Newcastle store had relocated during this. On 5 January the claimant wrote to the HR Department expressing concern as to the fairness of the procedure.
- 6.14 The disciplinary hearing was scheduled for 9 January. The hearing manager was Ms Kelly Reading; the claimant was accompanied by a Trae Union representative; at the meeting the claimant was concerned that she didn't have all the information she needed and further that her second grievance should be heard prior to the disciplinary meeting. The meeting having started in the morning concluded at 4pm. The notes of the meeting are handwritten and therefore difficult to read. The Tribunal notes that at the top of the page the word 'grievance' is circled, as opposed to disciplinary and clearly many of the issues raised are to deal with the second grievance, in summary at the Trade union representative repeats that the process is unfair, specifically the allegations 'haven't been listed so have to guess at what they refer to'.
- 6.15 The meeting was adjourned until 22nd of January, Ms Reading indicating she felt there was insufficient time for her to come to a conclusion. the Tribunal has reviewed notes from this hearing which have the word disciplinary circled at the top. The meeting started at 10.18 and was adjourned at 11.53 the claimant was given a document which was her job role. Ms Reading tells us that this was simply an aide memoir setting out general managers business objectives; Ms Reading tells is that it was suggested she was withholding evidence the claimant should be aware of her objectives and this was simply to guide her through the meeting. The claimant requested an adjournment to obtain her objectives document, Ms Reading's view was this was unnecessary because she wanted to make a

decision based only on the allegations however at the meeting was adjourned until 9th February 2018.

- 6.16 Following this hearing the claimant wrote requesting further information from the respondent including a request that Stephen Bracegirdle attend the hearing. This is in relation to his role in interviewing the claimant for her transfer to Newcastle which was being questioned. As part of the response to this request the claimant received a copy of an email from Stephen Bracegirdle, in which he had expressed the view that he had not interviewed the claimant for her position. The claimant believed, and it certainly seems to be correct that this was inaccurate.
- 6.17 On 8 February the claimant submitted a further grievance to the respondent (the third grievance). This grievance was a complaint against Kelly Reading, and Tierney Stevenson and their handling of the disciplinary and grievance process. Ms Stevenson is employed by the respondent in the HR Department and was handling many of the queries from the claimant. As a result of Ms Stevenson's previous involvement Emma Thompson was asked to undertake the HR role in relation to the third grievance. Ms Thompson accept she discussed various issues with Ms Stevenson. In particular this Thompson says "I felt like in lodging the grievance the claimant may have been attempting to stall the disciplinary which was outstanding at that time. I took legal advice as to how we should approach dealing with new grievance was a disciplinary was ongoing. I wanted matters to be resolved for both the company and the claimant".
- 6.18 Ms Thompson having taken advice was unsure whether this was to be a grievance or not as she was of the opinion the letter was not specific enough for it to be treated as a grievance, her clear view was that the claimant was attempting to stall her disciplinary hearing and potentially bring both to a halt. However, Ms Thompson did speak to both of the employees involved and responded to the claimant in writing in summary indicating that she could find no evidence to substantiate the claims.
- 6.19 Before Ms Thompson could undertake any further actions, the claimant escalated her concerns to the Director of HR who appointed Ms Katrina Barry to handle the matter around 19th February. She fixed a provisional date for a hearing of the grievance for 27th February.
- 6.20 In her witness statement the claimant says; "the last straw for me was HR's refusal to deal with my grievance, and the refusal with Stephen Bracegirdle even to admit or acknowledge he had interviewed me." As a result, the claimant resigned her position 23rd of February 2018.

The issues

- 7 These are the issues set out by the claimant at the request of the Tribunal

Constructive Unfair Dismissal

- i. Did the claimant resign
- ii. If so, did the respondent commit a repudiatory breach of the claimant's employment contract
- iii. What term was breached

- iv. What act or acts constituted the breach Did the claimant resign in response to the breach
- v. did the claimant resign within a reasonable period of time of the breach or did she waive the breach?

Disability Discrimination:

- i. Was the claimant disabled for the purposes of Equality Act 2010?
- ii. Did the respondent have knowledge of the disability or should it have known

Discrimination Arising

- i. Did the r treat the claimant unfavourably?
- ii. Was that a s a consequence of the disability?
- iii. Can respondent show that it was as a result of a legitimate aim and can the r show it was proportionate

Reasonable Adjustments

- i. What is the PCP to which the claimant was subject?

Public interest Disclosure

- i. did the claimant make a protected disclosure?
- ii. Did the disclosure fall within the section?
- iii. Which part of the section?

The Tribunal asked the parties to set out some further information as follows:

1. the incidents which the claimant alleges were breaches of her contract entitling her to resign; to include dates and times.

Answer

- i. failing to clarify the nature or detail of the disciplinary offences 7 December 2017 to the date of resignation
- ii. failing to provide specifics of the disciplinary allegations or evidence to enable the claimant to understand the allegations and defend herself (from 29th November to date of resignation)
- iii. failing to investigate the disciplinary allegations impartially, either at all or specifically wants the claimant was suspended from work and had no access to work information and further bearing in mind the allegations of dishonesty (29th November to date of resignation)
- iv. failing to allow the claimant to prepare her defence by providing the documents requested (from 11th December to date of resignation)
- v. failing to allow the claimant to defend herself by securing information from an office computer by refusing her access to her branch office (January 2018)
- vi. Mr Briscoe's denial that he had interviewed the claimant's (8 February 2018)

- vii. failure to postpone the disciplinary process when asked and in any event of failure to postpone the process in a timely manner (28th of January to end of January 2018)
- viii. failure to implement the grievance policy for the grievance procedure on 13 February 2018 brackets 13 February 2018)
- ix. failure to award the claimant a pay rise and she'd achieve the necessary criteria to warrant this (19th December)
- x. providing documents to the claimant in the course of the disciplinary hearing which she had not previously had the opportunity to consider 22 January
- xi. combining the disciplinary and grievance procedures 24 February.

2. What is the exact nature of the public interest disclosure; to include which ground she alleges they fall within; the disclosures were made and when.

Answer

- i. the claimant relies solely on the grievance letter submitted on 8 September 2017
- ii. the claimant contends the disclosures fall within Employment Rights Act 1996 43(1) (b) (d)
- iii. the exact nature of the public interest disclosure was a complaint of bullying by the claimant's manager Sandra Morgan. Within that generalised complaint contained a series of potential complaint of
- iv. a breach of the working Time regulations
- v. a failure to observe health and safety in relation to an incident in November 2016, when the claimant was injured during a training day and in relation to an incident when the branch suffered a rat its infestation
- vi. a failure to observe health and safety in relation to the claimant's mental health
- vii. the failure to observe health and safety in relation to the claimant's mental

with regard to the working Time matters: –

- viii. “do you think it acceptable for a grade a manager to have five days off?”
- ix. refusal to allow others to cover the claimant's days off
- x. why the claimant had taken the leader in December
- xi. incident involving the shop alarm causing the claimant to be kept at work late
- xii. the claimant being obliged to work on Easter Monday

the health and safety matters: –

- xiii. a complaint of a lack of support during a rat infestation

- xiv. unmanageable workload
- xv. failure by the respondent to take steps to protect the claimant's mental health

3. what are the detriments to which the claimant subjected?

- i. the claimant relies on all the breach of contract set out at her answer to one above

4. what is the nature of the claimant's mental impairment?

Answer

- i. the claimant suffers work related stress and anxiety and low mood

5. in what way is it's alleged the claimant was treated less favourably

Answer

- i. the claimant relies on all of the allegation to her answer at one above
- ii. the claimant suffers with anxiety and suffered a heightened state as a result of the errors or shortcomings

6. what was the legitimate aim space and how was it proportionate?

Answer

- i. to hear the disciplinary and grievance issues of employees

7. what was the unwanted conduct; to include dates?

Answer

- i. the claimant relies on her answers to one above in their entirety the claimant contends that this was harassment
- ii. she contends that she repeatedly complained to the employer that the manner in which the disciplinary procedure was being conducted was because of her unnecessary stress

8. what was the PCP

Answer

- i. the inept manner in which the respondent implemented its disciplinary investigation and procedure against the claimant
- ii. the inept manner in which the respondent implemented its grievance procedure in response to grievances filed by the claimant in December 2017 in January and February 2018.

9. what was the disadvantage

Answer

- i. making serious allegations, including allegations of dishonesty against any employee would, it is conceded, be stressful. Failing to properly evidence such allegations would, it is conceded, be more stressful for any employee.
- ii. At the time of the implementation of the disciplinary investigation the claimant had shortly return to work after a prolonged period of sickness absence and just completed a phased return to work. She was continuing to undergo her treatment from her counsellor and through her GP. The impact in the manner in which the respondent carried out its disciplinary procedures and implemented its grievance procedures had a more stressful impact on the claimant than it would have had on an employee not suffering the claimant's disability.

10.what are the reasonable adjustments?

Answer

- i. the reasonable adjustments set out in the grievance outcome letter of 27 October 2017.

The Law

Unfair Dismissal

- 8.1 An employee has the right not to be unfairly dismissed by his employer pursuant to Section 94 Employment Rights Act 1996. In this particular case the claimant alleges that she was entitled to claim constructive dismissal this is defined under section 95 of the employment rights act as "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminated without notice by reason of the employer's conduct. If the Tribunal concludes that an employee was constructively dismissed this does not mean that the dismissal is automatically unfair. It is then for the employer to show the reason for that dismissal and if it can establish that it is for some other substantial reason the Tribunal then must consider whether the dismissal is fair or unfair "depends on whether in the circumstances the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case" some other substantial reason to justify the dismissal of the claimant from holding the position which he held.

Western Excavating V Sharp [1978] IRLR 27 which set out the following guidance; There must be an actual or anticipatory breach of the employment contract, It must sufficiently serious to entitle the employee to resign, or the last in a series of breaches, He must leave because of the breach not an unconnected reason, He must not delay in resigning and thereby affirm the breach

The test has been refined through a number of cases and most recently these were all brought together in Guidance was given in Kaur V Leeds Teaching Hospitals NHS Trust [2018] E WC Civ 978 by Lord Justice under Hill as follows:

(“in the normal case where an employee claims to have been constructively dismissed, it is sufficient for a Tribunal to ask itself the following questions

(a) what was the most recent act (or omission) on the part of the employer which the employee says caused or triggered his or her resignation?

If an employer is able to establish) has he or she affirmed the contract since the act?

© if not, was that act (or omission) by itself a breach of contract?

(d) if not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the Malik term (if it was, there is no need for any separate consideration of a possible previous affirmation, the reason given at the end of paragraph 45 above) of (e) did the employee resigning response bracket or partly in response) to that breach?

Whistleblowing

- 8.2 An employee is protected from suffering a detriment under Section 47B Employment Rights Act 1996 if the reason for the detriment is that the employee has made a disclosure in accordance with Section 43B Employment Rights Act 1996

What may amount to a disclosure for the purposes of the section is discussed in Chesterton Global Lts v Nurmohammed 2017 EWCA Civ 97. The guidance given is that the Tribunal should ask itself the following questions

- i) What are the numbers in the group whose interests the disclosure served?
- ii) the nature of the interests affected and the extent to which they were affected by the wrongdoing disclosed
- iii) the nature of the wrongdoing disclosed
- iv) the identity of the alleged wrongdoer

- 8.3 Disability

Disability is defined in section 6 Equality Act 2010. To qualify as a disability a person must have a physical or mental impairment which has a substantial and long term-term adverse effect on the person’s ability to carry out normal day to day activities.

The Tribunal also had regard to the Guidance On The Definition Of Disability 2011 published by the Secretary of State.

Assistance is also provided by Underhill P in J v DLA Piper UK LLP 2010 IRLR 936 where a distinction is drawn between what is clinical depression and an adverse relation to life events; although the distinction may be

blurred Underhill recommends that a Tribunal starts by considering the adverse effect issue, if a claimant satisfies the Tribunal that she has been impaired by the symptoms for 12 months or more it is more to conclude that she was suffering with clinical depression rather than simply a reaction to adverse³ circumstances.

Discussion and Conclusions

9 Disability

9.1.1 The claimant submits she is suffering from a mental impairment namely stress and anxiety. In particular she tells the Tribunal she has suffered from anxiety for a number of years and receives treatment for it and this amounts to a disability. The Tribunal considered the claimant's impact statement and her medical history. In her impact statement the claimant states, "Once again, I was no longer sleeping, eating or socialising. I felt constant dread and was unable to relax. I felt like I could not function properly and so had stopped doing day to day activities such as cleaning the house or washing the dishes. It began affecting relationships with my family as I was irrational, snappy and had no interest in anything, ...I began to feel worthless and so destroyed my self-confidence". After my breakdown I went to see Dr ...who diagnosed me with work related stress, anxiety and low mood and prescribed medication for this. I was signed off work for some 5 months. During this time, I struggled to get out of bed, and on some days did not., I again stopped day to day tasks such as housework and washing myself and felt I could not function. My communication with family members also broke down as I felt so low and the anxiety was out of control. After 6 months of medication, counselling and family support I was well enough to return to work.

9.1.2 The claimant asserts this is a recurring illness, which has been ongoing since 2002 following the breakdown of her relationship she has suffered from anxiety for a number of years and receives treatment for it. The Tribunal considered the claimant's impact statement her medical history, the letter from her GP date Aug 2017. The Tribunal having considered the submissions made by Mr Barker and Mr Frew concluded that the claimant may suffer from anxiety which recurs, but it is not of such a duration that it fills the definition of disability.

9.1.3 From the evidence before the Tribunal the claimant clearly suffers from anxiety and low mood. This has the appearance of short-term recurring anxiety, none of the incidents considered lasted more than a few months. The Tribunal looked at the guidance in the Piper case and asked itself what the impact on the claimant was, how substantial was it, and how long did it last of.

9.1.4.1 As noted above and reading the impact statement, the Tribunal notes the following: when the claimant had her breakdown and presented to her GP she is described as well dressed, normal eye to eye contact, a little weepy. This is in contrast to the claimant's assertion her impact statement which describes the period prior to her breakdown she 'had stopped doing day to day activities such as cleaning the house or washing dishes' Later she says.' I *again*

stopped day to day tasks such as housework and washing myself and felt I could not function.'

9.1.4.2 Further the notes show that on 11th September 2017 the claimant felt well enough to leave her home and attend the gym. This is in direct conflict with her assertion. The last contact with the GP, the Tribunal is aware of was in October, although not determinative of the issue, the Tribunal takes Judicial Notice of the fact that GPs and other medical professionals would usually undertake routine reviews of a person on anti-depression medication.

9.1.4.3 The claimant returned to work, and from October, travelled from her home to Stockton every day. She makes no complaint about her day to day activities from this time; she had described work as a 'welcome distraction' during her illness in 2002. Her witness statement does not give any further examples of the impact on her day to day activities.

9.1.4.4 Upon her return she was the subject of disciplinary proceedings, she was able with the assistance of her Trade Union Representative to seek to defend herself. This included requests for substantial number of documents; attending at other workplaces in an attempt to retrieve information she believed she required. Finally, she lodged 3 separate grievances during the period September to February.

9.1.4.5 All of these factors led the Tribunal to conclude in line with the diagnosis from her GP of low mood anxiety and stress however the illness was such that the 'impact' was reduced by the time she returned to work in October, that being the case there was no substantial impact on her day to day activities and therefore she did not have a mental impairment.

9.1.4.6 Although it may be a recurring illness the episodes are short lived and are all a reaction to an adverse event sometimes years apart. The Tribunal did not consider that the illness could be looked at as long term because of the long periods of good health between short episodes.

9.1.4.7 The Tribunal concluded the claimant was not disabled for the purposes of the Equality Act 2010 at the time of the events complained of; first her illness was an adverse reaction to the events from January 20 secondly it did not have such a substantial adverse impact on her day to day life, nor was it of such length to become a disability, at the time of the events she complains of.

Public Interest Disclosure

- 10.1 As noted above there is only one alleged disclosure, this is the Claimant's grievance of 8th September. In general terms it alleges bullying by her line manager but also contains specifics in relation to health and safety and working time breaches and bullying. These may fall within the protection afforded by the section.

10.2.1 The first question the Tribunal must ask itself was this information that was in the public interest to disclose? the Tribunal went on to ask itself each of the questions raised in **Chesterton Global Ltd v Nurmohammed 2017 EWCA Civ 97.**

10.2.2 The numbers of persons who may be affected this was limited in scope, in particular it was limited to employees of the respondent. The person against whom she had lodged the grievance, Ms Morgan was the Regional Sales Manager, she oversaw a number of the respondent's shops, although the Tribunal does not have the exact numbers one of her fellow Regional Sales Managers Ms Reading oversaw 26 stores and 238 staff. Ms Morgan we concluded probably oversaw a similar number.

10.2.3 Whilst the claimant asserts, she made the disclosure to protect her co-workers, the Tribunal disagrees, all the evidence is that the claimant was lodging a grievance on her behalf and no others, it was an allegation of bullying against her, she does not raise a complaint that her co-workers are at risk from the Ms Morgan.

10.2.4 The wrongdoing alleged related solely to the behaviour of Ms Morgan in her employment role. There were no allegations in relation to her behaviour towards customers. Specifically, the disclosure related to the behaviour of the Ms Morgan towards the claimant herself. There were, on the evidence before the Tribunal no other complaints about the Ms Morgan behaviour.

10.2.5 The wrongdoing was of a particular type, it may be categorised perhaps, as close scrutiny of the claimant's work, which in this case amounted to bullying or harassment. It does not relate to inappropriate behaviour, involving, for example physical contact or threatening or abusive behaviour.

10.2.6 The Tribunal concluded that the disclosure was not in the 'public interest' because it did not involve a large group of people, specifically it didn't include people who fell outside Ms Morgan's work sphere, there was no evidence of other co-workers complaining about her behaviour. In particular the nature of the wrongdoing was very much a work focused allegation, the Tribunal concluded that as it did not include members of the public and in particular as members of the public would not be affected by it the disclosure was not in the public interest.

Unfair Dismissal

11.1 This is a classic case where the claimant alleges that the relationship had broken down to such an extent that she was entitled to leave and claim she was dismissed. The claimant points to a number of factors, set out by Mr Barker at paragraph 31 of his submissions which led to her resignation. The events relied on postdate the claimant's return to work, indeed in her witness statement the claimant was clear that the fact that the respondent had in part upheld her grievance, and only rejected part on a technicality,

that she was not unduly concerned she refers to 'being delighted' at the outcome. At paragraph 11 of her witness statement she describes the proposed actions to be taken by the respondent as reasonable adjustments going on 'I thought the company was taking a reasonable approach to prevent or at least minimise the risk of me suffering further harm. Having returned to work the respondent failed to follow through on its assurances, she returned to work, not only to a new geographic location but also a different type of work; she believed she was there short term but in fact the respondent never sought to return her to usual role. However, the Tribunal considered the events from October onwards against the background of a person who had been subjected to bullying, having returned to work with specific measures in place which were ultimately not acted upon.

- 11.2 It seems that the 'adjustments' were overtaken by the disciplinary and the grievance procedures. Whilst the Tribunal, having concluded that the claimant was not disabled, did not look at this issue as a question of adjustments as part of a disability claim, but it clearly played a part in the claimant's decision to resign, and it is against this background the Tribunal looked at all other factors raised by the claimant.
The Tribunal looked at each of the factors individually.

11.3.1 Failing to clarify the nature of the disciplinary offences. The claimant was aware that her behaviour was being called into question, and that the respondent considered it so serious as to amount to gross misconduct.

11.3.2 Failing to provide specifics of the disciplinary allegations or evidence to enable claimant to understand allegations and defend herself. This fact stands alongside the first. Although the claimant understood that her general behaviour was being called into question at the early stage the allegation lacked specifics, although refined during the process there were never specific examples rather 'headings'. In particular as some of the allegations revolved around financial mismanagement the Tribunal concluded that these should have been particularised fully. The Tribunal note that the claimant was presented with a number of witness statements which contained various allegations without being made aware of which were to be pursued or disregarded.

11.3.3 Failing to investigate the disciplinary allegations impartially either at all or once the claimant was suspended from work and had no access to work information and further bearing in mind the allegations of dishonesty. The Tribunal concluded that the investigation carried out by Ms Smithson was poor and conducted in haste. At the first meeting she was unable to clarify where the complaints had come from save for a vague assertion that issues arose whilst dealing with another matter. She conducted the investigatory meeting on basis of what was said by in a witness statement given by Kerry Gray (204A) during the investigation into Ms Morgan.

11.3.3.1 The investigation consisted of Ms Smithson collecting witness evidence, she did not investigate or

interrogate computers to find corroborative evidence, having collated the witness statement she did not produce a report setting out her findings and recommendations as may be expected. The Tribunal was surprised at how short, in terms of time, the investigation was, this clearly demonstrated that Ms Smithson was not an 'investigator'. This further evidence by her witness statement she states (paragraph 18) "When I spoke to staff, I thought what they were saying felt true. They all had strong reactions. They were all passionate and were annoyed...". This is evidence that Ms Smithson was not acting with an open mind.

11.3.3.2 The paucity of the investigation is also highlighted by the requests from the claimant for further information. Having considered the various lengthy lists, the Tribunal concluded that most were documents which the respondent should have compiled during the investigation stage; a good example of this is the O'Rourke booking information. When dealing with financial irregularities an employer must investigate and if necessary, produce documentary evidence to support its allegations; such allegations are very serious and may even be criminal and require a high standard of proof.

11.3.3.3 Whilst it may not be unusual for a Disciplinary letter to be prepared before 2nd investigatory meeting the Tribunal concluded that Ms Smithson did not consider the claimant's representations before she concluded that a disciplinary hearing was required.

11.3.3.4 Further the Tribunal did not understand the need for the claimant to be suspended at this time. She was no longer at the premises from where the allegations arose nor was, she involved with any financial dealings. The suspension may be viewed more as a sanction

11.3.4 Combining the disciplinary and grievance hearings. Whilst good industrial relations are that the two procedures should be kept separate the Tribunal had some sympathy with the respondent and concluded that in the circumstances in this case it was difficult to separate them. The Tribunal noted however that the two were separated in that there was a meeting to discuss the grievance followed by the disciplinary, although the decision was to be made following both. The Tribunal was impressed with Ms Reading, she was a good witness who was trying to deal with the claimant in an appropriate manner.

11.3.5 Failing to allow the claimant to prepare her defence by providing the documents that she requested; Failing to allow the claimant to defend herself by securing information from an office computer by refusing her access to her branch office. The Tribunal dealt with these two matters together as they are linked. As noted above many of the documents, the Tribunal concluded should have formed part of the respondent's investigation. Although the Tribunal having reviewed the list of documents

requested and those sent, it is satisfied that the majority of documents were sent to the claimant. It is still unsatisfactory that an employee facing serious allegations has to request substantial information to present her case. Indeed, one of the documents would show that the claimant was not at work when one of the allegations arose. In relation to the computer access, it was unclear to the Tribunal why the claimant was not able to access the Newcastle shop details from other premises, including her base in Stockton. The claimant's case was that access was not authorised for the person overseeing the process, this should have been easy to remedy. The Tribunal accept it was inappropriate for the claimant to attend at the Newcastle office during working hours, but query whether it was possible for the access to be granted when the premises were closed to the public. With regard to these issues the Tribunal concluded that the respondent did try and assist but that these were documents the respondent should have compiled during its investigatory meeting.

11.3.6 Failure to postpone the disciplinary process in January. This relates specifically to the claimants request to have her grievance heard before the disciplinary. As is noted above the Tribunal considered this issue were intertwined and whilst the Tribunal do not criticise the claimant's representative for his stance, it was clear to the Tribunal that he was trying to delay the disciplinary, the claimant was acting upon his advice. As it turned out, it appears that the grievance was heard although no decision was made prior to the reconvened, disciplinary meeting later in January.

11.3.7 Bracegirdle's denials that he had interviewed the claimant in light of the claimant already being of the opinion that she was being treated unfairly, the fact that Mr Bracegirdle, a Senior Manager, made such a clear denial, without as we now know, ever checking his facts, would have an impact. This was an issue in the proceedings as the claimant had made comments in branch as to interview and Mr Bracegirdle's presence at her interview, it might now be seen that she was lying about the smallest of matters. The Tribunal accept that the claimant in light of his comments might consider that the respondent was not acting impartially and that this statement might influence Ms Readings decision making. Whilst the Tribunal accept that Ms Reading was being honest when she was going to disregard it is clear the claimant didn't trust the respondent by this time. The Tribunal were surprised that even in evidence before us he was unable to confirm or otherwise that he had been involved in the interview. He seemed surprised when asked if he had checked. He was so arrogant that he didn't see the need to check his position.

11.3.8 Failure to implement the grievance procedure; this relates to the claimant's third grievance which concerned Ms Reading and Ms Tierney themselves. The respondent did not consider this to be a properly framed grievance, rather another attempt to stall the disciplinary process. It is unfortunate that this was the view taken, although the Tribunal note that Ms Thomson who was appointed to deal with it did deal with the issues raised by the claimant in correspondence. On the evidence before it, the Tribunal concluded that the claimant believed the correspondence from Ms Thompson to be the conclusion of her grievance

- 11.3.9 The bonus; On the evidence the Tribunal heard it is not satisfied that the claimant was entitled to any bonus and therefore this is not a breach of the contract.
- 11.4 The Tribunal looked at all these factors and considered that the trust and confidence between the claimant and the respondent was being eroded. In particular the Tribunal considered the following undermined the implied term of trust and confidence; the poor investigation, including the lack of evidence; the fact that the claimant had to seek out information to present her defence to serious allegations; the apparent lie by Mr Bracegirdle and the failure to deal with the third grievance in accordance with company policy. The Tribunal is satisfied that by the time the email from Bracegirdle was revealed the claimants trust in the respondent had vanished and the implied term of trust and confidence was broken to such an extent that entitled the claimant to resign.
- 11.5 Having come to that conclusion the Tribunal went on to consider what was the effective cause of the resignation. It is clear on the evidence that the claimant had been seeking alternative employment for some time. The Tribunal asked itself did the claimant resign because she had a new job or for some other reason. The Tribunal concluded that the claimant, who had previously enjoyed her position with the respondent, regarding it as a safe haven, would not save for the events we have heard about, sought employment elsewhere. The Tribunal concluded that the behaviour of the respondent led the claimant to look for other employment. She had returned to work, believing she was going to return to previous position, but this and other reassurances did not happen. She was then put through a disciplinary procedure which was slipshod and unprofessional, at every turn she believed that she was being blocked in her attempts to defend herself. To then receive a copy of the email from Mr Bracegirdle, a senior manager coupled with an apparent refusal to hear the grievance the Tribunal concluded that the claimant seized the opportunity of a job offer to leave.
- 11.6 The Tribunal concluded that the implied term of trust and confidence had been so undermined by the respondent that the claimant was entitled to resign, further that although she had other employment, she only sought this out because of the behavior of the respondent.
- 12.1 The claimant was not a disabled person for the purposes of the Equality Act 2010 at the time of the events complained out. Accordingly, all her claims for disability discrimination must fail.
- 12.2 The claimant did not make a public interest disclosure under section 43B Employment Rights Act. Accordingly, her claims for detriment under section 47B of the Act are dismissed.
- 12.3 The claimant was unfairly dismissed

Employment Judge AE Pitt

Date 21 February 2019