EMPLOYMENT TRIBUNALS

Claimant: Ms S Hulley

Respondent: Mr R Stoneham T/A The Eagle Pub

Heard at: North Shields On: 4 and 5 February 2019

Before: Employment Judge Shepherd

Members: Mr R Dobson
Ms M Clayton

Appearances

For the Claimant: In Person
For the Respondent: Mr Haines

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim of unfair dismissal is not well founded and is dismissed.
2. The claim of disability discrimination is not well founded and is dismissed.

REASONS

1. The claimant was represented by and the respondent was represented
2. The Tribunal heard evidence from:

Susan Hulley, The claimant;
Jackie Tannahill, The Claimant's friend;
Robert Stoneham, The respondent;
Malgorzata Ulenberg; The respondent's wife

3. The Tribunal had sight of an agreed bundle of documents which, consisted of 162 pages. The Tribunal considered those documents to which it was referred by parties.

4. The issues to be determined by the Tribunal were identified at a preliminary hearing before Employment Judge Speker on 26 July 2018 as follows:

Disability discrimination claim

2.1 Did the claimant suffer from a disability at the relevant time?

2.2 Has the claimant been subjected to discrimination or detrimental treatment on the grounds of disability?

2.3 Has the respondent treated the claimant less favourably than it would have treated the comparators identified by the claimant?

2.4 If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

2.5 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for an proven treatment?

Unfair dismissal (constructive)

2.6 What was the unfair treatment of the claimant by the respondent which amounted to a significant breach of the claimant's contract, express or implied?

2.7 Did the claimant resign in response to that breach of contract?

2.8 Did the claimant resign promptly or waive that breach?

5. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that the Tribunal made from which it drew its conclusions:

5.1. The claimant was employed by the respondent from 10 July 2015 as a member of the bar staff. Her contract of employment indicated that she was employed on a zero hours contract with no guarantee of standard hours. It was stated that the respondent would endeavour to accommodate her hours on a "week by week basis, pending trade." The claimant had worked 16 hours a week usually on Fridays and Saturdays.

5.2. The claimant was off work on sick leave from 1 June 2017 as a result of an injury, a fractured humorous. On Thursday, 2 November 2017 the respondent sent a text or Whatsapp message to the claimant this stated:

> "I am putting two blank rotas on the staff notice board for the festive season it's first come first served if you can't work the busy periods the ones that do get the shifts in January remember everyone is on 0 hour contract you need to put shifts on in person sickness will lead to 0 hours thank you Bob"

The claimant replied:

> "I will be popping down tomorrow and have a look thanks Bob"

5.3. The claimant says that when she saw the rota, nearly all of the shifts were already covered. The respondent said that he had sent a message to all staff and that the claimant did not come in when she said she would and did not contact him in any way to inform him of her preference or availability for work. He completed the rotas on the basis of the rest of the staff's availability.

5.4. On 27 November 2017 the claimant indicated to the respondent that she had got the 'thumbs up' from the doctor and could start from 4 December 2017. She did not receive an immediate reply from the respondent and sent a further message on 29 November 2017 asking if he had sorted out her hours for the next week. On 30 November 2017 the respondent sent a message to the claimant indicating that his head was "done in" because he had been in the hospital with his young son. He said that he could give the claimant "12 – 6 on the following Wednesday and 6 – 11.30" on the Sunday.

5.5. The respondent had given the claimant his own shift on the Sunday and had asked staff already confirmed on the rota whether they would give up any hours for the claimant and he had managed to get the Wednesday shift for the claimant as well. The claimant indicated that that was ok and did not raise any concerns. The claimant said that she did not question the hours as she thought the respondent had enough on his plate with his son.

5.6. The claimant returned to work on Wednesday, 6 December 2017. She said that she asked the respondent why he had reduced her hours from the normal 16 hours to 11.5 and that the respondent had said that another employee had got them now.

5.7. The respondent told the Tribunal that there was never any intention of the claimant to stay on these hours/shifts. It was simply a short-term fix due to the rotas having already been done and this was explained to the claimant.

5.8. The claimant said that there was no mention that the respondent would reinstate her hours back to her usual 16 per week. This was later explained to the claimant in the grievance meeting and she accepted that she then knew of the intention to reinstate her 16 hours.

5.9. The claimant said that the respondent's attitude towards her had changed and he made remarks to her indicating that he was watching her on the CCTV camera.

5.10. On Sunday, 10 December 2017 the claimant worked from 6pm until 11:30 pm. The claimant asked the respondent how she was going to get home. The respondent told the Tribunal that, as he had had a couple of beers, he wasn't able to drive her home and suggested a taxi. The claimant said that she asked the respondent if he was going to order a taxi as the last bus had gone but he shrugged his shoulders and said it was not his problem. The claimant got a lift home from a customer who was still on the premises.

5.11. The claimant worked 12pm to 6pm on Wednesday, 13 December 2017 and she was on the rota to work 6pm to 11:30pm on Sunday, 17 December 2017. The claimant phoned in sick on that Sunday morning and provided a fit note from her GP dated 18 December 2017 which indicated that the claimant was unfit for work because of depression and this would be the case for 3 weeks.

5.12. On Friday, 22 December 2017 the claimant went to collect her wages. These were handed to her by a member of the bar staff and stapled to a brown envelope was a written warning. This stated:

> "Following your verbal warning given on your return to work regarding your sickness records (in total 28+ weeks), it is with regret that I am today 22/12/2017 giving you a written warning due to your new sick notice.
> If you wish to discuss this matter further please do not hesitate to contact me."

5.13. On 2 January 2018 the claimant wrote to the respondent. In this letter she referred to the ACAS Code of Practice on Disciplinary and Grievance procedures. She indicated that she did not recall having been given any form of verbal warning and that no disciplinary steps had been taken prior to the issuing of a written warning. She indicated that she appealed the decision to provide her with a written warning. The letter went on to refer to the Equality Act 2010 and stated:

> "Depression is something I have struggled with for a while and I'm finally looking to get help managing the condition. This is a condition that is likely to have a long-term effect on my life. Providing me with a written warning due to me providing you with a fit note linked to a condition that is provided by the Equality Act without attempting to make any reasonable adjustments or to put me on a performance plan is unlawful and discriminatory…"

5.14. The claimant was invited to an appeal hearing against the disciplinary decision. She attended an appeal hearing on 10 January 2018. During that meeting there was discussion about the claimant's depression. The claimant said that depression was an ongoing long-term issue. She was now under a

different doctor and trying to get it under control. When asked if there was anything that made the condition worse or more manageable the claimant stated that it was not being able to get home after work on the night-time. The claimant was asked if any of it related to work and she replied that there were no other work-related issues re depression.

5.15. The claimant was asked if there was anything they could do to support her work and she replied that her:

> "arm is not yet fixed and she is unable to lift things one-handed"

she also stated that she

> "prefers to work days, but can work until 8 PM as she can get bus home"

5.16. On 10 January 2018 the respondent wrote to the claimant asking her to provide consent to the respondent obtaining a medical report from her GP or consultant. The claimant provided that consent.

5.17. On 16 January 2018 the respondent wrote to the claimant providing the disciplinary appeal hearing outcome. Within that letter He stated:

> "The warnings were issued as I was not aware of the law, your level of absence was of concern to me. I thought I was doing the right thing, and having now considered the issue, I realise I was not, for which I apologise."

The claimant's written warning was removed and all formal warnings were removed from her file. There was also mention of some missing payslips and it was stated that the respondent believed the claimant had now received these from his accountant.

5.18. On 15 January 2018 the claimant had an exchange of emails with the respondent in which she was informed that he had spoken to the accountant and they had sent some copies of the corrected payslips. The claimant said that she needed copies for missing weeks and the most important were those that covered December and January most of these would be 'nil' but she still require them as proof of earnings.

5.19. The claimant sent an email to the respondent on 18 January 2018 thanking him for his apology in the written confirmation of his decision to overturn the written warning. She also indicated that she was happy for the respondent to seek medical advice from her GP and that she had completed and returned the consent form. She said that she had suffered from depression for a number of years however, this had not affected her work previously. She also stated:

> "My main issue, still keeping me from returning to work at The Eagle, is stress, work-related stress. This is something that can only be relieved by you. I'm not going to lie, this whole shamble of the disciplinary procedure has made things worse, and I'm happy it is now concluded

but there are still issues that need to be addressed before I feel I can return.

You have mentioned that I raised additional matters during the appeal procedure that, I agree, were not part of my original appeal but came up along the way. I'm aware these are things that should be raised as grievances however, I would very much like to address the most important one of these informally for a quick resolution rather than go down that path.

I would really appreciate you getting back to me on the below items as soon as possible. As I stated in my email dated Monday, 15 January 2018 this is greatly affecting me financially

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- Explanation and correction of payslips received (xlsx spreadsheet attached again)
- Outstanding payslips."

5.20 on 15 February 2018 a Primary Healthcare Caseworker from the Citizen's Advice Bureau sent an email to the respondent on behalf of the claimant indicating that she wished to raise a grievance. The grievance referred to the claimant's problems beginning on her return to work on 6 December 2017 and referred to her hours having been reduced to 11.5 per week. Finishing at around 11.50pm on the Sunday night and to be advised to get a taxi. The letter also referred to the claimant being shunned and ignored by the respondent throughout her next shift on the following Wednesday. The letter also indicated that, as the respondent was aware, the claimant suffered from anxiety and depression and had done so for a number of years. There was a reference to the outcome of her earlier grievance, that the warning given to her was rescinded. The letter then stated:

"Our client believes that the implied relationship of trust and confidence has been too badly damaged to allow her to return to work. Bob's actions constitute a fundamental breach of her employment contract; namely the implied term of trust and confidence. As detailed previously, if the issues raised cannot be resolved promptly she will be left with no option other than to consider her contractual position within the organisation and consider making claims to an Employment Tribunal. Ms Hulley's condition, anxiety and depression, amounts to disability under the Equality Act. Bob's actions in issuing an invalid warning, without following any of the correct procedures, because of a disability - related absence constitutes discrimination arising from disability. In recent correspondence to Ms Hulley, Bob provided documentation which purport to show a shortfall between the amount Bob has actually paid her and the amount he had recorded as being paid to her. We therefore request payments of the difference between these two amounts. If the outstanding amount is not paid Ms Hulley will consider making a claim for unauthorised deductions from wages with an Employment Tribunal."

5.21. On 19 February 2018 the claimant was invited to a Grievance Hearing with the respondent.

5.22. On 20 February the claimant sent an email to the respondent. She thanked him for his apology and confirmation of the decision to overturn her written warning and removal of all disciplinary action against her from her file "thus concluding this disciplinary procedure." She referred to having suffered with depression for a number of years. She referred to work-related stress and that the disciplinary shambles had made things worse. She said she was happy that it was now concluded but there were still issues that need to be addressed before she felt she could return. The claimant said that she was aware that these things should be raised as a grievance but that she would very much like to address the most important one informally for a quick resolution rather than go down that path. The issues she referred to were "explanation correction of payslips received" and "outstanding payslips."

5.23. A grievance hearing took place on 27 February 2018 before the respondent. During that grievance hearing the claimant referred to the previous disciplinary issues and it was pointed out that it had been closed and the claimant had acknowledged and accepted the outcome. The claimant asked about pay discrepancies and said that there was £183.40 difference between what is she had been paid and what it said in her payslips.

5.24. The notes show that the respondent told the claimant that her hours had been cut down to 11.5 hours for the first two weeks, that she did not give him any notice of her return to work and he needed to ensure that the bar was adequately covered in advance and that, therefore, the shifts were already covered by staff. The claimant was told that the claimant's shift would change with time as the new rota was being prepared. However, due to the claimant going off sick she did not stay at work past the first two weeks to enable the respondent to give her the 16 hours per week she was used to working.

5.25 on 5 March 2018 the respondent wrote to the claimant indicating that, after the hearing and subsequent adjournment he had concluded the investigation into her concerns and provided his decision. This stated:

- As explained during the grievance hearing your hours of work were/are not permanently reduced and upon your return to work if no contraindication from medical aspect, you will receive the 16 hours of work per week.

- It is your/employee's responsibility to arrange/take care of your transport to and from work, as acknowledged by yourself during the meeting.

- Regarding being unable to close the premises on time during your shift on 10/12/2017, it is your/employee's responsibility to ensure customers leave the building and premises close on time.

- As explained during the hearing I have not ignored you and had no intention to make you feel ignored. As you were unable to provide evidence and examples of the detrimental treatment other than you feeling ignored, this matter is not being upheld.

- Disciplinary case – this has already been dealt with during the Appeal Hearing on 10/01/18 and you have acknowledged the outcome, therefore this is now closed matter.

- As discussed in the hearing the discrepancy in the payslips were a clerical error on the accountant's behalf, this you were made aware of via email on 19/01/2018. Having spoken with the accountant I can confirm that they are providing me with corrected copies of your payslips. The total amount of your earnings up to date is £3,503.70. Regarding your actual cash received and an alleged 2 weeks of no payments, I do believe the cash is handed over to you in both weeks, therefore there is no money owed to.

- We have considered that your doctor has diagnosed depression but at present have very little in the way of medical evidence, based on the evidence to date we do not consider that your condition amounts to a disability under the Equality Act 2010. As you know we have written to your GP and will review this matter on receipt of that report. We may need you to attend an Occupational Health Assessment for advice on what adjustments may be necessary to return you to work.

  Having taken everything into account I will allow you some time to recover however it is not reasonable that "you can come back when you want to". As an employer I need to support your return to work and therefore I suggest that we maintain contact while you still remain off sick."

5.26. On 14 March 2018 the claimant wrote to the respondent. She indicated that the grievance meeting minutes were not a true representation of the meeting she attended. They did not cover everything that was discussed and were a biased representation. She referred to the refusal to allow support from her daughter and the circumstances of the meeting held in the respondent's home where other members of the respondent's family were in very close proximity.

5.27. The claimant indicated that she was appealing the decision and set out the details as follows:

- Reduced hours of work.

  I feel this has finally been addressed as I now know your intention of reinstating my 16 hours when you feel I am capable,

however before this grievance meeting this was never discussed or made clear.

I'd like to add that had a 'Return to work plan' been made before my return to work in December this would not have been an issue.

- Transport home after shift

  I feel this is now addressed somewhat satisfactorily. I now see your stance has changed from an employer who deemed employee safety important to now making it perfectly clear it is not your responsibility/concern how your employees get home from work even in unsociable hours.

  I'd like to add, that had a new shift pattern (to me) of locking up, been discussed in more detail prior to working these shifts, this issue could have also been addressed earlier.

- Issue with closing on time on my shift on 10/12/2017.

  As far as I'm concerned this is not an issue.

- Being ignored/detrimental treatment since my return to work.

  I feel there is no resolution possible to this problem as you do not acknowledge your behaviour. As per the grievance meeting, I am obviously not able to give 'evidence' and any 'examples' I attempt to give are swiftly denied. It is thus effectively my word against yours. With this company's grievance procedure where you have no choice but to discuss your issue with the culprit to get a resolution, this grievance cannot be resolved unless acceptance of the behaviour is admitted. This is disappointing however, a predictable decision.

- Disciplinary case

  I am obviously aware that my disciplinary case has come to a close. This does not mean that I am not entitled to have a grievance about how it was handled, how I was treat during and how this has affected me since. To simply close the matter in this way shows very little concern for the additional stress and anxiety that I have suffered due to being forced to endure disciplinary action.
  Your line stating "Please be assured that the company takes any employee's concerns seriously" leave me with no confidence and trust in you or the company.

I would still like an explanation as to why you felt the need to do this and some genuine acknowledgement of wrong doing rather than “this is now closed matter” would be gratefully received.

- Discrepancy in my earnings/payslips

  I am definitely not happy with this decision. If I am to believe ‘clerical errors’ have been made than I am to be advised of this before or on my pay date when my pay and payslip should be received. I should not have to present you with a spreadsheet of my findings. I have spent months trying to obtain correct payslips that I am still yet to receive!

  You will also note that there are at least 10 ‘clerical errors’ shown on my spreadsheet and these are just from the payslips I have received. This still does not take into account that I have not received £3,503.70 from you. I state again, I have received £3,320.30!

  You say in your outcome letter that you believe cash was handed over to me, therefore there is no money owed – this is not an acceptable resolution.
  There is a discrepancy amounting to £183.40 this will be declared to HMRC by you and is wrong. I do not accept nor agree to this. I’m in the process of seeking legal advice on this issue as you have effectively broken the law and this is now more serious than can be dealt with in a grievance procedure.

- Disability due to depression

  You have been given all due medical evidence in the form of my ‘Fit notes and it is not up to you to consider whether my condition amounts to a disability under the Equality Act 2010. Until you hear back from my GP with her report and this matter is reviewed, this issue is not resolved.

  In short, not all of my concerns have been addressed.

  Your conduct throughout these last few months has been nothing short of appalling, not once in all of the time I have been away from work ill, have you either written text or telephone to simply ask how I am. This is not acceptable.

  You have made very little effort in resolving the issues I have raised and it is perfectly clear by reading your latest letter that things will not be changing in this regard any time soon.
  I have quite frankly had enough and I feel I am left with very little option other than to leave The Eagle Pub.

> I therefore request that you also take this letter as my written notice of resignation from today – 14 March 2018. I'm aware that my employment contract states this notice must be one month, although I'm not sure if this is applicable with my current situation."

5.28. On 21 March 2018 the respondent wrote to the claimant with regard to an appeal hearing on 29 March 2018.

5.29. On 26 March 2018 the claimant wrote to the respondent indicating that there was no purpose in the meeting as she had already provided full, detailed reasons for her appeal.

5.30. On 28 March 2018 the respondent wrote to the claimant indicating that her grievances had been fully investigated and not upheld as had been detailed to her in full and that, in her appeal letter she had largely acknowledged this.

5.31. On 9 April 2018 the respondent wrote to the claimant providing her with a cheque for four weeks holiday pay.

5.32. Following an early conciliation process, the claimant issued a claim to the Employment Tribunal on 14 May 2018. She brought complaints of disability discrimination and unfair constructive dismissal.

The law

Disability discrimination

6. Section 6 of the Equality Act 2010 states:

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, an

(b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Schedule 1 provides:

Long-term effects

(1) The effect of an impairment is long-term if—

(a) It has lasted for at least 12 months,

(b) It is likely to last for at least 12 months, or

(c) It is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

Section 212 provides that substantial" means more than minor or trivial.

Direct discrimination

7. Section 13 of the Equality Act 2010 states:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
>
> (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
>
> (4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
>
> (5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

8. In **Islington Borough Council v Ladele** [2009] ICR 387 Mr Justice Elias explained the essence of direct discrimination as follows:

> "The concept of direct discrimination is fundamentally a simple one. The claimant suffers some form of detriment (using that term very broadly) and the reason for that detriment or treatment is the prohibited ground. There is implicit in that analysis the fact that someone in a similar position to whom that ground did not apply (the comparator) would not have suffered the detriment. By establishing that the reason for the detrimental treatment is the prohibited reason, the claimant necessarily establishes at one and the same time that he or she is less favourably treated than the comparator who did not share the prohibited characteristic."

9. In **Glasgow City Council v Zafar** [1998] ICR Lord Browne-Wilkinson stated

> "Those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed, they may not even be aware of them"

10. It is sufficient for a claimant to establish direct discrimination if he or she can satisfy the Tribunal that the prohibited characteristic was one of the reasons for the treatment in question. It need not be the sole or even the main reason for that treatment; it is sufficient that it had a significant influence on the outcome.

11. Where an actual comparator is relied upon by the claimant to show that the claimant has suffered less favourable treatment it is necessary to compare like with like. Section 23(1) of the Act provides: "there must be no material difference between

the circumstances in relation to each case." That does not mean to say that the comparison must be exactly the same, there can be a comparison where there are differences. The evidential value of the comparator is weakened the greater the differences, see **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 and **Carter v Ashan** [2008] ICR 1054. The Supreme Court in **Hewage v Grampian Health Board** [2012] ICR 1054 confirmed that a Tribunal had not erred in relying on non-exact comparators in a finding of discrimination.

12. Evidence of direct discrimination is rare and the Tribunal often has to infer discrimination from the material facts that it finds applying the burden of proof provisions in section 136 of the Equality Act as interpreted by **Igen Ltd v Wong** [2005] ICR 931 and subsequent judgments. In **Ladele** Mr Justice Elias, in the EAT said:

> "The first stage places a burden on the claimant to establish a prima facie case of the discrimination: where the applicant has proved fact from which inferences could be drawn that the employer treated the applicant less favourably [on a prohibited ground] then the burden moves to employer… then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the Tribunal must find that there is discrimination."

13. A claimant cannot rely on unreasonable treatment by the employer as that does not infer that there has been unlawful direct discrimination; see **Glasgow City Council v Zafar** [1998] ICR 120. Unreasonable treatment of itself does not shift the burden of proof. It may in certain circumstances be evidence of discrimination so as to engage stage 2 of the burden of proof provisions and required the employer to provide an explanation. If no such explanation is provided there can be an inference of discrimination **Bahl v Law Society** [2004] IRLR 799.

14. In the case of **Qureshi v Victoria University of Manchester and another** [2001] ICR 863 Mummery J said:

> "There is a tendency, however, where many evidentiary incidents or items are introduced, to be carried away by them and to treat each of the allegations, incidents or items as if they were themselves the subject of a complaint. In the present case it was necessary for the Tribunal to find the primary facts about those allegations. It was not, however, necessary for the Tribunal to ask itself, in relation to each such incident or item, whether it was itself explicable on "racial grounds" or on other grounds. That is a misapprehension about the nature and purpose of evidentiary facts. The function of the Tribunal is to find the primary facts from which they will be asked to draw inferences and then for the Tribunal to look at the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the acts or decisions complained of in the originating applications were on "racial grounds". The fragmented approach adopted by the Tribunal in this case would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have on the issue of racial grounds. The process of inference is itself a matter of applying common sense

> and judgment to the facts, and assessing the probabilities on the issue whether racial grounds were an effective cause of the acts complained of or were not. The assessment of the parties and their witnesses when they give evidence also form an important part of the process of inference. The Tribunal may find that the force of the primary facts is insufficient to justify an inference of racial grounds. It may find that any inference that it might have made is negated by a satisfactory explanation from the respondent of non-racial grounds of action or decision."

15 Since the House of Lords' Judgment in **Shamoon v Chief Constable Royal Ulster Constabulary** [2003] IRLR 285 the Tribunal should approach the question of whether there is direct discrimination by asking the single question of the reason why. That case has been expanded on by **Chief Constable of West Yorkshire Police v Khan** [2001] IRLR 830, **Ladele, Amnesty International v Ahmed** [2009] IRLR 884, **Aylott v Stockton on Tees Borough Council** [2010] IRLR 994, **Martin v Devonshires Solicitors** [2011] ICR 352**, JP Morgan Europe Limited v Cheeidan** [2011] EWCA Civ 648, and **Cordell v Foreign and Commonwealth Office** [2012] ICR 280.

16 For a finding of direct discrimination it is not necessary for the discriminator to be consciously motivated in treating the complainant less favourably. It is sufficient if it can be inferred from the evidence that a significant cause of the discriminator to act in the way he has acted is because of the persons protected characteristic. As Lord Nicholls said in **Nagarajan v London Transport,**

> "Thus, in every case, it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on the grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question, will call for some consideration of the mental process of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision."

17. Therefore, in most cases the question to be asked by the Tribunal requires some consideration of the mental process of the discriminator. Once established that the reason for the act of the discriminator was on a prohibited ground the explanation for the discriminator doing that act is irrelevant. Liability has then been established.

18. In the case of **Qureshi v Victoria University of Manchester** Mummery J said, with regard to race discrimination:

> "As frequently observed in race discrimination cases, the applicant is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of racial grounds for the alleged discriminatory actions and decisions. The Applicant faces special difficulties in a case of alleged institutional discrimination which, if it exists, may be inadvertent and unintentional. The Tribunal …. must also consider what inferences may be drawn from all the primary facts. Those primary facts may include not only the acts which form the subject matter of the complaint but also other acts alleged by the applicant to constitute evidence pointing to a racial ground for the alleged discriminatory act or decision. It is this aspect of the evidence in race

relations cases that seems to cause the greatest difficulties. Circumstantial evidence presents a serious practical problem for the Tribunal of fact. How can it be kept within reasonable limits?"

Discrimination arising from Disability

19 Section 15 of the Equality Act 2010 states:

> "(1) A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arising in consequences of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Sub-Section (1) does not apply if A shows that A did not now, and could not reasonably have been expected to know, that B had the disability.

Duty to Make Reasonable Adjustments

20. Section 20 of the Equality Act 2010 states:

> "(1) Where this Act imposes a duty to make reasonable adjustments of a person, this Section, Sections 21 and 22 and the applicable schedule apply; and for those purposes a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements,
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (5) The third requirement is a requirement, where the disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid".

Paragraph 20 (1) of Schedule 8 provides:

"20 (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) In any other case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

20. Under sections 20 and 21, discrimination by reason of a failure to comply with an obligation to make reasonable adjustments, the approach to be adopted by the Tribunal was as set out *in Environment Agency v Rowan [2008] ICR 218*, where it was indicated that an Employment Tribunal must identify the provision, criterion or practice ("PCP") applied by or on behalf of the respondent and also the non-disabled comparator/s where appropriate, and must then go on to identify the nature and extent of the substantial disadvantage suffered by the claimant. Only then would it be in a position to know if any proposed adjustment would be reasonable.

Discrimination arising from the consequence of a disability

21. Under section 15 of the Equality Act 2010 (discrimination arising from the consequence of a disability) there is no requirement for a claimant to identify a comparator. The question is whether there has been *unfavourable* treatment: the placing of a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person; see Langstaff J in **Trustees of Swansea University Pension & Assurance Scheme & Anor v Williams** *UKEAT/0415/14* at paragraph
22. As the EAT continued in that case (see paragraph 29 of the Judgment), the determination of what is unfavourable will generally be a matter for the Employment Tribunal.

The starting point for a Tribunal in a section 15 claim has been said to require it to first identify the individuals said to be responsible and ask whether the matter complained of was motivated by a consequence of the Claimant's disability; see **IPC Media Ltd v Millar [2013] IRLR 707**: was it because of such a consequence?

23. The statute provides that there will be no discrimination where a respondent shows the treatment in question is a proportionate means of achieving a legitimate aim or that it did not know or could not reasonably have known the Claimant had that disability.

24. **Burden of Proof**

Section 136 of the Equality Act 2010 states:

"(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 sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An Employment Tribunal."

25. Guidance has been given to Tribunals in a number of cases. In *Igen v Wong [2005] IRLR 258* (a sex discrimination case decided under the old law but which will apply to the new Equality Act) and approved again in **Madarassy v Normura International plc [2007] EWCA 33.**

26. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of **Madarassy** the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: "They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

27. In **Project Management Institute v Latif (2007) IRLR 579** The EAT gave guidance as to how Tribunals should approach the burden of proof in failure to make reasonable adjustments claims. The burden of proof only shifts once the claimant has established not only that the duty to make reasonable adjustments has arisen, but also that there are facts from which it could reasonably be inferred, in the absence of an explanation, that it has been breached. It was noted that the respondent is in the best position to say whether any apparently reasonable amendment is in fact reasonable given its own particular circumstances. Therefore, the burden is reversed only once potential reasonable adjustment has been identified. It will not be in every case that the claimant would have to provide the detailed adjustment that would have to be made before the burden shifted, but "it would be necessary

for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not". The proposed adjustment might well not be identified until after the alleged failure to implement it, and in exceptional cases, not even until the Tribunal hearing.

28. In **Tarbuck v Sainsbury's Supermarkets Limited [2006] IRLR 664** the EAT said that an employer's failure to make an assessment of a disabled employee is not of itself a failure to make a reasonable adjustment. This was followed by the EAT in *Scottish & Southern Energy v Mackay UKEAT LL75/06.*

29. In **Romec v Rudham (2007) All ER 206** the EAT held that if the adjustment sought would have had no prospect of removing the substantial disadvantage then it could not amount to a reasonable adjustment. However, if there was a real prospect of removing the disadvantage it may be reasonable. **In Cumbria Probation Board v Collingwood (2008) All ER 04** the EAT stated "it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage" the finding of a failure to make a reasonable adjustment which effectively gave the claimant a chance of getting better through a return to work was upheld.

30. In **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10/JOJ** the EAT held that when considering whether an adjustment is reasonable it is sufficient for a Tribunal to find that there would be a prospect of the adjustment removing the disadvantage.

31. In **Noor v Foreign and Commonwealth Office 2011 ICR 695** Richardson J stated "Although the purpose of a reasonable adjustment is to prevent a disabled person from being at a substantial disadvantage, it is certainly not the law that an adjustment will only be reasonable if it is completely effective"

32. in the case of **Gallup the Newport City Council 2013 EWCA Civ 1583** Rimer LJ stated:

> "I come to the central question, namely whether the ET misdirected itself in law in arriving at its conclusion that Newport had neither actual nor constructive knowledge of Mr Gallop's disability. As to that, Ms Monaghan and Ms Grennan were agreed as to the law, namely that (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 section 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; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1. Counsel were further agreed that, provided the employer has actual or constructive knowledge of the facts constituting the

> employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined in section 1(2). I agree with counsel that this is the correct legal position."

Constructive dismissal

33.Section 95(1)(c) of the Employment Rights Act defines constructive dismissal as arising when "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct". The conduct must amount to a breach of an express or implied term of the contract of employment which is of sufficient gravity to entitle the employee to terminate the contract in response to the breach. In this case, the breach of contract relied upon by the claimant is a breach or breaches of the implied term of trust and confidence. That is expanded upon in a well-known passage from the judgment of the EAT in **Woods v WM Car Services (Peterborough) Limited [1981] IRLR page 347**: -

> "It is clearly established that there is implied in the contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation of the contract since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The employment tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it".

34. Next, there is the significance of what is colloquially called a final straw. This was considered in the Court of Appeal judgment in **London Borough of Waltham Forest v Omilaju [2005] IRLR page 35**:-

> "In order to result in a breach of the implied term of trust and confidence, a final straw, not itself a breach of contract but must be an act in a series of earlier acts which cumulatively amount to a breach of the implied term. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial. The final straw, viewed in isolation, need not be unreasonable or blameworthy conduct. However, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective".

35. Further clarification of the objective nature of the test is provided in the Court of Appeal judgment in **Bournemouth University Higher Education Corporation v Buckland [2010] IRLR page 45**: -

> "The conduct of an employer who is said to have committed a repudiatory breach of the contract of employment is to be judged by an objective test rather than a range of reasonable responses test. Reasonableness may be one of the tools in the employment tribunal's factual analysis in deciding whether there has been a fundamental breach but it cannot be a legal requirement".

36 There is also an issue surrounding the circumstances of the treatment of the claimant's grievance by the respondent. As the EAT put it in **WA Goold (Pearmak) Limited v McConnell & Another [1995] IRLR page 516**: -

> "There is a fundamental implied term in a contract of employment that an employer will reasonably and promptly afford a reasonable opportunity to its employees to obtain redress of any grievance they may have".

37. A further helpful passage concerning treatment of grievances to be found in the judgment of Judge Richardson in the EAT in **Blackburn v LD Stores Limited [2013] IRLR page 846 paragraph 25**: -

> "In our judgment failure to adhere to a grievance procedure is capable of amounting to or contributing to such a breach. Whether in any particular case it does so is a matter for the tribunal to assess. Breaches of grievances procedures come in all shapes and sizes. On the one hand, it is not uncommon for grievance procedures to lay down quite short timetables. The fact that such a timetable is not met will not necessarily contribute to, still less amount to a breach of the term of trust and confidence. On the other hand, there may be a wholesale failure to respond to a grievance. It is not difficult to see that such a breach may amount to a contributory breach of the implied term of trust and confidence. Where such an allegation is made, the tribunal's task is to assess what occurred against the **Malik** test".

38. In **Meikle v Nottinghamshire County Council [2005] ICR page 1**, Keane LJ said: -

> "The Appeal Tribunal there pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job. It is suggested that the test to be applied was whether the breach or breaches were the 'effective cause' of the resignation. I see the attractions of that approach but there are dangers in getting drawn too far in questions about the employee's motives. It must be remembered that we are dealing here with a contractual relationship, and constructive dismissal is a form of

> termination of contract by repudiation by one party which is accepted by the other … The proper approach therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the circumstances of the repudiation. It follows that, in the present, it was enough that the employee resigned in response at least in part, to fundamental breaches of contract by the employer".

39. The test was put in slightly different terms in a more recent EAT case, **Wright v North Ayrshire Council UKEATS 0017/13 (27 June 2013)**, in which Langstaff P endorsed a test first propounded by Elias P in **Abbey Cars West Horndon Limited v Ford UKEAT 0472/07**: -

> "The crucial question is whether the repudiatory breach played a part in the dismissal … it follows that once a repudiatory breach is established, if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon".

40. It is to be noted that the proper conduct of a grievance process is not capable of curing an earlier breach of the term of trust and confidence (if it has occurred), even if it upholds the grievance in the claimant's favour. Still less does the fact that the claimant has chosen to go down the grievance route before resigning, of itself amount to an affirmation of the contract? This is confirmed by a passage in the judgment in the Court of Appeal in the **Buckland** case, see in particular at paragraph 44 in the judgment of Lord Justice Sedley: -

> "Albeit with some reluctance, I accept that if we were to introduce into employment law the doctrine that a fundamental breach, if curable and if cured, takes away the innocent party's option of acceptance, it could only be on grounds that were capable of extension to other contracts, and for reasons I have given I do not consider that we would be justified in doing this. This does not mean however that tribunals in fact cannot take a reasonably robust approach to affirmation:-
>
> > 'A wronged party, particularly if it fails to make its position entirely clear at the outset, cannot ordinarily expect to continue with the contract for very long without losing the option of termination, at least where the other party has offered to make suitable amendments'".

Conclusions

Disability discrimination

41. The first issue considered by the Tribunal was the question of whether the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010. The claimant said that her disability is depression. She said that this condition

had been part of her life for the whole of her employment with the respondent. She also said that she had suffered from this condition since her teenage years and had been receiving counselling as well as taking antidepressants tablets – sertraline. She said that this was discussed with the respondent frequently before she broke her shoulder and went off on sick leave.

42. The Tribunal had sight of medical records provided by the claimant's GP. These showed an entry on 12 December 2017 for "Depression NOS [not otherwise specific] (new)". The entry referred to the claimant already being on sertraline "since last year (dad died, plus pneumonia, plus gallbladder op)." It also referred to the claimant having seen a counsellor.

43. There was no reference to depression in the medical records detailing the claimant's significant past. The GP records contained references to memory loss, low mood and tremor symptom. The only entry for depression prior to the 12 December 2017 entry within the medical records was shown as depression NOS on 7 May 1990.

44. The respondent said that he was not aware of the claimant suffering from depression until he received a 'fit note' dated 18 December 2017 which stated that the claimant was not fit for work because of depression for three weeks. Further 'fit notes' were provided for the claimant not being fit for work for four weekly periods on 4 January 2018, 1 February 2018 and 1 March 2018

45. The respondent had requested a medical report at the time of the claimant's resignation but the claimant withdrew her consent to obtain such a report and relied on her medical records.

46. The Tribunal has considered the Secretary of State's guidance on matters to be taken into account in determining questions relating to the definition of disability (2011). Substantial effect is an effect that is more than a minor or trivial effect. Long-term means an impairment which has lasted for at least 12 months or is likely to last at least 12 months. In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place.

47. The Tribunal is satisfied that the claimant was diagnosed with depression on 12 December 2017. This was recorded as a new problem. She was said to have received a supportive discussion and it was noted that she would telephone 'talking therapies'. The previous reference in the medical records to depression was as long ago as May 1990, 27 years before. There are entries in respect of anxiety and memory loss following the death of her father and taking sertraline from July 2016

48. The Tribunal accepts that depression affects a person's physical state, mood and thought processes. It is an all too common impairment and is potentially capable of constituting a disability. It can manifest itself in many different forms, with the most common types being mild, moderate and severe, or clinical, depression. The claimant said that her depression is at its worst when she has nothing to do and does not feel wanted or needed, like she is not a productive member of society. She said that working at the respondent's pub had helped her enormously and was good for her as

it gave her motivation and the opportunity to mix with other people in what she felt to be a safe environment. She said that, since returning to work in December 2017, the treatment she received made her feel afraid, anxious and out of place and that these feelings have not left her.

49. The Tribunal is not satisfied that the claimant has established that her depression was a substantial long-term condition such as to constitute a disability at the material time. In the case of **J v DLA Piper 2010 ICR1052 the EAT** said that**,** when considering the question of impairment in cases of alleged depression, Tribunals should be aware of the distinction between clinical depression and a reaction to adverse circumstances. While both can produce symptoms of low mood and anxiety, only the first condition should be recognised as a disability.

50. There is no doubt that a depressive illness is potentially prone to worsening and/or recurrence. The medical evidence does not justify any finding that the claimant's depression was an impairment which had a substantial adverse effect on her ability to carry out normal day-to-day activities in the long term. The Tribunal is not satisfied that the claimant's impairment had a substantial and long-term adverse effect which had lasted 12 months or was likely to last 12 months at the material time. It is important to note that the issue of how long an impairment is likely to last should be determined at the date of the alleged discriminatory act and not the date of the Tribunal hearing. The material time in this case is 6 December 2017 to 14 March 2018.

51. In considering the word 'likely' in the context of determining whether the adverse effects of an impairment were likely to last more than 12 months at the relevant date the House of Lords in **SCA Packaging Ltd v Boyle (2009) ICR 1056** indicated that the test was that 'likely' simply meant 'could well happen' rather than 'more probable than not'. In considering the medical records and the claimant's evidence, it was not established that, during the material time, the claimant's impairment could have been seen as substantial and long-term. Obviously, depression and anxiety has the potential to have substantial adverse effects and for those effects to be long-term. However, throughout the relevant period the evidence did not establish that the claimant's depressive condition could well have deteriorated so as to be both substantial and long-term.

52. The Tribunal has considered the medical evidence and the claimant's evidence. It is not satisfied that the claimant has established that she was a disabled person within the meaning of section 6 of the Equality act 2010 at the material time.

53. There was no evidence upon which the Tribunal could conclude that the claimant's impairment would be long-term at the material time. Although not an issue for this case, it may be that the claimant would now be found to have a long-term impairment and therefore be a disabled person pursuant to section 6 of the Equality Act at the time of the Tribunal Hearing although further evidence would be necessary to establish this. The claimant's allegations of discriminatory treatment are in respect of the period prior to 14 March 2018, many of the alleged detriments predate the claimant's absence from work on 18 December 2017.

54. The Tribunal has some sympathy with the claimant in respect of her medical condition. However, this was not shown to be such that the claimant had the protected characteristic of being a disabled person at the material time.

55. The claim of disability discrimination had been identified as one of direct discrimination at the preliminary hearing on 26 July 2018. This was also discussed at the outset of this hearing. The Tribunal noted that there had been a reference to reasonable adjustments in the claimant's letter of 2 January 2018 and the letter from the Citizens Advice Bureau of 15 February 2018 referred to discrimination arising from disability. The claimant indicated that the letter of 2 January 2018 had been written with some assistance. She was representing herself at the hearing and was not able to clarify the nature of her claim. As the Tribunal has found that the claimant was not a disabled person within the meaning of the Equality Act this is not an issue. However, the Tribunal heard submissions from the respondent on direct discrimination, discrimination arising from disability and the duty to make adjustments and it has gone on to consider the position if it had concluded that the claimant had the protected characteristic.

56. It was submitted by Mr Haines, on behalf of the respondent, that the respondent did not directly discriminate against the claimant by treating her less favourably than he would have treated others and the section 13 of the Equality Act 2010.

57. The question of the detriment alleged was discussed with the claimant at the outset of the hearing and she indicated that the detriment alleged was the treatment leading to her resignation.

58. The Tribunal is not satisfied that the respondent treated the claimant less favourably than Andrea Farrell when he sent the same message to all staff on 2 November 2017 regarding placing of the two blank rotas for the festive season on the staff noticeboard. This was stated to be on a first come first serve basis for staff to fill in their preferred availability.

59. The Tribunal is not satisfied that the respondent changed the claimant's hours of work permanently. This was a temporary arrangement in order to provide the claimant with some hours of work in respect of shifts that had already been allocated prior to the claimant indicating that she was to return to work. The claimant accepted that she knew the respondent's intention was to reinstate her 16 hours in her letter of 14 March 2018. This was not a detriment on the grounds of the claimant's alleged disability.

60. With regard to the disciplinary action taken against the claimant for her absence levels. The disciplinary sanctions were removed and the claimant accepted an apology from the respondent. The respondent submitted that his treatment of the claimant was fair and consistent with sound HR practice equal to that provided to any other member of staff in the same circumstances. The Tribunal is satisfied that the warnings issued were inappropriate. They related to the claimant's absence record which was in relation to the claimant's lengthy absence for her broken humerus and was not less favourable treatment because of the claimant's alleged disability.

61. The failure to provide a taxi home after the claimant's shift on 10 December 2017 and the requirement of staff to remove any customers and lock up by the finishing time were issues that applied to all staff and the Tribunal is not satisfied there was any detriment because of the claimant's alleged protected characteristic of disability.

62. The alleged discrepancy in earnings received as opposed to the payslips was an administrative error and the respondent's accountant provided the respondent with further information. The claimant was unable to establish that there was any evidence of a discrepancy between the amount paid to the claimant and that stated on the payslips. Even if there had been any discrepancy, it was shown to be not a detriment on grounds of the claimant's alleged disability.

63. The Tribunal is not satisfied that the claimant established that she was being ignored, or subjected to detrimental treatment on her return to work on grounds of her alleged disability. The claimant said that she was not treated as she had been before her absence and she felt that the relationship was not the same.The respondent may have been distracted and less engaged with the claimant as a result of serious issues with his son's health. There was no evidence that could lead the Tribunal to conclude that this was less favourable treatment because of the claimant's alleged disability.

64. With regard to discrimination arising from disability pursuant to section 15 of the Equality Act 2010, the respondent submitted that he did make a procedural error in relation to disciplinary action taken against the claimant for her unacceptable level of absence following the production of the fit note identifying depression as the reason for the claimant's current absence but that the sanctions were revoked. A resolution that was to the claimant satisfaction with an accepted apology within a matter of weeks. This may have been unfavourable treatment because of something arising in consequence of the claimant's depression. It was as a result of the claimant's absence record which related to the lengthy absence for her broken humerus followed by her absence by reason of depression.

65. The Tribunal accepts that the respondent did not know at the relevant time and could not reasonably be expected to know that the claimant had a disability. His evidence was clear. He said that the claimant would sometimes say that she was on a down but she was always happy and enjoyed work. The claimant's evidence was vague in this regard and she could not provide any examples of when she had mentioned depression to the respondent during her employment. A 'fit note' for a 3 week period for the condition of depression is not such as to provide knowledge of a long term substantial impairment. In the circumstances section 15(2) applies to disapply the provision for unfavourable treatment arising from disability.

66. The respondent was not aware of the claimant's depression before the fit note on 18 December 2017 and had done all that he could be reasonably expected to find out if the claimant had a disability by writing to the claimant's GP. The respondent had written the letter with reference to the claimant's past eight months absence and with regard to her ongoing fitness to work on 13 February 2018.

67. With regard to a duty to make adjustments, the duty does not arise as the respondent did not know and could not reasonably be expected to know that the claimant had an alleged disability. The respondent did not apply a provision, criterion

or practice (PCP) which would place a disabled person at a substantial disadvantage. It was submitted by Mr Haines on behalf of the respondent that a one-off flawed disciplinary procedure did not amount to a PCP. There was no element of repetition and the Tribunal was referred to the case of **Nottingham City Transport Limited v Harvey UKEAT/0032/12** in which the EAT provided that a practice must have some element of repetition. There was no evidence that the respondent consistently conducted its disciplinary procedures and flawed manner. Indeed, it was clear that the respondent made great effort to rectify the procedural error he had made and to ensure that he put in place a compliant procedure for the future.

Constructive Dismissal

68.It was submitted by Mr Haines that there was no repudiatory breach of contract on the part of the respondent. The claimant stated during cross-examination that her reason for resigning was that she'd just had enough. The majority of her concerns had been resolved to her satisfaction and were no longer an issue. Her stated reason was not sufficiently serious to justify the claimant resigning.

69. It was also submitted that, if the claimant was to argue that the giving of a written warning in December 2017 was the breach, the claimant had delayed too long and had waived the breach.

70. The Tribunal is satisfied that the disciplinary warnings had been withdrawn and the respondent had apologised. The claimant had accepted this apology. The Tribunal is not satisfied that was a material factor in claimant's resignation. The disciplinary procedure had been concluded and the claimant had delayed too long and had waived the breach. She accepted that the disciplinary procedure was concluded.

71. The claimant stated in her letter of resignation dated 14 March 2018 that the issue in respect of the reduction of hours had been addressed and she now knew the respondent's intention of reinstating her 16 hours. This was not a breach of contract which was a material influence on the claimant's resignation.

72. During the Tribunal hearing the claimant referred to former employees having had their hours reduced as a means of forcing them out of the business. However, she acknowledged the respondent's intention of reinstating her hours and had not raised this issue in respect of the treatment of former employees to the respondent or in her claim to the Tribunal. The claimant did not provide any evidence in support of her suspicions. This was not an issue that had been raised previously and it was not established that it was a breach of contract which was a material influence on the claimant's resignation. The respondent gave credible evidence that the claimant had been one of the best members of his staff and he did not want to lose her. The Tribunal accepts that this was the position.

73. The issue in respect of her transport home after her shift had concluded had been addressed "somewhat satisfactorily". The issue with closing on time was no longer an issue as far as the claimant was concerned.

74. The issue of being ignored/detrimental treatment since the claimant's return to work had been discussed. The claimant said it was a disappointing but predictable decision. The claimant said that she was not treated as she had been before her absence. She referred to being ignored and she felt that the relationship was not the same. It was made clear by the respondent and his wife, Malgorzata Ulenberg, that there had been, and continued to be, a major problem with the health of their young son. They were the only two people who were medically trained to deal with the tracheotomy. The Tribunal is not satisfied that any change in the relationship was a breach of contract by the respondent.

75. There was confusion regarding the allegation of discrepancies in the cash the claimant received and the amount shown on her payslips. The respondent said that this was a clerical error by his accountant. The claimant did not bring a claim of unauthorised deduction from wages or breach of contract with regard to the alleged outstanding sums. The claimant was unable to provide any evidence to show the basis of the alleged discrepancy in pay. She had provided a spreadsheet but was unable to explain how she could establish the amounts which she said had been paid to her in cash. It was not established that there was any breach of contract in this regard.

76. The Tribunal is not satisfied that the respondent had committed a repudiatory breach of contract.

77. The claimant said that she resigned because she just had enough. The Tribunal is not satisfied that there was a repudiatory breach of contract that was a material influence on the claimant's resignation. The claimant was not constructively dismissed.

78. For the reasons set out above, the claims are dismissed.

Employment Judge Shepherd

11 February 2019