



# EMPLOYMENT TRIBUNALS

**Claimant:** Ian Gilmore

**Respondent:** Streetscene Addiction Recovery

**Heard at:** Southampton                      **On: Monday 21<sup>st</sup> to Wednesday**  
Employment Tribunal                      **23<sup>rd</sup> December 2020**  
(via CVP)

**Before:** Employment Judge Mr. M. Salter

**Members:** Mr. M. Richardson.  
Mr. J. Shah MBE.

**Representation:**

Claimant: In person and not represented.

Respondent: Ms. A. Smith, counsel.

## JUDGMENT

It is the unanimous judgment of the tribunal that the claimant's claims are not well founded and are dismissed.

## REASONS

*References in square brackets below are unless the context suggests otherwise to the page of the bundle. Those followed by a with a § refer to a paragraph on that page and references that follow a case reference, or a witness' initials, refer to the paragraph number of that authority or witness statement.*

*References in round brackets are to the paragraph of these reasons or to provide definitions.*

### INTRODUCTION

1. These are our reasons given for the judgment given above.

2. As explained to the parties during the hearing the Employment Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: <https://www.gov.uk/employment-tribunal-decisions>. The Employment Tribunal has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the Employment Tribunal for an order to that effect under Rule 50 of the Tribunal's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.

#### BACKGROUND

##### The Claimant's case as formulated in his ET1

3. The Claimant's complaint, as formulated in his Form ET1 [1], presented to the tribunal on 19<sup>th</sup> September 2019, is, in short, he was constructively unfairly dismissed; that he was discriminated against on grounds of disability and that he was owed for a shortfall in his wages between November 2018 and April 2019 and during a period of time he was suspended from work leading up to his resignation.

##### The Respondent's Response

4. In its Form ET3 [19], the Respondent denied the claimant's claims and also that he was disabled within the meaning of the Equality Act 2010.

##### Relevant Procedural History

5. The matter came before E.J Gray on 20<sup>th</sup> March 2020 for a Preliminary Hearing. At this hearing both parties had legal representation and a list of issues was agreed. As would be expected directions were also given for the matter to take it to final hearing.
6. After the hearing those instructed by the Claimant applied to amend his claim to add one further element of his claim that he was subjected to discrimination

arising from disability. This amendment was not objected to by the Respondent. No other applications to amend were made.

7. Employment Judge Gray's directions do not appear to have been complied with. The Claimant did not provide the further particulars ordered and, as of early December 2020, there were still discussions taking place over the contents of the bundle and witness statements. We were told that in early December the Claimant's advisors (the same as had represented him at the Preliminary Hearing) contacted the Respondent's advisors to say they had no additional documents to add to the bundle.
8. Further, the exchange of Witness Statements also did not take place on time. In the week leading up to the hearing the Claimant's advisors ceased to act for him. However, the Claimant informed the Respondent his statement was complete and so the Respondent sent the Claimant its statements (apparently not password protected). The Respondent did not receive the Claimant's statement in return. The Respondent wrote to the tribunal informing the tribunal of this.
9. The Claimant then applied to adjourn the hearing so that he could obtain alternative representation. The Respondent confirmed that it did not object to this application. This application was put before the Regional Employment Judge who refused the application, partly because of the age of the matter, partly also on grounds that the tribunal are well experienced in litigants representing themselves and the future delay in relisting this matter may well mean the hearing was not held until late 2021. The Regional Employment Judge ordered that the Claimant had until 2pm on 17<sup>th</sup> December 2020 to exchange his witness statement with the Respondent otherwise his ET1 would stand as his statement.
10. The Claimant did not provide his statement to the Respondent by this time, or at all.
11. At gone 4pm on Friday, 17<sup>th</sup> December 2020, that is the last working day before the Final Hearing, the Respondent emailed to the Claimant and Tribunal a number of files including the bundle and a password protected file. It did not provide the password to this file.

12. The tribunal chased the password from the Respondent at 0900 on the 20<sup>th</sup> December 2020, but it was not until gone 11am that the Respondent's solicitors replied to the email and provided the password. By this time counsel for the Respondent had given it to the tribunal and claimant.
13. Further, at 11am on the first morning of the hearing the Respondent disclosed further papers, totalling some 26 pages, it wished to be included in the bundle. The Employment Judge expressed his surprise that this is taking place after the hearing has commenced, especially as the bundle was so late in being compiled.

#### THE FINAL HEARING

##### General

14. The Claimant represented himself. The Respondent was represented by Ms. Smith of counsel.
15. The hearing had a three-day time estimate. It was reduced from the four-days originally ordered by E.J. Gray as the 24<sup>th</sup> December 2020 was a non-sitting day for the tribunal.
16. The hearing was conducted by Cloud Video Platform. However, the Claimant had difficulties in logging into CVP, and so attended the hearing by telephone. The Respondent did not agree to this approach but equally did not oppose it.
17. Having conducted the hearing this way the tribunal are satisfied that this method did not detract from their ability to assess the claimant's credibility or understand what he considered his case to be.

##### List of Issues

18. The tribunal worked through the list of issues agreed at the Preliminary Hearing and obtained some limited clarification of some of the matters. With this clarification the list of issues was agreed as being:

##### Time Limit issues

- (a) Given the date the claim form was presented (19<sup>th</sup> September 2019) and the dates of early conciliation (Date A 6<sup>th</sup> August 2019, Date B 6<sup>th</sup> September 2019), any complaint about something that happened before 20<sup>th</sup> June 2019

is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

- (b) The Respondent accepts that the Claimant's claims that relate to dismissal have been presented within the primary limitation period contained within s123(1) of the Equality Act 2010 ("EQA") and s111(2)(a) of the Employment Rights Act 1996 ("ERA"), taking into account the effect of ACAS conciliation.
- (c) Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
  - (i) Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?
  - (ii) If not, was there conduct extending over a period?
  - (iii) If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
  - (iv) If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
    - 1. Why were the complaints not made to the Tribunal in time?
    - 2. In any event, is it just and equitable in all the circumstances to extend time?
- (d) Was the unauthorised deductions complaint made within the time limit in section 23 of the Employment Rights Act 1996? The Tribunal will decide:
  - (i) Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of payment of the wages from which the deduction was made?
  - (ii) If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
  - (iii) If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
  - (iv) If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

#### Equality Act Claims

##### *Protected Characteristic*

19. The Claimant relies on the Protected Characteristic of disability

##### *Disability*

- (a) Was the Claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of dyslexia?
- (b) Did/does the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?
- (c) If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

- (d) Would the impairment have had a substantial adverse effect on the Claimant's ability to carry out day-to-day activities without the treatment or other measures?
- (e) Is that effect long term? In particular, when did it start and:
  - (i) has the impairment lasted for at least 12 months?
  - (ii) is or was the impairment likely to last at least 12 months or the rest of the Claimant's life, if less than 12 months?
- (f) The relevant time for assessing whether the Claimant had/has a disability (namely, when the discrimination is alleged to have occurred) is from May 2016 until 23<sup>rd</sup> August 2019.

The Respondent's position on Disability

- (g) The Respondent:
  - (i) accepts Claimant had dyslexia
  - (ii) accepts it knew of the dyslexia [28 §16]But denies it knew that the claimant's dyslexia amounted to a disability.

*Section 15: Discrimination arising from disability*

- (h) Did the Respondent not know, and could not reasonably have been expected to know, that the Claimant had a disability?
- (i) Did the following thing arise as a consequence of the Claimant's disability? The Claimant's case is that the following arose from his disability:
  - (i) The need for Reasonable adjustments
  - (ii) The claimant's inability to carry out his role to the standard required by the Respondent
  - (iii) treated the Claimant unfavorably by accusing him of sexual misconduct, which triggered anxiety, a symptom arising from dyslexia, which forced his resignation (this issue was included in June 2020 after consensual amendment to the claim form. The amendment was made at a time when the Claimant was represented, and the Respondent's had the same representatives they have had throughout these proceedings)
- (j) Did the Respondent treat the Claimant unfavorably by:
  - (i) challenging the Claimant in his supervision sessions
  - (ii) forcing him to resign
- (k) Did the Respondent treat the Claimant unfavorably in any of those ways because of reasons set out in (i) above;.
- (l) No comparator is needed.
- (m) Can the Respondent show, on the balance of probabilities, that the treatment was a proportionate means of achieving a legitimate aim? The legitimate aim being the requirement for staff to comply with regulatory standards.

*Section 20 and 21: Reasonable Adjustment*

- (n) Did the Respondent not know, or could the Respondent not be reasonably expected to know that the Claimant had a disability?
- (o) If so, from what date?
- (p) Did the Respondent apply the following provision, criteria and/or practice ('the PCP') generally, namely standards of written work required by the Care Quality Commission.
- (q) Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that He was unable to achieve that standard
- (r) Did the Respondent not know, or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage set out above? The Respondent denies that it knew or ought reasonably to have known of any substantial disadvantage.
- (s) Did the Respondent take such steps to avoid the disadvantage? The burden of proof does not lie on the Claimant; however, it is helpful to know the adjustments asserted as reasonably required and they are identified as follows Provision of computer equipment. The Respondent accepts it did not make any reasonable adjustments to the Claimant's working practices.
- (t) Would it have been reasonable for the Respondent to have taken those steps at any relevant time?
- (u) What is the time limit point: when does the Claimant say time started to run, does the Respondent agree? The Claimant contends the obligation started in 2016.

*Section 26: Harassment related to Disability*

- (v) Did the Respondent engage in conduct of:
  - (i) criticizing performance during supervision sessions 2018-2019
  - (ii) not engaging with solutions that would assist claimant
  - (iii) pursuing false allegations of sexual misconduct
- (w) If so, was the conduct unwanted?
- (x) If so, was the conduct related to the Claimant's disability?
- (y) Did the conduct have the purpose of:
  - (i) violating the Claimant's dignity; or
  - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- (z) If not, did the conduct have the effect of:
  - (i) violating the Claimant's dignity; or

- (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- (aa) In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.
- (bb) Any act of harassment cannot be direct discrimination s212(1).

Unauthorised Deduction from Wages [70]

- (cc) Was the Claimant lawfully entitled to be paid:
  - (i) £300 a month from November 2018 until April 2019
  - (ii) June to August 2019 when suspended
- (dd) If so, has the Respondent made a deduction?
- (ee) Was any deduction required or authorised by statute?
- (ff) Was any deduction required or authorised by a written term of the contract?
- (gg) Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?
- (hh) Did the Claimant agree in writing to the deduction before it was made?
- (ii) How much is the Claimant owed?

Constructive unfair dismissal

*Qualification*

- (jj) The Respondent accepts that the Claimant was an employee and that at the time of their dismissal he had sufficient continuity of employment to present a claim of unfair dismissal. However, the Respondent denies that the Claimant was dismissed, he resigned.

*Breaches Alleged*

- (kk) The Claimant claims that the Respondent acted in breach of contract in respect of the implied term of the contract relating to mutual trust and confidence i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the Claimant? The breach(es) was / were as follows
  - (i) not making Reasonable adjustments
  - (ii) harassment

(The last of those breaches was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law).

*Where Any Proven Breaches Fundamental Breaches?*



- (ll) Not all breaches of contract are fundamental ones, do any of the breaches proven by the Claimant amount to fundamental ones?

*Did the Claimant Resign in Response to those Breaches?*

- (mm) Did the Claimant resign because of the breach? The Respondent contends the Claimant resigned in order to avoid a disciplinary hearing.

*Did the Claimant Delay too Long in Resigning?*

- (nn) Did the Claimant delay before resigning and affirm the contract?

*Was any Constructive Dismissal Wrongful?*

- (oo) If the Claimant was dismissed they will necessarily have been wrongfully dismissed because they resigned without notice.

*Was any Constructive Dismissal Necessarily Unfair?*

- (pp) In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?

### Particular Points

#### *Litigant in person*

20. It was explained to the Claimant that whilst the Tribunal would do our best to ensure that he was on an equal footing with the Respondent who was represented, and whilst we were able to ask questions of the witnesses in the case, we were not able to conduct cross examination of those witnesses on his behalf; we also explained that part of cross examination was to “put the case” to the witness, and what this entailed.
21. We discussed how the hearing would be conducted. It was recognised that the Claimant might require some latitude in terms of time for cross-examination, when giving evidence and generally in the presentation of his case, bearing in mind that he is a litigant in person. Whilst, time estimates for cross-examination were discussed, but time limits were not imposed. Through discussions it was anticipated that the Claimant would be cross-examined for two hours, and the Respondent’s two witnesses for around an hour each. Potentially, and with a fair wind, evidence could have been completed by the end of the first day. However, this timetable was not complied with and evidence was not finished until around 3:30 on Tuesday, 22<sup>nd</sup> December. The tribunal decided that it would hear submissions on the morning of 23<sup>rd</sup> December and reserve its judgment, using the remainder of 23<sup>rd</sup> to deliberate.

22. Both the Claimant and one of the respondent's witnesses have dyslexia. Before evidence was given it was agreed that if either witness wanted more time when in giving an answer that would be accommodated.
23. The Tribunal formed the conclusion that the Claimant had performed admirably well in conducting his case.
24. Bearing in mind his status as a litigant in person, and in order for us to adjudicate the matter, we took the claimant to the list of issues which Employment Judge Gray had identified with the assistance of the parties' representatives and encouraged the Claimant to focus on this as a roadmap for our determinations. Understandably the claimant departed from this on various occasions and the tribunal had to ask, on a number of occasions what the relevance of a line of questioning was and how it related to the issues. The tribunal had to explain to the claimant what its powers were and how it was not able to conduct an overarching enquiry into the practices in a workplace, rather it only had the power to determine the issues that were placed before it, in the claim form as clarified in the list of issues at the Preliminary Hearing. Despite this guidance often the Claimant had to be asked to explain which of the issues a line of questioning was aimed at, and his closing submissions, despite encouragement from the Tribunal, did not follow the list of issues identified as being relevant.

*Waiver of Privilege*

25. At one point in his evidence the Claimant embarked on an explanation of the advice he received from Ms Arthur who was instructed by him. The tribunal stopped the claimant from proceeding with this answer so it had the opportunity to explain to him the concept of legal privilege. Counsel for the Respondent informed us that Ms Arthur's advice was covered by privilege as she was a Legal Executive. It was explained to the Claimant that if he decided to waive privilege the Respondent and tribunal could ask questions on any aspect of the advice he had received. After this warning, the Claimant was content to waive privilege; but despite doing so questioning by the Respondent on the advice he had received was restrained and limited.

DOCUMENTS AND EVIDENCE

Witness Evidence

26. We heard evidence from the Claimant as his only witness. We also heard evidence from the following witnesses on behalf of the Respondent: Zoe Martindale a director of the Respondent and who was engaged in the WhatsApp message with the service user that commenced the disciplinary investigation into the Claimant; Sharon Baker-Pearson who is the Respondent's Chief of Human Resources.
27. The Respondent's witnesses gave evidence by way of written witness statements that were read by the tribunal in advance of them giving oral evidence, owing to the Claimant's failure to provide a statement, the Claimant's ET1 and impact statement were treated as being his witness statement. All witnesses were cross-examined.

#### Bundle

28. To assist us in determining the matter we had an agreed bundle consisting of some 283 pages prepared by the Respondent. As outlined above a further 26 pages were added during the course of the hearing. Our attention was taken to very few of these documents. We refer to this bundle by reference to the relevant page number. The bundle falls into the usual trap of containing vast amounts of irrelevant material including the entire staff handbook, much of which simply had no bearing on this matter; the draft list of issues prepared, one presumes, in advance of the Case Management Hearing and which was fundamentally reworked at that hearing and bears little similarity to that agreed at that hearing. Further parts of the bundle were not in chronological order.

#### SUBMISSIONS

##### Respondent

29. In helpful submissions, the Respondent worked through the list of issues identified above by Employment Judge Gray and as refined during the hearing. Ms Smith challenged the claimant's credibility as a witness and suggested that the Claimant was not a reliable witness owing to his confusion on matters and his uncertainty on others. She contrasted this with the evidence of the Respondent's witnesses who were candid and admitted matters that, perhaps, were not in their best interests too. Ms. Smith also commented on the latitude that had been given to the Claimant by the Tribunal in making his case.

Claimant

30. The claimant made oral submissions which we have considered with care but do not rehearse here in full. In essence the Claimant reminded us that a previous employer (Portsmouth City Council) had provided him with assistive technology and support but no such support was provided by the Respondent. He sought to highlight points he said were unfair in the process he was put through, namely the length of time it took for the disciplinary hearing to be convened as contrasted to that Ms Martindale whose suspension for making a comment to a service user which may have been sexual, was only for a period of weeks.

## MATERIAL FACTS

### General Points

31. From the evidence and submissions, we made the following finding of fact. We make our findings after considering all of the evidence before us, taking into account relevant documents where they exist, the accounts given by the Claimant, Ms Martindale and Ms Baker-Pearson in evidence, both in their respective statements and in oral testimony. Where it has been necessary to resolve disputes about what happened we have done so on the balance of probabilities taking into account our assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including the documentary evidence. In this decision we do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed.
32. Matters on which we make no finding, or do not make a finding to the same level of detail as the evidence presented to us, in accordance with the overriding objective reflect the extent to which we consider that the particular matter assisted us in determining the identified issues. Rather, we have set out our principle findings of fact on the evidence before us that we consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked us to decide.

### The Respondent

33. The Respondent is a drug and alcohol rehabilitation service. It is a charity. It is residential and its service users sleep on the premises. Its service users are vulnerable individuals.

34. The Claimant was an employee of the Respondent. There were a number of different dates recorded in the papers as to what date the Claimant commenced his employment. So far as it is relevant we find the claimant's account to be correct, he commenced employment in 2016 [4 §5.1] after an interview process. It is accepted that during this interview, he raised that he had dyslexia with his interviewer Clare Davison.
35. The Claimant worked night shifts and was provided with a room in which to sleep during those shifts. The employees of the Respondent would provide their own bedding when on shift. It is accepted the Claimant at the relevant point had leopard print bedding.
36. The Claimant passed his probationary period without incident.
37. During his employment he had various 1-2-1 supervision meetings with his managers: Grant Henderson [227], Mark Parker [228, 230, 234], Helen Phillips [232, 238, 240], Gail Cecil [236], Claire Davison [244, 246, 248] and one supervision report with an indecipherable signature [242]. In none of these is any issue or any allegation of discrimination recorded. Whilst it is clear that further training was highlighted in these documents we are told, and accept, that this was normal for supervision reports to highlight these and not unique to the Claimant, and was training to assist the claimant further exceed the standards required by the Respondent as opposed to training to remedy shortfalls in standards.
38. There were no recorded lapses in standards by the Claimant. We are told that the matters recorded in the supervision notes are not out of the ordinary and did not cause the Respondent any concerns.
39. It was agreed the claimant was not put through any capability procedure during his employment owing to any perceived failure to meet the standards of the Respondent as the Respondent's position is that he met the required standards.
40. The Respondent initially ran a shift system that gave its staff little notice of their upcoming shifts. In November 2018 this changed to a four week shift pattern which resulted in the staff knowing their contracted shifts in advance for that four

week period. The Claimant agreed to this contractual change. The contracted hours were the minimum employees would be required to work (apart from when they took holiday), and if available extra shifts could be offered.

41. The Respondent's employees got paid by the shift, so they got paid when they worked. They are not salaried.
42. The Claimant took holiday in November 2018 [120, 221] and so did not complete his contracted number shifts for that four-week period of time. He did not get paid for the shifts he did not complete. In evidence the Claimant accepted that if this was correct then he had been paid appropriately and was unable to point us to any other period he says that he worked but did not get paid for the shifts. His Schedule of Loss [69, 70] failed to identify with any particularity the dates of any payment he says he should have received but did not. The Respondent told us, and we accept, the Claimant received the correct pay for the shifts he had worked, indeed he had received an over payment and so steps were being taken to recoup that overpayment.
43. In May 2019 the Claimant had an incident with his line manager Mr Grant Henderson. Mr Henderson emailed Zoe Martindale, the Respondent's Chief of Treatment, and Sharon Baker-Pearson detailing his side of the incident [129], and the Claimant emailed Ms Baker-Pearson asking for her to call him. A discussion was had between Ms Baker Pearson and the Claimant and the Claimant was offered the grievance form but did not accept it [200].
44. At 0158 on 23<sup>rd</sup> May 2019 an ex-service user of the respondent ("AB") sent a text message to Ms Martindale raising allegations of sexual misconduct and behaviour against the Claimant which had occurred during her time with the Respondent, some two-years earlier. AB gave an account of sexual acts she said took place between her and the Claimant [136].
45. On 29<sup>th</sup> May 2019, the Respondent suspended the Claimant [142, 249]. In evidence, the Claimant accepted that this was an appropriate step to take when

faced with these allegations. The letter of suspension set out, in general terms, the allegation and arranged an investigatory meeting to be held.

46. After being suspended the claimant informed the Respondent that he wished to, in Ms Baker-Pearson's words, "re-ignite" his complaint about Mr Henderson. And so a grievance was presented.
47. The Respondent conducted an investigation into the allegations made by AB which involved contacting AB [270] and other ex-service users who AB identified as being able to give relevant information (CD and EF). CD in her statement said that AB had told her of the Claimant's actions; and EF in his statement said that the Claimant had entered AB's room on three occasions and performed a sex act on her [269]
48. It was noted by the Claimant that AB's account changed the nature of the allegations against the Claimant to an account set out in the email from Ms Martindale to Ms Baker-Person [257]. The last of these allegation contains reference to leopard print bedding which the service user says she saw in the room in which the Claimant was sleeping during night shifts.
49. In evidence the Claimant confirmed that, during his suspension, he received pay equivalent to his contracted hours.
50. During the Claimant's suspension an issue arose over his pay, and it transpired the Claimant had been overpaid. It had been arranged that a small deduction would be made each month so that the overpayment would be recouped over a period of time [143]. This was explained to the Claimant in an email of 19<sup>th</sup> June 2019 [154]. No claim has been presented about this recoupment plan.
51. The investigatory meeting took place on 5<sup>th</sup> June 2019 [250]. During this meeting the Claimant could give no account for how AB would know of his particular bedspread.

52. On 10<sup>th</sup> June 2019 the Claimant received a letter inviting him to attend a disciplinary hearing [150]. The letter set out the date and time of the meeting, the allegations and the possible outcome. It also reminded the claimant of his right to be accompanied. Originally this was to be held on the 13<sup>th</sup> June 2019. The Claimant asked for further time so he could discuss it with “his legal team” [255]. The disciplinary hearing was moved to the 20<sup>th</sup> June 2019 [255] and then rearranged until the week of 8<sup>th</sup> July 2019 [153] as Ms Baker-Person was on leave and to give the Respondents time to reply to the Claimant’s Subject Access Requests.
53. The Claimant’s grievance was progressed and was rejected and on 13<sup>th</sup> June 2019 the Claimant requested an extended period to appeal this decision. He was granted that extension [151]. We heard no evidence over the grievance meeting, and it does not appear to us to be relevant to the issues we are asked to determine.
54. The Claimant instructed lawyers. He instructed Caragh Arthur from Arthur Employment. The Claimant asked, and was granted, permission for Ms Arthur to attend the disciplinary hearing with him [165].
55. The disciplinary hearing took place on the 18<sup>th</sup> July 2019 [162] with the Claimant and Ms Arthur present. After this meeting we are told that Ms Arthur advised the Claimant to resign. Initially we are told the Claimant refused to follow this advice but that when Ms Arthur asked the claimant if he “wanted to go back and work with the people after what had happened”, the Claimant got thinking on this and decided to resign.
56. On 20<sup>th</sup> July 2019 the Claimant resigned. He did so by way of letter drafted by Ms Arthur which he forwarded on to the Respondent [159]. At this point the Claimant had been suspended for just under two-months. We reject the contention that it was “over three-months” as the Claimant alleged.
57. At some point, the Claimant instructed other lawyers who drafted his ET1 and attended the Case Management hearing on his behalf.



THE LAW

Statute

58. Section 95(1)(c) of the Employment Rights Act 1996 states there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct. This form of dismissal is commonly referred to as "constructive dismissal". The burden is on the Claimant to prove that there has been a dismissal.

59. In the leading case on this subject, Western Excavating (ECC) Ltd v Sharp [1978] ICR 221, the Court of Appeal ruled that the employer's conduct which gives rise to a constructive dismissal must involve repudiatory breach of contract. As Lord Denning MR put it:

*"if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

60. In order for the employee to be able to claim constructive dismissal four conditions must be met:

- (a) there were breaches of contract;
- (b) these were fundamental breaches: this is an objective test, and not every breach of contract will justify the employee resigning and claiming he has been constructively dismissed. The Employment Judge/Tribunal must decide objectively whether there is a repudiatory breach by considering its impact on the contractual relationship between the parties; and
- (c) the Claimant resigned in response to those breaches; and
- (d) the Claimant did not delay in resigning.

61. So far as is relevant the Equality Act 2020 states:

**15 Discrimination arising from disability**

- (1) A person (A) discriminates against a disabled person (B) if—
  - (a) A treats B unfavourably because of something arising in consequence of B's disability, and
  - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

**20 Duty to make adjustments**

- (1) Where this Act imposes a duty to make reasonable adjustments on 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's 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 a 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.
- ...
- (11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.
- ...
- (13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column

**21 Failure to comply with duty**

- (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
- (2) A person discriminates against a disabled person if A fails to comply with that duty in relation to that person.
- (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

**26 Harassment.**

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

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

62. To establish discrimination arising from disability a Claimant must produce evidence consistent with her being treated unfavourably because of “something” arising “in consequence of her disability”: a double causation test (see *Basildon & Thurrock NHS Trust v Weerasinghe* [2015] EAT 0397). If he does so, the Respondent may still be able to defeat the claim by showing that the reason for the relevant treatment was wholly unconnected with disability or that it was not known that the Claimant was disabled at the time or by establishing the defence of “justification”.

#### CONCLUSIONS ON THE ISSUES

##### If so, was the Claimant disabled?

63. Having heard the evidence from the claimant and read his impact statement we are satisfied that he was disabled within the meaning of the Equality Act 2010, on his account the impairment had a substantial impact on his normal day-to-day activities.

##### The Respondent’s state of knowledge

64. The Respondent accepts the Claimant had dyslexia and that they knew the Claimant had dyslexia. They dispute however that “they knew this amounted to a disability”. This statement is somewhat unclear as whether the impairment amounts to a disability is an assessment for the tribunal as a matter of law and not the Respondent (*Gallup v Newport city council* [2013] EWCA Civ 1583). If by this they mean they did not know that the claimant’s dyslexia presented him with a substantial disadvantage in some aspect of his role, then that is a question we will address when considering the claim of a failure to make reasonable adjustments.

##### Discrimination arising from Disability: s15

65. The Claimant has identified three matters he says arose as a result of his disability:  
Did the following arise as a consequence of the claimant’s disability:

- (a) the need for Reasonable adjustments  
Clearly where a requirement for reasonable adjustments arises that is something that arises from a disabled workers' disability.
- (b) the Claimant's inability to carry out his role to the standard required by the Respondent  
On the evidence we have heard and seen, we are not satisfied that the Claimant was unable to carry out his role to the standard required by the Respondent. It is agreed that the Claimant was never put through any form of performance management or that any additional training was required for him. Such recommendations for training, we are told, were standard and were suggested to enable the claimant to exceed the standards required and develop further, as opposed to being remedial to rectify any shortfall.
- (c) treated the Claimant unfavourably by accusing him of sexual misconduct, which triggered anxiety, a symptom arising from dyslexia, which forced his resignation  
This allegation was included in June 2020 after consensual amendment to the claim form. The amendment was made at a time when the Claimant was represented, and the Respondent's had the same representatives they have had throughout these proceedings. It appears to us to be misconceived as a claim as the "thing arising", namely the accusation of sexual misconduct, does not arise from the Claimant's disability. It therefore fails.

66. Did the Respondent treat the Claimant unfavourably by:

- (a) challenging the Claimant in his supervision sessions  
We find that it did not, we have heard no evidence and seen nothing in the bundle to indicate any sort of "challenge" by the Respondent's employees to the Claimant. We were not taken to any no complaint made against any manager arising out of these sessions and nothing was put to the Respondent's witnesses of any "challenge".
- (b) forcing him to resign  
We find the Respondent did not "force" the Claimant to resign. He did so after taking advice from his advisor, which focused on whether the Claimant could "return to work" with the Respondent. Clearly the Claimant disputed the allegations raised against him by AB. The Claimant was proceeding through a disciplinary process as part of those allegations. These were serious allegations and ones the Claimant accepts needed to be investigated and addressed. The Claimant accepts his suspension was appropriate in these circumstances. The Claimant was not, on the evidence we have seen, forced to resign.

67. Did the Respondent treat the Claimant unfavorably in any of those ways because of the need for reasonable adjustments. In light of our findings that there was no unfavorable treatment and it is not necessary for us to determine this issue.

However if we were required to make that finding we would have found that either of the acts of unfavourable treatment did not occur because of the Claimant's needs for reasonable adjustments.

68. Can the Respondent show, on the balance of probabilities, that the treatment was a proportionate means of achieving a legitimate aim? This was only advanced in relation to the allegation of challenging the Claimant in his supervision sessions. The Respondent contended that any conduct in those meetings was the Respondent seeking to ensure the requirements of the role the Claimant was employed to do. If called on to answer this question we would have agreed, the Respondent would require its staff to meet certain standards set by the CQC for the standard of its care.

*Section 20 and 21: Reasonable Adjustment*

69. Did the Respondent not know, or could the Respondent not be reasonably expected to know that the Claimant had a disability? The Respondent accepts it knew the Claimant had dyslexia from his interview prior to starting with them.
70. Did the Respondent apply the following provision, criteria and/or practice ('the PCP') generally, namely requiring standards of written work? The Respondent accepts it had certain standards as the CQC required it to meet standards.
71. Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that he was unable to achieve that standard? We find as a fact that the Claimant was not placed at any disadvantage, substantial or otherwise, by his disability, indeed the Claimant was unable to show any disadvantage having been applied to him (e.g. an inability to complete forms, or capability procedures etc).
72. Did the Respondent not know, or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage set out above? The Respondent does not accept the Claimant's performance fell below the standard they required. We find that the Respondent did not know, and could not reasonably be expected to know of any substantial disadvantage being caused to the Claimant by the required standards of written work: the Claimant was undertaking his role to the standards required by the Respondent; there is no

contemporaneous mention by the Claimant of him struggling or finding the written work he undertook a problem, or of his dyslexia impacting his role at all, and the documents we have seen in the bundle that do originate from the Claimant certainly do not give any reasonable grounds for the Respondent to believe the Claimant was suffering any disadvantage because of his dyslexia.

73. Did the Respondent take such steps to avoid the disadvantage? The burden of proof does not lie on the Claimant; however, it is helpful to know the adjustments asserted as reasonably required. The Claimant identified the provision of voice recording such as dragon dictate. On a strict and literal interpretation we would have found that this was not a reasonable adjustment as the provision of such a program would not have resolved the Claimant's problems he said he was having with the MARS sheets, as these were handwritten forms. However, the tribunal is to consider adjustments it thought would be reasonable and, had it been called on to do so at this stage of the process may have considered the provision of a computerised MARS form or the form on appropriate coloured paper may have assisted the claimant. However, this is hypothetical in light of our findings above.
74. The Respondent accepts it did not provide this adjustment, would it have been reasonable for the Respondent to have taken those steps at any relevant time? We have addressed this in relation to the MARS sheets above. Further consideration of this point is hypothetical in light of our findings above.
75. What is the time limit point: when does the Claimant say time started to run, does the Respondent agree? The Claimant contends the obligation to make reasonable adjustments arose 2—3 weeks prior to him starting in employment with the Respondent. As such his claim would have potentially been considerably out of time. We are not required to make a finding on this matter.

*Section 26: Harassment related to Disability*

76. Did the Respondent engage in conduct of:

- (a) criticizing performance during supervision sessions 2018-2019

As we have set out above the Claimant has not shown that he was criticised during these supervision meetings

- (b) not engaging with solutions that would assist claimant

This allegation appears to us to reflect the reasonable adjustments claim above. We do not consider the Respondent failed to engage with solutions that would assist the claimant

(c) pursuing false allegations of sexual misconduct

As stated above the Claimant disputed the allegations made by AB, but also accepted the Respondent had to investigate these complaints. Presuming the wording of this claim is unfortunately emotive, and that it should have been “proceeding with the investigation into the allegations of AB”, it is common ground that the Respondent were proceeding with the investigation into the allegation.

77. If so, was the conduct unwanted? Clearly the Claimant did not wish for this investigation to proceed.
78. If so, was the conduct related to the Claimant’s disability? We reject that this allegation was related to the Claimant’s disability. There is simply no evidence before us to make that link, the complaint does not have any overt connection to disability, as, say a crass and unpleasant joke about disabled persons would do; nor are we provided with any material from which we could begin to infer a connection between disability and the Respondent’s conduct of an investigation. Those advising the Claimant did not formulate this as a direct discrimination claim despite attending the Preliminary Hearing and subsequently amending the claim.
79. The Claimant’s claim here must, therefore, fail.

Unauthorised Deduction from Wages [70]

80. Was the Claimant lawfully entitled to be paid:

(a) £300 a month from November 2018 until April 2019

The Claimant was paid for the shifts he worked. The Respondent was able to show how the Claimant’s pay was calculated generally [143] as well as at the point when the Claimant left its employment [169]. He was paid for the shifts that he undertook [226]. He was not entitled to any other payment or amount.

(b) June to August 2019 when suspended

The Respondent accepts the Claimant was entitled to receive his contractual pay during his suspension

81. If so, has the Respondent made a deduction? The Respondent contends the Claimant received all pay he was entitled to. The Claimant, in his Schedule of Loss or in evidence was unable to point to any particular shortfall in the pay he had

received [275-277]. Further he accepted that he had received his contractual pay during his suspension. The Respondent has not, therefore, been shown to have made any deduction to the Claimant's pay. The Claimant's claim here fails.

Constructive Dismissal

82. The Claimant claims that the Respondent acted in breach of contract in respect of the implied term of mutual trust and confidence i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the Claimant?. The breach(es) was / were as follows:

- (a) not making Reasonable adjustments: we have set out our findings on this point above, the Respondent did not have an obligation to make reasonable adjustment
- (b) harassment: again we have made our findings on this claim above. We note that in the Case Management Order [40 §7.1.2] The allegation is made that the Respondent knew the allegation of AB to be false. We reject this allegation as, based on what we have heard, and whilst the delay in the allegation being raised may cause the Claimant to ask the Respondent to question the allegations, we are not satisfied the Respondent knew the allegation to be false, indeed it conducted an investigation into these allegations and the Claimant resigned before the disciplinary outcome could be determined.

Were the Claimant's claims presented in time?

83. The issue of the tribunal's jurisdiction to hear the claims has been raised. We would have found the tribunal did not have jurisdiction to hear the unlawful deduction from wages claim as, even if it was not reasonably practicable for him to have presented his complaint in time, the Claimant was aware of what he claimed was a short fall in August [197] yet did not present a claim until over a month later in circumstances where he had had access to legal advice during his employment, and this advisor was well aware of the wages issue.

84. Equally the Reasonable adjustments claim appears to us to have been presented out of time, as does the harassment claims. We were not told that there was any prejudice to the Respondent for the late presentation of these claims and would



have considered it just and equitable to have extended time to present the claims in the circumstances of this matter

Conclusions on the Complaints

85. The Claimant's claims are dismissed.

Employment Judge Salter

Dated: 19<sup>th</sup> January 2021

Judgment sent to parties: 20 January 2021

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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