EMPLOYMENT TRIBUNALS

Claimant: Miss A Parole

Respondent: Leila's Fine Foods Ltd

Heard at: Manchester (by CVP) **On:** 14-17 December 2020

Before: Employment Judge McDonald
Mrs S A Humphreys
Dr B Tirohl

REPRESENTATION:

Claimant: In person (assisted by her partner, Mr Horton)
Respondent: Ms Kight (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's claim that the respondent failed to make reasonable adjustments as required by ss.20 and 21 of the Equality Act 2010 is dismissed on withdrawal of that complaint by the claimant.

2. The claimant's complaint that the respondent sending her an email on 10 July 2019 checking her bank details was an act of disability related harassment in breach of section 26 of the Equality Act 2010 is dismissed on withdrawal of that complaint by the claimant.

3. The claimant's complaint that she was constructively dismissed and that that dismissal was unfair fails and is dismissed.

4. The claimant's complaint that the respondent breached section 15 of the Equality Act 2010 by treating her unfavourably because of something arising in consequence of her disability fails and is dismissed.

5. The claimant's complaint that the respondent harassed her related to her disability in breach of section 26 of the Equality Act 2010 fails and is dismissed.

REASONS

Introduction

1. The claimant worked from 11 November 2009 as a factory worker for the respondent, which is a family run business specialising in ready prepared meals for both the food service and retail markets. The claimant suffered an injury at work in May 2015 and did not return to work after that. She resigned on 25 January 2019. She says that resignation was a constructive dismissal and that the dismissal was unfair. The respondent accepts that at the relevant time the claimant was a disabled person for the purposes of the Equality Act 2010 ("the 2010 Act"). The claimant says that the respondent discriminated against her and harassed her in breach of the 2010 Act.

2. The case was listed for hearing over 4 days. On the morning of the first day of the hearing we dealt with a number of preliminary issues which are summarised in the section headed Preliminary Matters" below. To give the parties time to resolve the outstanding preliminary matters, we took the rest of the first day to read the documents in the case. We heard evidence on the second and third days of the hearing. We heard oral submissions on the afternoon of the third day and gave judgment on the fourth day. The claimant requested these reasons in writing. The Employment Judge explained to the parties that he was on a period of extended leave over Christmas and New Year which might lead to a delay in the reasons being provided.

3. The hearing was a hybrid hearing. The claimant, Mr Horton, Ms Kight, Employment Judge McDonald and Dr Tirohl attended the hearing in person. Mrs Humphreys and the respondent's witnesses attended by CVP videolink.

Preliminary Matters

4. We dealt with the following preliminary matters before we started hearing the evidence in the case.

a) Reasonable adjustments for the claimant and for Mr Horton. The claimant is a disabled person. Mr Horton, who was assisting the claimant, has 25% brain damage and diabetes. This causes a disadvantage for him in terms of the speed of taking in and processing information. On the morning of the first day of the hearing we discussed what reasonable adjustments it would be appropriate to make. In her Case Management Order dated 11 February 2020, Employment Judge Ross identified the need for the claimant to have regular breaks during the hearing. We confirmed that if at any point the claimant or Mr Horton wished to have a break in addition to the usual breaks which the Tribunal would be taking they should make the Employment Judge aware of the fact. The Tribunal would usually grant such a break but also had to ensure there was a fair trial. If there was a break at a point where it might disadvantage the respondent (for example during cross examination of a

witness) then Ms Kight could make representations as to why having a break at that point rather than shortly afterwards would be unfair for the respondent.

b) The List of Issues – Ms Kight had prepared a draft List of Issues. Mr Horton had seen it for the first time that morning. The Employment Judge explained that the List of Issues is central to the Tribunal running an effective hearing of the claim. It sets out the decisions the Tribunal needs to make. Mr Horton indicated that neither he nor the claimant was in a position to agree the List of Issues on the first morning. He estimated that he would need an hour at least in order to be able to take in the List of Issues and decide whether it was agreed or not. At the start of the second day of the hearing the parties confirmed that they had agreed the List of Issues.

c) The bundle of documents for the hearing ("the Bundle"). The respondent had prepared a final Tribunal hearing bundle consisting of 503 pages. On the first morning of the hearing the claimant said that there were now three different versions of the bundle and that the "final" bundle did not necessarily include all the relevant documents. Ms Kight explained the claimant was referring to draft versions of the bundle. We directed that by 9.30am on the second day of the hearing the claimant prepare a document saying which documents included in the final Tribunal hearing bundle she objected to or, alternatively, which documents which she said were in earlier versions of the bundle should be included in the final version but were not. As a result of that process, at the start of the second day we added further documents to the Bundle. They were a draft letter from the respondent to the claimant dated 27 June 2019 which both parties accepted had never been sent to the claimant (pages 169A-D); pages missing from the claimant's impact statement in the Bundle which we added as pages 203A, 203B and 206A; and the claimant's versions of the transcripts of two meetings which were added at pages 504 onwards (see para 4(e) below).

d) The respondent's witness statements. The claimant said that the respondent had been late in sending their witness statements. Ms Kight confirmed that the respondent had not been able to finalise their witness statements by 20 October as required by Employment Judge Ross's Case Management Order. Ms Kight said that was because the claimant had not agreed the bundle for the Tribunal hearing before that date. The respondent had applied to the Tribunal for an extension of time for exchange of witness statements until 9 November 2020. The claimant had sent her statement to the respondent on the original witness statement exchange date of 20 October 2020. The respondent's representative had sealed the claimant's witness statement and not looked at it until they had sent her the respondent's witness statements. The Employment Judge explained that while the dates for complying with orders made by the Tribunal were important, the Tribunal needed to understand whether there was any unfairness to the claimant in the respondents having sent their witness statements late. The claimant confirmed that she had received the witness statements on 11 November 2020. However, she had then sent them back to the respondent with "out of time" written on them. She told us that this meant she did not have copies of the respondent's witness statements. She said that as a result she had not been in a position to prepare any cross examination of those witnesses. There were copies of the witness statements in the Tribunal

bundle and the Tribunal explained that what the claimant needed to do was to go through those witness statements to identify what questions she needed to ask each of the witnesses in cross examination. The claimant and Mr Horton had an opportunity to read the respondent's witness statements and prepare cross examination after we adjourned the hearing on the morning of the first day. We are satisfied that the claimant was not disadvantaged as a result and that it was fair to proceed with the hearing.

e) Audio recordings of two meetings. The claimant had recorded the meetings which took place on 28 June 2017 and 19 June 2019. The respondent had prepared transcripts of those audio recordings which were in the Bundle but the claimant said that she did not agree that they were accurate. Ms Kight confirmed that the respondent had no objection to the Tribunal listening to the audio recordings and we did so in chambers before starting to hear the evidence. Having done so, we are satisfied that there were places where the respondent's transcripts had left words out or mis-transcribed what was said. We are satisfied that was because the recordings were not always clear rather than any attempt to mislead the Tribunal by the respondent. The claimant's transcripts were more accurate. We added it to the Bundle.

f) The need for an interpreter for the claimant. During the discussion of the preliminary matters on the first morning of the hearing there were times when Mr Horton needed to re-phrase what was said by the Employment Judge so the claimant could understand it. The Employment Judge asked the claimant whether it would be fairer for her to have an interpreter to enable her to understand what was happening at the Tribunal. The claimant said that she did not think so. She explained that she is Latvian but she has not spoken Latvian regularly for some time and therefore she thought that using a Latvian interpreter would not help her. We agreed that the claimant should make a particular point of telling us if she was having difficulty understanding questions that were being put to her. We also made it clear to Mr Horton that when the claimant had given her evidence he would have an opportunity to re-examine her, i.e. to ask her questions about the evidence she had given in cross examination if he thought it needed clarifying in any way because she had misunderstood what was being asked. During the hearing the Tribunal did sometimes have to re-phrase what was being said so the claimant could understand it. Mr Horton also sometimes helped us by putting what was said in language which the claimant could understand. We also took time during the hearing to double check that we had understood what the claimant was telling the Tribunal, both in her evidence and in submission. We are satisfied that the claimant, with Mr Horton's help, was able to play a full part in the proceedings.

5. Given that the number of witnesses we were concerned that we might not be able to hear the case and give judgment within the four days the hearing was supposed to take. To reduce the risk of the case not being finished within the four days we told the parties that the hearing would deal with liability only i.e. whether the case won or lost. If the claimant won, we would set a date for another hearing to decide what compensation she should get.

The Issues

6. At the start of the second day of the hearing the parties confirmed that they had agreed a List of Issues. We reviewed that List and made some amendments. The differences between the List of Issues agreed by the parties and the final List of Issues (which we've included in the Annex to this judgment) are as follows:

a) For the claimant's complaint that the respondent treated her unfavourably because of something arising from her disability (s.15 of the 2010 Act) the claimant confirmed that the unfavourable treatment was her constructive dismissal and that the "something" arising from her disability was her long-term sickness absence.

b) A respondent has a defence to a claim under s.15 of the 2010 Act if it can show that any unfavourable treatment was a proportionate means of achieving a legitimate aim. Ms Kight confirmed that the legitimate aim relied on by the respondent was "the need to have a workforce which is capable of fulfilling the operational requirements of the business and to manage sickness absence".

7. During her cross examination evidence, the claimant withdrew the allegation that Rose Archer sending her an email on 10 July 2019 checking her bank details was an act of disability related harassment. Because that complaint was withdrawn, we have dismissed it in our Judgment.

8. In her letter dated 5 August 2020 and her Schedule of Loss to the respondent and the Tribunal (pages 195-202) the claimant withdrew her complaint that the respondent had failed to make reasonable adjustments in breach of sections 20 and 21 of the Equality Act 2010. It did not appear that a Judgment dismissing that complaint on withdrawal was ever issued so we have included that in our Judgment.

Findings of Fact

9. We heard evidence from the claimant and from Mr Horton. Both had supplied written witness statements and were cross examined by Ms Kight for the respondent and answered questions from the Tribunal. For the respondent we heard evidence from Howard Reed, from Marta Banaszczyk and from Neil Solanki. Each had provided a written witness statement and was cross examined by the claimant and answered questions from the Tribunal. We also had a written statement from Normal Powdrill. Mr Powdrill did not attend to give evidence and although we read his statement we must give it less weight than those of the other witnesses because he did not attend the Tribunal to be cross examined. All the respondent's witnesses had roles in its HR function at various times. We have set out our findings about who did what at para 25 below.

10. In the event, there was not a great deal of factual dispute in this case; instead it turned on the interpretation of what happened and the motivations for the respondent's actions.

<u>Credibility of witnesses</u>

11. We accept that, as Ms Kight submitted for the respondent, the claimant was a genuine witness in the sense that she believed the truth of what she told the

Tribunal. However, we did not always find her evidence reliable. We accept that that may in part be because at times during the events her case is about she was on heavy medication. Mr Horton's evidence was, as Ms Kight submitted, at times contradictory. He said that he had a very vivid photographic memory but at other times in his oral evidence accepted that he could not remember things that had happened. We did not find his evidence wholly reliable.

12. For the respondent, we found Marta Banaszczyk to be straightforward witness and found her evidence to be entirely reliable. We found Mr Solanki's evidence reliable. We found Mr Reed's evidence to be less reliable, particularly when it came to whether or not the claimant had been given a copy of the employee handbook when she transferred from the agency for which she worked to become a permanent employee of the respondent in 2011.

What happened up to Autumn 2016

13. The claimant suffered an injury following a slip at work on 5 May 2015. She did not return to work for the respondent. There are fit notes covering her entire period of absence and the respondent concedes that she was a disabled person for the whole of the relevant period. That disability is both physical (in terms of neck and back pain) and mental (in terms of depression). In essence, the claimant's case was that she had been left in limbo by the company for four years while she was off sick.

14. We find that following her accident there was a delay before the respondent took proactive action in relation to the claimant. The claimant (with the help of her partner) did attend at work to drop of sick notes and confirmed that on those occasions she would speak to Howard Reed or Nail Solanki who would ask how she was. However, we find that the first proactive action taken by the respondent in relation to the claimant was a letter telling her that it was proposing to obtain an Occupational Health report to help decide her current fitness for work, her likely return to work date, whether there were any modifications or adjustments which it could consider in the workplace to alleviate her condition and to identify any duties she could do or duties she would be able to do (p.93). The letter was undated. When asked why there was no date on the letter Mr Reed, who had signed the letter, said that it was a simple "schoolboy error".

15. That letter referred to an Occupational Health appointment which the claimant was to attend on 14 April at 13:15 at the respondent's premises. On 14 April 2016, PAM Occupational Health Solutions wrote to the respondent to report that the claimant had failed to attend the scheduled appointment and so PAM was "unable to ascertain any information or recommendations regarding the fitness to work at this stage" (p.94). Taking that letter into account we find the undated letter at p.93 was sent at some point before 14 April 2016.

16. The claimant's evidence was that she had not received that letter. Ms Banaszczyk's notes of the meeting on 7 December 2016 (pp.102-103) do not suggest there was any reference at that meeting to a previous Occupational Health Appointment. Mr Reed's notes (pp.98-101) refer to a previous appointment only in brackets. We found Ms Banaszczyk's more reliable. On balance we prefer the claimant's evidence that she did not receive the letter at p.93 even if it was sent.

17. For the purposes of the issues we are deciding, the key point is that by Autumn 2016, more than a year after her absence began, the respondent did not have medical evidence about the claimant's condition and possible return to work other than what was in the sick notes she was supplying.

November-December 2016 – the first meeting

18. On 23 November 2016 Mr Reed, who was then in charge of HR matters at the respondent, wrote to the claimant to arrange a home visit. The letter said the purpose of the visit was to:

> "(1) To advise you of developments within the business since the commencement of your absence;
>
> (2) To determine more detail on your prognosis and attempt to determine your likely recovery period;
>
> (3) To determine if the company can support you in any way to aid your recovery with a view to return to work within the foreseeable future."

19. The meeting took place at the claimant's home on 7 December 2016 (pages 98-101). The claimant and Mr Horton were present and Mr Reed was in attendance with Ms Banaszczyk.

20. Mr Reed gave evidence about the reason for the delay in instigating that first meeting. The invitation was not sent to the claimant until some 18 months after the claimant had her accident at work and started her sickness leave. Mr Reed and Mr Solanki gave evidence about what a good worker the claimant was and how well-liked she was. Mr Reed's evidence was that he and his colleagues were keen for her to return to work and they took the view that the best way to do that was to allow her time to recover.

21. The claimant had sued the respondent for damages for the accident she suffered at work. We accept Mr Solanki's evidence that those proceedings were started a few weeks after the accident (so by June 2015 at the latest) and were not resolved until 2018. Mr Reed's evidence was that the personal injury claim was not a factor in the delay before the first meeting with the claimant took place. Given the respondent's small senior management team at the time we find it plausible that Mr Reed did know about the claim (even if he was not dealing with it directly) and that this led to the respondent taking a cautious approach to contacting the claimant in the months following the accident.

22. We find Ms Banaszczyk's notes at pages 102-103 of the bundle to be most reliable record of what happened at the meeting given the reliability of her oral evidence. Mr Reed asked for an update on the claimant's health and what the company could do to help her return. It is clear from those notes (and from Mr Reed's notes of the meeting at pages 98-101) that most of the talking for the claimant was done by Mr Horton. The claimant confirmed in evidence that during the home visits she was on strong medication and therefore not in a position to take a full part in meetings. Mr Horton told Mr Reed that there was not much that could be done. He said that he did not know what reasonable adjustments in the workplace

could be implemented in order to help the claimant to return to work. Mr Reed asked whether the claimant would be willing to see the respondent's Occupational Health adviser so they could make relevant recommendations. Mr Horton's response was that he did not think that would be a good idea. He thought it would be wiser for the claimant to continue to see NHS doctors.

23. At the end of the meeting Mr Reed said that the respondent would get back in touch with the claimant at the end of January 2017 when the claimant expected to have more information from the specialist about her condition. The claimant told the Tribunal that at that meeting she had asked Mr Reed to provide her with a copy of her employment contract and he had agreed to do so within two weeks. Neither Mr Reed's notes nor Ms Banaszczyk's meeting notes refer to that. On balance, we find that the claimant did not ask for a copy of her contract at that meeting.

January 2017 to the second welfare meeting on 28 June 2017

24. Mr Reed did not get back in touch with the claimant in January 2017 as agreed at the end of the November 2016 meeting. Mr Reed's explanation for the delay was that from around 2016 he was no longer involved in dealing with HR matters.

25. Although Mr Solanki in his witness statement (paragraph 5) said that Mr Reed had dealt with the claimant's absence up until the point when Mr Reed left the respondent in August 2018, we find that is not accurate. Ms Banaszczyk gave clear evidence about the changes in the HR department and we find that Mr Reed had stopped being involved in HR matters from the end of 2016/the start of 2017. Mr Solanki was then HR manager for the first few months of 2017. Around April 2017 a new HR Manager, Emma Hall, was appointed. Sue Shuttleworth was appointed in May 2017 as an HR adviser reporting to Ms Hall. During this whole period there were also two HR advisers, namely Ms Banaszczyk and Wioleta Borukalo.

26. We find that the changes in the HR personnel of the respondent led to a disjointed approach to dealing with the claimant's long-term sickness absence.

27. The claimant continued to file sick notes confirming that she was unfit for work. On 2 June 2017 Sue Shuttleworth wrote to the claimant (p.109). That letter said that the claimant's sick note had expired and asked her to send the updated sick note as soon as possible. The letter said that if the claimant had sent her updated sick note in the last couple of days she should disregard that letter. It gave a contact number for Sue Shuttleworth if the claimant had any questions about that letter. That letter was sent to the claimant's previous address in Southport. A similar letter was sent to the claimant, again to her Southport address, on 19 June 2018. The claimant said that the respondent had deliberately sent the letters to the wrong address. When we asked the claimant why the respondent would have done that she said that the respondent wanted her to fail to comply with the sickness procedure. She said the respondent had therefore written to the wrong address so she would not get the letters and would not do what those letters asked her to do by providing sick notes. That, she said, would then mean that the respondent could dismiss her for misconduct. She said that the respondent would want to do that rather than dismiss her for her sickness absence because the respondent was worried about dismissing her for anything to do with her disabilities.

28. Ms Banaszczyk and Mr Solanki both gave evidence that the respondent has different HR systems and that the most likely explanation was that the claimant's address had not been updated on the electronic system used to generate the sick pay chasing letters. The Southport address was a previous address of the claimant rather than a completely random address. We find the respondent's explanation for the letters being sent to the wrong address more plausible than the claimant's explanation. We accept that the letters were sent in error to the wrong address, which was an old address for the claimant which the respondent still had on its electronic HR system. We have taken into account the fact that other letters were sent to the correct address. However, we accept Ms Banaszczyk's evidence that they were more likely to be letters written relying on the hard copy paper file relating to the claimant than on the electronic system. We also note that the letter sent on 2 June 2017 was sent by Ms Shuttleworth before she had met the claimant and was the first letter that she had written to the claimant. She would, it seems to us, at that point have no way of knowing that the Southport address was incorrect. The claimant had in fact filed a sick note from 25 June 2017 to 30 September 2017 (p.108). Although it was not clear when that was sent to the respondent, it does seem to us the most likely explanation is that the respondent's system had generated a sick note reminder letter before they had received that fit note from the claimant. The respondent did not take any action to follow up the letter dated 2 June 2017.

29. On 21 June 2017 Sue Shuttleworth wrote to the claimant inviting her to a wellbeing meeting. That letter makes it clear that the reason for the meeting is her absence from work since 5 May 2015 and that the purpose of it is to discuss the reason for her absence, the prognosis and likely return to work date, any assistance the company can offer and to consider seeking a medical opinion from her GP or consultant (pp.110-111).

<u>The meeting on 28 June 2017 and follow up</u>

30. The meeting with Sue Shuttleworth took place at the claimant's home on 28 June 2017. Jordan McLellan also attended as notetaker for Ms Shuttleworth. As already mentioned there were parts of the respondent's transcript where the transcriber had had difficulty in understanding what was being said. That was partly because on a number of occasions those at the meeting talked over each other Where there was any doubt we cross-checked the respondent's and claimant's transcripts. We are satisfied, however, that then it comes to any matters in dispute the transcripts read together were accurate enough to form the basis for our findings.

31. The claimant accepted that Sue Shuttleworth throughout that meeting was calm and polite. She said however that Sue Shuttleworth used that meeting as a fishing expedition in relation to the claimant's ongoing personal injury claim. We find that Ms Shuttleworth did ask the claimant about her accident (p.444) but there is no evidence to support the allegation that she was doing so as a fishing expedition. We find that she was asking about the accident so she could understand the cause of the claimant's long-term sickness absence. That seems to us consistent with her only having been in post for some four weeks and having limited background knowledge of the claimant's situation because of the lack of continuity in the respondent's HR department.

32. At the meeting Ms Shuttleworth did express surprise that the claimant was still employed by the company given how long she had been off sick (p.449). She explained to the claimant that because the claimant had been off for two years and there was no indication of when she was coming back to work the respondent may have to consider whether to terminate the contract (pp.449-450). She explained to the claimant that that was why it was important to obtain medical evidence from her GP about the prospects for her likely return. It is the claimant's case that at that meeting Sue Shuttleworth told the claimant that she would have to leave her job and re-apply for it. We find that does not accurately reflect what Ms Shuttleworth said at the meeting. She explained that if the claimant was not going to be fit for a number of months (or the GP told the respondent that she was not going to be fit) then the respondent would be within their rights to terminate the contract, and that they had been quite reasonable in keeping her employed for the past two years.

33. It was in response to Mr Horton's question as to what the claimant would then do (i.e. if the claimant's contract was terminated) that Ms Shuttleworth said that as the claimant would then no longer be an employee of the company, she could apply for another job with the respondent if she became fit enough to work again. We are satisfied that Ms Shuttleworth was explaining what would happen if the respondent terminated the claimant's contract rather than telling her that she would have to leave her job and re-apply for it (pp.449-450).

34. The claimant also alleged that Ms Shuttleworth caused her confusion and gave mixed messages by asking the claimant for consent to write to her GP. We find that Ms Shuttleworth explained at the meeting that in deciding whether to terminate the contract the respondent would need information from the claimant's GP to understand whether she was able to or likely to return to work in the future. We find that at the meeting the claimant was unwilling to provide Ms Shuttleworth with information about her medication and made it clear that she was not happy to be seen by an Occupational Health doctor. The claimant also said that she could not talk about any medical matters at all "because it's confidential" (p.445). We find it probable that the claimant at that point was cautious about disclosing information to the respondent because her personal injury claim was still ongoing. Whatever the reason, it is clear that she did not cooperate with Ms Shuttleworth in terms of providing her with information about her medical condition and made it clear to Ms Shuttleworth that she was not willing to provide medical evidence or cooperate with the respondent to enable it to obtain a GP's report.

35. We find that Mr Horton did most of the talking on behalf of the claimant at that meeting. We find that the tone of the meeting throughout was polite and calm. We find that Ms Shuttleworth more than once made it clear that if the contract was terminated it was not be because the claimant had done anything wrong (pp.454 and 459).

36. There was no evidence from the audio or the transcript that Ms Shuttleworth at any point got angry or hostile in her behaviour towards the claimant. We do find that towards the end of the meeting Mr Horton did say that they would take the matter to a Tribunal and "take the owner of [the respondent] personally to task". We find that that was because he was genuinely concerned about the impact of the claimant's employment being terminated on her, and of the financial impact of what

had happened on him and the claimant. Mr Horton also asked Ms Shuttleworth whether she would need to give evidence if the matter went to an Industrial Tribunal (p.457). He challenged Ms Shuttleworth when she said that she would not need to give evidence saying that "the Judge would want witness statements, you cannot say you're not a witness because you'd be part of the system that put it together".

37. At the end of the meeting Ms Shuttleworth made it clear that the next step was likely to be a meeting to consider whether the respondent should terminate the claimant's contract. Ms Shuttleworth made it clear that she was not making a decision on that at the meeting (page 461) but that termination of employment was a possibility. Ms Shuttleworth made it clear that she would go back and speak to her HR Manager (who at the time would have been Emma Hall) before making the decision.

38. On 21 July 2017 Ms Shuttleworth sent the claimant a letter which summarised their discussion at the meeting on 28 June 2017. We find that letter is an accurate summary of the discussion. It recorded that the claimant had refused to be referred to Occupational Health and that she was not willing to provide consent for her GP to provide a report. Ms Shuttleworth enclosed a copy of the claimant's contract of employment (pp. 54-59) and pointed out that clause 14 (p.56) states that "there is an expectation for staff to provide consent to the company to write to your doctor". The letter said that if the claimant did not provide the consent that would render her in breach of contract and might lead to disciplinary action. The letter made it clear that "the company does not wish to take this action" and "would appreciate your cooperation with this".

39. The claimant had suggested that she had asked for a copy of the contract from Ms Shuttleworth but the transcript does not suggest that is the case. We find that it was Ms Shuttleworth who decided to send her the contract because she wanted to refer to clause 14.

40. We did hear evidence from Mr Reed suggesting that the claimant had been given her contract and the respondent's employee handbook when she and her agency colleagues transferred to the respondent's employment in 2011. We prefer the claimant's evidence that she did not have a copy of her contract until it was sent to her by Sue Shuttleworth. We find she clearly did sign her contract of employment on 27 March 2012 (p.59) but find that she did not have a copy herself until she received it from Sue Shuttleworth.

41. On 25 July 2017 the claimant sent the GP consent form to Ms Shuttleworth. Although that consent form agreed to a medical report being sent to the respondent, the claimant had crossed out those parts of the form giving consent for sharing medical records (p.114).

<u>September 2017 to May 2019 – respondent requesting a GP report</u>

42. On 27 September 2017 Ms Shuttleworth wrote to the GP to ask for a medical report. That letter gave the background to the request and set out eight questions. In summary, those questions asked about the claimant's ability to return to work including: what job role she would be able to undertake if she return, any health and

safety restrictions that might apply to her and if the company was able to offer any assistance in facilitating an early return to work (pp.117-118).

43. On 2 January 2018 Ms Shuttleworth wrote to the claimant with an update. She explained that she had requested a medical report from her GP but that had not been received so she had sent a chasing letter that same day. Ms Shuttleworth explained that once the medical information had been obtained she would be in touch with the claimant to arrange a further review meeting (page 120).

44. On 2 February 2018 Ms Shuttleworth again chased the GP and asked them to look into the matter as a matter of urgency (p.122).

45. On 16 February 2018 the GP sent the medical report to the respondent. That was received on 23 February 2018 (p.125). The "report" takes the form of one paragraph which does not answer the questions set out by Ms Shuttleworth in her letter of request. We agree with the characterisation of that report as "useless". It did not tell the respondent anything about the prognosis for the claimant's return to work nor any reasonable adjustments which the company could make in order to facilitate a return to work.

46. There was in the Bundle another version of the GP's report (page 236). That was dated 15 December 2017. It was slightly longer than the version sent to the respondent. The version sent to the respondent left out details of the medication which the claimant was taking, a statement that she was suffering from depression and taking medication for that, and that she was being seen by a mental health team and was currently waiting for counselling. The version sent to the respondent also omitted a reference to her having some features of fibromyalgia syndrome.

47. The claimant suggested that the respondent had somehow colluded with the GP to remove those sentences from the report it received on 23 February 2018. We do not find that plausible. What is more plausible is that it was the claimant who asked for the GP to remove the sentences from that 15 December 2017 report. The claimant had asked to see the report before it was sent to the respondent, and we think the more likely explanation is that she asked for those sentences referring to her medication and mental health issues to be removed. That would be consistent with her approach to requests about information for her medication in the meetings with the respondent. It also seems to us to be implausible that the respondent would ask for a GP to remove information from a medical report and implausible that a GP would agree to do that at an employer's request.

48. In those circumstances we accept that the only medical report that the respondent had from the claimant's GP was the one at p.125. Because it did not answer any of the questions that Ms Shuttleworth had asked, she then sent a further email to the GP repeating those eight questions and asking for answers to them. That was done by a letter and covering email on 6 March 2018 (pp. 127-129). The letter in the bundle at page 128 is dated 6 March 2017 but it clearly is mis-dated because it refers to a report received in February 2018.

49. On 7 March 2018 the GP acknowledged receipt of the request for further information. However, the GP's Practice Secretary replied to say that, "the original report that was sent to you on 20 February 2018 is all the information that she is able

to provide". That seems to us to corroborate our finding that the claimant had not been willing to provide consent for any more information being provided to the respondent.

50. Because the GP report did not provide enough information, Ms Shuttleworth wrote to the claimant on 3 May 2018 asking for her consent to refer her to an independent Occupational Health team. This is what the claimant's GP had suggested in the email of 7 March 2018 (p.130).

51. On 15 May 2018 the claimant wrote a handwritten letter to Ms Shuttleworth which she received on 17 May 2018. She agreed "to see another Occupational Health company paid for by the factory management", but she also said, "I regard my records as private and sensitive". In the letter she asked to be consulted about the name of the Occupational Health provider and also said that she had not signed the consent form because "I feel you can take some measure to organise my therapy inclusive of paying for that" (p.135).

52. On 26 September 2018 the claimant received a text message saying that her appointment with PAM Occupational Health had been booked for 3 October 2018 (pp.149-150). The claimant cancelled that appointment. Her explanation for this in cross examination evidence was that when she rang and explained that she was off sick she was told that she did not need to attend that Occupational Health meeting. Her diary entry (p.151) says, "cancelled because then told if I'm on sick note don't need attend". We considered whether the claimant's explanation of why she cancelled that meeting was credible. We do think from her letter to Sue Shuttleworth giving consent that she did not really understand what the Occupational Health adviser was. On the other hand, she clearly knew from the correspondence with Sue Shuttleworth that the claimant was setting up an appointment for her. There was no suggestion from the claimant that she tried to get in touch with Ms Shuttleworth to check whether this was the appointment that she was meant to attend. We do think that the claimant was confused about the process but find that the ultimate result was that she did not attend the Occupational Health adviser appointment. That meant the respondent still had no information about when she might be in a position to return to work or what adjustments they could make to facilitate that.

<u>May 2019 to the third welfare meeting on 19 June 2019</u>

53. Sue Shuttleworth left the respondent and there was no further proactive action taken by the respondent in relation to the claimant until May 2019. On that date, Norman Powdrill wrote to the claimant to invite her to a sickness absence wellbeing meeting on 5 June. The letter (p.157) made clear the meeting would be informal and would be to discuss the reasons for absence, prognosis and a likely return to work date, and any assistance the company could offer to facilitate a return to work.

54. On 3 June 2019 the claimant telephoned the respondent and spoke to Ms Banaszczyk and asked to rearrange the meeting to the 12 June 2019 at the claimant's home. She also asked that documentation about the pension scheme be brought to that meeting (p.158). There was then a further conversation between the claimant and Mr Powdrill on 12 June which led to the meeting eventually taking place on 19 June 2019.

55. The meeting on 19 June 2019 was attended by the claimant and Mr Horton, Mr Powdrill and by Ms Banaszczyk. We had the transcripts of the meeting, the audio and also the summary notes prepared by Mr Powdrill (p.162) and his follow-up letter (p.161). It is clear that meeting was a difficult meeting. Ms Banaszczyk's evidence, which we found to be reliable, was that the claimant took very little part in the meeting and seemed to her to be "absent". It seems to us that is consistent with the evidence the claimant herself gave about the effect that the medication she was on had on her. Mr Horton's evidence was that the claimant was distressed, which is why he did most of the talking. He also said that that was why he became quite stern in the meeting, and in particular why he asked Mr Powdrill to stop "harassing and bullying" the claimant.

56. We find that the meeting ended on a fairly hostile note. There was an allegation that Mr Horton had sworn at Mr Powdrill or vice versa. That happened outside the house and was not in any way directed at the claimant and we do not find it directly relevant to the issues we need to decide. What we do find is that the meeting started off on good terms with Mr Horton and Mr Powdrill discussing Gibraltar. Mr Powdrill then explained that he was seeking an update, including getting information from the claimant about her prognosis and likely return to work. He explained that he also wanted to discuss any assistance the respondent could offer if she wanted to return to work and to consider getting a medical opinion from the GP or from Occupational Health. Mr Horton's response was that the claimant did not want him to ask those questions because they had already been asked two years previously by Sue Shuttleworth. We find that Mr Horton started to become agitated by the fact that he felt the claimant had already provided the information Mr Powdrill was asking for to Sue Shuttleworth. Mr Horton made it clear that because the claimant was not well he would speak on her behalf, and when Mr Powdrill did attempt to speak direct to the claimant and asked her about her disability she responded to say that he should ask her no more questions because it was "private and confidence". Mr Horton also said it was private.

57. Mr Horton referred to Sue Shuttleworth having talked about terminating the claimant's contract and said that she had "point blank refused the reasonable adjustments and said basically[the claimant] being disabled would have to leave her job and then reapply". We find that is not an accurate summary of what Ms Shuttleworth said at that previous meeting. We have recorded above our findings about what she did say.

58. Mr Powdrill agreed that there had been a delay and then tried to ask the claimant whether she wanted to return to work. Mr Horton interjected to say that the claimant "don't need to answer that question". It is at that point that Mr Horton asked Mr Powdrill in a fairly challenging way, "I want to ask a question, have you finished harassing and bullying [the claimant], yes or no?". We find that at that point Mr Powdrill had done nothing other than try to obtain information from the claimant about her prognosis for returning to work.

59. At the meeting Mr Horton referred to disability being a protected characteristic under the 2010 Act and told Mr Powdrill that the claimant had already sent documentation to record what her disability was. It seems to us that the only documentation sent by the claimant to that date would be the fit notes and the GP

report from February 2018. Mr Powdrill again sought to clarify what the claimant's disability is and the claimant refuses to say, “because it is made in your files”.

60. Mr Horton suggested that the claimant had “done everything she possibly could” (to provide information) which again we find does not accurately reflect what had happened to that point. Mr Horton then suggested to Mr Powdrill that Sue Shuttleworth had made a “kind of mistake” i.e. in letting the claimant still remain employed despite the length of her absence. Mr Powdrill’s response was to say that Sue Shuttleworth had not made a mistake but what should have happened was that one year after the claimant had left work due to sickness her employment should have been terminated. Instead there had been an oversight which meant the claimant was still an employee three years down the line. He said that they needed to try and resolve the situation for the claimant's benefit and for the respondent’s benefit. Mr Powdrill then tried to explain what information the respondent had about the matter and that the Occupational Health report (which must be a reference to the GP report from February 2018) did not “really tell us anything as an employer”. He said the respondent did not know what adjustments could be put in place because it did not know what the claimant's medical condition was and what her prognosis was.

61. Mr Powdrill then sought to explain that employment can be terminated for potentially fair reasons such as some other substantial reasons, misconduct or capability. It seems to us that Mr Horton took the view that Mr Powdrill was refusing to accept that the claimant was disabled, and he suggested that the respondent was seeking to dismiss her on the grounds of being disabled. Mr Powdrill responded by saying that dismissal would be on the grounds of capability. Mr Horton in turn responded to say that this was not a case of capability.

62. Towards the end of the meeting Mr Powdrill said that all he was seeking to do was to ask reasonable questions. Mr Horton responded by saying that the claimant could not answer the questions and was getting stressed out. The meeting ended on an acrimonious note with Mr Horton saying “we’ll see you at Tribunal” and “I think there should be more for damages”.

63. Our view of that meeting is that Mr Powdrill was seeking to ask for reasonable information which an HR professional would need in order to decide what steps to take in relation to an employee on long-term sickness absence. We find that the claimant was not willing to cooperate in terms of providing information about her medical condition. We also find that the claimant and Mr Horton were both frustrated because they thought they had already gone through this process with Sue Shuttleworth two years earlier and could not understand why Mr Powdrill was asking what they thought were the same questions all over again. From Mr Powdrill’s point of view, we can see that he had only limited information about the meeting with Sue Shuttleworth and very limited medical information because of the claimant's previous unwillingness to provide more medical information or undergo Occupational Health assessment. We also accept Mr Horton’s evidence that during this meeting he was very concerned about the state in which the claimant was in. Although he described his attitude in the meeting as “stern”, we would say that it went further than that and was challenging and verging on hostile. We understand that if that was the case the motivation was likely to be his feeling that he needed to protect the claimant. The end result, however, was that that meeting did not assist the respondent in any way

in terms of understanding what the claimant's prognosis was or what steps it might be able to take (if any) to enable her to return to work.

July 2019 onwards. Resignation, grievance and other matters

64. In terms of what happened next, there was added to the bundle at page 169A a draft letter dated 27 June 2019 which was headed "Invite to a capability meeting". We did not hear from Mr Powdrill, but Mr Solanki's evidence was that Mr Powdrill had started drafting that letter to send to the claimant but did not complete doing so or send it because Mr Solanki told him that the claimant had sent in her resignation. The claimant quite correctly pointed out to us that parts of the letter from page 169B onwards obviously did not refer to her. They refer to another employee who had clearly been off sick for a much shorter period of time and has a sister called "Tracy". We accept Mr Solanki's evidence that the most likely explanation for the form of that draft is that Mr Solanki had cut and pasted text from another letter to use as the basis for a letter to the claimant but had not finished it because the claimant's resignation letter was received. Although the letter was never sent to the claimant we find that Mr Powdrill had intended the next step to be inviting the claimant to a capability hearing.

65. On 25 June 2019 the claimant resigned by a letter received by the respondent on 27 June 2019 (pp.163-169). That letter said the claimant had been left with no option but to quit her job with immediate effect because "you are clearly constructively terminating my contract of employment". It referred to the fact the claimant had taken advice from ACAS. We find that the claimant had also taken advice from ACAS before the meeting with Mr Powdrill and she had been told that she could either attend that meeting or not depending on what she wanted to do. We find that ACAS advised her to put in a grievance. This is what the claimant then did, setting out a mixture of questions and statements over 59 paragraphs in her letter of resignation.

66. On 10 July 2019 Mr Solanki wrote to the claimant to say that he would be dealing with her grievance. He invited her to a grievance meeting on 16 July 2019. He said that the purpose of the meeting would be for the claimant to provide him with full details of her grievance so that he could gather and consider all the relevant facts (p.170). The claimant responded on 11 July 2019 to say that not only was hers a case of constructive dismissal but also disability discrimination. She said that she "quit my job due to a lack of trust" and that she would not be attending any meeting and that the respondent "can't force me to do so". She suggested the respondent was continuing to harass and bully her and said that it must reply to her grievance in writing. At the end of that letter she requested any outstanding holiday pay be sent to her in full and that her P45 be sent to her (p.171).

67. The claimant's P45 was sent to the claimant. It was dated 10 July 2019 and gave the date of termination of employment as 4 July 2019 (p.192). The claimant put it to Mr Solanki in cross examination that the leaving date was incorrect and that sending the P45 on the same date as he sent his letter in response to her grievance was an act of harassment. Mr Solanki's evidence, which we accept, is that the date on the P45 reflected the date of the last payroll run which had included payments to the claimant. There was accrued holiday pay which she had owing to her and the

P45 had to be sent after that payment was made. The claimant accepted in cross examination evidence that sending out a P45 was standard practice for an employer when an employee's employment came to an end.

68. On 29 July 2019 Mr Solanki wrote to the claimant to say that he was still in the process of investigating the points in her grievance letter. He expected to conclude the investigation by the end of that week and provide a decision not later than early the following week. He invited her to contact him if she had any questions in the meantime (p.172).

69. On 6 August 2019 Mr Solanki sent the claimant the grievance outcome. He did not uphold the grievance. In summary, the claimant's grievance was that the respondent had delayed in dealing with her long-term sickness, had refused to accept that she was disabled and had tried to engineer her dismissal based on capability. She said that the respondent's HR had committed breaches of its own process and had discriminated against her because of her disability.

70. Mr Solanki's conclusion was that the respondent had maintained contact with the claimant throughout and had attempted to understand the reasons for her absence and what it could do to aid her return to work. He found that the respondent had attempted to seek accurate and up-to-date medical information and a medical report but the GP report that was received (in February 2018) provided limited information and only gave a description of her medical condition. He noted that the respondent had attempted to obtain a medical opinion about the claimant's condition, including by way of an Occupational Health report, but the claimant had refused to engage in that process. He noted the claimant had also refused to engage in the process at wellbeing meetings and that she had been informed that the respondent would arrange a capability hearing. His conclusion was that "the evidence demonstrated the company has carried out a fair, caring and sympathetic process in line with our policies and procedures and the ACAS Code of Practice in order to assist your return to work". The letter advised the claimant of her right to appeal.

71. The claimant wrote to Mr Solanki in response on 10 August 2019. The claimant acknowledged receipt of the grievance outcome and said that she would not be appealing. She however said she totally disagreed with what was stated in the grievance outcome letter (pp.175-176).

72. On 22 November 2019 the claimant received an email from Neil Solanki (pp. 178-179). That email informed her that because of banking issues some of the respondent's employees had not been able to access funds in their account. It advised any employees affected to contact their Bank immediately. The claimant suggested that this was an email sent only to her and was an act of harassment. Mr Solanki's evidence was that the email was sent to all employees and that it was sent to the claimant in error because she was still on a mailing list on the respondent's HR systems. He said that another ex-employee had also received that email. We find Mr Solanki's explanation more plausible and prefer his evidence on this point. We find that the email was sent to the claimant in error and was an email sent to all employees about problems with banking matters.

73. One further matter on which the claimant relied as an act of harassment was the sending of an email on 19 June 2018 to her old Southport address telling her that

she was absent without leave (pp.137-138). This was an email from Wioleta Borukalo telling the claimant that because the claimant was absent from work and had not provided a sickness absence letter she was required to contact Ms Borukalo by 25 June 2018 to discuss her intentions with regard to employment at the respondent. We find that letter was a standard letter and we find that it had been generated in error. As with the identical letter sent on 2 June 2017, we do not accept the claimant's submission that it had deliberately been sent to the wrong address so that she would then not respond to it so that the respondent could then dismiss her. Following the logic of that through, had the respondent tried to bring disciplinary proceedings based on that letter the claimant could easily have shown that any dismissal based on it was unfair because the letter went to the wrong address. We find it implausible that the respondent would have adopted this approach and accept Mr Solanki's evidence that this was simply a case of the email being sent to the wrong address on the email system.

Relevant Law

Unfair Dismissal

74. S.94 Employment Rights Act 1996 ("ERA") gives an employee a right not to be unfairly dismissed by his employer. To qualify for that right an employee usually needs two years' continuous service at the time they are dismissed, which the claimant had in this case.

75. In determining whether a dismissal is unfair, it is for the employer to show that the reason (or if more than one the principal reason) for dismissal is one of the potentially fair reasons set out in s.98(2) of ERA or some other substantial reason justifying dismissal.

76. In **Polkey v A E Dayton Services Ltd [1988] 1 AC 344, [1988] ICR 142** Lord Bridge said that "If an employer has failed to take the appropriate procedural steps in any particular case, the one question the [employment] tribunal is not permitted to ask in applying the test of reasonableness... is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under section [98(4)] may be satisfied."

Remedy for unfair dismissal

77. S.118(1) ERA says that:

> **"Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—**
>
> **(a) a basic award (calculated in accordance with sections 119 to 122 and 126, and**

(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126).”

78. The basic award is calculated based on a week’s pay, length of service and the age of the claimant.

79. The compensatory award is "such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal" (s.123(1) ERA).

80. A just and equitable reduction can be made to the compensatory award where the unfairly dismissed employee could have been dismissed at a later date or if a proper procedure had been followed (the so-called **Polkey** reduction named after the House of Lords decision in **Polkey v AE Dayton Services Ltd** referred to above).

81. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA).

82. Where the tribunal considers that any conduct of the claimant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly (s122(2) ERA).

Constructive dismissal

83. Section 95(1)(c) provides that “an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct”. This is known as “constructive dismissal”. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment entitling the employee to resign: **Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761**.

84. The claimant said that the incidents detailed in the List of Issues either separately or together amounted to a breach of the implied term of trust and confidence. The existence of that implied term of mutual trust and confidence was confirmed by the House of Lords in **Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL**. It confirmed that the obligation on each party is that it will not, 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 employer and employee.

85. The question is whether, objectively, there has been a breach of the implied term. For the implied term to be breached the conduct must be such as, objectively, is calculated or likely to undermine the duty of trust and confidence and must be conduct for which there is, objectively, no reasonable and proper cause (**Bradbury v BBC [2015] EWHC 1368 (Ch)** and **Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121**).

86. If the employer is found to have been guilty of such conduct, that is something which goes to the root of the contract and amounts to a repudiatory breach, entitling the employee to resign and claim constructive dismissal (**Morrow v Safeway Stores [2002] I.R.L.R. 9**).

87. A breach of that implied term can result from the cumulative conduct of the employer rather that one repudiatory act. In many cases there can be a final act or "last straw" before the resignation.

88. In **Omilaju v Waltham Forest LBC (No.2) [2005] I.R.L.R. 35** the Court of Appeal explained that the final act (the so called "last straw") in a series of actions which cumulatively entitled an employee to repudiate his contract and claim constructive dismissal need not be a breach of contract and need not be unreasonable or blameworthy. However, the act complained of had to be more than very trivial and had to be capable of contributing, however slightly, to a breach of the implied term of mutual trust and confidence. It would be rare that reasonable and justifiable conduct would be capable of contributing to that breach

89. The Court of Appeal clarified the correct approach for the Tribunal to take in such cases in **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1, para 55:**

"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

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

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the **Malik** term? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the employee's right to resign even if there was a previous affirmation).

(5) Did the employee resign in response (or partly in response) to that breach?"

90. If the "last straw" conduct of the employer which tips the employee into resigning could not contribute to a breach of the implied duty of trust and confidence, the claim of constructively dismissed must fail if (a) there was no prior conduct by the employer amounting to a fundamental breach; or (b) there was, but it was affirmed. But if, in such a case, there was prior conduct amounting to a breach which was not affirmed, and which also materially contributed to the decision to resign, the claim of constructive dismissal will succeed (**Williams v Governing Body of Alderman Davies Church in Wales Primary School [2020] I.R.L.R. 589**).

91. Where the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract and thereby lost the right to claim constructive dismissal. In the words of Lord Denning MR in **Western Excavating (ECC) Ltd v Sharp1978 ICR 221, CA**, the employee "must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged".

92. The leading case on the doctrine of affirmation as it applies where an employer is in fundamental breach of an employee's contract is **W E Cox Toner (International) Ltd v Crook [1981] IRLR 443**. Mr Justice Browne-Wilkinson in his judgment said so far as it material:

"13. … Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation: **Allen v Robles [1969] 1 WLR 1193**. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation …"

93. In **Mari v Reuters Ltd EAT0539/13** the EAT concluded that there is no absolute rule that in deciding whether an employee has affirmed a contract after breach acceptance of sick pay is always neutral; rather, the significance to be afforded to the acceptance of sick pay will depend on the circumstances. At one extreme, an employee may be so seriously ill that it would be unjust and unrealistic to hold that acceptance of sick pay contributed to affirmation. At the other, an employee may continue to claim and accept sick pay when better and when seeking to exercise other contractual rights.

Discrimination arising from disability ("a s.15 claim")

94. Section 15 of the 2010 Act states:

> **(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.**

95. There is a need to identify two separate causative steps in order for a s.15 claim to be made out (**Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT**):

- the disability had the consequence of 'something';
- the claimant was treated unfavourably because of that 'something'.

96. A s.15 claim will only succeed if the employer (or other person against whom the allegation is made) is unable to show that the unfavourable treatment to which the claimant has been subjected is objectively justified as a proportionate means of achieving a legitimate aim.

97. The Equality and Human Rights Commission's Code of Practice on Employment ("the Code"). sets out guidance on objective justification. In summary, the aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. Although business needs and economic efficiency may be legitimate aims, the Code states that an employer simply trying to reduce costs cannot expect to satisfy the test (see para 4.29). As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see para 4.31).

Harassment

98. The definition of harassment appears in section 26 of the 2010 Act which so far as material reads as follows:

> **"(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 sub-section (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."**

99. In this judgment we refer to the purpose and effect defined in s.26(1)(b) as the "harassing purpose" and "harassing effect".

100. Tribunals must not cheapen the significance of the words used in the definition of harassment - they are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment **(Grant v HM Land Registry & Anor [2011] EWCA Civ 769)**.

The Burden of Proof in cases under the 2010 Act

101. The 2010 Act provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> **"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

102. This means that it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the 2010 Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

Discussion and Conclusions

103. We now set out our conclusions, applying the relevant law to our findings of fact. We have used the List of Issues as a framework to set out our conclusions.

<u>The Unfair dismissal complaint</u>

(1) Did the respondent do any of the things set out at 1(a), (b) and (c) which the claimant relies on as entitling to resign on 25 June 2019.

104. Incidents 1(a) are said to have happened at the meeting on 28 June 2017. The first (1(a)(i)) is that Sue Shuttleworth used the meeting as a fishing expedition in relation to the claimant's ongoing claim. We have found that Sue Shuttleworth did not do this.

105. Allegation 1(a)(ii) is of Sue Shuttleworth referring to the possibility of the claimant being dismissed because the claimant had been absent from work for two years, and doing so several times, including explaining it was likely the claimant would be invited to a meeting to terminate her contract. We find that Sue Shuttleworth did do this as a matter of fact.

106. Allegation 1(a)(ii) is of Sue Shuttleworth telling the claimant she would have to leave her job and re-apply for it. As we have recorded above, we do not find that is an accurate characterisation of what happened. We find that Ms Shuttleworth was asked what would happen if the claimant's employment was terminated, and she responded by saying that if she was well enough the claimant would then need to re-apply for a job with the respondent.

107. Allegation 1(a)(iv) is that Sue Shuttleworth caused the claimant confusion or gave her mixed messages by asking her for consent to write to her GP. We do accept that the claimant may have been confused by what Sue Shuttleworth told her and Mr Horton at the meeting. However we do not find that that is what Ms Shuttleworth intended to do. As we have recorded in our findings of fact, we find that she was trying to explain what the next steps would be and trying to explain why it was important that the respondent have that information from the claimant's GP in order to decide what next steps the respondent could and should take.

108. Incidents 1(b) are the alleged acts of harassment at 9(a)-(g) of the List of Issues. Of those, the only incident which happened before the claimant resigned is set out at paragraph 9(b) of the List of Issues. That is the allegation of Sue Shuttleworth "forcing the claimant to see Occupational Health in September 2018 when the claimant did not need to do so". We found that Sue Shuttleworth did ask the claimant for consent to be referred to Occupational Health in September 2018. We do not find that she forced her to do so. Even if it is correct to regard it as Sue Shuttleworth "forcing" the claimant to do so because of the threat that she would otherwise be in breach of her employment contract, we do not accept that Sue Shuttleworth "did not need to" refer to the claimant to Occupational Health. As our findings of fact make clear, at that point the respondent still had no information about the prognosis for the claimant's recovery therefore a referral to Occupational Health was entirely appropriate.

109. Incident 1(c) is that on 19 June 2018 the respondent "deliberately and carelessly sent to C a letter regarding her absence to the wrong address". We found that a letter was sent to the wrong address but that this was the result of a genuine error on the respondent's part rather than a deliberate act.

110. Those are the only incidents which are pleaded in the List of Issues as being relied on as breaches of contract leading to the claimant being able to resign and claim constructive dismissal.

(2) Did any of the incidents in 1 above either individually or cumulatively amount to a fundamental breach of the implied duty of trust and confidence, i.e. were they done without proper cause and in a manner which was calculated or likely to destroy or seriously damage trust and confidence?

111. We remind ourselves that the test we need to apply is whether viewed objectively the respondent's conduct was such as to be calculated or likely to destroy or seriously damage trust and confidence and was done without proper cause. When it comes to all the incidents we have discussed above apart from the letter of 19 June 2018 we find that the respondent had a proper cause for taking those steps. We also find that they were not calculated or likely to destroy or seriously damage trust and confidence. We do accept that the claimant being told by Ms Shuttleworth that the next step was possibly her employment being terminated must have been upsetting, however we think that Ms Shuttleworth was simply trying to explain what those next steps were and to be clear with the claimant about the possible outcomes. We find that she acted in accordance with what we would expect an HR Manager or officer in those circumstances to do. We cannot see that it amounts to a

breach of the implied term of trust and confidence. That is particularly so because the claimant's own evidence was that that meeting with Sue Shuttleworth was polite and calm.

112. When it comes to the letter dated 19 June 2018 we found this was sent in error. It was certainly not a step "calculated" to destroy the employment relationship nor do we accept it was likely to do so. We find it was not sufficient in itself to amount to a breach of the implied term.

113. In fairness to the claimant because she is a litigant in person we have also considered whether what happened at the meeting with Norman Powdrill, a week or so before she resigned, could be a breach of the implied term. As we recorded above, the meeting was a difficult one and did not end on a good note. Again we remind ourselves that the test we are applying is whether objectively the respondent's behaviour was calculated or likely to destroy or seriously damage trust and confidence. We have acknowledged the frustration that Mr Horton and the claimant felt at that meeting because they were (they felt) being put in the position of starting all over again. However, we accept that what Mr Powdrill was seeking to do was to assess the situation as it was in June 2019, which would not have been the same as when the claimant and Mr Horton met with Sue Shuttleworth in 2017. Although that meeting was clearly not as cordial as the previous meeting we do not find that it, either by itself or with any previous incidents, breached the implied duty of trust and confidence.

114. What that means is that we find that the claimant did not have grounds for resigning and claiming constructive dismissal. In law that means she was not dismissed and her unfair dismissal claim fails. Because of that we do not need to deal with the other questions relating to unfair dismissal at issues number 3, 4 and 5 of the List of Issues, and therefore we do not do so.

<u>The complaint of s.15 disability discrimination</u>

115. When it comes to the claim of discrimination, the first is a complaint of discrimination arising from disability in breach of s.15 of the 2010 Act. Questions 7 and 8 in the List of Issues relate to this complaint. In this case the alleged unfavourable treatment is the claimant's constructive dismissal. We have decided that there was no dismissal and so this claim fails.

116. For the sake of completeness, however, we do record that had there been a dismissal we would have found that the respondent was in its actions pursuing the legitimate aim of needing to have a workforce which was capable of fulfilling the requirements of the business and of managing sickness absence. We have found, as we have recorded above, that despite the delays in between the meetings, the actions by the HR advisers and officers at each meeting were reasonable and appropriate.

<u>Disability-related harassment</u>

117. The final complaint was of disability related harassment in breach of s.26 of the 2010 Act. Question 9 in the List of Issues is whether the respondent did certain

acts. We have already recorded that we accept that certain of the acts at 9(a) and (b) were done as a matter of fact. We accept that allegation 9(c) happened as a matter of fact in that the respondent did send a P45 to the claimant dated 4 July 2019. We also accept that as a matter of fact Mr Solanki did the things at 9(d), (e), (f) and (g) in the List of Issues. The key question in relation to harassment is not whether those acts happened but whether they meet the definition of harassment.

118. Taking each of those in turn, considering the actions by Sue Shuttleworth at the meeting on 28 June 2017 (incidents 9(a)) we found incident 9(a)(ii) did happen, namely Sue Shuttleworth referring to the possibility of the claimant being dismissed, and we find that this was unwanted conduct. We accept that the claimant's perception of that matter was that it was upsetting. We have considered whether it meets the definition of harassment which we remind ourselves is of conduct having the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. We remind ourselves that in deciding whether conduct has that effect we take into account not only the claimant's perception but also whether it was reasonable for the conduct to have that effect.

119. In this case we accept as genuine the claimant's evidence that she felt intimidated and upset by what was said. However, we have decided that this did not amount to conduct having a harassing effect, because we do not think it was reasonable for the conduct to have that effect. Again, we refer back to our findings which was Sue Shuttleworth was simply seeking to explain what the next steps were and to provide clarity about the need for medical evidence. We do not accept that the conduct at that meeting amounted to harassment because we do not accept that it had a harassing purpose or a harassing effect.

120. The same applies to allegation 9(b), which is Sue Shuttleworth "forcing" the claimant to see Occupational Health. We have found in relation to the unfair dismissal claim that there was a good reason why this was done. We accept it might be regarded as unwanted conduct but do not accept it had a harassing purpose. We do not accept that it could have had a harassing effect. Even if the claimant's perception of it was that it had such an effect, we do not think it was reasonable for it to have that effect. That allegation therefore fails.

121. In relation to allegation 9(c), which is the generation of a P45 for the claimant, we find this was not unwanted conduct. The claimant had specifically asked for a P45 to be sent to her. If we are wrong about that then we would have found that it was not conduct having a harassing purpose or harassing effect.

122. Taking the allegations in relation to the grievance (9(d-f) together, we find that this could not be unwanted conduct because it was the claimant who had asked Mr Solanki to respond to her grievance. The claimant did in submissions suggest that because she had been sent her P45 and was no longer an employee it was harassment for Mr Solanki to continue with the grievance process, but we do not accept that that is the case. There was a suggestion that Mr Solanki should have dealt with the matter before the claimant's employment came to an end. That could not have happened because the claimant resigned with immediate effect. Equally, we do not think there is significance in the grievance going on beyond the point at which the P45 was sent. Our primary finding therefore is that this was not unwanted

conduct. However, if we are wrong about that we do not find that the conduct had a harassing purpose or a harassing effect or that it was disability-related.

123. When it comes to allegation 9(g), Ms Kight pointed out that this was an allegation arising after the date the claim form was lodged and there had not yet been an application to amend. We take the view that its inclusion in the List of Issues should be regarded as an application to amend. Dealing with the matter very briefly, we take the view that it would be appropriate to allow that amendment on the basis that there was no prejudice to the respondent in doing so. Mr Solanki was able to give evidence about that matter and it was a very small, limited incident which did not add to the length of the proceedings or the evidence that we needed to hear to any great extent.

124. Turning to whether it is an act of harassment, as we have said we preferred the evidence of Mr Solanki that that was an email sent to all employees and sent to the claimant in error. We accept the claimant may have regarded it as unwanted conduct but we do not find it had a harassing purpose. We do not accept that it had a harassing effect, in particular because we do not find it was reasonable for it to have such an effect. There was also nothing to suggest that if it was in any way disability-related.

Summary of Conclusions

125. In conclusion, therefore, what we have decided is that the claims of unfair dismissal, discrimination arising from disability and harassment all fail and are dismissed.

Employment Judge McDonald

Date: 11 February 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
15 February 2021

FOR THE TRIBUNAL OFFICE

ANNEX
List of Issues

Constructive unfair dismissal

1. Did the respondent do any of the following things to the claimant prior to her resignation with immediate effect on 25 June 2019:

    a. During a meeting on 28 June 2017, did Sue Shuttleworth:

        i. Use the meeting as a "fishing expedition" in relation to C's ongoing PI claim?

        ii. Refer to the possibility of the claimant being dismissed because the claimant had been absent from work for 2 years several times, including explaining that it was likely that the claimant would be invited to a meeting to terminate her contract?

        iii. Tell the claimant she would have to leave her job and re-apply for it?

        iv. Cause the claimant confusion/give mixed messages by asking the claimant for consent to write to her GP?

    b. Commit acts of discrimination (harassment – see below);

    c. On 19 June 2018 deliberately and carelessly send to C a letter regarding her absence to the wrong address?

2. Did any of the above either individually or cumulatively amount to a fundamental breach of the implied duty of trust and confidence, i.e. were they done without proper cause and in a manner which was calculated or likely to destroy or seriously damage trust and confidence?

3. If so, did the claimant resign in response to such alleged breach/breaches?

4. Did the claimant delay too long and affirm the contract, thereby waiving any breach?

5. If the claimant was constructively dismissed:

    a. was there a potentially fair reason for her dismissal, namely capability?

    b. If so, did the respondent act reasonably as treating that reason as a sufficient reason for dismissing the claimant?

c. Was the dismissal fair taking into account equity and the substantial merits of the case?

Discrimination

Disability

6. The respondent concedes that the claimant was, during the relevant period, disabled by reason of both a physical (back pain) and a mental impairment (depression and anxiety).

Discrimination because of something arising in consequence of the claimant's disability

7. If the claimant was constructively dismissed by the respondent:

   a. Was the claimant constructively dismissed because of her long-term sickness absence?

   b. Was the claimant's long-term sickness absence something arising in consequence of the claimant's disabilities?

8. If so, can the respondent show that the claimant's dismissal was a proportionate means of achieving a legitimate aim? The respondent says that the legitimate aim was the need to have a workforce which is capable of fulfilling the operational requirements of the business and to manage sickness absence.

Harassment

9. Did the respondent do any of the following which the claimant says was unwanted conduct:

   a. During a meeting on 28 June 2017, did Sue Shuttleworth:

      i. Use the meeting as a "fishing expedition" in relation to the claimant's ongoing PI claim?

      ii. Refer to the possibility of the claimant being dismissed because the claimant had been absent from work for 2 years several times, including explaining that it was likely that the claimant would be invited to a meeting to terminate her contract?

      iii. Tell the claimant she would have to leave her job and re-apply for it?

      iv. Cause the claimant confusion/give mixed messages by asking the claimant for consent to write to her GP?

b. Did Sue Shuttleworth force the claimant to see Occupational Health in September 2018 when the claimant did not need to?

c. On 4 July 2019, generate a P45 for the claimant?

d. On 10 July 2019:
   i. did Neil Solanki write to the claimant inviting her to a grievance meeting after her employment had already ended?

   ii. Did Rose Archer send the claimant an email checking her bank details were correct?

e. On 29 July 2019 did Neil Solanki write to the claimant to update her on the investigation into her grievance?

f. On 6 August 2019 did Neil Solanki write to the claimant with the outcome of her grievance to contents of which was a "pack of false information and lies"

g. On 22 November 2019 did Neil Solanki send an email to C about a fault in the banking system?*

*NB this allegation post-dates the claimant's presentation of her claim and there has not been any formal application to amend to include it.

10. If so, were any of the above acts related to disability?

11. If so, did they have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Time limits

12. Does the Tribunal have jurisdiction to hear the claimant's complaints of harassment at 8(a) and (b) above?

    a. Did those acts form conduct extending over a period, the last act of which was brought within 3 months of the date the claimant presented her claim on 23 September 2019 (subject to any ACAS extensions)?

    b. If not, were the claims brought within such further period of time as would be just and equitable in the circumstances?

Remedy (if C is successful in any of her claims)

13. What financial losses has the respondent's treatment of the claimant both before and arising from dismissal caused to the claimant?

14. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed?

15. Did the claimant fail to take reasonable steps to mitigate her loss?

16. If so (in relation to both 14 and 15 above), should the claimant's compensation be reduced and if so by how much?

17. Did the ACAS code of practice on Disciplinary and Grievance procedures apply?

18. Did either party unreasonably fail to comply with it?

19. If so is it just and equitable to increase or decrease any award payable to the claimant and if so by what proportion up to 25%?

20. What basic award is payable to the claimant?

21. What sum should be awarded to the claimant in respect of any injury to the claimant's feelings and/or personal injury the claimant claims to have suffered as a result of any acts found to have amounted to unlawful discrimination?