EMPLOYMENT TRIBUNALS

Claimant:	**Ms M Fitzgerald**		
Respondent:	**Ladbrokes Betting and Gaming Limited**		
Heard at:	**Leeds**	**On:**	**6 to 10 March 2017**
			13 March 2017
Before:	**Employment Judge Rogerson**		
Members:	**Mr T Downes**		
	Mr M Brewer		

Representation

Claimant:	In person
Respondent:	Mr S Hills, Solicitor

JUDGMENT

1. The Claimant's complaint of unfair constructive dismissal fails, and is dismissed.
2. The Claimant's complaint of a failure to make reasonable adjustments contrary to Sections 20 and 21 of the Equality Act 2010 fails, and is dismissed.
3. The Claimant's complaint of disability related harassment contrary to Section 26 of the Equality Act 2010 fails, and is dismissed.
4. The Claimant's complaint of victimisation contrary to Section 27 of the Equality Act 2010 fails, and is dismissed.
5. The Claimant's complaint of unlawful deductions from wages (non payment of national minimum wage) fails, and is dismissed.

REASONS

1. The issues in this case have been clarified and agreed by the parties at the beginning of the hearing and they were as set out in the annexe attached to preliminary hearing case management summary, at pages 28 to 33 of the bundle. I do not repeat those issues here and refer to the annexe noting that the complaint of Discrimination Arising From Disability (paragraph 7 to 8) and the complaints of Victimisation/Public Interest Disclosure/Sunday Working Opt

Out Detriment (paragraph 10 to 12 of that annexe), were dismissed prior to this hearing

2. For the remaining complaints to be determined by the Tribunal, we have had to refer to that annexe for the particulars of those complaints. This is because the Claimant's witness statement, although very lengthy, has failed to set out the evidence she relies upon to support those particular complaints.
3. We heard evidence for the Claimant from the Claimant and for the Respondent from Mr David Lomas, Market Place Manager (MPM) and also the Claimant's line manager, Mr Gary Lee, the Area Manager and Ms Heather Sayers, Customer Services Manager.
4. We saw documents from an agreed bundle of documents and further documents were provided by both parties at the hearing. From the evidence we saw and heard we made the following findings of fact.

Findings of fact

1. The Claimant was employed from 18 August 2008 to 18 September 2015 when she resigned without notice.
2. The Respondent runs betting shops and is a large employer with an internal human resource team which provides advice to the managers of the betting shop, when required.
3. The Claimant at the relevant time was employed as a Customer Service Advisor, at the Respondent's betting shop in Huddersfield, the '*New Street'* shop.
4. Her supervisor was Heather Sayers and the manager of the shop was Mr David Lomas.
5. The Claimant was a well thought of employee, knowledgeable in sports and sporting events and was a valued and highly regarded employee. As a measure of that regard, Mr Lee responded to the Claimant's resignation by asking her to reconsider her resignation, because he did not want to lose her.
6. Turning to the issues in this case, the first issue in dispute was whether the Claimant was a disabled person within the meaning of section 6 of the Equality Act 2010.
7. The Respondent accepted that the Claimant had two physical impairments relating to her spine:
    a. Osteoarthritis of the spine which has led her to develop tinnitus, spinal stenosis (narrowing of the spinal canal) and;
    b. A spinal chord cyst
8. It was accepted at an earlier Preliminary Hearing on 28 November 2015, before Employment Judge Jones, that these were physical impairments which were long term. The only issue was whether or not those conditions had a substantial adverse effect on the Claimant's ability to undertake normal day to day activities.
9. Notably at that hearing, Employment Judge Jones discussed with the Respondent whether in light of the agreed medical report the Respondent was 'realistically' questioning whether the Claimant was a disabled person. This is because this issue would have to be determined at this hearing by considering the Claimant's evidence on the substantial adverse impact.

10. At this hearing, the issue was contested and the Claimant's impact statement challenged in cross-examination. We were invited not to accept the evidence she gave to us at this hearing.

11. It was clear from that evidence that the Claimant has managed her back condition for many years. In her closing submissions she told us she has been a registered nurse in the past and she has sought to manage her condition without resorting to pain medication. She has done this by way of physiotherapy treatment and exercises. She has had external treatment from a physiotherapist and we saw reports confirming regular physiotherapy treatment in 2014 and 2015. She has also described the physiotherapy exercises she carries out three times a day and the hot baths that she takes daily to 'get mobile' in order that she can manage her working day. She has also explained to us how in January 2015, she arranged to take all of her annual leave for the whole year in a way that helped her to manage the pain of her condition in order to allow her to work. Her impact statement at page 58 was clear. The osteoarthritis is a bone and disc degenerative and nerve root compression condition. This impairment causes her muscular stiffness, reduced flexibility and neuropathic pain.

12. Importantly it affects every aspect of her day to day life because it affects her ability to move which impact on most normal day to day activities. She gives a detailed account of those effects which we accepted. She also refers to a spinal chord cyst. The medical report was not particularly helpful in relation to this condition, because it appears to indicate that there would not be any symptoms. The Claimant tells us and we accept that one of the symptoms of her condition is pain in her legs which causes her to suffer with incontinence. We accepted the Claimant's impact statement in relation to the effects of both of her conditions on her daily activities.

13. The mobility aspects of her back condition were not disputed by the Respondent's witnesses who refer to her having difficulties twisting, neck and back pains, adapted shoes to help with walking, difficulties experienced with lifting and working at the counter, where she required assistance/adjustments.

14. Importantly the Tribunal has to disregard the treatment that the Claimant undergoes to manage her condition (Paragraph B12 of the Guidance on the Definition of Disability (2011). We have to consider the effects of the impairment on day to day activities without that treatment. A substantial adverse effect is something that is more than minor or trivial (section 212(1) Equality Act 2010). The fact that treatment is required three times a day, to enable the Claimant to get moving to cope with work and her daily life, demonstrates the 'substantial' impact her condition has. We accepted the Claimant's impact statement which sets out the effects of her impairments on all her day to day activities. We accepted, disregarding the measures taken by the Claimant to cope with her condition, that the effects were substantial adverse effects on her day to day activities, particularly mobility and toileting because of her incontinence. We found the Claimant was a disabled person within the meaning of Section 6 of the Equality Act 2010.

15. However knowledge of disability is not enough for the complaint to succeed because in this case the Respondent also denies that it had actual or constructive knowledge that the Claimant was placed at a substantial disadvantage in relation to her reasonable adjustments complaints and it denies any disability related harassment.

16. For the duty to make reasonable adjustments to be triggered the Claimant relies on practices by the Respondent which are said to put her, as a disabled employee at a substantial disadvantage, in comparison to non disabled employees thereby requiring the Respondent to take reasonable steps to avoid that disadvantage. She complains that the Respondent failed to take those steps in breach of its duty (Section 20 and 21 of the Equality Act 2010).

17. The Respondent refers to and relies upon a number of 'return to work' interviews, when it says the Claimant referred to her back condition but made no request for any modifications. However, modifications and adjustments were made following a return to work in December 2014 even though the Respondent disputed knowledge of disability. At that time, a workplace monitor was provided to the Clamant at her request. Notably the return to work meeting took place on 10 December 2014 and the monitor was requested by Mr Lomas on the same day. He acted promptly on the information he was provided with.

18. There was a dispute of evidence as to whether the Claimant had also refused a risk assessment on that day. The Claimant denies this. Mr Lomas said it was offered by him and refused and was offered again by the Health and Security Officer, Mr Savage and was refused again. There is no record of the Claimant being offered a risk assessment and refusing it. We note that the duty to carry out a risk assessment is on the employer if one is required without the need for any request by the employee. We also know that Mr Lomas was proactive that day in ordering the monitor raised by the Claimant.

19. On the balance of probabilities we accepted the Respondent's evidence that the Claimant had refused a risk assessment. She had requested and obtained a monitor and had other adjustments made when she sought them. She was a forthright individual who would express an opinion without fear and would stand her ground if she was unhappy with anything the Respondent did. Had the Respondent failed to carry out a risk assessment when she believed one should have been carried out, then the Claimant would have raised a concern. She makes no mention of requesting a risk assessment in her witness statement.

20. There were other adjustments Mr Lomas made at the Claimant's request. For example, she requested that she be permitted to wear gel insole trainers at work which was agreed. She asked for shifts to be arranged around her medical appointments, which were agreed. Mr Lomas also agreed that the Claimant could take her leave, to help her manage her condition. It is also clear from our questioning of Mr Lomas and Mr Lee that they had very little training on disability issues (15 minutes on a computer). They did not know that they should disregard any treatment the Claimant was undertaking to manage her condition in order to manage her working day. They did not know when they should seek Occupational Health Advice about the condition and what type of information they should obtain from the Claimant. They accepted there are gaps in their knowledge which will need to be addressed in the future.

21. However what was material in this case was the knowledge (actual or constructive) of the substantial disadvantage the Claimant relies on in order to support her complaint that the Respondent failed to make reasonable adjustments. Dealing with those reasonable adjustments, chronologically the first complaint relates to November 2013, when the Claimant complains that Mr Lomas failed to make a reasonable adjustment by not providing an extra

sanitary unit. She also said that there was a practice of requiring her to work on her own, which put her at a substantial disadvantage because of the incontinence problems that she had. The question for the Tribunal was whether Mr Lomas ought reasonably to have known that she had issues with incontinence, as a result of her back condition and should have therefore provided an extra sanitary unit in the customer disabled unit (there was a unit in the staff female toilet).

22. The Claimant accepts that she did not tell Mr Lomas about her incontinence issues so he could not have any actual knowledge. The only conversation she had with him about an extra sanitary unit was in the context of the number of women that were employed at the shop and whether an extra unit was required. Mr Lomas moved the unit from the customer disabled toilet to the ladies toilet so the Claimant had access to it, not understanding it to be a disability issue. The disadvantage the claimant identified at this hearing is the need to have access to a sanitary unit to dispose of incontinence pads. By moving the unit the Claimant had access to a unit. It was not clear how the Claimant says she was 'substantially disadvantaged' by the Respondent not providing another unit in the customer toilet. Importantly, it was not made clear to Mr Lomas why a further unit was required at the time he is alleged to have failed to make a reasonable adjustment. If the Claimant felt awkward or uncomfortable talking to him about this issue she could have asked for a private meeting with him. What she did need to do was to provide Mr Lomas with sufficient information for him to know that she was placed at a substantial disadvantage as a disabled person by having only one sanitary unit available, for the duty to make adjustments to be triggered. We did not find the Claimant was placed at a substantial disadvantage as a disabled person and we found Mr Lomas did not have actual/constructive knowledge of any substantial disadvantage.

23. The second aspect of her reasonable adjustment complaint relates to 'lone working'. The Claimant asserts that she was a lone worker. Under the Respondent's policy she was not a lone worker because she only worked on her own for lunchtime cover (1 hour during a shift of 6 hours). The Claimant complains that as a disabled person she was put into a vulnerable position because of this, if she needed the toilet during that 1 hour period. Again, Mr Lomas had no knowledge of the incontinence issue and could not know reasonably have known that the Claimant was placed at a substantial disadvantage because of her disability during the lunchtime cover. The Claimant also knew that she could close the shop if she was on her own and needed the toilet and she could ask any customers in the shop to leave the shop. We did not find that the Claimant was placed at a substantial disadvantage and we found Mr Lomas did not have actual/constructive knowledge of any substantial disadvantage.

24. The third adjustment the Claimant says should have been made was in September 2014, when she alleges Mr Lomas failed to make adjustments to her work station. The Claimant alleges that when she raised the difficulties she had with her work station with twisting and stretching Mr Lomas told her "she should sort it out herself". We have the evidence of the monitor that was ordered in December 2014 on the day the Claimant returned to work and had requested it. It was unlikely, if the Claimant was requesting specific workplace adjustments, for Mr Lomas not to have dealt with them in the same way. We did not accept the Claimant's evidence that his response to her, in September 2014 was to tell her to "sort it out herself". If such a response had been made

she would have challenged it. We did not find that the Claimant was placed at a substantial disadvantage and we found Mr Lomas did not have actual/constructive knowledge of any substantial disadvantage.

25. The next event chronologically that the Claimant relies upon is about the door of the betting shop not functioning properly, which the Claimant relies upon as a breach of the Respondent's duty to take reasonable care of her health and safety for her constructive dismissal complaint. It was agreed that the door lock to the main door of the shop was not working from 27 July 2015 to 21 August 2015. The Claimant complains that she was required to work alone in this period. This was disputed by the Respondent on the basis that arrangements were made requiring an additional member of staff from another shop to attend the Claimant's shop for lunch break cover. The Claimant complains the Respondent's attitude was lax towards her safety but there was no evidence to support that assertion. Mr Lomas and Ms Sayers dispute the Claimant's assertion that she was made to work alone for lunch cover. Both confirm that in the three week period when the lock wasn't working, staff cover was provided. The diary entry records that this step was taken (to arrange cover for this period) and Mr Lomas and Ms Sayers confirmed it happened in practice. In contrast we had the Claimant's evidence that it didn't happen. We preferred and accepted the Respondent's witness evidence. As we have stated the Claimant is a forthright individual who would have complained if her health and safety was put at risk for those three weeks, by being made to work alone. She was also an individual who had made calls to security whenever she felt threatened or at risk, and had raised issues with management when she felt at risk. It is unlikely that for the three week period she would not have raised any issue about this with either management or security, if lunchtime cover had not been provided.

26. Additionally, Ms Sayers told us about an occasion when the Claimant had requested a set of keys to the safe, so that if there was a robbery the Claimant would not be put at risk. This was because the robber would then have access to the safe and could take the money. It was not the Respondent's usual practice to give a Customer Services Advisor the safe keys, but they gave them to the Claimant so that she did not feel at risk. The Claimant worked in an environment where her concerns were taken seriously and the Respondent's conduct in this period was not a breach of the implied term of trust and confidence or the implied duty to provide a safe working environment.

27. There was a complaint of 'disability related harassment' made against Ms Sayers. The Claimant alleged that she was subjected to unwanted conduct related to her disability that had the purpose or effect of creating an offensive environment for her (section 27 of the Equality Act 2010). She says that in the final 3 weeks of her employment, Ms Sayers wrote the word "rubbish" by the Claimant's name on the daily focus sheet(which allocated tasks to the staff for the day) to indicate she was responsible for taking the 'rubbish out'. The Claimant alleges that this was written by Ms Sayers in the knowledge that the word 'rubbish' had a double meaning and also because she knew the Claimant should not be involved in lifting because of her spinal condition.

28. Unfortunately, the Claimant's witness statement was silent on this complaint which we have taken from the annex we have referred to. We did not find that Ms Sayers wrote the word 'rubbish' on the focus sheets. She would refer to this task as 'bins', a task which was allocated to all the staff including the

Claimant. Even if the word rubbish had been used, it describes a work task nothing more nothing less. There was no evidence from the Claimant to explain why the effect of using the word 'rubbish' to allocate a work task was harassment related to her disability. Putting the rubbish/bins out was simply a task which was carried out by all staff in turn. It was a task the Claimant liked doing because it gave her the opportunity of having an extra cigarette break. She accepted that if she needed any help putting the bags into the bins, it was provided. She was never criticised or rebuked for this task. It was not unwanted conduct that related to her disability that had the effect of harassing her. That complaint therefore fails and is dismissed.

29. The next incident the Claimant relies upon is on 29 July 2015, when she alleges that Mr Lomas told her he could not organise a trespass notice for a particular customer, because there were no CCTV pictures of the individual involved. She asserts the trespass notice could be issued without a photograph. Mr Lomas' evidence was that he could not issue a trespass notice without either, a customer name, customer address or CCTV footage to provide a photograph. Otherwise there could be potential disputes as to the correct identity of the individual.

30. We accepted that he could not issue a trespass notice on 29 July 2015. The other 'safety' argument the Claimant makes, is that as a Customer Service Assistant, she did not have the authority to ask a customer to leave the premises, which left her vulnerable to threats and violence. The Respondent's witness evidence was that any employee could ask a customer to leave and could call security or the police if they felt threatened. To support the Claimant's case she relies on her recollection of a "What's Happening Notice" newsletter circulated to staff on 17 September 2015. She recalls that this notice referred to a local authority closing a shop of a competitor after a complaint was made about the behaviour of a customer and the police were called to the shop. She said the article suggested that as a Customer Services Advisor she did not have the authority to use informal means, to ask a customer to leave the shop, she only had authority to call the police.

31. At this hearing, we saw the only article the Respondent could locate relating to that date and this event. The Claimant doesn't accept that she saw it in this format. It might be that the information was filtered down into a shorter version for more junior staff (the Claimant refers to amber and green lights in the article directing staff to a particular section). However, we accepted that the Respondent has carried out a thorough search for this document and this is the only document for that date which makes any reference to closure notices. It was an article advising about closure notices and the legal obligations referring to a change of law in 2014. The clear message in that article was that the Respondent's procedures were not changing and it was not discouraging employees from calling the police or logging and reporting and seeking advice from central security. We didn't accept the Claimant's case that this article, indicated that the Respondent wanted to leave her vulnerable, or it 'impliedly warned her off' calling the police. There was no evidence to support a finding of any breach of the implied term relating to her safety or breach of trust and confidence.

32. The next event the Claimant relies upon is the change in her hours of work on 29 August 2015. The Claimant works 30 hours a week, working 5 six hour shifts which include every other Saturday from 11am until 5pm. In early August 2015, Mr Lomas decided to review the hours for Saturday morning

cover following a complaint from a Customer Services Manager, struggling to cope because the morning was a particularly busy time for transactions. Mr Lomas reviewed the transactions for the last week of July and first week of August 2015. He noted that the transactions had increased to 165 per hour. This was partly because of the advent of the new football season and partly because one of the Respondent's competitors shops had closed, which had led to an increase in trade. There was a genuine business need to schedule a customer service advisor to work earlier than 11 o'clock. He reviewed the working hours and decided to schedule the Claimant for a 10am to 5pm shift with a one hour unpaid break which meant she was still paid six hours but had an earlier start time. The first shift was due to commence on Saturday 29 August 2015

33. The rota was amended and distributed to staff but because of the Claimant's annual leave, she only saw it on 11 August 2015. Her complaint was that the change made, was in breach of the agreement made with the Staff Counsel at page 450. That document is a question and answer document dated 10 March 2011. The question posed is *"when are full details of break allowances (paid and unpaid) not stated in the staff handbook"*. The answer provided by the Respondent is "*there is a legal requirement for all employees working a shift of six hours or more to receive a 20 minute unpaid break and this is confirmed in the employee handbook. All other breaks are at the discretion of the company and are subject to change. The current rules on break times are shown below. Up to and including four hours – no break, over four hours and up to and including six hours – entitled a 20 minute paid break,* ***over six hours (six hours, one minute) and up to and including eight hours equals a one hour unpaid break.*** *Over eight hours equals an additional pay break of 20 minutes.*

34. The Respondent's case is there was no breach of agreement. The contract includes a flexibility clause which allows the Respondent to vary the hours and make changes in accordance with that clause. The clause states that *"the company may with reasonable notice vary the number of days per week and/or the number of shifts/sessions on which you are normally required to work and may also vary the times of your normal working day/week in order to meet the company's business needs within the statutory framework of opening times of betting shops".* The clause does provide for 'reasonable notice' to be provided to vary the times in order to meet the company's business needs. In the past when changes had been made to working days (Sunday Working Opt Out) there had been consultation with the individuals concerned and a period of notice given. That process did not happen this time. Mr Lomas did not speak to the Claimant he put up a rota and made the changes without consultation. The Claimant did not dispute that there was a business need for the decision and did not challenge Mr Lomas' evidence on this. As to 'reasonable notice' the rota was issued and seen by the Claimant on 11 August for a shift change due to be implemented on 29 August, so the Claimant had 18 days notice, which was reasonable notice.

35. We remind ourselves that we have to look at how the Claimant has put her complaint to this Tribunal. She complains it was in the breach of the agreement made with the Staff's Counsel regarding breaks. We did not find that it was in breach of that agreement because the shift times had changed. We considered the reasons why the Claimant objected to the change. At the time of the first shift she started at 10am but refused to stay until 5pm giving one reason only for her refusal which was that she was 'not working for free'.

At the investigation meeting she gave another reason which was that the change reduced the amount of time she had at home to recover from her physiotherapy for her back condition.

36. In relation to the second reason that reason was not communicated to Mr Lomas at all prior to the Claimant's resignation. It was odd (given the history of adjustments that Mr Lomas had made previously) that if there was a reason related to a disability that required an adjustment, that the Claimant didn't just tell Mr Lomas, as soon as she saw the rota or at least at some point before it was due to take effect on 29 August 2015. Mr Lomas told us and we accepted that if she had told him then he would have changed the rota back and covered the time some other way.

37. The Claimant said she made an attempt to speak to Mr Lomas but that attempt was unsuccessful and she did not persevere in trying to explain to him the reason was related to her disability. The relevance of this is that it goes to knowledge of any substantial disadvantage. Mr Lomas did not have actual knowledge of the substantial disadvantage the Claimant relies upon to support her reasonable adjustments complaint ie that a longer day affects her recovery from back pain. Was the Claim actually placed at a substantial disadvantage by the change and ought Mr Lomas to have known of that at the time- did he have constructive knowledge of the substantial disadvantage? On the day of the shift, on 29 August 2015, the Claimant actually finished at 4pm and did not stay until 5pm so there was no substantial disadvantage because her day was not any longer than normal. On 29 August 2015, the only explanation she gave to him for refusing to stay until 5pm was that "she was not willing to work for free". She never mentioned that a longer day might affect her recovery. As far as Mr Lomas was concerned the only problem with the change in times was that the Claimant felt she was being asked to work for free and objected to that. It was a 'conduct' issue for him and he decided to refer the matter to Mr Lee who then took over the matter as the Area Manager. We did not find that the Claimant was placed at a substantial disadvantage and we found Mr Lomas did not have actual/constructive knowledge of any substantial disadvantage.

38. An investigation meeting took place with another manager and the Claimant and Human Resources then liaised with Mr Lee to check his availability for a disciplinary hearing. An invitation to a disciplinary hearing letter was sent to the Claimant based upon Mr Lee's availability. The letter arranged a disciplinary hearing for 30 September 2015, which was one of the Claimant's annual leave days. The fact that the hearing was arranged on that date is relied upon by the Claimant as conduct in breach of the implied term of mutual trust and confidence. There was however a reasonable and proper cause for the hearing to be fixed on that date based solely on Mr Lee's availability in the first instance. However, there was no reason for the Claimant to doubt that if she told the HR officer or Mr Lee that the date was unsuitable for her that they would not have rearranged it to another date that was suitable. That was the Claimant's previous experience of the disciplinary process when she had rearranged dates for hearings based on her availability. Her previous experience of Mr Lee in particular was that he had decided a disciplinary case in her favour, over a 'think 21' issue, after he had spoken to her and heard her explanation. There was no basis upon which the Claimant could conclude that Mr Lee was likely to pre-judge this matter or not change the date if she had requested it.

39. As to the investigation, another manager had been charged to carry out that investigation which he did with the Claimant on 12 September 2015. At that investigation meeting the Claimant maintained that she told Mr Lomas that she would not work for free. For the first time, she tells the investigating officer that there is also an issue regarding her recovery time for her disability. There are some handwritten notes of that investigation meeting which were sent to the Claimant as well as Mr Lomas' statement of events. The Claimant complained at this hearing, that the notes she had received were guillotined and bits had been cut off in the copying process in the pack sent to her. She also complains that the pack was missing the Staff Counsel Question and Answer reference that she wanted to rely on. Both of those matters could have been addressed at the disciplinary hearing. Again based on the Claimant's previous personal experience of Mr Lee she knew she would have been treated reasonably by him if she raised these issues with him. Furthermore even though the notes might have been guillotined it was clear from the notes sent that bits were missing from the copies which would have been picked up. It was an obvious error that could have been corrected.

40. The Claimant made a self referral to Occupational Health on 9 September 2015. Her letter states the referral is made because she doesn't think her employer understands her conditions and their effects on her working duties and conditions. That letter is received by HR on 10 September 2015, and then an exchange of emails takes place between HR and Mr Lee in relation to that referral. HR asks Mr Lee for 'more information' without being specific of the information needed. The Claimant is asked by Mr Lomas for 'more information' and her response to him is "it's in the letter".

41. Mr Lee decided he would speak to the Claimant. That was clear from his final email to HR on 17 September 2015 at 5.45pm. He was going to make further enquiries with the Claimant and then speak to HR again. Unfortunately on the next day, 18 September 2015 the Claimant resigned from her employment.

42. The question for the Tribunal to decide was whether she had resigned in circumstances where she can treat herself as constructively dismissed. The Respondent denies dismissal and it is for the Claimant to prove dismissal – that she terminated the contract on the 18 September without notice in circumstances in which she was entitled to terminate it without notice, by reason of the employers conduct (section 95(1) c Employment Rights Act 1996). It is important to remind ourselves that the conduct of the Respondent has to be a fundamental breach of contract. A significant breach going to the root of the contract which shows the Claimant that the Respondent no longer intends to be bound by 'one or more essential terms of the employment contract'. There was no such conduct by the Respondent at the point the Claimant resigned. We had found no breaches of the implied term of mutual trust and confidence and no breaches of the duty to take reasonable care for her health and safety. The disciplinary hearing had been arranged to deal with a conduct issue-the alleged failure by the Claimant to comply with a reasonable management instruction to work to the end of the scheduled shift. The Respondent had reasonable and proper cause to investigate the Claimant's conduct in relation to her refusal to comply with the management request made for genuine business reasons. The Claimant's explanation/mitigation in relation to that alleged misconduct could have been considered at that hearing. She could have explained that not only was she not working for free but that there were also health issues that were relevant to the extended day that she wanted the Respondent to take into account.

Her previous experience of a disciplinary process with Mr Lee had demonstrated his fair approach to the Claimant and she had no reason to doubt that he was going to be any different this time. Mr Lee hadn't closed the door on any occupational health referral and was waiting to speak to the Claimant to facilitate this. The Respondent had not failed to make any reasonable adjustment and had not subjected the Claimant to any Disability Related Harassment. There was no conduct by the Respondent that entitled the Claimant to resign and treat herself as constructively dismissed. We agreed with Mr Hill's submission, that the Claimant 'jumped the gun' and resigned prematurely.

43. It was for the Claimant to prove dismissal and she has failed to prove this. It is not every case where an employer will ask an employee who has resigned to reconsider that decision. Mr Lee did so in this case as a measure of his regard for the Claimant and it is unfortunate that she closed the door to that option.

44. The final complaint is post employment victimisation. The Respondent accepts that the letter of resignation raised potential breaches of the Equality Act 2010 and was a protected act for the purposes of section 27 of the Equality Act 2010. The issue was whether the Claimant was subjected to a detriment because of that protected act. The detriment she relies upon is a form sent by the Claimant's insurers AXA requesting some employee information from the Respondent to support her claim.

45. In its ET3 response the Respondent states that the form was not completed because the Claimant had left her employment. At this hearing, Mr Lee having checked with HR discovered that was wrong and it was in fact as a result of a mistake by a HR officer who thought the form was a reference request when it was not. That 'mistake' is supported by the email documents which show communications between HR and AXA attaching a reference that failed to be sent by email. The Claimant didn't chase this up with the Respondent at the time and the mistake was overlooked. We accepted that it was a mistake by a HR office which had nothing to do with a protected act. Even though it is surprising that HR treated a questionnaire form as a reference request that is what they did. The Claimant's complaint (at paragraph 17 of the annex) is that the Respondent did not reply. They did reply but it was the wrong reply. There was no post employment victimisation. That complaint also fails and is dismissed.

46. The final complaint made by the Claimant is an unlawful deduction of wages claim, for the non payment of the National Minimum Wage. The Claimant alleged there was a shortfall in her pay of 25 minutes per day for every week she worked from October 2011 to 2015. She calculates that shortfall as £516.44 based on her recollection of the hours she worked in that period. She never complained about this during her employment and the trigger for her complaint appears to be a letter sent to her after her employment ended paying her for a shortfall. This was as a result of the Respondent auditing its systems following a change of system which disclosed some anomalies due to change over and change of grade which resulted in an underpayment of £23.89.

47. It is the duty of the employer to maintain records and the Respondent was not able to produce the full records for that period but was able to produce records for the period August and September 2015 prior to the Claimant's resignation. Those records did not support her complaint of 25 minutes per

week of extra work undertaken by the Claimant. The Respondent's case was there was no requirement for the Claimant to do any additional work and she did not do so. If there had been a requirement the time would be recorded and payments made because that work would be undertaken at the employers request. We accepted that was the position. It was the letter the Respondent sent that resulted in the claim. If the Claimant had been 'working for free' for 4 years she would have raised it with the Respondent. That complaint also fails and is dismissed.

48. As a final point although the Claimant's complaints were not successful and we cannot make recommendations, we do draw to the Respondent's attention the need highlighted in this case, for some disability awareness training. Both Mr Lee and Mr Lomas have admitted they have had very little (15 minutes or less) training on disability issues. It was clear that they didn't consider that the treatment the Claimant took to manage her condition was relevant to the question of disability and were unclear about when to seek occupational health advice. Although the Claimant was not successful in this case there was a training need identified for the future, which the Respondent might wish to address.

Employment Judge Rogerson

Date: 22 March 2017

Sent on: 23 March 2017