EMPLOYMENT TRIBUNALS

Claimant: **Miss J Limer**

Respondent: **Tracey Baker t/a Bakewell Gift and Bear Shop**

Heard at: **Nottingham**

On: **23rd and 24th January 2017**
1st and 2nd February 2017 &
6th February 2017 (In Chambers)

Before: **Employment Judge Heap**

Members: **Ms. H Andrews**
Mr. R Jones

Representation:
Claimant: **In Person**
Respondent: **Mr. A Famutimi - Consultant**

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the Claimant's claim of discrimination on the protected characteristics of age and disability fails and is dismissed.

REASONS

BACKGROUND & THE ISSUES

1. This is a claim brought by Ms. Julie Limer (hereinafter referred to as "The Claimant') against her now former employer Tracey Baker t/a Bakewell Gift and Bear Shop (hereinafter referred to as "The Respondent').

2. The claim is one of direct discrimination relying upon the protected characteristics of disability and age and was presented by way of a Claim Form dated 23rd March 2016. A Response was entered by the Respondent on 9th May 2016 denying the claim in its entirety.

3. The claim first came before Regional Employment Judge Swann at a Preliminary hearing for the purposes of case management on Thursday, 2nd June 2016. Thereafter, there followed an open Preliminary hearing before Employment Judge Britton on 29th September 2016. The primary purpose of that second Preliminary hearing was to determine whether the Claimant was, at the material time with which her complaints were concerned, a disabled person within the meaning of Section 6 Equality Act 2010 by virtue of depression; that being the condition relied upon by the Claimant for the purposes of the complaint of disability discrimination. Up until that point, disability had not been conceded by the Respondent.

4. However, a concession was made at that Preliminary hearing that the Claimant was at all material times a disabled person within the meaning of Section 6 Equality Act 2010. That being the case, the question of disability is not a matter that we have had to determine in these proceedings given that after the Preliminary hearing it no longer remained a live issue.

5. Employment Judge Britton thereafter attended to case management matters and it was confirmed by the Claimant that the only act of discrimination relied upon in these proceedings was her dismissal by the Respondent. That dismissal was communicated to the Claimant on 29th November 2015 and resulted in the termination of her employment following a period of due notice with effect from 27th December 2015.

6. The Claimant and Respondent are diametrically opposed as to the reason for dismissal. In this regard, and in relatively brief terms at this stage, the Claimant contends that she was dismissed by the Respondent on account of the fact that she had disclosed to another member of staff, Jayne Slater, the fact that she suffered from depression. The Claimant says that it is not merely a coincidence that some two days later she was served with notice of termination of her employment by the Respondent. That, therefore, is the basis of the Claimant's complaint of direct discrimination on the protected characteristic of disability.

7. Alternatively, it is the Claimant's case that the motivation of the Respondent in dismissing her was on account of the fact that from April 2016 she would be entitled to a pay increment to at least the rate of the National Living Wage. In this regard, the Claimant contends that her hours of work were allocated to a younger member of staff, Sarah Long, who was under the age of 25 years and would not therefore have been entitled to be paid the National Living Wage when that came into force. That, therefore, forms the basis of the Claimant's complaint of discrimination on the protected characteristic of age.

8. The Respondent's position is to the contrary. She contends that the Claimant was in fact dismissed for acts of misconduct which she perpetrated and as a result of which the Respondent had lost trust and confidence in her and, particularly, her ability to carry out reasonable management instructions. It is the Respondent's case that she was not aware of the fact that the Claimant suffered from depression until the course of these proceedings and therefore that could not have had anything to do with the matter of her dismissal. Insofar as the age discrimination complaint is concerned, the Respondent denies that the Claimant's age or her entitlement in April 2016 to the rate of the National Living Wage had anything to do with the termination of her employment.

9. To assist the parties in focusing on the issues that we as a Tribunal would be required to determine, we produced a List of Issues. That List of Issues was discussed with the parties and both were in agreement that it represented the matters that the Tribunal would be required to determine. We have appended that List of Issue within the Schedule hereto.

THE HEARING

10. This claim was listed for hearing by Employment Judge Britton at the aforementioned Preliminary hearing on 29th September 2016. It was allocated a period of two days for disposal. However, it swiftly became clear that the claim was going to take a great deal longer than that to determine, despite the fact that the issues involved were relatively narrow. By the time that we approached the second half of day two, the Claimant had not commenced cross-examination of the Respondent and it was clear that the same would not and could not be completed in the time allocated. Therefore, further dates were listed for a resumed hearing so as to allow cross-examination to be completed and for submissions to be made. Again, however, despite the addition of a further two days of hearing time, by the end of the fourth day the parties had insufficient time remaining so as to deal with oral submissions.

11. We accordingly invited the parties to consider dealing with matters by way of written submissions. Neither party objected to that course and therefore we Ordered that written submissions were to be provided to the Tribunal by 9.45 a.m. on 6th February 2017, that being a date that we had held in reserve for the purposes of taking our decision. Although the Respondent failed to provide her submissions within the time limit referred to above, we have nevertheless considered them in the course of dealing with our decision on the basis that the delay was minimal and it caused no injustice or prejudice to the Claimant.

12. In addition to the written submissions referred to above, we have also had regard during the course of the proceedings to the bundle of documents provided by the parties which ran to 179 pages. Further disclosure during the course of the hearing emanated both from the Claimant and from the Respondent with the eventual amended bundle running to some 256 pages. We observe more about issues of late disclosure below.

13. We were concerned to note, however, that the hearing bundle as initially produced contained transcripts of discussions with ACAS during the course of the ACAS Early Conciliation process which had taken place prior to the commencement of these proceedings. Those discussions are of course privileged and therefore ought not to have been included. We were told by Mr Famutimi on behalf of the Respondent that the notes had been included in the bundle at the request of the Claimant and that the Respondent was content to waive privilege. However, regrettably, the privileged nature of those documents and therefore whether privilege was being waived had not been explained to the Claimant by those instructed by the Respondent as it should have been given that the Claimant has at all material times acted as a litigant in person. As it happens, we have not had cause to consider that documentation given that little or nothing turns upon the same. We do express concern, however that the issue of privilege was not raised with the Claimant by the Respondent's advisers as it should have been.

14. Moreover, of further concern was the fact that the hearing bundle also contained documents pertaining to advice and communications between the Claimant and her previous legal advisers. Again, of course, those communications attract legal professional privilege. Although we understand the Claimant to hold a law degree, she has not, as far as we are aware, practiced law nor was she (nor would we expect her to be) aware of the effect of legal professional privilege. Regrettably, the Respondent's representatives did not alert the Claimant to the privileged nature of those communications when she disclosed the material in question, instead simply placing it within the hearing bundle.

15. It would, we would observe, have been the more appropriate course in the circumstances for the Respondent's representative to have drawn the issue of privilege to the Claimant's attention, perhaps along with a suggestion that she seek legal advice. That is not least given that the Claimant was a litigant in person. After discussion and in view of that background, Mr Famutimi did not make any suggestion or take any point that the Claimant had waived privilege in this regard or seek to further delve into advice received.

16. During the course of the hearing we heard evidence from the Claimant. On behalf of the Respondent we heard from the Respondent herself and also from Jayne Slater and Sarah Long. Both Ms Slater and Ms Long are also employees of the Respondent and worked alongside the Claimant during the period of her employment. We have made our assessment as to the credibility of those witnesses below.

17. We should observe that we have made reasonable adjustments and accommodations for the Claimant during the course of these proceedings in order to take into account her disability and also to ensure that she was on an equal footing with the Respondent given that she appeared as a litigant in person. That has included allowing breaks to be taken whenever necessary, assisting the Claimant with the focus of her questions during cross-examination (including consideration of to whom those questions might best be put) and elongating the lunch break on the second day of proceedings when the Claimant had reported to the Tribunal clerk that she felt unwell.

CREDIBILITY

18. Our findings of fact have in respect of the complaints before us have invariably been informed by assessments that we have made in respect of the credibility of the witnesses from whom we have heard. We should therefore say a word about that issue here.

19. We begin with our assessment as to the credibility of the Claimant. We did not consider her to be a particularly candid or straightforward witness. There were a number of elements of the Claimant's evidence which, quite simply, did not hang together and that was particularly the case in light of the documentation which was adduced by the Respondent during the course of the hearing. Despite there being obvious points which the Claimant should, in view of such material, have conceded, she was nevertheless unwilling to do so.

20. Indeed, all documents which did not fit with the Claimant's case were dismissed by her as having been manufactured by the Respondent. That was without any shred of evidence upon which to suggest such improper conduct.

21. Our view of the Claimant's evidence by the conclusion of the hearing was, in short terms, that she had convinced herself that her account of events was correct and had rewritten history so as to fit that particular pattern. She was unable or unwilling to accept anything which might suggest that she was wrong and that manifested itself on a number of occasions during cross-examination. As such, whilst we accept that the claimant may well have convinced herself of the accuracy of what she was saying we found her account to be far from reliable in view of both her dogmatic approach and the failure to take on board documentation which did not support her case, without reverting to entirely unfounded assertions that they had been manufactured by the Respondent.

22. In contrast, we considered the Respondent to be a credible witness. Whilst the Claimant is able to point to a few minor discrepancies in her evidence, that in our experience is not unusual and most certainly they were not matters which overall gave us any significant concerns over the reliability or credibility of the evidence which was given to us by the Respondent. The Respondent gave a clear and coherent account to all of the matters put to her, which not only fitted that of the other witnesses but also the documentation before us. She was able to give full and unhesitating accounts of events during cross-examination and we considered her to have given both a reliable and credible account.

23. We were less impressed, however, with the evidence of Jayne Slater. There were areas where Ms Slater did not or could not give a straightforward answer. That may be as a result of nerves, a lack of recollection or the fact that she was giving evidence in front of the Respondent as her employer but whatever the position, we did not consider her account of events to have been a particularly reliable or credible one and we deal with the pertinent issues in that regard further below.

24. We did finally then with the evidence of Sarah Long. Her evidence fitted with the documentary evidence, including that which was requested by the Claimant by way of specific disclosure, and she was able to give us a consistent and credible account of the key events. This included in relation to issues where the Claimant's evidence - and in turn the questions which were asked in cross-examination - could be said to amount to something of an unnecessary personal attack on Ms Long. Despite those matters, she dealt with cross-examination appropriately and answered the questions put to her in what we consider to be a reasonable and straightforward way. We did not have reason to doubt the evidence that she gave to us during the course of the hearing.

THE LAW

25. Before turning to our findings of fact, we remind ourselves of the law which we are required to apply to those facts as we have found them to be.

26. The Claimant's discrimination complaints all fall to be determined under the Equality Act 2010 ("EqA 2010) and, particularly, with reference to Section 13 of that Act.

27. Section 39 EqA 2010 provides for protection from discrimination in the work arena and provides as follows:

(1) An employer (A) must not discriminate against a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;

(b)as to the terms on which A offers B employment;

(c)by not offering B employment.

(2)An employer (A) must not discriminate against an employee of A's (B)—

(a)as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

(3)An employer (A) must not victimise a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;

(b)as to the terms on which A offers B employment;

(c)by not offering B employment.

(4)An employer (A) must not victimise an employee of A's (B)—

(a)as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

(5)A duty to make reasonable adjustments applies to an employer.

(6)Subsection (1)(b), so far as relating to sex or pregnancy and maternity, does not apply to a term that relates to pay—

(a)unless, were B to accept the offer, an equality clause or rule would have effect in relation to the term, or

(b)if paragraph (a) does not apply, except in so far as making an offer on terms including that term amounts to a contravention of subsection (1)(b) by virtue of section 13, 14 or 18.

(7)In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

(a)by the expiry of a period (including a period expiring by reference to an event or circumstance);

(b)by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

(8)Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms.

Direct Discrimination

28. Section 13 EqA 2010 provides that:

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

29. It is for a Claimant in a complaint of direct discrimination to prove the facts from which the Employment Tribunal could conclude, in the absence of an adequate non-discriminatory explanation from the employer, that the employer committed an unlawful act of discrimination (**Wong v Igen Ltd [2005] ICR 931**)

30. If the Claimant proves such facts, the burden of proof will shift to the employer to show that there is a non-discriminatory explanation for the treatment complained of. If such facts are not proven, the burden of proof will not shift.

31. In deciding whether an employer has treated a person less favourably, a comparison will in the vast majority of cases be made with how they have treated or would treat other persons without the same protected characteristic in the same or similar circumstances. Such a comparator may be an actual comparator whose circumstances must not be materially different from that of the Claimant (with the exception of the protected characteristic relied upon) or a hypothetical comparator.

32. Guidance as to the shifting burden of proof can be taken from that provided by Mummery LJ in **Madarassy v Nomuna International Plc [2007] IRLR 246**:

"'Could conclude' ….. must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of …… discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage …. the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to

whether the comparisons being made by the complainant were of like with like….. and available evidence of the reasons for the differential treatment.

The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."

33. The protected characteristic need only be a cause of the less favourable treatment but need not be the only or even the main cause. A Tribunal when considering the cause of any less favourable treatment will be required to consider that question having regard not only to cases where the grounds of the treatment are inherently obvious but also those where there is a discriminatory motivation (whether conscious or unconscious) at play (see **Amnesty International v Ahmed [2009] ICR 1450**.)

The ECHR Code

34. When considering complaints of discrimination, a Tribunal is required to pay reference to the Equality & Human Rights Commission Code of Practice on Employment (2011) ("The Code") to the extent that any part of it appears relevant to the questions arising in the proceedings before them.

FINDINGS OF FACT

35. We ask the parties to note that we have only made findings of fact where those are required for the proper determination of this claim. We have inevitably, therefore, not made findings on each and every area where the parties are in dispute with each other if that is not necessary for the proper determination of the remaining complaints before us.

The business of the Respondent

36. The Respondent runs a gift shop based at 8 Matlock Drive in Bakewell, Derbyshire ("The Shop") selling gifts items but mainly teddy bears, many of which are of a collectable nature. As we shall come to, she came to employ the Claimant in the Shop as a Sales Advisor.

37. The Respondent has owned and operated from the Shop where the Claimant was employed for approximately 7½ years, although she has been in business for approximately 12 years and previously occupied other premises with her gift and bear business.

38. The Respondent has grown her business from scratch and it was apparent to us that she feels very passionately about the same and is clearly a very hands-on owner/manager. The business of the Respondent is retail with the selling of gifts and particularly teddy bears, most notably from the "Charlie Bears" range. A number of those teddy bears are what might be best described as reasonably high end collectables. They are, as we understand it, very popular with collectors of the various ranges and, particularly, the "Charlie Bears" collections.

The interview and employment of the Claimant

39. The Claimant had, before her employment with the Respondent, occupied a management position within the Home Office. However, upon leaving that employment the Claimant applied for and was later offered after interview a vacant position as a Sales Assistant by the Respondent at the Shop in Bakewell. At that time, the Shop was the only premises from which the Respondent operated.

40. The notes of the Claimant's interview as taken by the Respondent are contained in the bundle at pages 115 and 116. The Claimant was interviewed by the Respondent and also Jayne Slater, a Senior Sales Assistant who had been with the Respondent for a number of years. Ms Slater did not attend every interview for new members of staff but had done so on the occasion of the Claimant's interview on the basis that she was working in the Shop at the time and had been asked by the Respondent to sit in.

41. We were also furnished, albeit late, with copies of Ms Slater's interview notes. We would observe that rather worryingly those notes had been provided by the Respondent to Mr Famutimi well in advance of the hearing but by reason of his omission had not been disclosed to the Claimant and they did not feature in the joint hearing bundle. It was somewhat fortunate that there transpired to be nothing contentious within Ms Slater's notes given that by the time that matter came to light and Mr. Famutimi did disclose them, Ms Slater had already given evidence and been released by the Tribunal.

42. However, there is an area of dispute between the Claimant and the Respondent in relation to the notes taken by the Respondent at pages 115-116. In this regard, the Claimant asserts that those notes had been falsified by the Respondent to include the word "karate" within a section relating to the Claimant's hobbies. That is relevant, as we shall come to in due course, to the matter of timing of the Claimant's dismissal. However, we are satisfied that there is no basis upon which the Claimant is able to properly say that the notes have been falsified by the Respondent. She was not privy to the interview notes before these proceedings and therefore is not able to say that they have been amended. The Claimant's case in relation to whether or not she mentioned karate at the interview has been somewhat fluid. In this regard, in her cross-examination questions to Ms Slater those were put on the basis that she had mentioned karate in the context of taking her son to karate lessons, but not attending herself.

43. During the Claimant's cross-examination of the Respondent, however, that position changed to an assertion that she had not mentioned karate at all.

44. However, the evidence of the Respondent and Ms Slater (and indeed also the position of the Claimant during her cross-examination of Ms Slater) was that reference had been made at interview about the fact that she took her son to karate. It is clear to us that there was therefore some mention of karate in the Claimant's interview.

45. Given that the question which had been asked by the respondent which prompted that reference had been about the Claimant's hobbies, we fully accept that there could have been a misunderstanding as between the Claimant and the respondent about the degree of involvement that the Claimant had herself in karate. In that regard, we are satisfied that the Respondent's understanding was that the Claimant had accompanied her son to karate lessons and participated herself, whereas the Claimant had indicated that she had only taken him to lessons.

46. The Respondent's interpretation, however, of what the Claimant said given the context that she was being asked about her own hobbies was not an unreasonable or unusual one to have reached in the circumstances.

47. We are therefore satisfied that the reference to karate was made as the result of issues which the Claimant herself had raised during the interview and that there can be no reasonable suggestion that the Respondent had falsified the interview notes after the event as the Claimant alleges. In fact, as we shall come to, it as a hallmark of the Claimant's case that whenever an document is disclosed which does not support her version of events or view of the case, her position is almost immediately one that the document must have been falsified rather than any acceptance that she might well be wrong about something.

48. After the interview the Claimant was offered the position as Sales Adviser which she duly accepted and her employment commenced on 6th April 2015. The Claimant's case before us was that the Respondent had wanted to employ a younger member of staff at the time rather than to take her on but holiday commitments had resulted in the Respondent having to appoint someone quickly and hence she had chosen to employ the Claimant despite her age. At the time of her appointment to the Sales Adviser role, the Claimant was 38 years of age. We do not accept the Claimant's evidence as to this matter. It is denied by the Respondent and the Claimant is not able to adduce a shred of evidence to support her contentions that she was, effectively the "last resort" when a younger member of staff could not be found.

49. The Claimant suggested during the course of cross-examination of the Respondent that Jayne Slater's evidence had been supportive of the above contention. However, in fact, when this was revisited by the Tribunal we were satisfied that that was not the evidence of Ms. Slater at all. We are therefore satisfied that the Claimant was taken on in the Sales Assistant role by the Respondent on the basis that the Respondent had taken the view that she was suitable for the role, most notably as a result of other experience which she had gained from working at Hallmark Cards. There had in fact been a number of applicants for the position which the Claimant was appointed to. The Claimant had been one of two candidates who had been shortlisted and interviewed. Both were of a similar age. No "younger" candidates were shortlisted or interviewed. As observed above, the Claimant was successful at interview and was duly offered the position.

50. The Claimant commenced her employment with the Respondent as a Sales Adviser with effect from 6th April 2015. There were no particular incidents of note in respect of that employment until October 2015, the events of which we shall come to in due course.

Other staff members at the Shop

51. During the period of the Claimant's employment the Respondent also employed a number of other members of staff. These were namely Jayne Slater who was employed as a Senior Sales Assistant; Elizabeth Hailwood, Stephanie Yates, Jane Thaw and Sarah Long. The latter were all part time Sales Assistants.

52. In addition to those members of staff, the Respondent herself also played an active part in the business. That included working shifts in the Shop herself and, indeed, having a significant degree of control over the day to day running of the business even when she was not at work. Whilst Jayne Slater would act as a quasi-manager in the absence of the Respondent, it is clear that the Respondent still retained overall and significant control of all aspects of the business, even when she was not herself at work.

Sarah Long

53. As indicated above, the Respondent employed a lady by the name of Sarah Long as a part time Sales Assistant. She began working for the respondent on 17th June 2014 when she was 18 years of age. Ms. Long features in a number of aspects of the Claimant's case before us and we shall therefore deal with those matters here.

54. In April 2015, Sarah Long was diagnosed with depression. Her evidence before us was that she knew that the diagnosis had been in or around that time as it had come in close proximity to her birthday. Her evidence was that she had approximately two months of counselling before she commenced medication, namely, Sertraline, which had been prescribed by her General Practitioner.

55. The Claimant contends that Ms. Long's evidence in this regard was untruthful and that she had not been diagnosed with depression until November 2015 and that the Respondent had not been aware of that diagnosis before she had terminated the Claimant's employment. The relevance of that issue is that the Respondent contends that she had no reason to dismiss the Claimant on account of her having depression (which forms the Claimant's complaint of disability discrimination) as she was aware that Sarah Long also suffered from depression and it had had no bearing on her employment.

56. In order to seek to demonstrate that her position was the correct one, the Claimant requested disclosure of Miss Long's dispensary records. She contended that the same would support the version of events that Ms. Long was not diagnosed with depression until November 2015. Ms. Long provided voluntary disclosure of those documents to the Claimant. We have also seen the same and it is abundantly clear that they do not in fact support the claimant's version of events (and it is perhaps noteworthy that she did not refer to them again after their disclosure) but in fact supported the evidence of Ms Long that she had been diagnosed with depression in April 2015.

57. In this regard, the records demonstrated quite clearly that Ms. Long had been prescribed Sertraline in June 2015, which is entirely consistent with her evidence of a diagnosis in April 2015 followed by two months of counselling before commencing medication.

58. We also accept Ms Long's evidence that she had disclosed to the Respondent that she was suffering from depression and that she did so shortly after her diagnosis. The Claimant contends in her final submissions that the evidence of the Respondent at paragraph 19 of her witness statement was that she had only become aware of Ms. Long's depression after she was prescribed 100 mg Sertraline. However, that is not the proper reading of paragraph 19 nor was that issue was ever put to the respondent during the course of cross-examination.

59. We are entirely satisfied from the evidence of both Ms Long and the Respondent that Ms Long told the Respondent about the fact that she was suffering from depression in or around the time of her diagnosis in April 2015. The Claimant ultimately has nothing to gainsay that position, other than the fact that this does not accord with the way in which her case is put and does not support her contention that she herself was dismissed by reason of having a mental health condition.

60. We are entirely satisfied from the evidence before us that Sarah Long did disclose to the Respondent in or around April 2015 the fact that she suffered from depression and, later, that she was taking medication. We have no doubt at all that contrary to the Claimant's case, the Respondent was therefore well aware of that position some significant time before the Claimant's later dismissal.

61. The Claimant contends that that cannot be the case given that at a launch event on 14th November 2015 (the events of which we shall come to) the Respondent offered Ms. Long a glass of prosecco, which the Claimant contends that she would not have done if she had been aware that Ms. Long was taking medication for depression. We fully accept, however, the Respondent's evidence that that drink was offered to Ms. Long, along with all other members of staff on that day, so that she would not appear singled out with the possibility for gossip to result. She did not accept the drink because of her medication and an alternative refreshment was then offered.

62. We also prefer the evidence of Ms. Long that there was no conversation between herself and the Claimant in November 2015 regarding her depression. The Claimant contends in this regard that in November 2015 Ms Long approached her to say that she had recently been diagnosed with depression. Ms. Long denies any such conversation and we prefer her evidence in this regard. Particularly, it would have been a curious comment for Ms. Long to have made given that it is abundantly clear from the dispensary information referred to above that Ms. Long had not been "recently" diagnosed with depression in November 2015 and that her diagnosis had been some seven months previously.

63. We therefore do not accept the Claimant's account in that regard and prefer the evidence of Ms Long that that conservation never occurred.

64. Another area of dispute between the Claimant and the Respondent in respect of Ms. Long centres around her abortive resignation from the

Respondent. It is the Claimant's case in this regard that that resignation had taken place in August 2015, whereas the evidence of Ms Long was that that had not been the case and in fact she had not resigned from employment until 4th September 2015 and, thereafter, had immediately rescinded that resignation.

65. It is common ground that Ms. Long was seeking permanent full time employment under a hairdressing apprenticeship. She had been told that she had secured a placement but that she needed to undertake extra work experience before she could commence the same. As a result of needing to plan cover, the Respondent asked Ms. Long to confirm whether she would or would not be leaving the Shop. We do not consider that unusual in the circumstances given that the Respondent would need to have arranged cover or a replacement if Ms. Long was going to resign. The Respondent therefore contacted Ms. Long by text in the early part of September 2015 to ask her to confirm her plans in this regard.

66. If the Claimant is correct that Ms. Long had already resigned by that stage, it appears to us that it would have been a somewhat unusual step for both the Respondent and Ms. Long to have entered into text communications in respect of that matter (as demonstrated by the messages at pages 49A and 49B of the hearing bundle).

67. Following those text communications, Ms. Long submitted an emailed letter of resignation to the respondent. Unfortunately for Ms. Long the rug was somewhat then pulled from under her feet in relation to the apprenticeship which was then withdrawn by the owner of the hairdressing business. Ms. Long then sought to retract her resignation with the Respondent the day after she had submitted it. That was duly accepted by the Respondent and the resignation was accordingly never processed. We also accept the evidence of both Ms. Long and the Respondent that due to the retraction of the resignation having taken place within 24 hours of it having been submitted, there were no changes made to the rota for fairly obvious reasons. Ms. Long therefore continued in employment with the Respondent.

68. We would observe here that if, as the Claimant contends, the Respondent had a dislike of people with mental health issues and wished to remove them from her employ then she would have had the ideal opportunity to do so with Ms. Long at this juncture. There would have been little difficulty in the retraction of the resignation being refused if, as the Claimant contends, the Respondent was predisposed to disliking people with mental health conditions and wishing to see them removed from employment. However, the retraction of Ms. Long's resignation – at a time when the Respondent was aware that she suffered from depression and was taking medication – was agreed without issue.

69. A further issue with regard to Ms. Long in respect of which we have heard evidence is the fact that she had caused some issue during the course of the Claimant's employment with regard to the WIFI access at the Shop.

70. In this regard, Ms. Long had downloaded a "dropbox" using the Shop's WIFI, which had used up all of the data allocated to the Shop from their internet provider. The Respondent had discovered that position and we accept that she had taken Ms. Long to task about it. Ms. Long confirmed that she considered

that to be a verbal a warning, although it is clear that what she actually meant in that regard was a verbal ticking off.

71. The Claimant contends that the actions of Ms. Long in respect of these events caused significant disruption to the business. She maintained that the evidence of Jayne Slater was supportive of that. That was not, however, the evidence that Ms. Slater gave to us. Her evidence had been that there was some disruption to the internet connection which caused problems with the connection speed but that had not caused the major and fundamental problems which the Claimant contends to be the case. We also have in mind the evidence of the Respondent that the problem was resolved by her simply paying the sum of a further £1.00 to her internet provider to obtain more data to get the WIFI back up and running. We therefore do not accept that this was the major incident which the Claimant contends it to be and which she compares with her own situation, to which we shall come in due course, and which eventually resulted in her dismissal.

The Anniversary Bears Collection

72. In October 2015 a new collection of "Charlie Bears" was released and stock was allocated to the Respondent's Shop by the Charlie Bears' manufacturers. This was the "Anniversary Bear" collection. As these were limited editions the Respondent introduced a rule of "one bear" per member of staff. That rule was so that a member of staff could purchase one bear of their choosing from the Anniversary Bears Collection but that there would then still be sufficient stock from the allocations to the Shop to meet customer demand.

73. The Claimant and other members of staff were made aware of that rule verbally by the Respondent who had indicated that they could purchase one bear each from the collection given the limited edition status of the bears. That was a rule that had not been in place in respect of other collections previously.

74. The bears from the Anniversary Collection would also have to be purchased at full price without the usual staff discount being applied. Again, that was not a rule which was in place for any other purchases but just as a result of the limited edition nature of these particular items.

75. Some of the staff members within the Shop were collectors of the bears and others were not. Some staff members therefore did not place an order for any the bears. The Claimant placed an order however and indicated that she wanted to purchase a bear from the Anniversary Collection by the name of Poem.

76. However, we accept that the Claimant then decided that she wanted to purchase a second bear, which of course was not permissible under the Respondent's "one bear" rule. That was a rule of which the Claimant was well aware at the time that she determined that she wanted to purchase the second bear.

77. The evidence of Jayne Slater was that the Claimant had asked her to buy a bear on her behalf so that she could have a second bear without the Respondent being aware that this was breaching her "one bear" rule. Ms Slater herself did not want a bear from the Anniversary Collection and therefore it is her

evidence that the Claimant had asked her to purchase the second bear in her name. The Claimant contends that Ms Slater is being untruthful about those events. Although we had concerns over the credibility and reliability of the evidence of both the Claimant and Jayne Slater, we ultimately prefer the evidence of Jayne Slater to the Claimant on that particular point.

78. In this regard, and particularly damaging to the Claimant's credibility on this issue, are a string of texts messages as between the Claimant and Ms Slater on the Anniversary Bear issue. Those messages feature at pages 54AC to 54AE of the hearing bundle.

79. The first of those messages, which have been disclosed by the Claimant, is from Ms. Slater and it reads as follows: "Hi Julie, why won't she let you have one don't understand??" That came from Jayne Slater and we accept that that refers to the fact that they were discussing the fact that the Claimant could not have a second bear from the Anniversary Bear collection. The reference to "one" is to a bear from the collection and "she" is a reference to the Respondent. The messages thereafter go on to discuss the fact that the Claimant had wanted to purchase two bears – "Poem" and "Tutti Frutti" – but that the Respondent would not allow that.

80. It is the Claimant's case that she made Ms. Slater aware of the "one bear" rule in those series of text messages. However, we do not have the text message in question which immediately precedes the one to which we have just referred from Ms. Slater. The Claimant's case was that that text message had been deleted but that all relevant ones were disclosed and it would have merely been a case of them discussing birthdays or barbeques and the like in any earlier deleted messages. That we find to be an incredible suggestion.

81. It was clear that the Claimant and Ms. Slater had been discussing the "one bear" situation within that text message. The obvious interpretation of Ms. Slater's response was that the Claimant had told her in an earlier message that the Respondent would not allow her to purchase a second bear from the collection and Ms. Slater was asking why that was the case. It is common ground in this regard that Ms. Slater was not aware of the "one bear" rule from the Respondent because she was not working on the day that the Respondent notified the other staff about that.

82. On the Claimant's account, the conversation would have simply gone from a discussion about barbeques to Ms. Slater, entirely unprompted, asking why the Claimant was not permitted to have a second bear. That, quite simply, makes no sense at all and we did not accept the Claimant's evidence in that regard. We are satisfied that the Claimant has not been candid in her duty of disclosure with regard to these text messages despite her assertion to the contrary and has been selective in the messages that she has disclosed. It is not in our view merely coincidental that the text message which is missing from those before us is the one that, according to Jayne Slater's evidence, which saw the Claimant ask her to buy a bear in her name so that she could have two bears from the Anniversary Collection without the Respondent being any the wiser that her "one bear" rule had been breached.

83. As we have not accepted the Claimant's account that earlier text messages were entirely unconnected to the Anniversary Bear matter, there is

clearly no reason for the Claimant not to have disclosed the entirety of the messages and, particularly, the one immediately preceding Ms. Slater's text to the Claimant.

84. We can therefore only draw from that the inference that the Claimant has not disclosed that text message because it is damaging to her account and we accordingly accept Ms Slater's evidence that that earlier message saw the Claimant asking her to buy a bear from the Anniversary Collection on her behalf in order that she could have two bears rather than the one which she was permitted under the "one bear" rule.
We therefore accept the evidence of Ms. Slater that the Claimant did ask her to procure a second bear in breach of the 'one bear' rule which had been put in place by the Respondent. Ms Slater ultimately refused to do that. She did not, at that time at least, inform the Respondent of what the Claimant had asked her to do.

85. The second bear in question was a bear from the Anniversary Collection by the name of "Tutti Frutti" which we are satisfied that the Claimant wanted in addition to "Poem", the bear which she had put herself down to purchase in her own name.

<u>The events of 12th October 2015</u>

86. On 12th October 2015 Ms Slater was working a shift in the Shop with the Claimant. When the Claimant arrived Ms Slater had just put down the telephone from having had a conversation with the Respondent who was not at work that day. Given that the Respondent is, as we have already observed, a very "hands on" owner/manager it was usual for her to either call into or to otherwise telephone the Shop to provide instruction or to see how things were going even on days when she was not at work. This was such an occasion.

87. During the telephone call, the Respondent gave instruction as to remaining bears from the Anniversary Collection and how the sale of the same should b dealt with. In this regard, Ms Slater had been informed by the Respondent that Tutti Fruitti (this being the bear that the Claimant had asked Ms. Slater to purchase in her name) was not the subject of any orders or reservations from customers and therefore could be offered for sale to anyone.

88. What Ms. Slater took from that was that this meant that the bear could be offered to anybody at all, including members of staff who had already purchased a bear. That was not, however, we accept what the Respondent did mean and that she had not at any time rescinded the "one bear" rule. What she had meant is that the bear could be placed on general sale in the Shop to any customers who might want to purchase it. However, it is clear that there was something of a breakdown in communication in that regard. Ms Slater therefore mentioned to the Claimant that the bear was now available if she still wanted to buy it. Ms. Slater was of course aware of the Claimant's interest in "Tutti Frutti" given that she had asked her to purchase it on her behalf during their text message exchange on 9th October 2015.

89. The Claimant indicated she would think matters over and would let Ms. Slater know if she did decide that she wanted to purchase "Tutti Fruitti". In fact, however, we are satisfied that the Claimant did not do that and she did not revert

to Ms. Slater about purchase of the second bear. Instead, the Claimant simply put her name down on the list to purchase the bear. She did not contact the Respondent beforehand to see if she would be able to do so given the "one bear" rule, although that is perhaps somewhat unsurprising given her conversation with Ms. Slater.

90. The Respondent later attended the Shop and collected the list of customers who had purchased or wanted to purchase bears from the Anniversary Collection. Upon later considering that list, the Respondent noted that this showed that the Claimant had put her name down for two bears – Poem and Tutti Fruitti.

91. We accept that the Respondent was unhappy about that given that it appeared to her that the Claimant had ignored her "one bear rule". The Respondent accordingly sent a text message to the Claimant expressing her concern about that. The text message which was sent on 12th October 2015, that being the point when the Respondent had collected and viewed the sales list and discovered the position. The text message said this:

> *"Hi Julie, I see you have put your name down for another Anniversary bear. I had said you could have 1 bear only. I don't know why you didn't mention this to me when I was in the shop today, but I'm sorry I do mean 1 bear only from this collection, so let me know which one you really want, so the other can be offered to a collector from my mountain of requests tomorrow."*

92. The Claimant replied:

> *"Hi. Jayne had said that someone had cancelled it and it was available to anyone who called about it so I paid a deposit today. I'm happy to leave it and buy one else where (sic). I will keep my original bear Poem. Julie."*

93. Matters were therefore left at that and the Claimant received a refund for the deposit that she had paid for "Tutti Fruitti".

94. We accept that the Respondent also had a telephone call with Jayne Slater about this situation, given what the Claimant had said in her text message regarding Ms. Slater's involvement with regard to the availability of the bear. We accept the evidence of both the Respondent and Ms Slater that the latter effectively put her "hands up" to that situation and accepted that she had some fault in the matter (albeit not the entire fault that the Claimant appears to suggest that Ms. Slater accepted within her written submissions). We accept that Ms. Slater was also taken to task informally by the Respondent in a similar way to the Claimant for not having informed her about the situation. This was a matter which had largely arisen as a result of a breakdown in communication, but we accept that the Respondent's concern in this respect was that she had informed the Claimant that there was a one bear per member of staff policy and that the Claimant had not consulted her despite having the opportunity to do so when putting her down on the list for a second bear.

95. Although matters were not taken further at that time by the Respondent, the situation was later revisited as we shall come to. That, we accept, was as a

result of a further incident with the Claimant in respect of the "Birthday Bear Boxes", and which re-ignited the Respondent's ire.

The Birthday Box

96. In this regard, a second incident took place, again relating to the purchase of a bear from one of the "Charlie Bears" collections.
As we have already indicated above, one of the major lines within the Respondent's Shop was and is the "Charlie Bears" collection. A campaign was launched in respect of a new collection, the "Birthday Boxes" by the Respondent in the Shop. The Shop had been allocated a number of "Birthday Boxes" which were set to be extremely popular with collectors. The "Birthday Boxes" were sealed boxes with each containing a different bear but with one in 12 of those bears having been signed by Charlotte of "Charlie Bears". The identity of the bear would not be known until the box was opened by the purchaser who might also discover one of the sought after signed bears. We accept the Respondent's evidence that there was therefore a keen interest by her customers and collectors in the purchase of the "Birthday Boxes". Indeed, that is borne out by the success of the launch party which the Respondent held at the Shop in respect of that collection.

97. In this regard, on 14th November 2015 the Respondent held a "birthday party" at the Shop to launch the new collection. This was referred to as a "Charlie Bear Birthday party". At that event, the Charlie Bear Birthday Boxes were put on sale. The Respondent set out to staff working at the event the rules as to how the Birthday Boxes were to be allocated. These rules, as we understand it, were ones that were set by the Charlie Bears manufacturers and were made clear to the stockists to whom Birthday Boxes were allocated. That included the Shop. In this regard, the rules were that none of the Birthday Boxes could be sold before the launch day and the Respondent's rule was that only customers who actually attended on the day would be able to purchase a box. Members of staff, if they were working at the launch event, were also permitted by the Respondent to purchase a Birthday Box. Those customers who were unable to attend on the day of the party had to put their name on a "wish list" and if there were any boxes left over at the end of the event, then they would be allocated to those on the wish list on a first come first served basis.

98. Some members of staff at the Shop put their name down for a Birthday Box but the Claimant at that time did not. Therefore, those members of staff who had been working at the event on 14th November 2015 and had bought a Birthday Box on the day, were able to have one without being required to go on the waiting list.

99. The "Birthday Party" itself was a relatively large and busy event with window displays to advertise the same and food and prosecco being offered to customers. Members of staff were also permitted a glass of prosecco or an alternative drink.

100. As it was, the 14th November 2015 event was extremely busy in the Shop and it took a significant amount of money in sales of some £4,000.

101. Approximately 15 minutes prior to the close of the Shop, a customer telephoned and sought to place an order for one of the Birthday Boxes. As we

have already indicated above, the "rule" in place was that only those who attended the Shop for the event could secure purchase of a Box and others who did not attend in person had to be placed on the waiting list. However, for reasons which somewhat escape us given that rule, the Respondent permitted the customer, a Ms. Fisher, to purchase a Birthday Box as if they had attended in person.

102. The Respondent, who had taken the call, therefore took payment in full over the telephone and that customer was able to secure a Birthday Box there and then, rather than having to go on the wish list. As we say, that individual did not attend in person, and clearly the way in which that order was processed did not fit in with the Charlie Bear rules that we have outlined above. However, we nevertheless accept the Respondent's evidence that that is what occurred and she chose to process the order somewhat outside the "rules".

103. We also accept the Respondent's evidence that some instruction was given to the Claimant to pack up that Birthday Box the following day. That was to be the Sunday when the Claimant was the only member of staff who would be working in the Shop who had also worked at the event. It was logical, we accept, to therefore tell the Claimant to prepare the Box for posting on the Monday. There was insufficient time to attend to that after the launch event and it would in all events be a quieter day on the Sunday so there would be time to prepare the Birthday Box so that it could be ready for shipping first thing on Monday.

104. It is common ground that the Claimant did not do that. The Claimant contends that no such instruction was ever given to her. We do not accept that to be the case and we prefer the evidence of the Respondent that that instruction was given. However, in light of the fact that the day had been a busy one, it may simply be that the Claimant did not recall that instruction; was not listening carefully or forgot about it on the Sunday. The Claimant accordingly did not package up the Birthday Box that had been purchased over the telephone.

105. It is the Respondent's case that the Claimant had deliberately not done so and had put the Birthday Box to one side so as to purchase it for herself and therefore again circumvent the rules that she had been told about because there was in fact by that point not a spare box available.

106. We have seen CCTV footage which the Respondent contend demonstrated the Claimant placing a box to one side and also putting a line through a list with the details of the boxes on it, so as to make it look as if a Birthday Box was still available. Ultimately, we were unable to ascertain from that footage, or indeed any of the other surrounding facts, that that is what happened. We find it more likely there was a further breakdown in communication about the purchase of these boxes and a failure by the Claimant to properly communicate with the Respondent about the issue.

107. As we have already indicated above, staff were permitted to purchase a Birthday Box at the event on the day. The Claimant had not done so. However, by the following day (Sunday, 15th November 2015), the Claimant had decided that she wanted to purchase a Birthday Box. She accordingly, put her name down to do so on the wish list. She did so without asking the Respondent if she could do so. Unfortunately, that created something of a problem on the basis that there was not, in fact, a Birthday Box that was actually available.

108. However, there was not in a fact a Birthday Box available. The effect of the Claimant having put her name down without speaking to the Respondent saw her take the Birthday Box which had in fact been allocated to another customer. The Claimant paid for the Birthday Box and took it home with her at the end of her shift. She did not wait for the Respondent to deal with the wish list allocations before paying for and taking the Birthday Box home with her.

109. The Respondent subsequently discovered when dealing with allocation of the boxes that the Claimant had put a name down for a Birthday Box, leaving her one box short. In this regard, the Claimant's purchase of a Birthday Box had seen her take the box allocated for Ms. Fisher. Ms. Fisher had been the customer who had purchased a box over the telephone on 14th November and who had paid in full at the time. Ms. Fisher's box had not, of course, been packed for despatch in accordance with the Respondent's instruction to the Claimant.

110. This had the result that when the Respondent came to allocate the Birthday Boxes, Ms. Fisher's was missing because the Claimant had purchased it. This meant that the Respondent had to revisit those who were on the "wish list" and was not in fact able to offer Birthday Boxes to everyone on that list who had asked for one. That was a matter that came to the Respondent's attention on 16th November 2015.

111. One of the customers on the wish list who wanted a Birthday Box but had not been able to attend the launch on 14th November 2015 was a lady by the name of Alison Booth. Ms. Booth had been added to the wish list by the Respondent when she had attended the Shop on day before the event and had expressed an interest in some of the Birthday Boxes which had been put out on display in readiness for the Birthday Party. As she could not attend on 14th November 2015, Alison Booth had been told by the Respondent that she could not purchase a box at that time but that she would be added to the wish list and she did indeed feature at the top of it because she had put her name down even prior to the launch event.

112. Next on the wish list was a lady by the name of Stephanie Fields who had also expressed interest in a Birthday Box. We understand Ms. Fields to have been a repeat customer of the Respondent.

113. Unfortunately, given that the Claimant had taken a Birthday Box this meant that there were insufficient boxes remaining to allow Ms. Fisher, Ms. Booth and Ms. Fields to have boxes allocated to them. The Claimant had in fact purchased the box which was destined for Ms. Fisher and that now left the Respondent without a box to allocate to Ms. Fisher. She therefore had to allocate the Birthday Box which should have been for Alison Booth to Ms. Fisher (given that the latter had already been promised a box and had paid in full) and this left her with only one available Birthday Box and more people on the wish list than there now were boxes. Ms. Booth was the first name on the wish list and so she received the only other available Birthday Box. This had the result that whilst Ms. Fisher and Alison Booth therefore had their boxes, there was now not one left over for Stephanie Fields.

114. If the Claimant had complied with the instruction given by the Respondent for proposed purchases other than on 14th November 2015 at the launch event, then upon her deciding the following day to order a box her name should have been at the bottom of the wish list and she would only have been allocated a box if there was one available after all of the others who were on the list before her had been allocated one. If she had done so, Stephanie Fields would have received her Birthday Box. However, there were none now left to allocate to her.

115. Whilst the Claimant offered to return the Birthday Box when that matter was brought to her attention by the Respondent, by that stage the box had been opened by the Claimant and so the Respondent was no longer in a position to see that to a customer.

116. Stephanie Fields was duly contacted about the situation and indicated that she had managed to source a Birthday Box from elsewhere. Whilst we accept that there was therefore no particular damage in terms of customer goodwill, we nevertheless accept that the Respondent was angry about the situation as she saw the Claimant as having disregarded the instructions given to her. That position was magnified given that it came to be the second occasion in less than a month when the Claimant had failed to communicate with the Respondent about the purchase of bears from special collections.

117. We accept that this caused a great deal of concern for the Respondent as to what might occur next, given that the Claimant did not appear to be following instructions which the Respondent had given to her. We accept that she also held concern that in her view there had been no lessons learned from the Anniversary Bears incident just a month previously.

118. Whilst it is entirely possible that both the Anniversary Bear and Birthday Box incidents might have been innocent mistakes on the part of the Claimant resulting from breakdowns in or a lack of communication, we accept that the Respondent did not see it that way. In her mind, there was a considerable amount of concern was that the Claimant had failed to communicate with her and that she had not asked her on either occasion if she could make the purchases of the items that she had sought to.

119. Whilst it is entirely clear to us that the Claimant did not and does not accept that there was any difficulty with regard to what had occurred, we are satisfied from the evidence before us that her actions were deemed to be a significant problem in the eyes of the Respondent on the basis that she saw that as undermining her authority and potentially as being detrimental to the business if there were to be further occurrences.

The Claimant's Dismissal

120. We accept that on or around 16th November 2015 when the incident with regard to the Birthday Boxes came to light, the Respondent resolved that she was going to dismiss the Claimant. Her reasons for doing so were, we further accept, the concerns that we have already highlighted above regarding the Anniversary Bears and Birthday Box incidents and her concern that the Claimant was not following instructions given to her.

121. There was, however, a delay before that dismissal was effected by the Respondent. The Respondent did not in this regard meet with the Claimant to deal with that matter until 29th November 2015.

122. The Claimant contends that this was on the basis that there was no issue arising from the Birthday Box matter and that in fact the catalyst for her dismissal was the fact that the Respondent had discovered, on or around 27th November 2015, from Jayne Slater that the Claimant suffered from depression.

123. We say more about the question of whether the Respondent was in fact aware of that position below but, ultimately, we are satisfied that at the point that the Respondent dismissed the Claimant she was not aware that the Claimant suffered from depression.

124. However, we have considered carefully why there was a delay in between 16th November when the Respondent became aware of the Birthday Box issue and 29th November when the respondent attended to dismissing the Claimant. In this regard, we are satisfied that during the course of that time the Respondent was undertaking her own legal research to determine what litigation risk there might be in dismissing the Claimant. After undertaking the same, the Respondent concluded that as the Claimant had under two years' service there was little risk in dismissing her. We accept that it took some time for the Respondent to undertake that research at the same time as dealing with her normal duties in running the Shop. We do not consider it unusual that the Respondent wanted to look into matters further before dismissing the Claimant on the basis that she had very little previous experience of terminating the employment of a member of staff. She had in fact only ever done so once previously with an individual in her first week of employment whom she had had to tell that things were "not working out".

125. We are also satisfied that there was some delay which resulted from the Respondent's husband being away from the family home on business. Whilst it is clear that the Claimant had never given the Respondent cause to be concerned that she might act inappropriately towards her (by way, for example, of deploying any karate skills which the Respondent believed that she had) we do accept that she was reluctant to dismiss the Claimant whilst her husband was away and she would be alone in her house at night. We do not suggest at all any impropriety on the Claimant's part in regards to such reluctance, but we accept that it was a matters which played on the Respondent's mind and therefore provides a reasonable explanation as to why she waited before dismissing the Claimant.

126. The Respondent met with the Claimant on 29th November 2015 and took her into the office in the Shop. This was without warning and we accept it came as a shock to the Claimant. During the meeting, the Respondent told the Claimant that she was being dismissed. In addition to the issue of the Anniversary Bear and the Birthday Box, the Respondent also made reference to other matters such as the fact that the Claimant was not living in Bakewell as she had led the Respondent to believe at interview, that she had not attended the Christmas party and that there had been difficulties in relation to the booking of holidays. Those additional matters were, we accept, areas that had caused the Respondent some concern but they were very much peripheral issues to the

Anniversary Bear and Birthday Box incidents which were the predominant reason that the Claimant's employment was terminated.

127. We find it likely that the Respondent, who as we have observed has no real experience in dealing with disciplinary matters or terminations of employment, dealt with the meeting in a somewhat unsophisticated and rather hurried way as we have no doubt that it would have been a difficult conversation for the Respondent to have with the Claimant.

128. We consider therefore that the meeting was likely to have taken place in something of a hurried and awkward fashion and it is therefore somewhat unsurprising that the Claimant was dissatisfied about the way that matters had been dealt with and, particularly, that she did not consider herself to have received an proper explanation for her dismissal. The Claimant had never been dismissed from employment previously and we accept that these matters would have come as a bolt from the blue.

129. This lack of clarity surrounding the reason for termination of employment was perhaps not assisted by the fact that the Respondent then wrote to the Claimant to confirm the termination of her employment but failed to give any reasons within the same for that dismissal (page 51 of the hearing bundle). Whilst as the letter in that regard correctly pointed that the Claimant was not entitled by law to written reasons given her length of service, nevertheless in view of the way in which the meeting had been conducted it is not surprising that that approach compounded the Claimant's dissatisfaction and confusion. It was, we would observe, not a model of best practice for the Respondent to have taken that line. Even though she was correct that the Claimant was not entitled by law to a statement of written reasons for dismissal, it would nevertheless have been helpful and productive to have said something.

130. The Claimant was informed that her last day of employment would be 27th December 2015. She was already booked to take annual leave for a considerable part of her notice period.

<u>The Claimant's Grievance</u>

131. On 17th December 2015 and during the period of her notice the Claimant raised a grievance with regard to the matter of her dismissal. The Claimant set out her grievance in a detailed four page letter in which she addressed the allegations that she had been told at the brief meeting with the Respondent on 29th November 2015 were the reasons for her dismissal. She asked that the grievance be investigated by an independent third party and for a prompt response. In fact, as we shall come to the Claimant never received such a response.

132. However, it is notable that nowhere within the Claimant's detailed grievance letter did she make any reference to the fact that she believed that her dismissal had anything at all to do with either her age or the fact that she has depression.

133. As set out above, the Claimant did not receive a substantive response to her grievance. At most, the Respondent sent to her a brief letter enclosing her

final remittance slip and P45 which indicated that she also wished to clarify the reason for dismissal. The relevant part of the letter in this regard said this:

"*This* [the dismissal] *was due to you failing to comply with instruction given and insubordination, resulting in a breakdown of mutual trust and confidence. It was therefore better for the business if your contract was terminated".*

134 Although there was no substantive response to the grievance, it has transpired before us that the Respondent did in fact take some steps to gather statements from other members of staff. Particularly, we have before us in the hearing bundle a statement from Elizabeth Hailwood dated 19th December 2015 which the Respondent told us had been obtained as a result of the Claimant's grievance. It transpired here that there had been further difficulties in relation to the issue of disclosure. In this regard, statements were taken from all members of staff and not just Ms. Hailwood. However, those statements were not included in the hearing bundle as the Respondent had not understood that they needed to be disclosed as all other staff members were giving evidence at this hearing and had prepared statements also for that purpose. It is clear that those earlier statements taken in connection with the grievance were disclosable documents and they should have been provided to the Claimant and included within the hearing bundle. We accept that the Respondent had not understood that and it appears to us that it is likely that she was not properly advised by those representing her of her duties of disclosure. Indeed, until asked about those statements by the Tribunal, she had never previously been asked for them. We therefore do not draw any negative inferences from the failure to disclose those documents but trust that those advising the Respondent will ensure that on future occasions such difficulties are avoided.

135. However, despite statements having been taken from members of staff, it is common ground that the Claimant's grievance was never addressed by the Respondent and she never received any substantive outcome to it. We have little doubt in the circumstances that resulted from the inexperience of the Respondent in dealing with personnel matters, but suffice it to say that the failure to provide a response clearly had the effect of increasing the Claimant's mistrust of the Respondent.

<u>The "missing bear" and the report to the Police</u>

136. A further rather unfortunate aspect to this case occurred in that during the period of the Claimant's notice, a bear went missing from the Respondent's Shop.

137. This had the result that the Respondent had to source a replacement from elsewhere and pay a significant premium so as to ensure that it could be secured for the customer who had ordered it.

138. However, rather unfortunately it would appear that the Respondent put two and two together and came up with five and concluded that the Claimant was responsible for the missing bear and that she had stolen it. She accordingly reported the Claimant to the Police for alleged theft of the bear. No further action was taken by the Police in respect of this incident following discussion with the Claimant.

139. Mr. Famutimi elected not to cross-examine the Claimant in respect of this issue and therefore the matter has not been advanced before us at the hearing before us, despite it clearly previously forming part of the Respondent's case (see particularly paragraph 19 of the ET3 Response and paragraphs 55 to 71 of the Respondent's own witness statement). Suffice it to say, however, that the subsequent police investigation after this matter was reported by the Respondent and the finger of blame pointed at the Claimant concluded that there was no basis upon which to suggest that the Claimant had been responsible for the loss of the bear in question. Whilst we do not suggest the Respondent acted from ill motive in relation to those matters, it appears to us that she significantly "jumped the gun" and made unfair assumptions as to the Claimant's guilt in such matters to the extent that she reported the Claimant to the police for theft. We accept that that would have been a devastating blow to the Claimant and one which only served further to sour by now already very difficult relations.

The Claimant's hours of work, Sarah Long and the employment of Samantha Hughes

140. It is the Claimant's case that her employment was terminated by the Respondent so as to ensure that the Respondent did not have to pay her the living wage which was set to be introduced in April 2016.

141. The Claimant contends in this regard, that the dismissal was manufactured to make way for a younger member of staff, Sarah Long, to undertake additional hours whereupon she would be paid less than the Claimant would have to be paid as from April 2016. The difficulty with this argument is that whilst the Sarah Long did undertake some of the Claimant's hours following her dismissal, the Respondent in fact recruited a new member of staff, Samantha Hughes, who took up employment in January 2016. Ms Hughes is 46 years of age (we have seen a copy of her passport at page 100 of the bundle which verifies that) and is therefore both older then the Claimant and would also be entitled to the living wage as at the point when that was introduced. It has to be said that the Claimant's attempts to counter that rather obvious difficulty with this aspect of her claim has been built on fairly shifting sands as the disclosure in relation to the matter evolved.

142. In this first instance, the Claimant's position appeared to be that Ms. Hughes had never been employed by the Respondent at all. However, it is absolutely clear from the documentation from Her Majesty's Revenue & Customs at page 180 of the hearing bundle that Samantha Hughes was employed by the Respondent in January 2016. That is also confirmed by a copy of an email from the Respondent to Ms. Hughes dated 14th January 2016 and offering her a position in the Shop.

143. In order to seek to counter that, the Claimant then contended that Ms. Hughes had not worked in the Shop but in another premises – an old apothecary shop - which the Respondent had by that time taken in Bakewell and that, as such, Sarah Long had still taken her hours. However, we are entirely satisfied that that was not the case. Particularly, the Respondent has disclosed an article from the local press which sets out that she took over the new premises to which the Claimant refers in October 2016. That tallies with an invoice which the Respondent has also disclosed setting out a bill for work done relating to the lease of the premises. That invoice is dated 7th October 2016 and we are

therefore entirely satisfied that there is nothing in the Claimant's suggestion that Ms. Hughes was employed to work elsewhere given that there was nowhere else for her to work for at least the first ten months of her employment. We accept therefore that she worked in the Shop and was taken on for that purpose as a replacement for the Claimant.

144. Whilst the Claimant still appears to contend, despite the documents referred to above, that the employment of Ms. Hughes was not "all above board", we do not agree. We accept the Respondent's evidence that her employment was brought about as a result of her popping into the Shop to make a purchase shortly before she left her own employment at the bookshop situated a short way down the same road as the Shop. She began talking to the Respondent about her imminent departure from the bookshop and she was invited to complete an application and submit her curriculum vitae if she might be interested in the vacancy which was shortly to be advertised at the Shop. This was in December 2015, around the time of the expiration of the Claimant's notice period. Ms. Hughes submitted an application (a copy of which we have at pages 126 and 127 of the hearing bundle) and she was interviewed by the Respondent. The Respondent was impressed with her experience, most notably, with regard to her experience in book sales as the Respondent had recently started to stock books and could therefore utilise those skills. Ms. Hughes was accordingly offered the role. We accept that she was engaged as a direct replacement for the Claimant.

145. We are therefore satisfied that the Claimant's hours were not allocated to Sarah Long and that the hours that she did work which the Claimant contends that she would otherwise have worked if she had not been dismissed were for the purposes of cover until a replacement member of staff was found. That replacement member of staff was Ms. Hughes, an employee some eight years older than the Claimant and who would, with effect from April 2016, also be entitled to receive the Living Wage as the Claimant would have.

146. Equally, and as pointed out by Employment Judge Britton, the age demographic of the respondent (page 54 of the hearing bundle does not give rise to any suggestion that the Respondent sought to employ only younger and thus "cheaper" members of staff.

<u>The Respondents knowledge of the Claimant's depression</u>

147. There is a significant dispute between the Claimant and the Respondent as to whether the respondent herself was aware that the claimant suffered from depression at the time that she terminated her employment. That is a highly relevant issue given that the Claimant contends that it was that knowledge that was the catalyst for her dismissal on 29th November 2015.

148. It is the Claimant's case that on 27th November 2015, she had a conversation with Jayne Slater during which she discussed her medication for depression. It is the Claimant's case that this came about on the basis that she had left her medication on the table in the staff room upon having collected it from a local pharmacy at lunch time and she believed that Ms. Slater had moved it to one side. The Claimant's evidence was that she thought therefore that she needed to tell Ms. Slater about her condition as a result of her having seen the medication.

149. The Claimant's evidence was that she had not told the Respondent about her depression previously as she had been convinced that the Respondent would dismiss her as a result. There is, however, nothing at all of any substance which the Claimant was able to take us to in order to begin to suggest she could have reasonably formed any opinion that the Respondent would dismiss her because she suffered from depression.

150. Ms. Slater denies that any conversation took place with the Claimant on 27th November about her depression. Her evidence was that she would have recalled such a discussion on the basis that she clearly remembered a conversation which she had had with Sarah Long when she was diagnosed with depression. She was therefore adamant that she would have remembered if the Claimant had told her about her own medical condition as is contended.

151. As we have already observed above, we had concerns both as to the evidence given to us by the Claimant and by Ms. Slater and we did not consider either of them to be particularly straightforward or a forthcoming witness. However, on balance we have preferred the Claimant's evidence on this particular issue. She was able to describe in detail how she contended that the circumstances of disclosing the information to Ms. Slater had come about and there was some documentary evidence to support that position on the basis that the Claimant was able to show that she had visited the pharmacy to collect a prescription on the same day as she contends that she had the conversation with Ms. Slater following the moving of her medication.

152. Therefore, on balance, we accept that the Claimant did have a conversation with Ms. Slater on 27th November 2015 where she told her that she suffered from depression. However, we are nevertheless satisfied, for reasons that we shall come to, that Ms. Slater did not disclose that information to the Respondent.

153. We would observe that it may well be the fact that Ms. Slater did not disclose that information to the Respondent that has coloured her recollection of those particular events. As we have observed, the Respondent is something of a hands-on manager and expects to be kept informed in respect of all aspects of the business within the Shop. We considered that Ms. Slater may well as a result be reluctant to divulge that she had received information of this nature from the Claimant but had not kept the Respondent informed about that. That is perhaps not least as a result of having been taken to task over the lack of communication surrounding the Anniversary Bears incident. Whatever the reasons, however, we accept that the Claimant did tell Ms. Slater about the fact that she suffered from depression and that Ms. Slater was accordingly made aware of that condition and the fact that the Claimant was on medication on 27th November 2015.

154. However, simply because Ms. Slater was aware of the Claimant's condition, it does not follow that the Respondent was. That is a matter which is strongly denied by the Respondent. The Claimant has no evidence herself that demonstrates that the information that she gave to Ms. Slater was disclosed subsequently to the Respondent, other than a general feeling that it would have been.

155. However, we are entirely satisfied from the evidence before us that the Respondent herself did not know about that the Claimant's depression at the time

that she determined that she was going to dismiss her and, in fact, that she was not aware of that prior to the Claimant commencing the ACAS Early Conciliation process.

156. As we have already observed, we considered the Respondent to be a credible witness. The evidence on this point has been consistent throughout the proceedings. As we have already observed, the Claimant has nothing to suggest that the Respondent was told about her disability by Ms. Slater other than her general supposition that this would have occurred.

157. The Claimant contends that Ms. Slater had said to her words to the effect *"well I'll have to tell Ms Baker"* but we do not accept her evidence in that regard. We consider that that is something which the Claimant has either embellished or re-written in her own mind so as to fit the case that she seeks to bring. We accept that she may well genuinely believe in her mind that the Respondent was told about the matter but ultimately she has no evidence to that effect and we have considered the Respondent credible on the point.

158. Indeed, the evidence of both Jayne Slater and the Respondent was to the effect that Ms. Slater had not said anything when she was told by Sarah Long that she suffered from depression. We cannot see any basis upon which Ms. Slater would tell the Claimant that she would have to tell the Respondent when she had said nothing to that effect to Sarah Long nor had she told the Respondent herself.

159. We do not therefore accept the Claimant's contention that the Respondent was aware of her condition prior to the initiation of these proceedings and, certainly, we are satisfied that she was not aware that the Claimant had depression at the time that she was dismissed.

160. The Claimant also sought to suggest before us that the Respondent would have been on notice of the fact that she suffered from depression because of the fact that she drunk a lot of water (a side effect as we understand it of her medication) and the fact that her medication had caused her a considerable gain in weight of some five stone an eight month period despite the Respondent having commented that she did not eat much food in the day time. Those are matters which could have resulted from a variety of issues and it is not the logical assumption when faced with the same that the Claimant was suffering from depression. We do not therefore accept that this could or should have fixed the Respondent with the knowledge that the Claimant had depression.

<u>"Sniffy"</u>

161. Before dealing with our conclusions in respect of the claim, there is one further issue of relevance to the claim which we have not already dealt with above. In this regard, the Claimant's evidence before us was that there was a customer of the Shop who the Respondent would refer to as "Sniffy". The name "Sniffy" emanated from the fact that the customer in question would pick up bears from the shelves in the Shop and sniff them. It is the Claimant's case that this customer suffered from obvious mental health problems and the Respondent assigned her this "nickname" so as to mock her. This, says the Claimant, evidenced the Respondent's dislike of people with mental health conditions.

162. However, we are not satisfied that that picture as painted by the Claimant was the reality of the situation. In this regard, it is clear that all members of staff in the Shop referred to the customer by the same name. There is no evidence that this "nickname" was devised by the Respondent as the Claimant contends. Whilst we do not condone or consider appropriate the use of such names, we do accept the evidence of the Respondent there was nothing malicious in it and as far as she saw matters, the customer was simply trying to bond with the bears by sniffing them. We accept that she had and continues to have no idea as to whether or not the customer in question had any mental health illness or condition. Indeed, other than supposition on the Claimant's part there is in fact no evidence that this customer has any form of mental health condition and, again, it appears to us that this is simply an assertion made by the Claimant to seek to support her disability discrimination claim.

CONCLUSIONS

163. We remind ourselves that in these circumstances the burden is upon the Claimant to establish facts from which we can infer, in the absence of any reasonable explanation to the contrary, that the act complained of - in this case her dismissal - was an act of discrimination on either the grounds of age or disability.

164. We do not have before us a claim of unfair dismissal. The question, therefore, of whether the Respondent had grounds to dismiss the Claimant on the basis of the allegations against her or whether she acted in a procedurally fair manner in doing so are not issues that we are to determine in this claim. Even if the Respondent did act unreasonably or unfairly in dismissing the Claimant, that does not mean that the dismissal was discriminatory.

165. We deal firstly with the complaint of age discrimination. We remind ourselves that the basis of this aspect of the claim is that it is contended by the Claimant that she was dismissed in order to allocate her hours to a younger member of staff in anticipation of the Claimant becoming entitled to the Living Wage in April 2016.

166. We are entirely satisfied that that notion is factually incorrect. As we have already found above, the Claimant's hours were not given to Sarah Long as she contends other than on a temporary cover basis until Ms. Hughes was recruited to replace the Claimant.

167. Ms. Hughes is older than the Claimant and would also have been entitled to the rate of the Living Wage in April 2016. There is nothing therefore whatsoever to support the Claimant's contention that her age had anything at all to do with her dismissal. As we shall come to, we are satisfied that the reason for termination of employment was as a result of the Anniversary Bears and Birthday Box incidents and the Claimant has shown nothing at all to begin to suggest that her age was a factor. Indeed, as her case is built around the suggestion that the introduction of the Living Wage some months later was the influencing factor that does not bear scrutiny when it is clear that Ms. Hughes would also have been entitled to the same rate of pay.

168. Moreover, even if we had made a finding that Sarah Long had taken the Claimant's hours, the Claimant has shown nothing other than a difference in age

to suggest that her dismissal was an act of discrimination. The Respondent had made no reference at any stage of the Claimant's employment to the Living Wage or concerns about paying the same once it was introduced and the Claimant's dismissal took place some months before the Respondent would have had to provide an increment in pay. There can in our view be no reasonable suggestion that the Respondent concocted unjustified reasons for the Claimant's dismissal in anticipation of the instruction of the Living Wage some four months after the event.

169. We are therefore entirely satisfied that the Claimant was not discriminated against on the grounds of age with regard to her dismissal.

170. We turn then to the complaint of disability discrimination. In this regard, we remind ourselves that the Claimant contends that the Respondent had become aware of her disability on 27th November 2015 and had thereafter manufactured reasons for her dismissal to cover up the real reason for termination which was the Claimant's depression.

171. However, ultimately as a result of the findings of fact that we have made this complaint falls at the first hurdle. In this regard, we are satisfied that the Respondent did not know at the time that she dismissed the Claimant that the Claimant suffered from depression. Therefore, it could not either consciously or unconsciously have been a factor in the mind of the Respondent when taking the decision to dismiss.

172. However, even had we not made that finding then we would still have dismissed the claim on the basis that the Claimant has not shown any facts from which we could have drawn an inference of unlawful discrimination.

173. The only real suggestion made by the Claimant in respect of this matter is the fact that the Respondent had, along with others, referred to a customer as "Sniffy". As we have set out above, we do not have anything before us to suggest that that customer had a mental health condition or that the Respondent used that term so as to mock or denigrate that individual because of any such condition. Indeed, we accept that the Respondent had no idea whether the customer had any mental health complaint or not. Whilst the name ascribed may have been unkind, it was no more than that and there is nothing before us to demonstrate as the Claimant suggests that this showed any predisposition to treat those suffering from depression unfairly.

174. Moreover, there is evidence before us that the Respondent in fact took no issue at all with employing people suffering from depression. She was made aware by Ms. Long that she had depression and was taking medication for her condition. The Respondent took no steps at all to seek to remove Ms. Long from her employ as would surely otherwise have been the case if the Claimant's contentions were correct. Indeed, had the Respondent been adverse to the employment of those with depression, then it seems to us that she would have been highly unlikely to have allowed Ms. Long to rescind her resignation and on 5th September 2015 and continue in employment at the Shop. The continued employment of Ms. Long in this regard in our view militates against any suggestion that the Respondent is predisposed to the dismissal of those with mental health conditions.

175. Therefore, the Claimant has not shown any facts in the course of these proceedings from which we could infer that her disability played any part in the reasons for her dismissal. Indeed, and in all events, we accept the evidence of the Respondent that the reason for the Claimant's dismissal was as a result of the Anniversary Bears and Birthday Box incidents and that, in her mind, she had lost trust in the Claimant to carry out instructions given to her. It was that matter and nothing else which led to the Respondent terminating the employment of the Claimant. We are satisfied that any individual, whether suffering from depression or not, in the same circumstances would have been dismissed by the Respondent. The Claimant has not taken us to anything to suggest to the contrary. At best, she has pointed to the fact that Sarah Long was not dismissed over the WIFI incident but of course Sarah Long also suffers from depression and is therefore not an appropriate comparator. Moreover, the circumstances of the WIFI incident and the two incidents for which the Claimant was not dismissed are not comparable.

176. As we have already observed, this is not an unfair dismissal claim and we need not therefore examine whether the Respondent's decision and processes in respect of termination for those reasons was fair or unfair. Even if the same was unfair, that does not equate to it being an act of discrimination. In these circumstances and on the basis of the evidence before us, we are entirely satisfied that the Claimant's disability played no part at all in the decision of the Respondent to dismiss her.

177. It follows that for all those reasons, the Claimant's complaints of discrimination on the protected characteristics of age and disability fail and are dismissed.

Employment Judge Heap

Date 27.4.2016

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

3 May 2017

FOR EMPLOYMENT TRIBUNALS

SCHEDULE

MISS. J LIMER

Claimant

v

MS. T BAKER T/A BAKEWELL GIFT AND BEAR SHOP

Respondent

LIST OF ISSUES

Section 13: Direct discrimination because of the protected characteristics of disability and age:

1.1. Has the Respondent subjected the Claimant to the following treatment falling within section 39 Equality Act, namely*:*

1.1.1. Dismissing the Claimant?

It is not in dispute that the Respondent terminated the Claimant's employment.

1.2. Has the Respondent treated the Claimant in dismissing her less favourably than it treated or would have treated an appropriate comparator?

1.3. If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic of:

1.3.1. disability

Particularly, the primary matters upon which the Claimant relies are as follows:

(i) That the Respondent was aware from Jayne Slater that she had depression and was taking medication. That is denied by the Respondent.

(ii) That a matter of two days after the Claimant had disclosed her medical condition to Jayne Slater (and she in turn had told the Respondent), the Respondent dismissed the Claimant for unjustified matters that the Respondent knew were without foundation and/or had already been informally dealt with (namely the Anniversary Bear incident);

(iii) That the Respondent was pre-disposed to discriminate against those suffering from mental health conditions, such as a customer referred to by the Respondent as “Sniffy”.

The Respondent contends:

(i) That she was not aware that the Claimant suffered from depression and that the Claimant had in fact never told Jayne Slater that she had depression or that she was taking medication;

(ii) The reason that the Claimant had been dismissed was not on account of disability but because she had failed to comply with management instructions – most notably in respect of instructions given in connection with the Anniversary Bear and Birthday Bear Box incidents;

(iii) The Respondent employs or has employed others who have mental health conditions – these employees being Marie (who has bi-polar disorder) and Sarah Long who also suffers from depression. The Respondent had been aware of those conditions and took no issue with them and as such would not have taken any issue with the Claimant having depression if she had been aware of it.

The above matters will be ones upon which the Tribunal will be required to make findings of fact.

1.3.2. age

Particularly, the Claimant relies upon the following:

(i) That the Claimant was replaced in her hours by Sarah Long, a younger member of staff whom the Respondent would not have to pay the rate of the National Living Wage when introduced in April 2016.

The Respondent contends:

(iv) That the Claimant was not replaced by Sarah Long but by a new member of staff with effect from January 2016 by the name of Samantha Hughes, who is older than the Claimant and would have therefore also been entitled to be paid the National Living Wage when it was introduced.

The above matters will be ones upon which the Tribunal will be required to make findings of fact.

1.4. If the Claimant has proved facts from which the Tribunal is able to draw an inference of discrimination (either on grounds of disability or age) and the Claimant has therefore reversed the burden of proof, what is the

Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?