EMPLOYMENT TRIBUNALS

Claimant: **Mrs C Gilbert**

Respondent: **Anderbury Limited**

Heard at: **Bristol** **On: 6, 7 and 8 June 2016**

Before: **Employment Judge Livesey**
Mrs E Burlow
Ms J Le Vaillant

Representation
Claimant: Mr Price, solicitor
Respondent: Mr Heard, counsel

JUDGMENT having been sent to the parties on 13 June 2016 and written reasons having been requested in accordance with rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claim

1.1 By a claim form dated 11 November 2015, the Claimant brought complaints of unfair dismissal, disability discrimination under ss. 15 and 20 of the Equality Act and of a failure to provide her with terms and conditions of her employment in accordance with s. 1 of the Employment Rights Act.

2. The evidence

2.1 We received the following documentary evidence:
C1 – A chronology;
C2 – Dr Andrew's report of 6 May 2016;
C3 – A copy of the claimant's Schedule of Loss;
R1 – An agreed bundle of documents.

2.2 We heard the following witnesses give evidence before us:
- The Claimant;

On behalf of the Respondent;
- Mr Trowbridge, General Manager;

- Mr Burns, the Regional General Manager;
- Mr Bills the Hotel Accountant, based at Llandudno.

We also read the statement of Miss Lodge, a Reception Manager, whose evidence was not challenged by Mr Price.

3. The issues

3.1 The issues that we had to determine were those which had been clarified when the matters were discussed before Employment Judge Mulvaney on 27 January 2016 and which were then recorded in her Case Management Summary. Those issues were then further discussed on 2 June 2016 and set out in another Case Management Summary of that date. Both Summaries have been referred to later in these Reasons.

4. The facts

4.1 We reached factual findings on the balance of probabilities and attempted to restrict those findings to matters which were relevant to the issues. Any page references within these Reasons are to pages within the bundle R1 unless indicated otherwise and have been cited in square brackets.

4.2 The Respondent owns and runs the Hatherley Manor Hotel near Gloucester. It also runs the St Georges Hotel in Llandudno.

4.3 There are approximately 70 people employed at the Hatherley Manor Hotel; a mix of full-time and part-time staff. The key member of staff for the purposes of the case was Mr Trowbridge, the Claimant's line manager and the hotel's General Manager, who had started there in August 2004. The Claimant also had a reporting line to Mr Bills, the Group Accountant, based in Llandudo.

4.4 The Claimant, who is now 70 years old, had been employed at the hotel since April 2002 as the Financial Controller. Her role involved bookkeeping, stocktaking, cash handling, debtor control and she was also involved in the payroll and HR functions. She was clearly a strong personality and had on occasions ruffled some feathers. She was also a very particular person who liked things done her way.

4.5 Despite her age, the Claimant maintained that she never had any firm intention to retire. Mr Trowbridge had asked her about her plans and she had made it plain to him that she had no wish to give up work. She told us that she had, however, intended to reduce to two days per week from the age of 75, having reduced to three days per week when the Hotel's Spa had opened. The Spa had been planned for the autumn of 2015 and, although it is still planned, it has not yet been built.

Contract

4.6 The Claimant did not believe that she had ever received a contract. The Respondent maintained that she had received a letter dated 18 June 2009 [95] which enclosed a Handbook which contained general terms and conditions [58-80]. The Claimant had "*no recollection*" that she had received that document (paragraph 3 of her statement), although she

remembered receiving something in a smaller format. Mr Burns stated that he was "*in no doubt*" that she had received a contract with her offer letter, but no such contract or offer letter was produced to us.

4.7 Having heard the evidence on that particular issue, we concluded that the Claimant had probably received the Handbook as it appeared within the bundle, albeit in a smaller format, but that she had not received anything else. We had no documents other than those to which we have referred and, given the fact that she was such a meticulous person and that neither she nor the Respondent could produce one, we considered that it was unlikely that particulars beyond the Handbook were provided. She certainly did not receive particulars some weeks after the Handbook, as it suggested that she should have done [60].

Payroll system and the Claimant's workload

4.8 The Claimant used the well known pay and expenses software called Sage. She used a spreadsheet to work out staff pay which was completed from hand completed timesheets. She then sent the details to the Respondent's external payroll provider that was based in York. The St Georges Hotel in Wales ran its own payroll internally. The Accounts Assistant undertook that work until Mr Hodgkin took it on as part of his broader HR function there.

4.9 In March 2014, the Respondent installed a new payroll management system at both hotels known as 'Fourth Hospitality'. It had perceived benefits; it was thought to have greater functionality, it provided an ability for department managers to become more accountable for their own department budgets and it was capable of dealing with the requirements which arose from the new pension regulations. Training on the new system was provided and the Claimant attended two courses provided by an external trainer. She said that the training was "*very good*" (paragraph 10 of her statement). She also praised the product support.

4.10 The new system went live in April 2014. it was clear that the Claimant had been anxious about its introduction [100]; she was sceptical about its functionality and had not wanted to see the payroll function taken back in house, which was the consequence of its introduction. She believed that there were problems with the system once it was introduced; she thought that the national minimum wage rates were incorrect, that rest breaks were not capable of having been recorded easily and that session rates for casual staff were difficult to input and operate.

4.11 The Respondent accepted that there were teething problems, but no more than reasonably could or should have been expected from any new system. It believed that the Claimant had been overly negative about the system and, in particular, the fact that the payroll function was taken back in house.

4.12 The Claimant was seen to run aspects of the old system and the new system in tandem. She agreed that she and Mr Trowbridge had had different views about when to phase out certain aspects of the old system, including her continued reliance on manual timesheets. The Respondent asserted that it had asked her to stop using the old system on several occasions without success. As a result, Mr Trowbridge considered that the

Claimant was preventing the new system from being used to its full potential. She, nevertheless, continued to have issues with it and felt that more time was required to input the required data. She said that she complained "*regularly throughout the summer*" (paragraph 12) about problems that she had and she felt that Mr Trowbridge had been unsympathetic, but she did accept that he had taken steps to reduce her workload; in cross-examination, she agreed that he had suggested that her daily revenue checks could be relaxed (she had actually disagreed with the proposal) but she also agreed that he took on some of the responsibilities and that she, for example, was no longer responsible for full budget preparation, just summaries. He took on some of the department head recording duties as well. During her evidence, she accepted that her actual hours of work did not increase, although she continued to occasionally take work home. She also accepted that, by September, her workload had dropped a little as the system had become bedded in. She said that she asked for an assistant but was told that there was no budget for extra employees until the new financial year, which ran from October.

4.13 Meanwhile, outside work, the Claimant had been buying a rental property and, once it had been purchased in July, she had to undertake work to it. With a horse that she looked after, her new house and her work, Mr Trowbridge asked her whether she was sure that she was not doing too much.

4.14 Against that background, the Claimant alleged that, throughout the summer, Mr Trowbridge had "*waged a campaign to undermine me at every possible turn*" (paragraph 16). She asserted that he had made sarcastic remarks, had been critical of certain aspects of her work and had failed to support her (one particular example was given which concerned an argument that arose between her and the Head Chef in mid-October). No allegation of bullying or poor treatment was raised formally or informally by the Claimant at any stage. She said that she had made Mr Burns aware that she was generally not coping at work but that, in our view, fell far short of telling him that she was being mistreated or bullied by Mr Trowbridge. Our impression, having heard all of the evidence, was that her relationship with Mr Trowbridge remained robust. She was clearly prepared to express forthright views when she received a management instruction that she did not like. When she had wanted to, she had been prepared to raise complaints (for example, concerning the Chef). We did not consider that the relationship between her and Mr Trowbridge could properly ever have been characterised as that of victim and bully.

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

4.15 According to the Claimant, her work at the Hotel began to cause her stress. She said that she had made it plain to Mr Trowbridge that she was very tired.

4.16 At the start of 2014, she had had bronchial problems for which she had received two courses of antibiotics. She had been fairly low in August and had been referred to an ENT Specialist who concluded that she then had stress. It was clear that there were a number of stressors in her life at the

time which included the purchase of the property and other issues [107, 136 and 269].

4.17 On 3 November 2014, she was signed off work for four weeks with stress. The entry in her GP notes that day read as follows (page 17 of Dr Andrews' report, C2):

"Feels unwell, feels like head will explode, worried she was going to have a stroke last night, life difficult at work since March with new payroll system."

That entry followed three others in September which referred to stress.

4.18 The Claimant and Mr Trowbridge spoke on the phone. Stress was clearly discussed and Mr Trowbridge appeared to have been relatively supportive. There was another entry on 15 November (page 18, C2):

"*Stress at work. Has not really got dressed for the past two weeks, feels exhausted, shattered, no energy for anything."*

4.19 On 16 November, however, she popped into the hotel. She did so during a quiet time in order to obtain some personal information. She maintained that she was "*horrified*" to see the backlog of work in her room (paragraph 23 of her statement). She left a note for Mr Trowbridge saying that she had been signed off for another two weeks. The note read, in part, as follows [157-158]:

"Sorry for the inconvenience but looking at my desk if I had tried to come back to this lot I would have been off again within a week".

Then later on:

"PS I don't think any of the day-to-day stuff has been done, it was obviously going to be left to me to catch up two weeks work. When I have been ill due to stress."

4.20 In November, Mr Trowbridge undertook a home visit which the Claimant was asked about during her evidence. To start with, she said that she did not recall the visit at all; she said she was "*99.5% sure*" that the visit had not happened. However, she recalled much of the conversation that Mr Heard then put to her in cross-examination and, having heard Mr Trowbridge's evidence that such a meeting had occurred, we concluded that it was probable that one had occurred. Consequently, we also preferred the Respondent's evidence about the contents of the meeting. We noted, in particular, that the Claimant herself had appeared to refer to the meeting in a later transcript [291].

4.21 At the meeting, the Claimant asked Mr Trowbridge why the Respondent had not simply chosen to make her redundant. Mr Trowbridge did not want to lose her, he said, but felt that she was isolated in her office and so he suggested that another employee should join her. She chose one of the reception team. Mr Trowbridge also reassured her about her workload, that it was being actively and properly managed in her absence.

4.22 On the basis of those reassurances, the Claimant returned to work on 1 December, but she alleged that there were continuing problems with her workload. She said that the work required for the completion of the end of a particular financial period had not been commenced and that some of the

balance sheet items had not been reconciled. There was a pile of work for her in her room. Mr Trowbridge said that they had met during the morning and he told her again that there was no pressure on her and that she had not then complained about workload. We therefore had two very different accounts but, on the basis of either one, it was clear that the Claimant found the work on that day and the next to have been difficult. She was of the view that Mr Trowbridge was not properly supporting her, whereas the Respondent found her attitude to have been negative and overly sensitive.

4.23 Mr Trowbridge had not convened any formal return to work interview as anticipated by the Employee Handbook [62]. He had an informal chat with the Claimant mid-morning. We concluded that he had probably had not done enough to discuss his expectations in terms of workload at the start of the day but, when he did meet her, he did state that there was no pressure on her. The Claimant, however, had over-reacted to the fact that things had not been done her way in her absence and appeared to be overly critical of Mr Bills who had covered in her absence. He had travelled from North Wales to provide that cover for which she seemed ungracious and he was somewhat put out as a result [165].

4.24 On 3 December, the Claimant was signed off work again (page 18 of C2):

> "*Stress at work. Panic attack last night (seen OOH). Is she getting to the age where she needs to give up work?...Sick note for stress-related problem."*

The Claimant never returned to work.

4.25 There was a reasonable amount of e-mail contact between her and the Respondent in the immediate period after her sickness absence started. It appeared to have been cordial and supportive (in particular [168]). Mr Trowbridge tried to conduct a home visit with her before Christmas but it did not actually take place until the New Year, on 15 January [173]. In the meantime, the Claimant's workload continued to be covered by Mr Bills who had himself been trying to wind down his hours in advance of his own retirement but had continued to travel from North Wales to Gloucester and had increased his hours in order to take on that extra work.

4.26 On 15 January, Mr Trowbridge visited the Claimant again with a gift. On that occasion, she chose to covertly recorded their conversation although Mr Trowbridge had been unaware [282-313]. We found the transcript to have been illuminating and, on balance, it was more helpful to the Respondent's case than it was to the Claimant's.

4.27 Mr Trowbridge appeared sympathetic and largely listened to the Claimant during the meeting. He considered lots of scenarios with her frankly and openly which included part-time work, a redundancy situation being engineered or the possibility of the parties getting into a dispute [298]. All of the possibilities were talked around and he made it clear that, was she to have returned to work, she would have undertaken new work only and that backlog of old work would not have been left for her [302].

4.28 The Claimant said, however, that she had "*lost all faith in the company*" [304]. She went on to say this [305]:

> "*I am just not capable of doing a job properly. Which again was another reason I was getting so frustrated and stressed over those months because I knew that things were getting left, that I wasn't chasing stuff up the way I should be doing, I wasn't doing my HR stuff the way I should be doing, I wasn't chasing up debts latterly, the last few weeks, the way I should have been doing. And, I don't like that, I don't like being in that situation because that's not me."*

4.29 Later on in the meeting, she made a direct plea to "*make me redundant or as I say offer me, offer me early retirement on health grounds.*" [305]. Mr Trowbridge said that he would have a look at that possibility, but the transcript showed that he also said that the Respondent would have been happy to have had her back to either full-time or part-time work, despite her statements that she could not have seen herself ever working full-time again.

4.30 Mr Trowbridge also discussed getting in a full-time Accounts Assistant to support her [307]. She replied that she nevertheless still wanted a route out. She discussed the possibility of a return to the hotel in some form of consultancy role only. She also gave a clear indication of an intention to go to part-time work in November in any event and that she had obtained a pension quote for such a decision [309].

4.31 A few days after the meeting, the Claimant raised a grievance [177]. There were two elements to her complaint; first, she alleged that the Respondent had failed in its duty of care by overworking her and, secondly, she complained about sick pay. We considered it important that she had not complained about bullying or harassment at the hands of Mr Trowbridge.

4.32 A grievance hearing took place on 10 February. Mr Trowbridge, Mr Hodgkins, the HR Manager from Llandudno, the Claimant and her stepdaughter, Miss Spires, who supported her, were present [179-181]. At the end of the hearing, Mr Trowbridge restated that the Respondent had no plans to replace her.

4.33 On 12 February, Mr Trowbridge provided a grievance outcome letter [182-4]. He rejected the first element, but accepted the second and her sick pay was increased from four to nine weeks.

4.34 The Claimant appealed on 27 February [192-6] and Mr Burns dealt with it. He provided an outcome letter on 13 March in which he decided to uphold Mr Trowbridge's initial response [197-8].

4.35 During all of this time, the Claimant had remained off sick and, in April, the Respondent sought her permission to obtain a medical report in respect of her continuing absence [202]. The Respondent sought advice about her condition from her GP, Dr Goodrum, and the Claimant's complaints before the tribunal concerned aspects of that letter and how it was framed. The letter read as follows [204-5]:

> "*We would like you to prepare a medical report on her current state of health and on the prognosis for her future health in*

> *regards to the likelihood of her returning to work in the foreseeable future and whether she will be physically and mentally capable of carrying out her duties on a regular basis."*

The letter ended with the following paragraph:

> *"Based on the fact that Carol's position is a senior one and within our organisation and structure, can only realistically be done by one person and involves working to strict deadlines, is it likely to be further detrimental to her health for her to return to work and such responsibilities."*

4.36 We were told that the letter had been based upon another which had been used in the case of another long-term sick employee. It had been proof read by the HR Manager in North Wales. The Claimant argued that the letter was aggressive, that it was framed towards a dismissal and that it was 'deeply flawed'. In our view, it was not perfect; the employer did not ask for specific options to have been considered by the GP and it could have been said that the Respondent had implied that the Claimant's role was not divisible within the last paragraph. However, overall, it did not appear to have been an unfair or an unreasonable letter. The Respondent had not prevented the GP from suggesting part-time work, a phased return or any other option that might have facilitated a return to work.

4.37 The GP responded on 22 May [212-3]:

> *"I can confirm that she had significant problems caused by stress related to her workplace. This makes Carol extremely anxious and also causes some physical symptoms such as severe exhaustion and lack of concentration."*
>
> *"Unfortunately her anxiety does cause her significant problems out of the workplace. She has little energy, finds it hard to concentrate and finds it difficult to cope with doing too many things in a day. Even driving has been difficult for her. She is currently taking medication to try and improve her anxiety symptoms and to improve her day to day functions. However, currently she remains unfit for work. It is not possible to predict if she is going to be fit to return to work. This depends on her progress over time and with medication."*

4.38 Mr Trowbridge had maintained e-mail contact with the Claimant. Their communications had remained friendly and reasonably positive [207-211] and, on 8 June, having confirmed receipt of Dr Goodrum's report, he suggested a meeting with her later that month. He suggested that it should be somewhere neutral [206]. The Claimant agreed and suggested the venue, a Costa franchise on the outskirts of Gloucester. She confirmed that she was then working towards "*full or partial retirement later this year, with my heath and finances intact*" [210].

4.39 The meeting took place on 12 June and lasted for over an hour but, other than that, very little of the detail of it was agreed between the parties. The Claimant's account in her Claim Form was that Mr Trowbridge had handed her an SSP1 form and had stated that, since Dr Goodrum could not give an indication as to her likely return to work, the Respondent had to make long term plans and therefore wanted to bring her contract to an end (i.e. that it

would have looked to do so at some stage in the future). Mr Trowbridge stated that the Respondent had "*changed everything*" at work and that the Claimant would not have understood what was going on and that it would have been like "*starting again*". She maintained that she was given the distinct impression that, even if she had been well enough, her position had not been available to her (paragraph 12 of the Claim Form). She was not given an opportunity to comment on the medical report or provide her own view as to her likely return work.

4.40 That account within the Claim Form was compared with that provided within paragraph 34 of her statement which we considered to have been rather different. Critically, in her statement, she said that she had told Mr Trowbridge that she could have returned to work on a part-time basis before the end of her sick note, which was then due to have lasted until 31 July. That was despite what Dr Goodrum's report had said. Paragraph 34 also contained the allegation that she was dismissed orally that day. We considered that those inconsistencies undermined her credibility.

4.41 The Respondent's account was that it was the Claimant who had asked that an exit package should have been provided as she had been hoping to retire. She said that she was not hopeful that she would have been able to return to work and (in paragraph 25 of his statement, Mr Trowbridge said that *"she told me that she felt that she could not see a return to work"*). He said that she could have remained on the books without pay because her statutory sick pay had run out, or that she could have been paid three months' salary if termination had been agreed on the grounds of ill health. The situation between them was left on the basis that she would reach a decision and that they would then speak further.

4.42 Our conclusions in relation to that meeting were, first, that the Claimant's account that she had offered a return to work on a part-time basis was unreliable and improbable because of the contents of Dr Goodrum's report, the fact that she was then still signed off sick and the contents of her Claim Form. We accepted Mr Trowbridge's evidence and concluded that his description of the Claimant's stance was consistent with her position at the earlier meetings in November 2014 and January 2015. We accepted that all aspects of the Claimant's employment were discussed; her health, the medical report, the Respondent's ability to cope in her absence (including Mr Bills' input), the spa development and her sick pay. Nothing definite was determined but, in light of what he had been told, it seemed clear to Mr Trowbridge that her employment was going to end in some way. That said, he did not terminate it at the meeting. The Claimant appeared to have been seeking an enhanced financial offer.

4.43 Later on 12 June there was a telephone conversation between Mr Trowbridge and the Claimant. During the call, she accepted that he offered her a further payment of eight weeks' salary on top of her notice pay and he also proposed that her departure would have been framed as a termination by the Respondent. It seemed to us that that had particularly upset her since she had not wanted to have been dismissed, even cosmetically. The following day, she e-mailed the Respondent [217]:

> *"I will ask my Solicitor to respond on my behalf in respect of Anderbury's severance offer, he would probably have wished to do so anyway."*

4.44 Mr Trowbridge responded on 15 June [217A]; he had taken umbrage at the criticisms that had been leveled against him in the Claimant's previous e-mail and he indicated that a termination letter would follow:

> *"I do not accept the statements you have made in regards to how you have been treated and in fact whole heartedly refute them.*
>
> *The meeting with you on Friday was all about trying to put a mutually acceptable end to this situation by today to use your words "to avoid any further upset and stress", clearly based on your email that will not be the case and I therefore withdraw my proposed verbal offer to you.*
>
> *I will confirm to you by letter the notification of termination of employment on grounds of ill health, as agreed this will be 12 weeks payment in lieu of notice, so this situation does not drag on and further affect you or your health and can also allow the business to begin its own recovery…"*

4.45 The letter of dismissal followed on 16 June. The Claimant's employment was terminated on the grounds of her continued ill health [218]. No right of appeal was offered, nor did the Claimant ask for one. The subsequent correspondence was a cordial attempt to resolve issues regarding her personal effects, some of which we noted had already been taken by her before Christmas [220]

5. Conclusions

Dismissal or resignation

5.1 The first issue identified within paragraph 6.1 of the Case Management Summary of 27 January and paragraph 12.1 of the Summary of 2 June 2016 was whether or not the Claimant had been dismissed. Mr Heard ultimately conceded that point. There clearly had been open discussions about a consensual termination between the Claimant and Mr Trowbridge in November and January 2015, but the events of 12-15 June did not result in any agreement. On 12 June, she had been made an offer and the ball had been left in her court as to how to proceed. Over the telephone later that day, an enhanced offer had been put which had neither been accepted nor rejected. The Claimant's e-mail of 13 June made it clear that, whilst the offer was still not accepted or rejected, she had become upset about the possibility of any consensual termination being styled as a dismissal and she had put matters in the hands of her solicitor. On 15 June, her e-mail was met with a clear intention to terminate, which was then followed by a letter of dismissal on 16 June [218]. Mr Trowbridge ultimately accepted in cross-examination that the Respondent had dismissed the Claimant for ill health.

Unfair dismissal

5.2 The reason for the Claimant's dismissal was capability, a fair reason under s. 98 (2)(a) of the Act, which was not disputed by Mr Price.

5.3 The next, more significant question that we had to deal with was the question of fairness under s.98 (4) and paragraph 12.3 of the Case Management Summary of 2 June 2016 contained the Claimant's complaints in that respect.

5.4 In a case of long term sickness absence such as this, we had to bear mind the guidance from cases such as *Spencer v Paragon Wallpapers Ltd* [1977] ICR 301, *Lynock v Cereal Packaging Ltd* [1988] ICR 670, recently considered in *BS v Dundee City Council* [2013] CSIH 91 in which the Scottish Court of Session suggested that three matters needed to be considered when examining the fairness of a decision to dismiss as a result of long term illness; first, whether the employer could have been expected to have waited any longer. Secondly, whether there had been adequate consultation with the employee and what, in terms of further information, that had produced and, thirdly, whether reasonable steps were taken to discover the employee's medical condition and prognosis.

5.5 Taking those in turn, we did not consider that the Respondent could have reasonably been expected to have waited any longer. It was a relatively small organisation and the Claimant occupied a key role which another employee was having great difficulty in covering from a distance when he had been approaching his own retirement. Further, Dr Goodrum's report was open ended; there was no date upon which she was expected to have returned to work within the near, or even distant, future.

5.6 The second question concerned consultation. The parties had met in November 2014, January 2015 and June 2015 and had held lengthy discussions on each of those occasions. At each meeting, the Claimant had said that she was not fit to return to work and, in our view, she held no real desire to do so.

5.7 Thirdly, the medical evidence. Although Dr Goodrum's report was not as informative as others that we had seen in similar circumstances, particularly because its lack of clarity in respect of the prognosis, there was no doubt that it was negative and the GP's pessimism about the Claimant's likely return to work was matched by her own stated desire not to have returned (see her comments at the January meeting [284] (top of page), [286] (bottom of page) and [304] and [306]). It did not appear that anything had changed significantly when Mr Trowbridge met her again in June. It was reasonable, therefore, for the Respondent to have concluded that there was no likelihood of a return to work in any capacity in the foreseeable future as at 12 June. We concluded that the decision to dismiss her therefore fell somewhere within the band of responses available to an employer faced with the facts that it had at that time.

5.8 Was the dismissal procedurally fair? There were obvious procedural problems in this case for the Respondent; the Claimant had not been warned of the possibility of dismissal following the meeting of 12 June and

had not been given the opportunity to be accompanied to that meeting. She had also not been given a right of appeal. We considered that the Respondent's failings breached its own Disciplinary Policy [75] and requirements of the ACAS Code of Conduct (paragraphs 9, 10, 13 and 26). The dismissal had been procedurally unfair.

[Note; since expressing our views orally, the decision in the case of *Holmes v QinetiQ* UKEAT/0206/15/BA has been reported. In view of the fact that this element of our decision was academic in terms of the Judgment and financial outcome, the parties' further comments were not been sought. For the avoidance of doubt, even if there had not been a breach of the ACAS Code, its spirit had not been followed, nor had the Respondent's own procedure.]

5.9 We were asked to consider the application of the *Polkey* principle. The decision in *Polkey v Dayton Services* [1988] ICR 142 required Tribunals to reduce compensation if it was found that there was a possibility that the employee would still have been dismissed even if a fair procedure had been adopted. Compensation could be reduced to reflect the percentage chance of that possibility. Alternatively, a Tribunal might conclude that a fair procedure would have delayed the dismissal, in which case compensation could be tailored to reflect that likely delay.

5.10 It was for an employer to adduce evidence on that issue, although a Tribunal should have regard, to any relevant evidence when making the assessment. A degree of uncertainty was inevitable, but there may have been circumstances when the nature of the evidence was such that a prediction was so unreliable that it was unsafe to attempt to reconstruct what might have happened had a fair procedure been used. However, a Tribunal should not have been reluctant to undertake an examination of *Polkey* simply because it involved some degree of speculation, as recently stated in the cases of *Software 2000 v Andrews* [2007] ICR 825 and *Contract Bottling v Cave* UKEAT/0100/14.

5.11 We concluded that there would have been an identical outcome had a fair procedure been followed in this case. We reached that view because of the evidence that we gleaned from the meetings of November 2014, January and June 2015 and the Claimant's e-mails including, for example, the one of 8 June 2015 [210]. A return to work seemed to have been very unlikely and the question was really whether she would have retired, resigned with an enhanced offer, or been dismissed. Her departure was nevertheless inevitable within a short period and the only question for us was the length of that period.

5.12 Mr Heard suggested a timescale of two to four weeks. We accepted that that was a reasonable estimate, although we considered that a 4 week period was more likely because the Claimant had been off sick and meetings would have been more difficult to arrange and, since she had appealed her grievance, it seemed probable that she would also have appealed the dismissal decision, had an appeal been offered. The *Polkey* principle therefore applied and we considered it probable that the Claimant would have been dismissed fairly within 4 weeks.

Disability discrimination

5.13 We first had to determine whether the Claimant was disabled. A person was disabled within the meaning of the Act if he had a physical or mental impairment which had a substantial or long term adverse effect on his ability to carry out normal day to day activities (s. 4). Guidance in relation to the definition was contained within Schedule 1 and we also took into account the *Guidance On Matters to Be Taken into Account in Determining Questions Relating to the Definition of Disability*.

5.14 The Claimant alleged that she had been disabled from a point in 2014. She claimed to have suffered from depression, anxiety and stress. Dr Andrew's report, which was admitted in written form as a result of the decision that was made at the Preliminary Hearing on 2 June 2016, strongly supported her contentions and she relied upon her self report to him as her own evidence of disability (paragraph 2 of C2). Dr Andrew also reviewed the GP notes in which her medication and treatment had been recorded, which helped to reflect the severity of her condition, and he concluded that she had developed a major anxiety disorder which had started in either July or August 2014 (classified as Generalised Anxiety Disorder under the International Classification of Diseases, F41.1, paragraph 7.3 of his report).

5.15 We did not accept everything that Dr Andrew had written at face value. For example, he stated that the Claimant's GP records indicated that she was signed off sick from work in August 2014 with work related stress and anxiety related symptoms. Having reviewed those entries, that did not appear to have been the case. Nevertheless, his conclusions were expressed in clear terms and, in respect of the period starting at the end of 2014, he stated that the Claimant had developed an Adjustment Disorder with Mixed Anxiety and Depressed Mood (ICD paragraph F43.23) which included symptoms of lethargy, anhedonia, social avoidance, poor concentration, reduced self-care, feelings of hopelessness and early morning waking. She was tearful, she required anti-depressant medication and she continued with those symptoms into April 2015 (paragraph 7.4).

5.16 In paragraph 7.6, he stated that the mental disorder which had started in 2014 and had continued into 2015, during which time it had met "*the criteria for a mental impairment and thereby a disability*". As to the future, he opined that:

> *"This might also have remained the case longer term if she had remained in the job from which she was dismissed, particularly if she had remained in the same situation in which she found herself prior to and after returning from sick leave."*

5.17 In paragraph 7.7, Dr Andrew then went on to deal with what happened after the Claimant's dismissal. He believed that, at some point during 2015, her symptoms no longer fulfilled the criteria of a disability as her mood and general anxiety had gradually receded.

5.18 We had to assess whether the Claimant was disabled at the time of discrimination complained of in the case. The Respondent agreed that the

essential elements of the statutory test had been met save for the requirement that the condition had been long term.

5.19 Schedule 1, part 1, paragraph 2 contained the following requirements:

"The effect of an impairment is long term if -

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

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

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

The Claimant's condition had not lasted for 12 months by the date of the adverse treatment complained of (her dismissal) because, according to Dr Andrew, it had only been present for 10 or 11 months from approximately July or August 2014. There was no indication that it had been likely to last for the rest of her life and so the question for us was whether it was likely that her condition was to have lasted for at least 12 months *then*. Having considered all of the evidence, we concluded that the answer to that question was 'yes'. 'Likely' in that context meant 'could well happen' (*SCA v Boyle* [2009] UKHL 37 and paragraph C3 of the *Guidance*). Mr Heard relied upon the fact that Dr Andrew has only used the word '*might*' in paragraph 7.6 of his report and he suggested that that was not sufficient to have passed the test of 'likelihood'. However, in June 2015, the Claimant was still signed off work up to 31 July and was not expected to have recovered in the short term. Dr Goodrum's report certainly indicated that it was likely that she would have been off for a further period of time. It is true that there had been some signs of improvement (the GP note of 8 June had suggested that she was improving then [261]), but Dr Goodrum had nevertheless signed her off until the end of the following month. Accordingly, at the point of her dismissal, it was likely that her condition would have lasted for 12 months. We acknowledged that the Claimant had recovered later in 2015 but that did not mean that, when considered in June 2015, it had not been likely that her condition would not have been likely to have continued for at least a further month or two.

5.20 The next question was that of knowledge. It was a defence for a respondent to a claim under either s. 15 or s. 20 of the Act, that it did not have actual or constructive knowledge of the employee's disability. The relevant provisions were s. 15 (2) and Schedule 8, Part 3. Ignorance itself was not a defence; what we had to ask was whether the Respondent either knew or ought reasonably to have known that the Claimant was disabled. In relation to the second part of that test, we had to consider whether the Respondent ought reasonably to have asked more questions on the basis of what it already knew and we have had in mind Lady Smith's judgment in the case of *Alam v DWP* [2009] UKEAT/0242/09, at paragraphs 15-20.

5.21 In this case, prior to the Claimant's sickness absence, she maintained that Mr Trowbridge was aware that her work had been making her tired. The Respondent also knew that she was not fit for work in November and then, again, from December onwards. It therefore knew that she had been off work for approximately seven months up until June 2015 and, prior to that, that she had had a very good absence record. Mr Trowbridge also knew that she had been in receipt of counselling and that her symptoms had been debilitating when they had met in January (see, in particular, the contents of the transcript [283-284]). Even then he had clearly expected her condition

to have lasted several months more because reference was made to him having anticipated that it might have lasted beyond April [290]. On the other hand, the Respondent did not have a diagnosis or prognosis until it received Dr Goodrum's report of May 2015 which, itself, did not contain a clear view with reference to the Equality Act. Mr Trowbridge told us that, at the date of his letter to Dr Goodrum in May, he did not consider that she was disabled. He said that he *"would not have thought for a second that she was then."* Whilst we did not doubt what he said, it was a statement made by a manager who had had received little training on equal opportunities issues and who gave a poor impression of understanding of the concept of disability as it was defined under the Act.

5.22 If more questions had been asked, the Respondent should have appreciated that the Claimant's condition was likely to have lasted, in the *Boyle* sense, for more than a year. It was not a case, like that of *Gallop v Newport City Council* [2013] EWCA 1583 to which reference was made by Mr Heard, in which an employer had relied upon medical evidence, albeit wrongly. The problem here was that it had never really occurred to the employer to consider disability. The Respondent was looking at exit strategies and was concentrating on the Claimant's desire to leave. We did not therefore consider that it was a case in which the Respondent could properly argue that it ought not to have known of the Claimant's disability.

5.23 As to the claim under s. 15 of the Act, Mr Heard sensibly accepted that the Claimant had been dismissed for something which had arisen from her disability, since she had dismissed because of her long term sickness absence. Even though the Claimant was therefore able to demonstrate the essential elements of the test under s. 15 (1)(a), the Respondent still had a defence if it could show that the treatment had been a proportionate means of achieving a legitimate aim under s. 15 (1)(b), a test which we had to approach objectively.

5.24 As to the legitimate aim, Mr Heard argued that there was a need to manage sickness absence within the Respondent's workforce and, in the Claimant's case, to have her role and functions fulfilled. We agreed that that was a legitimate aim; there had been a genuine need to cover her absence. The Respondent was a relatively small business and hers was a unique and important role at the Hotel. Mr Bills had had a long commute to cover her work and his long term coverage of it was untenable in light of his own anticipated retirement. There was little challenge to Mr Trowbridge's and Mr Burns's statements that the Respondent was struggling in that respect.

5.25 Next, we had to consider whether the Claimant's dismissal had been a proportionate means of achieving that aim. It had certainly enabled the future to have been planned for. The Respondent had found that she had been evasive about her intentions regarding retirement over a number of years. Ironically perhaps, in mid-2015, she seemed to have been much clearer about her intentions which were that she had no real intention of returning to work, as she indicated at the meetings in November 2014 and January and June 2015. In our view, the dismissal was both justified and unsurprising; it was a proportionate means of achieving the legitimate aim of planning for the long term future of her role.

5.26 As to the claims under ss. 20 and 21 of the Act, we bore in mind the guidance in the case of *Environment Agency v Rowan* [2008] IRLR 20 in relation to the correct manner in which we had to approach the sections. We also reminded ourselves that, in the context of defining a provision, criterion or practice (a 'PCP'), a practice generally had to involve an element of repetition (*Nottingham City Transport v Harvey* [2013] EqLR 4). In relation to the second limb of the test, a claimant needed to demonstrate that he had been caused a substantial disadvantage when compared to those who were not disabled. It was not sufficient that the disadvantage was merely some disadvantage when viewed generally. It needed to have been one which was substantial when viewed in comparison with persons who were not disabled, and that test was also objective.

5.27 In terms of the adjustments themselves, it was necessary for them to have been both reasonable and to have operated so as to have avoided the disadvantage. The duty to make adjustments did not generally arise unless or until a claimant was able to return to work, although that is not always the case, as revealed by the cases of *Home Office v Collins* [2005] EWCA Civ 598*, NHC Scotland v McHugh* [2006] UKEATS/0010/06 and *London Underground Limited v Vuoto* [2009] UKEAT/0123/09. In the case of *Collins,* there had been no evidence that the adjustments contended for would have aided the Claimant's return to work whereas, in *Vuoto*, a more positive view was expressed by Occupational Health in relation to the proposed changes and the employee's likely consequent return. What those cases both demonstrated was that, in all questions of that sort, the focus had to be upon the extent to which the adjustment was said to have been likely to have overcome or alleviated the disadvantage suffered at work, assuming a likely return to work if the employee was actually then absent. We also referred to the Statutory Code of Practice and, specifically, paragraph 6 relating to the duty under ss. 20 and 21.

5.28 The PCPs that we had to consider were set out in the Case Management Summary of 2 June 2016 at paragraph 15. We considered them in turn;

5.28.1 Paragraph 15.1.1; 'Accepting medical reports without further enquiries when a clear prognosis was not given';
Mr Heard's criticisms of this claim was largely, but not exclusively, correct. In our view, paragraph 15.1.1 did not contain a PCP; there was no evidence that the employer had a practice of accepting medical reports without further enquiries. Even if there had been, there was no evidence that an adjustment to that practice would have produced a different result or alleviated the disadvantage of dismissal. There was no evidence that an adjustment would have necessarily or somehow facilitated a return to work;

5.28.2 Paragraph 15.1.2; 'Dismissing employees who were off work for a sustained period and/or when a prognosis was uncertain';
That was really in two parts. The second part largely repeated the PCP in 15.1.1 and the first part repeated the essence of the s. 15 complaint;

5.28.3 Paragraph 15.1.3; 'Failure to carry out reviews or obtain further medical reports when there was uncertainty as to an employee's ability to return to work';
Again, that seemed to have been a rewording of the PCP in paragraph 15.1.1 and it was flawed for the same reasons.

5.29 Further, there was no evidence of a substantial disadvantage that the Claimant suffered when compared to those who were not disabled. If those PCPs had existed, we considered that any disadvantages would have applied to any sick employees, not just the Claimant.

5.30 Even if we were wrong, as to the adjustments themselves, we considered that those contended for within paragraph 15.3 of the Summary did not actually match the PCPs within paragraph 15.1. Paragraph 15.3.3 for example, appeared to have been an adjustment to a different PCP which had never been framed. The adjustments claim was put forward in a rather confused manner. The Claimant's complaints had been more coherent under s. 15 and had, of course, succeeded, subject to the Respondent's defence under s. 15 (1)(b).

Statement of terms of employment

5.31 The Claimant should have been provided with a s. 1 statement of the particulars of her employment. We concluded that she had only received the Employee Handbook. The Handbook only partially complied with the requirements within s. 1 (4) in that it contained general provisions relating to such things as holiday entitlement, incapacity and pension provision. It did not comply with other aspects; it did not set out her rate of pay or her hours of work. There was partial compliance with the statutory requirements in terms of the Handbook's content, but the Act required the details to have been provided at the *start* of the Claimant's employment and, on the basis of our findings, that had not been done and that element of the claim therefore also succeeded.

6. Remedy

6.1 The parties were in agreement as to the amount of the Claimant's Basic Award; £9,262.50 (1.5 x 13 x £475).

6.2 In relation to the Compensatory Award, as a result of our decision in relation to the application of the *Polkey* principle, the Claimant's claim for loss of earnings was to have been restricted to 4 weeks' pay. Mr Heard made the point that, had a fair procedure been followed, the Claimant would have continued to receive the same pay that she had received up until the point of dismissal. She was then receiving nothing because she was no longer in receipt of sick pay. Mr Price argued that she should, nevertheless, have been awarded four weeks' pay because she should have received compensation calculated on the basis of her notional weekly pay.

6.3 We considered that that was simply wrong; *Polkey* required us to consider would have happened had a fair procedure been implemented. In this case,

we concluded that she would have remained in employment for a further 4 weeks but you would not have received pay since she had not received any pay in the weeks leading up to that point.

6.4 There was, therefore, no increase to that award that we were in a position to make under s. 207A of the Trade Union and Labour Relations Consolidation Act 1992 as a result of the Respondent's failure to follow the ACAS Code of Conduct.

6.5 However, s. 38 of the Employment Act 2002 was relevant and, in particular, s. 38 (2):

> *"If in the case of proceedings to which this section applies-*
> *(a) the Employment Tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relate, and*
> *(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996*
> *the tribunal must, subject to subsection (5), make an award of a minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead."*

The minimum and higher awards were either two weeks' or four weeks' pay. Sub-section 5 (the defence of 'exceptional circumstances') was not said to have applied.

6.6 Although the Claimant had received the Employee Handbook sometime in 2009, she did not receive any statement of her particulars when her employment had begun. Consequently, we concluded that she should have been awarded the higher amount.

6.7 The Claimant was also entitled to her fees as costs and the Respondent did not resist that award in the sum of £1,200.

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Employment Judge Livesey

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Date 15 July 2016

REASONS SENT TO THE PARTIES ON

20 July 2016
FOR THE TRIBUNAL OFFICE