EMPLOYMENT TRIBUNALS

Claimant	**Mrs Anna-Marie Wheatstone**
Respondents	**Blakeney News Food and Wine Ltd** **Mr David Mills** **Mrs Wendy Mills**

Heard at: **Bristol** **On:** **10 to 13th September 2018**

Before: **Employment Judge Street**
Members **Dr J Miller**
Mr D Clements

Representation
Claimant: Mr Yagomba (friend)
Respondent: Mr Mills, Company Director, for all three respondents

JUDGMENT having been sent to the parties on 20th September 2018 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. **Evidence**

1.1. The Tribunal heard from 4 witnesses for the claimant, including the claimant herself: Mr Miles Hunter, the claimant's partner, Mrs Shirley Byett, her mother, and Mrs Mary Rose, a former employee of the first respondent. We were given witness statements from witnesses not attending, from Ms Jane Kidger, Miss Sarah Allaway, Ms Jemma Turley and Mr DJ Gregory and a witness statement from Mr George Yagomba, the claimant's representative.

1.2. The Tribunal heard from 8 witnesses for the respondent. Mr David Mills, shareholder and company director, the second respondent, Mrs Wendy

Mills, shareholder and company director, the third respondent, from Mr John Cadogan and Mrs Shona Cadogan, customers, from Ms Rachel Smith, Miss Lisa Turley, Ms Michelle Hewitt and Ms Elaine Gibson, retail assistants.

1.3. The Tribunal read the documents in the bundle referred to.

2. **Issues**

2.1. The claimant claims unfair dismissal, disability discrimination, that is, failure to make reasonable adjustments and disability arising from discrimination, breach of contract, unlawful deduction from wages and a failure to provide particulars of employment.

2.2. The claim included constructive dismissal at the preliminary hearings. On discussion of the issues at the start of the hearing, that claim was not pursued.

2.3. Disability was agreed. The claimant relies on epilepsy

2.4. The claimant claims personal injury so the hearing in respect of disability had been listed for a hearing of the merits only, liability to be dealt with by way of directions.

2.5. The issues before the Tribunal to decide were as follows.

Unfair Dismissal

2.6. Was the claimant dismissed or did she resign?

2.7. If dismissed, what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?

2.8. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent act within the band of reasonable responses?

2.9. As to whether the dismissal was procedurally unfair.

2.10. As to whether the claimant contributed to the dismissal.

Disability

2.11. Was the claimant a disabled person. The respondent accepted that they had been aware that the claimant had epilepsy and accepted that she met the definition of disability at the hearing.

EQA, section 15: discrimination arising from disability

2.13. Was the claimant treated unfavourably because of something arising in consequence of her disability.

2.14. The "something arising" is pleaded as the claimant's sickness absence from 20/07/17.

2.15. Did the respondent treat the claimant unfavourably by:

i. Dismissing the claimant
ii. Requiring her to resume her duties by 16/08/7 despite being medically certified as unfit to work (para 22 ET1)
iii. Changing her duties and roles without warning, consultation or communication see 113 him to her, 20/07/17
iv. And then replacing her altogether (para 22 ET1)
v. Failing to contact or check on her following the sick note
vi. Discussing her private life with "people in the village" including regarding her employment status
vii. Informing her that her colleagues allegedly said they were not prepared to work alongside her and threatening to sue her
viii. Stopping payment of her statutory sick pay without warning or notice.

2.17. If so, including the dismissal, was that because of that sickness absence?
2.18. If so, has the respondent shown that that unfavourable treatment was a proportionate means of achieving a legitimate aim?

Reasonable adjustments: EQA, sections 20 & 21

2.19. A "PCP" is a provision, criterion or practice. Did the respondent apply the following PCP:

> *that the respondent did not offer flexibility to enable the claimant to return to the workplace, in that the respondent expected the claimant to return to work and effectively to perform the essential functions of her roles with the respondents.*

2.20. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time
2.21. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?
2.22. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage?
2.23. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Unlawful deductions

2.24. Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13 by the failure to pay in respect of the period 1/08/17 to 25/08/17

Breach of contract

2.25. To how much notice was the claimant entitled?
2.26. Did the claimant fundamentally breach the contract of employment, such that notice was not payable.

Failure to provide written particulars of employment

2.27. Was there a failure to provide written particulars of employment?

3. **Findings of Fact**

3.1. The first respondent was incorporated in 2016, taking over the previous unincorporated business. Mr and Mrs Mills, who are business rather than personal partners, are each directors and shareholders, holding 50% of the shares each. Mrs Mills is the employed manager.
3.2. Mrs Mills deals with pay matters. She gives the accountants, who provide a professional payroll service, the starting and leaving dates, they email the documents to her and she pays the staff.
3.3. Mr Mills is dyslexic.
3.4. Mr Mills deals with contract matters. No staff records of disciplinary or grievance matters are kept or any personnel files. The two directors jointly deal with appointments, but any disciplinary matters are left by Mrs Mills to Mr Mills.
3.5. Mrs Wheatstone started work with the respondents on 08/08/11.
3.6. Mrs Wheatstone has epilepsy (138). She was diagnosed in 1997 as suffering from complex partial status epilepticus and has been taking anti-epileptic medication on a regular basis. The seizures have been generally well controlled on medication but less well so in 2018. However, at the time of her employment, the principle effect during the day were occasional petit mal, which she called “moments”. She identified the frequency of those as related to stress. She might have some warning. She has fallen to the floor without warning. She is not able to drive
3.7. She told the respondents about her epilepsy on appointment. She had had occasional “moments” while working. Mrs Mills had driven her home on one occasion, recognising that she was feeling unwell but not recognising that this reflected a petit mal. She avoided doing tasks such as climbing up to higher shelves or to change light bulbs and that was accepted without difficulty.
3.8. Mrs Wheatstone was a retail assistant, doing tasks such as till work, stacking shelves, cleaning, dealing with deliveries, opening and closing the store, cashing up and taking the banking to the post office. In addition, she dealt with newspaper orders and accounts, ordered stock from a range of suppliers, set up promotions, trained new staff and managed the shop when Mrs Mills was away. She enjoyed the work, enjoyed the

customers and felt that she held a valued role in the shop and local community (51).

3.9. She was trusted by Mr and Mrs Mills to manage the shop in their absence. Mrs Mills confirmed that she was a good worker.

3.10. Her shift on 19/07/17 (a Wednesday) started at 6.50 am and she attended with Lisa Turley, also on duty. They were chatting about work, including that the first ten minutes of the morning shift was not paid.

3.11. Mr Mills lives in the flat above. He heard raised voices downstairs. He came downstairs.

3.12. Later, he spoke to Mrs Wheatstone aside and there was a discussion between them on which their accounts wholly disagree. Findings on the contested accounts are discussed below but we accept that he gave her a choice of resigning or being dismissed.

3.13. Later that day, the claimant's partner telephoned and left a message for Mrs Mills to say that Mrs Wheatstone was ill and would not be in the following day.

3.14. Mrs Mills did not get that call but sent a text message at 19.58 that day,

> "Missed your call
> I guess u aren't in tomorrow…..
> Please let me know asap"

3.15. Mr Hunter telephoned Mrs Mills back and explained that Miss Wheatstone had suffered a serious seizure and would be seeing her GP.

3.16. The following day, 20/07/17, Mrs Wheatstone went to her GP. The notes show that

> "yesterday told by the male owner (the manager, his ex-wife female) "hand in your resignation or I will fire you", "bring it in tomorrow", overheard Anne-Marie and a colleague discussing work-related issue.
> She very distressed.
> "lots of petit mals".

3.17. She was signed off with work-related stress for one month from 20/07/17 and the sick note was handed in to the employer that day

3.18. On 19/07/17 or 20/07/17, Mr Mills drafted, for discussion with Mrs Mills, a letter setting out a final written warning to Mrs Wheatstone

> "It is with regret that you are receiving your final written warning, for your disruptive and troublemaking behaviour amongst all members of the current staff…..
>
> "After numerous verbal warning your disruptive behaviour and your ability as a troublemaker has now become unpalatable,

we have no intentions on losing any more staff because of this ongoing situation.

After talking to members of staff we have now found it necessary to reduce and alter your working hours and try and find a member of staff that is willing to work alongside you.

Over the next couple of days we will try to find you suitable hours, without upsetting our existing staff." (113) (*spelling corrected for ease of reading)*

3.19. That does not refer to resignation.
3.20. It was not sent to Mrs Wheatstone. Mrs Mills does not remember it.
3.21. On 21/07/17, Mrs Wheatstone was asked to return the keys of the shop and did so.
3.22. Her job was advertised as vacant on 28/07/18 (83, confirmed by Mrs Mills orally).
3.23. She was paid as normal on 31/07/17, including statutory sick pay..
3.24. She provided a further sick note, issued on 21/08/17 for one month and handed it in that day. The sickness was work-related stress.
3.25. There was no contact with her in relation to her role or the sick note. There were some exchanges with Mrs Mills by text about picking up her pay slip and purchases she or her family had made. Those are routine and make no reference to resignation or her absence.
3.26. The first intimation directly to her after 19/07/17 that the employment was not continuing was Mr Mills' text message on 22/08/17 saying,

"We have received a sick note from your doctor today.
Can I remind you that you no longer work for this company and you will need to seek legal advice from this point" (74).

3.27. She responded on 23/08/17 by letter, asking for information as to when her employment ended (65).
3.28. On 25/08/17, Mr Mills responded by text message,

"Dear Anna Marie

Please can I reiterate your original comments to me on the morning of your resignation, 19/07/17. Not only did you verbally resign on that morning but you also told others within the store. We have witness statements to confirm this….
When we received your sick note we then gave you the benefit of the doubt and assumed you would be returning back to work when your shift was due to start the day after you're sick note came to an end, 16/8th/2017.

> After several attempts of trying to contact you and you not contacting us we then naturally assumed that you had actually resigned!
> This coming Monday we received yet another note.
> Please note the gap between your original sick note and this new one had long gone.
> With the knowledge of your original resignation and the information we have from others in writing we have to reiterate back to your original intentions.
> Affectively you did not turn up for your working duties, leaving us with no alternative than to replace your position.
> I also have to add that had you (have) decided to come back at the end of your sick note then your duties would of changed as none of your existing working colleagues are prepared to work alongside you.
> Once again, we have also this in writing from our existing staff." (78/79)`

3.29. Mr Mills, in oral evidence, frankly admitted that some of the contents were not true, that he had lied. That was in relation to the suggestion that they had statements in writing from customers and staff and in relation to the statement that they had made several attempts to contact her.
3.30. That letter does not set out the terms in which it is said that she resigned.
3.31. The date of 16th August is four weeks on from the date of the sick note issued for one month on 20/08/17. She had not been told that they expected her back on that day or that they read the sick note as covering only four weeks.
3.32. She wrote again, refuting the claim that she had resigned and saying she planned to resume work when fit to do so (66).
3.33. Mr Mills replied on 30/08/17 (60) reiterating what he said had happened on 19/07/17.

> "On the morning of the 19th July after receiving yet another verbal warning it was explained to yourself that you were going to receive a final written warning alongside a disciplinary hearing where you could receive the termination of your contract due to your ongoing misconduct at work.
> From that point you verbally resigned in an aggressive manner.
> Your exact words, "I fucking resign I hate this fucking place……
> If you intended to return to work then your shift was due at 7 AM on Monday, 21st August 2017
> We did not receive your second sick note until late that afternoon on 21 August 2017.
> As employers we firmly believed you had ceased your employment with ourselves."

3.34. That is the first time that the terms in which she is said to have resigned is set out.

3.35. It also sets out that there had been a discussion about notice,

> "You advised me that you could easily find alternative employment within the months' notice that I respectfully gave you when you asked me "how long did you have"." (81).

3.36. She wrote again on 1/09/17, rebutting again that she had resigned, and again saying she would return. She asked for payment. She had not been paid since 31/07/17 and was not in fact paid for August, although the accountants prepared a pay slip for two weeks statutory sick pay (117, 64).

3.37. There was no reply.

3.38. She gave out a couple of CVs to her niece and a friend to hand in on her recovery so she could find another job quickly.

3.39. The ACAS procedure started 20/09/17.

3.40. She issued her claim on 6/10/17.

4. **Law**

Unfair dismissal

4.1. By section 98(1) of the ERA 1996, it is for the employer to show -

> "a) the reason (or, if more than one, the principal reason) for the dismissal, and
> b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

4.2. A reason falls within subsection (2) if it relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do or which relates to the conduct of the employee. Misconduct is therefore a potentially fair reason for dismissal, as is lack of capability for the role.

4.3. By section 98(4),

> "Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
> a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

b) shall be determined in accordance with equity and the substantial merits of the case."

4.4. First, therefore the employer must establish the reason or principal reason for the dismissal and that it is a potentially fair reason.

4.5. Then the Tribunal must be satisfied that the employer has acted reasonably in treating the ground as a sufficient reason for dismissal. It must be true in fact or believed to be true on reasonable grounds (*W Devis & Sons Ltd v Atkins [1977] AC 931*, *[1977] 3 All ER 40 HL).* If there are no reasonable grounds for a belief relied on as an important part of the reason for dismissal, the employer may be held not to have acted reasonably in all the circumstances in relying on it (*Smith v City of Glasgow District Council [1987] IRLR 326*, *[1989] ICR 796, HL).*

4.6. In relation to misconduct, the issue is not whether or not the employer proves the misconduct alleged, only whether or not the employer "entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time." (British Home Stores Ltd v Burchell [1980] ICR 304. In other words, was there a genuine belief, founded on reasonable grounds and based on reasonable investigation; but having regard to the fact that the burden of proof as to reasonableness is neutral.

4.7. Dismissal must be a fair sanction, that is, within the band of responses which a reasonable employer might have adopted (Foley v Post Office, HSBC Bank (formerly Midland Bank) v Madden [2000] ICR 1283).

4.8. The ACAS Guidance on disciplinary proceedings suggests the following factors may be relevant when determining what, if any, penalty to impose:

- The employer's rules and guidance
- The penalty in similar cases
- The employee's disciplinary record, work record, experience and length of service
- Whether there are any mitigating circumstances
- Whether the proposed penalty is reasonable in the circumstances and those will be relevant to the question of reasonableness.

4.9. In Sainsbury's Supermarkets Ltd v Hitt, CA: 2003 IRLR 25, this is said,

'The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason….

Unfair Dismissal Remedy

4.10. Where reinstatement or reengagement are not at issue, compensation for unfair dismissal comprises a basic award and a compensatory award. The compensatory award includes the immediate loss of wages, from the date of termination to the date of hearing and then an amount in respect of future loss, reflecting the period of loss still attributable to the employer's actions.

4.11. The compensatory award is capped by an overall maximum and under the Unfair Dismissal (Variation of the Limit of Compensatory Award) Order 2013, the maximum which can be awarded to any individual is one year's salary.

Failure to provide Written Particulars of Employment

4.12. Where an employee has not been provided with the necessary particulars of employment required by section 1 of the ERA 1996, and the claimant is successful in an unfair dismissal claim the tribunal must award the employee two weeks' pay and may award four weeks' pay, unless there are exceptional circumstances that would make that award or increase in the award unjust or inequitable. That is by section 38 of the Employment Act 2002. The calculation is based on gross pay and forms part of the compensatory award for unfair dismissal.

Failure to comply with the ACAS Code

4.13. Where there has been a failure to comply with an ACAS Code of Practice, section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, authorises an award to be increased by up to 25%, where that is just and equitable in all the circumstances and where the failure by the employer was unreasonable. That award forms part of the compensatory award for unfair dismissal. The relevant Code of Practice in unfair dismissal cases is the Code of Practice on Disciplinary and Grievance Procedures 2015.

Disability

4.14. Disability is a protected characteristic under section 6 of the EA 2010.

Discrimination arising from disability

4.15. By section 15(1) of the EA 2010,

> "A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

4.16. The focus of section 15 is about the extent to which the employer is required to make allowances for disability. (General Dynamics Information Technology v Carranza [2015] EAT 0107). The consequences of a disability include anything that is the result, effect or outcome of a disabled person's disability.
4.17. The Code of Practice sets out at paragraph 5.7 that this means placing someone at a disadvantage. Even if an employer thinks they are acting in the best interests of a disabled person, they may still treat that person unfavourably.
4.18. By section 15(2) of the EA 2010, the above does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
4.19. So long as the unfavourable treatment is because of something arising in consequence of the disability, it will be unlawful unless it can be objectively justified, or unless the employer did not know and could not reasonably have been expected to know that the person was disabled.
4.20. The knowledge required is of the disability only and does not extend to the "something" arising in consequence of it. (Pnaiser v NHS England and Coventry City Council [2015] EAT 0137.
4.21. There is no requirement for a comparator.
4.22. It is for the claimant to show that the unfavourable treatment was because of something arising out of his disability. When asking whether the unfavourable treatment is because of something, one must identify what that something is. That requires the consideration of a subjective question what was in the alleged discriminators conscious or unconscious mind – Madani Schools Federation v Mr F Uddin UKEAT/0194/16
4.23. The anaylsis required is explained in Basildon v Turrock NHS Foundation Trust v Weerasinghe [2015] UKEAT 0397, [2016 ICR 305. At paragraph 26,

> "There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the Tribunal to

conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B. …

In my view, it does not matter precisely in which order the Tribunal takes the relevant steps. It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of" and thus find out what the "something" is, and then proceed to ask if it is "because of that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability."

4.24. Simler P in *Pnaiser v NHS England* gave the following guidance as to the correct approach to a claim, adopting and developing the guidance in Weerasinghe.

'(a) 'A tribunal must identify the unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant:

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. This involves an objective question and does not depend on the thought processes of the alleged discriminator.

4.25. If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified" (para 5.21 Code of Practice).

Adjustments for disabled persons

4.26. The Equality Act, by section 39(5), imposes a duty on employers to make reasonable adjustments.

4.27. The duty is set out at section 20 of the EA 2010.

4.28. The duty comprises three requirements. The first is where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. The second relates to where a physical feature puts the disabled person at a substantial disadvantage, making the same comparison, to take such steps as it is reasonable to have to take to avoid that disadvantage. The third, in similar terms relates to the provision of an auxiliary aid.

4.29. A failure to comply with any of those requirements is a failure to make reasonable adjustments. By section 21(1) and (2), "A discriminates against a disabled person if A fails to comply with that duty in relation to that person".

4.30. The duty does not arise where A did not know and could not reasonably be expected to know that B has a disability and is likely to be placed at the disadvantage referred to – that is the effect of schedule 8, paragraph 20, as amended, to the EA 2010. However, the employer must do all they can reasonably be expected to do to find out whether a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer will be taken to have the requisite knowledge provide that they are aware of the impairment and its consequences. They do not need to be aware of the specific diagnosis.

4.31. The ACAS Code at paragraph 6.19, says:

> "For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

4.32. And at 6.21,

> "If an employer's agent or employee (such as an OH adviser, a HR officer or a recruitment agent) knows, in that capacity, of a worker's or applicant's … disability the employer will not usually be able to claim that they do not know of the disability and that they therefore have no obligation to make a reasonable adjustment."

4.33. No like for like comparator is required – the comparison may be between those who could do the job and the disabled person. As explained in Royal Bank of Scotland v Ashton ([2011] ICR 632), the tribunal must identify the

non-disabled comparator or comparators. That may be a straightforward exercise,

> "In many cases, the facts will speak for themselves and the identity of the non disabled comparators will be clearly discernible from the provision, criterion or practice found to be in play." Fareham College Corporation v Walters ([2009] IRLR 991)

4.34. There is no onus on the disabled worker to suggest what adjustments ought to be made. It is good practice for employers to ask. If the disabled person does make suggestions, the employer should consider whether such adjustments would help overcome the substantial disadvantage and whether they are reasonable. (Code of Practice para 6.24)

> "It is a good starting point for an employer to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required. … It is advisable to agree any proposed adjustments with the disabled worker in question before they are made." (Code of Practice para 6.32.)

4.35. In considering whether there has been a failure to make reasonable adjustments, the tribunal must identify the step or steps it is reasonable to take to avoid the disadvantage – the question is the nature of the step, not the assessment of the mental process concerned. (Royal Bank of Scotland v Ashton, op cit).

4.36. The PCP should identify the feature which actually causes the disadvantage and exclude that which is aimed at alleviating the disadvantage.

4.37. The process for the Tribunal therefore is to identify:

(a) the employer's provision, criterion or practice which causes the claimant's disadvantage

(b) the identity of the persons who are not disabled with whom comparison is made

(c) the nature and extent of the substantial disadvantage suffered by the employee

(d) what step or steps it is reasonable for the employer to have to take to avoid the disadvantage (General Dynamics Information Technology Ltd v Carranza [2014] EAT 0107).

4.38. The Tribunal must identify all of those in order to judge whether the proposed adjustment is reasonable. It must identify the nature and extent of the substantial disadvantage suffered by the claimant, including, if applicable, any cumulative disadvantage, say, from both provisions applied and physical features. In the absence of that, it is not possible to

identify the adjustments that are reasonable to prevent the disadvantage. There is no need to find that the adjustment would have prevented the adverse effects. The Tribunal is entitled to find that the adjustment proposed was a reasonable option with a not unreasonable chance of success. (The Environment Agency v Rowan [2007] EAT 0060)

4.39. Assessing the reasonableness of any particular step, relevant factors will be how effective it will be in preventing the substantial disadvantage, how practicable it is, how much it will cost and how disruptive it may be, the size and resources of the employer and the nature of the business. It may also be relevant that external resources are available to help provide adjustments.

4.40. Failure to make a reasonable adjustment cannot be justified, but only reasonable steps fall within the duty. Whether or not adjustments were reasonable in the circumstances is to be determined by the employment tribunal objectively, (HM Land Registry v Wakefield [2009] All E R 205 (EAT)).

5. **Reasons**

Delay

5.1. The application for Reasons and the first respondent's application for reconsideration were sent to the Tribunal Judge on 9 October 2018 but for reasons unknown were not received, nor did the failure come to light until a period when the Judge was unavailable. It was not possible to provide the Reasons until now. The delay is very much regretted.

Reconsideration

5.2. Even more regrettably, in drafting the Reasons, it has become clear that the effect of the cap on the compensatory award, which includes the uplift for failure to apply the ACAS Code and the uplift for failure to provide written particulars of employment, was overlooked. That is the cap referred to at paragraph 4.11 above. At the end of these Reasons, the correct calculation applying the cap has been set out. The sum due in respect of unlawful deductions was also omitted.

5.3. The Tribunal is minded to reconsider of its own motion given those errors.

The second and third respondents.

5.4. The claimant brought proceedings against Mr and Mrs Mills personally as well as against the company. Since the contract of employment was with the company and not with Mr and Mrs Mills personally, the successful claims could only be successful against the company. The claims against Mr and Mrs Mills were dismissed.

The statement of terms and conditions of employment

5.5. We have been provided with a written statement of terms and conditions. Mrs Wheatstone denies having seen it during her employment.
5.6. We find it to be a sham. It is not genuine.
5.7. The reasons are:

- It is taken from one for the Mears Group;
- It refers to holiday entitlement for 2004/5 year, but is dated 2011;
- It uses the company name for the employer, but incorporation was 2016;
- It refers to her as a labourer;
- It includes provisions for call out;
- It contains inappropriate provisions for work at other Group sites, intellectual property rights, etc;
- The signature line for the employee is expressly for signature on behalf of the company;
- It was not produced when requested in September 2017, only in 2018

5.8. It is not an appropriate contract for a shop assistant in a small village store.
5.9. That does not preclude Mr Mills having relied on it, not realising – he is dyslexic, although he can read. He is not attentive to documents. However, Mrs Mills never saw it and the apparent use of the company name years before incorporation is significant.
5.10. We accept Mrs Wheatstone's evidence that this was never issued to her. She would have recognised that it was not an appropriate document identifying her own terms and conditions. If it was not issued to her, then it was produced for these proceedings.

What happened on 19th July

5.11. We have several versions, including Mr Mills', and his vary.
5.12. He says Mrs Wheatstone resigned. She denies resigning or using words that could be interpreted as resignation.
5.13. She tells us that Mr Mills come down in the morning early, at the start of the morning shift and overheard her conversation with her colleague, including complaints about the extra ten minutes unpaid required of the staff in the morning that had been introduced a couple of years earlier; and complaining about his management and about Mrs Mills' management. Mrs Wheatstone then says he came in at around 9.00 am and without warning, he challenged her, calling her a "Fucking ungrateful cow" and saying that if she tried to sue them, she wouldn't have a leg to stand on. At about 2pm, he followed her into the stock room and gave her a choice between resigning voluntarily and being fired - that they would have to sack her but if she handed in her one month's notice, they would still give her a good reference.

5.14. The latter is as recorded by the GP the next day. It is also consistent with the account Mr Mills gave us of expecting to receive a resignation letter the next day, when in fact he got a sick note.

5.15. Her evidence is that she was told on 22/08 that her job had come to an end. She queried it. She was told on 25/08 that she had resigned. She challenged that. She was told on 30/08 the detail of her resignation.

5.16. Elaine Gibson, Lisa Turley, Rachel Smith and Michelle Hewitt all say they were told on 19/07/17 or the next day by Mr Mills that Mrs Wheatstone had resigned.

5.17. Mr and Mrs Cadogan, customers, report seeing and hearing her at lunchtime that day at the door of the shop saying that she had told Mr Mills to "stick his job right up his fucking ass" and that "she fucking hated him", and that Mrs Wendy Mills was not capable of running an ice-cream van, let alone the village store.

5.18. She worked the rest of the shift.

5.19. Mrs Mills' text message of 19.58 (3.14 above) shows that she was not understood to have resigned with immediate effect.

5.20. He says to us he was waiting for a resignation letter. There was no resignation letter.

5.21. The sick note was accepted without demur or enquiry.

5.22. Within a week her job was advertised. It is agreed that it was her job that is being advertised.

5.23. No P45 was issued.

5.24. Mr Mills presented a document headed Notes from July 2017 as being broadly contemporary with the events. It refers to the discussion with ACAS. He did not speak to ACAS until August. It refers to Mrs Wheatstone as the claimant. It is not an immediately contemporary account.

5.25. Neither his "final written warning" draft of 20/07/17 nor his document "Notes – July 2017" refer to her having resigned.

5.26. According to his email of 25/08/17, they "gave her the benefit of the doubt" and took it that she would be returning to work on 16/08/17. So if there had been words of resignation, they were not relied on as being that. The later email of 30/08/17 suggests she might have been expected to return at 7 am on Monday 21/08/17.

5.27. There was no contact with her to confirm that she had resigned. There is no agreed or obvious date of termination.

5.28. We have found the contract Mr Mills produced to have been created for the purposes of the proceedings; He has admitted lying in the text messages that he sent her. He concedes that his message of 30/08/17 was untruthful both in saying they had tried to contact her and as to the written statements from customers and staff.

5.29. He has given us various versions of what happened, including on points that we would confidently expect him to have a clear memory – such as how early in the morning she resigned and whether it was when he was wearing pyjamas or when he was fully dressed.

5.30. All of that leads us to prefer her evidence as to the course of events on 19 July.

5.31. We can accept that he came down early in the morning and overheard complaints about his management. We can accept that he was cross about that – not that it amounts to gross misconduct but that he was cross.
5.32. But we do not find that Mrs Wheatstone resigned or that she used the words he attributes to her, or that he in fact understood her to have resigned. We do not find that she told him, "I fucking resign. I hate this fucking job". He did not understand her to have resigned and they were expecting her back to work when she provided her first sick note.
5.33. We accept that Mrs Wheatstone was unaware that she was considered to have resigned until 25/08/17 and was given that account of resigning only on 30/08/17.
5.34. Mrs Mills relied on what Mr Mills told her. So did most of the other witnesses we have heard.
5.35. It does mean that we don't accept Ms Elaine Gibsons' or Miss Lisa Turley's evidence, for example that Mrs Wheatstone told Miss Turley that morning, immediately after Mr Mills came down and after a private discussion between him and Mrs Wheatstone, that she was leaving. We bear in mind that they are both still working for Mr Mills, who has shown himself to be quite forceful in the course of his conduct of the case.
5.36. We found the Cadogans' evidence impressive but the weight of the evidence on the key point of what transpired between Miss Wheatstone and Mr Mills supports her account; it is also hard to square that very public conduct with Mrs Mills expecting Mrs Wheatstone back the next day or Mr Mills waiting for a resignation letter.
5.37. We also don't accept Mr Mills' evidence on the discussion of a month's notice. Mrs Mills did not know of it. Mrs Wheatstone denies any such discussion. There was no payment made for August 2017. The issue of the payslip of 31/08/17, showing two weeks' statutory sick pay would be consistent with an agreed notice period of one month from 19/07/17, had it been accompanied by payment and a P45, but it wasn't..
5.38. We find that Mrs Wheatstone did not resign on 19th July, and Mr Mills did not understand her to have resigned.

Was she dismissed?

5.39. There was no dismissal on 19/07/17. We find that Mrs Wheatstone was told she should resign or face dismissal and Mr Mills tells us that he was waiting for the letter of resignation. Mrs Mills was expecting her back in.
5.40. The following are not consistent with a continued contract of employment:

- The text message of 22/08/17 (74)

  "Can I remind you that you no longer work for this company"

- The text message of 25/08/17 (79)

"You did not turn up for your working duties leaving us with no alternative but to replace your position"

- The text message of 30/08/17 (75)

  "We ask you now to put this matter now into a court of law"

- The letter of 30/08/17 (60-62). – setting out for the first time the case relied on as to resignation

  "We can only now go down the road of litigation"

- The refusal of pay on 31/08/17 for the period from 1/08/17

- The claim made of 1/09/17 for recovery of SSP paid in July

5.41. We find the dismissal to be the text message of 22/08/17, to which she replies, "When and why" was she dismissed?

5.42. Mr Mills said about this,

"I am informing her she is deluded if she thinks she can come back to the shop".

5.43. His intention and the effect were to terminate the contract. The cumulative impact of later messages and texts shows the same. She accepted that she was in fact dismissed as shown by her response and by her beginning to seek alternative options by getting her CV into the hands of people who could put them forward to their managers once she was well again.

What was the reason for the dismissal?

5.44. The reason is not established. Mr Mills suggests misconduct but he does not give a clear account of misconduct meriting dismissal; and of course, he denied dismissal, relying on resignation.

5.45. The evidence points to the reasons behind this dismissal being Mr Mills' volatile temper and his anger at his employees questioning his management decisions, including that they work an additional ten minutes unpaid, in a short early morning discussion. That would not be a fair basis for dismissal.

5.46. Since the employer has failed to show the reason and that it was a qualifying reason for dismissal, this was an unfair dismissal.

5.47. There was no semblance of a fair procedure. Mr Mills' various references to warnings shows how limited his understanding is of disciplinary procedures: there is no suggestion of putting charges to the employee and giving an opportunity to respond before imposing a penalty.

5.48. This employer does not have any fair employment procedures.

5.49. Mrs Wheatstone has not been shown to have committed misconduct contributing to her dismissal.
5.50. It has not been shown that a fair procedure would have led to dismissal.

Discrimination arising from disability

5.51. The disability is epilepsy
5.52. The "something arising" in consequence of the disability is pleaded as the claimant's sickness absence from 20/07/17.
5.53. The GP signs her off for work place stress. All the notes are about work-related stress (68, 70, 94).
5.54. A petit mal was reported that evening, that is the evening of 19/07/17.. Mrs Wheatstone saw the GP the following day, saying she had had lots of petit mal. In spite of that, the notes are issued on the basis of work-related stress.
5.55. GP, in his more detailed later note confirming the diagnosis, does not make a connection between the epilepsy and the absences, save to say that in March 2018 she is going through a particularly stressful time (138).
5.56. On the medical evidence, the absence is not because of the epilepsy
5.57. We cannot infer, absent medical evidence, that these events caused an exacerbation in the epilepsy.
5.58. The absence did not arise in consequence of the disability. We cannot therefore consider the list of instances of unfavourable treatment as being related to the disability.

Reasonable adjustments

5.59. The PCP proposed is:

> *"that the respondent did not offer flexibility to enable the claimant to return to the workplace, in that the respondent expected the claimant to return to work and effectively to perform the essential functions of her roles with the respondents"*

5.60. The evidence does possibly point to an expectation that the claimant would return to work on the expiry of her first sick note. There probably was a PCP that after an absence, including any sickness absence, staff would return to work to perform their role fully.
5.61. However, the sick note refers to work-related stress. It does not refer to epilepsy.
5.62. Mrs Mills had been told of the petit mal on the evening on 19/07/17, but both she and Mr Mills are clear that the impact of the epilepsy had hitherto been minimal – that was one reason why they were reluctant to agree to the claimant qualifying as a disabled person.
5.63. There is little to suggest that the respondents reacted to the report of a further petit mal attack on 19/07/17, rather than the events earlier that day and later.
5.64. Mrs Wheatstone was not at a disadvantage here because of her epilepsy or because she was a disabled person. She had been able to manage the

job fully with very minor adjustments before and it was not her disability that was preventing her returning to do so again. It was the work-related stress. The fundamental conditions for the duty to make reasonable adjustments are lacking.

5.65. It would have been helpful at some stage to discuss Mrs Wheatstone's return to work perhaps on reduced hours to start wth, but that would have been premature given the dates here. There was clearly poor management in the failure to keep in touch with the claimant but there was not a failure to make adjustments to facilitate a return to work at this early stage.

Breach of contract

5.66. Mrs Wheatstone was entitled to notice under section 86 of the ERA 1996, which provides for one week's notice for each full year of employment. The provision operates so as to vary any non-compliant contract of employment. Here, there was an oral contract of employment with no notice term specified, and the remedy for breach of the statutory right is in respect of the breach of the contract as statutorily varied.

Failure to provide written particulars

5.67. There was a failure to provide written particulars of the employment.

6. **Remedy**

Additional Findings of Fact

6.1. The applicant was born on 28/02/81. She started this employment on 8/08/11. The period of continuous service was 6 years. Termination of employment was by text message on 22/08/17.

6.2. On dismissal, Mrs Wheatstone was paid £7.50 per hour, in respect of 128.2 hours per month on average, or 29.58 hours per week. She was paid the national minimum wage, so her entitlement was £221.85 gross per week. She paid a pension contribution of £1.54, as did her employer. The employer's contribution was due to double from April 2018 as required by statute.

6.3. Mrs Wheatstone has since earned nothing and received no benefit income.

6.4. Her last sick note expired on 26/04/18.

6.5. She has no formal qualifications. She has done care home work and retail, and she could do cleaning.

6.6. She lives in a small community with limited opportunities.

6.7. She is not allowed to drive due to her diagnosed condition. With previous jobs, she has been dependent on public transport, or if none, or finishing late, family members driving to collect and deliver her.

6.8. She is currently not confident to take the bus and because of fear of intimidation. The bus stop is right opposite the shop where she was employed by the first respondent; not helped by the respondents having produced witness statements and oral evidence from former colleagues complaining vigorously about her, apparently to support the decision to dismiss.
6.9. She is emotionally fragile compared to how she was when employed there, when she enjoyed the role, felt trusted, effective and a valued member of a wider community..
6.10. At the shop, she did ordering, drinks machines, lottery machines, worked and checked CCTV. She is literate, organised and efficient. She watches tv. She has a smart phone. We have not been told she cannot use any computer and would infer that she could use one to a degree with training.
6.11. She is limited by her disability and in a poor labour market. She moved to Blakeney to be within walking distance of her employment. She is limited by the petit mal in that she cannot for example carry glasses or hot food for waiting on table, or climb ladders to stack shelves, although she has at times a limited warning. She didn't climb up to stack shelves at the shop or change light bulbs at a height at this shop. She cannot undertake duties where she is required to be continuously alert to the safety of others. She has fallen to the floor, with little warning while her mother has been with her.
6.12. There has been no major seizure since May 2017, but the GP evidence is of 3 – 6 petit mal episodes per week, with no aura and no recollection. She finds them to be more frequent when she is under stress.
6.13. The May seizure left her struggling to speak normally and consistent with past history, unable to do much for the rest of the day of the following day. Although her nocturnal fits have been under control, the effect of the medication on her is that she has to go to bed early, on a very regular basis. She cannot take on night shifts.
6.14. She has not claimed benefits, on advice from the jobcentre about entitlement.
6.15. She found Mr Mills in particular and Mrs Mills to be intimidating, and has lost confidence significantly since losing her job. In spite of being signed back as fit for work, she has been low in mood, with panic attacks and her mother has provided substantial, daily support, as well as transporting her around.

Reasons

6.16. We don't find a failure to mitigate in spite of the fact that she has not found work since being found fit for work in April. She was well suited to the work she had but that was the only such employer in the village. She has looked at advertisements, keeping an eye for example on the nearby major employer, a care home, but vacancies have not been advertised. Her confidence has taken a severe knock and she is still struggling with low mood and panic attacks.
6.17. The period of loss did not include the period to which Mrs Wheatstone was entitled to notice and the compensation for breach of contract over six weeks is £1129.

6.18. In respect of the breach of ACAS procedures we uplift by 25%, because this employer pays no regard to fair procedures. The specific breach is of paragraph 4 of the Code. This was a dismissal without any fair process.

6.19. In respect of the failure to provide written particulars of employment we award £887, that is four weeks' pay, because this was a particularly serious failure. Leaving aside the attempt to mislead the tribunal, there had been no attempt to comply with the requirements of section 1 of the ERA 1996 at all, over the six years of employment.

Calculation

6.20. Mrs Wheatstone did not seek reinstatement or re-engagement.

6.21. The Basic Award is based on the following information:

- The effective date of termination applying s 97 (2) and 119(1) and section 86, was 2nd of September 2017, allowing for the statutory notice period of six weeks.
- At that time, the applicant was aged 36
- Monthly gross £961.25 using the payslip on page 84, excluding the atypical SSP. That shows £2883.75 over three months which gives an average of £961.25 gross per month, or £221.85 per week, based on 128.2 hours average per month.
- based on payslip on page 84,, taking off the NI gross figure (different and higher than the taxable figure because of the deduction of pension payments for which tax relief)
- Average is taken over 3 months.
- Weekly wage £221.85
- Multiplier is 1
- Total basic award is £1331 (rounded from 1330.98)

Compensatory Award

6.22. Her gross pay per week was £221.85

6.23. Her net pay per week was net of £33.75 by way of national insurance, with no tax, giving rise to net pay at £188.10. The national minimum wage increased by 4.4% in April 2018.

6.24. The employer's pension contribution had been £1.54 but increased from April 2018 and April 2019, from 1% to 2% and then 3%.

	£
Loss to date of hearing	
27 weeks at £7.50 = £188.10, net	5079
23 weeks at £7.83 = £196.38	4517
Pension loss	49

Loss to date of hearing		9645
Future loss		
13 weeks @ 196.35	2553	
26 weeks at half that	2553	
Loss of statutory rights	400	
Pension (inc incr to 2% etc)	100	
Total Future loss		5606
Uplift for breach of ACAS procedures 25%		3814
Failure to provide written particulars		886
Total compensatory award		19,951

Total payable

Unfair Dismissal		
1331 + 19951		21282
Breach of contract	6 x188.10	1129

Error

6.25. As noted above, there was an error at the hearing in failing to apply the statutory cap introduced in 2013 on the level of the compensatory award.

6.26. A further error identified is the failure to include in the judgement the claim for unlawful deduction of wages for the period 1/08/17 to the date of termination 22/08/17. That was simply missed out. The loss is of three weeks statutory sick pay at £82.61 amounting to a total of £247.83.

6.27. The award should have been as follows, including the proposed reconsideration by applying the statutory cap and adding in the award for unlawful deductions in respect of pay for August 2017.

Unfair Dismissal

Basic award		£1331
Compensatory Award		
Loss to date of hearing		
27 weeks at £7.50 = £188.10, net	5079	
23 weeks at £7.83 = £196.38	4517	
Pension loss	49	
Loss to date of hearing		9645

Future loss		
13 weeks @ 196.35	2553	
26 weeks at half that	2553	
Loss of statutory rights	400	
Pension (inc incr to 2% etc)	100	
Total Future loss		5606
Uplift for breach of ACAS procedures 25%		3814
Failure to provide Written Particulars		886
Total Compensatory award		19951

But capped at 52 x a week's gross pay, £221.85 ***£11,536.20***

Total sums payable therefore

Unfair dismissal		
Basic award	1331.00	
Compensatory award	11536.20	
Total		£12,867.20
Breach of contract		1129.00
Unlawful deductions		247.83
Overall total payable		**14,244.03**

Employment Judge Street

Date: 22nd January 2019