EMPLOYMENT TRIBUNALS

Claimant: **Mrs H Hodgetts**

Respondent: **Compass Group UK and Ireland Limited**

Heard at: **Cardiff** **On: 18 September 2019 and 4 December 2019**

Before: **Employment Judge S Moore**
Members:
Mrs B A Currie
Mrs P Palmer

Representation:
Claimant: In person
Respondent: Ms J Loombe, Employment Relations Partner

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal does not succeed and is dismissed.
2. The Claimant's claim for disability discrimination does not succeed and is dismissed.

REASONS

Introduction

1. This claim was presented on 28 January 2018 following a period of Early Conciliation between the period 7 December 2017 and 4 January 2018. The Claimant was summarily dismissed on 22 September 2017. The Claimant brought claims of unfair dismissal and disability discrimination (failure to make reasonable adjustments). The Tribunal had an agreed bundle of documents running to 154 pages and heard witness evidence from the

Claimant and from Mr Mark Cox and Mr John Ishmael of the Respondents. In addition we were handed a letter from a Ms Gaynor Morris dated 14 March 2016, but Ms Morris did not attend the Tribunal to give oral evidence in support of that letter that was handed in.

2. Prior to the hearing the Respondent conceded that the Claimant was a disabled person within the meaning of Section 6 of the Equality Act 2010 but continued to dispute that they knew or should have known that she had a disability. The Claimant's condition she relied upon was depression.

3. There had been two previous preliminary hearings ("PH") for this claim. The Reasonable adjustments claim was discussed with the Claimant. The PCP was clarified and recorded as "a failure to support the Claimant".

Findings of Fact

4. We have made the following findings of fact on the balance of probabilities.

5. The Claimant commenced employment with the Local Authority Newport Council on 1 September 1993. Since 2003 she has worked as a Unit Manager for Bassaleg High School in Newport. We did not have sight of an employment contract for the Claimant. The Claimant transferred by way of the TUPE Regulations to the Respondent on 18 April 2011 when the catering contract was outsourced to the Respondent.

6. Initially following the transfer the Claimant had a good working relationship with the management team. She reported directly to Mrs Thomas who in turn reported to John Ishmael and the Claimant was involved with working in other kitchens across the Newport area as well as training and helping to manage other sites.

7. Prior to 2012 the Claimant and her husband went into business having purchased a chip shop. The business had to be closed in 2012 and thereafter the Claimant was diagnosed with depression. We had sight of the Claimant's GP records which recorded on 9 June 2014 she undertook a depression medication review. There was no dispute that the Claimant had been diagnosed with depression at this time. The GP notes record in the entry of 9 June 2014 that the issue was regarding the loss of the Claimant's business with her husband and recorded that the Claimant loved her job. The Respondent was not aware of the GP records until these proceedings. Mr Ismael accepted he was aware of the loss of the business and this caused the Claimant stress at the time.

8. The Claimant had received training from the Respondent. On her induction record dated 6 May 2011 she received training in hygiene, food allergies, personal hygiene and food safety (HACCP Principals). There was some

further later training in April and May 2011 in relation to sterilisers, probe calibration, food stimulants, special diet, stock ordering, temperature control and quality returns and then later in 2015 further indication of training in respect of food safety for caterers, health and safety for caterers, profit and protection and managing safety for caterers. We find that the Respondent had taken adequate steps to ensure that the Claimant was fully trained in respect of her role.

9. In May 2015 the Claimant received a Level 2 recorded warning under the Respondents disciplinary procedure in respect of issues relating to financial controls, stock, HR administration and communication. A plan was put in place to enable the Claimant would concentrate on the one site at Bassaleg and that she would have regular reviews and discussions with her Line Manager, Mrs Thomas. The warning was in place for 12 months.

10. On 29 February 2016 the Claimant was signed off initially for a week with a chest infection. During her absence Mrs Thomas went into the unit to either cover for or assist with the management of the unit in the Claimant's absence and identified a number of issues of concern. Mr Ishmael wrote to the Claimant on 3 March 2016 to inform her that he considered there were failing standards and that her performance in the team needed to be corrected and he invited her to a meeting on 8 March 2016. As it was this meeting did not go ahead as the Claimant was subsequently signed off for a further period of time initially with a chest infection and then from 21 March 2016 with work related stress. The GP Fit Note stated the reason work related stress, there was no mention of depression on the Fit Notes.

11. Following the Claimant's return to work after this period of absence she was invited to a meeting with Mr Ishmael on 26 April 2016. The day following that meeting Mr Ishmael wrote to the Claimant and sent her a copy of an action plan that had been discussed with the Claimant on the 26 and 27 April 2016. The action plan identified three areas of concern as follows;

a. Budgetary control - the Claimant was recorded as not having full focus and control on labour spend or generation of additional sales;

b. Food safety - the Claimant was noted as having lack of confidence in management of training of the team specifically with regard to their full understanding of the HACCP controls and adherence to company standard in terms of stock rotation, labelling, cleaning schedules and staff training records;

c. Compliance - the Claimant was targeted with ensuring promotional activity was current and that all points of sale were visible to pupils and that stock for promotions was available and compliant to Welsh standards.

12. The Claimant asserted in her impact statement that she informed Mr Ishmael that she had been diagnosed with depression at a meeting in the school boardroom. There was no documentary evidence in the bundle apart from the GP Fit Note recording work related stress (noting that it did not mention depression), or that the Claimant had informed anyone within the Respondent that she had been diagnosed depression and was taking medication in respect of that diagnosis. In the Claimant's impact statement she stated as follows:

> "I did and still do struggle with my life and work, I had spoken with John Ishmael at a meeting held in the school board room and I asked him has he ever suffered or knew anyone suffering with depression? He said no, and he actually looked confused or maybe ignorant about the condition. I told him how it felt to struggle to get out of bed in the morning, to sit in your dressing gown all day, crying staring into space it's a massive black cloud hanging around your head and trying to find a way but only finding myself going around in circles getting nowhere only deeper into a more desperate state which is not a nice place to be at all."

13. The Claimant relied on this conversation as evidence the Respondent had constructive knowledge of her depression. The Claimant was asked about this in cross examination and she clarified that the conversation she says took place in the school board room was during the return to work interview that took place on 26 April 2016 and she clarified she specifically told Mr Ishmael she had depression.

14. Mr Ismael accepted he was aware at the time her business closed that the Claimant was experiencing the difficulties in her personal life. He denied that the Claimant ever informed him she was suffering from depression. Mr Ishmael was asked when giving evidence whether the Claimant had informed him whether she was taking medication or seeing her GP and in response he said he did not remember. He was asked by the Judge whether or not the Claimant had told him she was depressed. In his response to the Tribunal he described the meeting to discuss the absence which must have been the return to work meeting and also described how the Headteacher had been present and informed Mr Ishmael that the Claimant was in Mr Ishmael's words "struggling" in her role, had lost her confidence, but Mr Ishmael told the Tribunal that he did not recall the Claimant saying she was depressed and said that he had had a number of discussions also with her union and at no time did they ever refer to her being depressed.

15. We find that there was a conversation along the lines as described by the Claimant in that return to work discussion. The context of the situation was that the Claimant was having difficulties with her team due to her disclosing she had received an equal pay settlement and some team members had

not, and that she had just had a period of work-related stress absence as well as the situation ongoing in her personal life. We do not find that the Claimant informed Mr Ishmael directly that she was suffering or she was experiencing depression or had been diagnosed with depression and/or that she had been prescribed medication.

16. On 27 April 2016 Mr Ishmael wrote to the Claimant confirming their discussions and enclosing an action plan that had been discussed. She was asked to re-familiarise herself with the Compliance pack and in particulars the A-Z of Food Safety. There was no mention that the Claimant had informed Mr Ismael of depression but he acknowledged she needed to build up her confidence. The attached action plan focused on budgetary control, food safety compliance and set a number of targets

17. Around this time the working relationship between the Claimant and Mrs Thomas deteriorated. We were taken to a letter from Ms G Morris that had been written to the Headteacher, also called Mrs Thomas, complaining about an incident with Mrs Thomas that had happened a few weeks earlier. Mrs Morris alleged that Mrs Thomas shouted and used foul language before members of the canteen staff which had been heard also by staff and sixth formers. Mr Ishmael accepted that this was brought to his attention by the Headteacher. He told the Tribunal that this was not taken any further as he had asked the Headteacher to provide him with details of the complaint so it could be properly investigated and no such details were forthcoming. Mr Ishmael said that the first time he had seen the letter from Ms Morris was at the Employment Tribunal hearing and we accepted that evidence.

18. Mr Ishmael said that the Headteacher informed Mr Ishmael that she believed Mrs Thomas should no longer manage the Claimant and Mrs Thomas had also informed him at the time she no longer wished to line manage the Claimant. Mrs Thomas was removed as the Claimant's Line Manager. The plan was that Mr Ishmael would support the Claimant in the line management relationship. He implemented a PIP for the Claimant in April 2016 and this was extended in June 2016. In addition Mr Ishmael split the school into two separate sites with the lower school site and team being managed by another manager allowing the Claimant to concentrate on the team, site and financial control of the upper school.

19. On 16 June 2016 Mr Ishmael wrote to the Claimant revisiting the action plan. He considered there had been some progress but there were still areas that needed improving. He also sent the Claimant a management duties planner over the space of a working week broken down into sections. It set out what the Unit Manager should be doing throughout the day and week for example Monday morning 7.30 to 8.00 check unit email/phone for messages or actions. The plan was a very detailed breakdown of the duties that the Claimant should have been undertaking in her role. The Claimant's

salary was based on managing two sites but Mr Ismael decided to remove the Claimant from managing both sites so she could focus on one site only.

20. There was no evidence that the Claimant was put on any further improvement plan or of any formal outcome that she had passed the plan set by Mr Ishmael in June 2016. Mr Ishmael's witness statement described that there was a marginal improvement in her performance between June 2016 and May 2017.

Final written warning – May 2017

21. In May 2017 the Claimant was issued with a Level 3 final written warning for breach of the company social media policy. The Claimant had posted on her personal Facebook page the following:

"wonder who got the bestest (sic) kitchen in Newport?????"

22. There then was a discussion in the comments section under that post between the Claimant and her Facebook friends, some of whom worked with the Claimant in Bassaleg school. The Claimant had made the comment as an internal award operated by the Respondent for the best kitchen had been given to another school. In order to have the chance to win the award the kitchen had to be nominated by Mrs Thomas and it was evident that the Claimant felt that her kitchen was never going to be nominated because of the difficulty in their relationship. The Claimant went onto to comment:

"that shot you up arse" followed by emoji tears of joy symbols

23. The Claimant went on to say (after a number of people speculated that Bassaleg might have won the award) as follows:

"nah (sic) Joy I'm hated biatch (sic) so my girls suffer such a shame cos they are a fab bunch of girls and they have worked real hard but get kicked in the teeth" (followed by 4 angry emoji faces").

24. She then went on to make further comments that she was sorry the girls had missed out and they would never get anything as long as she was there and then later she names another local school, presumably being the kitchen that won the award, and offers her congratulations to Bassaleg Comp girls commenting that they know that they had done herself and themselves proud and they could hold their heads high after everything they had been through.

25. Following these posts which were on the Claimant's public Facebook page Mr Chris Milne, who was Regional Director of the Respondent, received complaints from the client about the post (we were unsure who the client was). The Claimant was requested to attend a disciplinary meeting on 24

May 2017 for an alleged failure to meet the standard of conduct by breaching the social media policy and posting defamatory comments which were viewed by employees and customers. Mr Ishmael wrote to the Claimant on 24 May 2015 (this letter was incorrectly dated, it should have been dated 2017) confirming that she had received a Level 3 final written warning for this behaviour. The Claimant did not dispute that she had posted the comments and the letter records that she had confirmed that she did not dispute having made those comments. The Claimant appealed the sanction on the basis it was excessive and there was an appeal hearing with Mr Chris Milne, the Regional Director, who upheld the final written warning by letter of 20 June 2017.

26. In June 2017 the Respondent undertook a business review of the upper and lower school and decided to employ a Site Manager to oversee the catering contract. Mr Ishmael accepts that he did not have the time to spend at the unit that he felt was necessary. To that end, the role was filled by a Mr Mickleburgh, who started with the Respondent on 3 July 2017. There was a conversation between Mr Ishmael and the Claimant at that time which they both agreed happened, but they both had different accounts of what was discussed. We deal with this as it was set out in the Claimant's ET1 although we remained unclear why the Claimant maintained it was relevant. The Claimant accepted that she had asked Mr Ishmael if she could be made redundant as part of the process. The Claimant agreed that Mr Ishmael had said he had not planned that there would be any redundancies but he would enquire if it was a possibility and a few days later came back with a figure of £9000 and a pension pay-off, but this was never followed through by Mr Ishmael. Mr Ishmael denied that he had suggested a figure, and in fact was quite specific that the restructure was not going to result in the Claimant being made redundant as the purpose of the restructure was to provide more support to the school and to ensure it was working as two separate sites. Mr Ishmael accepts that they had general conversation about how much someone would get if they were made redundant based on length of service being a rough guide of 1 week for every year of service.

27. In July 2017 the Claimant was asked to organise a cream tea event by the headmistress. This took place on 20 July 2017.

28. Mr Ishmael was interviewed on 7 August 2017 as part of a later investigation into allegations against the Claimant (see below). In the record of the interview he stated that the Claimant had discussed the request for the cream tea event and that he had said that was fine. When the Claimant asked him about hiring catering equipment (tiered cake stands) Mr Ishmael instructed her that "buffet flats" (which were a type of tray) should be sufficient. Mr Ishmael asked the Claimant about 3 weeks before the event how much it was going to be and the Claimant replied "not as much as the barbeque" which had been the previous year event.

29. On the Monday of the week of the event Mr Ishmael says he asked the Claimant again about the event cost, to which the Claimant replied that she had not worked it out, at which point he queried if the Headteacher knew what she was paying for and the Claimant said she had told her "not as much as the barbeque". He exchanged a look with Mr Mickleburgh who had asked the Claimant why she did not know the price 3 days before the event and what the client thought they would be paying. Mr Ishmael must therefore have known in advance of the event that the Claimant had not costed the event and had not informed the client of the price, but at no time did Mr Ishmael inform the Claimant that that conduct was in any way considered to be the type of conduct that could lead to the Claimant being subject to disciplinary proceedings.

30. The Claimant's evidence was that the Headmistress was aware of the cost of the event not specifically but on the basis that it would not cost as much as the barbeque that had taken place the previous year. There was no evidence before us that there was any complaint from the client about the cost of the event.

31. Following the cream tea event Mr Mickleburgh raised issues of food safety in the kitchen, although it was not clear with whom these were raised as Mr Ishmael's evidence was that he was instructed to go to the school and suspend the Claimant on 21 July 2017. Mr Ishmael was asked who instructed him to suspend the Claimant, initially he could not remember, but then he stated that he thought it might have been Miss Michelle Corrigan.

32. The suspension letter was from Mr Ishmael and the allegations were set out as follows (1) failure to implement management appropriate management control (sic) within your unit (2) breach if (sic) company procedure with regard to financial management (3) breach of hygiene and food safety regulations potentially putting pupils at risk.

33. We saw a note of a telephone interview with Mr Mickleburgh on 25 July 2017 though it is not clear who took the statement. In the statement Mr Mickleburgh set out a number of concerns, namely that the kitchen staff were arranging lunchtime menus and he believed that the Claimant did not have any idea what was on for lunch on a daily basis, he did not believe that the Claimant knew what stock was on site or that she involved herself with stock control, that he had found fish in the freezer that had gone through a process of defrosting being battered then cooked and re-frozen. Mr Mickleburgh says that when he challenged the Claimant about this she told him "I have never questioned the practices in place my team have relayed to me, this process was instructed them by higher management" (the Claimant subsequently claimed that Mrs Thomas had informed them that they could re-freeze previously cooked fish). Lastly that Mr Mickleburgh

had asked a kitchen assistant whether she had probed rice before service and had been told that the Claimant had instructed her not to do this as it was classed as a vegetable.

34. Mr Mickleburgh stated that for the cream tea, the Claimant had self-purchased away from company suppliers and had bought disposable items even though the client had, according to Mr Mickleburgh, stated they were not happy with disposable items. This contradicted the Claimant's account that the Headmistress had specifically requested disposable items.

35. Mr Mickleburgh alleged the Claimant had ordered 'vast amounts of food stock for the event in extreme excess with there being no plan, no budget and no calculation of money spent and no authorisation to buy from outside suppliers. He stated that the Claimant bought items on her personal credit card and then processed the receipts through Nexus to obtain her money back and was concerned there was a possibility that she also took the receipts to the clients to be reimbursed, but admittedly had no evidence to prove this. He stated that the kitchen was clean and organised however the staff had been instructed by the Claimant not to waste anything and he had found freezers contained small amounts of food and vegetables that had been cooked and re-frozen. He also alleged that he had been made aware that the Claimant allegedly constantly disappeared without informing anyone and that this was due to her popping home during working hours (the Claimant lived in the Caretaker house on site as her husband was the Caretaker of the premises).

36. The Claimant was invited to attend an investigation meeting by Michelle Corrigan on 25 July 2017. The Claimant failed to attend and therefore Ms Corrigan arranged a further meeting on 2 August 2017 and prepared a list of questions for the Claimant to answer. It would appear that the Claimant submitted a response to those questions as we had sight of her answers in a response of 2 August 2017. The relevant sections of those questions and answers we set out as follows. There was a question about the Claimant raising additional sales invoices and that there were two invoices outstanding from September that had not been paid. The Claimant was asked to clarify and confirm why these were outstanding and had not been chased and she was also asked about why she had not raised an invoice for the cream tea event with a GP for the site closing at 17% which was a big difference from the previous weeks of 62% and 54%. She was also asked about the chilled delivery totalling £415 on 18 July which was 2 days before the end of term and allegedly 2 days later £138 of the stock was discarded and £186 worth of the delivery was frozen. In response to those questions the Claimant accepted that she raised invoices and was aware one was outstanding, she accepted that she had yet to raise the invoice for the cream tea event. In relation to the delivery she said that the goods were needed for the function of the cream tea event. She alleged that Mr

Mickleburgh had taken some of the stock himself rather than it being thrown away. In relation to the cream tea event, and not calculating the amount the client would be charged for, the Claimant stated she had discussed the hiring of the products with Mr Ishmael and made it clear that the school did not want buffet flats rather than the tiered cake stands and said that she had authorisation from the school to buy what was needed and add it to the bill. She accepted that she informed Mr Ishmael that she had not calculated the price.

37. The Claimant described the freezing of fish happened in other kitchens and when they had been short on delivery of fish she had previously rung another school and picked up a tray of fish that had also been cooked and frozen. The Claimant says she queried whether this was really OK and was told 'yes we do it all the time'. She explained the small amounts of food being frozen as an instruction that was given to her staff when she was off sick by 'management' and also that cover managers had also said that cooked fish could be frozen. In relation to the probing of rice the Claimant said that members of her team were "laughed at" for probing rice, but did not explain or give her position in respect of whether or not rice was being probed. The Claimant also goes on to say that 2 years ago she informed Mrs Thomas she would not sign the temperature logbook at the end of every day, but Mrs Thomas said nothing and just looked at the Claimant in response. The Claimant later explained that she refused to sign the logbook as she had not been present and was not able to say that the temperatures had been taken properly.

38. Ms Corrigan wrote to the Claimant on 22 August 2017 acknowledging that she had sent her the answers to her questions, but she advised that she felt they were not detailed enough for them to be able to move forward in the investigation and asked her again to attend an investigation meeting which she arranged on 25 August 2017. The Claimant attended this investigation meeting with her Trade Union Representative in accompaniment. In respect of the frozen fish the Claimant accepted that she understood she should have sought clarification from a superior manager regarding this matter. The Claimant also expanded about her answer to the probing of rice. The Claimant said that her and her staff had been probing rice but not entering the temperature in the book and she accepted that she understood that she should be doing this correctly and logging the information. There was no record that the Claimant informed Ms Corrigan that she had depression. She did talk about lack of support from Mr Ishmael after the breakdown of her relationship with Mrs Thomas.

39. Following that investigation meeting the Claimant was invited to attend a disciplinary meeting in a letter of 4 September 2017. The letter set out the same allegations as we have set out above in paragraph [32]. It went on to say that as the Claimant was already on a Level 3 final written warning she

should be aware that this meeting could possibly lead to her dismissal from the company. The letter did not say that the allegations were deemed as potentially gross misconduct.

40. In an undated letter the Claimant asked for the meeting to be rescheduled and she also stated that she had no point of contact for the Investigating Officer as she was not answering her calls. The Claimant attached a document entitled "Grievance – Mr Mickleburgh, Forge Kitchen". She advised she was unable to attend the disciplinary hearing as she had a doctor's appointment. In her grievance the Claimant relays instances over 2 days on 19 and 20 July 2017 where she makes allegations that Mr Mickleburgh had been engaged in unhygienic practices within the kitchen and she repeated her allegations that he removed several packets of sandwiches from the cream tea event. We saw no evidence that the Respondent addressed the grievance.

41. The Respondent subsequently rearranged the disciplinary hearing at the Claimant's request to 15 September 2017. It was due to be conducted by Mr Mark Cox, who is Group Manager for the Respondent. The Claimant did not attend the meeting. It is the Claimant's evidence that Mr Short, her Union Representative, telephoned and left a message for Mr Ishmael that she was too unwell to attend the meeting. Mr Ishmael denied receiving any such call and Mr Cox was unaware that the Claimant had made this telephone call and proceeded in her absence.

42. We heard evidence from Mr Cox. The Claimant did not ask Mr Cox any questions which left his evidence unchallenged. The Tribunal, in accordance with Rule 41 put some questions to Mr Cox. Mr Cox was asked specifically what he had found in relation to the first bullet point, namely the failure to implement appropriate management control. Mr Cox explained that he used to be a Unit Manager and it was important to ensure there was compliance or due diligence that the food produced within the unit was served at the right temperature. The failure to implement appropriate management control was in Mr Cox's view that the Claimant had failed to show leadership required to ensure these controls or take responsibility or challenge poor practice in the unit. The Claimant had admitted she had refused to sign the health and safety records. He told the Tribunal that the big issue for him was that she had not wanted to take responsibility for the temperature book and the logbook and as Unit Manager it was her responsibility to ensure temperatures were taken correctly. Mr Cox also cited the need to ensure and demonstrate compliance and due diligence, that breaches in these procedures could had led to closure of sites and illness in very young children. He stated that he had never heard of a Unit Manager not following or knowing these rules. In relation to the financial breach of company procedures, financial management. Mr Cox cited the order that was placed in the last week of term and took the view that as an

experienced manager she should have been able to manage the ordering of stock. He also noted that she had agreed she should have the spend for the disposable items at the end of term function authorised. In this regard we note that the Claimant's reply to the questions asked by Ms Corrigan had stated that the school had authorised the disposable items and that she had also discussed this with Mr Ishmael beforehand.

43. In relation to the third allegation of breach of hygiene and food safety regulations, this was Mr Cox's particular concern by what he described as the Claimant's disregard to food safety which he considered to be unacceptable for a manager of a kitchen in an education establishment. He considered that the Claimant had not complied with her role to ensure that the food served to children and students was stored safely and served safely. Mr Cox is a qualified Health and Safety Auditor. He told the Tribunal that it is a basic rule within catering that you should not re-freeze anything that has already been cooked. He particularly emphasised that fish was a high-risk product. Mr Cox said that he had taken into account that the Claimant had been on a PIP to ensure that she did things correctly moving forward, but concluded he did not believe that the Claimant's behaviour had changed and she had failed to tackle food safety issues that had been highlighted. This was an extremely serious error in his view, in particular in relation to the fish and the rice temperatures not being recorded.

44. Mr Cox decided in the Claimant's absence that she should be dismissed. The letter dated 22 September 2017 stated the Claimant was dismissed without notice on the grounds of gross misconduct. The date of dismissal was recorded as 15 September 2017 but this cannot have been the effective date of termination as the dismissal was not conveyed to the Claimant until the letter dated 22 September 2017.

45. Mr Cox was asked why the letter inviting the Claimant to a disciplinary hearing had not specified that the allegations could amount to gross misconduct. Mr Cox did not appear to know. He was aware that there had been an accumulation of incidents and was aware the Claimant had been on a final written warning.

46. Mr Cox's witness statement explained he had taken into account the Claimant's length of service and concluded this meant in his view that she had sufficient experience and training to carry out her role. He was quite clear about the reasons he considered the allegations amounted to misconduct. He concluded the Claimant had wilfully disregarded company procedures in relation to food hygiene.

47. The Claimant was given the opportunity to appeal the dismissal but she did not do so.

48. Turning now to the reasonable adjustments claim. It was unclear despite this being explored at Preliminary Hearing what the Claimant's reasonable adjustment claim actually was. It was articulated at the Preliminary Hearing as "a failure to provide support for the Claimant". The Claimant was asked to articulate what support she says she should have been given by the Respondent in cross examination. The Claimant was unable to articulate this in any level of detail at all. Her response to the question when she was asked what type of support should have been offered was "anything, any queries, I could go to someone if I had problems". The Claimant did not give any evidence on how her condition of depression put her at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at the relevant time. She was not able to articulate what the substantial disadvantage was other than to say she did not have support. It was put to the Claimant Mr Ishmael had provided her with significant support in the form of PIP's removing part of her responsibilities (lower kitchen) and was asked what more Mr Ishmael could have done and the only detail the Claimant was able to give was that he should have visited her site more and that he had used to pop in and pay invoices. The Claimant was asked how this would have helped her to comply with the matters that she was ultimately dismissed for and the Claimant replied, "could have been anything, and to talk to and ask advice". She went on to admit that she should have questioned the fish incident as a manager but that everyone in Newport was doing what she did.

Relevant Law

49. The relevant law in relation to the unfair dismissal claim is set out in Section 98 of the Employment Rights Act 1996.

50. In a conduct dismissal case **British Home Stores v Burchell [1980] ICR 303**, the Court of Appeal set out the criteria to be applied by Tribunals in cases of dismissal by reason of misconduct. Firstly the Tribunal should decide whether the employer had an honest and genuine belief that the employee was guilty of the dishonesty in question. Secondly the Tribunal has to consider whether the employer had reasonable grounds upon which to sustain that belief. Thirdly at the stage at which the employer formed its belief, whether it has carried out as much as an investigation of the matter as was reasonable in all of the circumstances. Although this was not a case involving dishonesty it is well established that these guidelines apply equally in cases involving misconduct.

51. The relevant authorities in relation to reasonableness under Section 98 (4) were considered by the EAT (Browne-Wilkinson J presiding) in **Iceland**

Frozen Foods v Jones [1982] IRLR 439. The test was formulated in the following terms:

"Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the Industrial Tribunal to adopt in answering the question posed by [ERA 1996 s 98(4)] is as follows.

the starting point should always be the words of [s 98(4)] themselves;

in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;

in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;

in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair'.

52. In assessing whether the Claimant's conduct amounted to gross misconduct that conduct must be deliberate wrongdoing or gross negligence. In the case of deliberate wrong doing it must amount for wilful repudiation of the express or implied term of the contract **(Sandwell and West Birmingham Hospitals NHS Trust v Westwood)**.

53. If the dismissal is procedurally unfair we must assess the percentage chance of the Claimant being fairly dismissed **(Polkey v AE Dayton Services Ltd [1987] IRLR 503, [1987].**

54. We must also consider whether, under S207 (2) TULRCA 1992 there is any provision of the ACAS Code of Practice on disciplinary procedure which appears to be relevant.

55. Lastly whether the Claimant's basic and or compensatory award should be reduced under S122 (2) and S123 (6) ERA 1996. The wording of the two provisions are not identical and differing reductions can be made in

principle. S122 (2) provides that where the tribunal considers any conduct of the Claimant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly. S123 (6) provides that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

56. In **Steen v ASP Packaging Ltd [2014] ICR 56** (Langstaff P presiding) the EAT stated that the application of those sections to any question of compensation arising from a finding of unfair dismissal requires a Tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy—the answer depends on what the employee actually did or failed to do, which is a matter of fact for the Tribunal to establish and which, once established, it is for the Tribunal to evaluate; (3) the Tribunal must ask for the purposes of ERA 1996 s 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did cause or contribute to the dismissal to any extent then the Tribunal moves on to the next question; (4) this is to what extent the award should be reduced and to what extent it is just and equitable to reduce it.

Disability Discrimination claim

Failure to make reasonable adjustments

57. Sections 20 and 21 of the Equality Act 2010 set out the duty to make reasonable adjustments. In this case, it is the duty arising under S20 (3) EQA 2010. The Tribunal must consider first of all the PCP applied by the employer, secondly the identity of non-disabled comparators (where appropriate) and thirdly the nature and extent of the substantial disadvantage suffered by the Claimant. (**Environment Agency v Rowan 2008 ICR 218, EAT**).

58. Under paragraph 20, Schedule 8 EQA 2010, the respondent (A) is not subject to a duty to make reasonable adjustments if they do not know and could not reasonably be expected to know that the [interested disabled person] has a disability and was likely to be placed at a disadvantage. This is referred to as constructive knowledge. The EHRC Code of Practice on Employment gives guidance on this issue in paras 5.13 – 5.19.

Conclusions – Reasonable adjustments claim

59. We have considered whether or not Mr Ishmael and therefore the Respondent had constructive knowledge of the Claimant's disability. The Respondent was aware that in 2012 that the Claimant experienced a period of stress after her business closed. They were also aware in March and April 2016 the Claimant had a short period of absence for work related stress which was supported by her GP fit note. There was also the discussion between Mr Ismael and the Claimant on 26 April 2016 which we found had taken place along the lines described by the Claimant at paragraph 12. These were the sum of the facts relied upon by the Claimant to assert the Respondent had constructive knowledge of her disability.

60. The conversation on 26 April 2016 as described by the Claimant relayed that she was experiencing some serious issues. Anyone who listened to that conversation would have been in no doubt that the Claimant was experiencing mental health issues at that time.

61. However, we have taken into account the context of that discussion. The Claimant had only been absent for a short period of time. Her fit notes described that she was experiencing work related stress and she was in the process of being placed on a PIP. There were no further periods of absence from work, there is nothing recorded in any of the documents including when the Claimant was subsequently disciplined and given a final written warning a year later where she ever mentioned anything of this nature to Mr Ishmael or anyone else at the Respondent. She had been represented by her union and there was no evidence they had ever raised any issues with the Respondent that she was experiencing depression.

62. Taking of all these factors into account, we do not find that the discussion with Mr Ismael in 2016 was sufficient to have amounted to information from which the Respondent could reasonably have known the Claimant was disabled. For these reasons we do not find there was constructive knowledge of the Claimant's disability.

63. For the sake of completeness, if we are wrong about the knowledge point we have gone on to consider whether the Claimant has made out her case in respect of reasonable adjustments. Plainly the PCP articulated by the Claimant ("to provide more support") could not be a valid PCP. It was not of neutral application. The Claimant was a litigant in person and we make no criticism of her in this regard.

64. It was clear from the Claimant's evidence that the PCP she was articulating was that the Respondent had a required standard of conduct / performance (as set out in the allegations at paragraph 32) and her depression meant she was unable to meet those standards. The steps she says the

Respondent could have taken to avoid the disadvantage was to provide more support.

65. The Respondent evidently had a standard of conduct. The Claimant was dismissed for breaches of the various procedures.

66. We did not know as the Claimant failed to give any evidence about how her disability put her at a substantial disadvantage in comparison with persons who are not disabled. We did not hear any evidence (and the Claimant was specifically asked this point in cross examination) as to how her depression disadvantaged her when being required to comply with the company standards in respect of food hygiene and management practices.

67. We also did not agree that the Claimant has shown there had been a failure to take steps to avoid the disadvantage. The Respondent did take steps to support the Claimant. Mr Ishmael implemented two detailed PIP's, removed duties and responsibilities from the Claimant whilst her retaining her salary and set out step by step what the Claimant should have been doing on daily basis. She had access to training resources as well as having been trained. Mr Ismael emphasised to her that if she had any queries in respect of that plan that she should be able to discuss that with him. The Claimant was not able to say what other adjustments should have been made by the Respondent other than there being more support.

Conclusions – Unfair dismissal

68. We are satisfied that the Respondent has shown that the Claimant was dismissed for conduct and this was a potentially fair reason under S98 (2) ERA 1996.

69. Turning now to the procedure and the steps required under **Burchell.** We have determined that Mr Cox had an honest and genuine belief that the Claimant had acted as per the allegations. He also had reasonable grounds upon which to sustain that belief. In relation to the lack of financial controls there was no challenge to the evidence that there had been a mismanagement of the cream tea event by lack of financial planning and discarding £138 of stock due to over ordering or ordering the wrong goods on the last week of term. The Claimant had accepted that she had refused to sign the temperature logbook and had failed to record the rice temperature in the logbook as well as admitting she was aware her staff were also failing to record the probing. The Claimant had also accepted that she should have sought clarification from a supervisor regarding cooking fish that had already been cooked and frozen.

70. In our view, the Respondent had also conducted a reasonable investigation in the circumstances, particularly taking into account the initial non-

engagement of the Claimant and also her failure to attend the disciplinary hearing. There was an investigation meeting and the Claimant gave a response. There was no evidence that there was any matter that had been raised by the Claimant and not followed up. In relation to her grievance concerning Mr Mickleburgh, this was not related to the disciplinary allegations as they were about his conduct.

71. As regards the Claimant's non-attendance at the disciplinary hearing, the Claimant asserted at the time that she had a doctor's appointment however her GP records showed that that was not the case (although we note that she was issued with a Fit Note on 6 September 2017 she never informed the Respondent of this or ever asked for the disciplinary hearing to be rearranged nor did she appeal the dismissal).

72. In our view, Mr Cox had reasonable grounds to conclude that the Claimant was guilty of the allegations that were put to her in the letter inviting her to the disciplinary hearing.

73. In respect of the range of reasonable responses we have taken into account the following:

74. In our judgment, the lack of financial controls were not matters of misconduct but more capability related. There was no evidence that the Claimant had deliberately and wilfully breached financial management procedures. Mr Ishmael was well aware of the cream tea budget (lack of) situation and did nothing to intervene. Had these been serious matters it seems implausible that he would not have acted. These were matters for concern, but could not have amounted to gross misconduct. In May 2015 the Claimant had received a Level 2 recorded warning under the Respondents disciplinary procedure in respect of issues relating to financial controls and stock but this had long expired.

75. In relation to the first and third allegations The Claimant was the Unit Manager responsible for the food safety and hygiene standards within a school kitchen. The Claimant had admitted that she had refused and had continued to refuse for almost 2 years to sign the cleaning schedule documentation. Mr Cox's evidence on this particular issue was credible and reasonable. The Respondent was entitled to expect their managers of a school kitchen to take responsibility for important records and ensuring staff were complaint.

76. The Claimant had also accepted that she was aware of a failure to document the food probing temperatures within the unit as well as having been found to have been freezing previously cooked fish.

77. Having regard to whether or not these amounted to misconduct we find that it was within the range of reasonable responses for Mr Cox to conclude that they amounted to gross misconduct. We have been mindful not to substitute our view for that of the Respondent. Mr Cox is an experienced and qualified catering manager with more knowledge of the food hygiene standards and potential consequences for the poor practices he found the Claimant to have committed. The Claimant was on a final written warning. Mr Cox had reasonable grounds to conclude that the Respondent's trust in the Claimant was broken.

78. There was one aspect of the procedure we found to have been unsatisfactory. In the Claimant's invite to the disciplinary hearing she had not been told that the allegations were deemed to be potentially gross misconduct. She was however informed that the meeting could lead to her dismissal from the Company. The Claimant did not raise this as an issue but we have considered this issue in regard to the ACAS Code of Practice on Discipline and Grievance at Work. This provides that the employee should be notified in writing, containing sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case. However we do not find that this procedural error rendered the procedure unfair as the Claimant failed to take part in the process in any event.

79. Lastly it is important to record that the Respondents ET3 had alleged that the Claimant had claimed twice on expenses for the cream tea expenses. This was not borne out by the evidence and was not pursued by the Respondent. The Claimant had not made duplicate claim for expenses in respect of the cream tea.

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Employment Judge S Moore
Dated: 7 February 2020

JUDGMENT SENT TO THE PARTIES ON 10 February 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS