EMPLOYMENT TRIBUNALS

Claimant: **Diane Lutkin**

Respondent: **Mr Atif Dinsdale (On behalf of the Executive Committee of The Dorman Long United Athletics Club)**

RESERVED JUDGMENT

Heard: **Remotely by Cloud Video Platform On: 17th, 18th June, 26th November 2021 (submissions and deliberations on 26th November and further deliberations on 17th December 2021)**

Before: **Employment Judge Sweeney**

Members: **Louise Atkinson**
Jonathan Adams

Representation:

For the Claimant: In person
For the Respondent: Morgan Brien, counsel

The unanimous Judgment of the Tribunal is as follows:

1. **The complaint of unfair dismissal is well founded and succeeds**.

2. **The complaint of discrimination because of something arising in consequence of disability (section 15 Equality Act 2010) is well founded and succeeds.**

3. **The claims shall be listed for a remedy hearing on a date to be notified by the Tribunal.**

REASONS

The Claimant's claims

1. By a Claim Form presented on **15 October 2019**, the Claimant brought claims of unfair dismissal and disability discrimination for contravention of section 15 Equality Act 2010. The Respondent denied the claims. It contended the tribunal had no jurisdiction to adjudicate on the unfair dismissal complaint because the Claimant had not been employed for two continuous years. It stated that there had been concerns about her not attending her rostered shifts and submitting fit notes. It does not give a reason for dismissal but says only that it made a decision to terminate her employment on **15 July 2019**. The Respondent did not admit that the Claimant was a disabled person within the meaning of section 6 Equality Act 2010. The Respondent contended that they did not know and could not reasonably have known that the Claimant was disabled and, in any event, denied dismissing her because of something arising in consequence of her disability. It said nothing about justification, in the event that the Claimant was found to be disabled.

2. At a preliminary hearing on **16 December 2019**, Employment Judge Speker made various case management orders, including orders for the Claimant to send further particulars and for the Respondent to serve an amended response. The further particulars were sent on **05 March 2020** and an amended response was served on **11 March 2020**. There was a further preliminary hearing on **12 March 2020** before Employment Judge Morris. There was then a further preliminary hearing on **30 October 2020** before Judge Garnon, which were sent to the parties on **19 November 2020**.

The Final Hearing

3. The Final Hearing took place remotely initially over 2 days on **17 and 18 June 2021**. However, we were unable to conclude and it went part-heard for the parties to return to make closing submissions. We were to return on **23 July 2021** but due to a mix-up with dates on the part of the Employment Judge's availability, it was listed for **8 October 2021**. Unfortunately, that date had to be vacated for reasons personal to the Respondent's counsel and in respect of which the parties were made aware. We were unable to reconvene until **26 November 2021**. On that day, the Tribunal listened to oral submissions and retired to deliberate. Some further, final deliberations were required on **17 December 2021** to enable the Tribunal to finalise its conclusions.

4. The Claimant gave evidence at the hearing. She also called her daughter, Laura Cooper as a witness.

5. The Respondent called the following witnesses:

   (1) Mark Hedley, Club Steward,
   (2) Thomas Sewell, Club Secretary,
   (3) Atif Dinsdale, Club Treasurer

6. Each party prepared a bundle of documents: the Respondent's consisted of 223 pages and the Claimant's 39 pages. The Claimant gave evidence and called her daughter, Laura Cooper.

The issues

7. At the preliminary hearing on **30 October 2020**, Employment Judge Garnon identified the complaints and issues as follows:

Unfair Dismissal

7.1.1. Does the Claimant have the qualifying period of continuous employment?
7.1.2. If so, what was the principal reason for dismissal?
7.1.3. Did the Respondent act reasonably as required under section 98(4) ERA 1996?

Section 15 Equality Act 2010:

7.1.4. Was the Claimant, at the date of dismissal, disabled?
7.1.5. Did the Respondent know, or ought it to have known, that she had a disability?
7.1.6. Dismissal being unfavourable treatment under section 15, was the treatment because of something arising in consequence of her disability?
7.1.7. If so, was the treatment a proportionate means of meeting a legitimate aim?

Unfair dismissal

8. Just before the Claimant started giving evidence, counsel for the Respondent conceded that she had been unfairly dismissed. Counsel explained that the Respondent would be advancing a 'Polkey' argument to the effect that, had the Respondent acted reasonably, the Claimant would nevertheless have been fairly dismissed at the time or very shortly thereafter to allow time for a fair procedure to be concluded. The reason for dismissal was said to be capability.

Findings of fact

9. The Claimant was employed as a bar person at the Respondent Club on a zero hours' contract. She was never provided with a written contract of employment

or a written statement of particulars of employment as required by section 1 Employment Rights Act 1996.

10. There had been a dispute as to the date on which the Claimant commenced her employment. The Claimant said that it was in **June 2017**, the Respondent that it was on **19 July 2017**. This issue was discussed at the beginning of the hearing when the Tribunal Judge asked about the effect of section 97(2) ERA 1996. Following this, it was agreed that the dispute was academic, as the Respondent accepted that the Claimant qualified for the right to bring a complaint of unfair dismissal – the date of termination being within a week of the second anniversary of the commencement of employment. The effect of section 97(2) meant that, going by the Respondent's dates, she is deemed to have been employed for the requisite length of time for the purposes of section 108 ERA. Therefore, it was unnecessary for us to have to resolve the dispute as to the start date. It was this recognition by the Respondent that led to the concession of unfair dismissal referred to in above.

11. Irrespective of the precise start date, the Claimant was put forward for a job with the Respondent by Mark Hedley. She was interviewed by someone called Linda, whose surname was never given to us. Linda was, at the time, a relief Steward. The Claimant told Linda that she had been the victim of a serious sexual assault the previous year, the precise nature of which we need not go into. She also told her that she suffered from depression and that she was on anti-depressant medication. Mr Hedley already knew these things but we will address his knowledge later.

12. The Claimant's son, Nathan, also worked at the Club as bar staff and latterly in an administrative role. Mr Hedley was, at the time, in a relationship with the Claimant's daughter, Laura Cooper. Many of those who work in and frequent the club are local and reasonably well known to each other.

13. Given that there was a dispute as to whether the Claimant qualified as a disabled person within the meaning of section 6 Equality Act 2010, we set out our findings in paragraphs 14 – 35 on issues relating to disability, the Claimant's depression and as to what was known about the Claimant's depression, before returning in paragraph 36, to the sequence of events relevant to the complaints.

The Claimant's depression

14. The Claimant was diagnosed with depression in **January 2010** (see **Claimant bundle**, **page 17/ Respondent bundle, page 214 – 221**). She had been suffering from depression probably before that date. The medical records record a diagnosis in **January 2010** alongside a description of certain life events which give the reader a brief understanding of the possible causes. From what can be seen on **Respondent bundle page 215**, it is likely that the Claimant was suffering from depression from earlier than **2010**. However, from

the records available to us, the trigger in early **2010** appears to have been her mother's diagnosis of cancer (**Respondent bundle page 96**). That year she was referred to the psychiatry service and obtained mental health counselling. The entry on **02 July 2010** records her depression as stable (**Respondent bundle**, **page 97**).

15. There were no records in either the Claimant's or the Respondent's bundle between **2010** and **2019**. In answer to a question from the Tribunal, Mr Brien told us that a complete set of records were sent to the Respondent covering the period between **2010** and **2019** and that the records had been sifted by those who instructed him. He made clear that it is not disputed that those records refer to the Claimant's prescription of sertraline. The Claimant was on a repeat prescription throughout that period. Some references to this repeat prescription can be seen in the notes made available to us from **2019**. There is an entry on **04 February 2019** (**Claimant bundle**, **page 30**) '*request for sertraline 50mg tablets by patient*'. That was an online request. It was repeated on **05 March 2019** (**Claimant bundle**, **page 31**) and on **11 April 2019** (**Claimant bundle**, **page 33**) and on **09 May 2019** (**page 34**). The entry on **22 March 2019** (**Claimant bundle**, **page 32-33**) records the Claimant having '*been on sertraline 100mg od several years'*.

16. In **July 2010** the Claimant's depression was described as stable. In the documents which were provided, there is no other reference to the word depression until we get to **August 2019** although there are references to her mental health earlier in **2019**. For example, the entry on **22 March 2019** added: '*generally struggling/difficulty with work/unwell mum/leg injury etc., had collapse 8w ago due to hypoglycaemia…wants to temporarily increase sertraline to 50mg x 3 daily, having counselling…* '

17. The Claimant had been getting some counselling through Carers Together, to support her emotional and mental well-being in caring for her frail mother. This was in about **February 2019**, some three months before her mother passed away. She also had counselling following a sexual assault which took place in **2016**.

18. There is an entry on **14 May 2019** referring to the Claimant being severely upset on the phone following her mother's death (**Respondent bundle**, **page 98**). The entry on **16 July 2019** (**page 100**) records '*request for sertraline 50mg tablets by patient'*. The entry on **12 August 2019** is a telephone triage, recording the Claimant as '*not coping with life'* (**R bundle, page 100; C bundle, page 38**). It goes on to say:

"…says has 'PTSD' as mother's death was traumatic – but no formal diagnosis actually made, has depression, on sertraline 150mg currently. Also just been sacked whilst on sick leave at the Dormans club where she was a barmaid – says is appealing this as love her job, agreed sick note – did go to the job

centre but not in a fit state to look for employment currently. Agreed increase sertraline."

19. As stated above, the Claimant's mother died on **9 May 2019** which exacerbated her depression, leading to an increase in medication in **August 2019**, to the maximum dose of Sertraline. She then commenced on Mirtazapine in **September 2019**. She was declared unfit to work up to **09 September 2019** (the last fit note we have seen). Her fit notes over that period described the reason for absence in different ways, with the last one referring to traumatic bereavement and depression (**Claimant bundle**, **pages 5-7**).

20. In paragraphs 5-15 of her further particulars (**Respondent bundle page 77-80**), the Claimant sets out the adverse effects on her ability to carry out normal day to day activities. She also gave evidence of the effects in her witness statement, at paragraphs 26 – 38. That evidence was not challenged – admittedly it is often difficult to challenge such evidence, given its intimate nature. However, we accept what the Claimant says to be a truthful account. In her witness statement – and in her impact statement - she uses the present tense to describe the effects of her depression. However, we were satisfied that this was a stylistic issue and that she was in fact describing an ongoing state of affairs over a long period of time and that the symptoms she described were persistent, albeit fluctuating in their severity and effect, depending on what is going on in her life at any given moment in time. As she said in paragraph 38 of her witness statement, the effects that she describes have been recurrent over the past 10 years.

21. Indeed, we shall now use the present tense to describe the effects of the Claimant's depression on her but we wish to make clear that we find that these effects came and went over that whole period to varying degrees of intensity. The Claimant had and has difficulty in concentrating. This adversely affects her ability to read books or newspapers as her mind wanders and she finds it difficult to retain information and to concentrate on what she is reading. This also adversely impacts on other activities, such as watching television. She sometimes has difficulty following conversations. She is sufficiently concerned about her concentration levels and memory that she has limited how far she will drive a car, driving only locally as she is familiar with the area. These low levels of concentration have affected her work around the house. She once burned a shirt when ironing because she got distracted and has made basic errors when washing clothes. She has burned food when cooking. Her organisational skills have been adversely affected, such that she has difficulty in preparing or cooking meals. Her motivation levels are very low, such that sometimes she will not get out of bed until late in the day. She has frequently disturbed sleep at night, resulting in her lying in bed and not getting dressed. Her memory has affected other day-to-day living. For example, she has inadvertently left lit cigarettes in an ashtray at home. She once put the television control in the fridge. She has left the gas on under a pan and has burned several pans trying

to cook. From time to time she forgets things when going shopping. Frequently, she forgets which day it is.

22. In about **June-July 2016**, the Claimant was the victim of a serious sexual assault, which exacerbated her symptoms of depression. The effects described in her witness statement and impact statement (and set out above) were particularly pronounced around that time and thereafter – albeit most likely they would have fluctuated in intensity during the period from **June 2016** to **July 2019**.

23. Although affected in the way set out above (and as set out in her witness statement and further particulars), the Claimant's depression did not prevent her from working as a full-time carer for her mother. As she said in evidence, and we accept, she put a brave face on things and probably got a lot of reward out of caring for her mother. It was not easy for her but she did it, out of a sense of love and duty.

24. From **2010**, the Claimant had been on sertraline. It is right that her depression was described as 'stable' in J**uly 2010** but that does not equate to the depression having gone away. It does not follow that there were periods after **July 2010** where it might be said not to be 'stable'. Nor does the description of the depression as 'stable' give any clue as to the <u>effect</u> of that depression on the Claimant at that time and thereafter.

25. We find that the Claimant continued to live with depression and to suffer the effects of it from **2010** right up to her dismissal, and beyond. The effects of it on her ability to carry out normal day-to-day activities fluctuated. We infer that, without the anti-depressant medication the doctor would not have been in a position to describe her depression as 'stable' by about **July 2010**.

26. The effects were particularly severe during the year after her assault in **June 2016**, and again particularly severe leading up to and beyond her mother's death in **May 2019**. But for the medication and the counselling which she received, they would have been more pronounced and would have recurred more often.

What the Respondent knew of the Claimant's depression

27. There was a dispute between the parties as to whether the Respondent knew that the Claimant had depression and as to whether she had a disability. The Claimant says that they did know that she suffered from depression – in particular, Linda, Mr Hedley, the Club Steward and Mr Sewell, the Club Secretary knew. In fact, she says it was well known within the club. Mr Hedley and Mr Sewell said that they did not know. We must resolve that dispute as it will be a relevant, albeit not a conclusive, factor when we come to consider in

our conclusions whether the Respondent knew or ought reasonably to have known that the Claimant was a disabled person.

28. Mr Hedley and the Claimant knew each other well. Not only did she work in the club, but he frequently visited her home because of his relationship with her daughter, Laura. In his witness statement, Mr Hedley says that the Claimant never told him, nor did she ever appear to him, to exhibit any symptoms of depression. We do not accept that evidence. Not only was it demonstrably clear to us that Mr Hedley was being untruthful in his evidence in this respect, he actually accepted when questioned by the Claimant that he had lied in his evidence. We accept the Claimant's account that there were many occasions when he visited her home, where he saw her distressed and in tears. They discussed her depression and they also on occasion discussed how depression affected Mr Hedley. As he ultimately accepted in evidence, he knew that she was on medication for depression. He was aware that she was on a prescription of sertraline. He was also aware that she had been the victim of sexual assault because she told him. He also knew that her medication increased following that experience and that she went through intense counselling. He knew this because the Claimant was open about her mental health and her traumatic experiences and discussed these with him.

29. We must say something about Mr Hedley's evidence. When asked by the Claimant whether his evidence that he did not know about her depression was a lie, Mr Hedley eventually agreed that it was. He was visibly nervous and distressed at this point. During his evidence he glanced nervously from side-to-side with a worried expression on his face and conveyed a generally uneasy manner. We were conscious that Mr Hedley, much as the Claimant, appeared to have his own mental health issues to contend with and that the experience of giving evidence can be distressing for some people. We took this on board and considered it as a potential explanation for his demeanour and for his statement that he had lied (we considered whether it might have been a nervous slip). However, we were, in the end, satisfied that his nervousness and apparent distress was because he felt the pressure of having to say something in his witness statement which he knew not to be true. We formed the distinct impression that he was afraid of saying the wrong thing. His acceptance that he had not told the truth was clear. We find that Mr Hedley felt under pressure by someone to say that he was unaware of the Claimant's depression.

30. In or around **November 2018**, Thomas Sewell was appointed Club Secretary. He remained in that position until **December 2020**. Mr Sewell had been a member of the club prior to his appointment and since **December 2020** he has remained a member and on the club committee.

31. Shortly after Mr Sewell's appointment, the Claimant spoke to him about the behaviour of a customer who, she explained, had made her feel uncomfortable. This was referred to in evidence as the incident regarding the '*Terry's chocolate*

orange'. The incident, during which the customer touched/patted the Claimant, really upset her. Mr Sewell, in his evidence, said that he recalled something about the 'chocolate orange' incident. He said that the Claimant 'put a mask on at work, that she was jocular, popular and good-humoured'. He said that he contacted the customer and 'read him the riot act' and that the Claimant said she had dealt with it and was proud of herself for having done so. We find, from this evidence, that the Claimant did tell Mr Sewell about the incident, that she was upset about it and that he knew that she was, that she said she was proud that she had stood up to the customer and that Mr Sewell did have a word with the customer albeit he took no action beyond that. However, his reference to a 'mask' was illuminating. That was, in essence, what the Claimant had said to him – that she put a brave face on things. Mr Sewell knew that she 'put a mask on'. What we had to consider is whether he knew what she was masking.

32. In an attempt to get Mr Sewell to understand why she was so upset about this incident – and that she was not overreacting – she disclosed to Mr Sewell that she had been the victim of a serious sexual assault back in **July 2016**. We find that she mentioned the sexual assault by way of explaining to him her sense of vulnerability as a result of the customer's behaviour towards her. The Claimant also told him that she had a history of depression for which she was taking medication. Although Mr Sewell accepted in oral evidence that the Claimant had told him about the 'chocolate orange incident' and about the sexual assault he denied that she said anything about depression or the impact of the assault on her. In cross examination, Mr Sewell said that he may have known that the Claimant was depressed from time to time, adding, '*we all do from time to time but that is as far as my knowledge goes*'. Although not necessarily inconsistent with what he says in paragraph 4 of his witness statement that '*she never told me that she suffered from depression',* the two statements do not sit entirely comfortably together. Although he acknowledged that he may have known she was depressed from time to time, he did not say how he had come to this knowledge: whether by his own observation, or through anything that the Claimant or someone else had told him. Mr Sewell insisted that Mr Hedley never mentioned it to him. If, as Mr Sewell maintained, Mr Hedley never mentioned the Claimant's depression and the Claimant never told him directly, then he must have gained the understanding that she was depressed from time to time from someone – but he did not say who. We did not believe Mr Sewell's evidence that the Claimant did not speak to him about her depression. We find that he got his understanding from the Claimant directly and that he most likely understood this also from informal discussions with Mr Hedley, Gemma and others in the club.

33. From our observations, and in our considered judgement, Mr Sewell attempted to control the Claimant during her questioning of him. Although his responses were clothed in an air of apparent 'respectful disagreement', we found him to be supercilious in his demeanour and attitude towards her. It is difficult for a reader of the written word to discern what it is that leads a tribunal to form such

a view of a witness. These things are, by their essence, a matter of observation. Before forming this view, we considered alternative explanations for our observations, such as the witness simply being a naturally confident individual. However, we were unanimously of the view that Mr Sewell's demeanour went beyond mere self-confidence. In our judgement, he set about to control the Claimant during their verbal exchange, with a view to undermining her and in explaining to her that she had misunderstood events, he patronised her. Mr Sewell is a strong personality and we infer that staff and management alike would have found it difficult to stand up to him.

34. Mr Sewell's demeanour aside, we did not accept as credible his evidence that, whilst she mentioned to him that she had been raped, the Claimant did not go on to explain the impact of the sexual assault on her mental health. Having gone to the extent of referring to the ordeal of a serious sexual assault, it seems to us that it would be natural for her to say <u>why</u> she was telling him this. She was not simply telling him about it for no reason. We find that she was open about her mental health – that was why she mentioned the sexual assault. It would, we conclude, be natural for her to explain that she was on medication for depression. This is especially so, given that she was relaying the experience in an attempt to make Mr Sewell understand how and why she had reacted adversely to a customer's inappropriate behaviour towards her – something which, in a club, might be laughed off or dismissed by some. There was an inherent consistency and natural feel to the Claimant's account. Further, Mr Sewell says himself, in paragraph 7 of his witness statement, the Claimant was 'not backward in coming forward' and that they spoke about personal matters on many occasions. We have found her to be open about her mental health and traumatic experiences. It is right that the Claimant did not say to Mr Sewell that she was 'disabled' or suffering from any 'disability'. She did not actually consider herself at the time as 'disabled' – because she did not understand the scope of that concept - but she made it clear that she suffered from depression. We return to the implications of this in our conclusions.

35. We are satisfied, therefore, that both Mr Hedley and Mr Sewell knew that the Claimant suffered from depression and that she was on regular medication. They both knew about the sexual assault in **2016**. We find that both of them knew that it was her reaction to her mother's death that triggered her absence in **May 2019**. That was, we find, also well known within the Club and not limited to Mr Hedley and Mr Sewell.

The Claimant's working pattern and pay

36. In the period **01 April 2018** to **02 February 2019**, the Claimant worked an average of 15 hours a week. The payslip dated **02 February 2019** shows a rate of £7.83 (the then national minimum wage). That was tax week 44. The payslip records gross earnings as **£5,183.52** (with no tax paid) which means an average of **£117.80** gross a week or **£116.91** net (after deducting national

insurance contributions). That average of 15 hours a week was reflective of her employment at the Club throughout the whole of her employment.

37. In the year leading up to the end of her employment, she worked the following shifts:

    - Tuesday: 6.30pm – 9.45pm
    - Friday OR Saturday: 6.45pm – 11.30pm
    - Sunday: 12pm – 3pm; 7pm – 11.30pm

38. There was little evidence as to the arrangements of other staff. In re-examination, Mr Brien asked Mr Sewell about staff numbers available to work on weekdays and weekend shifts. He said that Monday to Thursday they could manage with 1-4 members of staff. On a weekend he said that there may be 12-14 and that during the pandemic they had over 20 members of staff on their books. As far as the Claimant was concerned, any time that she was unable to attend a shift in the past, which was not often, she arranged for her son or daughter to cover and did not leave the bar under-staffed. We find that the Claimant was reliable and did not wish to let the club down.

39. Aside from working in the bar, the Claimant worked as a full-time carer for her mother, a role which she had performed for some 10 years.

First period of absence

40. In **March 2019** the Claimant was absent from work for a spell following an injury to her leg. Although we have not seen a fit note covering this absence, the entry in the medical records (**Claimant bundle, page 32**) refers to a fit-note which was issued on **20 March 2019** in respect of a leg muscle injury for the period **18 March 2019** to **31 March 2019**. A further note was then issued on **08 April 2019** in respect of the same injury covering the period **01 April 2019** to **22 April 2019 (Claimant bundle, page 33).** We accept the Claimant's evidence that, after she was issued with the first fit-note, she told Mr Sewell and Mr Atif that she had a fit-note in respect of her leg injury. She showed it to Mr Dinsdale who handed it back and said to her not to worry. This was discussed at the Claimant's appeal against dismissal (**Respondent bundle, page 23**) and Mr Dinsdale did not disagree with what the Claimant said. Indeed, at the appeal, Mr Dinsdale accepted that there was no dispute that the Claimant brought in the first sick note (relating to her leg injury) - **page 32**. We also accept the Claimant's evidence that Mr Sewell told the Claimant that he did not want the fit-note.

41. On expiry of the second fit-note, the Claimant returned to work. However, not long after that, her mother passed away on **9 May 2019** which exacerbated her depression and resulted in a further period of sickness absence.

Second period of absence

42. There were three fit-notes in the bundle all relating to this subsequent period of absence, following the death of the Claimant's mother. The Claimant did not submit any of those fit-notes to Mr Dinsdale or to Mr Sewell. She did so, however, as soon as she was asked to present them by Mr Dinsdale at the appeal against her dismissal (see below).

43. After the first of those fit-notes was issued on **13 June 2019**, the Claimant visited the club's office in order to submit it. Gemma Patton (employed as an administrator), Mark Hedley, Nathan and Laura were there. Gemma told the Claimant that they did not need the fit note; that no one would look at it and that it would just go in a drawer Therefore, the Claimant did not hand it in. Instead, she kept it at home.

44. It is important to consider what is said on the fit-notes. The first, dated **13 June 2019**, declared the Claimant to be unfit from **20 May 2019** to **28 June 2019.** The reason for absence was given as 'family bereavement'. The second, dated **01 July 2019**, declared the Claimant to be unfit from **28 June 2019** to **16 July 2019.** The reason for absence was the same, namely family bereavement. During her visit to the GP on **01 July 2019,** the GP mentioned to the Claimant that she had symptoms of 'PTSD' but did not give any formal diagnosis.

45. There is then a gap before the third and final fit note (or at least the last we have seen), which is dated **12 August 2019**. This declared the Claimant to be unfit from **17 July 2019** to **09 September 2019**, referring to traumatic bereavement and, for the first time, depression (**Claimant bundle, page 7**). On her visit to the GP on that day the Claimant mentioned PTSD, as that had been suggested to her on her previous visit. It was recorded in the notes that there was no formal diagnosis of PTSD (**Claimant bundle, page 38**).

46. During her absence from **20 May 2019**, the Claimant kept in contact with those in the club. On occasion she would visit to see her daughter and her son. She also went on occasion to socialise. She kept in touch with Gemma, who knew that the Claimant was off sick – and she marked the rota accordingly. The Claimant had intended to return to work on **19 July 2019**, after expiry of her second fit note. She had made Gemma aware of this. The Claimant was then included in the rota for that evening and for the following evening, Saturday **20 July 2019** (**Claimant bundle page 8**). Mr Sewell had oversight of the rotas. Indeed, according to Mr Dinsdale at the appeal hearing, Mr Sewell prepared the rota (**Respondent bundle**, **page 33-34**). Therefore, Mr Sewell, with responsibility for the rota and knowledge of the Claimant's sick leave, was fully aware that she was placed on the rota for **Friday 19th and Saturday 20th July 2019**. Mr Hedley also knew that the Claimant was to be working on **19 July 2019**.

47. In paragraph 3 of his witness statement, Mr Sewell said that '*at no stage, during the time that I was Secretary, did the Claimant give me any sick notes regarding her sickness absence during the time that she was absent*.' However, in evidence Mr Sewell accepted that he remembered the conversation regarding her absence because of the leg injury. He said in evidence that the Claimant told him she was coming back to work soon but that he said '*sorry, your doctor said 2 weeks, we will have to wait for that'*. He must have obtained this knowledge from somewhere. Either he accepted what was said to him by the Claimant (without wishing to inspect the fit-note) or he had seen a fit-note. Either way, on his own evidence, he understood at the time that the Claimant's absence was covered by a fit-note and he was aware of the period. This is consistent with what the Claimant said in evidence, which was that she had a fit-note to give to Mr Sewell but he did not want it – see paragraph 41 above -. We would observe that we can understand why Mr Sewell and Mr Dinsdale would say that they did not want to take the fit-note, as the retention and filing of fit-notes is ordinarily an office administration task. But the point here is that we accept that the Claimant attempted to submit a fit-note both on the occasion after she injured her leg and on the occasion after her mother died.

48. We find that the Respondent's procedures for submission and retention of fit-notes were unclear, possibly because most of the staff were engaged on zero-hour contracts and the Respondent's practice towards zero-hour contract employees was less than diligent (exemplified by the absence of written particulars of employment in the Claimant's case and the absence of any procedure prior to terminating her employment). Indeed, this less than diligent approach to fit-notes was recognised by Mr Rowntree at the appeal hearing (**Respondent bundle, page 31)**, where he said: '*I think we need to get to the bottom of that and make it clear that if anyone is off on the sick to make it clear they bring in a sick note and we take a photocopy of it and put it in a personal file*.'

49. On **14th July 2019**, Mr Dinsdale asked the Claimant's son, Nathan, where the Claimant's fit note was. Nathan told Mr Dinsdale that the fit note was at home (**Respondent bundle, page 31**). Nathan called the Claimant and said to her that Mr Dinsdale had asked about a fit-note. However, the Claimant did not appreciate the urgency of this. It was urgent because Mr Dinsdale was aware that a letter of dismissal had been drafted and was to be issued the following day after obtaining committee approval. Mr Dinsdale knew that a letter of dismissal had been written (**Respondent bundle, page 31)**. He believed that, if the Claimant had a fit-note, this would have a significant effect on the outcome (**Respondent bundle, page 31**). However, he did not mention to Nathan that a letter of dismissal had been written or that the Claimant's employment was at risk. Of course, Mr Dinsdale ought to have addressed, or ensured that someone else address, these matters directly with the Claimant, and not direct them through her son. As he had not heard back from Nathan, Mr Dinsdale took no

steps to prevent the letter of **15th July** from being sent or to make any inquiries of the Claimant directly.

50. The letter of dismissal, which Mr Dinsdale knew had been drafted by Mr Sewell, and which the Claimant read on **16 July 2019**, said:

    "Dear Ms Lutkin,

    Due to your continued absence from work, we have found it necessary to reassign your duties to other staff members on a permanent basis.
    We have enclosed a final payment which comprises of 1 weeks wage in lieu, less the holiday overpayment you received (see pay slip also attached).
    We thank you for your service to the club and wish you well for the future."

51. The letter was very much out of the blue and it set the Claimant back (as described by the GP in the letter of **04 March 2020** (**Claimant bundle, page 17/Respondent bundle, page 214)**. There had been no warning or discussion with her about dismissal or the potential for dismissal. Mr Sewell made no inquiries of the Claimant's health nor did he take any steps to find out from her what the current position was with regards to her returning to work, despite recording her on the rota as working on **19 July 2019**. If he had any concern about the production by her of a fit-note, he did not speak to her about those concerns. In the letter, he did not offer the Claimant any right of appeal. It is no surprise that Mr Brien conceded unfair dismissal at the outset of the proceedings.

52. In seeking to explain why he issued the letter of termination, in his witness statement at paragraph 5, Mr Sewell says that it had been brought to his attention by Mr Hedley and Ms Patton that the Claimant was taking prolonged periods of absence and was not producing sick notes and that her absences were causing difficulties in covering the bar work during her shifts and that she was not providing proper explanations as to why she was absent. We do not accept this evidence. Our reasons for rejecting it are as follows: firstly, Mr Hedley was asked by the Tribunal what he meant by '*complained'* in paragraph 7 of his witness statement. He said that he had mentioned to Mr Sewell <u>before</u> the Claimant's sickness absence began that, over a 2 to 3 week period, the Claimant had not responded to messages regarding shifts which had been allocated to her. Mr Hedley explained that they sometimes put messages in a group chat, asking '*can you work*?' or '*where are you'*? He said that the Claimant did not reply to those messages. Mr Hedley then assumed, from the absence of a reply, that they would have to find cover for the shifts. He mentioned this to Mr Sewell, hoping that Mr Sewell would simply have a quiet word with the Claimant. Secondly, at no stage did anyone ask for any explanation for the Claimant's absence. The reason for this was, we find, that it was well-known that her mother had died and that she was absent on sick-leave caused by her reaction to this. Mr Sewell himself had either prepared or

approved the rota, in which she was marked as 'sick'. Therefore, the Respondent knew why the Claimant was absent and never asked for any further explanation. It is not the case, as asserted by Mr Sewell, that the Claimant did not provide a proper explanation for her absence. Thirdly, we do not accept that Mr Sewell had any real concern about the Claimant not producing a fit-note. The processes for submission and receipt of fit-notes was very relaxed and he did not mention any concern about non-production of fit-notes in the letter of dismissal.

53. The Claimant was shocked and extremely upset to receive the letter of dismissal. She immediately sought legal advice. Although she had been offered no right of appeal, after taking advice, on **20 July 2019**, she wrote to the Committee to appeal the decision to terminate her employment (**Claimant bundle**, **page 10**). Aside from making some obvious and unarguably accurate points about the failure to permit her any hearing or any opportunity to make representations, she added the following:

    "The club was aware I was sick absent with a mental health condition (diagnosed as Post Traumatic Stress Disorder) following the traumatic events of my mother's death in May this year. In addition, I have been prescribed sertraline for depression for several years which I continue to take.

    I was dismissed for a reason (my sickness absence) which arises from my medical condition which is a disability. I have suffered disability discrimination.

    The club was aware that I was due to return to work Friday 19th July 2019. It seems to me that Mr Sewell hurriedly dismissed me before I could return to work which is unfair."

54. The Claimant was wrong about a 'diagnosis' of PTSD. She had been told that she had symptoms of PTSD (see paragraphs 44-45 above). It does not surprise us that she may have taken this to be a diagnosis. However, there are three parts of the letter of note: she says that 'the club was aware she was absent with a mental health condition following her mother's death and that she was due to return to work on **19 July 2019**. We find that she was right about those two things, as we have set out in our findings above. The third notable feature of the letter is that the letter refers to her having a disability. It is important to note that this letter was drafted with the assistance and input of a solicitor, who would appreciate that a mental health condition may amount to a disability. That is not something that the Claimant understood. She never regarded herself as disabled, something which we shall come to when we deal with the appeal hearing below.

Disputed statements purported to be signed by Mr Hedley

55. After she submitted the letter of appeal, the Claimant obtained two statements from Mr Hedley. She was encouraged to do so by her daughter, Laura, who was the main actor in obtaining the statements. These statements were the subject of controversy in these proceedings. They are at **pages 15 and 16 of the Claimant's bundle**) and bear the dates **21st and 26th July 2019** respectively. The letters are referred to in the Claim Form in section 15 of the ET1 (**Respondent bundle, page 12**). Nothing is said about those letters in the ET3 or in the amended response. They are also referred to in paragraph 6 of Employment Judge Morris's case management summary of **12 March 2020** and again by Judge Garnon in paragraph 8 of his case management summary of **30 October 2020**. In paragraph 6 of his witness statement, Mr Hedley says that he neither wrote, nor signed either of the letters. He says they have been forged by the Claimant. This suggestion of forgery had not been foreshadowed before the exchange of witness statements. Therefore, neither the Claimant nor her daughter addressed it in their statements. They did, however, give supplemental oral evidence about the statements and were cross-examined on the matter. The Claimant also cross-examined Mr Hedley on them. We must now resolve this dispute.

56. Mr Hedley and Ms Cooper had been in a personal relationship, which ended amicably in about **May 2019**. They remained good friends and indeed their intimate relationship was briefly rekindled after a holiday in August of that year. They went together to see Ed Sheeran in concert that month. Ms Cooper's grandmother celebrated her 100th birthday in **September 2019.** They were still together at that point. However, very shortly after this, Mr Hedley cut ties with her entirely for reasons that were never explained.

57. The Claimant and her daughter understood from their visit to the solicitors that it would help her case if she had a statement from someone in a managerial capacity which stated what Mr Hedley and management knew about her 'PTSD'.

58. The first letter (**21 July 2019**) states as follows:

"I, Mark Hedley, can confirm that Diane Lutkin informed the club that she was experiencing Post Traumatic Stress Disorder. After the death of her mother, Diane disclosed to myself, management (Thomas Sewell) and admin (Gemma Patton) that she was suffering from PTSD. Diane engaged in a telephone conversation with Gemma who reiterated this to Mr Sewell and remained in contact during her absence with the club."

59. The second letter (**26 July 2019**) states:

"I, Mark Hedley, have been witness to conversations regarding Diane Lutkin and sick notes on a few occasions. The first occasion was between Atif Dinsdale on Monday 18th February when Diane ruptured her calf muscle. Diane,

her daughter and I were together when Diane gave Atif her sick note. He told her the club did not need to see any more sick notes regarding her leg and she should let Tommy and Gemma know when she is planning on returning. She kept in touch with Tommy, Gemma and myself and told us she had extended her sick, note on a few occasions.

More recently, when Diane went on the sick due to her mother's death, she brought her sick note in for the club to see immediately after she had collected it from her GP. During a telephone conversation with Diane, Gemma told her that the club did not require her to bring in any other sick notes and to continue to stay in touch about her return. Gemma was directed by Tommy to remain in contact with Diane and to tell her that the club no longer required her to submit a sick note.

I can confirm that I was witness to these conversations and that Diane stuck to the agreement, set out by Tommy, Gemma and Atif with staying in touch with the extension of the sick notes. I can also confirm that I was present when Diane attempted to submit her sick notes and that she was told that this was not necessary."

60. In evidence-in-chief, Mr Hedley said that he first saw these letters when Mr Dinsdale approached him in the club after the first preliminary hearing in **December 2019**. He said that the signature was not his and he did not make the statements. Laura Cooper, on the other hand, said that when Mr Hedley learned of the Claimant's dismissal, he was shocked. We accept Ms Cooper's evidence. It is consistent with his oral evidence that he thought Mr Sewell was simply going to have a quiet word with the Claimant. Therefore, we find that he was shocked by the decision to terminate her employment. Ms Cooper said that Mr Hedley offered to give the Claimant a reference. Again, we accept this evidence. From the evidence we have heard, we further find that after they had taken legal advice, Laura and the Claimant suggested to Mr Hedley that it would help if he would sign a statement. He said that he was happy to help and would sign any documents.

61. As regards the first statement, Mr Hedley went to their home on **21 July 2019**. Laura and Mr Hedley went upstairs where she typed the statement in her room. She printed it off downstairs, where both she and Mr Hedley read through it and he signed it there and then.

62. As regards the second statement, this is a little more complicated. In her evidence, Laura said that her mother collected Mr Hedley from the club and they drove back to her house. She described a similar scene to the first scene; that, she typed the statement, and after Mr Hedley read it, he signed it.

63. Although there is no handwriting expertise in this case, we are of the view that the signature by Mr Hedley on both documents is genuine. We find that Mr

Hedley signed the statements. There is a part of the letter which we find to be inaccurate. The first reference to the Claimant having or possibly having 'PTSD' was made on **01 July 2019** when the Claimant visited her GP to obtain a fit-note. It is more likely than not, and we so find, that after her consultation with the GP on **01 July 2019**, the Claimant mentioned to Mr Hedley that she had 'PTSD' – genuinely believing this to be the case. This is consistent with our finding that the Claimant was open about her mental health. It is also more likely than not that she mentioned this to Gemma Patton and we so find. Therefore, to that extent, there is nothing controversial in the first statement. However, it is difficult to see from the evidence when the Claimant 'disclosed' any reference to PTSD to Mr <u>Sewell</u> personally between **01 July and 15 July 2019** (i.e. the date when the possibility of PTSD was mentioned and the letter of dismissal). The Claimant did not say that she had spoken to Mr Sewell in that period. It may be that the last sentence in the statement explains this, where it says that Gemma reiterated it to Mr Sewell. If anyone had mentioned PTSD to Mr Sewell, it was not the Claimant and to that limited extent, the statement is inaccurate. However, the substantive finding is that Mr Hedley agreed to it and signed it. The letter was not, we conclude a forgery.

64. The second statement is more problematic. If it was written on **26 July 2019** as Laura told us, it is remarkably prophetic. Nowhere in the letter of dismissal is there any reference to the Claimant's failure to submit fit notes as being a concern to the Respondent. The first paragraph of the disputed statement talks about **18 February 2019** when the Claimant ruptured her calf muscle. It specifically says that Mr Dinsdale said to her that the club did not need to see any more sick notes regarding her leg. It can be seen from **Claimant bundle, page 17**, that the Claimant talks about that fit note at the disciplinary hearing (<u>after</u> the purported date of the signed statement). She says that she handed the fit-note to Mr Dinsdale and he said 'don't worry about any more, just let us know when you're coming back' Mr Dinsdale replied: 'No I didn't say that.' The disputed statement addresses that very point.

65. Given that fit notes were not mentioned in the letter of dismissal and there was no way for the Claimant to anticipate that Mr Dinsdale was going to deny saying that the club did not need to see more fit notes in respect of her leg injury back in February/March 2019 - either the Claimant and Laura were incredibly lucky in securing that statement from Mr Hedley in advance of the appeal hearing and it was entirely fortuitous that the very point emerged during the appeal hearing **OR** it was prepared after that meeting with the benefit of the recording, and was back-dated.

66. Neither statement was handed in to management or even mentioned at the appeal. That is particularly surprising given that a lot was said about fit notes and the purpose of the appeal was to have her reinstated. That failure is more understandable if one concludes that the Claimant only obtained the statements

as back up, should she not be reinstated and should she need to go to litigation, which is what the Claimant told us in evidence.

67. We conclude that the following is the most likely explanation: Mr Hedley wanted to help the Claimant but he was also concerned about his own position. We accept the evidence of the Claimant and Laura Cooper that Mr Hedley felt intimidated by Mr Sewell. At the time he agreed to help the Claimant, he was on good terms with her and Laura. He felt sorry for the Claimant. None of them thought that the statements would be necessary. Mr Hedley subsequently cut off all ties with Laura and the Claimant in or about **September 2019** and the Claimant felt that it was the appropriate time to refer to the statements, which she did in her ET1, which was presented in **October 2019**.

68. We find that Mr Hedley willingly signed both statements. He came to regret doing this over time and his only way out of this very awkward predicament he found himself in was to deny that the statements were his and to say that they were forgeries. We conclude that this very awkward situation also contributed to his distressed and nervous demeanour when giving evidence. We find that he was not telling us the truth about his knowledge of the Claimant's depression and his involvement in producing the two statements.

69. However, we find that the second letter was created <u>after</u> the appeal hearing and was signed and back-dated. We were never provided with the properties of the document – that would have been an easy way of attempting to show the date of creation – and we were left only with the evidence of the relevant individuals. The appeal hearing had been covertly recorded. The Claimant and Laura had access to the recording and could quite easily have prepared, after the event, a statement addressing points made during the appeal hearing. There was no reason that we could think of as to why Mr Hedley should offer up 5 days after the first letter, of his own volition, any statement in relation to the submission of fit notes – and especially the reference to Mr Dinsdale back in **February 2019**, which appears in his second statement.

70. We are not at all satisfied that the Claimant would have had the foresight to ask Mr Hedley to specifically address that aspect on **26 July 2019** (the date given on the second statement as the signature date).

71. We infer from the above that Laura, having listened to the audio recording of the appeal hearing, conceived of the idea of obtaining a further statement from Mr Hedley regarding fit notes, believing that it would help counter the point made by Mr Dinsdale at the appeal hearing that he never said to the Claimant that the club did not need more fit notes. Laura worded the statement, she typed it and she asked Mr Hedley to sign it after the appeal hearing, which he agreed to, willingly on the basis that their relationship was rekindling at that time, and he wanted to do what he could to help the Claimant. It was a dishonest embellishment and a wholly unnecessary one at that. It was not at the

instigation of the Claimant but ultimately it was something which she went along with.

Appeal against dismissal

72. Returning now to the sequence of events, it was not until **01 August 2019** that Mr Rowntree, Club Vice President, wrote to the Claimant acknowledging her letter of appeal. He explained that her appeal would be heard by Mr Dinsdale and himself on Wednesday **14 August 2019** at 2.30pm (**Claimant bundle, page 12**).

73. As we have set out, the appeal was recorded covertly by the Claimant and the notes in the bundle were typed by her daughter, Laura. The notes are in the Respondent's bundle at **pages 16-42**. The Claimant told Mr Dinsdale and Mr Rowntree what she did with regards to the fit-notes (**Respondent bundle, page 22-24**). She explained that Gemma had told her that she did not need one as they do nothing with them, they just shove them in a drawer. Mr Dinsdale was surprised to hear this. He said that they file everything. Mr Rowntree said that they could speak to Gemma about that. He repeated this later, saying that they needed to look at this (**page 33**). However, they did not speak to Gemma. In fact, they took no steps after the appeal hearing to investigate anything. Mr Rowntree made the point that Gemma did not have the authority to say that the club did not want a sick note (**page 25)**. He also maintained that Mr Sewell did not know that the Claimant was to return to work on **18th July 2019**, which the Claimant disputed. It can be seen from **page 26** that the Claimant had brought two of the fit notes to the appeal hearing and that she showed them to Mr Dinsdale and Mr Rowntree. The Claimant told Mr Dinsdale that the letter of dismissal had a debilitating effect on her, that it pulled the rug from under her feet, and that she had been worse since receiving it (**Respondent bundle, page 26**). We find that the letter of dismissal did set the Claimant back to a very large degree. Her work in the club was extremely important to her. Although the Claimant would put on a brave face whilst at work, we also find that the social contact helped her and lifted her mood. She had been through a traumatic period and was looking forward to returning.

74. Mr Dinsdale told the Claimant at the appeal hearing that if Nathan had brought in her fit-note the dismissal could have been avoided. He said: '*On that day when you got that letter [referring to the letter of dismissal] I said to Nathan where was your sick note and any of this, before the day this letter was written could have been avoided if he went home to get the sick note. He never brought it to me. He had every opportunity to go and get it and he said it was there, like you said, it's at home…. So, if you'd have brought it in, there's no need for all this. At least the sick notes there. I just don't understand it' (***page 30**).

75. Mr Dinsdale was aware that Mr Sewell was to send the letter before the day it was sent. At the appeal, Mr Dinsdale said: '*On that day when you got that letter*

[referring to the letter of dismissal] *I said to Nathan where was your sick note and any of this, before the day this letter was written could have been avoided if he went home to get the sick note. He never brought it to me. He had every opportunity to go and get it and he said it was there, like you said, it's at home….So, if you'd have brought it in, there's no need for all this. At least the sick notes there. I just don't understand it' (***Respondent bundle, page 30)**.

76. Mr Dinsdale added: *'…I knew the letter* [of dismissal] *had been wrote and I said listen, if there is a sick note, it could have a significant effect at what's in that letter*.' (**page 31)**

77. The Claimant referred to her mental health (**Respondent bundle, page 37)**. Mr Dinsdale said: '*do you think if we knew about all them issues, it would change anything? Like it would…what's the word I'm looking for? If we knew about all them disabilities, we could cater for them?'* the Claimant replied yes. Mr Rowntree, who works in the public sector, referred to '*reasonable adjustments'* and a disability '*passport'*. The Claimant said she told Linda at the beginning of her employment about her depression. The Claimant added: '*I don't class depression as a disability…. I'm not disabled. I'm just having a bad time at the minute. I'm just struggling to cope….I've been to the doctors for depression for years and years and years*' (**page 38).** Neither Mr Dinsdale nor Mr Rowntree did anything with this information.

78. There was a lot of discussion about zero-hour contracts at the appeal hearing – the subject seemed to preoccupy the minds of Mr Dinsdale and Mr Rowntree. It is clear from the exchanges that the Respondent sees those on zero-hour contracts as having little if any rights and especially no entitlement to any procedural fairness. Mr Rowntree said: *'I did have a look at zero-hour contracts and it basically comes up saying it's not a contract so there's no procedures. You've still got to abide by health and safety but other things like sickness, you don't have to have them in place. …*' (**Respondent bundle, page 40**)

79. The Claimant was asked to produce the first fit-note which was issued following her mother's death. Mr Rowntree said that once the Claimant had done that, they would have another chat and make a recommendation to the committee (Respondent bundle, **page 41**). The Claimant produced the first fit-note after the appeal hearing. However, they never did have a chat.

80. Instead, on **28 August 2020**, Mr Rowntree and Mr Dinsdale wrote to the Claimant rejecting the appeal (**Claimant bundle, page 13**). He said:

"*Thank you for attending the appeal hearing on 14 August 2019.*
As you are aware, at that meeting we said we would be making a recommendation to the committee for their decision. We also asked you to supply sick notes covering your period of absence and you have recently sent these.

We have considered what you said at the meeting and, also the statements in the fit for work notes from your doctor who still doesn't consider you 'fit for work' as the final sick note ends on the 9 September 2019.

You should appreciate that our workforce is made up of bank staff (zero-hour contract) and that work is offered to those employees who can make a genuine commitment to come in and work. We believe we are unable to sustain this level of sickness and would feel it unfair to keep your name registered as part of our bank staff (zero-hour contract) program as we are utilising all current staff and hours available to optimum efficiency.

We therefore believe we have no option other than to uphold the original decision to dismiss."

81. There is nothing in that letter that addresses why the decision was made to terminate the Claimant's employment the day before her sick note was to expire and whether and when it was known that she was to return to work on **Friday 19 July –** points which the Claimant had explicitly raised as part of her appeal.

82. Although he did not address it in his witness statement, Mr Dinsdale explained in oral evidence that his recommendation to the sub-committee after the appeal hearing was to uphold the decision to dismiss because the Claimant had been off for a long time and the club needed to know when someone was coming to work. That recommendation was accepted by the sub-committee without debate or discussion. We would say finally that we found Mr Dinsdale to be a straightforward witness. He did not try to mislead anyone in his evidence and was, in our judgement, honest in his account. However, he exhibited a lack of awareness and understanding of employers' obligations towards disabled workers and the rights of such workers. We acknowledge that he dedicated his time to the club on a voluntary basis and that he did not dedicate a great deal of time to the affairs of the club. We are not being critical of him. However, his lack of understanding we find contributed to the lack of action after the appeal.

Relevant law

Unfair dismissal

83. It is for the employer to show the principal reason for dismissal and that it is a reason falling within section 98(2) or that it is for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

84. A reason for dismissal '*is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*': **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, CA. In a more recent analysis in **Croydon Health Services NHS Trust v Beatt** [2017] ICR 1240, CA, Underhill

LJ said that the 'reason' for dismissal connotes the factor or factors operating on the mind of the decision maker which causes them to take the decision. It is a case of considering the decision-maker's motivation.

Reasonableness – section 98(4)

85. If the employer establishes the reason, the next step is to consider section 98(4) of the Act. Section 98(4) poses a single question namely whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant. Whilst an unfair dismissal case will often require a tribunal to consider what are referred to as 'substantive' and 'procedural' fairness it is important to recognise that the tribunal is not answering whether there has been 'substantive' or 'procedural' fairness as separate questions. A dismissal may be unfair because the employer has failed to follow a fair procedure.

Polkey

86. What is known as 'the Polkey principle' (**Polkey v AD Dayton Services** [1988] I.C.R. 142, HL) is an example of the application of section 123(1) ERA 1996. Under this section the amount of the compensatory award awarded to a successful complainant of unfair dismissal shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. A tribunal may reduce the compensatory award where the unfairly dismissed employee could have been dismissed fairly at a later stage or if a proper and fair procedure had been followed. Thus the 'Polkey' exercise is predictive in the sense that the Tribunal should consider whether the particular employer could have dismissed fairly and if so the chances whether it would have done so. The tribunal is not deciding the matter on balance. It is not to ask what it would have done if it were the employer. It is assessing the chances of what the actual employer would have done: **Hill v Governing Body of Great Tey Primary School** [2013] I.C.R. 691, EAT.

87. Whilst the Tribunal will undertake the exercise based on an evaluation of the evidence before it, the exercise almost inevitably involves a consideration of uncertainties and an element of speculation. The principles are most helpfully summarised in the judgment of Elias J (as he was) in **Software 2000 Ltd v Andrews** [2007] I.C.R. 825, EAT (paragraphs 53 and 54).

88. An employer which is found to have unfairly dismissed an employee may lead or rely on evidence adduced during a hearing and invite the tribunal to take that evidence into account in determining that the employee would or might have been fairly dismissed in any event. If the evidence shows that the employee may have been fairly dismissed in any event, the tribunal should ordinarily make

a percentage assessment of the likelihood and apply that when assessing compensation. It is for the employer to adduce relevant evidence on which it wishes to rely although the Tribunal must have regard to all the evidence which includes evidence from the employee.

Disability

89. Section 6 Equality Act 2010 provides that:

(1) A person (P) has a disability if –

(a) P has a physical or mental impairment, and

(b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

90. Schedule 1, paragraph 2(1) of the EqA provides that:

(1) The effect of an impairment is long-term if –

(a) It has lasted for at least 12 months,
(b) It is likely to last for at least 12 months, or
(c) It is likely to last for the rest of the life of the person affected

91. Schedule 2, paragraph 2(2) provides:

'if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur'

92. The Guidance on the definition of disability (2011) states that if substantial effects are likely to recur, they are to be treated as if they were continuing. If they are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term (para C6 of the Guidance).

93. It is not unusual for a person to display symptoms which are, on the one hand, common to a mental impairment of 'clinical depression' and on the other hand to something which does not constitute a mental impairment, such as anxiety, stress, or low mood and despondency. The courts have recognised a legitimate distinction in principle between these two states of affairs and that in some cases, such distinction may give rise to some difficult issues when determining whether a person qualifies as disabled for the purposes of the Equality Act 2010. This distinction has led the courts to observe that a reaction to life events may fall short of the definition of disability for the purposes of the Act: **J v DLA Piper UK LLP** [2010] I.C.R. 1052. Although recognising the difficulties that may arise from the distinction, the EAT in **DLA Piper** case went on to say that such

difficulties should not often cause real problems because of the long-term effect requirement. Therefore, the court recommended that a tribunal starts by considering the adverse effect issue and whether the claimant's ability to carry out normal day to day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more. In taking such an approach, in most cases, the Tribunal should be able to conclude whether a person is in fact suffering from a mental impairment or a reaction to adverse circumstances (see para 42 of the EAT judgment).

Section 15 Equality Act 2010: discrimination because of something arising in consequence of disability

94. Section 15 provides:

(1) 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.

(2) Subsection (1) 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.

95. The Act does not define what is meant by 'unfavourably'. However, paragraph 5.7 of the EHRC Employment Code says that the disabled person must have been 'put at a disadvantage'.

96. For a claim under section 15 to succeed, there must be something that led to the unfavourable treatment and this 'something' must have a connection to the claimant's disability. Paragraph 5.9 of the EHRC Employment Code states that the consequences of a disability 'include anything which is the result, effect or outcome of a disabled person's disability'.

97. In **Pnaisner v NHS England and anor** [2016] IRLR 170, EAT Mrs Justice Simler, as she then was, summarised the proper approach under section 15 EqA. First, the tribunal has to identify whether the claimant was treated unfavourably and by whom. It then has to determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person. The 'something' need not be the sole reason for the unfavourable treatment but it must be a significant or more than trivial reason for it. In considering whether the something arose 'in consequence of' the claimant's disability', this could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the

thought processes of the alleged discriminator. There is no requirement that the employer be aware of the link between the disability and the 'something' when subjecting the employee to the unfavourable treatment complained of: **City of York Council v Grossett** [2018] I.C.R. 1492.

Knowledge of disability

98. An employer has a defence to a claim of discrimination under section 15 Equality Act 2010 if it shows that it did not know and could not reasonably have been expected to know of the employee's disability.

99. An employer cannot, however, simply turn a blind eye to evidence of disability. The EHRC Employment Code provides that an employer must do all it can reasonably be expected to do to find out whether a person has a disability (paragraph 5.15). It suggests that employers should consider whether a worker has a disability even where one has not been formally disclosed, as for example, not all workers who meet the definition of disability may think of themselves as a disabled person (para 5.14 of the Code). In para 5.15, it observes that, in the case of the particular example given, it is likely to be reasonable to expect the employer to explore with the worker the reason for changes in time-keeping and performance and whether the reason for the changes in behaviour were because of something arising in consequence of a disability.

100. The Code does not and cannot cover every possible factual permutation and each case must always turn on its own facts. It is important to note that a failure to enquire into a possible disability is not in itself sufficient to invest and employer with constructive knowledge. It is necessary to consider what the employer might reasonably have been expected to know had it made enquiry: **A Ltd v Z** [2020] I.C.R. 199, EAT.

101. There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment: **York City Council v Grosset** [2018] I.C.R. 1492, para 39. As to constructive knowledge, the employer need not have constructive knowledge of the claimant's diagnosis. However, the employer must show that it was unreasonable for it to be expected to know that the claimant suffered an impairment to his physical or mental health or that the impairment had a substantial and long term effect on his ability to carry out normal day to day activities. Therefore, constructive knowledge in this context means constructive knowledge of the facts constituting the employee's disability. If the employer has constructive knowledge of such facts, there is no requirement that it must also have constructive knowledge of the consequence of those facts, i.e. that the employee is a disabled person within the meaning of section 6 Equality Act 2010: **Gallop v Newport City Council** [2014] IRLR 211.

102. The employer must have knowledge of disability (actual or constructive) at the time of the unfavourably treatment. In a case where the alleged unfavourable treatment is dismissal, the Tribunal should consider whether the employer had gained the requisite knowledge at the date of dismissal. There is authority to the effect that the Tribunal should also consider whether knowledge had been gained by the time it rejected an appeal against dismissal: **Baldeh v Churches Housing Association of Dudley and District** UKEAT/0290/18. There may be some residual doubt as to the correctness of the decision in **Baldeh**, which was distinguished in the case of **Stott v Ralli Ltd** UKEAT/0223/20. **Baldeh** was a case involving a dismissal and an appeal against dismissal, whereas **Stott** was a case involving a dismissal followed by a grievance. An appeal against dismissal is more readily viewed as an integral part of the dismissal process, unlike the submission of a grievance after dismissal.

The 'something arising in consequence of disability'

103. Section 15(1)(a) EqA involves two distinct causative issues:

103.1.1. Whether A treated B unfavourably because of an identified 'something'; and

103.1.2. Whether that 'something' arose in consequence of B's disability.

104. The first issue requires an examination of A's state of mind. The second issue requires an objective examination, to see if there is a causal link between the disability and the 'something': **City of York v Grosset** [2018] EWCA Civ 1105.

105. The Tribunal must take a broad approach when determining whether the 'something' that led to the unfavourable treatment, had arisen in consequence of the claimant's disability. There must be some connection between the 'something' and the claimant's disability. For example, where the unfavourable treatment is dismissal, and the 'something' which led to dismissal is the employee's absence, the absence must arise in some way as a consequence of the disability.

Justification

106. It is open to an employer to objectively justify unfavourable treatment even where that treatment is because of something arising in consequence of a person's disability. To justify such treatment, the employer must show that it was a proportionate means of achieving a legitimate aim. It is for the tribunal to assess objectively whether treatment is justified in this sense. In doing so, it must weigh the real needs of the undertaking against the discriminatory effects of the treatment: **Homer v Chief Constable of West Yorkshire Police** [2012]

IRLR 601, SC, para 20. In having regards to the business needs of the employer, the Tribunal must also have regard to the size and resources of the particular employer: **Hensman v Ministry of Defence** [2014] UKEAT/0067/14

Submissions on behalf of the Respondent

107. Mr Brien prepared a skeleton argument which he developed in oral submissions. We set out below a summary of those submission only but we have read carefully his written submissions and our notes of his oral submissions.

108. Mr Brien urged the Tribunal to consider the letters at **Claimant bundle pages 16 – 16**, said to be letters from Mr Hedley to be forgeries. We have already made our findings on those letters and found them not to be forgeries, albeit the second letter was, on our findings, conceived after the appeal hearing.

109. On the issue of unfair dismissal, Mr Brien reminded the Tribunal that the Respondent conceded at the beginning of the hearing that the dismissal was procedurally unfair. The reason for dismissal, he submitted, was capability. He submitted that – although unfair - the Claimant would have been dismissed fairly in any event if a fair procedure had been undertaken. He submitted that this is evident from the evidence of Mr Hedley, Mr Sewell, Mr Dinsdale and the appeal notes. Mr Brien submitted that the Claimant would have been dismissed in July 2019 or within a month or two of then given the effect on other staff.

110. On the subject of disability discrimination, Mr Brien submitted that there was no adverse effect on day to day activities and/or the effects were not long-term and the Claimant did not qualify as disabled for that reason. He did not submit that the Claimant did not have a mental impairment (depression) but relied on the absence of 'substantial' adverse effects and their short-term nature. He accepted that we must consider the deduced effects by disregarding medication and treatment but that we should consider the lack of evidence of any effects up to **2019**. He observed that the Claimant's statement was written in the present tense and that there was no evidence of long-term effects.

111. Mr Brien accepted that the Tribunal should consider the issue of recurrent effects but that this should not result in a conclusion that the Claimant was disabled. This was, he submitted a case where the Claimant was adversely affected by life-events, as understood from the case of **J v DLA Piper.**

112. Mr Brien submitted that, in any event, the Respondent did not have knowledge of disability. He pointed out that there was no reference to depression on the fit notes until the one which was back dated to **17 July 2019**. He further submitted that the 'something' (the Claimant's absence) for which the Claimant was dismissed did not arise in consequence of disability but was a consequence of the Claimant's bereavement, which he submitted was entirely divisible from her depression and the effects of that depression.

113. Although the Respondent had not pleaded any justification defence to the section 15 claim, and Mr Brien had not referred to this in written submissions, in oral submissions he said that the Respondent had a legitimate aim of maintaining sufficient staffing levels. He relied on Mr Sewell's evidence on this. He submitted that the decision to dismiss in order to achieve the aim of maintaining staffing levels was proportionate. However, he candidly acknowledged that proportionality was not a strong argument.

Submissions on behalf of the Claimant

114. The Claimant provided a 5-page written statement to the Tribunal at the end of the hearing, which we have read and considered.

Discussion and conclusion

115. We turn now to our conclusions on the complaints and issues.

Unfair Dismissal

116. As indicated, this was conceded by the Respondent. Therefore, the answers to the three questions in paragraph 7.1.1 to 7.1.3 are set out in bold below:

- Does the Claimant have the qualifying period of continuous employment? **Yes (conceded)**

- If so, what was the principal reason for dismissal? **The Claimant's absence from work (this was a reason related to capability)**

- Did the Respondent act reasonably as required under section 98(4) ERA 1996? **No (conceded)**

117. The reason for dismissal falls within section 98(2)(a) in that it related to the capability of the Claimant for performing work of the kind she was employed to do.

118. We turn now to discuss the section 15 claim.

Discrimination because of something arising in consequence of disability – section 15 Equality Act 2010

(1) Was the Claimant disabled within the meaning of section 6 Equality Act 2010 at the date of dismissal?

119. This involved us asking:

- Did the claimant have a mental and/or physical impairment? (the 'impairment condition')
- Did the impairment affect the claimant's ability to carry out normal day-today activities? (the 'adverse effect condition')
- Was the adverse condition substantial? (the 'substantial condition'), and
- Was the adverse condition long term? (the 'long-term condition').

The 'impairment condition'

120. It is not always easy to determine whether a person has a mental impairment. In cases of difficulty, it may be preferable to consider first the question of adverse effects and whether they are long-term and from there, go on to consider whether the employee can be said to have had a mental impairment – i.e. whether the existence of an impairment may be deduced from the effects.

121. We conclude that the Claimant did, at the date of dismissal, have a mental impairment. We have arrived at this conclusion by taking the following approach: (a) firstly, by considering what medical evidence or reference in the medical notes there is of a mental impairment and secondly (b) by considering the effects on the Claimant's ability to do day to day activities and asking whether we might deduce the existence of an impairment from those effects.

Was a mental impairment evident from the medical evidence?

122. Mr Brien did not suggest that the Claimant did not suffer from depression or that her depression did not amount to a mental impairment. In any event, we are satisfied that she has been diagnosed with depression and that she has had a mental impairment to that extent since **2010**. There is sufficient evidence within the Claimant's medical records to justify this inference. We refer to paragraphs 14-16 of our findings. Further, given the longevity of the period during which the Claimant has been prescribed sertraline, we infer that the reference to depression is not merely a loosely applied term to describe short-lived stress and anxieties but is a reference to underlying clinical depression. The entry in **January 2010** refers to a diagnosis of depression. The Claimant was on a repeat prescription of anti-depressant medication for a period of 10 years. We consider it unlikely that medical professionals would continue to prescribe such medication over such a long period in the absence of some underlying mental impairment. From those facts, we conclude that the Clamant has suffered from a mental impairment, which we infer to be clinical depression.

The 'adverse effect condition'

123. The adverse effects of the Claimant's mental impairment are set out in paragraphs 20-22 above (and more fully set out in the Claimant's witness statement and further particulars which we have accepted). The effects on her ability to carry out the day to day activities referred to therein were in our judgement clearly adverse.

The 'substantial condition'

124. Further, those effects were adverse to the Claimant in a way that was more than minor or trivial. Whereas each of them in isolation might not reach the threshold of being 'substantial', in our judgement it is the cumulative effect of them that make them more than minor or trivial. In so concluding, we have regard to the fact that the Claimant had been on medication and obtained counselling. Where an impairment is subject to treatment, it is to be treated as having a substantial adverse effect if, but for the treatment, the impairment could well have that effect. Treatment may and often does mask or ameliorate a disability so that it does not or does not always have a substantial adverse effect. We must endeavour to assess the substantiality of the adverse effects of her depression by disregarding such treatment. That is not an easy task when there is no medical or professional evidence as to the positive effects of the medication. However, it is not a task that is beyond us. Although by no means automatic, it is not a great leap for us to infer that, in the absence of medically prescribed anti-depressant medication, the effects of the Claimant's depression on her ability to carry out normal-day-to-day activities would have been even more pronounced than we have found them to be. The effects which the Claimant experienced even when taking her medication are likely to have been more frequent and more pronounced. Her low motivation (even when on medication) and which in turn affected her ability to do household work and to socialise is likely to have more substantially impacted even than that which already existed. In the end, we were satisfied that the Claimant's impairment had a substantial adverse effect on her ability to carry out day-to-day activities, but even if we were wrong, we conclude that but for the medication and counselling received, they would have had that effect.

The 'long term condition'

125. We are also satisfied that, on a fluctuating basis over the period certainly from **June/July 2016** (the time of the sexual assault), the Claimant regularly experienced these substantial adverse effects on her ability to carry out normal day-to-day activities.

126. Her depression did not always manifest itself in such a way that we could say that those effects were present constantly during the whole period of 10 years, or even during the period from **June 2016 to July 2019**. For many people, depression does not affect them in that way. The effects come and go, and we conclude that is likely to have been the Claimant's experience.

However, we were satisfied that they persisted throughout, in the sense that they were manifested themselves regularly from **June 2016**.

127. There were two significant traumatic events in the Claimant's life during this period (the sexual assault in **2016** and her mother's death in **2019**). Those events may be described as 'life-events' of the sort discussed in the case law (e.g. **J v DLA Piper**). However, this is not a case of short-lived depression or short-term adverse effects caused by those two life events. It is a case of long-standing, underlying depression, the effects of which are fluctuating and recurring with varying levels of intensity. The two traumatic events described in these reasons resulted in an exacerbation of the effects of the underlying depression. We are satisfied from the evidence we have seen and heard that, from the first of those events in about **June 2016** (the sexual assault) the Claimant experienced the adverse effects right up to dismissal. During that period there would have been periods where the depression did not result in the effects she describes. For example, when the Claimant was at work, she did not always exhibit any effects. This was for two reasons: firstly, she enjoyed her work and it was an escape for her, and secondly, at times she would put a brave face on. However, the effects described in in our findings existed and continued on a fluctuating basis up to the time of her dismissal.

128. We asked ourselves what if we were wrong about the effects persisting on a fluctuating basis from **2016** up to the date of dismissal? What if the correct analysis was that the effects had ceased within a period of 12 months of the sexual assault – by the time the Claimant had started employment at the club? Even approaching it on that basis, however, we concluded that given her underlying condition of depression, those effects were, as of **June 2016** likely to recur (in the sense that they could well recur) beyond a period of 12 months from then.

129. In fact, they did recur in the period leading up to and following the passing of the Claimant's mother in **May 2019**. They had started to subside by **mid-July 2019** to an extent that the Claimant was able to face returning to work. Again, given her underlying condition of depression, we are satisfied that as of **July 2019**, it could be said that the effects were likely to recur beyond a period of 12 months..

130. Therefore**,** as at the date of dismissal, our considered judgement is that the Claimant had a mental impairment which had a substantial adverse effect on her ability to carry out normal day to day activities. Those substantial adverse effects had lasted for more than 12 months (at the very least since **2016**). Alternatively, considering the position at two different points in time, namely **June 2016** and **July 2019**, we conclude that they were likely to recur beyond a period of 12 months.

What if we were wrong to conclude that there was a mental impairment simply from an analysis of the medical notes and that the Claimant had been on a repeat prescription of anti-depressants for 10 years? Could a mental impairment be inferred from the effects?

131. We concluded that the Claimant suffered from a mental impairment from our analysis of the medical notes in the bundle and her prescription regime. However, we were acutely conscious that there was no report or other medical document which in terms identified that the Claimant had a mental impairment. As is often the case, it was a question of whether we could properly infer the existence of a mental impairment. Therefore, we also looked at this from the perspective of the adverse effects. Applying the principles derived from **J v DLA Piper**. Had we not been able to conclude that the Claimant had a mental impairment from the medical records, considering both the medical records and our findings regarding long-term substantial adverse effects, we were satisfied that we could properly infer that the Claimant had a mental impairment at the date of dismissal.

(2) Knowledge of disability – Has the Respondent shown that it did not know and that it could not reasonably have been expected to know that the Claimant had the disability (depression)

132. We turn now to the issue of knowledge, which was a particularly difficult issue in the circumstances of this case. We conclude that the Respondent had constructive knowledge of the Claimant's disability. Our reasons are as follows.

133. Although the Claimant put on a brave face for customers when at work, nevertheless she was open about her depression and her medication. Mr Hedley knew about the Claimant's depression and that she had been on medication for many years. He had also witnessed the Claimant distressed and tearful at home on occasions. Mr Sewell knew about the Claimant's depression and that she had been on medication. They both knew about the serious sexual assault on the Claimant and they knew that she was very badly affected by her mother's death. They were both in managerial positions.

134. Of course, none of this means that they must be taken to have known that she qualified as a disabled person or that they must be held to have constructive knowledge of that. A finding that the employer knew that a person has depression does not of itself lead to a conclusion that it had constructive knowledge of a disability – see the section above under relevant law (especially paragraphs 98-101). There must be constructive knowledge of the facts which made her a disabled person.

135. Section 15(2) Equality Act 2010 places the burden on the employer. This means that the employer must show that it could not reasonably have been expected to know that the Claimant had a mental impairment, which had

substantial adverse effects on her ability to carry out normal day to day activities and that those effects had lasted at least 12 months or were likely to last at least 12 months.

136. We conclude that the Respondent did not know at the time of dismissal, or even as at her appeal that the Claimant was a disabled person within the meaning of section 6 Equality Act 2010. However, we do conclude that as at the date of dismissal – which includes the date of appeal (in accordance with the case of **Baldeh**) – the Respondent had constructive knowledge of the facts which made her a disabled person.

137. Taking the date of dismissal first: Mr Sewell and Mr Hedley (both in senior positions to the Claimant) knew that the Claimant suffered from depression; that she had been on medication and that she had experienced traumatic events. They knew that prior to her mother's death, she was a reliable worker with good attendance. They also knew that she was absent from work since May as a result of the effects of her mother's death on her mental well-being. These things combined should have alerted Mr Sewell, in particular, to the possibility that her depression and absence from work were connected to a disability. We have been guided to some extent in this conclusion by paragraphs 5.14 and 5.15 of the Code of Practice on Employment 2011. Section 15 requires the employer to show that it could not 'reasonably be expected to know' the facts that made the Claimant a disabled person. The Respondent conceded that it did not act reasonably in that it failed to warn the Claimant of the potential for or risk of dismissal and that it did not meet with the Claimant to discuss her health with her or her future prognosis. Had it acted reasonably it would have done those things. Had Mr Sewell explored things with the Claimant prior to issuing the letter of dismissal, given her openness regarding her mental health, we conclude that she would have explained further details about her medication, (about which Mr Sewell already had some knowledge); she would have told him how her depression adversely affected her daily life; she would have told him how long she had been affected in those ways by her depression; she would have explained that the effects can be triggered and exacerbated by events outside her control (such as her mother's death). Acting reasonably, Mr Sewell would have sought a report from the Claimant's GP or would have referred her for an independent occupational health assessment. That would have provided him with more information regarding the effects of her depression and its longevity.

138. Turning now to the events at the appeal stage: We acknowledge that the Claimant said at the appeal she did not think of herself as disabled. However, that is simply a factor. The Code recognises that there will be employees who do not regard themselves as disabled (para 5.14 of the Code). The Claimant thought 'disability' was about physical disabilities and referred in evidence to 'broken bones' or 'amputated legs'. However, Mr Rowntree had more knowledge of the concept of disability. There was talk about disability

'passports' and 'reasonable adjustments' as we have found. The Claimant's letter of appeal, which was drafted by her solicitor, should have been used as a platform for further investigations when it expressly referred to disability. Had Mr Rowntree and Mr Dinsdale approached the issue reasonably and had they obtained some occupational health advice, they too would have learned of the effects of the Claimant's depression on her daily life, irrespective of whether she regarded herself as disabled or not. We infer from the discussion at the appeal hearing that the Respondent did not look into any of these matters because, at the end of the day, they regarded those on zero-hours contracts as having few rights in the workplace and that they were in a somewhat different category.

139. The Claimant's complaint of unfavourable treatment is about her dismissal. It is at the dismissal stage that we must consider the Respondent's argument that it could not reasonably have been expected to know that the Claimant was a disabled person. The dismissal includes the appeal (particularly given that she was afforded no earlier hearing).

140. We have asked (as we must in light of **A Ltd v Z**) had the Respondent sought medical advice on the Claimant's health, and had they explained to her either at the point of dismissal or at the appeal about mental impairments such as depression being capable of resulting in disability in as much as 'broken bones', we infer that it would have been in a position to understand that the Claimant's depression was long-standing and underlying; that she had experienced recurring substantial adverse effects for a period of over 12 months or that the effects which she was experiencing in May to July 2019 were likely to recur over a period of at least 12 months. This is not a case where the Claimant would not have opened up (as was the case in **A Ltd v Z**). She was quite prepared to talk about her mental health and would have done to the Respondent and to a medical professional.

141. We conclude, in the light of this, that the Respondent has failed to show that it could not reasonably have been expected to know that the Claimant had the disability and, having considered what they are likely to have found upon a proper and reasonable examination of the matter, we conclude that both at the date of dismissal – and as at the date of the appeal – they had constructive knowledge of disability.

(3) Dismissal being unfavourable treatment under section 15, was the treatment because of something arising in consequence of her disability

142. It is not in dispute that the reason for dismissal was the Claimant's absence. That is the identified 'something' for the purposes of section 15. Nor is it in dispute that dismissal constitutes unfavourable treatment. However, Mr Brien submitted that (if the Claimant qualified as disabled) the 'something' (her

absence) arose not in consequence of her disability but in consequence of something else, namely bereavement.

143. We reject that submission. As clarified by the Court of Appeal in City of **York v Grosset**, this part of section 15 (whether the 'something' arose in consequence of B's disability) requires an objective examination. The Claimant was dismissed because she was absent from work. She was absent from work because of the effects of her depression which had been exacerbated by and, on that occasion, triggered by the death of her mother. We are required to take a broad approach when determining whether the absence had arisen in consequence of the Claimant's disability. The bereavement cannot sensibly be isolated from the Claimant's depression and looked upon as a separate cause of the Claimant's absence so as to say that it did not arise in consequence of her disability. There is an obvious connection between the absence and the Claimant's depression (which we have found to be a disability). To say that her absence did not arise in some way as a consequence of her depression is a rather opportunistic argument. It may not have resulted in the immediate absence (as all bereaved people may have an absence of a short period). But Many people suffer bereavement and have absences from work. But the Respondent was not concerned about the Claimant being absent for a short period by way of bereavement. Not everyone who is bereaved is disabled. The immediate absence may have been the bereavement but the bereavement resulted in a deterioration in the Claimant's mental health such that her continued absence was connected to and a consequence of her disability. The two are not mutually exclusive and in light of our findings above are indivisible.

144. Thus, the dismissal being 'unfavourable treatment' and the reason for dismissal being the absence which, we conclude arose in consequence of the Claimant's disability, the Respondent must show that the dismissal was a proportionate means of achieving a legitimate aim.

(4) Was the unfavourable treatment a proportionate means of meeting a legitimate aim?

145. The Respondent had not pleaded any justification defence and Mr Brien did not address this in his skeleton argument (presumably on the basis that none was pleaded). Nevertheless, when asked about this by the Tribunal, Mr Brien made some brief oral submissions, which we were prepared to listen to, and which even he acknowledged were not strong on the issue of proportionality.

146. Having considered the submissions and the evidence, we are satisfied that the Respondent cannot show that the Claimant's dismissal was a proportionate means of achieving a legitimate aim (of maintaining staffing levels) for the following reasons:

146.1.1. The Respondent has not carried out any balancing exercise from which we were able to see that the disadvantage to the Respondent by maintaining the Claimant's employment was greater than the disadvantage to the Claimant which would result from her dismissal;

146.1.2. The Claimant was dismissed only a matter of days before she was due to return to work from sick-leave, which was known to the Respondent;

146.1.3. The Claimant was employed on a zero hours contract, which meant that the Respondent believed that it could continue to employ the Claimant without committing itself to any specified number of hours in a week;

146.1.4. The Steward, Mr Hedley, believed Mr Sewell was going to have no more than a quiet word with the Claimant;

146.1.5. Mr Dinsdale believed that the dismissal could have been avoided had the Claimant submitted fit-notes (something she did when he requested this at the appeal);

146.1.6. There was no evidence of the impact on staffing levels, and a mere passing comment by Mr Sewell in cross examination to other staff asking to be given the Claimant's shifts;

146.1.7. The Claimant's mental well-being, given the traumatic bereavement she had recently experienced, was severely adversely affected by the termination of her employment, something the Claimant mentioned at the appeal;

147. We are required to weigh the real business needs of the Respondent against the discriminatory effect on the Claimant. In doing so, we were acutely conscious that this is not a large, sophisticated employer. We mean no discourtesy by that phrase. It is intended to convey our appreciation that it has limited resources, and is managed by people who volunteer their services. Nonetheless, it is an economic enterprise which employs in excess of 20 people, who depend on it for an income.

148. We reject the justification defence. We could not see that dismissal corresponded to a real need of the undertaking. We were not in terms told what the real needs of the business were at the time of the Claimant's dismissal. However, we could infer that the need was to be able to adequately staff the bar. In light of Mr Sewell's evidence that people were asking to be able to work the Claimant's shifts, we could not see how dismissing the Claimant corresponded to that need. We infer from his evidence that there was no problem in covering her shift.

149. Further, given that the Claimant was due to return to work within days of the dismissal, we could not see how dismissing her could said to be appropriate to achieving the aim of maintaining staffing levels. If anything, it worked in the opposite direction. It was certainly not reasonably necessary to that end.

150. Considering the impact to the Claimant, in terms of her mental well-being and financially, termination was in our objective analysis disproportionate. Added to all of this, the Respondent made no attempt to obtain any medical input or to assess the Claimant's likelihood to return and to maintain regular good service – something she had managed to do since **July 2017** up until the death of her mother. The Respondent advanced no positive evidence of the business needs beyond Mr Dinsdale's evidence in paragraph 9 of his statement where he said her failure to attend a shift caused an inconvenience to the running of the bar, which meant that they had to try and bring other people in at short notice or existing members of staff had to provide cover. As we have found, Mr Sewell in cross examination said only that staff were asking to take over the Claimant's shifts on a permanent basis – not that he was having difficulty filling her shifts.

151. We do not understand how her absence gave rise even to an inconvenience. This was not a situation where she was expected to attend but failed to turn up without notice, leaving the employer in difficulty. She was on sick-leave (as marked on the rota). She gave the Respondent a return date (as marked on the rota). The Respondent had over 20 people working for it, and most, if not all of them, were on zero-hour contracts providing the Respondent with maximum flexibility. We were given no evidence of what these difficulties or this inconvenience created by the Claimant's absence looked like. We have found that when the Claimant had been unable in the past to attend a shift at short notice, she always arranged cover. If the Respondent had a concern that she might not attend a shift at short notice in the future, it had the reassurance of knowing that, where that happened before, the Claimant arranged for her son or daughter to cover her shift. Any concern it might have had about her being absent in the future for longer than a shift or two might have been a real concern but there was no evidence as to how difficult it would be (beyond being inconvenient) for the Club to arrange for one of its many zero-hour contract workers to cover. In any event, we conclude that the Respondent did not have a concern about long term absence at the date of dismissal because it had been expecting her back at work on **19 July 2019** and marked her as such on the rota. It is for the Respondent to show that the dismissal of the Claimant was a proportionate means of achieving a legitimate aim. It has failed to do so.

152. Therefore, we conclude that the Claimant's complaint of discrimination because of something arising in consequence of disability succeeds.

Polkey argument

153. We turn now to consider the Respondent's submission that, had the Respondent acted reasonably the Claimant's employment would have been terminated in any event (or shortly thereafter). We also consider the submission that the Respondent could and would have dismissed the Claimant fairly in a way which would not amount to unlawful discrimination. These were not identified as issues by Judge Garnon but they arise out of the concession by the Respondent that the Claimant was unfairly dismissed.

154. We do not accept Mr Brien's submission that, in light of the evidence of Mr Hedley, Mr Sewell and Mr Dinsdale, the Claimant would or might have been fairly dismissed either at the time or within a few months of **July 2019**. Firstly, Mr Hedley's evidence was that he simply thought that Mr Sewell was going to have a quiet word with the Claimant for not responding to the group chat messages -see our finding in paragraph 52 above.

155. As regards Mr Dinsdale, he emphasised two key points at the appeal: firstly, that had the Claimant presented a fit-note her dismissal could have been avoided, and secondly, that the Claimant was on a zero hours contract and therefore, if her appeal was to be allowed, she would return without any guaranteed work pattern or number of hours. Neither the evidence of Mr Hedley nor that of Mr Dinsdale, in our judgement, supported an argument that the Claimant would or might have been dismissed fairly had the Respondent acted reasonably and undertaken a fair procedure.

156. The Employment Judge asked Mr Brien what a fair procedure would look like. He submitted that, prior to sending the letter of dismissal, the Claimant should have been given notice that her employment was at risk because of continued absence; that the Respondent should have had a meeting to discuss this with her. We agree, but we would add to this: even having regard to the size and administrative resources of the club (and we note that, although we had little evidence of the size and resources, we infer that they are limited) a reasonable procedure would have involved the Respondent obtaining some medical input on the Claimant's health and prognosis. That should and would have happened some time in advance of the issuing of the letter of dismissal. The Respondent would then have had a sensible, reasonable discussion with her about her health and prognosis. Had it done so, it would have learned that the Claimant's condition was underlying and long-standing but was fluctuating in nature. It would have learned that she was able to return to work on **19 July 2019**. It would have been able to discuss in a reasonable, measured way, with the Claimant directly that whatever Gemma had told her, she had to submit her fit-notes.

157. We next considered, had this happened, what is likely to have come out of this. In light of Mr Dinsdale's comments that her dismissal could have been

avoided had she handed in fit-notes, and bearing in mind that the Claimant had been a reliable worker and bearing in mind the Respondent's insistence on employing staff on a zero hours contract, we conclude that the Respondent would not have dismissed the Claimant. Even on its own case, all that it had to do was to reinstate her on appeal, and the number of hours work she would have undertaken thereafter would not be guaranteed.

158. It is difficult, if not impossible, given the way in which all staff were engaged on zero-hour contracts, to see any down-side to the Respondent by continuing to employ the Claimant in these circumstances. Certainly none was articulated in these proceedings. Had the Respondent acted reasonably before issuing the letter of dismissal, we conclude that it would not have dismissed the Claimant at all. Rather, the Respondent would have understood that she was expecting to come back to work on 19 July 2019. Therefore, rather unusually, we feel that this is a case where we can confidently say, had the Respondent behaved reasonably, it would not have dismissed the Claimant. In any event, it is for the Respondent to adduce evidence of what might have happened had there been a reasonable appraisal of the Claimant's health and a reasonable procedure undertaken. Mr Brien, despite his best efforts in submissions, was not able to point to anything that might have led us to conclude there was a chance that the Claimant would have been fairly dismissed (and in a non-discriminatory way). We considered his submission but it was a submission not based on evidence or on information presented during the hearing from which we could infer that a fair and reasonable approach might have resulted in the Claimant's fair dismissal if not on **16 July 201**9 the within a couple of months thereafter.

159. If not dismissed right away, Mr Brien submitted that the Claimant would probably have been dismissed in any event at some later point, because she remained unfit for work for some time after dismissal. We reject this. Had it acted reasonably, we conclude it would not have dismissed at all. The dismissal of the Claimant had a major impact on her mental well-being. This comes across very clearly in the appeal hearing. The rug had been pulled from under her (see paragraph 73 above). To the extent that she was unable to work after **July 2019** this was due to the way she had been treated by the Respondent. We bear in mind our finding that she had recovered sufficiently after her mother's death to be in a position to return to work on **19 July 2019** and was marked on the rota to that effect. Had the Respondent acted reasonably, we have no doubt that she would have returned as it was the very thing that the Claimant looked forward to and from which she obtained some pleasure. It is right that she was declared unfit to work after **16 July 2019** but that was a result of the effect on her of the dismissal.

160. In any event, as we have set out above, there was no evidence as to the effect on other staff. On the contrary, we repeat our finding that the Respondent positively adopted a model of engaging bar staff on zero hours contracts so as

to give them maximum operational efficiency. As is clear from Mr Dinsdale's position at the appeal, the Respondent did not feel obliged to offer any number of hours' work. The only evidence that Mr Brien could refer to when asked about difficulties was that there was some evidence from Mr Sewell about staff asking to be given the Claimant's shifts on a permanent basis. We could not understand how this was a factor that impacted negatively on the Respondent or on those other staff. It was not that the other staff's shifts were being adversely affected. It was not that the staff were said to be under pressure by having to fill the Claimant's staff. On the contrary, we were told that others wanted more work (the Claimant's hours). Again, we come back to the Respondent's own case that employees were engaged on zero hours. It was up to the Respondent how they operated shifts and hours. We accept that they would, if acting reasonably, seek to do this in a way that was fair to all employees. But according to them, no one was entitled to permanent shifts. Therefore, they could control what staff were given. In any event, we were not provided with any reliable evidence as to who was seeking to be given the Claimant's shifts on a permanent or regular basis, or how many, or when such requests (if they were made) were in fact made. Any such requests could easily and reasonably be dealt with by reminding staff that the Claimant was on sick leave, and would be returning to work, subject to medical advice (which, had it acted reasonably, the Respondent would have obtained).

161. Therefore, we reject the Respondent's argument that the Claimant would have been fairly dismissed had the Respondent followed a fair procedure. We decline to make any 'Polkey' reduction on the basis of how it was put to us.

162. In light of our conclusions there will have to be a remedy hearing. At that hearing, we will have to consider how long the Claimant's employment at the Club would have continued, had she not been unfairly dismissed and had she not been unlawfully discriminated against. We will also have to determine the Claimant's claim for compensation for injury to feelings. There is also the issue of our finding that the Respondent failed to provide the Claimant with a statement of written particulars under section 1 ERA 1996. The Tribunal will send directions for preparation of the remedy hearing separate to this judgment. However, we would encourage the parties to endeavour to resolve the proceedings in the meantime, if possible and without the need to return to the Tribunal.

Employment Judge Sweeney

17 December 2021